THE HIGH COURT

COMMERCIAL

[2013 No. 12439 P]

[2013 No. 177 COM]

BETWEEN

DEFENDER LIMITED

PLAINTIFF

AND

HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED

DEFENDANT

AND

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

THIRD PARTIES

Judgment of Mr. Justice Twomey delivered on the 4th day of December, 2018

Introduction

1. This is a case involving a claim for $141 million by the plaintiff, Defender Limited, an investment fund, ("Defender") against the defendant company HSBC Institutional Trust Services (Ireland) Limited ("HSBC"), an Irish based subsidiary of the HSBC group, which is, this Court was told, the largest bank in the world, outside of China.

2. The essence of the claim by Defender is that pursuant to the terms of a custodian agreement, Defender invested over half a billion dollars ($540million) with Mr. Bernie Madoff's company, which led to significant losses as Mr. Madoff was the creator of, what is now known to be the world's largest Ponzi scheme.

3. Defender claims that, *inter alia,* HSBC was negligent and in breach of contract in its role as custodian because of its knowledge of Mr. Madoff and its failure to properly monitor him and his company.

A preliminary issue which might save 5 months of court time

4. After the opening submissions in this case which is due to last for five months, and for the reasons set out below, this Court decided before the first witness began to give evidence that it was appropriate to hear a preliminary legal issue concerning this claim, since it had the potential to decide the case and thereby save five months of court time.

5. This preliminary legal issue is the reliance by HSBC in its defence on s. 17(2) of the Civil Liability Act, 1961. The reliance on s. 17(2) arises because Defender settled its claim for the return of $540 million with Mr. Madoff's company for at least 75% of that sum and is now suing HSBC in these proceedings, as an alleged concurrent wrongdoer with Mr. Madoff's company, in relation to the balance of its loss.

6. However, HSBC claims that because of this settlement, under the terms of s. 17(2) and s. 35(1)(h) of the Civil Liability Act, 1961, Defender must be '*identified with'* Mr. Madoff's company in its claim in these proceedings to recover damages from HSBC. HSBC says that Mr. Madoff's company would, in its view, be 100% liable for the loss caused to Defender, if there was to be any judicial determination of the respective contributions owed by Mr. Madoff's company and HSBC to Defender for its loss. Accordingly, HSBC claims that Defender must, under s 17(2) be '*identified with'* this 100% liability of Mr. Madoff's company. This view, regarding the respective contributions of Mr. Madoff's company and HSBC, is based on the contention that Mr. Madoff's company was fraudulent, while HSBC was, at most, negligent, guilty of breach of contract or otherwise vicariously liable for the loss.

7. As a result therefore, HSBC claims that Defender cannot pursue this claim against HSBC since s. 17(2) makes clear that the effect of a plaintiff, such as Defender, being '*identified with*' a concurrent wrongdoer, such as Mr. Madoff's company, is that its claim against the other concurrent wrongdoer, such as HSBC, must be '*reduced'* by the amount of the contribution of the other concurrent wrongdoer (Mr. Madoff's company), which HSBC says must be 100% A 100% reduction of Defender's claim against HSBC would mean that Defender has no claim against HSBC. On this basis, HSBC say that there is no justification for Defender pursuing these proceedings against HSBC in light of its settlement with Mr. Madoff's company.

8. That is the preliminary issue which has to be determined by this Court, and if HSBC is correct, HSBC claims that there is no basis for these proceedings by Defender against it. For the reasons set out in this judgment, this Court finds that s 17(2) applies to this case so that Defender's claim against HSBC for $141 million is reduced by 100%, as a result of Defender's prior settlement with Mr. Madoff's company. Reference will first however be made to the factual background relevant to this issue.

Factual background

9. Defender entered into a Custodian Agreement ("Custodian Agreement") dated 3rd May, 2007 with HSBC whereby Defender appointed HSBC as its custodian for cash and other assets delivered to it. HSBC entered into a Sub-Custody Agreement ("Sub-Custody Agreement") dated 4th May, 2007 with Bernard L Madoff Investment Securities, LLC ("Madoff"), a company set up and owned by Mr. Bernie Madoff ("Mr. Madoff").

10. The third party companies to these proceedings, Reliance Management (BVI) Limited and Reliance International Research LLC (together "Reliance") were joined by HSBC to this litigation as HSBC alleges that Reliance, and in particular Reliance Management (BVI) Limited, which was engaged on behalf of Defender to establish the Defender investment fund, was, *inter alia,* aware of Mr. Madoff's secretive and unorthodox approach to investments that 'appeared' to give unwavering above market returns to investors, but which was in fact a Ponzi scheme. Furthermore, HSBC claims that as Defender did not have any employees, the knowledge of Reliance in this regard is the knowledge of Defender as its agent and the directing mind and will of Defender.

11. The net claim by Defender against HSBC is for $141 million to take account, *inter alia,* of $335 million returned to Defender by Mr. Irving H. Picard, the trustee in the liquidation of Madoff (the "Trustee") out of its original investment of $540 million with Madoff under the terms of the settlement to which reference has already been made.

12. It became clear during the opening of the case that Defender expects to recover 75% of the $540 million invested with Madoff, once the Madoff liquidation comes to a conclusion. This is based on the fact that there is a market for the sale of claims in the Madoff liquidation and the current value of those claims indicates that there is an expectation in the market of a 75% recovery. For this reason, it seems, Defender provided expert evidence from a New York lawyer to the effect that if a New York court had to determine the respective proportionate liability of HSBC and Madoff to Defender for the losses incurred to the investment by Defender with Madoff, HSBC would be found in a New York Court to be more than 25% liable. The expert report of Mr. Ira Brad Matetsky states at p. 5:

> "If the facts as set forth in the Statement of Claim are taken as true and ultimately proved by Defender, I believe a finder of fact in New York would be likely to conclude that [HSBC's] "equitable share of the damages" suffered by Defender is more than 25%."

13. For its part, HSBC claims that Defender will recover a lot more than 75% of its $540 million invested with Madoff and it made submissions to the effect that the Trustee has publicly stated that the recovery will be very high and could be 100% of allowed claims.

14. Before considering the preliminary legal issue regarding s. 17(2) of the Civil Liability Act, 1961, this Court should make reference to the proposed length of five months for the hearing of the substantive issues in this case and in particular the manner in which this preliminary issue came to be decided by this Court, since it was not at the instigation of either of the parties.

Five months to determine a professional negligence/breach of contract action?

15. Professional negligence and breach of contract actions regularly appear before the High Court and they do not last any more than a few days or weeks at most. Yet, this case is listed to last for some five months of court time, although it appears that even this exceptionally long period of time may be an under-estimate, since during the opening of the case, submissions were made to the effect that it could last several days in excess of the 80 court days originally fixed.

16. In *Fyffes v. D.C.C. plc* [2007] IESC 36 at para. 7, in a case that went on for a similar length of time (88 days) and also involved a considerable amount of money, Fennelly J. remarked that:

> "It is difficult to escape the expression that the length of the trial was the product of the large amounts of money at stake and the depth of the respective corporate pockets rather than of the complexity of the issues."

17. In this case, the depth of the pockets is perhaps best illustrated by the fact that one set of legal submissions before the Court has a total of seven barristers - four senior counsel and three junior counsel - listed as the co-authors of those submissions. It is not surprising that, with this level of legal expertise, the legal arguments on all sides of the dispute are so comprehensive, which may go some way to explaining why so much time is required to deal with the issues raised by the parties.

18. However, as was the case in *Fyffes*, it is difficult for this Court to escape the impression (based on the first week of the case in which all the parties outlined their claims and defences), that five months of court time is being sought, not because this dispute could not be resolved in a much shorter time and without five months of evidence, but rather because of the sums of money at stake and the fact that the parties can afford to pay their own lawyers and therefore use up valuable court resources to resolve what is, essentially, a private dispute. It is difficult to avoid the conclusion that while 'ordinary' litigants have to wait years to have their cases or appeals heard (e.g. if an appeal is sought today in the Court of Appeal it will be listed for hearing in 2021), on the other hand wealthy litigants can monopolise court time and thus further delay hearings for other litigants, simply because they can afford to do so.

***A limit on amount of court time to which parties are entitled*?**

19. Five months is an inordinate amount of time for the determination of any dispute and it seems likely to this Court that if the same issues regarding alleged negligence and breach of contract concerned an investment of €1 million, rather than $141 million, the parties would not be seeking five months of court time to determine the issues in dispute, which suggests that it is not the complexity of the legal issues which causes the long trial, but the amount of money that the parties are prepared to spend disputing those legal issues.

