THE HIGH COURT

CHANCERY

[2001 No. 9288 P.]

[2001 No. 15119 P.]

BETWEEN

COMCAST INTERNATIONAL HOLDINGS INCORPORATED, DECLAN GANLEY, GANLEY INTERNATIONAL LIMITED and GCI LIMITED
PLAINTIFFS

- AND -

THE MINISTER FOR PUBLIC ENTERPRISE, MICHAEL LOWRY, ESAT TELECOMMUNICATIONS LIMITED, DENIS O'BRIEN, IRELAND and THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of the Hon. Ms. Justice Stewart delivered on the 31st day of July, 2018.

1. This judgment is delivered in respect of notices of motion dated 24th June, 2016, issued by the third-named defendant (since re-named BT Communications Ireland Ltd and hereafter referred to as "BTCIL") in both sets of proceedings and seeking to have notices of indemnity and contribution ("NICs") issued by the first, fifth and sixth-named defendants (hereafter referred to as "the State defendants") struck out under O. 19, r. 28 of the Rules of the Superior Courts (ROSC) on grounds that the claim has no reasonable prospect of success and/or is bound to fail. Further or in the alternative, BTCIL seek an order dismissing the NICs under the Court's inherent jurisdiction on grounds that they are unsustainable, frivolous, vexatious and/or an abuse of process.

Background

2. This application is but a small scene in the saga of legal proceedings inspired by the tendering process for Ireland's second GSM mobile telephone licence. The plaintiffs were part of a joint enterprise that partook in the bidding process for the licence and was a disappointed bidder to Esat Digifone's successful bid. The first-named defendant was the decision-maker in awarding the licence and the second-named defendant occupied the office of the first-named defendant at the relevant time.

3. Further relevant background facts are set out in the affidavit of Seamus Walsh, a director of BTCIL, sworn on 23rd June, 2016, to support this application. The two sets of proceedings were issued in 2001, with statements of claim delivered in 2005. The proceedings bearing record number 2001/9288P seek a declaration that the extension of time allowed for the receipt of tenders is null and void. The proceedings bearing record number 2001/15119P seek a declaration that the decision dated 16th May, 1996, to grant the licence to BTCIL is also null and void. The narrative of these proceedings is best understood against the backdrop of the Tribunal of Inquiry into Payments to Politicians and Related Matters, chaired by Moriarty J. (hereafter referred to as "the Tribunal"). The plaintiffs had stayed their hand in progressing their claim while they awaited the publication of the Tribunal's final report, which occurred in March, 2011. These proceedings had been struck out in 2007 on foot of that delay but the Supreme Court overturned that order in a decision delivered on 17th October, 2012. In early 2013, the fourth-named defendant and the State defendants served NICs against each other and all other defendants. The Court has not had sight of the NICs served by the fourth-named defendant.

4. The plaintiffs sought to amend their statement of claim in December, 2013 with the consent of BTCIL. That consent was not forthcoming and BTCIL instead sought to have the plaintiffs' claim against them struck out in May, 2014 for failure to disclose a reasonable cause of action. On 31st July, 2014, a consent order was made by Gilligan J. dismissing the plaintiffs' claim against BTCIL. On 21st October, 2014, a further order was made, without objection from the other defendants, permitting the plaintiffs to amend their 2005 statement of claim. Since the making of these orders, the fourth-named defendant has withdrawn his NICs against BTCIL. The State defendants made clear in correspondence that they did not intend to follow suit and the notices of motion grounding this application were duly issued.

The Affidavits

5. Mr. Walsh avers that a wrongful act is not alleged against BTCIL at any point in the statement of claim, either pre- and post-amendment, nor at any time over the seventeen years since the proceedings were issued. He also alleges that the plaintiffs have specifically constructed their pleadings in order to conflate the role of BTCIL with that of other actors in the tendering process. In particular, he challenges both the import and existence of the "holding company" relationship alleged between BTCIL (which was not a member of the Esat Digifone consortium, i.e. the winning bidder for the licence) and Esat Telecom Holdings Ltd (which was a member). It is further stated that s. 17(2) and 35(1)(h) of the Civil Liability Act 1961 provide sufficient protection for the State defendants in these matters. Mr. Walsh concludes by outlining the prejudice that would be visited upon BTCIL if it were required to answer at full hearing a claim of significant vintage that is, in respect of the plaintiffs at least, laterally accepted to be unsubstantiated and un-stateable.

6. Jim Luby, chartered accountant, swore an affidavit, dated 9th November, 2016, in which he outlines his instructions to report on the treatment of the plaintiffs' claim in BTCIL's accounts and on the question of whether BTCIL profited from the award of the licence in 1996. In respect of the latter, Mr. Luby avers that he has not been provided with sufficient information to reach a conclusion on that issue. In his expert report, he reviews the various disclosures of the proceedings made in BTCIL's financial statements from 2002 – 2014 and concludes that said disclosures are indicative of BTCIL's concern that it could be held liable in these proceedings. He sets out the accounting obligations contained in Financial Reporting Standard 12 ("FRS12") and the requirement outlined therein that a contingent liability must be disclosed unless a transfer in settlement is remote. He concludes that BTCIL's decision to disclose these proceedings as a contingent liability serves as an acknowledgement by BTCIL that such a transfer is not remote and that they did not perceive the imposition of liability in this case as unlikely.

7. Matthew Shaw, a Principal Solicitor with the Dept. of Communications, Climate Action and Environment, swore an affidavit dated 9th November, 2016, on behalf of the State defendants. He avers therein that pleadings in this matter closed on 21st October, 2016, and that discovery has not been obtained against BTCIL. He also stresses that this affidavit is made strictly without prejudice to any defence that the State defendants may advance at a later date. He relies on Mr. Luby's findings regarding FRS12 as a statement that BTCIL did not consider its potential liability in these proceedings to be remote. After exploring the relevance of the plaintiff's attitude vis-à-vis BTCIL, Mr. Shaw highlights BTCIL's undeniable involvement in the 1995/6 tendering process and avers that the precise

nature/extent of that involvement cannot be assessed without discovery. It is also claimed that the State defendants' pursuit of BTCIL is not limited to their alleged status as a wrongdoer. Rather, the State defendants also seek to trace into BTCIL the profits that flowed from the alleged wrongful grant of the licence, regardless of whether BTCIL actually committed any wrongdoing. In buttressing that argument, Mr. Shaw avers that the claim for indemnity and contribution was served pursuant to O. 16, r. 12 ROSC, and not just under the provisions of the 1961 Act. As with Mr. Luby, Mr. Shaw states that the question of whether BTCIL profited from the alleged wrongdoing cannot be addressed until the discovery process has concluded. It is also denied that ss. 17(2) and 35(1)(h) of the 1961 Act provide sufficient protection for the State defendants in these proceedings. Mr. Shaw concludes by arguing that BTCIL have delayed in bringing these motions.

