



THE COURT OF APPEAL

Neutral Citation Number: [2021] IECA 325

High Court Record Number: 2001/15119P & 2001/9288P

Court of Appeal Record Number: 2019/46

**Costello J.
Haughton J.
Binchy J.**

BETWEEN/

**COMCAST INTERNATIONAL HOLDINGS INCORPORATED, DECLAN GANLEY, GANLEY
INTERNATIONAL LIMITED AND GCI LIMITED**

PLAINTIFFS

-AND-

THE MINISTER FOR PUBLIC ENTERPRISE,

DEFENDANT/APPELLANT

MICHAEL LOWRY,

DEFENDANT

ESAT TELECOMMUNICATIONS LIMITED,

DEFENDANT/RESPONDENT

DENIS O'BRIEN,

DEFENDANT

IRELAND AND THE ATTORNEY GENERAL

DEFENDANT/APPELLANT

Judgment of Mr. Justice Robert Haughton delivered on the 1st day of December 2021

Introduction

1. These are appeals in respect of Notices of Motion dated 24 June 2016 issued by the third named defendant/respondent ESAT Telecommunications Limited, since renamed BT Communications Ireland Ltd (hereinafter called "BTCIL" or "respondent") seeking to strike out two Notices of Indemnity and Contribution ("NIC"s) issued by the first and fifth named defendants ("the State parties" or "the appellant") and served on BTCIL.

2. BTCIL's motions sought to have the NICs struck out under O.19 r.28 of the Rules of the Superior Courts on the ground that the claims for indemnity and/or contribution made therein had no reasonable prospect of success or were bound to fail, and further/in the alternative on the basis of the inherent jurisdiction of the court on the basis that the said claims "are unsustainable, are frivolous and vexatious and/or they constitute an abuse of the process."
3. In a reserved judgment delivered on 31 July 2018 Stewart J. determined that the NICs be struck out, not under O.19 r.28 but under the inherent jurisdiction of the court, on the basis that the claims therein were bound to fail. Costs were awarded against the State parties, with a stay. The High Court order was perfected on 25 January 2019.
4. The State parties have appealed that order, and central to the appeal is whether, having regard to the provisions of the Civil Liability Act, 1961 ("CLA") related to contribution and indemnity, the State parties' claims against BTCIL are bound to fail.

Background

5. In June and October 2001 respectively the plaintiff issued two sets of proceedings in the High Court claiming damages for breach of statutory duty, misfeasance in public office, fraud, deceit, breach of duty and breach of contract against various defendants, including the State parties and BTCIL, arising out of the processes leading up to the grant of the second GSM Mobile Phone licence by the then Minister for Transport, Energy and Communication, Michael Lowry, to ESAT Telecommunications Ltd, now BTCIL, on 16 May 1996. The plaintiff was fifth in rankings at the end of the tender process.
6. The first set of proceedings is concerned with extension of the original deadline for receipt of tenders, and the second set of proceedings is concerned with the decision, announced on 22 October 1995, to award the licence to ESAT Telecommunications Ltd, now BTCIL (together referred to in this judgment as "the proceedings").
7. Statements of Claim were delivered in each of the proceedings in June of 2005. It is pleaded that through a company, Communicorp Group Limited, Mr. Denis O'Brien held an interest of between 37.5% and 40% in –

"Esat Digifone, a consortium formed for the purpose of submitting a bid for the licence and consisting of ESAT Telecom Holdings Ltd, Telenor Invest AS and IIU Nominees Limited. For the purpose of this Statement of Claim, Esat Telecommunications Limited, Esat Telecom Holdings Ltd and Esat Digifone will be referred to as 'Esat'" (para.8).

The essence of the pleaded claims is that the integrity of the process to award the licence was compromised by ministerial interference in the provision of information and in the evaluation of tenders, and that the Minister received corrupt payments or benefits from Denis O'Brien and/or "Esat" resulting in the award of the licence to "Esat".

8. So far as the reliefs claimed are concerned, they are substantially identical in each proceeding. In addition to claiming a declaration as to the unlawfulness of the grant of the

licence, the plaintiffs seek damages for breach of duty, misfeasance in public office, breach of the Prevention of Corruption Act, 1906, fraud, deceit, and conspiracy, including damages arising by reason of loss of opportunity to have been awarded the licence, loss of profits in respect of the operation of the licence, and tender costs.

9. There were substantial delays in progressing the proceedings, which are for the most part explained by reference to the statutory tribunal of inquiry established by government to investigate payment to politicians, and constituted by its sole member Mr. Justice Moriarty ("the Tribunal"). This delay led to an application by the State parties in July 2007 – BTCIL was not a party to that application – to strike out the proceedings on grounds of inexcusable and inordinate delay, which application ultimately found its way to the Supreme Court.
10. In July 2012 the Supreme Court in judgments reported at [2012] IESC 50 determined that the matters raised by the proceedings were of such profound public interest and concern that they should not be dismissed on grounds of delay. The public interest in the matters raised required that they should be determined following a substantive hearing, and was such as to outweigh factors that would, in the ordinary course of events, lead to the dismissal of the proceedings. In the course of her judgment Denham C.J. found the delay excusable, and that the proceedings should not be "struck out on a technicality" and stated (para. 44):

"There is a public interest in determining such a claim of corruption in high office. It is a matter of public interest as to whether a Minister of Government corrupted a State process."

In his concurring judgment Hardiman J. also found the delay excusable, and he comments at para. 85 that the litigation "is truly exceptional".

At the hearing of this appeal, the appellant placed considerable weight on these judgments to support the argument that the State parties' claims for contribution/indemnity against BTCIL should be allowed to proceed.

11. The Tribunal's report in respect of the award of the licence was published in March, 2011.
12. In December 2013, in their first communication with BTCIL since 2005, the plaintiffs delivered proposed amended Statements of Claim in both proceedings, and requested BTCIL consent to such amendments. BTCIL refused to agree to the proposed amendments, and in 2014, the plaintiffs applied to amend the Statements of Claim in both proceedings. By order made on 21 October 2014 (Keane J.) leave to amend was granted, and amended Statements of Claim were delivered on 28 October, 2014.
13. Before leave was granted for such amendment, in May 2014, BTCIL brought its own applications against the plaintiffs, seeking to have each of the proceedings dismissed pursuant either to O. 19, r.28, of the Rules of the Superior Courts, or alternatively pursuant to the inherent jurisdiction of the High Court. BTCIL's primary grounds for such applications were that BTCIL's role in the 1996 tendering process was limited to preparatory work,

including the acquisition and development of transmission sites, and that no adverse findings were made against them in the Tribunal's report. It was submitted that the only wrong alleged against BTCIL in the 2005 Statement of Claim was a payment of \$50,000 to Fine Gael's fundraisers, which the Tribunal determined was made by Telenor Invest AS at the possible request of Communicorp Ltd, and not by or at the request of BTCIL. Ultimately, following the exchange of extensive affidavit evidence and submissions as between BTCIL and the plaintiffs, these applications were dealt with by way of a consent order made by Gilligan J. on 31 July 2014, as follows:

"BY CONSENT **IT IS ORDERED** that

1. the plaintiff's claim herein against the Third Named Defendant be dismissed on the grounds that the claims advanced as against the Third Named Defendant, in each set of proceedings are unsustainable
2. there be no order as to costs."

The respondent places some emphasis on the fact that this order was made by consent, and submits that this order is key to its applications to have the NICs struck out.

14. The terms of the "release and accord" (the phrase used in s.17 of the CLA) entered into as between the plaintiffs and BTCIL that led to the said consent order were not exhibited or otherwise made available to the High Court for the purpose of this application, apparently because those terms contained a confidentiality clause. At the hearing of this appeal, counsel for BTCIL confirmed that those terms are subject to a confidentiality clause, but indicated that they could be made available to this Court, if required. However, counsel for the State parties objected to BTCIL being permitted to do so at this late stage. One of the grounds upon which the appeal is advanced is that the failure to make available the terms of settlement - 'release and accord'- is fatal to any reliance placed by BTCIL upon on the terms of s.17 of the CLA.
15. Notices of indemnity and contribution – the NICs - in each case were served by the State parties on the other defendants, including BTCIL, on 7 March 2013. Pursuant to these notices the State parties claim from BTCIL an indemnity and contribution "in respect of any damages or costs for which the first, fifth and sixth named defendants [the State parties] may be held liable to pay the plaintiffs in the above entitled proceedings...." In the second paragraph the notice proceeds to state that at the hearing of the action the State parties will apply to the court "for an indemnity and/or contribution and such application will be pursuant to the Civil Liability Act 1961 on the grounds that if, which is denied, the plaintiff suffered the alleged damage, the same was caused solely or alternatively were contributed to by the wrongdoing, fraud, deceit, breach of contract and breach of duty and/or breach of statutory duty of the third named defendant."
16. Notices in similar terms were served by Denis O'Brien on BTCIL. Since the consent order of Gilligan J. dismissed the plaintiffs' claims against BTCIL, Mr. O'Brien agreed to withdraw his claims for indemnity/contribution against BTCIL.