20. While an appeal court is very different from a trial court, nonetheless it is instructive to note that in the US Supreme Court, lawyers, no matter how deep the pockets of their clients, have just 30 minutes to present their case. One cannot help but wonder whether it would assist in reducing the considerable amount of money which it costs to litigate in Ireland, as well as reducing the strain on court resources in this country, if some limits were placed on the amount of court time to which litigants are entitled in order to resolve their disputes, so that a team of lawyers do not come up with every conceivable argument that might be in their favour, but rather just the strongest points in their favour. In this way, justice is achieved for wealthy litigants, but not to the detriment of other litigants who do not have justice denied by having justice delayed..

21. Due to the high cost of litigation in Ireland, Kelly P. has noted that the Irish courts are currently the preserve of the very rich (who can afford to use up five months of court time to resolve a private dispute) or the very poor (who can endlessly litigate with no legal representation without consequence, as orders for costs against them, if they lose, are effectively meaningless). Speaking extra-judicially in an interview published in the *Bar Review* Vol. 23 No. 1 at p. 11, he stated:

> "Under the current system, as they say, the only people who can litigate in the High Court are paupers or millionaires!"

22. We may well have reached the point where the ongoing *Review of the Administration of Civil Justice* may consider whether there are good policy reasons for the imposition of a limit on court time to make litigation more affordable, since as noted by the Chairman of that Review Group, also Kelly P., in relation to the work of the Group:

> "An assessment might indicate that *a case should take no more than X number of days*, and the costs will not be allowed to exceed Y," (Irish Independent 16th February, 2018). (emphasis added)

However, this is clearly not a matter for this Court to decide.

More efficient use of court resources in this particular case

23. However, what this court can do, because this case has just been opened (which could not be done in the *Fyffes* case as the hearing had already concluded when the case came before Fennelly J. in the Supreme Court on appeal) is that this Court can direct its mind, if the parties' minds are not so directed, to how the trial might be run more efficiently in the interests of the taxpayer, who is funding the court resources for this dispute.

24. In this regard, the case was opened by counsel for Defender over a period of two and a half days, counsel for HSBC responded over a period of one day and counsel for Reliance replied in a half day. During these submissions, the various claims and defences of the parties were all comprehensively outlined, in advance of the giving of evidence by the first witness on day five of the trial.

25. During its opening submissions, HSBC claimed that even if it was negligent or otherwise liable to Defender, which it denied, it had a complete defence to these proceedings by virtue of s 17(2) of the Civil Liability Act, 1961 ("CLA") as summarised in para 4 *et seq*.

26. After hearing these detailed oral submissions outlining Defender's case and HSBC's defence to that claim, and then carefully considering the written submissions in light of those oral submissions, it became clear to this Court that the effect of what HSBC was claiming was that after hearing five months of evidence, this case could be decided by this Court on the CLA legal point, for which the preceding months of evidence would be irrelevant.

27. In deciding how to deal with this issue, this Court considered the public interest in the efficient use of court resources, particularly in light of the well-publicised delays in litigants having their cases and appeals heard.

The public interest in the efficient use of court resources
28. The Supreme Court in *Tracey v. Burton* [2016] IESC 16 (per MacMenamin J.) has held that court time is a *'scarce public resource'* which should not be *'unnecessarily wasted'* and in particular at para. 45 that:

> "Court time is not solely the concern of litigants, or their legal representatives. There is a strong public interest aspect to these issues."

29. In view of this public interest, there is an onus on the Court and indeed lawyers to efficiently use scarce court resources. For this reason, it seemed clear to this Court that if there was any prospect of the CLA issue, which the Court was advised could be heard over two or three days with little or no evidence, being determinative of this case and thereby saving some five months of court resources, it was incumbent not only on the Court, but also on the lawyers, to ensure that this CLA issue is heard first, rather than after five months of evidence. In reaching this decision, it is relevant to note that the CLA issue was due to be heard towards the end of the substantive hearing anyway and therefore any decision to hear the CLA issue first would not add to the amount of hearing time in the case as a whole.

30. Accordingly, on the morning of Day 5 of the trial, and before the first witness began giving his evidence, this Court indicated to the parties its view that the CLA issue should be heard first, since if there was any validity in this defence, it could lead to the case being decided without five months of evidence and thus lead to a massive saving of court resources.

31. After counsel had sought instructions from their respective clients, this Court adjourned the hearing of the witnesses' evidence and went into a hearing on the preliminary issue regarding the CLA. The hearing of the substantive issue (i.e. whether HSBC was negligent, in breach of contract *etc* vis-à-vis Defender in connection with its losses from investing with Madoff) was therefore adjourned until after a decision was handed down regarding the preliminary issue.

***If preliminary issue is decided in favour of* Defender?**
32. If the CLA issue was decided in favour of Defender, the evidence of the witnesses would immediately resume after the judgment on the preliminary issue was delivered, the Court aiming to deliver judgment within a week of the end of the hearing of the preliminary issue. This Court also indicated that if the preliminary issue was decided in favour of Defender, then it would not grant a stay on the substantive hearing to allow HSBC to appeal that preliminary issue judgment. In any case, HSBC confirmed that if it were to appeal the CLA decision, it would do so only after judgment was delivered in the substantive case.

***If preliminary issue is decided in favour of HSBC*?**
33. On the other hand, if the CLA issue was decided in favour of HSBC, then the substantive case would cease and Defender could of course appeal that decision and might seek an expedited appeal. However, counsel for HSBC also indicated that it might have to consider a constitutional challenge to the CLA in such an eventuality within days of the delivery of the judgment, such constitutional challenge to be heard within a very short time of that judgment. Obviously, if the preliminary issue went against Defender, but if its constitutional challenge were to be successful or its appeal were to be successful, then the substantive hearing would resume.

34. Against this background therefore, the hearing on the preliminary issue on the application of the CLA began.

Background to the preliminary hearing on s. 17(2) of the CLA
35. It is important to note that for the purposes of deciding this preliminary issue, this Court must proceed on the basis of agreed or established facts and it is common case that this involves this Court taking Defender's case against HSBC at its height (see the Supreme Court decision *McCabe v. Ireland* [1999] 4 I.R. 151 at 157), such that, *inter alia,* this Court is assuming that HSBC was guilty of negligence in the appointment of Madoff as sub-custodian. It is important to record however that HSBC contends that the five months of evidence, if and when it is heard, will show, *inter alia,* that not only was it not negligent but that Madoff was not a sub-custodian of HSBC, but rather Madoff held the funds directly for Defender. Thus, while HSBC claims that it is not a concurrent wrongdoer with Madoff for the purposes of the substantive proceedings, it is the case that for the purposes of this preliminary issue HSBC is assumed to be a concurrent wrongdoer with Madoff.

36. The essence of HSBC's defence and thus the core of the preliminary issue is that under the CLA, *if* HSBC is found to be a concurrent wrongdoer with Madoff in relation to the loss caused to Defender, it is the case that Defender has settled its claim with Madoff for the loss of that investment (which settlement was with the Trustee of Madoff) and that settlement with one wrongdoer (Madoff) means that, under s. 17(2) of the CLA, it cannot now pursue the other wrongdoer (HSBC).

Settlement between Defender and Madoff
37. The settlement which is at the core of this CLA issue arose from a Settlement Agreement dated 23rd March, 2015 ("Settlement Agreement") between the Trustee and Defender, Reliance *et al.* The background to the settlement was that after the assets of Madoff were frozen on 12th December, 2008, after Mr. Madoff was arrested by the FBI on the 11th December, 2008, Defender filed a claim in a US bankruptcy court in New York for losses of $441 million under the Securities Investors Protection Act USC, 15 U.S.C. ("SIPA"), since at that stage, Defender had received back some $93 million of its $540 investment with Madoff before its liquidation.

38. The very fact that Defender had received back a considerable sum from Madoff while the Ponzi scheme was in operation, led the Trustee to commence an action against Defender and Reliance to recover this $93 million which it alleged had been fraudulently or preferentially transferred from Madoff to Defender, in preference to other customers of Madoff.

39. The Settlement Agreement between Defender and Madoff (through its trustee) therefore encompassed both Defender's claim against Madoff/Trustee for the return of Defender's money as a customer of Madoff under SIPA and the settlement of Madoff/Trustee's claim against Defender for the money paid to Defender in alleged preference to other customers.

