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No redaction needed*



THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2021] IECA 316

Court of Appeal Record No 2019/152

Whelan J.

Collins J.

Binchy J.

BETWEEN

JOSEPH SHEEHAN

Plaintiff/Appellant

AND

TALOS CAPITAL LIMITED

Defendant/Respondent

JUDGMENT of Mr Justice Maurice Collins delivered on 26 November 2021

BACKGROUND

1. This is an appeal brought by the Appellant, Dr Joseph Sheehan, (“*Dr Sheehan*”) from the judgment and order of the High Court (Twomey J) of 20 June 2018 dismissing his claim against the Respondent, Talos Capital Limited (“*Talos*”).
2. The circumstances in which that claim arose are set out in detail in the Judgment of the High Court Judge ([2018] IEHC 361). While there are some aspects that will require more detailed discussion, the following summary (which no doubt simplifies the background excessively) will suffice at this stage.
3. Dr Sheehan was one of the founders of the Blackrock Clinic, a well-known private hospital in Dublin, and, during the time-period relevant to these proceedings, he continued to be (directly or indirectly) a significant shareholder in Blackrock Hospital Limited (“*BHL*”), the company that (through a further company) owned and operated the Clinic. As of 2014, however, his shareholding was encumbered by charges securing loan facilities that had originally been provided by Anglo Irish Bank and that by then were owned by the Irish Bank Resolution Corporation (“*IBRC*”). A fellow shareholder, Mr Duffy, was in a similar position and a third shareholder, Mr Flynn, had significant indebtedness to the National Asset Loan Management Limited (“*NALM*”) which was also secured over his shareholding (all of these shareholdings being held through corporate vehicles). These three shareholders between them held some 56% of the shares in BHL (28% held by and/or on behalf of Dr Sheehan and 20% and 8% held by and/or on behalf of Mr Duffy and Mr Flynn respectively).

4. As anyone with an interest in the recent work product of the Superior Courts in this jurisdiction is aware, the Blackrock Clinic has been a much fought-over prize and disputes over its ownership and control have generated very significant litigation, much (though by no means all) involving Dr Sheehan as either plaintiff or defendant. It will be necessary to say something more about this litigation later in this judgment given the observations that the Judge made about it. However, it has no direct bearing on any of the substantive issues arising in this appeal.

5. In 2014 Talos agreed to lend up to €45 million to Dr Sheehan, Mr Flynn and Mr Duffy (and/or to companies controlled by them) for the purpose of funding the acquisition of their respective loans from IBRC and securing the release of the charges over their shareholdings in BHL. Talos (now Talos Capital DAC) is an investment subsidiary of the Children's Investment Fund Foundation, a charity registered in England and Wales and described in evidence as "*one of the UK's largest philanthropic organisations.*" A series of agreements was entered into in March 2014 in connection with this lending. While the borrower was originally intended to be Medfund, a Cayman SPV controlled by Dr Sheehan, it was subsequently agreed that the borrower would instead be an Irish SPV. That SPV was JCS Investments Holdings XIV Limited ("*JCS*"). The terms of the agreed facility were set out in the schedule to an *Amendment and Restatement Agreement* dated 17 March 2014 (which restated facility I shall refer to as "*the Facility Agreement*"). These included, by way of security for Talos, a requirement that a share charge be granted in its favour over the entire share capital of JCS and a requirement that a personal guarantee be entered into by Dr Sheehan and Mr Flynn. These were

conditions precedent to the advancing by Talos of the “*Deposit Loan*”. The purpose of the Deposit Loan was to enable JCS to pay the deposit that would have to be paid to IBRC under the loan sale deed that was being negotiated at that time (“*the Deposit*”). It had been originally intended that Medfund would fund the deposit but subsequent to the signing of the original facility agreement on 13 March 2014, it emerged that Medfund was not in a position to do so and Talos agreed (“*reluctantly*”, it was said) to fund the deposit also and that was one of the factors that led to the agreement of a restated facility by means of the Amendment and Restatement Agreement a few days later. The Amendment and Restatement Agreement “*and any non-contractual liabilities arising from it*” was governed by English law (clause 8), as was the Facility Agreement itself (clause 33).

6. In accordance with Clause 24 of the Facility Agreement, JCS acceded to it as the “*Acceding Borrower*” in place of Medfund on 19 March 2014. On the same date, a Deed of Guarantee (“*the Guarantee*”) was executed by Dr Sheehan and Mr Flynn. It guaranteed the punctual performance by “*the Borrower*” (by then JCS) of its payment obligations under the “*Finance Documents*” subject, however, to a maximum liability of “*€2,400,000 plus any accrued but unpaid interest under the Senior Facility Agreement*” (clause 2.1(b)). The Senior Facility Agreement referred to here was the restated facility set out in the Amendment and Restatement Agreement. The amount of €2.4 million corresponded to the Deposit that would be payable to IBRC under the intended loan sale deed (that amount being 10% of the total consideration of €24 million). The Guarantee was governed by Irish law.

7. Pursuant to clause 17 of the Facility Agreement, JCS was liable for all costs and expenses of Talos (including legal fees) in relation to the negotiation of the loan transaction and also in respect of the enforcement of, and/or preservation of rights under, the Facility Agreement or associated transaction documents. As a result of the operation of this provision, JCS ended up with significant liabilities to Talos over and above its liability for the Deposit Loan.

8. A loan sale deed was executed on 7 April 2014 by IBRC and its Special Liquidators, JCS and Dr Sheehan personally as “*Purchase Guarantor*”, (“*the Loan Sale Deed*”) and the Deposit was paid on the same day. The deposit amount was transferred directly by Clifford Chance, the solicitors acting for Talos, to the Special Liquidators of IBRC but the payment was clearly made on behalf of JCS, whose payment obligation it was. The Loan Sale Deed provided for the sale of the relevant IBRC loans to JCS and was governed by Irish law.

9. It was at this point that serious problems arose. In brief, Talos learned that Mr Duffy’s loans with IBRC had already been redeemed in full prior to the Loan Sale Deed becoming operative. From Talos’ perspective, Mr Duffy’s participation in the transaction was critical because his shareholding was needed to ensure that Talos would obtain security rights over a majority of the shares in BHL, thus giving it control over the payment of dividends (which were intended to fund interest payments to Talos). In that context, it was a further condition of the funding being provided by Talos that Dr Sheehan, Mr Duffy and Mr Flynn and their associated corporate vehicles would enter

into a *Framework Agreement* with Talos which would regulate their rights as controlling shareholders, including as regards payment of dividends by BHL.

10. In Talos' opinion, the redemption of Mr Duffy's loans and the failure of Dr Sheehan and JCS to disclose that fact prior to draw down of the Deposit Loan gave rise to a number of material breaches of the Facility Agreement, each constituting an event of default for the purposes of clause 21 of that agreement. Consequently, on 6 May 2014 Talos issued a notice pursuant to Clause 21.18 which cancelled its commitments under the Facility Agreement, declared the Deposit Loan of €2.4 million, and accrued interest of €27,616.44, immediately payable and demanded payment of those amounts. On the same day, Talos demanded payment from Dr Sheehan and Mr Flynn pursuant to the Guarantee. A further demand followed on 15 May 2014 for payment of expenses incurred by Talos as lender, namely legal fees payable to Clifford Chance pursuant to an interim invoice. This demand was made on the basis of provisions contained in a Term Sheet that had been executed by Dr Sheehan and Mr Flynn in early March 2014.
11. In addition, Talos exercised its security rights under the Facility Agreement to take control of JCS. While there is a reference in the papers to a Deed of Charge over Shares which was apparently executed by Medfund over the shares in JCS on 19 March 2014, that Deed does not appear to be in the papers furnished to this Court. In any event, no issue arises in the appeal as to Talos' entitlement to take that step.
12. Difficulties also arose in relation to the Loan Sale Deed. On 21 May 2014 IBRC served a completion notice. In the absence of funding from Talos, JCS was not in a position to

complete and on 26 June 2014 IBRC served a termination notice and it subsequently forfeited the €2.4 million Deposit.

13. Talos then sued Dr Sheehan (and Mr Flynn) in this jurisdiction on foot of the Guarantee. The claim was opposed but on 23 January 2015 the High Court (Ryan J) gave judgment upholding Talos' entitlement to summary judgment ([2015] IEHC 27) and on 30 January 2015 judgment was formally ordered in favour of Talos in the sum of €2,788,671.53 (€2,400,000 plus interest of €388,671.53), subject to a stay of 6 months. Dr Sheehan appealed to this Court but on 27 July 2015, the day on which the appeal was listed for hearing, it was withdrawn. As a result, costs were awarded against Dr Sheehan and the stay on the High Court judgment was lifted with immediate effect.
14. On foot of this judgment, Talos obtained charging orders over Dr Sheehan's shares in BHL and a related entity, Blackrock Medical Partners Limited.
15. There was further litigation outside of this jurisdiction also. On 8 May 2014 (that is to say, just a few days after the demands made by Talos on 6 May 2014) Dr Sheehan was one of a number of parties that issued proceedings against Talos and others in New York alleging that Talos had acted in breach of the Facility Agreement and that the defendants had (mis)used the Facility Agreement to take over control of BHL. In June 2014, at the suit of Talos, an anti-suit injunction was granted on an interim basis by Blair J in the High Court of England and Wales prohibiting the further prosecution of the New York proceedings. Talos' proceedings subsequently came before the High Court (Flaux J) on 21 November 2014 when (*inter alia*) he made an order for costs

against Dr Sheehan (and JCS), and also made an order directing payment by him (and by Mr Flynn) of €284,867.86 (plus interest of €2,622.35) within 14 days. That sum represented the interim Clifford Chance invoice amount payment of which had been demanded by Talos on 15 May 2014 in reliance on the terms of the Term Sheet. Other orders were made by Flaux J declaratory of the position of Talos under the Facility Agreement. Flaux J's judgment of 21 November 2014 – to which extensive reference is made in the Judge's Judgment here – is very critical of the New York proceedings and of the conduct of Dr Sheehan and his New York attorney, Mr O'Neill, in relation to those proceedings.

16. The costs order made against Dr Sheehan resulted in the issuing of two Default Costs Certificates ("*the Costs Certificates*") on 10 July 2015 in amounts of STG€436,285.74 and STG€184,722.04 (totalling STG€621,007.78) respectively. Costs certificates also issued in relation to JCS.

17. Pausing here, it will be apparent that, as of the end of July 2015, Dr Sheehan had significant liabilities to Talos. There was an enforceable High Court Judgment against him in the amount of €2,788,671.53 on foot of the Guarantee. Dr Sheehan was also liable for the costs of the guarantee proceedings in the High Court and in this Court. Those costs were at that stage unquantified. In addition, he was also liable for €287,490.21 on foot of the Order made by Flaux J in November 2014 (which had been ordered to be paid by 5 December 2014 but which in fact was unpaid as of July 2015). Finally, he was also liable under the Costs Certificates for STG€621,007.78 which at the time converted into €842,387.49. These quantified elements amounted to

€3,918,549.23. Allowing for the costs of the guarantee proceedings and accruing interest, it seems clear that Dr Sheehan's liabilities to Talos as at the end of July 2015 exceeded €4 million. These were, I emphasise, liabilities of Dr Sheehan *personally*.

18. As we shall see, JCS also had significant liabilities to Talos.
19. Meanwhile, the issue of the forfeited Deposit was not settled. As early as 14 May 2014 (before ever the Deposit was forfeited) Clifford Chance (on behalf of Talos) had written to the Special Liquidators asserting that they had been guilty of misrepresentation on the basis that, though they had been aware of the redemption of the Duffy loans in advance of the drawdown of the Deposit, and knew of the importance to Talos of Mr Duffy's participation in the transaction, they had failed to disclose the redemption to Talos. In these circumstances (so Clifford Chance said) the Special Liquidators were obliged to repay the Deposit to Talos. That claim was firmly rebuffed by the Special Liquidators. Talos sought advice on its prospects of successfully suing for the recovery of the Deposit and was advised that an action for recovery of the Deposit would not be successful.
20. Nonetheless, Talos resolved to make a further approach to the Special Liquidators and on 23 December 2014 a further letter was sent in which Talos set out at some length its dissatisfaction with the conduct of the Special Liquidators and asserted once more that the Deposit was being wrongfully withheld by them and ought to be repaid immediately to Talos. After some further engagement, a meeting took place in Dublin on 14 January 2015 at which the Special Liquidators made a *without prejudice* offer to repay €1.7

million of the Deposit. The deduction of €700,000 was explained by reference to the fees and expenses that had been incurred by them in relation to the aborted loan sale to JCS and in the subsequent sale of those loans to a third party.