8. Paul O'Connor, a chartered accountant and registered auditor with PwC, swore an affidavit dated 24th March, 2017. He states therein that he was the individual responsible for the audit of BTCIL's accounts from 2001 – 2009, and his colleague, Damian Byrne, assumed that responsibility thereafter. He offers a disclaimer for some of his evidence, in that some of the events took place more than a decade ago, the files were destroyed after seven years and his memory of the events is not complete. However, he makes clear that BTCIL did not indicate at any point that the claim made by the plaintiffs in these proceedings was justified or had any prospect of success. He avers that the disclosure was made primarily because the proceedings, and BTCIL's involvement in them, were matters of public knowledge and significant debate.

9. Thomas Byrne, a chartered management accountant and partner with Pathfinder, swore an affidavit dated 27th March, 2017, for purposes similar to those of Mr. O'Connor. He avers that he became CFO of Esat BT Group Ltd (also referred to as Esat Group Ltd in affidavits filed in respect of BTCIL's motion to strike out the plaintiff's claim) when it and its subsidiaries were acquired by BT Plc and that he was responsible thereafter for the financial management of all the companies operating under its aegis, including BTCIL. As part of this new role, he was a director of, *inter alia*, BTCIL from 15th August, 2001, until 10th September, 2008, and signed BTCIL's 2002 financial statements on its behalf. He offers the same disclaimer as Mr. O'Connor and outlines his understanding of a meeting that took place between himself and Mr. O'Connor in the run-up to BTCIL's 2002 financial audit. He avers that Mr. O'Connor raised the topic of these proceedings and suggested that they be disclosed as a note on the accounts, given the public attention they were receiving. Mr. Byrne agreed with this approach, added a note and sent the statements to the board of directors for approval.

10. On 28th March, 2017, Mr. Walsh swore a second affidavit, in which he questions the accuracy and relevance of the case made in the State defendants' affidavit evidence. Regarding the suggestion that the State's defendants' claim operates in some way outside the auspices of the 1961 Act, Mr. Walsh avers that such a suggestion is baseless and has not been pleaded. He also sets out an alternative chronology of events to rebut any allegation of delay.

11. Mr. Luby swore a second affidavit, dated 23rd June, 2017, in which he reviews the affidavit evidence produced thus far and re-iterates his view that BTCIL's decision to disclose these proceedings as a contingent liability is indicative of a belief that a finding of liability on their part was not a remote prospect.

12. Mr. Shaw swore a second affidavit, dated 26th June, 2017, in which he clarifies that the State defendants' claim includes a right independent of the 1961 Act to trace wrongfully obtained profits received by BTCIL. He notes further that the success of such a claim cannot be assessed until discovery has taken place and that BTCIL have not sought particulars of the State defendants' NICs. He then re-iterates the allegation of delay and refers on to an affidavit of a Joanna O'Connor for more information.

13. Ms. O'Connor, a solicitor with the CSSO, swore an affidavit dated 27th June, 2017, in which she outlines the nature of communications and correspondence between the two legal teams and the impact this has had on the alleged delay. Mr. Walsh swore a third affidavit, dated 17th July, 2017, in which he takes further issue with the characterisation of delay, and Ms. O'Connor swore a second affidavit, dated 18th September, 2017, expanding on this point of dispute. Mr. Walsh concludes by clarifying that the financial accounting disclosure occurred on an elective basis and that the rules in FRS12 did not require that disclosure.

The 2014 Strike Out/Dismissal Application

14. While BTCIL's application to strike out/dismiss the plaintiff's claim was ruled on consent, the pleadings and submissions filed in respect of it have been put before the Court and are relied on for the purposes of this application. I will briefly outline the evidence contained therein that is relevant to this application, where it has not already been referred to above. A dismissal/strike out order was sought under O. 19, r. 28 ROSC, under the Court's inherent jurisdiction and/or on grounds of delay. It was alleged 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 final report. It was submitted that the only wrong alleged against BTCIL in the 2005 statement of claim was a first payment of $50,000 to Fine Gael's fundraisers, which the Tribunal allegedly determined was made by Telenor Invest AS at the possible request of Communicorp Ltd, and not by or at the request of BTCIL.

15. The allegation of a holding company relationship was explored further and it was stated that Esat Telecom Holdings Ltd held shares in BTCIL, rather than the other way around. There would appear to have been a dispute as to which company the Tribunal's reports are referencing when they refer to "Esat Telecom". However, it was accepted that some of these references were directed at BTCIL. The inter-relationship between Communicorp, Esat Digifone Ltd, Esat Telecom Holdings Ltd and BTCIL was also explored in more detail, as was the alleged weakening of the plaintiffs' case by the amendments they sought to make to their statement of claim. The allegations made by the plaintiffs against BTCIL were also given greater specificity. It was submitted that, while records and witness statements from the time of the alleged wrongdoing may have been preserved for use before the Tribunal, the ameliorating effect of that preservation does not extend to BTCIL, as the issues alleged by the plaintiffs in these proceedings did not arise before the Tribunal. BTCIL also highlight that they had a much more minimal involvement with the Tribunal in comparison to the State defendants. Delay was alleged by both sides.

Submissions

16. BTCIL submit that the consent order dismissing the plaintiffs' claim would act as a bar to the plaintiffs' pursuit of the State defendants for any loss a court may find was caused by BTCIL, thus obviating any basis for a claim to indemnity and contribution. In addressing the Court's jurisdiction on an application such as this, reliance is placed on Clarke J.'s (as he then was) decision in *Lopes v. Minister for Justice, Equality and Law Reform* [2014] IESC 21. The State defendants rely, *inter alia*, on Clarke J.'s judgment in *Salthill Properties Ltd v. Royal Bank of Scotland* [2009] IEHC 207 and the Supreme Court's judgment in these proceedings [2012] IESC 50. They submit that BTCIL's application is unsuited to proceedings such as these. In particular, the State defendants rely on Morris J.'s (as he then was) decision in *Doe v. Armour Pharmaceutical Inc*. [1997] IEHC 139 to argue that a dispute as to fact would fatally undermine a strike out application.

