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Concurrent wrongdoers and the Civil Liability Act – Defender v HSBC

Summary

A recent High Court judgement delivered by Mr Justice Michael Twomey analysed the link between blameworthiness and causation in ascertaining the impact of the Civil Liability Act 1961 (the “CLA”) on concurrent wrongdoers where a settlement has been made with one wrongdoer.

The case highlights the dangers that may arise where a settlement agreement is entered into with one of a number of parties that contributed to the same loss. The High Court, having reviewed a number of decisions from other jurisdictions, found, based on the facts of this case, where there are civil and criminal wrongdoers in respect of the same loss it will not be just and equitable for the primary criminal wrongdoer to be entitled to a contribution from the secondary civil wrongdoer. In this case the civil wrongdoer was entitled to a full indemnity from the criminal wrongdoer.

Case Background

The case concerned a claim by Defender Limited (“**Defender**”) against HSBC Institutional Trust Services (Ireland) Limited (“**HSBC ITSI**”). Defender is an investment fund which had invested in the Madoff ponzi scheme through its custodian, HSBC ITSI. Defender claimed that HSBC ITSI had been negligent and had breached its contractual duties in its failure to properly monitor Bernard Madoff and his company and to minimise the risks that the Madoff structure posed.

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Section 17 of the CLA provides that a concurrent wrongdoer can be released from their obligations to the injured person in the circumstances prescribed in the CLA. This is subject to an analysis of the respective degrees of fault of the concurrent wrongdoers.

It was argued by HSBC ITSI that it should be indemnified from any obligation to make payments to Defender, on the basis that, a settlement agreement had been entered into between Defender and Bernard Madoff's company (the "**Settlement Agreement**"). Therefore the CLA applied to protect HSBC ITSI. Defender had invested \$540 million with Madoff and expected pursuant to the Settlement Agreement to receive approximately 75% of the amount invested by it. The claim against HSBC was for \$141 million, being approximately 25% of the amount invested by Defender. HSBC ITSI claimed the Settlement Agreement constituted a release or an accord for the purpose of the CLA which would result in Defender being identified as a wrongdoer with Madoff, therefore reducing any claim of Defender against HSBC ITSI. The level of reduction claimed in this case was 100%.

Applicability of New York law

The court noted that, at most, HSBC ITSI was guilty of, negligence, breach of contract and was vicariously liability for the losses suffered by Defender. The court also noted that Defender had not alleged that HSBC ITSI should have noticed the fraud perpetrated by Madoff.

Defender argued that in line with the decision in *Caffola v O'Reilly* and the Rome 1 Regulation, the provisions of New York Law should be applied by the Irish Courts in determining the contribution of HSBC ITSI. This argument was rejected by the trial judge because HSBC ITSI was not a party to the Settlement Agreement and therefore the Rome 1 Regulation did not apply to it.

Apportionment of Loss

The trial judge looked at the causative link between the fraud perpetrated by Madoff and the loss incurred by Defender. The court found that Madoff (with whom Defender was identified with under the CLA) and not HSBC ITSI was 100% liable for the losses incurred by Defender. The court in making this analysis stated that it must examine the issue on the assumption that HSBC ITSI was guilty of negligence in allowing Defender invest its funds in Madoff.

In view of the fact that HSBC ITSI was also a victim of Madoff's criminality, the trial judge concluded that while this was not a determining factor, in this case, the criminal nature of the acts carried out by Madoff were such as to materially affect the appropriate contribution for which HSBC ITSI could be liable to Defender. Section 21 (2) of the CLA provides that where "just and equitable" the court has the power to exempt any person from liability on the part of a contributor in line with the extent to which the losses suffered are the fault of another party. The trial judge concluded that based on the facts, it would be "absurd" if Madoff was not held 100% liable for the losses incurred by Defender.

In considering the qualitative differences of the acts of HSBC ITSI and Madoff, the trial judge referred to a number of decisions including the Australian case of *Burke v LFOT Pty Ltd* [2002] HCA 17 (the “**Burke Case**”). In this case a solicitor was joined to proceedings by the seller of a business premises. In the Burke Case the seller had misrepresented the quality of the tenant of the property. This resulted in the buyer paying more for the property than its true value. The Burke Case rejected the idea that someone who is guilty of a 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.

Decision

Mr. Justice Twomey was influenced by the Burke Case based on the similarities between the Australian approach to culpability of wrongdoers and the test under Section 21 (2) of the CLA. In assessing the requirement under Section 21 (2) of the CLA that any contribution be just and equitable, the trial judge found that a primary wrongdoer guilty of fraud and criminal conduct, should not be entitled to contribution from a secondary wrongdoer guilty of a civil wrong such as negligence. The trial judge also considered the position of Defender and its right to recovery. He concluded that entering the Settlement Agreement (in respect of which it had extensive legal representation) with Madoff amounted to acceptance of the risk that a court would attribute blameworthiness to Madoff and not HSBC ITSI and that Defender should have been aware of the relevant provisions of the CLA.

Commentary

This judgement provides an interesting examination of the relationship between blameworthiness and causation in assessing a contribution for losses. Of importance in this case was the criminal nature of the acts perpetrated by Madoff in contrast with the civil wrongs of HSBC ITSI. The judgement clarifies the considerations to be taken into account when considering the contribution to be made by a concurrent wrongdoer in the context of a contribution claim under the CLA.

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