40. Under the terms of this Settlement Agreement, it was agreed that the Trustee would allow Defender's claim in the Madoff liquidation in the sum of $522 million, and pay a catch-up distribution of $254 million to Defender, which was paid on the closing date under the Settlement Agreement which was 28th March, 2015. The total repaid to Defender from its investment with Madoff, as of the hearing of this action, including this $254 million catch-up distribution is a total of $334 million.

41. Under Clause 3 of the Settlement Agreement there is a very extensive release by the Trustee on behalf of Madoff of any claims by Madoff against Defender, which would encompass any claim that Defender benefited from a fraudulent preference. Under Clause 4 of the Settlement Agreement there is an equally extensive release by Defender of Madoff of any claims Defender has of whatever kind, including contract and tort or otherwise, known or unknown, existing or which might be asserted arising out of, or in any way related to, Madoff.

42. In order to consider whether Defender's Settlement Agreement with Madoff means Defender is not able to pursue its claim against HSBC under the CLA, this Court must first consider whether HSBC and Madoff are concurrent wrongdoers under the CLA.

Are HSBC and Madoff concurrent wrongdoers under CLA?
43. Before HSBC can rely on the CLA, which it seeks do in this preliminary hearing, it must be a concurrent wrongdoer with Defender. Section 11 of the CLA deals with this issue.

Section 11 of the CLA
44. Section 11 of the CLA, insofar as relevant, states:

> "(1) For the purpose of this Part, two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person (in this Part called the injured person or the plaintiff) for the same damage, whether or not judgment has been recovered against some or all of them.
>
> (2) Without prejudice to the generality of subsection (1) of this section—
>
> > (a) persons may become concurrent wrongdoers as a result of vicarious liability of one for another, breach of joint duty, conspiracy, concerted action to a common end or independent acts causing the same damage;"

45. Since this preliminary issue is based on taking Defender's claims against HSBC at their height, it is common case that HSBC and Madoff are both guilty of a wrong for the purposes of the hearing of this preliminary issue only. It is also clear that Mr. Madoff, operating through his company Madoff, was guilty of fraud and he is currently serving a 150-year sentence for this fraud.

46. It is important to note that no allegation has been made against HSBC by Defender that HSBC should have discovered the Madoff fraud. Rather the claim against HSBC is that, *inter alia,* it was negligent in not putting in place the appropriate safeguards to minimise the risks that the Madoff structure posed. In this regard, it is relevant to note that HSBC was a victim of the Madoff fraud, since it had invested some $1 billion of its own funds, as distinct from client funds, in Madoff at the time of the liquidation.

47. For Madoff and HSBC to be concurrent wrongdoers, s. 11 of the CLA provides that they must be responsible to a third person, in this case Defender, for 'the same damage'. Defender claims that because its claim pursuant to SIPA was a customer claim in the Madoff liquidation, it is a very different claim from its cause of action against HSBC as custodian and thus Madoff and HSBC, for the purposes of the CLA, are not responsible for the same damage and so are not concurrent wrongdoers. In addition, Defender claims that because their reliefs in the Statement of Claim seek, *inter alia,* a declaratory order and a claim for restitution of fees paid to HSBC, that HSBC and Madoff are not concurrent wrongdoers

48. On any reading of the pleadings in this case, the essence of the claim against HSBC and against Madoff is for the loss of the money Defender invested in a Ponzi scheme operated by Madoff. In this Court's view therefore, Defender's claim is that HSBC and Madoff are responsible for the same loss. It is clear from s. 11(2)(a) of the CLA that persons can be concurrent wrongdoers where '*independent acts'* cause the same damage. In this case, fraud by Madoff and negligence by HSBC are alleged by Defender to have lead to the same damage. Thus, for the purposes of this preliminary hearing only, this Court finds Madoff and HSBC to be 'concurrent wrongdoers'

49. Having established that HSBC and Madoff are concurrent wrongdoers in relation to Defender's loss, the next issue to consider is the effect under the CLA on proceedings between a plaintiff (Defender) and a concurrent wrongdoer (HSBC) of a prior settlement by that plaintiff with the other concurrent wrongdoer (Madoff).

Position of wrongdoer under CLA if plaintiff settles with other wrongdoer
50. The key provision in this dispute is s. 17 of the CLA, and s. 17(2) is at the core of the dispute in this preliminary issue between the parties.

Section 17 of the CLA

> "(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."

51. It is not contended by HSBC that the Settlement Agreement between Defender and Madoff indicates an intention on the part of Defender to discharge HSBC from its liability for the loss of the investment, as contemplated by s. 17(1) of the CLA. Instead reliance is placed by HSBC on s. 17(2), which provides that if the *'release or accord'* does not disclose such an intention, then the injured person, in this case Defender, *'shall be identified with the person with whom the release or accord is made'*. The next question therefore is whether the Settlement Agreement constitutes a release or accord.

Is the Settlement Agreement a 'release or accord' under CLA?
52. At p. 396 of the Supreme Court decision of *Murphy v. J. Donohoe Ltd* [1992] I.L.R.M. 378, Egan J. stated that:

> "The word 'accord; (unlike the word 'satisfaction') is not defined by the [Civil Liability Act, 1961] but in general and, more particularly in so far as the law of tort is concerned, has been defined as an agreement that is a release in all respects except that it is under seal."

53. In the High Court case of *Arnold v. Duffy* [2012] IEHC 368, Hedigan J. at para. 6.18 confirmed, in reliance on *Chitty on Contracts* (30th edition), that for there to be a valid accord:

> "it must be complete and certain in its terms and that consideration (satisfaction) has been given or promised in return for the promised or actual forbearance to pursue the claim. It is a good defence to an action for breach of contract to show that the cause of action has been validly compromised."

54. In this case however, Clause 17 of the Settlement Agreement between Defender and Madoff states that the Agreement is to be '*construed and enforced in accordance with the laws of the State of New York'*. Accordingly, expert legal opinion on New York law was obtained by HSBC to the effect that:

> "a New York court would conclude that the Settlement Agreement is a complete and certain agreement, enforceable in accordance with its terms to reflect an exchange of Defender's right to seek damages for its forborne claims in consideration of the promised and (received) payments out of the Madoff estate."

55. As is noted hereunder, Defender and its legal expert on New York law argued that the relative contributions of Madoff and HSBC to Defender's loss should, by virtue, *inter alia,* of the choice of law clause in the Settlement Agreement, be determined by New York law rather than Irish law. However, Defender's legal expert on New York law did not dispute the conclusion by HSBC's legal expert on New York law that the Settlement Agreement was complete and certain in its terms and given in return for a forbearance to pursue a claim.

56. In those circumstances, it seems clear to this Court therefore, that for the purposes of the CLA, the Settlement Agreement amounts to an accord. The next question to consider is whether, as claimed by Defender, New York law, rather than Irish law (namely s. 17(2) of the CLA) is to be applied in determining the relative contributions of Madoff and HSBC to Defender's loss.

Is New York law applicable in determining the effect of Settlement Agreement?
57. Defender has argued that the law which should determine the contributions which should be made by Madoff and HSBC respectively to the loss suffered by Defender is New York law. Their expert on New York law has applied New York law, namely General Obligations Law of New York s. 15-108, to the factual circumstances in this case and he has concluded under that New York law as follows:

> "I believe a finder of fact in New York would be likely to conclude that HTIE's "equitable share of the damages" suffered by Defender is more than 25%."

58. This Court cannot agree with the claim that New York law, and not Irish law, should be applied by this Court in determining the contribution to be made by HSBC, a defendant in proceedings brought by Defender before this Court in Ireland.

59. This is because Defender is suing HSBC in the Irish courts for, *inter alia,* negligence and breach of a Custodian Agreement which agreement is governed by Irish law and subject to the exclusive jurisdiction of the Irish courts (Clause 33). In doing so, Defender is patently subject to Irish law, including the CLA and indeed in these proceedings it has already accepted the application of the CLA to these proceedings, since pursuant to s. 27 of the CLA, Reliance was joined to these proceedings.

60. It just so happens that for the purposes of this Court assessing, under s. 17(2) of the CLA, the *'reduction'*, if any, to be applied to the claim by Defender against HSBC before the Irish courts, that reference has to be made to the Settlement Agreement, to which HSBC is not a party, but which is between Defender and a concurrent wrongdoer, Madoff (who is not a party to the proceedings before the Irish courts). It also so happens that this Settlement Agreement between the plaintiff in these proceedings before the Irish courts and Madoff, which is not party to these proceedings, is subject to New York law.

