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### Settling with a Concurrent Wrongdoer

This article will consider two significant recent judgments of the Irish Courts on the topic of concurrent liability - [Defender Limited v HSBC France \[2020\] IESC 37](#) (“**Defender**”) and [Ulster Bank DAC & Ors v McDonagh & Ors \[2020\] IEHC 185](#) (“**McDonagh**”)

#### Concurrent Liability

Concurrent liability is governed in Ireland by the Civil Liability Act 1961 (the “**Act**”). Section 11 of the Act defines a concurrent wrongdoer as “*one of two or more people responsible to a plaintiff for the same damage*”. Damage in this regard includes loss of property (including money), loss of life and personal injury.

Section 17 of the Act deals with settlements between concurrent wrongdoers. Issues tend to arise where a settlement is agreed with one wrongdoer and not the other. For example, both the *Defender* and *McDonagh* decisions concern situations where the plaintiff (“**P**”) settles with one wrongdoer (“**D1**”), and then subsequently attempts to obtain the remainder of their claim from a second concurrent wrongdoer (“**D2**”). See our previous briefing highlighting the potential pitfalls of such settlements [here](#).

Section 17 (1) of the Act provides that a settlement agreement between P and D1 will discharge the other concurrent wrongdoers from liability for the same damage if it contains an intention to do so. However, this will rarely be the case so the majority of settlements will instead fall to be considered under section 17(2) of the Act. This provides that P and D1 are identified together, such that any claim brought by P against D2 is reduced by the greater of:

- 1) The amount of the settlement between P and D1; or

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- 2) Any amount stipulated in the settlement agreement between P and D1; or
- 3) The extent by which it can be said that D1 was culpable for the entire claim.

## The Defender Case

The starting point for this discussion is the 2018 High Court decision, which was analysed in our previous briefing [here](#). This case involved a Ponzi scheme which was effected by Bernard Madoff's company Bernard L. Madoff Investment Securities LLC ("**Madoff**"). This represented the largest Ponzi scheme of all time, with Defender Limited alone suffering approximately \$540 million worth of losses. Defender settled with Madoff for roughly 75% of this sum, before bringing an application in the Irish courts to recover the remainder of its losses from HSBC. Defender alleged that HSBC were negligent in their role as custodian and that they had breached their duty in failing to properly monitor Madoff's company, despite suspicions that it was acting nefariously.

In the High Court, Twomey J. sought to efficiently use the Court's resources and identified a preliminary issue which he felt could resolve the matter in an expedient fashion. HSBC in their defence raised the fact that Defender had settled with Madoff for a portion of its losses, and as such, that Defender and Madoff could be identified together for the purposes of the Act. HSBC claimed that they should therefore be released from liability in line with the third limb of section 17 (2). The High Court agreed, holding there was no doubt that Madoff should be held 100% liable for Defender's loss and as such, HSBC's liability was reduced by 100%.

Defender appealed this decision, arguing that the High Court's literal interpretation of section 17 was incorrect and that the true intention of the Act was that an injured plaintiff should always be in a position to recover full damages. Whilst Defender accepted that it was to be identified with Madoff for the purposes of apportioning liability, it argued that such apportionment should proceed in line with the provisions concerning contributory negligence in section 34 of the Act, which would require the plaintiff's award to be reduced by an amount that is "*just and equitable*" having regard to the degrees of fault of Defender and HSBC.

The Supreme Court rejected this argument and agreed with the High Court's interpretation of section 17 - that in order to assess the reduction of Defender's claim against HSBC, the court had to examine the level of blame attributable to each party in line with the third limb of section 17(2). O'Donnell J. affirmed it was "*beyond argument*" that a deficiency may fall upon a plaintiff in situations such as these and the Act "*explicitly and deliberately contemplates the possibility of a plaintiff recovering less than full damages*". The objective of the Act, it was explained, is that D2 should not have to pay more than its fair share, and that if P has settled with D1 for less than the true value of the sum owed, then any shortfall should rest with P, and not D2. He also noted that the Act does not distinguish between cases where the deficiency results from a failure of P to properly value the claim and liability of D1; and those cases where the plaintiff accepts the settlement as the best that is possible in difficult circumstances. O'Donnell J. further explained that such an interpretation was necessary, as otherwise defendants would have little incentive to settle, as D1 would remain open to the possibility of a further contribution claim which would clearly negate the benefit of a previous settlement.