17. In defining the concept of a concurrent wrongdoer, BTCIL relies on s. 11 of the 1961 Act, as well as Peart J.'s comments thereon in *Lindsay v. Finnerty* [2011] IEHC 403. Given the type of damages claimed by the plaintiffs, it was not contested in the written submissions that the State defendants and BTCIL fall to be considered as concurrent wrongdoers. However, in oral submissions,

counsel for BTCIL stressed that his client was not a wrongdoer in actuality, still less a concurrent wrongdoer. Even if that transpired not to be the case at plenary hearing, counsel submitted that the plaintiffs could not recover against any party for any wrong committed by BTCIL due to the consent order and s. 35(1)(h) of the 1961 Act.

18. It was submitted that, in assessing how contribution and liability as between concurrent wrongdoers is to be apportioned under ss. 21 and 34 of the 1961 Act, blameworthiness, as distinct from causation, is the key criterion to be applied. Kenny J.'s decision in *Carroll v. Clare County Council* [1975] I.R. 221 was relied on. However, the Court's attention was also drawn to ss. 17 and 35 of the 1961 Act (most particularly s. 35(4)) and the consequences that a release of or accord with one concurrent wrongdoer has for the overall claim made by the plaintiffs. BTCIL relies on, *inter alia*, Laffoy J.'s decision in *ACC Bank v. Malocco* [2000] 3 I.R. 191 and O'Donnell J.'s decision in *Hickey v. McGowan* [2017] IESC 6 as a statement on how this area of the law operates in practice.

19. The State defendants submit that the proper approach to take is that taken by Laffoy J. in *Manning v. The National House Building Guarantee Company and Anor* [2011] IEHC 98, as the facts of that case are extremely similar to those currently before the Court. It was also highlighted that s. 35(1)(h) is not mandatory in its application and that the Court retained a discretion to dis-apply it, as occurred in *Gammell v. Doyle* [2010] 1 ILRM 358. It was submitted that a consent order is not a release or accord and that no document fitting such a description has been exhibited. The State defendants also questioned how the Trial Judge in this action could be expected to reach a fully informed decision on liability if BTCIL were released from these proceedings and spared the burden of making discovery.

20. Regarding Mr. Shaw's averment that the State defendants' claim was served pursuant to O. 16 r, 12 ROSC, BTCIL highlight that the O. 16, r. 12 claim was not pleaded and that no facts have been identified to support this cause of action. The State defendants submit that this is an incorrect construction of the pleadings. BTCIL refer to the Tribunal's reports and the lack of findings therein that BTCIL derived ill-gained profit from the events at issue. They also argue that a claim of unjust enrichment and/or the remedy of tracing operate solely over property which the moving party alleges belongs to them and was mis-appropriated from them. In this case, it is submitted that the only party that can trace the allegedly mis-appropriated profits is the plaintiffs. In making this argument, BTCIL relies on, *inter alia*, *Foskett v. McKeown* [2000] 3 All E.R. 97 and *Relfo Ltd. (In Liquidation) v. Varsini* [2014] EWCA Civ 360.

21. In a supplementary note furnished to the Court on the day of hearing, the State defendants disputed this statement of law and argued that the more appropriate authority is the UK Supreme Court's decision in *Bank of Cyprus (UK) Ltd v. Menelaou* [2015] UKSC 66. It was submitted that, while the remedy of tracing relates to the vindication of property rights, the State defendants' claim is one of unjust enrichment, which operates on a much broader scale. In oral submissions, the State defendants also relied on *NAD v. TD* [1985] ILRM 153 to argue that a constructive trust operates over profits accrued from the proprietary right that the State awarded (i.e. the licence) and that, on foot of said trust, they have a right to pursue BTCIL for any profits it may hold arising from the grant of the licence. In response, BTCIL submit that these arguments are entirely un-stateable in law, as they seek to offset liability onto a party who, within the context of the argument currently being considered, is entirely innocent of the wrongful activity alleged.

22. In the State defendants' submission, O. 19 r. 28 ROSC only operates over pleadings and, per the definition of "pleading" in O. 125 ROSC, O. 19 r. 28 is therefore incapable of striking out NICs because such notices are not pleadings. In addressing the tracing issue and the equitable relief sought, the State defendants highlight that none of the affidavit evidence put before the Court by BTCIL addresses the question of whether BTCIL profited from the award of the licence in 1996. If the Court were satisfied that some flaw existed in pleadings, reliance is also placed on *Sun Fat Chan v. Osseous Ltd*. [1992] 1 I.R. 425, wherein McCarthy J. finds that a claim should not be struck out if an amendment to the pleadings could save it.

23. Regarding the delay alleged against BTCIL, it was submitted that this application could not have been seriously progressed before the plaintiffs' claim against BTCIL had been dismissed. It was stated that any further delay alleged was caused by *bona fide* attempts by BTCIL to dispose of this matter on consent. Alongside that submission, BTCIL suggested that they could bring this application at any stage in the proceedings, as the State defendants' claim is improperly pleaded and an abuse of process. The State defendants maintain that the explanations offered by BTCIL do not excuse the delay. They rely on Kearns J.'s (as he then was) decision in *SM v. Ireland* [2007] 3 I.R. 283 as a statement on how this delay should impact on the Court's consideration of the motion.

24. The State defendants highlight that, in construing BTCIL's disclosure under FRS12, the only expert evidence put before the Court has been that of Mr. Luby and no alternative evidence has been proffered by BTCIL. BTCIL maintain that the disclosure and the motives behind it are of no relevance in this matter.

Decision

25. Before addressing the application in earnest, it would be useful to dispose of a few preliminary issues. Firstly, the impact of the Supreme Court judgment in this case needs to be assessed. The decision of the Supreme Court is lengthy and detailed, with all five members of the Court delivering a judgment. Each judgment explores, to differing degrees, the matters at issue. McKechnie J. refers to the gravity of the plaintiffs' allegations and the conduct of the defendants both prior to and during the currency of these proceedings. Clarke J. explored the nature of covert wrongdoing, its impact on the progression of the plaintiffs' claim, the operation of this matter as a "documents" case and the significant weight attached to the questions of high public interest that are raised in these proceedings. At para. 39 of her judgment, Denham C.J. sets out an extensive list of factors that are relevant to the consideration of the State's dismissal application, including the extreme complexity of the case. All of these observations were neatly summarised in the decision of Hardiman J., wherein he highlights the unique and serious nature of these proceedings and the implications that has for binding precedent and the applicable law, an issue which I shall return to later on in this judgment.