61. However, while the fact that a concurrent wrongdoer has entered a Settlement Agreement under a foreign law is relevant to determine if under that foreign law it is a valid *'accord'* for the purposes of the CLA, that is the extent of the relevance of foreign law. It does not, as suggested by counsel for Defender, mean that s. 17, s. 35 *etc* of the CLA cease to apply to the dispute between Defender and HSBC before the Irish courts. Nor does it mean, as suggested by counsel for Defender, that those provisions of the CLA relevant to contribution between wrongdoers, but not other provisions of the CLA, are supplanted by General Obligations Law of New York s. 15-108.

62. It is Defender's case that, rather than s. 17(2) applying to determine the contributions which should be made by HSBC to the loss suffered by Defender, that New York law should determine the issue, simply because the Settlement Agreement with the other concurrent wrongdoer happens to be governed by New York law.

63. The role of this Court is to apply Irish law to proceedings issued by Defender against HSBC in the Irish courts. One of the provisions of Irish law is that under the CLA if a concurrent wrongdoer has previously settled with the plaintiff, the other non-settling concurrent wrongdoer gets the benefit of that settlement in determining the amount due to the plaintiff in the proceedings against him. It is irrelevant to that determination what the position under any foreign law is regarding contributions between concurrent wrongdoers.

64. The only relevance of foreign law is that the Settlement Agreement which is governed by New York law must be said to constitute

an 'accord' for the purposes of the CLA and as previously noted, this is the case.

Reliance by Defender on Cafolla v. O'Reilly

65. In making its case, Defender places particular reliance on the judgment of O'Donnell J. in the Supreme Court case of *Cafolla v. O'Reilly* [2017] 3 I.R. 209, in support of its proposition that because the Settlement Agreement between Defender and Madoff is governed by New York law, this Court should apply New York law, and not Irish law, to determine the relative contributions between Madoff and HSBC for the purposes of these proceedings between Defender and HSBC before the Irish courts.

66. *Cafolla v. O'Reilly* involved the question of whether the plaintiffs' claim of sexual abuse before the Irish courts, was subject to a prior accord and satisfaction in light of settlement agreements previously entered into in Northern Ireland by the plaintiffs. Particular reliance is placed by Defender on the statement at para. 29 by O'Donnell J. in his judgment regarding the Northern Ireland settlement in that case:

> "Was there an equivalent to ss. 16 and 17 of the 1961 Act? Could a settlement discharge concurrent wrongdoers? Did the settlement do so? In any event, a conflict of law issue, and a question of the interpretation of the 1961 Act would also arise."

67. The question *'was there an equivalent to ss. 16 and 17 of the 1961 Act?'* if read in isolation would appear to suggest that O'Donnell J. was contemplating applying, in that case in the Irish courts, Northern Ireland legislation regarding the effect of that settlement, rather than the CLA. However, it is important to note that O'Donnell J. did not decide in that case that Northern Ireland law, regarding whether a settlement discharged concurrent wrongdoers, should be applied in the Irish courts, rather than Irish law. Furthermore, a reading of the judgment makes clear that the primary thrust of the case is not whether the CLA applied at all (which is the argument put forward by Defender in the case before this Court), but whether the settlement agreement in that case entered into in Northern Ireland comprised an accord and/or satisfaction. So, for example, O'Donnell J. refers to the issue of whether newspaper reports relating to the sexual abuse were relevant and he states at para. 21:

> "They may have been relevant to a number of issues in the case more broadly, but they were of little relevance to the issue of whether there had been an accord and satisfaction."

Furthermore, rather than applying Northern Ireland law, it is clear from para. 28, that his is applying the CLA, since he states

> "The fact that the plaintiffs make separate claims, against different defendants in respect of different conduct and alleging different legal liability, does not mean that the defendants in the two sets of proceedings cannot be concurrent wrongdoers for the purposes of the 1961 Act."

Similarly, O'Donnell J. applies the CLA again at para. 29, where he states:

> "In any event, it is not clear that that rule precludes evidence on the question as to whether any settlement in Northern Ireland discharged concurrent wrongdoers pursuant to s. 16 of the 1961 Act in this jurisdiction."

68. Indeed, if one examines the entire paragraph from which O'Donnell J.'s question comes (*was there an equivalent to ss. 16 and 17 of the 1961 Act?*'), one can see that what he is simply suggesting is that the question of whether there was an equivalent to s. 16 and s. 17 is just one of the facts which forms part of the factual background to the interpretation of the settlement agreement, rather than a statement by him that he felt Northern Ireland civil liability legislation should be applied by the Irish courts in that case in preference to Irish civil liability legislation:

> "This is not merely a question however of analysing very general and diffuse pleadings in which the plaintiffs' case did not even address the fact of the Northern Ireland settlements, but it also involves evidence: first from psychiatrists, as to the nature of the injury and in particular the impact of the 2012 revelation, and second, from other parties as to the factual background of the Northern Ireland settlement and in particular the law applicable at that time. Was there an equivalent to ss. 16 and 17 of the 1961 Act? Could a settlement discharge concurrent wrongdoers? Did the settlement do so? In any event, a conflict of law issue, and a question of the interpretation of the 1961 Act would also arise. The defendants relied heavily on the parol evidence rule, but while that rule excludes evidence as to the subjective intention of a party to an agreement it permits evidence to be given of all background facts and circumstances against which any agreement was made. In any event, it is not clear that that rule precludes evidence on the question as to whether any settlement in Northern Ireland discharged concurrent wrongdoers pursuant to s. 16 of the 1961 Act in this jurisdiction. Again, these matters can be said to be anything but clear-cut and therefore, the conclusion of the High Court and the Court of Appeal that the proceedings were the subject of prior accord and satisfaction cannot be retrospectively supported by reliance on ss. 16 and 17 of the 1961 Act, even if such a course were possible procedurally."

69. Thus, it is this Court's view that *Caffola v. O'Reilly* does not support Defender's claim that New York law should be applied by the Irish courts in determining the relative contributions of HSBC and Madoff to Defender's loss.

Reliance by Defender on Rome I Regulation

70. Defender also relies upon *Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations* (the "Rome I Regulation"). Article 3 of the Rome I Regulation establishes the principle that:

> "A contract shall be governed by the law chosen by the parties"

71. There is no dispute between the parties regarding the application of this principle to the Settlement Agreement and as noted above, this has led to the conclusion that under New York law the Settlement Agreement does amount to an accord for the purposes of the CLA.

72. However, Defender argues that the effect of the Settlement Agreement, and in particular the contributions to be determined by an Irish court to be applicable between Madoff and HSBC regarding Defender's loss, should be governed by New York law. Defender relies upon Article 12 of the Rome I Regulation for this argument and Article 12(1) of the Rome I Regulation states:

> "1. The law applicable to a contract by virtue of this Regulation shall govern in particular:
>
> (a) interpretation;

(b) performance;

(c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;

(d) the various ways of extinguishing obligations, and prescription and limitation of actions;

(e) the consequences of nullity of the contract."

73. In its submissions, Defender argues that since HSBC is claiming that the effect of the Settlement Agreement is to extinguish its obligations to Defender, this means that even though HSBC is not a party to that Settlement Agreement, the effect of Article 12(1)(d) of the Rome I Regulation is that this claim by HSBC fails within the expression *'extinguishing* obligations' which HSBC would otherwise have to Defender. Defender then argue that this alleged extinguishment of obligations should not be governed by the rules regarding contributions between wrongdoers in the CLA, but should be governed by the rules regarding contributions between wrongdoers under New York law (i.e. General Obligations Law of New York s. 15-108), even though the liability of HSBC for those very same obligations is being governed by Irish law and being determined by an Irish court in proceedings brought before these courts by Defender.

74. Quite apart from the fact that, as previously noted, these proceedings are already subject to Irish law, it is also relevant to note that there is no privity of contract between Defender and HSBC regarding this issue, since the contract between them is the Custodian Agreement, which is subject to Irish law, while the contract that is governed by New York law is between Defender and Madoff.

75. In support of its argument, Defender relies upon a very old decision of *Scott v. Pilkington* (1862) 2 B & S 11, in which the English court considered whether it was required to recognise a judgment of a New York court (the 'local court') in circumstances where the English court would have been likely to reach a different decision. The English Court held at p. 990 that:

"It is enough that, being satisfied that the question of the defendants' liability must be determined by the lex loci of the contract, we have the decision of a local Court of competent jurisdiction as to what that law is."