However, the Supreme Court refused to follow the High Court's conclusion that the only possible outcome was an apportionment of liability of 100% against Defender. O'Donnell J. stated that he

could not judge “with the requisite degree of confidence that there was no prospect of any apportionment of liability and damages other than 100% to 0%”. As such, the case will now proceed to a full hearing in the High Court where this apportionment will be fully assessed.

A second argument raised by Defender, which centered on the constitutionality of the “just and equitable” language in the Act was not decided by the Supreme Court.

## The McDonagh Case

The McDonagh case has also developed the law in relation to concurrent liability as it applies to summary judgment cases. This case involved the purchase of a site in Kilpeddar, County Wicklow by the three McDonagh brothers (the “**McDonaghs**”), which was financed in part by a €21.8 million loan granted by Ulster Bank (the “**Bank**”). The intended purpose of the 82-acre site was the construction of a data centre, however, for various reasons this did not proceed. The loan was granted to the McDonaghs based on a valuation of the land provided by to the Bank by CBRE, however it transpired that this valuation was inaccurate. The McDonaghs were subsequently unable to repay the loan and the Bank sought summary judgment in respect of the sums owed.

Prior to the hearing of the McDonagh case, Ulster Bank sued CBRE for negligence in relation to the valuation of the site and reached a settlement of €5 million (the “**Settlement**”). As a part of their defence, the McDonaghs argued that they and CBRE were concurrent wrongdoers pursuant to the Act and, as such, the Settlement released them from any further liability under sections 17 and 35 of the Act.

First, the court had to consider whether the Act was applicable in cases of summary debt collection. The Bank argued that it was not, but the High Court (Twomey J.) rejected that argument, stating “*if the legislature had intended to exclude one type of civil liability from the provision of the 1961 Act, namely the liability of a borrower to repay an unpaid loan, this could have been easily achieved by suitable wording.*”

Secondly, the court had to consider whether the McDonaghs and CBRE were concurrent wrongdoers. The court noted that the Bank had claimed in its case against CBRE that it would not have advanced the relevant sum to the McDonaghs had CBRE provided it with an accurate valuation of the site. It was therefore “*arguable*” that CBRE were responsible for the damage caused to the Bank arising from the McDonaghs’ failure to repay the loan. As such, Twomey J. was willing to assume that CBRE and the McDonaghs were concurrent wrongdoers in order to facilitate further analysis of section 17 of the Act. There was no intention in the Settlement for the McDonaghs to be discharged from liability, so Section 17(1) did not apply. Therefore, the court’s analysis focused on the three limbs of section 17(2) of the Act in determining the amount by which the claims against the McDonaghs should be reduced, namely the greater of:

- 1) The amount of the Settlement: This was €5m, which had already been applied by the Bank when taking its claim against the McDonaghs; or
- 2) Any amount stipulated in the Settlement: There was no such amount stipulated; or

- 3) The extent by which it could be said that CBRE was culpable for the entire claim: If the percentage liability of CBRE was greater than the €5m provided in the Settlement, then the McDonaghs' debt would be reduced accordingly. If the liability was less, then the amount would not be reduced. As such a division of liability would require further submissions, the court adjourned the matter to allow the parties to consider the terms of the judgment before making final orders.

The court also rejected the McDonaghs' argument that they should be relieved from all liability as the Bank had settled with CBRE for less than the full sum owed. Twomey J held that the purpose of section 17(2) was to encourage settlements, and the McDonaghs' interpretation was clearly at odds with that.

## Conclusion

The Supreme Court judgment in the Defender case has clarified that where there are concurrent wrongdoers, a settlement with one wrongdoer will not discharge the other wrongdoer(s) from all liability unless there is an express intention to do so. In the absence of such intention, the Court will apply section 17(2) of the Act such that the plaintiff and the settled wrongdoer will be identified together. The court will then assess each wrongdoers' respective culpability for the damage caused, with the plaintiff's claim against the remaining wrongdoers being reduced by the deemed culpability of the wrongdoer that has settled.

Accordingly, settlements are encouraged by the Act as the plaintiff knows that if they settle with one wrongdoer, they can still seek to recover the remainder of their claim; the wrongdoer that settles knows that the plaintiff will be identified with them in any subsequent proceedings so they will not be exposed to any further liability; and the remaining wrongdoers know they cannot be held liable for anything more than their fair share.

The McDonagh case has further clarified that the Act and, therefore, the above principles, also apply to summary judgment cases and in cases where the plaintiff has settled with one concurrent wrongdoer for less than the full value of their portion of the claim.

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