26. In oral submissions, counsel for BTCIL sought to narrow the scope of these judgments and confine the observations of the Supreme Court to the context of the application that was before it. I am of the view that it would be inappropriate to approach the Supreme Court judgment from such a limiting point of view. I am satisfied that the views of the Supreme Court permeate every aspect of these proceedings and should be considered in detail, irrespective of what application is before the Court. In particular, the public interest in these proceedings and the seriousness of the plaintiffs' allegations should weigh heavily on the minds of the parties at every turn in this matter.

27. At p. 3 of Hardiman J.'s judgment, he notes the tenuous relationship between these proceedings and precedent on the issue of delay. My reference to the Supreme Court's decision, as set out above, should not be taken as my suggesting that this matter has thrown off the chains of all precedent determined by the Irish courts over the past century. Determinations as to the applicable law will be made by the members of the Judiciary assigned to hear each particular application in this matter and, eventually, make final determinations at plenary hearing. However, in hearing the parties' arguments on this application, the Court is concerned that the parties have given insufficient weight to the Supreme Court decision and its impact. There is a high level of public interest in determining whether Irish public administration has been undermined by corruption at the highest levels of government. However,

there is undoubtedly also a public interest in discovering, if such corruption did occur, the individuals and interests that sought to corrupt it. Any party to these proceedings would under-estimate the relevance of that public interest at their own risk.

28. Secondly, the status of the Tribunal's reports also needs to be addressed. As noted by the Supreme Court, the views and conclusions of Moriarty J., as expressed in the Tribunal's reports, have no bearing on civil proceedings such as these. Notwithstanding that, reference was made, both in the affidavits sworn for the purposes of this application and, most particularly, BTCIL's strike out application against the plaintiffs, to the views of the Tribunal as to any wrongdoing committed by BTCIL and any profits they accrued from the grant of the licence in 1995/6. In some instances, both sides referred to the exact same paragraph of the reports and strenuously disagreed as to its meaning. The text of the Report was not put before the Court, meaning that said reliance occurred completely outside the context of the full 2000+ page document from which the paragraph was quoted. As Ryan J. (as he then was) noted in his own judgment in this matter [2014] IEHC 18, there is a high level of public awareness as to the background facts of this case and the conclusions of the Tribunal. However, that awareness does not serve as a substitution for compliance with the rules of evidence. Even if the Supreme Court had not made it clear that the conclusions of the Tribunal are of no relevance to these proceedings, the Court would nevertheless consider itself obligated to disregard any submissions or averments premised upon the Tribunal's reports, given the absence of the reports' full and proper context and the manner in which evidence and points of dispute fall to be considered in an application of this nature.

29. Thirdly, both parties to this application spent significant time debating the subjective intent of other parties involved in these proceedings. I am not satisfied that anything turns on those submissions. What the plaintiffs did or did not agree to, what they have or have not accepted, how they do or do not truly view BTCIL's liability is of no relevance in this particular application. The question the Court is being asked to determine is not one of reason or motive. The pertinent issue is the existence of the consent order and whether it engages the provisions of the 1961 Act.

30. The dispute over FRS12 also does little to advance matters. Having considered the plaintiffs' claim at length, BTCIL reached a view that no case had been sufficiently pleaded against them. In light of that, they brought an application to strike out the plaintiffs' claim, an application that was ruled on consent in their favour. Following the making of that order, they reached a view that there was no basis on which their fellow defendants could maintain a claim for indemnity and contribution against them. The State defendants refused to withdraw that claim and an application has been brought to strike it out. Little assistance is to be found in speculation as to BTCIL's state of mind before they brought the application, before the Tribunal had completed its work and before the plaintiffs had properly articulated their claim against the defendants.

31. However, even if I considered BTCIL's disclosure to be relevant, I am of the view that the wording of the disclosure and the operation of FRS12, as it was explained to this Court, do not support the argument that BTCIL considered itself potentially liable. As explained in Mr. Luby's expert evidence, there is an obligation to disclose a contingent liability where the company believes that said liability is not remote. He also explained that there is no such obligation to disclose if said liability is considered to be remote. However, at no point did the State defendants argue that there is an obligation not to disclose the liability if liability is considered to be remote. It would appear, based on a plain reading of the text of FRS12 (which is silent on the issue), that disclosure of remote contingent liabilities is an optional matter that the company can determine as it wishes. Mr. O'Connor and Mr. Byrne averred that the decision to disclose was made based on the unique circumstances of this high-profile case and for the purposes of maintaining the highest level of transparency. While the State defendants dispute that this was the true reason for the disclosure, and the Court is obligated to resolve points of dispute in the State defendants' favour for the purposes of this application, such points of dispute must be reasonable and relevant. The State defendants' argument on this issue flies in the face of the 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 by the very evidence it is based on and it cannot be sustained.

32. Fourthly, the Court must address the State defendants' submission that a NIC is not a pleading and the Court cannot strike it out under O. 19, r. 28. Order 125, rule 1, states, *inter alia*, that a pleading "includes an originating summons, statement of claim, defence, counter-claim, reply, petition or answer". The language used clearly indicates that this is not an exhaustive list. The question therefore becomes whether a NIC comes within the definition of a "pleading". Counsel for the State defendants relied on the precise language of O. 16, r 12 and argued that a NIC is an indication of an intention that a claim will be made, which is followed by pleadings. No authority on this issue was opened to the Court by either party. I am assisted by the following passages from the 3rd Ed. of Delany and McGrath's "*Civil Procedure in the Superior Courts*", which read as follows at para. 5-01 and footnote 6 to para. 16-03:-

> "5-01 The term "pleading" is a generic one applied to a variety of documents which set out the content of the claim or defence of a party to proceedings and, thus, identify the issues between the parties…"
>
> "16-03n …Although [the definition contained in O. 125, r. 1] 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 matter 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"

I can find no fault in the reasoning outlined in the above paragraphs and the interpretation of the law as set out therein (although it must be said that the making of a strike out order at such an early juncture would be extremely rare, given that the moving party has barely had an opportunity to articulate their position). 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 defendants. Given that the Court has jurisdiction to strike out an originating notice of motion (and there can be no doubt that the Court has jurisdiction to strike out an originating summons, as it comes within the definition of "pleading" in O. 125, r. 1), and with no authority cited on this issue, I can see no reason why the Court would not have jurisdiction to strike out similar originating pleadings, such as a NIC. I am therefore satisfied that O. 19, r. 28 can be applied to NICs.