21. By the end of January 2015, the Special Liquidators and Talos had reached a *without prejudice* agreement on this basis, subject to the execution of the necessary legal documentation. At around the same time, the Special Liquidators were advised that any settlement would have to involve JCS as “*the purchaser company*” and should provide that any monies be paid “*through them*” (i.e. through JCS). The settlement documentation was not executed until 28 September 2015, when a Settlement and Waiver Agreement between IBRC (described as “*the Vendor*”), the Special Liquidators (“*SLs*”), JCS (“*the Purchaser*”), Talos and two Talos related entities was signed. I will refer to this agreement as the “*IBRC Settlement Agreement*” in order to distinguish it from the settlement agreement subsequently entered into between Dr Sheehan and Talos.

22. The critical provision of the IBRC Settlement Agreement was clause 2.1 whereby “*in consideration of the entry into this Deed and Vendor and the SLs returning the sum of €1,700,000 to the Purchaser, which sum forms part of the Deposit paid by the Purchaser under the Loan Sale Deed*” JCS, Talos and the two other Talos-related entities waived “*all claims past, present or future (known or unknown) of any kind whatsoever against each of the Vendor, the SLs and/or their servants or agents and advisors arising out of or relating to the entry into by the Purchaser of the Loan Sale*

Deed or any other connected transaction.” The IBRC Settlement Agreement also contained a confidentiality clause. The agreement was governed by Irish law.

23. The IBRC Settlement Agreement become effective on 27 October 2015 and on that date IBRC made the agreed payment of €1.7 million to JCS. A week later, on 3 November 2015, JCS paid that sum on to Talos.
24. Although JCS was a party to the IBRC Settlement Agreement, Dr Sheehan and his advisors were not aware of the agreement at the time and did not know of the payments just referred to. As I have noted, Talos had effectively taken control of JCS, the existing officers had been replaced and a new secretary and new directors had been appointed. It was this new board that had made the decision that JCS should be a party to the IBRC Settlement Agreement (with the benefit of independent legal advice) and it did so without recourse to Dr Sheehan.
25. Dr Sheehan himself was in fact contemplating the possibility of a claim against IBRC for the recovery of the Deposit. On 25 March 2015 solicitors acting on his behalf (Mr Larry Brennan of Arthur McClean) wrote to the solicitors acting for Talos (Mr Gavin Simons of AMOSS Solicitors) referring to the judgment that Talos had just obtained against Dr Sheehan (that being the judgment of Ryan J on the Guarantee). Mr Brennan suggested that, in light of the judgment, there appeared to be little purpose in Talos retaining control of JCS and he asked Mr Simons to take Talos’ instructions as to whether it would be prepared to allow Dr Sheehan to appoint new directors to JCS for the purpose of JCS bringing proceedings against IBRC to recover the Deposit. Mr

Brennan added that “*his clients*” had no objection to Talos retaining its share charge over the assets of JCS.

26. While this request was rejected, it did lead to further, intermittent, engagement between Dr Sheehan (or, more correctly, a succession of different solicitors acting on his behalf, initially Mr Brennan, followed by Mr Marc Hickey of Downes Solicitors and finally by Mr Eamonn Shannon of Shannon O’Connor Solicitors) and Mr Simons on behalf of Talos that intensified significantly in November 2015 and resulted in the execution of a settlement agreement between Dr Sheehan and Talos on 19 November 2015 (“*the Settlement Agreement*”).
27. The Settlement Agreement identified the total amount outstanding from Dr Sheehan (and JCS) as €3,958,536 and provided that on receipt of that amount there would be no further sums due from Dr Sheehan, JCS or Medfund and that Talos would not rely on any security provided by any of those parties (clause 2). A deed of release in agreed form was attached to the Agreement. The Agreement also provided that on payment, Talos would take all such action as Dr Sheehan reasonably requested in order to effect a transfer of the ownership and control of JCS to him or his nominee (clause 5). In turn, Dr Sheehan waived any claims against Talos arising from the Loan Sale Deed, the Facility Agreement and the other Finance Documents (as defined in the Facility Letter) (clause 6). Both the Settlement Agreement and the deed of release were governed by Irish law.

28. The agreed amount was duly paid by Dr Sheehan and he thus regained control of JCS. In January 2016 he was provided with a copy of the IBRC Settlement Agreement. This prompted correspondence on his behalf to Talos which demanded the return of the €1.7 million received by Talos (notably, no assertion of any form of misrepresentation appears to have been made in the initial pre-action correspondence; rather, the complaint at that state was that the amount paid by Dr Sheehan to Talos ought to have been reduced by the €1.7 million). Talos did not agree to this demand and these proceedings issued subsequently.
29. In this summary, I have intentionally avoided any detailed discussion of the engagement between the parties in November 2015. I discuss this in more detail below. Ultimately, however, it was claimed by Dr Sheehan that Talos was guilty of misrepresentation, deceit and fraudulent misrepresentation in its dealings with him (through his solicitors) in November 2015. Specifically, Dr Sheehan claimed that two emails sent by Mr Simons on 16 November 2015 falsely represented that the entirety of the liability under the Costs Certificates remained outstanding. Those representations, it was said, had caused Dr Sheehan to believe that JCS's entitlement to litigate against IBRC for the return of the forfeited Deposit remained intact, thereby inducing him to enter into the Settlement Agreement. The failure to notify Dr Sheehan of the IBRC Settlement Agreement and/or the payment made under it was also said to amount to an actionable misrepresentation in the circumstances.

THE PROCEEDINGS

The Pleaded Claim

30. A Plenary Summons issued on 3 August 2016, followed by a Statement of Claim on 15 August 2016. This pleaded two distinct claims on behalf of Dr Sheehan. The first claim was the claim for misrepresentation pleaded as follows:

“34. Arising from the aforesaid, the Defendant has acted wrongfully and unlawfully and has been guilty of misrepresentation (including fraudulent misrepresentation) in the following respects:

Particulars

Throughout all communications sent by the Defendant its servants and/or agents, in the period following the settlement made between IBRC and the Defendant/ JCS:

(a) the Defendant was guilty of misrepresentation and/or deceit/ fraudulent misrepresentation (by silence) in failing to notify the Plaintiff of the said settlement, or of the terms thereof, or of the payment or payments made or to be made by IBRC under the said settlement.

(b) the Defendant was guilty of misrepresentation and/or deceit/ fraudulent misrepresentation (by silence) in causing the Plaintiff to believe that the entitlement to litigate against IBRC in respect of the forfeited deposit was preserved.

Further, by the email of the 16th November 2015:

(c) the Defendant falsely represented that the entirety of the liability pursuant to the U.K. costs Orders remained outstanding in circumstances where the Defendant knew that a proportion of the said liability had been discharged from the IBRC settlement monies and where the Defendant well knew that if it stated that a proportion of the said liability had been discharged the Plaintiff would thereby be alerted to the fact of the IBRC settlement.”

On foot of this claim, Dr Sheehan sought damages for misrepresentation, deceit and fraudulent misrepresentation and also sought rescission of the Settlement Agreement. No *Hedley Byrne* type claim for negligent misstatement is made in the pleadings. Neither is there any reference in the pleadings to the (UK) Misrepresentation Act 1967 or its Irish equivalent, Part V of the Sale of Goods and Supply of Services Act 1980. No contractual claim – whether on the basis of an argument that the representations allegedly made by Talos were incorporated into the Settlement Agreement and/or that any term or terms ought to be implied into the Settlement Agreement – is made.

31. The second claim (pleaded without prejudice to the misrepresentation claim) was to the effect that Talos and IBRC were concurrent wrongdoers within the meaning of the Civil Liability Act 1961 (*“the 1961 Act”*) so that (so it was said) *“all/any payment or other consideration accruing to [Talos] under the IBRC settlement must be treated in accordance with the provisions of Section 17(2) of the [1961 Act] and the liability of the Plaintiff under the judgment in the summary proceedings must be diminished in the manner therein specified.”* A declaration to this effect was sought, along with damages for breach of section 17(2) of the 1961 Act.
32. The Statement of Claim was amended in November 2016 to rely on Mr Brennan’s letter of 25 March 2015 as constituting notification to Talos that Dr Sheehan’s only intention and motivation in seeking to regain control of JCS was to litigate the issue of the forfeited Deposit. Surprisingly – given the weight subsequently placed on this letter by Dr Sheehan - it seems that it had been overlooked when the Statement of Claim was drafted. In fact, the Statement of Claim had originally pleaded - *“for the avoidance of doubt”*- that Dr Sheehan was *not* alleging that he or his advisors had expressed that intention or motivation to Talos, though it also pleaded that Talos could not but have known that this was his intention and motivation.
33. In its Defence and Counterclaim, Talos denied all material elements of the claim. The Counterclaim alleged that the bringing of proceedings by Dr Sheehan constituted a breach of clause 6 of the Settlement Agreement. In its Defence, Talos referred to emails and attached schedules sent to Dr Sheehan’s legal advisors on 22 September 2015 and 11 November 2015 and pleaded (at para 14) that:

“b. A comparison of the schedules of 22 September 2015 and 11 November 2015 clearly shows that the amount claimed and due from JCS had reduced from €2,180,295.31 –made up of 45 entries – to €516,505.42 – made up of five entries – in the period between 22 September 2015 and 11 November 2015.

c. It was, and ought to have been, clear to the Plaintiff and his advisors that these liabilities had reduced by a significant amount.”

34. This was a key element of Talos’ defence at trial which, as we shall see, was accepted by the Judge. Dr Sheehan’s pleaded response to it should also be noted. Paragraph 8 of the Reply and Defence to Counterclaim expressly acknowledges that “*the Plaintiff*” had noted that the liability claimed in the schedule of 11 November 2015 was “*considerably lower*” than that claimed in the schedule of 22 September 2015. However, paragraph 8 goes on to deny that the Plaintiff was cognisant that these schedules set out aggregate liabilities or that the reduced amount in the schedule of 11 November 2015 was associated with any sum having been credited against the liabilities in the schedule of 22 September and reiterates the Plaintiff’s position that he was unaware of any such credit. Paragraph 9 accepts that the Plaintiff made no inquiry as to why the liability in the 11 November schedule was reduced.

The Hearing in the High Court

35. In due course the pleadings closed and the action proceeded to trial in the Commercial list. Witness statements were exchanged in advance of the hearing and one of the

witness statements delivered by Talos was from Arthur Lawrence QC which addressed a number of specific issues of English law said to arise in the proceedings.¹ While it had not been pleaded that any part of the claim was governed by English law (an Amended Defence and Counterclaim may have been delivered subsequently containing such a plea) it was ultimately agreed that this was the case as regards the misrepresentation claim. In due course Dr Sheehan's side produced a witness statement from Richard Salter QC. That in turn prompted a further statement from Mr Lawrence the contents of which, we were told, had been accepted by Mr Salter. In these circumstances the statements were admitted into evidence by agreement and neither Mr Lawrence nor Mr Salter was called to give oral evidence. Reference will be made to their written evidence in due course.

36. The Judge heard the action over 7 hearing days in April 2018. Mr Shannon, Mr Hickey and Mr Brennan gave evidence on behalf of Dr Sheehan. Dr Sheehan himself was not called to give evidence even though he had provided a witness statement. At the conclusion of day 3, immediately after the evidence of Mr Hickey, counsel for Dr Sheehan indicated to the Court that he had made the decision not to call Dr Sheehan. In explanation of that decision, he referred to the fact that the claim under the 1961 Act (which, in his opening, he had characterised as "*the first claim*") depended on the

¹ Mr Lawrence addressed three issues in his report: a. whether Talos was under any obligation to disclose to Dr Sheehan the JCS/IBRC settlement prior to its settlement with Dr Sheehan; b. the nature of JCS's liabilities to Talos under the Facility Agreement (which was governed by English law) and c. the application by Talos of the monies paid to it by JCS, having regard (inter alia) to the Facility Agreement. Mr Salter addressed the same three issues. The first of these issues is central to this appeal but the others do not arise and in particular no issue arises as to the entitlement of Talos to allocate the monies recovered from JCS in the manner that it did.

characterisation of undisputed facts. As regards the misrepresentation claim (which counsel in his opening had characterised as “*an alternative claim*”), he explained that the claim depended on the communications between Mr. McLean, Mr. Hickey and Mr. Shannon on the Plaintiff’s side and Mr. Simons, informed by Mr. Livingstone, on the other side and observed that the Court was “*going to hear first hand evidence from all of those people about what was said, the context of it and what they understood by the communications.*”

37. Talos also called three witnesses. The first was Mr Hal Livingstone, legal counsel of TCI Fund Services LLP, which provided legal and other services to TCI Fund Management, which had managed Talos as and from 29 June 2015. Kieran Wallace, one of the Special Liquidators of IBRC, then gave evidence, followed by Mr Simons.