76. However, there is a crucial difference from the present case, in that the defendant in that case was a party to the contract sought to be enforced. HSBC is not a party to the Settlement Agreement and so this Court does not find this decision to be supportive of Defender's claim. Thus this Court concludes that Scott v Pilkington is not authority for a settlement agreement between a plaintiff and a third party concurrent wrongdoer, circumventing the statutory rights (under the CLA) of a defendant in the Irish courts who was not a party to the settlement agreement.

77. For the foregoing reasons, this Court does not find persuasive the arguments that the respective contributions between HSBC and Madoff should be governed by the law of New York law, which law has no application to the substantive establishment of the liability between Defender and HSBC, which is governed by Irish law, since these proceedings have been instituted by Defender in the Irish courts.

Effect of Defender/Madoff settlement on Defender/HSBC claim under s. 17(2)

78. Having determined that Irish law is the applicable law to determine the effect of the settlement between Defender and Madoff in New York on the proceedings in this Court by Defender against HSBC, the first relevant provision of Irish law to consider is s. 17(2), which has been set out above.

79. It is common case that where a plaintiff (Defender) settles with one concurrent wrongdoer (Madoff), s. 17(2) provides that the other wrongdoer (HSBC) is not discharged by that settlement. Instead, s. 17(2) provides that the plaintiff (Defender) is identified with the person with whom the accord was made (Madoff) in any action by Defender against the other wrongdoer (HSBC) in accordance with s. 35(1)(h).

Section 35(1)(h)

80. Section 35(1)(h) clarifies how this *'identification with'* occurs. Since the plaintiff is suing the second concurrent wrongdoer, but with the burden of being identified with the first concurrent wrongdoer, who was negligent or guilty of some other wrong, the plaintiff is deemed to be contributorily negligent when suing the second wrongdoer. This explains why s. 35(1)(h) refers in its opening words to being '[*f]or the purpose of determining contributory negligence'*. The section, insofar as relevant, reads as follows:

"(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;"

81. Based on this section and s. 17(2), it is clear that Defender is *'deemed to be responsible for the acts of'* the wrongdoer whose liability is discharged (Madoff). For the purposes of determining the *'reduction'* in the plaintiff's claim against HSBC under s. 17(2) only, Defender is therefore deemed to be identified with Madoff and is hypothetically deemed to be contributorily negligent in its action against HSBC for damages for its investment loss.

So what is Defender is 'identified with'?

82. Since Defender is, under s. 17(2) identified with Madoff for the purposes of that section, it is relevant to note that evidence was provided by an American expert in fraud examination and financial forensics regarding the extent and nature of the fraud perpetuated by Mr. Madoff through his company, Madoff. For example, between 2000 and 2008 alone, there was over 46 million fake investment transactions forged by Madoff. Thus, pursuant to s. 17(2) and s. 35(1)(h), it is with this fraud that Defender is being identified for the purposes of its claim against HSBC.

The hypothetical exercise under s. 17(2)

83. Section 17(2) then provides that in any such action to determine the respective contributions of wrongdoers, the claim against the other wrongdoer (HSBC) shall be *'reduced'* by the higher of three possible amounts, namely the amount paid for the release or accord, the 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"

84. It is common case that it is the latter of the three amounts which is the relevant one in this case, so that under s. 17(2) the claim by Defender against HSBC is reduced by the extent that the wrongdoer, with whom the release or accord was made (Madoff), would have been liable to contribute if Defender's total claim had been paid by the other wrongdoer (HSBC).

85. Because of the language used in this section ("*would have been liable if*"), it is clear that this Court is required to engage in a hypothetical exercise to determine the extent, if any, that one concurrent wrongdoer would be liable to contribute to another concurrent wrongdoer who has previously settled with the plaintiff.

86. The effect of s. 17(2) and s. 35(1)(h), therefore, is that in this case Defender is deemed to be identified with the fraud of Madoff when this Court comes to determine the amount of any contribution that 'would be made' by HSBC, relative to the contribution to be made by Madoff, to the loss suffered by Defender.

What level of contribution would HSBC get from Madoff?
87. This then leads to the hypothetical exercise under s. 17(2) in which this Court must engage, namely what amount would Madoff have been liable to contribute if Defender's total claim had been paid by HSBC. This section by its express terms presupposes HSBC has previously discharged the total claim in favour of Defender ('*if the plaintiff's total claim had been paid*') and is then pursuing Madoff for a contribution. The question therefore this Court must ask is what level of contribution would HSBC be entitled to from Madoff in these circumstances?

Relev*ant facts in determining the level of contribution*
88. As previously noted, in determining this issue, this Court must take Defender's case at its height, namely that, *inter alia,* HSBC was guilty of negligence in allowing Defender to invest its funds with Madoff and in failing to monitor Madoff while the funds were with him and that Madoff is vicariously liable as custodian of Defender's funds for the fraud of Madoff.

89. There appears to be no dispute between the parties that Madoff was guilty of a massive fraud. Evidence was provided by an American expert certified in fraud examination and financial forensics of the sophisticated and extensive nature of the fraud. This evidence establishes that the massive fraud was possible in part because of the stature of Mr. Madoff in the financial community at that time, since he had been a Chairman of the Board of Directors of Nasdaq and had served on the Securities Exchange Commission ("SEC") Advisory Committee of Market Information. The fraud was also made possible by the fact that Mr. Madoff ran at the same time, and from the same building as Madoff operated, a completely legitimate stockbroking business with 2.4 million legitimate trades per month, which allowed him to embed and conceal the fraud by giving him an understanding of exactly what fake trading needed to look like in order to deceive customers, custodians and other intermediaries and regulatory authorities. Thus, Mr. Madoff's separate legitimate business gave him the inside knowledge he needed to successfully run the Ponzi scheme through Madoff.

90. The fraud lasted for at least 17 years until it came to an end on the 11th December, 2008 and it is relevant to note that so sophisticated was the fraud, that it was never discovered by any regulatory authority or third-party custodian or investor, but only came to light when Mr. Madoff admitted the fraud to the FBI in December 2008.

The extent and sophistication of the Ponzi scheme
91. The essence of the Ponzi scheme is in the public arena and it is that Madoff pretended to its investors, including Defender, that he was buying shares with their money, when in fact he did not buy one share, but simply took in money and pretended to investors that his investment in shares on their behalf was producing an investment return always in excess of market returns. Because of the 'profitability' of the apparent investments made by Madoff, money poured in so that at its height, Madoff had approximately $65 billion under management. As a result, when every so often investors needed to cash in their 'investments', there was so much other money invested with Madoff that this was not an issue. This all changed during the financial crisis of 2008, when many investors with Madoff needed to take out their investments all at the same time to meet their financial needs arising from the crisis. At this stage, Mr. Madoff disclosed the true nature of the Madoff business to his sons, who told the FBI and Mr. Madoff was arrested. However, so successful was Madoff in attracting funds that it had billions of dollars that it could not possibly spend, unlike smaller Ponzi schemes. Somewhat ironically therefore, if you had to invest in a Ponzi scheme, this was the one in which to invest, since on the liquidation of Madoff, investors, instead of getting nothing back, as might happen in other smaller Ponzi schemes, could anticipate a return of at least 75% of their money.

92. The sophistication of the fraud is evidenced by the fact that Madoff, as already noted, created 46 million fake transaction documents between the years 2000 and 2008 alone. In order to convince investors and third parties that he was buying shares, Madoff faked not only statements to investors, but also tax returns to the Inland Revenue Service with details of pretend 'dividends' paid to investors on shares he was pretending to hold. Madoff also faked tax returns for capital gains tax on pretend 'gains' that investors made on the 'sales' of shares. Madoff procured special paper and printers to forge statements from the Depository Trust Company (the "DTC"), which was the holding institution for stock certificates and Treasury Bills and so was the holding institution for the shares which Madoff pretended it held. Madoff also maintained a supply of its external auditor's letterhead to produce alternative and fictitious versions of audited financial statements.

93. Madoff created a fake computer terminal which 'showed' regulatory authorities, that visited the Madoff premises, client holdings with the DTC, when in fact no holdings existed. In addition, in order to prove to the regulatory authorities during site visits that options were actually being entered with counterparties, Madoff had one of its employees hide in a closet in another room with a computer and pretend to be a counterparty in Europe on a 'trade' with an employee on a computer which was visible to the regulatory authorities.

94. Although the SEC had *sub poena* powers, which it used to conduct examinations on Madoff and thus it had the power to get sworn testimony and request third party documents, Madoff escaped any detection of the fraud.