33. Fifthly, the Court must assess what standard BTCIL must reach if the Court is to accede to their applications. While the usual position is helpfully set out in Clarke J.'s decisions in *Lopes* and *Salthill*, the unusual nature of this application cannot be ignored. These are not proceedings brought by the State. They are brought by the plaintiffs and it is clearly not permissible for defendants to corrupt the plaintiffs' proceedings by litigating under its auspices issues that are unrelated to the overall claim in dispute. In advancing a claim against a co-defendant, the moving defendant must engage and comply with a procedure that allows it to do so. Should that defendant fail to do so, then their claim must be struck out, irrespective of the claim's actual viability when viewed in isolation (for the purposes of this decision, a claim is considered viable where the Court has not been satisfied that, based on the claim's own merits, it should be struck out under O. 19, r. 28 or dismissed under its inherent jurisdiction. In effect, when assessing viability, it is as if the claim had been advanced in an entirely separate action between the two defendants). Unless otherwise provided for, disputes between co-defendants should be litigated in their own proceedings and not as part of a plaintiff's claim. In this

case, the State defendants have engaged the provisions of the 1961 Act and O. 16, r. 12 ROSC. Order 16, rule 12 states that follows:-

> "(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."

34. The relationship between the plaintiffs' claim and a claim brought under the provisions of the 1961 Act is self-evident. In order to avail of O. 16, r. 12, the relevant party would need to set out a claim a) of entitlement to contribution or indemnity, b) of entitlement to a relief or remedy sufficiently associated to the original subject matter of the action and substantially similar to some relief or remedy claimed by the plaintiff, or c) that an issue sufficiently associated to the said subject matter is substantially similar as some issue arising as between the plaintiff and the claiming defendant and should be properly determined as between any combination of the plaintiff and the co-defendants that are parties to the O. 16, r. 12 claim. The operation of O. 16 r. 12 must not prejudice the plaintiffs' rights against any defendant in the action.

35. In my view, there is an argument to be made that, following the consent order dismissing the plaintiff's claim as against BTCIL, O. 16, r. 12 is not an appropriate procedure to engage as between co-defendants where one of them is no longer participating in the case. As stated at para 1.2 of Laffoy J.'s judgment in *Manning*, following a strike out order on consent, the party thereby released from the proceedings was no longer a defendant. However, BTCIL (the moving party in this application) did not make that argument and they do still technically come within the definition of "defendant" contained in O. 125, r. 1 ROSC (a person served with the originating summons). It is entirely possible that, upon a full and proper examination of the law, a court may conclude that released defendants can still be pursued under O. 16, r. 12. But that is an issue for another time and the Court will not consider it further.

36. It is also worth highlighting at this juncture the meaning of "the original subject matter of the action". The original subject matter of an action is the object or physical fact in dispute. While the background facts are a major factor in the development and assessment of the subject matter, they do not constitute the subject matter in and of themselves. The subject matter of these actions is 1) the decision of 16th June, 1995, whereby the deadline of 23rd June, 1995, for the receipt of tenders for the award of the second GSM Mobile Telephony Licence was extended, 2) the decision, announced on October 25th, 1995, to award the second GSM Telephony Licence to Esat Digifone Ltd, and 3) the tender process that led to the making of these decisions and the grant of the licence.

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 defendants' claim is in its earliest infancy and there are no pleadings other than the NICs itself. While it is true that the NICs makes no mention of tracing, a claim for unjust enrichment 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.

38. However, there is a wealth of further material to consider for the purposes of dismissal under the Court's inherent jurisdiction. It should first be noted that, as stated in the affidavit of Mr. Shaw dated 9th November, 2016, some aspects of the claim made in these NICs operate in circumstances where BTCIL has been absolved of any wrongdoing. In submitting that BTCIL have not met the requisite standard to strike out/dismiss the O. 16, r. 12 claim, the State defendants articulated a claim which, it seems to me, can be classified under four headings: 1) indemnity and contribution *simpliciter* against BTCIL in a capacity other than concurrent wrongdoing, 2) a constructive trust operating over profits attained by BTCIL on foot of the wrongful grant of the licence, 3) recovery for unjust enrichment independent of any loss suffered by the State defendants, and 4) recovery for unjust enrichment dependent on loss suffered by the State defendants. The Court must now determine whether it has been established that these aspects of the claim can be dismissed under the Court's inherent jurisdiction.

39. Regarding the first heading, the Court has little hesitation in concluding that this aspect of the State defendants' claim should be dismissed. Outside of claims of concurrent wrongdoing (which are governed by the 1961 Act and will be considered thereunder), a claim for indemnity or contribution *simpliciter* would normally be grounded on some alleged legal relationship that was in existence at the relevant time, as opposed to one constructed and imposed by equity. That relationship would exist between the pursued party and the claiming defendant, or between the claiming defendant and some other legal person for whom the pursued party would be responsible. Examples of such a legal relationship include a trust or a contract in which grounds for a claim to indemnity/contribution arise or are provided for. No such legal relationship (other than the legal relationship grounding the claim of concurrent wrongdoing) has been referred to in any way and any claim of that nature is entirely unsustainable. Therefore, there is no need to determine whether this heading of the claim comes under any of the O. 16, r. 12 provisions, as the claim is not viable.

40. As for the claim that a constructive trust exists, it is far too early to determine whether such a claim is viable. That issue would require extensive pleadings, a thorough airing of the evidence and detailed legal argument before I could form any view on the issue

(albeit, the Court does note that the argument of a constructive trust was made for the first time in oral submissions and was not referred to at any point in the affidavit evidence or in the written submissions). Therefore, the Court must presume that the claim is viable. The question then arises as to whether there is any way such a claim could come within the provisions of O. 16, r. 12 (b) or (c). Part (a) does not arise for consideration because, as stated in para. 39 above, it would require some kind of legal relationship to exist at the relevant time. It would be entirely inappropriate to allow the State defendants to rely on constructive trusteeship in order to 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 an indemnity or contribution. There is no basis on which a creature of equity could be employed by a culpable party to shirk an award in damages granted in respect of a wrongful act that it alone committed.