17. Following upon the dismissal of the plaintiffs' claims against the BTCIL, their solicitors by letter dated 26 January 2015 wrote inviting the State parties to withdraw their NICs against the BTCIL, as "there is no basis for any claim that our client has been a concurrent wrongdoer in respect of the claim made by the plaintiffs". There followed some engagement, but ultimately the State parties refused, and on 24 June 2016 BTCIL issued motions to strike out the State parties' NICs.

The NIC strike out motions

18. As previously mentioned, the motions are brought pursuant to Order 19, r.28 RSC, or alternatively the inherent jurisdiction of the Court. They are grounded on the affidavit of Mr. Seamus Walsh, a Director of BTCIL in which the key averments assert:

- 1) that no facts are asserted in the Statement of Claim, including the December 2013 proposed amended Statement of Claim, or in particulars, (or, for that matter, in correspondence) which identify any allegedly wrongful act on the part of BCTIL;
- 2) that it is not pleaded that BTCIL (as opposed to Esat Telecom Holdings Ltd) was a member of the consortium which made the successful bid for the licence;
- 3) that "Esat Digifone"/"Esat" is referred to in the Statements of Claim "as if it constituted some kind of entity or collective, and is thereafter referred to as an alleged perpetrator or beneficiary of the many alleged wrongdoings", but "No facts, however, were asserted in the [June 2005 Statement of Claim] to show any wrongdoing either on BTCIL's part, nor any which showed BTCIL as being party to any wrongdoing on the part of all or any of the other companies named – none of whom were named by the plaintiffs as defendants to the proceedings." (para. 20);
- 4) that while the Tribunal found that prior to the formation of the consortium's bid BTCIL had carried out some preparatory work for a bid -

"The Tribunal report does not suggest that BTCIL was a member of the consortium or that BTCIL acted wrongfully in any respect." (para. 21);

- 5) that the 2005 Statements of Claim appeared to have been formulated without the plaintiffs knowing or having reason to believe in the existence of any evidence of wrongdoing on the part of BTCIL, and that neither the evidence before the Tribunal nor its report assisted the plaintiffs;
- 6) that the plaintiffs agreed to release BCTIL from the proceedings on the grounds that they were unsustainable;
- 7) that the fourth named defendant, Mr. O'Brien, had withdrawn his NIC as against BCTIL;
- 8) that it follows that the proceedings against BCTIL are unsustainable, but in any case, the State parties would have the benefit of the statutory indemnity provided for by s.17(2) of the CLA;

- 9) that it would be oppressive and unwarranted for BCTIL to be compelled to answer at a full hearing the claims for indemnity of the State parties where they are evidently unsubstantiated and the plaintiffs, who initiated the proceedings, have accepted that there is no stateable basis for them; and
 - 10) that "From enquiries that BTCIL has made it seems extremely unlikely that there is anyone still attached to or known to BTCIL, who would have knowledge of the matters referred to in either the June 2005 or December 2013 Claims or in the Tribunal's report or in the evidence heard by it. BTCIL could not expect at this stage to be able to identify or obtain the real assistance of former personnel who might be expected to have or to be able to deny BTCIL's having had knowledge relevant to the facts alleged by the plaintiffs or derived from those by the State Defendants, or which would enable BTCIL to provide or challenge evidence given in such an action...." (para. 25).
19. In his first replying affidavit sworn on 9 November 2016 on behalf of the State, Mr. Matthew Shaw, Principal Solicitor of the Department of Communications, Climate Action and Environment, relies upon the following matters in opposition to the application:
- 1) the fact that the accounts of BCTIL [since the issue of the proceedings] have disclosed the within proceedings as a contingent liability which could not therefore be said to be "remote";
 - 2) discovery will be required to identify the nature and extent of the wrongdoing of BCTIL;
 - 3) the "vigour" of the plaintiffs' affidavit evidence in the response to BTCIL's application to strike out their proceedings (which resulted in the consent order of Gilligan J.), seeking to link BTCIL to the wrongdoing pleaded;
 - 4) BTCIL's involvement in preparatory work for a bid;
 - 5) that there were "complex and unexplained movement of shares in Esat Digifone Limited (the company formed to submit the tender for the Licence) in which BCTIL was involved" (para. 29);
 - 6) the proceedings involve complex and difficult issues of law and fact;
 - 7) it is incorrect to assert that the indemnity is claimed solely under the CLA. The NICs were served pursuant to O.16, r. 12 of the RSC, which allows a co-defendant claim for contribution or indemnity but also to claim "any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff" (O16 r.12(1)(b));
 - 8) even if, therefore, BCTIL is not found to be a wrongdoer for the purposes of the CLA, if it "profited from wrongdoing it is open to the State to trace those profits into BCTIL to recover them" (para.32), although the State's expert accountant Mr. Jim

Luby, as deposed to in his affidavit, "is not at present, in a position to comment on whether BTCIL may have benefitted from the award of the Licence" (para. 34) without a detailed analysis of the financial history of the companies involved in the consortium and their interrelationships, which would require discovery;

- 9) it is denied that the State parties will be protected by s.17(2) or s.35 (1)(h) of the CLA, under which the plaintiffs would be deemed liable for the wrongdoing of BTCIL, in circumstances where s.17(2) is triggered when there has been a release or accord, but no such document has been exhibited; and
- 10) the chronology does not support the delay point, in particular because BTCIL issued their motions over 3 years after the NICs were served, and delayed for over 6 months after instructing their solicitors to issue the motions in December, 2015 until the issue on 24 June 2016.

As the trial judge rejected the contention that BTCIL delayed unduly in seeking to strike out the NICs, and as there was no appeal from that part of her decision, it is not necessary to consider this last point or the further affidavit evidence related to delay.

20. In making the first and second points, Mr. Shaw relies on averments in an affidavit sworn by Jim Luby, chartered accountant, and his expert report. In his report, Mr. Luby expresses the opinion that the proceedings were noted as a contingent liability of BTCIL for 12 out of 13 years, and "this indicated BTCIL's concern that it could face liability in these proceedings." Mr. Luby also states in his affidavit that he would need discovery to undertake a detailed analysis of the financial history of the companies involved in the consortium and their inter-relationships in order to "comment on whether or not British Telecom may have benefitted from the award of the Licence." (para.4)
21. In response to the contention in relation to the recurring note in BTCIL accounts, BTCIL rely on an affidavit sworn on 24 March 2017 by Mr. Paul O'Connor, the audit partner in PwC in charge of auditing BTCIL's accounts in the year ending 31 March, 2002 and in the ensuing financial periods to 31 March 2009. While not recollecting many of the details of the work involved 13 or 14 years previously, Mr. O'Connor provides his recollection of the circumstances in which BTCIL made this disclosure. He says that he was aware of the Tribunal, and the relationship between its work and these proceedings. He avers -
 - "5. ...The Tribunal, I recall, attracted significant media coverage. I do not recall discussions about this particular item, but I am satisfied that I did not learn anything in the course of our inquiries to indicate that BTCIL knew anything done or allegedly done by it which might justify the claim made in the proceedings.
 6. The claim fell within the definition of a contingent liability as articulated by Mr. Luby. Without regard to any judgment made about the claim's possible substance, the claim was made in legal proceedings relating to a matter of potential significance and the Tribunal's enquiries into the related matter were the subject of ongoing political and media debate. The existence of the proceedings had already become a matter of

public knowledge and this was the main factor which I understood led to the company's decision, which I concurred with, that the claim should be explicitly referenced in the financial statements."

Mr. O'Connor considered that such disclosure, as distinct from treating it for accounting purposes in any other way, was consistent with the accounting requirements of FRS 12, and its continued reference in subsequent accounts was "because there was no obviously objective basis for varying this." (para.8)

22. In his replying affidavit sworn on 28 March, 2017 Mr. Walsh summarises the basis for the striking out of the NICs -

"3. ...BTCIL has obtained an Order from this Honourable Court with the consent of the plaintiffs, dismissing the plaintiff's claims against it on the grounds that the claims so advanced against BTCIL are unsustainable. In other words, the plaintiffs have accepted that BTCIL cannot be held accountable for any of the losses and damage said to have been sustained by them.

4. ...the State's notices of indemnity and contribution served on BTCIL are premised exclusively on a contention that BTCIL is a concurrent wrongdoer with the State in respect of the damage claimed by the plaintiffs. The consequence of this is that where the plaintiffs have now acknowledged that BTCIL has no case to answer to the plaintiffs...then the State could never claim any contribution from BTCIL at all in the event that the State is found liable to the plaintiffs. The State defendants have not been able to identify any basis for contending that the plaintiffs are wrong."

23. In paragraph 5 Mr. Walsh contends that the disclosure in BTCIL's annual accounts was initially agreed at management level and was not the subject of any "significant discussion" at Board level when the statements for the year ended 31 March 2002 were formally adopted at a meeting on 27 January 2003. He contends that the disclosures are irrelevant and cannot constitute a basis for the State parties maintaining their claim. This is lent support by a short affidavit sworn on 27 March 2017 by Mr. Thomas Byrne, a director and chief financial officer of BTCIL at the relevant time who signed financial statements on behalf of the company. Mr. Byrne only recalls discussion of the audit of the 2002 financial statements when Mr. O'Connor, lead member of the PwC audit team, advised that as the proceedings were already in the public domain BTCIL should consider disclosing them in a note to the accounts, following which Mr. Byrne included such a note.