95. While some frauds will involve just one person and therefore there is no risk of leakage of the fraudulent scheme to the outside world, Madoff, because of the sophistication and size of the fraud, had to involve 14 different people, apart from Mr. Madoff himself, with differing expertise ranging from computer specialists to tax experts over a considerable number of years. So sophisticated were the methods used, that Mr. Madoff managed to carry off this Ponzi scheme through his company, Madoff, for a period of at least 17 years without any leakage of the details of the fraud.

Determination of contribution of HSBC to the loss caused to Defender by Madoff
96. Against this background, this Court must determine under s. 17(2), the extent that Madoff would have been liable to contribute to

HSBC if HSBC had paid Defender's claim in full for the loss of its investment with Madoff.

Section 21(2) of the CLA

97. Since this Court is required under s.17(2) to hypothetically determine the contribution between wrongdoers, s. 21(2) of the CLA is relevant as that sub-section deals with contribution between wrongdoers. Section 21 is the first section in Chapter II of the CLA, which is entitled *'Contribution between Concurrent Wrongdoers'*. Section 21 is entitled *'Contribution in respect of damages'* and thus the reference in s. 21(2) hereunder to 'contributors' is clearly a reference to concurrent wrongdoers. This sub-section states:

> "(2) In any proceedings for contribution under this Part, the amount of the contribution recoverable from any contributor shall be such as may be found by the court to be just and equitable having regard to the degree of that contributor's fault, and the court shall have power to exempt any person from liability to make contribution or to direct that the contribution to be recovered from any contributor shall amount to a complete indemnity."

98. While s. 21(2) requires the Court to determine the contribution between Madoff and HSBC in accordance with what would be *'just and equitable'* having regard to the degree of a concurrent wrongdoer's fault, it is to be noted that it contemplates a situation where the Court can find that a concurrent wrongdoer is to be exempt from making any contribution, notwithstanding that he is a concurrent wrongdoer (as is clear from the reference to a concurrent wrongdoer getting a *'complete indemnity'* from his fellow concurrent wrongdoer.)

99. It is also clear from the Supreme Court case of *O'Sullivan v. Dwyer* [1971] I.R. 275 and the Supreme Court case of *Carroll v. Clare County Council* [1975] I.R. 221 that in determining what is *'just and equitable'* having regard to the degree of a concurrent wrongdoer's fault, the key factor is the respective blameworthiness of the concurrent wrongdoers, rather than the extent of the causative link between their actions and the loss. As noted by Walsh J. in *O'Sullivan v. Dwyer* at p. 286:

> "…a judge, in directing a jury, must direct their minds to the distinction between causation and fault and that they should be instructed that degrees of fault between the parties are not to be apportioned on the basis of the relative causative potency of their respective causative contributions to the damage, but rather on the basis of the moral blameworthiness of their respective causative contributions. However, there are limits to this since fault is not to be measured by purely subjective standards but by objective standards. The degree of incapacity or ignorance peculiar to a particular person is not to be the basis of measuring the blame- worthiness of that person. Blameworthiness is to be measured against the degree of capacity or knowledge which such a person ought to have had if he were an ordinary reasonable person"

100. In *Carroll v. Clare County Council*, Kenny J. stated at 227 that:

> "I think that judges, when addressing juries, should not under any circumstances use the word "moral" when speaking of blame-worthiness, but that they should emphasise that the jury are to apportion the fault according to their view of the blameworthiness of the causative contributions to the accident and that it is to be measured and judged by the standards of conduct and care to be expected from a reasonable person in the circumstances."

101. Since it is therefore clear that blameworthiness is the key consideration in determining what is a just and equitable contribution by Madoff to HSBC in respect of the liability to Defender for its loss, the next issue for consideration is the relative blameworthiness of HSBC and Madoff in the circumstances of this case.

Relative blameworthiness of Madoff and HSBC

102. When considering the relative blameworthiness of Madoff and HSBC, while not in any way determinative of the issue, it is nonetheless of some relevance that if, as this Court must assume, HSBC was negligent or otherwise vicariously liable for Madoff's wrongs, then it was negligent not only to the detriment of Defender, but also to its own detriment to a very significant degree, since it had invested the sum of approximately $1 billion of its own money, up to 25% of which it may not recover in the liquidation of Madoff. This detriment it has suffered is much more significant than the amount of fees that it earned from acting as custodian for Defender, which were in the sum of $200,000.

103. To put the matter another way, when this Court is asking how blameworthy A is for not, say, monitoring investment guru B, whose wrongful conduct led to the loss of money to A's client C, it can, in this Court's view, be relevant that A also lost money invested with B. This is because in assessing the relative blameworthiness of A and B, it is relevant to note that A applied the same level of care, even if it amounted to negligence, to its own affairs as it applied to its client's affairs. If B, the investment guru, was merely negligent, so that both A and B were negligent concurrent wrongdoers, this point is not especially significant from a legal perspective, since the fact that A treated his client's money with the same degree of care as his own money does not relieve him of liability to C for that negligence, since both A and B are equally blameworthy, in the sense that they were both negligent, in this example.

104. However, since the test under s. 21(2) is relative blameworthiness, and if B is guilty of criminal wrongdoing and A is guilty of mere negligence (or some other civil wrong), then in assessing the relative blameworthiness of A, it is relevant that he was also the victim of B's criminality. Thus, this fact, although not a determining factor, is nonetheless a factor in determining the relative blameworthiness of A and B, and consequently it may affect the appropriate contribution between A and B for the purposes of s. 17(2).

Qualitative difference between a criminal wrong and a civil wrong

105. However, what is determinative in this Court's view, is that whether one is dealing with a claim that HSBC was negligent in not monitoring Madoff or a claim that HSBC was vicariously or otherwise liable for Madoff's fraud, in considering contribution between wrongdoers, there is a qualitative difference in the relative blameworthiness on the one hand, between an action between wrongdoers where one wrongdoer is guilty of a criminal activity and the other is guilty of a civil wrong such as negligence, and on the other hand an action between two wrongdoers who are both guilty of a civil wrong (or indeed both guilty of a criminal wrong). The fact that HSBC was a victim of Madoff's fraud simply serves to highlight the qualitative difference between HSBC and Madoff as concurrent wrongdoers on the one hand and say some other common form of concurrent wrongdoers, e.g. an architect and a builder who are both sued for negligence arising from substandard building on the other hand.

106. This qualitative difference is best illustrated by the High Court of Australia case of *Burke v. LFOT Pty Ltd* [2002] HCA 17, a case heard by Australia's equivalent of our Supreme Court.

107. That case involved a Mr. Burke who was a solicitor acting for a company called Hanave and in that capacity was negotiating with a company called LFOT, which was the owner of a shop which was for sale. The shop was bought by Hanave after LFOT had

represented to Hanave, *via* Mr. Burke, that the tenant was of a high quality, even though the tenant had been in arrears on a number of occasions. LFOT also failed to disclose that an incentive payment had been made to the tenant. As a result of this misrepresentation, Hanave purchased the shop for a price of Aus$2,550,000 even though its true value was Aus$1,800,000.

108. In the proceedings issued by Hanave against LFOT for misleading or deceptive conduct, LFOT cross-claimed against Mr. Burke claiming that if LFOT was liable to Hanave, LFOT was entitled to equitable contribution from Mr. Burke to the damages LFOT would have to pay, on the basis that he acted in breach of his duty as a solicitor to exercise reasonable care in relation to the purchase of the premises. Similar but not identical principles apply in Australia regarding determining contribution between wrongdoers, so, for example, in Australia while contribution is determined in part by the causal significance of the respective wrongdoers to the loss (which is not the case in Ireland), contribution is also determined in part by the respective culpability of the wrongdoers (which is similar to the test set down in s. 21(2)). Applying these contribution principles, LFOT's application for a contribution from Mr. Burke was rejected by the Australian High Court and the reasoning of the judges is instructive in this case.

109. In the joint judgment of Gaudron ACJ and Hayne J. in *Burke v. LFOT*, it is stated at paras. 19 and 20 that:

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

110. In the *LFOT* case, LFOT was the 'primary concurrent wrongdoer', to use that expression to distinguish from a secondary concurrent wrongdoer (whose role was of a lesser degree of blameworthiness, such as negligence or vicarious liability). In the *LFOT* case, the wrongful conduct of the primary concurrent wrongdoer consisted of a false representation. In this case, the wrongful conduct of the primary concurrent wrongdoer (Madoff) is of much more serious nature than a misrepresentation about the quality of a tenant and a failure to disclose the making of an incentive payment to the tenant, since it involved the Madoff company being the vehicle for criminal conduct (which resulted in a 150-year sentence for the operator of that company).