41. I am satisfied that the relief, remedy or issue pursed by the State defendants is sufficiently associated with the original subject matter of this action. But I am also satisfied that the relief, remedy or issue bears absolutely no resemblance to the reliefs, remedies or issues arising from the case made by the plaintiffs. The plaintiffs seek various declarations regarding the subject matter of this action and damages for the loss it is alleged they suffered, including loss of profits. It is important not to confuse a claim for loss of profits with a claim of entitlement to track down and secure the profits accrued in actuality. The plaintiffs have not set out a claim to any equitable relief or remedy akin to tracing or a trust, nor do they seek to have an issue determined between themselves and any of the defendants related to the actual profits that flowed from the grant of the licence and the interests held therein. I am therefore satisfied that this aspect of the State defendants' claim could be dismissed, as said aspect is entirely dis-connected from the claim advanced by the plaintiffs and it is impermissible for the defendants to litigate it as a part of the plaintiffs' proceedings.

42. Regarding the claim for unjust enrichment independent of loss, the State defendants have couched their arguments in private law terminology and concepts, such as tracing and the prevention of unjust enrichment. However, when looked at in practical terms, it seems to me that this claim seeks orders in respect of property that potentially represents, directly or indirectly, the proceeds of illegal activity. There can be little doubt that this claim is viable and that there are venues in which such a claim can be pursued. However, those venues do not include private proceedings brought by plaintiffs seeking damages for loss suffered because of allegedly wrongful acts committed against them. To facilitate this approach would be to facilitate an entirely inappropriate and misguided exercise of the State's powers. There is also no similarity between the reliefs, remedies or issues pursued by the State defendants under this heading and those pursued by the plaintiffs. I am therefore satisfied to dismiss this aspect of the State defendants' claim.

43. Turning finally to the claim for unjust enrichment dependent on loss, the authorities opened to the Court raise a variety of substantive legal issues that require detailed consideration. All the authorities relied on by the parties emanated from foreign jurisdictions and, given the relatively recent delivery of the *Menelaou* decision, it would seem quite sensible to allow this issue to go to a plenary hearing, so its application in this jurisdiction can be determined. In short, on its face, the claim is viable. However, the loss which the State defendants claim to have suffered must also be considered. In oral submissions, the State defendants referred to the licence itself as a proprietary right they held which was mis-appropriated and which they should be entitled to trace. However, there was a set licence fee to be paid to the State by the grantee of the licence, irrespective of which prospective grantee was successful. That fee was paid and there is, in reality, no loss flowing from the grant.

44. The only other loss identified by the State defendants, at para. 4.16 of their written submissions, is loss incurred by the granting of an award in damages in favour of the plaintiffs against the State defendants. That award in damages would be calculated based on the extent of State defendants' liability and the degree to which their conduct is held to be the cause of the wrongs inflicted upon the plaintiffs. The State defendants would then seek to offset that award and impose it upon a party which, in the factual matrix necessary to engage Menelaou, is completely innocent of any wrongdoing, did not contribute to any harm inflicted upon the plaintiffs and has not agreed to offset or become responsible for the State's liability. To describe this as an abuse of process is to under-state the issue. There is no legal or equitable construct that would allow this. The Court has no hesitation in dismissing this aspect of the State defendants' claim.

45. The Court has considered every formulation of the claim identified by the State defendants under O. 16, r. 12 and has come to the view that none of them can proceed. As noted in this Court's decision in *Connell v. Danske Bank* [2017] IEHC 765, while the defendant is the moving party and no onus rests on a plaintiff (in this case, the State defendants) to prove anything in an application of this nature, a plaintiff would be well advised to properly inform the Court as best they can about what their claim is and what facts are or aren't in dispute. If they fail to do so, there is a real chance a court could strike out or dismiss their claim without properly appreciating its significance. The causal events in this matter occurred more than two decades ago and related proceedings have been ongoing since then. In the unique circumstances of this case, it cannot seriously be suggested that the State defendants have not had sufficient time to determine precisely what claims they are pursuing against the other parties. Even if they have not had sufficient time, 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.

46. As it is, the State defendants have made their claim and, as far as the broader O. 16, r. 12 issues are concerned, the Court is satisfied that any such claim advanced by them is un-stateable and/or an abuse of process and should be dismissed under the Court's inherent jurisdiction. The claims are so inherently flawed at their very core that no expansion thereon or amendment thereto could save them. There is no basis on which they could be allowed to proceed, at least not within the auspices of the plaintiffs' overall case.

47. The Court is aware that, in reaching the above conclusions, it has ventured beyond the approach that would normally be taken in an application of this nature. Various aspects of the Court's reasoning, as outlined above, were not advanced or explored by BTCIL, who are the moving party in this application and bear the burden of proving that a claim should be struck out/dismissed. However, there is an inherent responsibility upon this Court to ensure that court processes are not abused and put to improper means. Regardless of whether a claim is being advanced under O. 16, r. 12 (1) (a), (b) or (c), it seems clear to me that O. 16, r. 12's purpose is to facilitate the litigation of claims between co-defendants that hold a meaningful relationship with some aspect of the claim advanced against them by the plaintiff. The arguments dealt with by the Court above are either un-stateable, a manifest abuse of process or so completely dis-connected from the plaintiffs' case that it would be impermissible for the Court to allow the State defendants to avail of O. 16, r. 12 at this juncture. The claim is at a very early stage and, as was submitted, the NICs are very broadly pleaded. It is perhaps an indicator of how far out of bounds these claims are that, notwithstanding the claims' general nature and infancy, I am more than satisfied that they should be dismissed.

48. This is not to say that the State defendants would not have a good claim if they issued their own proceedings and sought to litigate their claim in the proper venue. Nor can it be said that an application to have those proceedings heard concurrently with or consecutively to the plaintiffs' proceedings would be baseless. However, such determinations are not a matter for this Court. In this matter, the State defendants have sought to metastasise unrelated claims to the plaintiffs' action. I am of the view that they cannot

do so, most especially in circumstances where claims such as *Menelaou*-esque unjust enrichment and constructive trusteeship were raised for the first time at the hearing and the plaintiffs are not on notice of what their case may be morphing into. As I mentioned to counsel on day 2 of the hearing, it is a matter of concern to this Court that numerous applications in these proceedings have been litigated between parties acting in isolation. It would appear that the courts are not being informed as to the views and state of knowledge of the other parties not attached to the application at hand, meaning that it is unclear whether all parties are aware of what is happening in the case and what consequences or prejudice said developments could have for them. The continuance of the State defendants' claims would have immense consequences for, *inter alia*, the length of the discovery process, the advancement of the case and the progression of the trial. I am of the view that this is an improper approach to take to litigation and it cannot be permitted, at least not in the way the State defendants have sought to go about it.