38. In the course of the hearing, Dr Sheehan’s misrepresentation claim altered somewhat. During counsel’s opening, the Judge was asked by consent to delete the words “*by silence*” from particulars (a) and (b) in paragraph 34 of the Amended Statement of Claim.² In the course of counsel’s closing submissions, it was indicated to the Judge that Dr Sheehan was no longer relying on the second part of the allegation in particular (c). While Dr Sheehan was continuing to maintain that Talos “*falsely represented that the entirety of the liability pursuant to the U.K. costs Orders remained outstanding in circumstances where the Defendant knew that a proportion of the said liability had been discharged from the IBRC settlement monies*” (and in the course of this

² Day 2, page 4.

discussion, it was made clear that this was indeed an allegation of *fraudulent* misrepresentation), counsel explained that Dr Sheehan was no longer alleging that Talos “*well knew that if it stated that a proportion of the said liability had been discharged the Plaintiff would thereby be alerted to the fact of the IBRC settlement.*” That was, counsel said, “*an imputation that this was a separate and conscious lie on the part of Mr Simons*” and Dr Sheehan was not proceeding with it.³ No Re-Amended Statement of Claim incorporating these changes appears to have been delivered.

39. One other aspect of the High Court proceedings should be mentioned. I have explained that the parties agreed that the misrepresentation claim was governed by English law and that they had also agreed to admit the witness statements of their respective experts on English law as their evidence, without the necessity for either to attend to give oral evidence or be cross-examined. While those witness statements are detailed and illuminating, they are also limited in scope, addressing only the specific issues which had been put to the witnesses for analysis. Naturally, the statements did not purport to set out the entirety of English law on actionable misrepresentation. This gave rise to difficulty when, in the course of the closing submissions of counsel, issues were raised by the Judge about elements of actionable misrepresentation such as reliance/inducement/causation that were not addressed (or not addressed in any detail) in the expert evidence. Such issues were, arguably, particularly pertinent in light of the fact that Dr Sheehan had not been called (a scenario that neither expert had explicitly considered in their respective reports) but they are issues that require to be addressed

³ Day 7, page 84.

in any claim for misrepresentation and the parties and their advisors ought to have anticipated that they would arise here.

40. The parties had agreed that the misrepresentation claim was governed by English law. That being so, it was their responsibility to ensure that appropriate evidence of English law was put before the High Court so as to allow that claim to be adjudicated. That required evidence addressing *all* relevant issues in dispute (and/or potentially in dispute). The evidence furnished to the Court manifestly did not do so.

41. In the circumstances, it clearly was open to the Judge to direct that the parties furnish further written evidence from Mr Lawrence and Mr Salter and/or to direct that they be called to give oral evidence (and counsel did bring that option to his attention, though suggesting that it was not necessary). One can readily understand, however, why that might have seemed an unattractive option to the Judge. It may be that the Judge could have dismissed the misrepresentation claim, on the basis that the onus was on Dr Sheehan to adduce evidence sufficient to enable the High Court to adjudicate on his claim.⁴ In the course of his closing submissions, there were points when counsel for Talos appeared to come close to inviting the Judge to adopt such an approach but the point was not pressed. However, it appears to me that there was a third alternative, namely that, as regards issues which had not been addressed in the expert evidence – in other words, issues in respect of which the applicable English law had not been proved - the Judge was entitled to apply Irish law. This follows from the principles reflected

⁴ *Dicey, Morris & Collins on the Conflict of Laws* (15th ed; 2012) at para 9-002, especially fn 8 and supporting text.

in *Dicey, Morris & Collins on the Conflict of Laws* (15th ed; 2012) Rule 25 which is in the following terms (adapted for application in this jurisdiction):

“(1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.

(2) In the absence of satisfactory evidence of foreign law, the court will apply [Irish] law to such a case.”

Binchy, *Irish Conflicts of Law* (1988), at page 113, is to similar effect, suggesting “*that where foreign law is not pleaded or is not proved, the law of the forum will be applied*” (a formulation of the rule that the author considers to be “*more realistic*” than a rule expressed in terms of a presumption that foreign law is the same as Irish law). Notably, the same point was made by Ryan J in his judgment in the guarantee proceedings: “*the rule is that foreign law must be proved; in default of evidence or sufficient evidence, the court applies Irish law*” (at para 46). That statement does not appear to have been brought to the attention of the Judge.

42. The principle in Rule 25(2) is not absolute. In their discussion of it, the learned editors of *Dicey, Morris & Collins* state that “*there will still be cases in which the application of English law ... will be just too strained or artificial to be appropriate*” (para 9-026) and that “*there are cases in which the default application of a rule of English law is simply too problematic to be appropriate*” (para. 9-029). I do not see any basis on which

it would be “*problematic*” or “*inappropriate*” to apply Irish law here. English law and Irish law on the issue of misrepresentation are very similar, especially as regards common-law claims (and the misrepresentation claim here is such a claim; no statutory misrepresentation claim has been advanced). If the misrepresentation claim made here had been governed by Irish law, it is likely that the submissions of counsel would have referred to the same texts as were referred to by Mr Lawrence and Mr Salter (*Chitty on Contracts*, Spencer Bower & Handley, *Actionable Misrepresentation* and Cartwright, *Misrepresentation, Mistake and Non-Disclosure*) and many of the same authorities. Other aspects of the legal relationship between the parties (notably the Guarantee) were governed by Irish law. The misrepresentation claim had a close connection with this jurisdiction.

43. The Judge was not invited to adopt such an approach. In fact, he was told by counsel for one of the parties (without demur from his opposite number) that he was *precluded* from taking Irish law into account. In my opinion, that submission was mistaken. The court could not properly be constrained in that way. If the Judge considered that an issue or issues arose for determination that had not been addressed, or sufficiently addressed, by the evidence of English law provided by the parties, he was entitled to decide that issue by applying Irish law. The application of Irish law in the circumstances may not have been the perfect solution but it represented a pragmatic and workable response to a problem that was not of the Court’s making.

THE HIGH COURT DECISION

The Misrepresentation Claim

44. The Judge addressed the misrepresentation claim first. He made a number of references to the fact that Dr Sheehan had chosen not to give evidence. It was, he observed, “*a curiosity of this case*” (para 89). He referred to the expert evidence and noted the view of Mr Salter QC (Dr Sheehan’s expert) that the category of misrepresentation by silence had no application on the facts. It followed, in his view, that the misrepresentation claim came down primarily to the meaning and effect of the email of 16 November 2015 (by which, it is clear, he meant the longer of the two emails sent by Mr Simons on that date) (para 93). That email, he noted (relying again on the evidence of Mr Salter), had to be looked at in context and in light of the previous emails (para 94).
45. The Judge then noted that what was being alleged was not an express misrepresentation by Talos that the IBRC claim was extant but rather an implied representation to that effect (para 95). He then referred to what Mr Salter had said in his witness statement as to the appropriate approach in relation to implied representations, referring here to *Geest Plc v Fyffes Plc* [1999] 1 All ER (Comm) 672 and *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2018] EWCA Civ 355, [2018] 1 WLR 3529 and noting that, in the latter, the Court of Appeal had stated that the court “*should not be too ready to find an implied representation.*”

46. The Judge then referred to the evidence of Mr Shannon. Mr Shannon had been instructed to act for Dr Sheehan in relation to his refinancing only on 13 November 2015 (the evidence established that Dr Sheehan’s engagement with Talos was part of a larger refinancing project to be financed by HIG Bayside Capital (“HIG”)) but had previously been provided with copies of the earlier email correspondence. He himself had been in email correspondence with Mr Simons on 13 November. However, in his evidence he had said that he had no recollection of reviewing the earlier emails (specifically emails of 22 September and 11 November 2015) or opening the attachments to them. As regards the email sent to him by Mr Simons on 13 November, he had not reviewed that or the attachments to it in detail either. In the Judge’s view, Mr Shannon’s failure to carefully read the correspondence (including correspondence pre-dating his instructions which, in the Judge’s view, he should have carefully reviewed upon being instructed) ought not to be allowed to benefit Dr Sheehan (paras 106 and 107).
47. Looking at the email correspondence (and, in passing, I note that the misrepresentation claim was based entirely on these emails; no reliance was placed on any oral representations, whether by Mr Simons or anyone else on Talos’ behalf), the Judge acknowledged that, if read in isolation, “*it is possible*” (his emphasis) that the recipient could read its contents as “*meaning that JCS’s costs and expenses in relation to the UK Costs Certificates came to a total of €878,262.89 and these were all still outstanding*” (para 111). However, it was “*equally possible*” for the recipient of the email of 13 November 2015 to have read that email and the attachment to it as indicating that the amount outstanding in respect of those Certificates was €516,505.42 (para 112).

Furthermore, in the Judge’s view, that interpretation of the email of 13 November 2015 was made more likely when one considered the emails of 11 November and 22 September 2015 (para 113). A comparison of those emails indicated a number of matters set out in para 114 of the Judgment, including the fact that the total amount that Dr Sheehan was being asked to pay had dropped by €1.3 million, as well as that the amount shown to be payable to Clifford Chance had reduced by over €1 million. If the email of 16 November was to be interpreted as Mr Shannon had said he had interpreted it, it followed that there was a conflict between the costs figures set out in that email and the email sent 3 days before and that should have prompted inquiry from Mr Shannon (para 116(vii)). Further, “*it should have been obvious to Mr Shannon*” that the “*very precise figure*” of €842,387.49 which the email of 16 November stated would be accepted by Talos in full and final settlement was the sum of the JCS expenses and interest set out in the 13 November email (para 116(vii)).

48. On the basis of this analysis, the Judge concluded as follows:

“122. However, as is clear from the foregoing evidence, Mr. Shannon had been provided with sufficient information, in emails and attachments prior to the 16th November, 2015, to conclude that the UK Costs Certificates had been previously part paid (or more generally, that JCS's costs and expenses had been part paid) prior to the execution of the Talos/Sheehan Settlement Agreement, but he either did not read those emails and attachments or did not read them carefully. In this Court's view, it is not now open to Mr. Shannon to seek to benefit his client, Dr. Sheehan, by relying on his own failure to carefully read emails and attachments

and by so doing allege that another solicitor had misrepresented the facts to him, which is a very serious allegation to make against any professional.

123. More generally, it seems clear to this Court that, when all of the emails and attachments are viewed in the round, it would have indicated to Mr. Shannon, if he had read them at all, or indeed carefully which a solicitor would be expected to do, the very thing which he complains he was not told, namely that some of the UK Costs Certificates and/or some of JCS's costs and expenses had been paid, would have been obvious to him.

124. Since English law requires this Court to consider the alleged misrepresentation in " all the circumstances" of the case, this Court cannot see how the 16th November Email can be read in isolation. When all of the correspondence is considered, this Court concludes that there has been no representation by Mr. Simons or Talos on the 16th November, 2015, or on any other date that the UK Costs Certificates were all outstanding (after they had been part paid) and therefore there was no misrepresentation that some of JCS's costs and expenses had not been paid and accordingly there was no misrepresentation that the IBRC Claim had not been settled.

125. In particular, this Court cannot see how Mr. Shannon can claim that the 16th November Email amounted to a misrepresentation to him that the UK Costs Certificates (in the sum of €878,262.89) were all outstanding, when only three days previously, the 13th November Email stated that the only costs and

expenses outstanding for JCS totalled €666,504.42 made up of five invoices, two of which were from the UK law firm Clifford Chance, and one of which was stated to be "part paid" and the total of those two invoices from Clifford Chance alone only came to €626,722.16.