24. Mr. Walsh invites the court to reject as speculative Mr. Luby's opinion that inclusion of the note was because BTCIL had a "concern" about the plaintiffs' claim, in light of the reasons for the note given by Mr. O'Connor and Mr. Byrne. He also relies on an affidavit sworn on behalf of BTCIL on 23 May 2014 by Mr. Andrew Tackaberry grounding BTCIL's application to dismiss the plaintiffs' proceedings, which pointed up features demonstrating the plaintiffs' lack of seriousness in their claim against BTCIL, such as the absence of correspondence before claim, deferral of service of proceedings as long as possible, and no

statement of claim delivered until 2005, suggesting the claims made were speculative. I will refer further to Mr. Tackaberry's affidavits later in this judgment.

25. Mr. Walsh also contests the assertion by Mr. Shaw that the claims in the NICs are not solely made under the CLA. Mr. Walsh points out that they do not refer to any other separate or distinct cause of action on foot of which contribution might be sought, such as tracing of profits – mentioned for the first time in Mr. Shaw's affidavit. In para.s 15-17 Mr. Walsh engages with Mr. Shaw's delay argument which is not relevant to this appeal.
26. In a further round of affidavits –
- Mr. Luby takes issue with Mr. Walsh's averments, expressing the view that the existence of these proceedings and that fact that they were public knowledge would not be an appropriate basis on which to note them in the accounts, and he restates his view that the inclusion in the accounts indicated a contingent liability, which there would be no reason to include if it were "remote", and he suggests that Mr. Walsh's views on affidavit are at odds with those of BTCIL's auditors, and that whether or not the note was the subject of "significant discussions" with the board is not relevant;
 - Mr. Shaw in his second affidavit repeats that the State parties NIC claims are not just under the CLA but extend to tracing of profits, and that this right exists independently of the CLA entitlement, and that such a claim requires discovery, and that BTCIL has not sought particulars of the NICs;
 - An affidavit sworn by Joanna O'Connor, a solicitor in the CSSO, addresses delay, but this issue does not arise on the appeal.
27. Mr. Walsh in his third affidavit responds on the delay issue, in response to which Ms, O'Connor swore yet another affidavit; this evidence is no longer relevant. Mr. Walsh also joins issue with Mr. Luby's opinion that the contingent liability represented by these proceedings cannot have been "remote"; he asserts that that opinion cannot displace the evidence/recollections of Mr. Byrne and Mr. O'Connor as to the actual reasons for inclusion of the note.
28. At the hearing before the trial judge for the first time it was asserted on behalf of the State parties that the State is entitled to pursue other remedies via the notice of contribution and indemnity, such as tracing of profits (mentioned above), a claim that BCTIL holds profits on a constructive trust for the State parties, unjust enrichment and "subrogated restitution". The primary legal basis for such claims appears to be unjust enrichment, the relevant legal principles being those enunciated by Lord Clarke in the UK Supreme Court decision in *Menelaou v Bank of Cyprus plc* [2015] UKSC 66 –
- "18. ...it is now well established that the court must ask itself four questions when faced with a claim for unjust enrichment. There are these:

- (1) Has the defendant been enriched?

- (2) Was the enrichment at the claimant's expense?
- (3) Was the enrichment unjust?
- (4) Are there any defences available to the defendant?"

The High Court

29. The trial judge addressed the O.16 r.12 argument first, and it is appropriate to set out that rule more fully:

"12. (1) Where a defendant claims against another defendant:

- (a) that he is entitled to contribution or indemnity, or
- (b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or
- (c) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant making the claim and should properly be determined not only as between the plaintiff and the defendant making the claim but as between the plaintiff and the defendant and the other defendant or between any or either of them,

the defendant making the claim may, without any leave, issue and serve on such other defendant a notice making such claim or specifying such question or issue. No appearance to such notice shall be necessary.

- (2) After service of such notice either defendant shall be at liberty to apply for directions as regards pleadings between them if either considers it necessary to do so. In default of such application within twenty-eight days of service of such notice, the claim, question or issue shall be tried at or after the trial of the plaintiff's action as the trial judge shall direct.
- (3) Nothing herein contained shall prejudice the rights of the plaintiff against any defendant to the action."

The trial judge in para. 34 observed that in order to avail of O.16 r.12 the claiming defendant must set out a claim coming within (a), (b) or (c).

30. At para. 37 of her judgment, the trial Judge stated:

"37. Turning now to the case at hand, the Court will address the O.16, r.12 argument first before turning to the provisions of the 1961 Act. BTCIL highlights that O.16, r.12 was not specified in the NICs and that no facts have been identified to support such a claim. The State defendant's claim is in its earliest infancy and there are no pleadings other than the NICs itself. While it is true that NICs makes no mention of tracing, a claim for unjust inherent jurisdiction or O.16, I am of the view that a full

and proper explanation of the claim made, the procedures engaged and the reliefs sought cannot reasonably be expected until the State defendants have been given a more extensive opportunity to articulate their case by way of further pleadings. I am therefore satisfied that it would not be appropriate to strike out the claim under O.19, r.28. For the avoidance of doubt, I would also be of the view that any time periods or limits set out in the procedure relied on by the State defendants would not begin to run until BTCIL were properly on notice of the procedure that was being engaged and precisely what claim was being made under O.16, r.12”.

31. However, the trial judge took a different view of matters when considering the exercise of her inherent jurisdiction to dismiss. She analysed each of the claims which it had been submitted to her State parties might advance via O.16, r.12 (although such claims had yet to be made), and in effect, concluded that all of these were bound to fail. Thus she addressed four claims that the State parties sought to pursue against BTCIL under O.16 r.12:

- (1) a claim over as concurrent wrongdoer *simpliciter* outside of the CLA,
- (2) a constructive trust over profits claim,
- (3) an unjust enrichment claim independent of any State loss, and
- (4) an unjust enrichment claim dependent on loss by the State.

32. The trial judge dealt with these as follows (adopting the above numbering):

- (1) She considered that outside of claims of concurrent wrongdoing, which are governed by the CLA, claim (1) was not “viable” as there was no legal relationship between the State parties and BTCIL, such as a trust or contract, in existence at the time.
- (2) This claim, based on a constructive trust, was raised for the first time in oral submissions in the High Court. In the absence of “extensive pleadings” and a “thorough airing of the evidence ” and argument, the court should “presume it is viable”, but it could not come with O.16 r.12 (a) because of the absence of any legal relationship upon which the State parties could secure indemnity or contribution from BTCIL “for a wrong in which BTCIL had no hand, act or part and for which it did not agree to provide such indemnity or contribution” (para.40), and the relief of a constructive trust bore “absolutely no resemblance to the reliefs, remedies or issues arising from the case made by the plaintiffs”, who had not claimed “any equitable relief or remedy akin to tracing or a trust” or accounting of profits, and as the State parties claim was “entirely disconnected” from the relief/remedy claimed by the plaintiff it was impermissible for the State to litigate it as part of the plaintiffs’ proceedings (para.41).
- (3) As to this claim of unjust enrichment *independent of loss*, this was to be regarded as seeking “orders in respect of property that potentially represents, directly or indirectly, the proceeds of illegal activity” and “viable”, but it could be pursued in other “venues” which did not include “private proceedings brought by the plaintiffs seeking damage for

loss suffered because of allegedly wrongful acts committed against them”, and because there was no similarity in relief or remedy between the plaintiffs’ claims and the reliefs sought the State parties (para.42).

(4) The claim to unjust enrichment *dependent on loss*, including any claim based on *Menelaou* principles, while “it would seem sensible to allow this issue to go to plenary hearing” the State parties could not show any loss as the licence fee was received from the grantee of the licence (para.43), and any award of damages against the State parties in favour of the plaintiffs could not be claimed under *Menelaou* principles against a party “completely innocent of any wrongdoing” and who “did not contribute to the any harm inflicted on the plaintiffs” (para 44).

33. Having considered “every formulation of the claim identified by the State defendants under O.16 r.12” the trial judge held that none of them could proceed. Referring to the passage of over two decades since the causal events occurred, she said it could not seriously be suggested that the State had not had sufficient time to decide precisely what claim it wanted to pursue, and that it would be “highly inappropriate to serve a NIC without having a particular claim in mind and then wait to see if anything emerges in evidence by way of discovery that may give foundation to a claim that was, as far as the claiming defendants were aware, baseless when it was first pleaded” (para.45). She concluded that the above claims were unstateable and an abuse of process and “so inherently flawed at their very core that no expansion thereon or amendment thereto could save them” (para.46), and that this would not prevent the State issuing their own proceedings – but the State could not “metastasise unrelated claims to the plaintiff’s action”, especially where these were raised for the first time at the hearing (para.48).

34. The trial judge then addressed the CLA claim in the NICs, and it is convenient here to set out, so far as relevant, the sections that she considered and which are relevant to this appeal:

“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.

...

34. (1) Where, in any action brought by one person in respect of a wrong committed by any other person, it is proved that the damage suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff or of one for whose acts he is responsible (in this Part called contributory negligence) 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 fault of the plaintiff and defendant...