111. Although this Australian case is not binding on this Court, it is relevant to note that it rejected out of hand the notion that someone who is guilty of false representation could be entitled to a contribution from a solicitor who failed to make enquiries which would have established that the representation was false. For this reason, it does, in this Court's view, provide support for the conclusion that where the primary concurrent wrongdoer is guilty of criminal conduct and the secondary concurrent wrongdoer is guilty of negligence (or other civil wrong), in most cases it will not be just and equitable under s. 21(2) for the primary concurrent wrongdoer to be entitled to a contribution from the secondary concurrent wrongdoer (or to put the matter another way, in most cases it will be just and equitable for the secondary concurrent wrongdoer to be entitled to a 100% contribution from the primary concurrent wrongdoer), in light of the respective degrees of fault of the concurrent wrongdoers.

112. In this regard, it is relevant to reference again the fact that s. 21(2) itself contemplates a *'complete indemnity'* from one wrongdoer to another (or to put it another way a 100% contribution from one wrongdoer to another). One could reasonably ask if the 'complete indemnity' scenario in s. 21(2) is not designed to apply to a situation such as this, where one wrongdoer was guilty of a criminal wrong and another was guilty of 'mere' negligence (or other civil wrong), what was it designed for?

113. Counsel for HSBC gave examples of what he perceived to be cases of vicarious liability where a 100% indemnity would be the norm e.g. where an employer is vicariously liable for a negligent employee driving a van, but that where the van driver is a financial mark, the employer would be entitled to full recovery. Similarly, he referenced a situation where a teacher injures or abuses a child, the school would, in his view, be entitled to full recovery from the teacher.

114. An example of an English case involving a teacher and a manager of the school, where a 100% contribution was awarded is that of *Ryan v. Fildes* [1938] All E.R. 517. In that case the plaintiff was punched on the ear by a schoolmistress, which led to the boy becoming deaf in one ear. He sued the schoolmistress and the manager of the school for damages. An action for contribution was taken by the manager against the schoolmistress for the damages awarded to the boy and Tucker J. in the English High Court held that the manager was entitled to a 100% contribution from the schoolmistress.

115. A specific example of an Irish case of two concurrent wrongdoers where there was a 100% contribution from one wrongdoer to the other is the case of *Staunton v. Toyota*, *Fieldhill Investments and Flogas* (Unreported, High Court, Costello J., 15th April, 1988.) Accordingly, this is an example of a case where the Irish courts have held that a concurrent wrongdoer, although legally responsible for the loss caused to a plaintiff, should be entitled to a 100% contribution/complete indemnity from the other wrongdoer.

116. The case involved a claim by the plaintiff, an employee of Toyota who was damaged by a gas explosion on a forecourt owned by Fieldhill Investments when the plaintiff backed his car into the liquid gas dispenser, which dispenser had been supplied by Flogas. In the substantive case, Fieldhill was found to have been negligent by virtue of its failure to erect a barrier around the gas dispenser and was found to be 49% responsible for the accident, the plaintiff being guilty of contributory negligence to the extent of 33% and his employer being 18% responsible.

117. The proceedings before Costello J. concerned a claim for contribution or indemnity by Fieldhill from Flogas on the grounds that a Flogas agent had arranged for the installation of the gas dispenser. Flogas had instructed the agent to make provision on the plinth on which the dispenser was placed for the later erection of a protective barrier. However, neither the agent nor Fieldhill were told by Flogas prior to the accident to erect a protective barrier.

118. In those circumstances, Costello J. held that although Fieldhill had been found to be negligent, that Flogas was also negligent and that it was just and equitable to make Flogas 100% liable for the loss caused to the plaintiff.

119. It is relevant to note that in *Staunton v. Toyota*, Flogas, the primary concurrent wrongdoer, to use that expression, was guilty of negligence and the secondary concurrent wrongdoer was also guilty of negligence, yet Costello J. felt that Flogas should be 100% liable for the loss. It seems to this Court that where the primary concurrent wrongdoer is guilty of something worse than 'mere' negligence, such as fraud, the justification for making the primary concurrent wrongdoer 100% liable for the resulting damage is even

greater. This is because the test for determining the respective contributions of concurrent wrongdoers under s. 21(2) is the relative blameworthiness of the wrongdoers. There is clearly an even greater difference in the blameworthiness of a criminal concurrent wrongdoer and a negligent concurrent wrongdoer, compared with the relative blameworthiness of two negligent concurrent wrongdoers, as in the *Staunton v. Toyota* case.

120. In the *LFOT* case, the Australian High Court refused to countenance any contribution between the maker of the wilful misrepresentation of the seller of the shop and the negligent solicitor acting for the purchaser. At para. 67 McHugh J. concludes:

> "LFOT's conduct misled the parties with whom it dealt in trade and commerce. Its misleading and deceptive conduct caused Hanave to pay more than the property was worth. Hanave's loss was quantified as the difference between the value of the property at the time of purchase and what it paid for the property. That difference was gained by LFOT, and the order requiring it to pay damages to Hanave is no more than an order requiring it to reimburse Hanave for the loss that it suffered and LFOT gained. In accordance with the course of authority, it is not inequitable that LFOT be solely liable for repaying this sum even though Hanave might have discovered the misleading and deceptive nature of its representations but for the omissions of Burke. It would be inequitable, however, if Burke, who gained nothing from the transaction and was misled by LFOT, should now have to pay LFOT the sumof $375,000. There is no equality in LFOT gaining $375,000 and Burke losing $375,000 as the result of LFOT's unlawful conduct."

121. In the present case, HSBC did not gain from the investment by Defender in Madoff as was the position with Mr. Burke in the *LFOT* case (save insofar as HSBC got fees for its services just as Mr. Burke got paid *'good fees'* for his services - see para. 114). However, not only did HSBC not gain from the investment, but as previously noted it suffered a loss of up to 25% of its $1 billion investment as a result of Madoff's fraudulent conduct.

122. However, perhaps most compellingly, McHugh J. states at para. 59 that

> "In paying the entire amount of damages awarded against it, LFOT is merely accounting for the profit it wrongly made from this transaction by reason of its misleading and deceptive conduct. It is not discharging an antecedent obligation, but accounting for moneys that it should never have received. In those circumstances, it would be inequitable to make Burke contribute to LFOT's repayment of Hanave's loss - a loss which was LFOT's gain. It would be absurd to suggest that a person who stole money and was ordered to repay it could obtain contribution from a person who negligently failed to safeguard the money. And in substance, I do not think that there is any difference between that example and the present case."

Absurd if Madoff is not 100% liable for the loss

123. McHugh J.'s reference to absurdity is relevant, because for this Court to find (even hypothetically, as it must do for the purposes of s. 17(2)) that HSBC would not get 100% contribution from Madoff for the loss caused to Defender, would, in this Court's view, be even more absurd than such a finding in LFOT, because of the criminal wrong of the primary concurrent wrongdoer (Madoff), unlike the civil wrong of the primary wrongdoer in the *LFOT* case. Such a finding would be absurd because it implies that a person or company that stole money (Madoff) and was ordered to repay it could obtain a contribution from a person who negligently failed to safeguard the money (HSBC).

124. For this reason and for the purposes of s. 17(2), this Court concludes that it is just and equitable for HSBC, the wrongdoer who is assumed to have been guilty of civil wrongdoing, to be entitled to 100% contribution from Madoff, the wrongdoer which was involved (as the corporate vehicle of Mr. Madoff) in criminal wrongdoing, because of the qualitative difference between the respective wrongdoing of the two concurrent wrongdoers.. As a result, Defender's claim against HSBC must be reduced by 100% as required by that sub-section.

125. Even if this Court were wrong in this regard, it would add that taking Defender's claim at its height (as it has done in reaching the foregoing decision), it cannot see how HSBC could be found to be more than 25% liable for the loss arising from Madoff's fraud and caused to Defender by HSBC's negligence, vicarious liability etc. This Court understands from the parties that a finding of more than 25% liability against HSBC is necessary for the substantive proceedings to be successful, since Defender is due to recover at least 75% of its investment from Madoff when the current liquidation is complete. While a finding of say 5% or 10% liability is an acknowledgment that a concurrent wrongdoer had some, *albeit*, limited blame for the loss that occurred, a finding of more than 25% liability is in essence a finding that HSBC bore, while not the majority of blame, nonetheless significant blame for the loss. This Court cannot see how it could find HSBC to be significantly to blame for this loss, even taking Defender's claim at its height.