126. The only way in which a claim for misrepresentation could even have a chance of success, in this Court's view, is if the only email that was sent by Mr. Simons was the 16th November Email and if there never had been the 22nd September Email, the 11th November Email and the 13th November Email. However, this was patently not the case.” (original emphasis)

49. In a section of his judgment headed “*Absolutely no question of fraudulent misrepresentation by Mr Simons*”, the Judge went on to reject in emphatic terms any suggestion that Mr Simons had deliberately sought to mislead Mr Shannon. If that was Mr Simons’ intention, the Judge observed, “*the last thing he would do*” was to send an email “*just three days earlier*” in the terms of his email of 13 November (para 129). The Judge then referred to the principles in *Cooke v Cronin* (Unreported, Supreme Court, 14 July 1999) and, while noting that the principles had no direct application given that Mr Simons was not a defendant, he observed that the underlying rationale implied that, at a minimum, particular care should be taken by litigants and their advisors before making serious allegations against a professional. There were, in the Judge’s view, “*no grounds for the very serious allegations of misrepresentation made by Dr Sheehan against Mr Simons*” (paras 129-134).

The Section 17(2) Claim

50. The Judge next considered Dr Sheehan’s section 17(2) claim. He summarised that claim as one “*that he and IBRC are concurrent wrongdoers vis a vis Talos and that the payment by IBRC of €1.7 million in respect of the Deposit of €2.4 million should have reduced Talos’ claim against Dr Sheehan in respect of his guarantee of the obligations of JCS to Talos, which included the repayment of the Deposit*” (para 137)
51. Having looked at section 17(2) and the definition of “*concurrent wrongdoer*” in section 11(1) of the 1961 Act, the Judge expressed the view that it was quite clear that, for section 17(2) to apply “*there must be only one injured party or plaintiff.*” It could not, in his view, “*be the same damage if it is caused to two different persons since damage caused to C and damage caused to D could not be the ‘same damage’*” (at para 140). He then considered the argument made by Dr Sheehan that, for the purposes of section 17(2), the first claim (that against IBRC) was in substance a claim by Talos, rather than a claim by JCS. He rejected that argument, referring to a number of considerations. First, the Deposit payment had been made to IBRC by JCS, not Talos (nothing turned in his view on the fact that the payment had been effected by Talos as this had been done on the instructions of JCS and the funds were JCS’s funds) (para 143). Second, the Deposit (less costs) had been repaid to JCS and not to Talos. He pointed to an email to IBRC from its solicitors of 30 January 2015 which advised that any settlement agreement must include JCS and “*provide that the monies are paid through them*” as supportive of the view that the payment could not be made to Talos as the claim being settled was a claim which JCS (not Talos) had against IBRC for the return of the Deposit

(para 144). The fact that, after receiving the payment from IBRC, JCS paid it to Talos was “*neither here nor there*” (para 145). Equally, the fact that Talos negotiated or brokered the settlement between IBRC and JCS did not provide a basis on which the court could conclude that Talos was to be treated as the injured party or the party that has suffered the loss for the purpose of section 17 (para 147).

52. The Judge therefore rejected Dr Sheehan’s claim to be entitled to have the benefit of the settlement between IBRC and JCS.

Other Aspects of the Judgment

53. There are other aspects of the Judgment that were the subject of criticism in Dr Sheehan’s notice of appeal, in his written submissions and/or in the oral submissions made by him at the hearing of the appeal to which I now refer.
54. The Judgment begins with a short summary of what the action was about and a statement of the Judge’s findings. There is then a short section headed “*Applicability of Isaac Wunder orders to all litigants.*” That section starts with a statement that the High Court had been provided with uncontroverted evidence of Dr Sheehan’s previous litigation in relation to the subject matter of the dispute, which had been described (by Flaux J) as “*outrageous*”. Noting that *Isaac Wunder* orders had been made “*on several occasions*” against lay litigants, the Judge goes on to observe that “*the Courts need to be alive not just to impecunious lay litigants (for whom a costs order is not a deterrent) but also serial litigants with significant financial resources (who pursue private*

disputes or private agendas and for whom a costs order is also not a deterrent)” (para 10).

55. The Judge returns to this theme, at considerably greater length, at the conclusion of his Judgment, in a section headed *“Dr Sheehan’s ‘Outrageous’ Litigation to Date”*. He there discusses the New York and English litigation already referenced above, refers to certain evidence given by Mr Wallace *“in relation to the very litigious nature of Dr Sheehan and other parties connected to him”* and then (under the sub-heading *“Half-year of court time already involving Dr Sheehan’s Blackrock Hospital dispute”*) refers to his own previous comments on the amount of litigation involving Dr Sheehan and others *“in relation to other aspects of what is essentially a private dispute over the ownership of Blackrock Hospital”* (para 156) adding that it was clear to the Court that a stage had been reached *“where Dr Sheehan and the parties he is in dispute with regarding Blackrock Hospital are monopolising large periods of the time of the High Court and the Court of Appeal”* while other litigants were having their right of access to the courts delayed. This part of the Judgment (and the Judgment itself) concludes with the following:

“173 However, no application has been made by any party for an Isaac Wunder order in this case and this Court does not propose at this stage, and of its own motion, to impose an Isaac Wunder order in this instance. However, if such an application were made in the future, this Court would be required to consider whether there is sufficient evidence to justify such an order, in light of the submissions of the parties at that stage. It is of course the case that any

such Isaac Wunder order, if granted, would only apply to future proceedings proposed to be issued and not to existing proceedings.”

56. Dr Sheehan also takes objection to the fact that, in the course of setting out the factual background, the Judge referred to evidence which, in his view, established that Dr Sheehan had been aware that the Duffy loans had been redeemed and had misrepresented the position to Talos in April 2014. It was, the Judge observed, “*ironic*”, in light of the misrepresentation claim being made by him, that the reason that the Loan Sale Deed did not proceed in the first place “*was because Dr Sheehan had actually misrepresented to the Talos Group that the Duffy Loans had not been redeemed.*” (original emphasis).

APPEAL

57. Dr Sheehan lodged his appeal on 3 April 2019. Detailed written submissions were lodged on his behalf which were prepared by solicitor and counsel, which in due course Talos responded to.
58. When the appeal came on for hearing, Dr Sheehan was no longer legally represented and he presented his appeal himself. He did so succinctly and courteously but I do not mean to be unfair to him when I say that his oral submissions (which reflected a speaking note which he helpfully provided to the Court) largely focussed on issues relating to the Guarantee which did not really bear on the issues in the appeal (and which in any event were *res judicata*). Dr Sheehan also spent a considerable time addressing the circumstances in which JCS had been substituted as borrower in place of Medfund (suggesting that this had been insisted on by the Special Liquidators) and the adverse consequences that flowed from that substitution from his perspective (not least because of what he said had been the effect of section 31 of the Companies Act 1990), as well as seeking to demonstrate that IBRC had not been in a position to complete the Loan Sale. None of these issues is relevant to any issue in the appeal. However, Dr Sheehan did effectively convey his real sense of grievance at having been labelled a “*serial litigant*” by the Judge. Such a label was, he said, unnecessary and inaccurate and, as a result, the threat of an *Isaac Wunder* order had been used against him in subsequent proceedings and he had been subjected to “*character assassination*”. He suggested that there had been a conflict of interest, referring to a disclosure made

by the Judge on Day 3 of the hearing that, while in private practice, he had given partnership advice to AMOSS, the solicitors acting for Talos, of which Mr Simons was a partner. I will refer in more detail to this disclosure below.

59. In the course of his submissions, Dr Sheehan also made a number of statements concerning his state of mind and understanding in November 2015 to which I shall refer further below.
60. While a book of transcript extracts had been furnished to the Court in the ordinary way, Dr Sheehan invited the Court to review the complete transcripts of the opening and closing submissions of his counsel and of the evidence of the witnesses who gave evidence on his behalf. I have reviewed those transcripts (*inter alia*) for the purpose of preparing this judgment.
61. Mr Dunleavy SC made detailed submissions on behalf of Talos in support of the Judge's substantive conclusions. I will refer to these submissions as appropriate when addressing the substantive arguments on the appeal. I would note immediately, however, that Mr Dunleavy did not seek to stand over the criticisms made of Dr Sheehan by the Judge or the suggestion that he was a serial litigant and/or someone who was misusing the court process. Mr Dunleavy explained that Talos had not at any stage suggested that an *Isaac Wunder* order should be made against Dr Sheehan. It had been invited by the Judge to apply for the making of such an order following the giving of his Judgment but had declined to do so. I would also note at this point that Mr

Dunleavy also made it clear that the Judge's reference to *Cooke v Cronin* had not arisen from any submissions made on behalf of his client

ASSESSMENT

The Misrepresentation Appeal

Argument

62. As regards the misrepresentation appeal, a number of arguments are made by Dr Sheehan, which I will now summarise:

- There was no dispute that Talos “*remained silent and did not disclose the IBRC settlement*”. On the facts, however, an obligation to notify Dr Sheehan of the settlement arose because Talos was expressly on notice of his desire to regain control of JCS so as to pursue a claim against IBRC for the return of the Deposit. This arose from the letter of 25 March 2015 from Mr Brennan to Talos (to which I have already referred). The Judge had held that this “*clear and unequivocal statement*” was diluted by a series of subsequent events but he was wrong to do so.
- The Judge failed to engage with “*one of the pivotal aspects of the case*”, namely that Dr Sheehan had no personal liability for JCS’s costs other than that portion of those costs which were reflected in the Costs Certificates. Dr Sheehan’s desire to regain control of JCS was “*entirely dependent upon his intention to pursue IBRC*” which was also confirmed by the evidence of Mr Shannon. The

Judge's finding that Mr Simons (and therefore Talos) were not aware of Dr Sheehan's intentions was not consistent with the evidence.

- The Judge failed to apply the test for misrepresentation by silence/implicit misrepresentation set out by Mr Salter in his evidence. In particular, the Judge had failed to ask himself "*whether, in all the circumstances, a reasonable person in Dr Sheehan's position would naturally have assumed that the Settlement Waiver Agreement did not exist and that, had it existed, he would in all the circumstances have been informed of it.*" Instead the Judge had wrongly embarked on an analysis of Irish law relating to claims against solicitors.
- The Judge had failed to engage with the evidence of Mr Livingstone who had stated that the emails of 16 November 2015 indeed represented that the entirety of the UK Costs Certificates remained outstanding and that such representation was true. The Judge had referred only to the evidence of Mr Simons on this point.
- The "*only rational interpretation*" of the emails of 16 November (and it was submitted that the Judge had largely disregarded the second email of that date) was that the full amount of the UK Costs Certificates remained outstanding. That was also how Mr Shannon had understood the emails. The Judge had embarked on a "*detailed exercise*" as to why the emails should not be so interpreted, in the course of which he had been extremely critical of Mr Shannon for failing to review the email correspondence. A number of points were made

about that email correspondence, essentially to the effect that they did not clearly disclose the application of any credit against the liabilities of JCS.

- As regards the implications arising from the misrepresentations in the emails, Mr Shannon's evidence (said to represent the position of Dr Sheehan) demonstrated that Dr Sheehan had been misled as to the extent of the remaining liability under the Costs Certificates.

63. In its written and oral submissions, Talos emphasises what it refers to as "*the most singular feature of the High Court trial*" which was the fact that Dr Sheehan had elected not to give evidence. That was, it was said, a "*fatal infirmity*" in the case. Leaving that point aside, the Judge had made certain findings of fact which were open to him on the evidence and which could be reviewed only within the parameters of *Hay v O' Grady* [1992] 1 IR 210 and subsequent jurisprudence such as *McCaughey v Irish Bank Resolution Corporation* [2013] IESC 17 and *Leopardstown Club Ltd v Templeville Developments Ltd* [2017] IESC 50; [2017] 3 IR 707. It was said that the finding that the emails of 16 November 2015 did not contain any misrepresentation, as well as the Judge's finding that, as of November 2015, Mr Simons was not aware that Dr Sheehan wanted to secure the return of JCS in order to pursue a claim against IBRC, were findings of that kind. As regards the latter, Talos relied on the evidence to the effect that, subsequent to Mr Brennan's letter of 25 March 2015, no reference was made by Mr Brennan, Mr Hickey or Mr Shannon to Dr Sheehan's intention and motivation in seeking the return of JCS and no form of due diligence was carried out, or even the

most basic inquiry made, as to whether the “*asset*” of the potential claim against IBRC was still held by JCS.