...

35. (1) For the purpose of determining contributory negligence—

...

- (h) where 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;

...

- (4) Where a plaintiff is held to be responsible for the acts of another under this section and his damages are accordingly reduced under subsection (1) of section 34, the defendant shall not be entitled to contribution under section 21 from the person for whose acts the plaintiff is responsible"

35. The trial judge concluded (at para. 49) that a plaintiff's consent to an order dismissing their claim as unsustainable constituted a "release" for the purposes of s.17 of the CLA. Accordingly she treated the consent order of Gilligan J. as constituting a "release". She then gave detailed consideration to sections 17, 34 and 35 (which she noted had "been exposed to little judicial determination until relatively recently") of the CLA, and referred to the cases of *Hickey v. McGowan* [2017] IESC 6, *Manning v. The National House Building Guarantee Company & Anor.* [2011] IEHC 98 and *Gammell v. Doyle* [2010] 1 ILRM 358.

36. The trial judge's consideration of the CLA issue was prior to the seminal decision of the Supreme Court in *Defender v. HSBC France* [2020] IESC 37 delivered on 3 July 2020, which now definitively considers these provisions and is binding on this court, and for this reason it is not necessary to refer to the arguments made in the High Court, or to set out the trial judge's analysis and reasoning. She concluded, with some misgivings, that it was very likely that the identification provisions provided for by these sections of the CLA would apply, the effect of which would be to reduce the amount of any award made in favour of the plaintiff, as against the State parties, by such sum as is found to be attributable to the wrongdoing of BTCIL. She therefore concluded that BTCIL was to be identified with the plaintiffs who were deemed to be responsible for any BTCIL wrongdoing (contributory

negligence), and that the State parties were entitled to have any damages awarded against them reduced accordingly. She accepted the BTCIL submission that –

“Therefore there is no amount of indemnity or contribution that can be claimed from BTCIL and the State defendant’s claim is bound to fail”.

Grounds of Appeal

37. The appellants Notice of Appeal pleads that the trial judge erred in the following respects:-

1. In not having regard or sufficient regard to the narrow nature of the jurisdiction to strike out the Notices of Indemnity and/or contribution.
2. In not satisfying or sufficiently satisfying the standard that no matter what may arise on discovery or the trial of the action the course of action will be resolved in a manner fatal to their State parties.
3. In dismissing the spectrum of claims available to the State parties under the Notices for Indemnity and Contribution.
4. In not assuming that disputed issues of fact will be resolved in favour of the State parties.
5. In concluding that the claims in the Notice of Indemnity and Contribution were “unrelated to the overall claim in dispute”.
6. In concluding that the claims in the Notice of Indemnity and Contribution must be struck out “irrespective of the claim’s actual viability when viewed in isolation”.
7. In concluding that the claims in the Notice of Indemnity and Contribution must be struck out notwithstanding the finding that the relief, remedy or issue pursued by the State parties is sufficiently associated with the original subject matter of this action.
8. In her findings and/or interpretation of s. 17, 34 and/or 35 of the Civil Liability Act, 1961.
9. In not having regard or sufficient regard to the expert evidence that BTCIL’s application was contradicted by its own accounts.

The Notice of Appeal elaborates on each of these grounds.

38. The Respondent’s Notice in essence joins issue with each of the Grounds of Appeal.

Submissions

39. The court permitted the filing of revised written Submissions in light of the centrality of the consideration of the relevant provisions of the CLA by the Supreme Court in *Defender*.

Submissions of the State parties

40. In their written and oral submissions Counsel for the State parties principal arguments were the following:

(1) Release/Accord

The Consent Order of Gilligan J. was not in itself a “release” or “accord” for the purposes of s.17 of the CLA. There was a heavy onus on BTCIL to put before the court the terms of its settlement with the plaintiff – which the Supreme Court in *Defender* characterised as a “central piece of evidence” (para. 67). The release/accord had not been exhibited, and there was no proof of an accord “complete and certain in its terms”, such as “to show that the cause of action has been validly compromised” - quotes from Chitty on Contracts (30th Ed) approved by Hedigan J. in *Arnold v Duffy* [2012] IEHC 368, and in turn approved by the Supreme Court in *Defender*. The Consent Order did not disclose the consideration for the release/accord, which is relevant to assessment of the reduction of the plaintiff’s claim that arises under s.17(2). The uplifting of a lodgement under s.17(3) was the only circumstance in which there was “deemed to be an accord and satisfaction with” a defendant. It was asserted that it is necessary for the court to see the terms of settlement/accord. This failure by BTCIL should be viewed in the light of the well established principle that the jurisdiction to strike out a claim should be exercised sparingly and only in clear cases.

(2) Assessment of s.34(1) contribution

41. The effect of s.34(1) CLA is that the extent to which the plaintiffs can recover off the State parties is reduced by the extent of the “contributory negligence” of the concurrent wrongdoer (for these purposes read BTCIL) identified with the plaintiff. But this requires the court to assess the extent of BTCIL’s liability and “the degrees of fault” as referred to in s.34(1), and in this respect to have regard to what it thinks is “just and equitable”. It was contended that this could only be assessed if BTCIL remained in the proceedings, which would allow the court to consider relevant evidence and legal argument. Whatever was in the settlement between the plaintiffs and BTCIL (or whatever informed their negotiations) is irrelevant to this assessment of contribution liability (although relevant to the s.17(2) reduction of the plaintiff’s claim) and cannot predetermine the court’s adjudication of the contribution. If BTCIL is struck out of the proceedings it will deprive the trial court of “the only remaining procedural mechanism (and, very possibly, or probably, the jurisdiction) by which that exercise can be performed” (para. 6.7), and deprive the State parties of procedural devices of discovery and interrogatories. Counsel pointed to the plaintiffs’ plea at para. 29 of the Amended Statement of Claim:

“The Third [i.e. ESAT/BTCIL] and/or Fourth Named Defendants caused the payments herein before referred to be made to the Minister in breach of the rules of the tender process and of the provisions of the Prevention of Corruption Act 1906, as amended. The purpose and effect of these corrupt payments was to ensure the award of the licence to ESAT and/or to reward the Minister for having intervened to ensure the awarding of the licence to ESAT.”

42. It was submitted that a strike out of the NIC would deprive the State parties of recourse to BTCIL, and that in a case involving allegations of “clandestine fraud” (para. 6.14) the court should not accede to an application to dismiss unless “confident that no matter what may arise on discovery or at the trial of the action the course of action will be resolved in a manner fatal to the plaintiff’s contention” (per Keane J., as he then was, in *Lac Minerals v*

Chevron Corporaton, High Court [1993] 8 JIC 0601, approved by Hardiman J. in *Supermacs Ireland Ltd v Katesan (Naas) Ltd* [2000] I.R. 273, and again by Fennelly J. in *Lawlor v Ross* [2001] IESC 10, at p.9 of his judgment). It was submitted that BTCIL could not "...prove that it is 0% responsible for the purposes of the 'just and equitable' apportionment" (para. 6.21). Counsel accepted that if the NICs were struck out it would still be open to the State parties to seek non-party discovery from BTCIL, but argued that the bar would be higher.

In written submissions Counsel emphasised that in the refusing the earlier applications to dismiss the present proceedings for delay the Supreme Court described this case as "absolutely unique, without precedent or parallel in the ninety year history of the State" [2012] IESC 50, and in oral submissions counsel emphasised the public interest in them proceeding to trial with all parties in place. Reliance was also placed on the Mr. Luby's opinion that the disclosure of these proceedings in BTCIL accounts over a 13 year period "indicated BTCIL's concern that it could face liability in these proceedings."

(3) The non-CLA claims

43. As to the 'non-CLA' claims, counsel suggested that there was no need for the High Court to have considered O.16 r.12, which does not confer jurisdiction and is merely a mechanism for making claims. It was sufficient that the trial judge assumed these claims to be "viable", or, to use another word, stateable. Counsel asked the question 'Can BTCIL prove that the State defendants' case is exclusively within the Civil Liability Act?' It was submitted that, taken at its height, BTCIL could not. It was argued that BTCIL could not show that such 'non-CLA' claims had no prospect of success, or were bound to fail. It was submitted that the NICs were drafted in the widest possible terms and that indemnity/contribution could be sought under O.16 r.12 in respect of non-CLA claims – even if concurrent wrongdoing against BTCIL could not be established - if necessary with appropriate amendment (of the sort envisaged by McCarthy J. in *Sun Fat Chan v. Osseous Ltd* [1992] I.R. 425, at p.428, to "save...the action", an approach also accepted by Fennelly J. in *Lawlor v Ross* [2001] IESC 10 at p.25).
44. Counsel therefore argued that the State parties should be permitted to pursue the claims made for reliefs under the headings of constructive trust/tracing, citing Barron J. in *NAD v. TD* (1985) ILRM 153, at 160, *HKI Invest Oy v. Incotrade Pvt. Ltd* (1993) 3 IR 152 at 162, and *Kelly v Cahill* (2001) 1 IR 56 as examples of the willingness of Irish judges to impose a resulting trust to satisfy the demands of justice and good conscience.
45. As to unjust enrichment, together with the remedy of "restitutionary subrogation", reliance was placed on the principles enunciated by the UKSC in *Menelaou v. Bank of Cyprus* [2016] AC 176. There Lord Clarke at para.18 stated:

"...In *Benedetti v Sawiris* [2014] AC 938 the Supreme Court recognised that it is now well established that the court must ask itself four questions when faced with a claim for unjust enrichment. They are these: (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant?"