49. Turning now to the provisions of the 1961 Act, the State defendants made several preliminary arguments, including that a consent order was not a "release or accord" for the purposes of the 1961 Act and that the terms on which consent was given to the order have not been disclosed. They also submitted that letting BTCIL out of these proceedings would allow them to avoid discovery and conceal incriminating evidence related to the wrongdoing alleged. Firstly, if the State defendants have reason to suspect that BTCIL hold evidence related to the wrongdoing alleged, there are processes and procedures available to them through which they can pursue such a claim. A NIC, issued on grounds of concurrent wrongdoing or under O. 16, r. 12, is not among those procedures. Secondly, BTCIL are not the only party to the consent order. The plaintiffs are also parties to the order and discovery can be sought from them if the State defendants believe that terms of settlement or agreement with BTCIL exist which may impact upon the operation of the 1961 Act. And thirdly, I am satisfied that a plaintiff's consent to an order dismissing their claim as unsustainable does constitute a release for the purposes of the 1961 Act. It is worth noting at this juncture that the fact of consent is central to this aspect of the case. Had there been no consent and had BTCIL's strike out application been heard and determined in their favour by a court, different considerations may apply in an application to strike out a NIC issued against them.

50. In assessing the claim to indemnity and contribution on grounds of concurrent wrongdoing, the Court is, of course, aware that it is not determining the application to strike out the plaintiffs' claim against BTCIL. That application was ruled on consent by Gilligan J. in 2014. However, in articulating their allegation that BTCIL are concurrent wrongdoers, the State defendants relied primarily on the contents of the plaintiffs' statement of claim. Therefore, some assessment of the claims made therein is warranted. Various allegations are made against BTCIL in the statement of claim, including that a holding relationship existed between BTCIL and ESAT Telecom Holdings Ltd, who were a member of the consortium that won the bidding process. In the affidavits, there seems to be some confusion as to whether this holding relationship relates to actions as a holding company or actions via a shareholding held by BTCIL in ESAT Telecom Holdings Ltd, or vice versa. The relevance of this holding relationship, and what influence it could have had over developments in the tender process, remains unclear at this juncture. The Court also notes that, throughout the Supreme Court judgments in this matter, BTCIL is referred to as the body that was granted the licence. It would also appear from the judgment of Denham C.J. that the Supreme Court may have had sight of documents related to this case that were not put before this Court. Full and final determinations on all these issues will be addressed at plenary hearing.

51. For the purposes of this application, and as noted by Hardiman J., I am satisfied that BTCIL's alleged liability in this matter is vicarious in nature and relates to the individuals whose actions allegedly corrupted the tender process and the grant of the licence. A comprehensive list of those individuals has not been provided, nor have BTCIL sufficiently divorced their involvement in the events at issue from the wrongful acts allegedly committed. Therefore, I cannot be satisfied at this juncture that the allegations of wrongdoing against BTCIL are so without foundation that I could strike/out dismiss the NICs on those grounds. BTCIL did not seriously contest this issue. As outlined above, in making this application, counsel for BTCIL relied primarily on ss. 17, 34 and 35 of the 1961 Act as grounds for securing the reliefs sought, and so it is to those provisions that the Court now turns.

52. As noted in contemporary judicial and academic comment, s. 35 of the 1961 Act has been exposed to little judicial determination until relatively recently, despite being passed into law nearly six decades ago. Of those determinations that have been made, fewer still relate to s. 35(1)(h). Whilst addressing s. 35(1)(i), O'Donnell J.'s judgment in *Hickey* states that the section "might benefit from further detailed scrutiny". I am of the view that this observation could apply to s. 35 generally, including s. 35(1)(h).

53. The most relevant authorities relied on by the State defendants on this issue are Hanna J.'s decision in *Gammell* and Laffoy J.'s decision in *Manning*. In my view, neither of these authorities are of real assistance in determining this application. In the State defendants' submission, under *Gammell*, the Court can dis-apply s. 35 and strip defendants of the protection it provides. In *Gammell*, Hanna J. found that the defendant with which an accord had been reached had done nothing wrong. He therefore found that there was no concurrent wrongdoing for the purposes of the 1961 Act and that s. 35(1)(h) was not engaged. It cannot be said that Hanna J. dis-applied a legal provision, as that provision never applied in the first place.

54. As for *Manning*, I am of the view that the nature of the claim under review and the construction of the parties to that strike out/dismissal application are manifestly different to those currently before the Court. In *Manning*, an un-released defendant had brought a strike out/dismissal application against the plaintiff on grounds that, *inter alia*, the released defendant was the party responsible for the wrongs alleged by the plaintiff and that released defendant was the only party against whom the reliefs sought could be secured. In seeking to strike out the plaintiff's claim, the un-released defendant argued that, per s. 35(h) of the 1961 Act, the plaintiff could not recover from the un-released defendant because he would be identified with the defendant he had released. Laffoy J. concluded that this was a convoluted argument that fell short of standard necessary to strike out the plaintiff's claim. Mr. Manning sought various declarations and damages for loss suffered by him because of the defendants' alleged wrongdoing. There were several avenues open to the unreleased defendant in seeking to strike out/dismiss that claim. One of those avenues was to establish that any claim that they were liable for the plaintiff's loss was bound to fail. In respect of that overall question, there is no relevance to be found in arguments regarding contributory negligence and responsibility for discharging compensation following apportionment of liability. Indeed, the entire concept of contributory negligence is based in the notion that the defendant is only partially liable, whereas there would be no liability apportioned to the defendant if the claim against them were bound to fail. Therefore, ss. 17, 34 and 35 were of no assistance in securing the reliefs sought.

55. The application currently before the Court is quite different. It is the released defendant who has brought the application and they have brought it against a co-defendant to strike out/dismiss their NICs. In determining issues of indemnity and contribution, contributory negligence and the discharge of compensation are of central relevance. Therefore, ss. 17, 34 and 35 do fall to be considered. The relevant provisions state as follows:-

> 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.