64. According to Talos, the Judge correctly identified and applied the relevant English law principles, which he had derived primarily from Dr Sheehan’s expert, Mr Salter QC. On the facts, there was no basis for finding that the (admitted) non-disclosure of the IBRC Settlement Agreement amounted to an actionable misrepresentation. The experts were agreed that the case did not come within any of the exceptions to the general principle that silence cannot amount to a misrepresentation. There had not been any concealment of the settlement. No inquiry had been made and no term or warranty had been sought regarding the continued existence of any cause of action against IBRC.

65. Talos stood over the Judge’s approach to the emails and his criticisms of Mr Shannon’s failure to review with due care and attention the emails which preceded the emails of 16 November. While the principal email of that date was “*definitely deficient*” in terms of its clarity, and while the “*plain words*” of the two emails of that date, if read in isolation, would convey that €878,262 was due on foot of the Costs Certificates (the correct position being that some €517,000 remained outstanding at that point), they could not properly be read in isolation and, when read in their proper context, they were not misleading or inaccurate and the Judge had correctly concluded that, when all of the emails and attachments were viewed in the round, the fact “*that some of the Cost Certificates and/or some of JCS’s costs and expenses had been paid, would have been obvious to [Mr Shannon].*”

Discussion and Conclusions

66. The misrepresentation claim here was governed by English law. As already noted, there was a large degree of consensus between the parties' respective experts such that it was agreed that their witness statements could be admitted as their evidence without the need for them to be called at the trial.
67. Mr Lawrence QC's witness statement identifies three issues which he had been asked to address. Two of these issues - the nature of JCS's liabilities to Talos under the Facility Agreement and the allocation of the monies paid by JCS to Talos in part-satisfaction of its liabilities under that Agreement - are not issues in the appeal and need not be discussed further. The other issue addressed by Mr Lawrence QC (and then in turn addressed by Mr Salter QC) was:

"Whether Talos was under any obligation to disclose to Dr Sheehan the JCS/IBRC settlement, prior to the making of the Talos/Sheehan settlement."

68. In his witness statement, Mr Lawrence QC concluded that it was "*clear as a matter of English law that Talos was not under an obligation to disclose to Dr Sheehan the JCS/IBRC Settlement, merely because it was known to be relevant*" (he had earlier made clear that he was, for the purpose of addressing this question, proceeding on the assumption that Talos knew that the IBRC Settlement would have been regarded by

Dr Sheehan as relevant to his negotiations with Talos). The IBRC Settlement Agreement was not a contract of utmost good faith. There were, he said, other “*well-established qualifications*” to “*the rule that there is generally no obligation to disclose relevant facts in the course of contractual negotiations*” but none had been said to apply in the present case.

69. In his witness statement, Mr Salter QC agreed that, as a broad statement of principle, it was undoubtedly correct that, in negotiating a commercial contract, neither party is under a general obligation to disclose facts or matters to the other party merely because the first party knows or believes that those facts or matters would be considered relevant to the negotiation by the other. He also agreed that this general rule applies to agreements of settlement or compromise. However, Mr Salter went on to observe that English law recognises a variety of situations “*in which (depending on the facts) an actionable misrepresentation can be made, even though nothing is said that is, in itself, untrue*” mentioning in that context the recognition in English law of implied representation and representation by conduct. He emphasised the fact-sensitive nature of the inquiry to be undertaken in this context. Having referred to a number of textbooks and authorities, Mr Salter expressed his conclusions as follows:

“29. Applying those principles to the present case, it seems to me that, depending on the facts, a court applying English law could properly hold that Talos had (as alleged by Dr Sheehan) made an implied representation that JCS retained its entitlement to litigate against IBRC in respect of the forfeited deposit, despite the absence of any general duty of disclosure.”

30. *Whether it should do so must depend upon whether that court is satisfied on the facts that that is what a reasonable person in Dr Sheehan's position would have inferred was being implicitly represented by Talos' relevant words and conduct, in their context. In order to come to its conclusion on that issue, that court would be likely to find it helpful to consider whether, in all the circumstances, a reasonable person in Dr Sheehan's position would naturally have assumed that the Settlement Waiver Agreement did not exist and that, had it existed, he would in all the circumstances necessarily have been informed of it.*

31. *Those are largely factual issues, about which I cannot properly or usefully comment. To do so would be to usurp the function of the Court, and to go beyond what an English court would consider to be the proper role of an expert witness on foreign law.*" (footnotes omitted)

70. The Judge accepted Mr Salter's evidence (which, as noted, did not differ materially from the evidence of Mr Lawrence). It has not been suggested that he was wrong to do so. Accordingly, as regards the issue of whether a (mis)representation had been made by Talos in the terms alleged by Dr Sheehan, the key issue was whether the relevant words and conduct of Talos, in their context, would have led "*a reasonable person in Dr Sheehan's position*" to infer that JCS retained its entitlement to litigate against IBRC in respect of the Deposit that IBRC had previously forfeited. The onus of

establishing that Talos' words and conduct properly gave rise to such an inference was, of course, on Dr Sheehan.

71. As the Judge correctly emphasised (at para 95 and following), it is important to bear in mind that the misrepresentation claim made by Dr Sheehan was founded on an *implied* representation, rather than any *express* statement said to have been made by Talos. It is also important to bear in mind that the claim advanced was primarily based on alleged fraud/deceit on the part of Talos. While the pleadings referred to misrepresentation *simpliciter* as well as to fraudulent misrepresentation specifically, it is evident from those pleadings (and in particular paragraph 35 of the Statement of Claim/Amended Statement of Claim), from the submissions of counsel for Dr Sheehan before the High Court and from the terms of Dr Sheehan's written submissions to this Court on appeal that the misrepresentation claim being made by Dr Sheehan was largely if not entirely one based on fraud. Establishing fraud requires proof that a false representation has been made knowingly, without belief in its truth or recklessly as to whether it is true or false: *Derry v Peek* (1889) 14 App Cas 337.⁵ I will come back to this point in light of the findings made by the Judge regarding the state of mind of Mr Simons.

⁵ In *Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland* [2010] EWHC 1392 (Comm), an influential decision that has been cited with approval on a number of occasions in this jurisdiction, including by this Court in *Egan v Heatley* [2020] IECA 354, Clarke J stated that "*In order to establish a claim in deceit it is necessary for a claimant to prove that the relevant representations were dishonestly made in that the defendant (a) knew that he was making the statement that the Court finds him to have made; and (b) had conscious knowledge of the facts alleged to render the statement false*" (para 338). As to (a), Clarke J went on, "*it is necessary for the claimant to identify the representation made and to show that that was what he was saying.*"

72. Dr Sheehan did not give evidence. That is said by Talos to be a “*fatal infirmity*” in his claim. It will be necessary to come back to this point also. Instead, evidence was given by the various solicitors who had acted on his behalf and who, in their professional capacity, had had dealings with Talos on behalf of Dr Sheehan. The evidence established that Mr Brennan had written to Mr Simons on 25 March 2015 inquiring whether Talos would be willing to allow Dr Sheehan to regain control of JCS for the purpose of JCS pursuing a claim against IBRC and/or the Special Liquidators for the return of the forfeited Deposit. Much weight was placed on that letter in the High Court and before this Court on appeal. It is set out in full at paragraph 37 of the High Court Judgment. Given the weight placed on it, it is perhaps surprising that Dr Sheehan himself appears to have overlooked it when proceedings were being drafted. It is also surprising that Mr Shannon – the principal witness on behalf of Dr Sheehan and who in essence purported to speak on his behalf – was at all material times unaware of that letter.⁶

73. More curious still, perhaps, is that the evidence of Dr Sheehan’s witnesses disclosed that in the period from 27 March 2015 (by which time Talos had made it clear that it had no interest in the proposal that had been made by Mr Brennan, a position affirmed by Mr Simons in telephone conversations that appear to have taken place on 26 and 27 March 2015) up to the execution of the Settlement Agreement on 19 November 2015, the issue of JCS’s potential claim against IBRC and/or Dr Sheehan’s evident desire to regain control over JCS so as to pursue such a claim appears not to have been raised

⁶ Day 2, pages 89 and following.

again. Mr Brennan's letter of 25 March 2015 referred to a deadline of 31 March 2015 for the submission of claims by unsecured creditors in the liquidation of IBRC and, in that context, had indicated that there was "*an urgency to this issue*" and had sought an immediate response. On one reading, the deadline of 31 March 2015 might be seen as (to adopt a phrase used by Mr Brennan in his evidence) "*a guillotine for [Dr Sheehan's interest].*" Dr Sheehan's witnesses, including Mr Brennan himself, disputed such a characterisation of the letter and insisted that Dr Sheehan's interest in regaining control of JCS for the purpose of bringing a claim for the recovery of the Deposit continued after 31 March 2015. Notably, however, nothing to that effect appears to have been said to Talos or to Mr Simons and no reference to any potential claim against IBRC appears to have been made between the end of March 2015 and the execution of the Settlement Agreement on 19 November 2015.

74. Thus, Mr Brennan accepted that "*one way or another [he] never indicated to Mr Simons that when the 31st came and went that Dr Sheehan's interest persisted.*"⁷ In fact, he could not recall having *any* conversation with Mr Simons after 27 March 2015. Mr Hickey gave evidence that he had seen Mr Brennan's letter of 25 March 2015 and had been told by Mr Brennan that Mr Simons' response on behalf of Talos was "*in short .. a no*".⁸ Mr Hickey did not regard 31 March as a deadline but he never said to Mr Simons that Dr Sheehan still wanted to pursue a claim against IBRC.⁹ His evidence

⁷ Day 4, page 26

⁸ Day 3, page 101.

⁹ Day 3, page 103.

was, in effect, that Dr Sheehan's purpose was so obvious that it went without saying.¹⁰ Mr Shannon's evidence was to the same effect. As already noted, Mr Shannon was not even aware of Mr Brennan's letter of 25 March 2015. Before engaging with Mr Simons, no-one had told him that Mr Simons had been made aware of Dr Sheehan's purpose in seeking to regain control of JCS.¹¹ He therefore had no basis for believing that Talos was on notice of that purpose. Even so, he did not feel the need to say anything to Mr Simons nor did it occur to him to ask whether the claim against the IBRC continued to subsist.¹²

75. The Judge understandably found this silence puzzling. The fundamental premise of Dr Sheehan's misrepresentation claim was that his sole reason for entering into the Settlement Agreement was to regain control of JCS so as to pursue a claim against IBRC in respect of the Deposit. Dr Sheehan's case was that the claim against IBRC was the only asset that he stood to obtain in return for agreeing to discharge JCS's substantial liabilities to Talos (liabilities which, he emphasised, he was not otherwise liable for, though that is rather an oversimplification of the actual position). Yet, it appears from the evidence, at no stage during the discussions leading to the Settlement Agreement did Dr Sheehan or his advisors seek any reassurance or comfort that that asset remained with JCS. Even if it did not seem practical to carry out any formal due diligence or seek formal warranties or indemnities from Talos – as Mr Shannon suggested in his evidence, though that evidence must, I think, be treated with some reserve given that

¹⁰ Day 3, page 111.

¹¹ Day 2, pages 95-96.

¹² Day 2, page 128.

the issue was never raised with Talos – that would not explain Dr Sheehan’s absolute silence on this point or the failure of his advisors to seek a simple confirmation that JCS’s potential claim against IBRC remained intact. Notably, Mr Brennan accepted in cross-examination that, if he had been paying money for an asset on behalf of a client, he “*would have asked questions.*”¹³ That appears to be no more than a statement of basic common sense. In contrast, Mr Shannon’s evidence was that it “*never occurred*” to him to ask any questions. That is, frankly, very difficult to understand. Even if it is accepted that Mr Simons’ emails of 16 November 2015 impliedly represented that any claim that JCS might have against IBRC remained alive – and that is, of course, a matter of acute dispute – it begs the question why the issue had not been raised in the period *prior* to 16 November 2015.

76. In any event, Mr Simons gave evidence that he had read Mr Brennan’s letter as indicating that the date of 31 March was a “*cut-off*”.¹⁴ Thereafter, he said, it had never been suggested to him or to Talos by any party that Dr Sheehan wanted to regain control of JCS in order to sue IBRC.¹⁵ Nor had he ever been asked whether IBRC had repaid any portion of the Deposit or whether any claim against IBRC in relation to it had been “*preserved*”.¹⁶ This evidence was, of course, consistent with the evidence that had been given by Mr Brennan, Mr Hickey and Mr Shannon. Mr Simons’ evidence was that Mr Brennan’s letter had faded from his memory and had been forgotten¹⁷ and that, as a

¹³ Day 4, page 33. Mr Simons also gave evidence to that effect: Day 5, page 119.