The UKSC considered unjust enrichment to be a broad doctrine which allowed a flexible approach to the remedies appropriate in a particular case, be it a restitutionary monetary award or some other remedy designed to reverse the unjust enrichment. In *Menelaou*, the remedy was to subrogate the Bank to an unpaid vendor's lien.

46. Counsel submitted that the trial judge erred in her reasoning, summarised earlier in this judgment, in rejecting these claims. Counsel argued that the plaintiffs claim loss of profits arising from their failure to secure the licence, and that BTCIL benefitted from the profits and was thereby unjustly enriched at the expense of the State parties. Counsel relied on the "holding company" relationship between BTCIL and Esat Telecom Holdings Ltd, which was a member of consortium awarded the licence. He argued that BTCIL is a concurrent wrongdoer. Even if it is not a concurrent wrongdoer there would be a claim for tracing of profits wrongfully received, and for their restitution to the State parties. He argued that each of the above equitable claims/remedies is complex and not such as could be dismissed *in limine*. In contending that a party who has been released from proceedings by the plaintiff may still be required to remain a defendant in the proceedings because of a notice of contribution and indemnity served by a co-defendant, Counsel acknowledged that there is no supporting precedent, but argued for amendment to the pleadings giving the State parties the opportunity to advance pleas in relation to the non-CLA equitable claims. He did point to para.122 of the judgment of O'Donnell J., as he then was, in *Defender* where he stated –

"...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...",

And para.123 where he stated:

"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."

Counsel resisted the suggestion that the 'non-CLA' claims could be mounted in fresh proceedings against BTCIL, as it was 26 years since the licence was awarded, and because the State parties might be met by a *Henderson v. Henderson* argument of abuse of the process for not availing of the O.16 r.12 process in respect of such claims, which the State parties argued were "related to or connected with the with the original subject matter or the action".

Submissions of BTCIL

47. Amongst the submissions made by counsel for BCTIL were the following:

- (1) Firstly it was stated that the respondent took the view that there was no need to cross appeal the decision of the trial Judge in relation to her decision made pursuant to O.19, r.28. In this regard he referred to *A.A. v. Medical Council* [2003] 4 IR 302.
- (2) He submitted that insofar as the “non CLA” claims are concerned, they are free standing and differ from the claims advanced by the plaintiff. On no version of events is the plaintiff’s claim a “proprietary” claim such as one grounded on a constructive trust or such as that in *Menelaou* giving rise to subrogated restitutionary relief or damages. If the court is satisfied that the notice of contribution and indemnity, in its current form, should be dismissed, there is no other claim of the State parties before the Court.
- (3) It was submitted that if the plaintiff succeeds in establishing wrongdoing on the part of the State, the State can have no cause of action against a party against whom there can be no such finding i.e. BCTIL.
- (4) While the terms of settlement are not before the Court, the application is based on the fact of the release of BCTIL from the proceedings by the plaintiff, and as ordered by the Court and that is sufficient for the purposes of s.17 of the CLA.
- (5) It was submitted it is clear from the terms of the notices of contribution and indemnity that the only ground relied upon for such purposes is the CLA. In most cases this is as far as the pleadings go as between co-defendants in this regard, because the party seeking indemnity is relying on the plaintiff’s allegations in the proceedings.
- (6) Counsel urged on the court that the State parties are protected pursuant to s.17 of the CLA and that this is clear from the judgment of O’Donnell J. in *Defender*, notwithstanding that that case was different and the wrongdoer, who was released from the proceedings, was not before the court.
- (7) Counsel submitted that the absence of BCTIL will not present an unusual difficulty for the trial court in establishing the extent of BCTIL’s liability, if that is necessary. It very often is the case that a wrongdoer is not in court, and the court has to embark on such an exercise. As far as the State parties are concerned, they will have at their disposal procedural devices, such as subpoenas, non-party discovery, and discovery of the plaintiff’s records.

Discussion

48. By way of preliminary comment, the State parties sought to make much of the views of the judges of the Supreme Court in respect of the serious claims of wrongdoing made by the plaintiff in this case, as reported at [2012] IESC 50. The Supreme Court refused to strike out the plaintiff’s claim for delay over several years, and indicated that the case should go to trial. At p.25, for example, Denham C.J. said “these proceedings make serious allegations of corruption by a Minister of the Government, not a matter which should be struck out on a technicality but which should be addressed in a full hearing in open court”.

49. However, the context in which such views were expressed on that occasion was the application by the State parties to strike out the plaintiffs' *entire* claim. The court was applying the test for striking out proceedings where there has been delay, as enunciated by Hamilton CJ in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459, 475. The public interest in the matter proceeding to trial because it concerned a claim of corruption was only one of fourteen reasons why Denham C.J. found that the delay was excusable.
50. While that decision is a significant part of the background to the present motion/appeal, we are not here concerned with the legal principles applicable to applications to dismiss for delay or want of prosecution, and the views expressed by the members of the Supreme Court have limited relevance to this appeal. This is particularly so in relation to the application to strike out under O.19 r.28. Also, it need hardly be said that the outcome of the present appeal will have no effect on whether the plaintiffs' claims of corruption proceed to trial.

O.19 r.28 jurisdiction to strike out proceedings

51. The State parties in their Grounds of Appeal contend that the decision to dismiss under the inherent jurisdiction of the court was incorrect, and they argue that the High Court's decision to decline to strike out under O.19 r.28 cannot be challenged by the respondent as there was no cross appeal on that point. However the Respondent's Notice opposes the appeal in its entirety, and asks this court to affirm the decision to dismiss, and at Preliminary Ground 1 it expressly "reserves its entitlement to refer to the decision of the learned High Court Judge as a whole for the purposes of responding to the appeal".
52. In *A.A. v Medical Council* [2003] 4 IR 302 the Supreme Court held that the appellate court may consider any of the reasons of the High Court to be erroneous in law or may uphold them, or "adopt reasons of their own for arriving at the same conclusion or a different conclusion" (per Keane C.J., at p.309). I am satisfied on that basis, and because of BTCIL's reservation of its right to refer to the decision as a whole – which includes the trial judges reasoning for declining to dismiss under O.19 r.28 – that BTCIL should not be precluded from arguing the case for dismissal under O.19 r.28 notwithstanding that this should more properly have been raised by way of cross-appeal. Equally it follows that this court can decline to follow the trial judge's reasoning and is free to adopt O.19 r.28 as the basis for a dismissal.
53. The following principles were not in dispute: that the jurisdiction to strike out under O.19 r.28 for failing to disclose a reasonable cause of action or as being frivolous or vexatious requires the court to take the claimant's case as pleaded; that the court must assume that the facts are as asserted; that the court must take the claimant's case at its height – *Lopes v MJELR* [2014] IESC 21; that the onus is on the party seeking the strike out; and that the court should exercise caution in utilising its jurisdiction.
54. What then are the relevant pleadings that must be scrutinised by the High Court, and this court on appeal, for the purposes of the BTCIL motion? In my view they are the NICs served by the State parties on BTCIL. Those are the pleadings in which the State parties

set out their claim against BTCIL, and they are the pleadings that BTCIL seeks to have struck out.

55. In the High Court, but not in this court, the State parties argued that a NIC is not a pleading. O. 125 r.1 defines "pleading" as follows - "**includes** an originating summons, statement of claim, defence, counterclaim, reply, petition or answer". The trial judge analyses this at para. 32 and quotes Delaney and McGrath's *Civil Procedure in the Superior Courts* (3rd Ed.) para. 5-01 and para.16-03 and footnote 6. It is appropriate to quote equivalent passages in the 4th Ed. (2018), where the authors state:

"5-01. The term 'pleading' is a generic one applied to a variety of documents which set out the contents of the claim or defence of a party to proceedings and, thus, identify the issues between the parties. It is important that a claim or defence be pleaded properly because if an allegation of fact is not pleaded, no evidence can be adduced in relation to it and no finding in relation to it can be made by the court of trial.

"16-04 Order 19, rule 28 provides that a court may order a pleading [7] to be struck out on the grounds that 'it discloses no reasonable cause of action or answer' and, in any case where the action or defence is shown by the pleadings to be 'frivolous or vexatious'..."

[Footnote 7 to para. 16-04:] "Order 125, rule 1 defines pleading as including 'an originating summons, statement of claim, defence, counter-claim, reply, petition or answer'. Although the definition does not include an originating notice of motion, an action is defined to mean 'a civil proceeding commenced by originating summons or in such other manner as may be authorised by [the] Rules' and, thus, the better view would seem to be that the court also has jurisdiction under Order 19, rule 28 to strike out an originating notice of motion."