56. There is a lot of merit to be found in the argument put forward by counsel on behalf of BTCIL as to the operation of s. 35(1)(h) in this case. The State defendants are seeking indemnity and contribution from BTCIL as concurrent wrongdoers. If BTCIL were found liable to some degree at full hearing, s. 35(1)(h) would be engaged on foot of the 2014 consent order, the plaintiffs would be identified with BTCIL's wrongdoing and any award in damages made against the defendants would thereby be reduced by the percentage amount with which the plaintiffs have now been identified. Therefore, there is no amount of indemnity or contribution that can be claimed from BTCIL and the State defendants' claim is bound to fail. Alternatively, BTCIL could be cleared of all concurrent wrongdoing at full hearing, meaning that there would be no basis for a claim for indemnity or contribution under the doctrine of concurrent wrongdoers and the claim is still bound to fail. This approach also correlates with the approach outlined in various other decisions of the courts (albeit most of them via the analogy of s. 35(1)(i)), such as O'Donnell J.'s decision in *Hickey*. Once s. 35(1)(h) is engaged, s. 35(4) would apply and would prohibit the State defendants' claim for indemnity/contribution from succeeding. It seems to me that the question therefore becomes whether the Court can be certain that s. 35(1)(h) will be engaged. To put this back into the language of *Lac Minerals v. Chevron Corporation* [1995] 1 ILRM 161, can the Court be confident that no matter what may arise on discovery or at the trial of the action, the course of the action will be resolved in a manner fatal to the State defendants' contention?

57. In reviewing the authorities and academic commentary related to s. 35, it is difficult to ignore a rising sense of concern as to the practical operation of those provisions. Some of these concerns are set out at para. 66 of O'Donnell J.'s decision in *Hickey*. He notes therein, *inter alia*, that no provision is made in s. 35(1)(i) for the state of the plaintiff's knowledge at the time when they are preparing their case. In my view, as highlighted by the State defendants, this could also apply by analogy to s. 35(1)(h), although to a much lesser extent than for s. 35(1)(i). If wrongdoing is eventually attributed to BTCIL in this matter and it is proven that they concealed evidence to that effect, thereby effectively procuring the 2014 consent order under false pretences, it would seem quite unfair that s. 35(1)(h) would be used against the plaintiffs to deny them recovery they would otherwise be entitled to. In those circumstances, the State defendants would have a valid claim for indemnity/contribution. However, the Court also cannot ignore that s. 35(1)(h) is mandatory in its language, in that it states that "the plaintiff shall be responsible", and not that they "may" be responsible. There would therefore appear to be no discretion vested in a court to dis-apply s. 35(1)(h) where said application would be unjust. These are not questions of discovery or evidence. These are questions of law. The provisions relied on are plain and unambiguous in their intent and meaning and the State defendants have failed to provide any reason why ss. 17, 34 and 35 might not operate in the manner which BTCIL submits that they do.

58. It seems to me that, for the State defendants to maintain a valid claim, a specific series of events would have to occur:-

- Evidence of wrongdoing on BTCIL's part would have to emerge and, a conclusion having been reached that the plaintiffs suffered loss on foot of the defendants' wrongdoing, the Trial Judge would have to find that some measure of liability is attributable to BTCIL. This would engage s. 35(1)(h).

- The plaintiffs would have to make an application asking the Court to exercise its discretion to dis-apply s. 35(1)(h), a discretion that has clearly not been provided for in the legislation. In the alternative, they could seek to challenge the constitutionality of s. 35(1)(h). The Trial Judge would then have to accede to that application and dis-engage s. 35(1)(h), thereby holding the un-released defendants liable for 100% for the plaintiffs' loss. The State defendants would therefore have a valid claim for indemnity/contribution from BTCIL.

- This series of events would also presume either that the plaintiffs did not make an application seeking to have the 2014 consent order set aside on grounds of fraud/lack of candour or that such an application was refused.

59. As should be apparent from the above, this possible future scenario moves well beyond the realm of possible revelations at trial, out into the field of legal conjecture. While the Court does have concerns as to the fairness of s. 35(1)(h), the provisions are quite clear in that there is no discretion to dis-apply them. Section 35(1)(h) also enjoys the presumption of constitutionality and it would be entirely inappropriate for this Court to refuse the reliefs sought on grounds that a particular set of facts may arise in the future that may convince some other court that said presumption has been rebutted. While the Court is, of course, required to resolve all disputes in the State defendants' favour in an application such as this, this cannot extend so far as to suspend the presumption of

constitutionality enjoyed by Acts validly passed by the Oireachtas.

60. The eventualities outlined above are made all the more remote by the fact that the plaintiffs would have a strong case in seeking to have the consent order set aside on foot of BTCIL's fraudulent or dishonest concealment of their wrongdoing. Once that order is set aside, there is no release or accord for the purposes of the 1961 Act and the plaintiffs could recover against BTCIL in the normal way. It would be an impermissible limitation on the Court's inherent jurisdiction to dismiss claims if the reliefs sought could be refused on grounds of abstract judicial hypothesis. I am therefore disposed to granting the reliefs sought. However, for the sake of completeness, I would note that, notwithstanding the dismissal of these particular NICs, it would be open to the State defendants to issue fresh NICs against BTCIL if the scenario set out above should come to pass.

61. Turning finally to the allegations of delay, the Supreme Court's judgment was delivered in October, 2012 and the NICs were served in 2013. The consent order was made on 31st July, 2014, and perfected on 10th September, 2014. The passage of time up until that point could not be characterised as delay, as there would have been no basis whatsoever on which to seek the withdrawal of the NICs before the plaintiffs' claim against BTCIL was dismissed, the order to that effect was perfected and this new development in the case could be definitively outlined to the State defendants. Three and a half months later, BTCIL contacted the State defendants, seeking the withdrawal of the NICs. A month and a half after that, the State defendants confirmed that they would not withdraw their NICs. BTCIL immediately called on them to reconsider and, a month and a half later, the State defendants again refused to withdraw their claim. Two and a half months after that, BTCIL clarified some points of dispute and the State defendants requested that they hold off on issuing any motion while they considered matters further. Nothing substantive occurred for the next five months, until 18th December, 2015, when BTCIL indicated that they had lost patience with the State defendants and that they were preparing the application currently before the Court, which was finally filed on 24th June, 2016.

62. Of the three-year period that passed between the service of the NICs and the filing of this strike out/dismissal motion, I am satisfied that BTCIL is responsible for a cumulative period of approximately one year. I am of the view that those cumulative periods, insofar as they can be classified as delay, are not in any way inordinate. At every stage of this affair, which commenced following the grant of the licence in 1995/6, matters have been held up by protracted and heavily contested legal proceedings. Against that background, it is perfectly understandable that BTCIL would make every effort to avoid further litigation and do all they could to resolve this dispute outside of court. The complexity of this matter is also undeniable. It would appear that there is very little authority on the provisions and procedures that arose for consideration during this application. Certainly, precedent that was on all fours with the issues raised in this case was not opened to the Court.

63. For the reasons set out above, I would grant the reliefs sought and dismiss the State defendants' NICs under the Court's inherent jurisdiction on grounds that the claims set out therein are bound to fail.