¹⁴ Day 5, page 73.

¹⁵ Day 5, page 78.

¹⁶ Day 5, page 79.

¹⁷ Ibid

matter of fact, he was not aware that Dr Sheehan's purpose in seeking to regain control of JCS was to sue IBRC and indeed Mr Simons expressed the view that that had not been Dr Sheehan's purpose or, if it was, "*he had wanted to hide that from Talos*".¹⁸

77. While Mr Simons' evidence in this respect was challenged on cross-examination, it was clearly accepted by the Judge. He accepted that, as of November 2015, Mr Simons no longer recalled Mr Brennan's letter of 25 March 2015: Judgment, para 52. He also accepted (at para 54) that, notwithstanding that letter, "*Mr Simons was not aware, and could not be expected to have been aware, when he wrote the 16th November Email that Dr Sheehan's alleged purpose at that time in November 2015 in acquiring JCS, was to pursue the IBRC Claim*". That is a significant finding, encompassing both what Mr Simons actually knew and what he ought reasonably to have known as of November 2105. It is said by Dr Sheehan that these are inferences from the evidence that are not consistent with it. I do not agree. In my opinion, these are findings of primary fact based (*inter alia*) on the Judge's assessment of Mr Simons' oral evidence, including his evidence in cross-examination. No basis has been identified on which this Court might properly interfere with such findings and accordingly the Court is bound by them.

78. As appears from paragraph 62 above, one of the arguments advanced by Dr Sheehan in this appeal is that Talos had an obligation to disclose the IBRC Settlement to Dr Sheehan because Mr Brennan's letter of 25 March 2015 had put it on notice of Dr Sheehan's desire to regain control of JCS so as to pursue a claim against IBRC for the

¹⁸ Day 5, pages 80-81.

return of the Deposit. In light of what is stated by Mr Salter QC at paragraphs 15-19 of his report, it does not appear to me that the fact that one party to a transaction is on notice of the other party's purpose in entering into a transaction is sufficient in itself to impose a duty of disclosure on that party (at least where the contract is not one of utmost good faith or one of the other categories of contract where a duty of disclosure is recognised and there is no dispute that the contract here was not such a contract). In any event, it appears to me that it follows from the express findings made by the Judge that this argument fails on the evidence.

79. The Judge made other findings arising from the evidence of Mr Simons which are also significant for the resolution of this appeal. At paragraph 127 of his Judgment, he noted that Dr Sheehan had made "*very serious allegations of deceit and fraudulent misrepresentation against Talos, which was acting through its agent, Mr Simons.*" He went on to reject emphatically the suggestion that Mr Simons had deliberately sought to mislead Mr Shannon (Judgment, paragraph 129), going on to state that there were "*no grounds*" for the "*unfounded allegations*" against Mr Simons (paragraph 134). It appears to follow inevitably from these findings (again, findings of primary fact reached on the basis of the Judge's assessment of the oral evidence given by Mr Simons) that Dr Sheehan's claim for fraudulent misrepresentation/deceit must fail.
80. That does not, of course, resolve this appeal. Dr Sheehan's contention that Mr Simons' emails of 16 November 2015 amounted to an implied misrepresentation that JCS retained its right of action against IBRC for recovery of the deposit remains to be

considered. If such a misrepresentation was made, even if innocently, Dr Sheehan may be entitled to succeed on this appeal.

81. The Judge took the view that those emails could not be read in isolation and had to be considered “*in context*” and having regard to “*all the circumstances.*” In doing so, he relied on statements made by Mr Salter’s report, para 30. I did not understand Dr Sheehan to take issue, at the level of principle, with the Judge’s approach. It is, in any event, consistent with authority: see, for instance, Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th ed; 2015) (“*Cartwright*”) at para 3-07 and *Spencer Bower & Handley, Actionable Misrepresentation* (5th ed; 2014) (“*Spencer Bower & Handley*”) at paras 4.24-4.25. Where it is said that a misrepresentation arises by implication, rather than any express statement, consideration of the context is likely to be particularly important.

82. On 4 August 2015 Mr Hickey emailed Mr Simons asking whether Talos would transfer control of JCS on receipt of funds in the amount of the Guarantee judgment.¹⁹ In response (by way of email of 6 August), a solicitor in Mr Simons’ office made it clear that “*the original sponsors*” (which included Dr Sheehan) could only be entitled to a transfer back of JCS once all secured obligations under the Talos loan had been paid, not simply the judgment amount. The email indicated that Talos was in the process of

¹⁹ This email, and many of the subsequent emails referred to in this judgement, were marked “*without prejudice*” but they were admitted into evidence without objection in the High Court and it is clear that any without prejudice privilege has been waived.

compiling a spreadsheet summarising what those secured obligations were which would be furnished when finalised.

83. On 22 September 2015 Mr Simons sent an email to Mr Hickey referring to clause 17.3 of the Facility Agreement (which made JCS liable for the costs incurred by Talos in enforcing/preserving its rights under the Agreement) and attaching a spreadsheet “*setting out the current schedule of outstanding costs.*” The spreadsheet listed a large number of invoices (45 in total, though 2 are marked “*not issued*”), relating to legal and professional fees, in varying amounts and totalling €2,180,295.31. All but 6 of the invoices were marked as paid. The 6 unpaid invoices had different payees. Two of them related to Clifford Chance, in amounts of €747,412.07 and €120,384.46 (the latter was stated to be a draft which had not issued).
84. As the Judge observed, the clear import of this email was that the amount required to clear the indebtedness of Dr Sheehan and JSC to Talos was in excess of €5 million. The Judge calculated that amount at €5,262,602.52 but that calculation appears to overlook the fact that the costs figure of €150,000 set out in the email is said to be an estimate and also that the email indicates that there was some overlap between that figure and the costs included in the schedule set out in the spreadsheet. However, nothing turns on those points in my view and the essential point made by the Judge was correct.
85. The emails of 6 August and 22 September were addressed to Mr Hickey, who at this stage was dealing with Talos on Dr Sheehan’s behalf. In his evidence, Mr Hickey agreed that he had read the email of 22 September and the schedule attached to it. He

had been on vacation at the time and had read it on his phone. When it was put to him that, as of 22 September 2015, he knew that it was going to cost Dr Sheehan “*somewhere north of €5 million*” to recover control of JCS, he agreed that that “*seem[ed] to be the case*”,²⁰ though he later said that he did not recall taking note of “*the overall figure.*”²¹ On 5 October 2015, after his return from vacation, Mr Hickey forwarded the email to Mr Shannon (who was acting for Dr Sheehan in relation to the refinancing of his debts by HIG) but he did not discuss it with him. For his part, Mr Shannon agreed that the email had been sent to him. He “*may have opened the attachment*” and thought that he might have “*scanned*” it but could not say that he had “*definitely opened it.*” In any event, he did not “*analyse*” it and did not recall seeing the “*bottom line figure*” of €2,180,295.31.²²

86. The next relevant email is that of 11 November 2015 from Mr Simons to Mr Hickey. It set out “*the amounts required to be paid in discharge of the Judgment and JCS’s liabilities in order to return JCS to your client’s control*”. The amounts set out included the amounts for the judgment, Courts Act interest and costs (estimated) that had been set out in the email of 22 September, as well as a substantial figure for contractual interest in addition to the claim for Courts Act interest. The email then set out the following additional amounts:

“Additional costs and expenses of JCS (net of 150k above) €516,505.42

²⁰ Day 3, page 106.

²¹ Day 3, page 107.

²² Day 2, pages 102-107.

Additional costs to be incurred up to date of full redemption To be determined”

A breakdown of the “*additional costs and expenses of JCS*” was attached to the email (an attachment called “*Blackrock – outstanding invoices as at 10 Nov 2015*”). That attachment listed 5 unpaid and part-paid invoices due by Talos, amounting to €666,505.42 which, less the costs payable under the guarantee judgment, left an unpaid balance of €516,505.42. Two of the invoices listed on the attachment related to Clifford Chance. One had the same date and invoice number as the larger of the two unpaid Clifford Chance invoices that had been listed as unpaid in the spreadsheet attached to the email of 22 September 2015. However, it is listed as “*part paid*” in the attachment to the 11 November email and the amount shown as due is significantly lower than the amount set out against that invoice in the earlier spreadsheet.

87. As the Judge observed (Judgment, para 66), this email indicated that the “*overall ‘price’*” to clear the indebtedness of Dr Sheehan and JCS had reduced very significantly. The source of that reduction was a reduction in the total claimed for the costs and expenses of JCS (i.e. the costs and expenses for which JCS was liable under Article 17 of the Facility Agreement) from €2,180,295.31 on 22 September 2015 to €516,505.23, the effect of which had been partially off-set by the inclusion of the amount for contractual interest.
88. Mr Hickey was asked about this email. It was put to him that the overall cost to return the control of JCS to Dr Sheehan had reduced by some €1.1/€1.2 million. While accepting that that was the case, Mr Hickey said that he did not note it at the time and

had not reviewed the 22 September email.²³ Again, he had forwarded it to Mr Shannon. In his witness statement, Mr Shannon had stated that he did not conduct any “*substantial analytical exercise*” of the schedules attached to that email or any “*substantial exercise of comparison*” between the schedules attached to the emails of 22 September and 11 November. He had not, his statement said, noted that one of the Clifford Chance invoices had been noted as “*part paid.*” In cross-examination, Mr Shannon said that he did not know whether he had even opened the attachment at the time.²⁴ If he had, he was certain that he had not conducted any “*detailed analysis*” of it. He did not note the difference between the two schedules.²⁵

89. I would observe here that the emails of 23 September and 11 November are not lengthy. The schedules attached to them were not lengthy either. They did not require any “*detailed analysis*” by Dr Sheehan or his advisors in order to be absorbed and understood.

90. Pausing here, the clear evidence of Mr Hickey and Mr Shannon was that neither had noticed the reduction in JCS’s costs and expenses disclosed by the schedules to the emails of 22 September 2015 and 11 November 2015. That was a significant (and striking) part of their evidence and they were closely cross-examined on it. In any event, however, Dr Sheehan himself *had* noted that reduction. Paragraph 8 of the Reply and Defence to Counterclaim expressly acknowledges that “*the Plaintiff noted*” that “*the*

²³ Day 3, pages 108-109.

²⁴ Day 2, page 109.

²⁵ Day 3, page 53

liability claimed in the schedule of the 11th November 2015 was considerably lower than that claimed in the schedule of the 22nd September 2015". In the course of argument before this Court, Dr Sheehan accepted that the reduction in the "*bottom line*" had come to his attention.²⁶ Unlike Mr Hickey and Mr Shannon, he had seen the notation "*part paid*" beside one of the Clifford Chance invoices at the time.²⁷

91. During his cross-examination, Mr Shannon was asked about the plea in paragraph 8 of the Reply but said that he did not know what the specific reference was to. That is rather surprising. Mr Shannon's firm, Shannon & O'Connor, had filed the Reply and Defence to Counterclaim on Dr Sheehan's behalf and one would have expected that Mr Shannon would have been familiar with the basis for the pleading in paragraph 8. Furthermore, it seems reasonable to expect that Mr Shannon had discussed the emails with Dr Sheehan at the time. In any event, it is far from satisfactory that the Court should have been asked to proceed on the basis of a potentially misleading evidential picture, namely that Mr Shannon's state of knowledge (or, perhaps more accurately, his state of self-induced ignorance) was to be imputed to Dr Sheehan and the court ought to proceed as if Dr Sheehan's state of knowledge was the mirror-image of Mr Shannon's.

92. The Judge did not have evidence from Dr Sheehan. If Dr Sheehan had given evidence, this issue would no doubt have been the subject of discussion, not least as to why, having identified the significant reduction between the figures set out in the two schedules, Dr Sheehan did not instruct his advisors to seek any further explanation or

²⁶ Transcript, page 45.

²⁷ Transcript, page 132.

clarification from Talos or Mr Simons. In any event, whatever the state of knowledge of Mr Hickey and Mr Shannon, the case made by Dr Sheehan falls to be assessed on the basis that he was aware of the differences between the schedules.