56. The trial judge found that "A NIC sets out the content of the claim, identifies in a very broad sense the issue between the parties and is effectively the originating document in the claim made by the State parties" (para.32), and concludes that O.19.r.28 can be applied to a NIC. Whilst I agree with this conclusion I do not agree with the further conclusion in para.37 of the judgment, quoted earlier, to the effect that the State parties' claims in the NICs are in their "earliest infancy" or that the State parties should be afforded a more "extensive opportunity to articulate their case". I would make the following observations.
57. O.16 r.12(1) establishes that the issue and service of a NIC is the process by which a claim for contribution or indemnity is to be made between existing defendants. It does not itself give the court jurisdiction, but it empowers a defendant to serve such a notice to bring such a claim before the court so that it can be heard and determined at or immediately after the trial of the issue between plaintiff and defendants, and it sets out the basis for the claim for contribution/indemnity.

58. O.16 r.12(1) allows some flexibility. In addition to seeking contribution and indemnity under (1) (a), or instead of that, a defendant can claim –

“(b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or

(c) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant making the claim and should properly be determined not only as between the plaintiff and defendant making the claim but as between the plaintiff and the defendant and the other defendant or between any or either of them”.

These are empowering rules, but they govern pleadings, and it cannot be overlooked that it is up to the defendant claiming contribution to actually plead such related or connected claims/remedies/issues.

59. The State parties sought to compare the claim in a NIC to the summary claim endorsed on a Plenary Summons, in support of its submission that in a strike out application such as the present the court should take into account the more particularised claim that may follow the service of the NIC.

60. While it is the case that O.16 r.12(2) gives liberty to the serving defendant or the receiving defendant to seek directions for further pleadings, if either “considers it necessary to do so”, I do not think the comparison with a Plenary Summons is apt, or assists the State parties. O.4 r.2 expressly applies to the Indorsement of Claim on a Plenary Summons, which is to be a “ ‘GENERAL INDORSEMENT OF CLAIM’ and there shall be an indorsement of the relief claimed and the grounds thereof expressed in general terms in such one of the forms in Appendix B, Part II as shall be applicable to the case”. It is then followed by an Appearance, and then a Statement of Claim within 21 days. Absent a Statement of Claim the action cannot proceed and is liable to be struck out. The same considerations do not apply to a NIC.

61. A further significant difference is that O.16 r.12(1) does not limit the level of detail in a NIC, and it is open to a defendant to include particulars in support of the claim. Most importantly in my view the claiming defendant has an obligation to plead in the NIC the basis for the claim for contribution or indemnity, and r.12(1) expressly provides that defendant may issue a notice “...making such claim or specifying such question or issue”. If that claim is on one basis e.g. a contractual claim to indemnity, then, absent an amendment, it not permissible to proceed with a claim over based in tort.

62. Moreover, while the recipient of a NIC can seek further pleadings or particulars, there is no onus on it to do so. In the present case no particulars were raised. Either party can, under r.12(2), apply for directions “as regards pleadings between them if either consider it necessary to do so”. The State parties did not seek any such directions. If the State parties wished to make, or try to make, a more elaborate or expansive claim on foot of the NICs it

was up to the State parties to take the initiative by seeking directions for further pleadings or by applying to amend the NICs to make such additional claims as might be permitted by O.16. r.12. It singularly failed to make any such application.

63. The NICs actually served by the State are therefore the critical pleadings that the court must consider.
64. The NICs do not make any claim other than a claim for contribution and indemnity; this clearly falls under O.16 r.12 (1)(a). While O.16 r.12 and sub rule (1)(a), are not expressly referred to in the NICs, this is not necessary as that rule simply sets out the mechanism by which such a claim can be made between defendants. There is no additional claim made, still less particularised, under (b) or (c). As already observed, the State parties have never sought to amend or expand the NICs to claim related or connected reliefs, or to raise for determination related or connected questions.

Conclusions on O.16 r.12 and the non-CLA claims

65. Counsel did submit before this court that the State parties should now be permitted to amend the NICs to include additional 'non-CLA' claims against BTCIL, based on the inherent jurisdiction of the court to 'to save an action' in motions to strike out where the pleading admits of an appropriate amendment– see Fennelly J in *Lawlor v. Ross* [2001] IESC 110. Undoubtedly such a jurisdiction exists, although it is rarely exercised. It is perhaps surprising that State parties should seek to rely on it, and no authority was cited to demonstrate a court availing of this jurisdiction to 'save an action' brought by a such well-resourced party.
66. In any event, beyond indicating in argument that it would wish to pursue claims under headings of constructive trust, tracing or unjust enrichment 'restitutional subrogation', the State parties have never identified the factual or legal basis for such claims in correspondence, or set out a factual basis for such claims on affidavit. The plaintiff's correspondence before action and the amended Statement of Claim do not allege any wrongful act on the part of BTCIL, which was not, as a matter of fact, a member of the winning consortium. The State parties also do not adduce any evidence of wrongdoing on the part of BTCIL, but they appear to rely on a number of matters.
67. The first is that BTCIL had a role in the 1996 tendering process. However the evidence is that this was limited to preparatory work, including the acquisition and development of transmission sites, and there is no evidence of wrongdoing. The Tribunal found that this preparatory work had ended by April 1995 – which was before the submission of the winning consortium's bid, long before the main pleaded allegations of impropriety (August/September, 1995), long before the decision to award the licence was made on 25 October 1995, or indeed the grant of the licence in May 1996, and long before the allegation hereinafter mentioned (and other allegations in the amended Statement of Claim of corrupt payments in 1996/1997/1999 and 2002, which largely related to Mr. O'Brien). As the trial judge notes, in para.14, the only wrong alleged against BTCIL in the 2005 Statement of Claim was a payment of \$50,000 to Fine Gael's fundraisers in December 1995, but the Tribunal determined that this was made by Telenor Invest AS at the possible request of

Communicorp Ltd. The Tribunal found no evidence that this payment was made by BTCIL, or on its behalf.

68. Furthermore the State parties have not suggested that there are other facts indicative of wrongdoing by BTCIL, not determined by the Tribunal, which may come to light during discovery or other pre-trial process, and on the basis of which the NICs should not be struck out.
69. The second matter relied on is a corporate association of BTCIL with Esat Telecom Holdings Ltd. The amended Statement of Claim alleges BCTIL “acted as a holding company for Esat Telecom Holdings Ltd.” However, the evidence adduced by the plaintiff in the Affidavit of Damien Young, solicitor, sworn on 20 June 2014 to oppose BTCIL’s application to dismiss – which never proceeded to a hearing, but which is relied on by the State parties – primarily relies on showing that BTCIL held one of the two issued shares in Esat Digifone Limited for a short period from 6 March 1996 to 12 April 1996. That was some time after the decision to award the licence was made in October, 1995. On 12 April 1996 BCTIL’s one share in Esat Digifone Limited was transferred to Esat telecom Holdings Ltd – before the grant of the licence on 16 May 1996. BTCIL was a trading company providing land line services, and as such was a wholly owned subsidiary of Communicorp. It is never explained by Mr. Young how BTCIL’s brief shareholding in Esat Digifone Ltd converted BCTIL into a “holding company”, or for whom such shares were held, or how BCTIL could have any vicarious or other liability for the bidding entity or those against whom the allegations of corrupt payments are made. It is also clear from the affidavit evidence sworn by Mr. Tackaberry, a director of BTCIL, in response to Mr. Young, that BTCIL never held any shares in Esat Telecom Holdings Ltd. Indeed the opposite was the case, as Esat Telecom Holdings Limited at the time of the grant of the licence was the parent company of BTCIL. Mr. Tackaberry robustly avers in both the affidavits that he swore that BTCIL has a separate legal personality. Mr. Young does present further evidence of links between directors and advisors of BTCIL and Esat Digifone Ltd/Communicorp and Mr. O’Brien, who was a director of all three companies, but that evidence singularly fails to link BTCIL to any pleaded wrongdoing. None of the individuals named, other than Mr. O’Brien, features in the amended Statement of Claim. It is notable that none of the pleaded allegations of wrongdoing fall into the period 6 March 1996 to 12 April 1996, and Mr. Young fails to explain why this period of holding is, as he describes it in para.31 of his affidavit, “part of the crucial period in which the wrongdoings pleaded by the plaintiffs arose”. It also bears repeating that Esat Digifone Ltd and Esat Telecom Holdings Ltd have never been joined as defendants in these proceedings. I do not consider any of the evidence relied on here by the State parties as supportive of the non-CLA claims raised in their submissions.
70. The third matter relied upon to support the idea that the court should allow amendment to ‘save the action’ is the evidence that BTCIL’s audited accounts over a number of years noted these proceedings as a contingent liability. I do not propose to dwell on this at any length. It will be recalled that the State parties rely on the expert evidence of Mr. Luby which, as recounted earlier, is contested in the affidavits of Mr. O’Connor the PWC audit manager at the time the note was introduced, and Mr. Byrne the BTCIL chief financial officer

at the time, whose evidence was that at the time of first disclosure the possibility of liability was regarded as remote and the entry was made because the Tribunal/proceedings were a matter of public record. The trial judge formed the view that the wording of the disclosure and the operation of FRS12 do not support the argument that BTCIL considered itself potentially liable. She noted that the State parties did not argue "that there is an obligation not to disclose the liability if liability is considered to be remote" (para.31); she considered that under the FRS12, which is silent on the issue, "disclosure of remote contingent liabilities is optional...". She concluded:

"The State defendants' argument on this issue flies in the face of plain wording of BTCIL's disclosure, which was unequivocal in its view that BTCIL 'has no liability in the matter'. In effect, their argument is contradicted in its view by the very evidence it is based on and it cannot be sustained."