Not just/equitable to deny innocent Defender recovery from negligent HSBC?

126. It remains to be noted that Defender submitted during the hearing that if the Court was to make the finding of 100% contribution by Madoff which it has now made, that this would not be *'just and equitable'* which it claimed is the guiding principle of the CLA. This is because Defender has argued that it has lost up to 25% of its investment because of HSBC's negligence and if anyone should foot the bill, it should be HSBC and not Defender, who should be doing so, since Defender is, for the purposes of this preliminary hearing, deemed to be a completely innocent investor.

127. However, it seems clear to this Court that one of the public policy reasons for the introduction of the CLA was, in the interests of plaintiffs (and with a knock-on benefit to court resources), to encourage settlement by concurrent wrongdoers (D1) with a plaintiff (P), where a settlement with D2 was not, at that time, possible, so to ensure that P at least got a settlement with D1. At p. 448 of his text *Joint Torts and Contributory Negligence* (1951), Dr Glanville Williams, the international expert on the law of torts, who was the drafter of the CLA, refers to the "*identified with*" rule set out in s. 17(2) in the following terms:

> "It is true that the working of the rule may operate to some extent to dissuade plaintiffs from making a settlement, for the result of a settlement would be (under the statutory rule here proposed) to make the plaintiff share in the risk of insolvency of one of the remaining defendants."

However crucially, he goes on to state that:

> "But in the absence of the statutory rule here proposed, it would be the defendant who would be reluctant to enter into a settlement, for he would have no assurance that the settlement would be final if he were still open to claims for contribution from his fellow tortfeasors."

He then concludes that:

> "Since the policy of the law should be to promote settlements, the question to be decided is which of these two disincentives to a settlement is the greater; and it is submitted that beyond all doubt it is the latter. For the latter consideration is capable of applying in any case, whereas the former does not apply if it is clear that the remaining tortfeasors are solvent."

Hence Dr. Williams advocated the adoption of wording along the lines of s. 17(2) in Ireland for the very clear public policy reason that it encouraged out of court settlements.

128. When enacted, the CLA provided this incentive for D1 to settle, by ensuring that if D1 settled with P, that this was the end of the litigation for D1 and he was not going to be embroiled in subsequent litigation with D2 regarding the extent of their respective contributions to P's loss, even if and when D2 was successfully sued by P.

129. In order to encourage D1 to settle and thus ensure that (in most cases) P got some damages for his loss, the CLA ensured that D1 was immune from a contribution action by D2, in the event of P successfully suing D2 after settling with D1. It achieved this by providing that if P sued D2 after P had settled with D1, then D2 got the benefit of the settlement between P and D1. In this way, P could not get double recovery, but more importantly, s. 17(2) of the CLA encouraged D1 to settle, by providing that after settling with D1, P is *'identified with'* D1 in any claim he has against D2. In this way, if D1 is found in the subsequent litigation between P and D2 to have been 60% liable (and D2 40% liable) for say a €100 loss, then P is only entitled to €40 damages from D2, (since P is *'identified with'* the D1 liability of 60%). This also of course means that if P had previously settled with D1 for say €50, he will get €10 less than his loss of €100 i.e. €50 from the D1 settlement and €40 from the judgment against D2.

130. It might appear unfair that an innocent plaintiff, P, will get less than what he feels are his full damages in settling in this manner. However, P knows that this is the consequence, when, and if, he decides to settle with D1. He also knows that this is the risk he takes on if, after settling with D1, it subsequently turns out that he 'under settled', since this is the law and has been since the enactment of the CLA in 1961. In many cases, plaintiffs will settle with D1 for €50, even though they are not guaranteed that a court will subsequently find D2 50% liable, because of the benefits attaching to settlement of litigation.

131. This might be regarded as an example of the CLA achieving a result which is not *'just and equitabl*e' to plaintiffs in certain instances. However, in considering Defender's claim that it is not fair that Defender does not recover against HSBC because of the CLA, the CLA needs to be looked at as a whole, since it is also the case that the CLA can achieve results which might not be regarded as *'just and equitable'* to defendants.

132. The best example of this is the so called 1% rule, whereby a concurrent wrongdoer who is found by a court to be only 1% liable for the damage caused to a plaintiff is liable to pay 100% of the damages. However if his concurrent wrongdoer is insolvent, he will have no way of recovering the 99% 'overpayment' which he has to make to the plaintiff. As is clear from the judgment of Keane J. in *Iarnród Éireann v. Ireland* [1963] 3 I.R. 261, this rule, although it leads to results which in specific circumstances might not appear to be just and equitable to the defendant, was held by the High Court (and upheld on appeal by the Supreme Court) to be perfectly valid.

133. The alleged injustice and inequity in Defender's case is arguably less than that which applies in the 1% rule, since unlike the 1% rule, over which the litigant has no say, the rule in s. 17(2) only operates if a litigant freely (and in Defender's case no doubt with the benefit of extensive legal advice) enters into a settlement agreement with a concurrent wrongdoer. Thus, when Defender decided to settle with Madoff for what will be at least 75% of its loss, it knew or should have known that it was settling with a company that was in effect the largest Ponzi scheme in history, and more importantly it knew or should have know that in settling with Madoff, the CLA requires that Defender become identified with Madoff in its proceedings against HSBC for the very same loss of its investment. In this regard, it is relevant to note that Defender had instituted the proceedings against HSBC some 16 months prior to the execution of the Settlement Agreement, so Defender should have been very well aware of the effect of its settlement with Madoff and its then extant proceedings against HSBC.

134. Indeed, even if Defender had settled with a negligent, rather than a fraudulent, Madoff for 75% and then sued HSBC for the balance, but in the interim HSBC had become insolvent, this too would appear to be unfair, since Defender could not re-open its settlement with a merely negligent Madoff to recover the 25%, since Defender would or should have known at the time of its settlement that it was taking on an insolvency risk regarding HSBC.

135. In either case, Defender knew or should have known the consequences and risks of settlement with Madoff under the CLA and so this Court does not accept that when one considers the policy aims of the CLA and the CLA as a whole, that the result in this case could be said to be unjust and inequitable to Defender in all the circumstances. This is because in entering the Settlement Agreement with Madoff, Defender would, or should, have been aware of the consequences of its settlement with Madoff, namely that it is indentified with Madoff. This carried with it the risk, as has happened, that a court would find that in view of the relative blameworthiness of Madoff and HSBC, that Madoff would be liable to contribute 100% to the loss suffered by Defender. For these reasons, this Court finds that while Defender may feel aggrieved that this is the result of its settlement with Madoff, this is the law as it applies under the CLA.

The contents of this judgment

136. Finally, although initially scheduled to last up to three days, the preliminary hearing (somewhat like expectations regarding the length of the substantive hearing) over-ran and lasted five days. During this period, this Court heard many different legal arguments and has considered them all carefully in both the oral submissions and the extensive written submissions.

137. In view of the pressures on court resources and the fact that five months of court hearings are dependant on the outcome of this decision, this Court undertook to the parties to seek to deliver its judgment within a week of the conclusion of the hearing. In doing so, this Court was conscious of the fact that Defender may decide to appeal this decision in an expedited manner so as to continue with the trial (that is now stopped) as it had a 'slot' in the Commercial Court diary. This Court was also conscious of the fact that counsel for Defender indicated that if the decision goes against his client, which it has, he may seek, within days of this judgment, to challenge the constitutionality of the CLA, which if it does happen, should if possible proceed very quickly, since if that application were to be successful, the trial should resume as soon as possible.

138. Accordingly, this judgment concentrates on what counsel for Defender has described as being at the core of the contention that the CLA provides a defence to HSBC, namely s. 17(2) as supplemented by s. 35(1)(h), and which sections occupied counsel for HSBC for the majority of its submissions. This Court has taken this approach since it can decide the issue between the parties based on s. 17(2) and without having to consider all the other issues raised during the preliminary hearing.

139. It should be noted that this Court has taken a similar approach to that of Finlay Geoghegan J. in *Flynn v. Breccia* [2017] IECA 74 at para. 32 (*albeit* that that case was an appeal, rather than a trial) regarding the contents of this judgment. Accordingly, since the s. 17(2) claim decides the issue between the parties, other matters raised by the parties are not necessarily referred to in the judgment, but it should be noted that this Court has fully taken into account all of the issues outlined by both parties in their oral and written submissions in reaching this decision even though the judgment does not consider each and every ground of claim and defence in turn or indeed set them out.