93. At para 106 of his Judgment, the Judge observed that Dr Sheehan could not benefit from the fact that Mr Shannon failed to carefully read the correspondence sent by Mr Simons. It is impossible to gainsay the Judge's view that Mr Shannon did not read the correspondence carefully. In light of the evidence given by him, any other view would be perverse. The proposition that Dr Sheehan ought not to benefit from Mr Shannon's failure appears entirely unremarkable. The same point applies to the period of Mr Hickey's involvement. However, there is another and perhaps more fundamental point. The real representee here was not Mr Shannon but his client Dr Sheehan. Mr Shannon (and before him Mr Hickey) was simply acting as Dr Sheehan's agent. Information available to Mr Shannon (and/or Mr Hickey) ought, in principle, to be imputed to Dr Sheehan: *Strover v Harrington* [1988] Ch 390. But no real issue of imputation arises here. The Reply and Defence to Counterclaim makes it clear that the emails of 22 September and 11 November were in fact reviewed by Dr Sheehan and that he noted the reduction in the amounts for JCS's costs and expenses (and he also noted that one of the Clifford Chance invoices was noted as "*part-paid*" in the later schedule, as he acknowledged before this Court). Insofar as knowledge of such matters is relevant, it is clear that Dr Sheehan had such knowledge and Mr Shannon's failure to appreciate those matters, and his stated ignorance of them as of November 2015, is *nihil ad rem*.

94. This serves to highlight the fact that Dr Sheehan did not give evidence and it illustrates some of the difficulties that arose from that fact and from the fact that Mr Shannon effectively purported to stand in Dr Sheehan's shoes in his evidence to the High Court. That is a point to which I will return below.
95. Returning to the dealings between the parties leading up to the Settlement Agreement, there were further exchanges on 11 and 12 November in which Mr Hickey sought to explore the option of Dr Sheehan discharging only his liabilities arising from the guarantee judgment (which Mr Hickey calculated at €3,124,481). Ultimately, Mr Simons indicated that he was instructed that Talos was "*not willing to sign anything unless the JCS liability is also dealt with*" (email of 12 November 2015). In adopting that approach, Talos was influenced by contact that it had received from HIG (also on 12 November) which indicated that it was trying to arrange funding so that Talos "*can get its money back*" (Judgment, paras 71-73).
96. HIG's role was of some significance in this context. According to Mr Shannon, HIG's "*strong preference*" was for a resolution that would involve Talos entering into a deed of release in favour of Dr Sheehan.²⁸ HIG's intervention on 12 November was seen by the Judge as strengthening Talos' position *vis a vis* Dr Sheehan and that appears to be reflected in the terms of an email sent by Mr Shannon to Mr Simons on 13 November 2015 where he indicated that he was acting for Dr Sheehan "*in relation to his current refinancing transaction*", noted Talos' unwillingness to sign the requested form of

²⁸ Day 2, page 82.

release until all of the costs incurred by it against Dr Sheehan and JCS were addressed and asked for the “*exact amount*” being sought by Talos in order for Dr Sheehan to seek “*additional funding from his lenders*”.

97. Mr Simons responded to Mr Shannon’s request on the same day. Apart from the fact that a figure of €10,000 was now given for “*additional costs to be incurred up to the date of full redemption*” and that the costs figure of €150,000 was no longer described as an estimate, Mr Simons’ email was materially identical to that sent by him on 11 November and the attachments to it were the same. No total was given for the amounts set out in the email but they in fact total €3,976,868.59.
98. Mr Hickey was out of the picture at this stage, Mr Shannon having taken over responsibility for dealing with Talos/Mr Simons. He did not review the earlier email correspondence at this point. He did read the email of 13 November and read the amount of €516,505 for the JCS costs.²⁹ Once again, however, Mr Shannon could not be sure that he had opened the attachment or read the schedule.³⁰
99. We next come to the two emails of 16 November 2015 from Mr Simons to Mr Shannon on which the Plaintiff’s case effectively rests. In the first (sent at 14.08) Mr Simons refers to having taken instructions and confirmed that Talos had obtained costs certificates against Dr Sheehan, JCS and others on a joint and several basis in the amounts of £436,285.74 and £184,722 (I have already referred to these costs

²⁹ Day 2, page 134.

³⁰ Day 3, page 48.

certificates). This email was, it seems, prompted by an earlier telephone conversation between Mr Shannon and Mr Simons in which reference had been made to the Costs Certificates. The Euro equivalent of those amounts, Mr Simons continued, “is €878,262.89 (based on today’s spot-rate as per www.xe.com)”. Mr Simons then stated:

“My client’s intention is, for so long as the amounts due thereunder are outstanding, to enforce these costs certificates in this jurisdiction before releasing the existing charging orders. My client will accept payment of €842,387.49 in full and final settlement, subject to entering into a mutual settlement agreement. However, this would need to be dealt with at the same time as payment of the €3.1 m approx. judgment amount.”

This email was sent as part of a longer chain of emails and immediately below it was Mr Simons’ email of 13 November.

100. The other email is shorter:

“Given that my client has Judgment for the €878,262.89 it is not prepared to discount by €150,000 but would be prepared to discount to €842,000.”

This email was also sent as part of a longer chain and immediately below it was Mr Simons’ earlier email of 16 November and, beneath that, a further copy of his email of 13 November.

101. Also on 16 November 2015, Mr Shannon emailed Mr Simons setting out his understanding that Talos was agreeable to a full and final settlement of all on payment of “*the sum of €3,958,536 (inclusive of €842,000 together with payment of the €3.1m approximate judgment amount)*” and that, in consideration of such payment, Talos “*will return ownership and control of JCS to our client.*”. Neither of Mr Simons’ emails of 16 November referenced a sum of €3,958,536 or gave sufficient information to allow that amount to be calculated. It could readily be calculated by reference to Mr Simons’ email of 13 November, however. €3,958,536 was the settlement amount provided for in the Settlement Agreement and that amount was duly paid by Dr Sheehan, presumably from funds provided by HIG.
102. I have already set out paragraphs 122 – 126 of the Judgment which express the Judge’s conclusions on the misrepresentation claim. Earlier in his Judgment, the Judge had suggested that the claim would “*stand or fall*” on the basis of whether the Court concluded that the 16 November email (referring here to the earlier email of that date) “*amounted to a misrepresentation by [Mr Simons] to Mr Shannon that all the UK Costs Certificates ... were outstanding.*” For the reasons set out in paragraphs 122-126, the Judge determined that issue against Dr Sheehan and his claim failed accordingly.
103. That conclusion was one which the Judge was entitled to reach in my view. I do not propose to repeat his analysis. However, a number of the points made by the Judge appear to me to be worthy of particular emphasis:

- Comparison of the schedule attached to the 22 September email on the one hand and that attached to the 11 November and 13 November emails on the other disclosed a very significant reduction in the relevant costs and expenses of JCS – a reduction well in excess of €1.5 million. The obvious explanation for such a significant reduction in the costs and expenses being claimed by Talos under Article 17 of the Facility Agreement was that funds had been recovered by Talos which it credited against those costs and expenses. While no express reference is made to any such credit – a point emphasised on Dr Sheehan’s behalf in this appeal - no plausible alternative explanation was ever offered on Dr Sheehan’s behalf.
- A comparison of the two schedules also indicated a significant reduction in the amounts being claimed in respect of fees paid or payable to Clifford Chance. The unpaid fees due to Clifford Chance also reduced significantly. The amount due against the larger of two invoices marked unpaid on the earlier schedule had reduced from €747,412.07 to €517,659.67 and in the later schedule that invoice was marked “*part paid*”. A significant part-payment had clearly been made.
- The amount shown in the later schedule (sent with the emails of 11 and 13 November) as being due to Clifford Chance was significantly less than the total of the amounts in the Costs Certificates.
- The total of the amounts in the Costs Certificates significantly exceeded the amounts that had been specifically and unambiguously identified in the emails

of 11 and 13 November 2015 (in response to specific requests on Dr Sheehan's behalf) as being the amounts that Talos required to be paid to return control of JCS (which included not just amounts due to Clifford Chance but other legal and professional fees).

In light of these considerations, the Judge was entitled to conclude that a reasonable person would not have understood the 16 November emails as meaning that the full amount payable under the Costs Certificates remained undischarged. Far from that being "*the only rational interpretation*" of those emails, such an interpretation made little or no sense in light of the contents of the emails of 11 and 13 November and the schedules attached to them.

104. It is said that the Judge wrongly disregarded the evidence of Mr Shannon as to how he understood the emails of 16 November 2015. But the test was not what was Mr Shannon's subjective understanding of the emails. As a matter of general principle (and I shall refer in a moment to important qualifications of that general principle), the test is an objective one. It is expressed thus in *Chitty on Contracts* (33rd ed; 2018) ("*Chitty*").

"The question is not solely one of looking at the words used: the question is how the words would be understood by a reasonable person in the factual context."
(at para 7-006)

The same point is made in the following passage from *Cartwright* which is useful in that it refers specifically to express and implied representations:

“Where the alleged misrepresentation was express, the question is how a reasonable person in the claimant’s position would have understood the words used. Where it is alleged that there was an implied representation, the question is what a reasonable person would have inferred was being impliedly represented by the representor’s words and conduct in their context.” (para 3-06)

105. This is, in essence, how the Judge approached the question of whether the 16 November emails misrepresented that the entire amounts of the UK Costs Certificates remained outstanding. He looked at those emails in their factual context and asked how a reasonable person would have interpreted them. In his view, a reasonable person would have carefully reviewed the earlier emails that formed part of a single chain of emails and the attachments to them and, reading the 16 November emails against that background, would not have understood them as stating that the entire amounts of the UK Costs Certificates remained outstanding. On the contrary, when all of the emails were “*viewed in the round*”, it was “*obvious*” that some of those Costs Certificates and/or some of the costs and expenses for which JCS was liable had in fact been paid (Judgment, at para 123).

106. The Judge was, in my view, entirely justified in disregarding Mr Shannon’s evidence in this context. He was entitled to take the view that the notional “*reasonable person*” would have reviewed and understood the earlier correspondence. Mr Shannon had

signally failed to do so and, in light of that failure, he could not be regarded as a reliable proxy for such “*reasonable person.*”

107. Criticism is also made of the Judge for failing to address the evidence given by Mr Livingstone and the differences between his evidence and the evidence given by Mr Simons as to the meaning of the emails of 16 November 2015. Mr Livingstone gave evidence to the effect that in his view the emails *did* say that the UK Costs Certificates were unpaid and that they were correct in saying so because, in essence, no final decision had been made as of 16 November 2015 regarding the allocation of the monies that Talos had recovered from JCS. Mr Livingstone was not the author of the emails. Even if he had been the author, for the reasons already set out, his opinion as to their proper interpretation was not relevant or admissible (save to the extent that his state of mind might be relevant to the issue of fraud) and the Judge made no error in not having regard to it in this context.

108. Next it is said that the Judge failed to apply the test for misrepresentation by silence/IMPLIED misrepresentation identified by Mr Salter in his evidence and, in particular, that he failed to ask himself whether, in all the circumstances, a reasonable person in Dr Sheehan’s position would “*naturally have assumed that the Settlement Waiver Agreement did not exist and that, had it existed, he would in all the circumstances have been informed of it.*” . That formulation derives from the decision of the Court of Appeal of England and Wales in *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2018] EWCA Civ 355, [2018] 1 WLR 3529 and that Court’s consideration of the earlier decision of the Commercial Court in *Geest plc v Fyffes plc*

[1999] 1 All ER (Comm) 672. Both of these decisions are referred to in the Judge's Judgment.