71. I am not persuaded by Counsel's argument before this court that the trial judge erred in any of these observations or findings. It follows that the accounts disclosures cannot be a sound evidential basis for any claim that the State parties seek to pursue under the NICs, whether pursuant to the CLA or in respect of suggested 'non-CLA' heads of claim, and such disclosure could not support any amendment of the NICs.
72. It is also significant that the State parties have never, in correspondence, submissions, or otherwise, set out precisely, or even in a rudimentary way, what amendment it would wish the court to make to 'save the action'. In consequence BTCIL has never had a proper opportunity to respond.
73. In my view the pleadings between the defendants have never gone beyond the CLA claims in the NICs precisely because the State parties rely on the plaintiffs' allegations of wrongdoing against all the defendants, and not on its own different or additional allegations of wrongdoing against BTCIL – the 'non-CLA' claims.
74. It was not therefore appropriate for the High Court to consider other possible claims, such as the constructive trust/tracing claims, and the unjust enrichment/restitutionary subrogation claim, *asserted by the State in submissions* in that court, in assessing the strike out claim under O.19 r.28. The court's task was confined to the claims actually pleaded, and insofar as the trial judge went beyond that she fell into error.
75. The trial judge was correct in observing that if the State parties wished to bring these other claims then it was open to them to do so by issuing their own proceedings, and that the State parties could not "metastasise unrelated claims to the plaintiffs' action", or do so by raising such matters for the first time in submissions at the hearing of the motion. I did not find persuasive the State's submission that new proceedings might founder on complaints based on *Henderson v Henderson*, delay or abuse of the process; such apprehensions may or may not be realistic, but in my view such possibilities have no relevance to the court's consideration of whether the NICs do, or do not, disclose any reasonable cause of action under O19 r.28.

The actual claims in the NICs

76. These are dated 7 March 2013 and are in identical in terms, running to two paragraphs. In the first paragraph the State parties claim from BTCIL –

“...an Indemnity, and/or Contribution up to and including a full indemnity in respect of any *damages* or costs for which the [State parties] may be held liable to pay the Plaintiffs...and for costs of making the claim herein against you the third-named Defendant (the Plaintiffs’ entitlement to recover such damages being fully denied by the [State parties]).”

In the second paragraph commencing “AND TAKE NOTICE...” the State parties repeat their intention at the hearing to apply –

“...for an Order for Indemnity and/or Contribution and ***such application*** will be pursuant to the Civil Liability Act 1961, on the grounds that if, which is denied, the Plaintiffs did suffer the alleged damage the same was caused solely or alternatively were contributed to by the wrongdoing, fraud, deceit, breach of contract, and breach of duty and/or breach of statutory duty of the third-named Defendant or your servants or agents.”

[Emphasis added].

77. In analysing the NICs it is essential that the court has regard to the claims actually pleaded in the Statements of Claim – and in the (proposed) amended Statements of Claim. On such analysis, the following are critical points emerge:

- (a) The first paragraph in the NICs refers only to the Plaintiffs’ claim for damages and costs. This is consistent with the claim pleaded in the unamended and the amended Statements of Claim, which in essence plead losses and claim damages. Declarations are sought, but only as a prelude to the damages claim. The Plaintiffs do not plead any claim that seeks to attach profits that any defendants may have made from the wrongful acts pleaded, or from the grant of the licence; they do not seek tracing, or an account of profits, or any declaration related to any constructive trust; they do not plead unjust enrichment in any form, or seek any consequential remedy such as restitutionary subrogation; they do not make any proprietary claim.
- (b) The second paragraph is somewhat repetitive of and overlapping with the first paragraph. In my view the reference to “such application” applies to both paragraphs – to the “Indemnity and/or Contribution” claims made in the first paragraph, and also to the *application* for “Indemnity and/or Contribution” under the Civil Liability Act 1961 which the second paragraph states will be made at the hearing. What is clear is that in each NIC read as whole the only basis pleaded for contribution/indemnity is the Civil Liability Act, 1961 and the claims for damages/costs pleaded by the Plaintiffs.
- (c) There is no pleading related to tracing, constructive trust, unjust enrichment or a *Menelaou* type claim. These are factually, and in terms of the remedies sought,

properly characterised as 'freestanding' claims, but by seeking to maintain the NICs as the basis for pursuing such claims the State parties seek to tack them onto a claim that is for damages *simpliciter*. That in my view is not envisaged or permitted by O16 r.12.

(d) As O'Donnell J. states in para. 13 of *Defender* the CLA contribution claim –

"...is a separate cause of action...The cause of action is not, however, related to anything that either concurrent wrongdoer is alleged to have done to the other. It relates to what one concurrent wrongdoer claims the other concurrent wrongdoer did to the plaintiff."

As Counsel for the State parties highlighted, at para.15 O'Donnell J. states –

"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 NICs served by the State parties make no claims other than a CLA contribution claim.

78. It cannot be the case, as submitted by the State, that BTCIL should be kept in the proceedings at this stage solely in order that discovery/interrogatories could be pursued which might yield evidence to support the unpleaded non-CLA claims for unjust enrichment and equitable remedies. It is a general principle that proceedings cannot be brought solely for the purposes of pursuing discovery of documents. Nor can the fact that non-party discovery, such as could still be sought from BTCIL if the NICs are struck out, might be more difficult to obtain (because it may need to be demonstrated that it cannot be obtained otherwise), be a consideration.
79. It follows that the only matter that needs to be considered under O.19 r.28 is whether, in light of the strike out of the Plaintiffs' claims as against BTCIL on consent before Gilligan J on 31 July, 2014, the State Defendant's NICs now disclose any reasonable cause of action against BTCIL. This requires the court to address ss. 11, 17,21, 34 and 35 of the CLA 1961 to ascertain whether the CLA contribution claim can still be maintained.

The CLA contribution claim

80. This court has the advantage that, since this motion was heard in the High Court, the Supreme Court has considered these provisions of the CLA 1961 in *Defender*, and it is not therefore necessary to analyse the reasoning that led the trial judge to conclude that the State Defendant's CLA contribution claims are bound to fail. Suffice it to say that I agree with the conclusion reached by the trial judge on this issue.
81. In *Defender* the facts were different in that there was effectively only one defendant, HSBC Institutional Trust Services (Ireland) Limited, which had placed funds of Defenders' clients with Bernard Madoff. Before the proceedings Defender had reached settlement with the trustee in bankruptcy of the concurrent wrongdoer - Bernard L. Madoff Investment

Securities LLC – which it was common case released any claim by Defender against Madoff’s company. The primary question was not whether one concurrent wrongdoer should be let out, but rather whether the trial judge (Twomey J.) was correct in determining that Defender should bear 100% of the fault because of the criminal nature of Madoff’s conduct and that the claim against HSBCITS should therefore be reduced to nil under s.17(2) of the CLA 1961. On that issue the Supreme Court held the High Court to be wrong, and remitted for fresh trial the issue of what percentage (if any) of liability for Defender’s loss for which HSBCITS might be liable. However one of the issues addressed by the court was the true interpretation of ss.11, 17(2), 21(2), 34 and 35(1)(h) of the CLA 1961, and in that regard the dicta of O’Donnell J are of assistance.

82. S.11(1) CLA provides that –

“For the purposes of this Part, two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person...for the same damage...”.

The persons may not be subject to the same claim, or have the same liability – the focus is on the *same damage*. S.11(2) is a broadly worded provision defining the persons who may become concurrent wrongdoers. As O’Donnell J. observed in para. 35 –

“35. ...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.”

83. S.21(1) also refers to “same damage” –

“(1) ...a concurrent wrongdoer... may recover contribution from any other wrongdoer who is, or would if sued at the time of the wrong have been liable in respect of the same damage...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 contribution is sought.”

This emphasis on the “same damage” is relevant, because what the plaintiffs claim against the State parties, and what the State parties in turn seek to claim from BTCIL in the NICs is “the same damage” viz. the damages for loss of opportunity, loss of profits and tender costs pleaded in the amended Statements of Claim.

84. S. 17 bears repeating here:

“(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 wrong doers 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 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."

85. I do not propose to requote s.34(1); it is the general provision that provides for contributory negligence "by the plaintiff or one for whose acts he is responsible", and the reduction of the damages recoverable "by such amount as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant..."

86. The relevant parts of s. 35 also bear repeating:

(1) For the purpose of determining contributory negligence –

...

(h) where 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;

(4) Where a plaintiff is held responsible for the acts of another under this section and his damages are accordingly reduced under subsection (1) of section 34, the defendant shall not be entitled to contribution under section 21 from the person for whose acts the plaintiff is responsible."

87. O'Donnell J comments on s.35(4) at para.60 –

"...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 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)."

His commentary at paras.95, 96 and 97 is also pertinent. In para. 95 he finds that the policy of the CLA evident from s.17, ss.35(1)(i) and 35(1)(h) is that a defendant should not have to pay more than his 'fair' share and the plaintiff must bear the deficiency and thereby recover less than their full damages. In para. 96 he comments that this is "clearly the advertent choice of the legislation", and in para. 97 he addresses s.35(4):

"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...*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.*" [Emphasis added].

88. O'Donnell J. was careful to exclude from this claims to contribution/indemnity falling outside the CLA, stating:

"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."

89. However this cannot be relied upon by the State for the simple reason that, as I have indicated earlier, no non-CLA claim to contribution is made in the NICs in the present case.

Release or accord

90. It will be recalled the State parties argued that there was no 'release or accord' for the purposes of s.17. They argued that the consent order of Gilligan J. was not in itself a release or accord, and that absent the settlement between the BTCIL and the plaintiff there was insufficient evidence.

91. This argument is fallacious. The Order of Gilligan J. records –

"BY CONSENT IT IS ORDERED THAT –

1. the Plaintiffs' claim herein as against [BTCIL] be dismissed on the grounds that the claims advanced as against [BTCIL] are unsustainable.
2. there be no order as to cost."

92. This plainly records and implements an agreement between the plaintiffs and BTCIL. That is an 'accord with' BTCIL for the purposes of s.17. The accord is that the Plaintiffs' claims against BTCIL are "unsustainable" and are to be dismissed. The order dismissing the claims is a 'release of' BTCIL from the proceedings; and the trial judge was correct to regard it as such. The fact of release and accord is evidenced by the Consent Order, and that is sufficient evidence to trigger s.17. It is true that the Settlement itself was not exhibited. Counsel for BTCIL explained that this was because it was confidential to the parties, but proffered it for the court to inspect it. The court properly declined this offer because it was not in evidence

before the High Court or this court. But the Settlement itself is not required to be before the court in circumstances where the order of Gilligan J. evidences an accord and release. The fact that the Settlement between Defender and Madoff's trustee *was* before the High Court and Supreme Court does not persuade me otherwise. Firstly, in *Defender* the court did not have the benefit of a court order such as that in the present case. Secondly, insofar as the Settlement in *Defender* was relevant to establishing the percentage wrongdoing (if any) for which HSBCITS might be liable, that issue was remitted to the High Court for trial where the Settlement could be further considered.

93. In the same way, the State parties in the present proceedings will be entitled to obtain disclosure of the written settlement between the plaintiffs and BTCIL for the purpose of claiming and measuring the reduction, if any, to which the State parties are entitled from the plaintiffs under s.17(2) and/or s.34(1) CLA. Subject to any submission which the Plaintiffs may make at the trial, any consideration paid for the release and accord will be reckonable under s.17(2) in reduction of any damages awarded to the plaintiffs. But while the terms of the settlement will be relevant to measurement of the reduction at trial, it is not required to be exhibited on this motion or appeal to evidence a 'release'. I agree with counsel for BTCIL that the State Defendant's argument conflates the reduction/apportionment measurement with the fact of release.

Conclusions

94. I agree with the trial judge's conclusion that the Consent Order of Gilligan J. constitutes an "accord and release" by the Plaintiffs with BTCIL for the purposes of s.17 of the CLA.
95. It follows that pursuant to s.35(1)(h) the plaintiffs are "deemed to be responsible for the acts of the wrongdoer whose liability is so discharged", and the State parties are entitled to have the damages claims against it reduced accordingly, again, subject to any submissions which the Plaintiffs may make to the contrary.
96. Of course BTCIL maintains its denial of any wrongdoing, but if the State parties can satisfy the court at trial that BTCIL was a wrongdoer, and the extent to which it would have been liable to contribute, then the plaintiffs' claim to damages against the State parties will fall to be reduced accordingly. That is the overlapping and complimentary effect of s.35(1)(h) and s.17(2), and s.34(1).
97. The State parties' argument also fails to engage with s.35(4) under which, where the Plaintiffs are held to be responsible for any wrongdoing on the part of BTCIL, and the damages claim against the State parties is reduced accordingly, the State parties are no longer entitled to contribution from BTCIL. This, fundamentally, is the reason why the NICs should be struck out.
98. I should add as the Plaintiffs were not parties to BTCIL's motions to strike out the NICs, or these appeals, the foregoing conclusions cannot foreclose the Plaintiffs from arguing for a different position at the trial of the action.

99. The State parties argued that the NICs should not be dismissed so that, as a matter of practicality, the claims of wrongdoing against BTCIL could be proven, and the extent of its liability to contribute (and hence the extent of the reduction in any damages that could be claimed against the State parties) could be established. It also argued that this would enable discovery and the raising of interrogatories, which it said would be critical to proving BTCIL's wrongdoing. It argued that the only prejudice that BTCIL might suffer is the cost of defending, which could be met by a costs order.
100. I have already addressed these arguments in the context of amendment of the NICs to admit the putative non-CLA claims. In my view they do not bear scrutiny. Striking out the NICs will not prevent the State parties at trial seeking to prove that BTCIL was a concurrent wrongdoer, and the extent of its liability. S.35(1) applies the determination of "contributory negligence" under the CLA to all the sub-paragraphs that follow, and in many of them the concurrent wrongdoer will be nowhere near the court e.g. where the claim against that a potential wrongdoer is statute barred and is not issued against that party, yet the court of trial still has to undertake the task of apportionment of fault on the evidence adduced before it. In terms of information, and sourcing witnesses, the State parties have the benefit of the Tribunal findings (although not in themselves admissible evidence); it can call evidence, including compelling by *subpoena* if necessary persons involved with BTCIL at the relevant time, and it can cross examine the witnesses called by the other remaining defendants or *subpoena* those defendants themselves. It can, in advance of trial, seek discovery, including non-party discovery which could be directed to BTCIL. This will doubtless include the settlement between BTCIL and the plaintiffs; notwithstanding the confidentiality that may attach to the settlement it is hard to envisage any argument that would persuade a court not to order discovery, with appropriate safeguards against unnecessary dissemination, in the circumstances. The State parties can also raise interrogatories.
101. In that BTCIL will not be present or represented at trial it may, or may not, make the State parties' task more difficult (it might be suggested that it will give the State parties an easier run in proving BTCIL to be a concurrent wrongdoer). But what the State parties perceive to be practical difficulties in proving that a (former) co-defendant might be a wrongdoer is not a reason for not striking out a NIC where the plaintiffs' claim against that co-defendant has been settled and dismissed on consent. To keep BTCIL in the proceedings for this reason would fly in the face of one of the policies behind the relevant provisions of the CLA, which is to encourage settlements. The question of prejudice to BTCIL by it being kept in on the basis of the NICs, which the State parties suggested could be resolved by a costs order, simply does not arise as a factor for consideration under O.19 r.28.
102. Equally the possibility that the plaintiffs may have had pragmatic or economic reasons for not fighting to keep BTCIL in the proceedings is of no relevance. Subject to any submissions that they may make at trial, the plaintiffs' choice means that they must accept that if the State parties satisfy the court at trial that BTCIL was a wrongdoer, and the extent of the fault attributable to that wrongdoing, their claim against the State parties will be reduced accordingly.

103. It follows from the foregoing that I agree with the trial judge's conclusion – reached by her on consideration of the case law that preceded the decision in *Defender* – on the CLA issues, namely that the State parties cannot seek indemnity/contribution from BTCIL as an alleged concurrent wrongdoer following the release and accord arising from agreement between Plaintiffs and BTCIL and the ensuing Consent Order of Gilligan J., and that as s.35(1)(h) is engaged, s. 35(4) applies such that the State parties' claims for indemnity/contribution from BTCIL cannot succeed.
104. I would therefore dismiss the NICs under O.19 r.28 on the basis that they do not now disclose any reasonable cause of action, and I would vary the order of the High Court accordingly.
105. In these circumstances it is not necessary to consider whether the court should exercise its inherent jurisdiction to strike out the NICs as bound to fail. That would involve treating the NICs as encompassing or permitting wider non-CLA claims, propositions which I have already rejected. It would also involve addressing the principal argument of BTCIL that the non-CLA claims suggested by the State, being based on equitable principles of constructive trust, tracing, unjust enrichment, or 'restitution subrogation', are in the nature of proprietary claims, which could never succeed. The BTCIL arguments in this regard involve very broad propositions, with wide-ranging implications, and I would be reluctant to address them on an *obiter* basis, particularly in circumstances where the State parties may yet decide to institute separate proceedings based on such claims, and such proceedings would fall to be determined in due course in the High Court. While BTCIL would have liked these arguments addressed, it is not necessary or appropriate for us to do so to decide this appeal, and I do not propose to do so.

Costs

106. As BTCIL has been successful on this appeal it is my provisional view that BTCIL is entitled to its costs of this appeal, to be adjudicated by a legal costs adjudicator in default of agreement. Should the State parties wish to dispute such proposed costs order they will have 14 days, in which to do so to indicate to the Court of Appeal Office, and a short costs hearing will be arranged.

Judges Costello and Binchy having read this judgment are in agreement with same.