109. The Judge did not express his conclusions in the precise terms of the test articulated in *Property Alliance Group Ltd v Royal Bank of Scotland plc*. That is, I think, explained by the manner in which the Plaintiff advanced his misrepresentation claim. The Plaintiff's argument was that, firstly, the emails of 16 November 2015 (mis)represented – in express terms – that the Costs Certificates were still outstanding in full and secondly, that this (mis)representation implied that nothing had been received by Talos from any source that reduced JCS's liability which in turn led to the implication that JCS's claim against IBRC for the return of the Deposit remained intact: Judgment, para 95. Having concluded that Dr Sheehan had failed to establish the fundamental premise of this argument – that the 16 November emails misrepresented that the Costs Certificates remained outstanding in full – the Judge took the view that it followed that Dr Sheehan's misrepresentation claim was not made out: Judgment, para 124. The Judge addressed the claim as it was advanced before him and Dr Sheehan cannot now be heard to complain about the Judge's approach.
110. In my view, there is no substance in this criticism in any event. As the Judge noted at para 96 of his Judgment, the Court of Appeal in *Property Alliance Group Ltd v Royal Bank of Scotland plc* emphasised that “*there must be clear words or clear conduct of the representor from which the relevant representation can be implied*” and that the court should not “*be too ready to find an implied representation*”. With these warnings in mind, can it plausibly be suggested that Dr Sheehan had succeeded in demonstrating

that a reasonable person in his position would “*naturally have assumed that the Settlement Waiver Agreement did not exist and that, had it existed, he would in all the circumstances have been informed of it*”? As Mr Salter noted in his report, that question is fact-sensitive. In my view, the evidence here fell far short of establishing what was required if Dr Sheehan was to succeed. It may be, as matter of fact, that Mr Shannon assumed that the IBRC Settlement Agreement did not exist and that if it did he would have been informed of it. It may be that Dr Sheehan assumed that also –he said as much in the course of his submissions to this Court, though of course he did not give evidence to that effect and Talos had no opportunity to cross-examine him on this (or any other) issue. But, in my view, there was no basis on which a *reasonable person* could properly have made any such assumption on the basis of the email correspondence discussed above. The wider context is also relevant. Dr Sheehan was at all times legally represented. It was open to him to seek confirmation of the position regarding any claim against IBRC. So far from doing so, no reference of any kind to the possible pursuit of such a claim was made by or behalf of Dr Sheehan in the period between 27 March 2015 up to the execution of the Settlement Agreement on 19 November 2015. Against this background, the need for there to be “*clear words or clear conduct*” before a representation is to be implied appears particularly important and one which ought not to be diluted. There were no such “*clear words or clear conduct*” here.

111. While these conclusions are sufficient to dispose of Dr Sheehan’s appeal, I wish to add some observations on the implications of Dr Sheehan not being called to give evidence.

112. It is clear from the authorities that the principle that the meaning of a representation is a matter for objective determination is not unqualified. According to Spencer Bower and Handley, “*where the representation is reasonably capable of more than one meaning, the representee must prove how he understood it and that, so understood, it was false*” (at para 4.14; see also at para 6.13).

113. *Cartwright* makes the same point, in the following terms:

“It is possible that, even when tested objectively, a statement could equally well be understood in different senses: it is simply ambiguous. It will then be for the representee to establish the meaning of the words which he actually understood; it is not enough for him simply to claim that one of the meanings was actionable, or to leave it to the court to decide the ‘ordinary’ meaning.” (para 3-06)

114. *Halsbury's Laws of England, Misrepresentation* (Volume 76 (2019)) is to the same effect:

“776. Where the representation is fairly capable of two or more constructions, in one of which it would be false and in the other or others true, it is for the representee to allege and prove in which of its possible meanings he understood it, and, so understanding, was induced by it to alter his position.”

115. As is evident from the discussion in these works, in this context issues of proof of meaning and proof of inducement are closely related. The discussion in *Halsbury* occurs in the course of considering inducement. *Spencer Bower and Handley* discuss

the requirement for evidence from the representee in both contexts. Here we are concerned solely with the issue of meaning, not inducement. Issues of inducement/reliance/causation were not reached by the Judge and were not debated before this Court.

116. In *Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland*, to which I have already referred, Clarke J stated (at para 87) that “*the claimant must show that he understood in the sense (so far as material) which the court ascribes to it ... and that, having that understanding, he relied on it. This may be of particular significance in the case of implied statements” (emphasis added). Although not so qualified on its face, I think it is clear that Clarke J was referring to cases where the alleged representation was ambiguous or uncertain, given that he had already set out the general principle that meaning was to be established by reference to what a reasonable person would have understood the representation to mean (paras 81 – 83).*
117. While these statements are statements of English law, there appears to be no reason to suppose that Irish law might adopt any different approach.
118. None of this material was referred to by Mr Lawrence or Mr Salter. That is not surprising. It seems reasonable to assume that each anticipated that Dr Sheehan would give evidence in support of his claim. It was not referred to by counsel in the High Court presumably because they considered that they were precluded from relying on any material that had been not been referred to by the experts. I have already expressed the view that this was incorrect.

119. *Prima facie*, this case would appear to be one where, having regard to the nature of the representation alleged, Dr Sheehan had to give evidence “*to establish the meaning of the words which he actually understood*”. On that analysis, Dr Sheehan’s failure to give evidence would indeed constitute a “*fatal infirmity*”. However, in light of the conclusions reached above, it is not necessary to express any concluded view on that question nor would it be appropriate to do so in the absence of detailed argument on the point.
120. Dr Sheehan’s appeal from the dismissal of his misrepresentation claim therefore fails.

The Section 17(2) Appeal

Argument

121. The respective positions of the parties on Dr Sheehan’s claim pursuant to section 17(2) of the 1961 Act can be stated relatively briefly. According to Dr Sheehan, the IBRC Settlement Agreement expressly provided that the payment of €1.7 million by IBRC to JCS was made in settlement of Talos’ claim for the recovery of the Deposit. The Judge had wrongly “*traded*” Talos’ claim and failed to recognise the connection between that claim and the compromise of the claim made in the IBRC Settlement Agreement. The suggestion that the claim for which the payment was made was the claim of JCS, rather than the claim of Talos, was “*merely an argument of convenience*” adopted by Mr Livingstone in his evidence. The Judge had failed to address the merits (or

otherwise) of the JCS claim. The reality disclosed by the evidence was that Talos had asserted its entitlement to recover the Deposit from IBRC and had concurrently asserted its entitlement to recover the same Deposit from Dr Sheehan (under the Guarantee) and “[a]ccordingly, IBRC and Dr Sheehan were ‘concurrent wrongdoers’” within the meaning of Section 11(1) of the 1961 Act. It was not necessary that Talos’ claims against IBRC and Dr Sheehan should involve any “common wrong” (the decision of the Supreme Court in *Cafolla v O’Reilly* [2017] IESC 17, [2017] 3 IR 209 being cited in support of that proposition); what was required was that IBRC and Dr Sheehan should have caused “the same damage”. Having regard to what was said by the High Court (Barniville J) in *AIB plc v O’Reilly* [2019] IEHC 151, [2019] 3 IR 722, the claims against IBRC and Dr Sheehan “related to precisely ‘the same damage’” and thus section 17 of the 1961 Act was applicable.

122. In response, Talos contended that it was not the claimant or injured party *vis a vis* IBRC. It emphasised the following “key facts”: (i) the Deposit monies were paid to IBRC by JCS; (ii) as payer of the Deposit, JCS was the only party entitled to recoup it; (iii) Dr Sheehan’s own legal advisors had accepted that any claim against IBRC, such as it was, lay with JCS and (iv) JCS had sought and obtained independent legal advice as to the merits of such a claim. Reliance was also placed on the evidence of Mr Wallace to the effect that the Special Liquidators “were always very clear that the only party we could deal with, we could contract with, we could settle with was JCS” and that while a number of other parties had been included in the IBRC Settlement Agreement “on a waiver basis”, “payment had to go to JCS.” That evidence, Mr Dunleavy suggested, was “definitive”. The fact that the correspondence and engagement leading to the

settlement was conducted by Talos and/or its legal advisors, Clifford Chance, did not alter the legal position of JCS as the putative injured party.

123. That was, so Mr Dunleavy submitted, “*the beginning and the end of the matter*”. Once the Judge was satisfied that there were two different injured parties, it was not necessary for him to go on to analyse whether it was “*the same damage*”. While that issue was addressed in Talos’ written submissions – it being said there that the damage was *not* the same damage - that point was not pressed at the hearing and, in any event, I note that the Respondent’s Notice filed by Talos did not invite the Court to affirm the Judgment on any additional grounds. The key issue on appeal, therefore, is whether the Judge was correct in the conclusion he reached that section 17(2) did not apply because for the purposes of the 1961 Act the injured parties were different.

Discussion and Conclusions

124. This aspect of the appeal presents a net question that does not permit of elaborate or extended analysis.
125. Section 11 of the 1961 Act provides that:

“(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;

(b) the wrong on the part of one or both may be a tort, breach of contract or breach of trust, or any combination of them;

(c) it is immaterial whether the acts constituting concurrent wrongs are contemporaneous or successive.”

126. Section 17(1) and (2) provide:

“(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 a record 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."

127. Section 35(1)(h) provides that, for the purpose of determining contributory negligence, *"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"*

128. Reference should also be made to section 16 of the 1961 Act (*Discharge and estoppel by satisfaction*). Section 16(1) provides that *"[w]here damage is suffered by any person as a result of concurrent wrongs, satisfaction by any wrongdoer shall discharge the others whether such others have been sued to judgment or not."* Section 16(2) then provides that *"[s]atisfaction means payment of damages, whether after judgment or by way of accord and satisfaction, or the rendering of any agreed substitution therefor."* Section 16(3) provides that if the payment is of damages, it must be of the *"full damages"* agreed or adjudged to be due otherwise it operates as a partial satisfaction only.

129. In *Cafolla v O' Reilly* [2017] IESC 17, [2017] 3 IR 209 O'Donnell J (as he then was), speaking for the Supreme Court, observed that the "*provisions of the 1961 Act in relation to concurrent wrongdoers are a mystery whose secrets have been revealed only to a few, and ss 16 and 17 and the relationship between the two provisions is particularly Delphic*" (para 25). The principal issue in *Cafolla v O' Reilly* was whether the proceedings against the first defendant were in respect of the "*same damage*" as earlier proceedings in Northern Ireland that had been compromised. The High Court decided against the plaintiffs on a preliminary issue, heard without oral evidence, and proceeded to strike out the claims against the first defendant. While that decision was upheld by this Court on appeal, the Supreme Court allowed the plaintiffs' further appeal and set aside that order. In O'Donnell J's view, the issues were too complex to be dealt with satisfactorily or fairly by way of preliminary issue and ought to be addressed at a full hearing "*in which all the evidence can be adduced*" (para 30).
130. Here, of course, the section 17 issue was determined at trial and with the benefit of evidence, including the evidence of Mr Livingstone and Mr Wallace.
131. For two (or more) persons to be "*concurrent wrongdoers*" both or all must be (i) "*wrongdoers*" who are (ii) responsible to a third person ("*the injured person or plaintiff*") (iii) "*for the same damage*". What constitutes "*the same damage*" in this context presents significant difficulty and has been the subject of analysis in cases such as *Moloney v Liddy* [2010] IEHC 218, [2010] 4 IR 653 and *ACC Bank plc v Johnston* [2011] IEHC 108, both decisions of Clarke J (as then he was) in the High Court.

132. However, before one reaches the issue of whether it is “*the same damage*”, the person who has suffered the damage (“*the injured person*”) must be identified and it is clear from section 11(1) that for wrongdoers to be “*concurrent wrongdoers*” they must all be responsible to the same “*injured person*”.
133. Here, Dr Sheehan says that he was a “*wrongdoer*” *vis a vis* Talos insofar as he was liable under the Guarantee and was sued to judgment on foot of it. Notwithstanding the decision of the High Court in *AIB plc v O’ Reilly* [2019] IEHC 151, [2019] 3 IR 722 – where this particular issue does not appear to have been the subject of any real debate - there may be scope for argument as to whether a claim for payment on foot of a guarantee is properly characterised as a claim for breach of contract (and is thus a “*wrong*” within the scope of section 2(1) of the 1961 Act). In any event, no such argument was made here and, accordingly, for the purposes of section 17(2) Dr Sheehan must be taken to be a “*wrongdoer*” responsible to Talos (the “*injured party*”) for JCS’s failure to repay the Deposit Loan to Talos and/or his own failure to perform his obligations as guarantor of that loan.
134. The crucial question, therefore, is whether the Judge was correct in holding that IBRC was not a “*concurrent wrongdoer*” for the purposes of section 17 (1), on the basis that any claim against IBRC in respect of the forfeited Deposit was the claim of JCS rather than Talos and thus that IBRC was not a “*wrongdoer*” *vis a vis* Talos.
135. While claims were asserted in correspondence both by Talos and JCS (and a claim appears also to have been made on behalf of JCS in the IBRC liquidation), neither party

ever brought a formal claim against IBRC for the recovery of the Deposit. There appeared to be a significant measure of consensus in the evidence that, as a matter of law, any such claim lay with JCS (Mr Brennan, who it will be recalled gave evidence for Dr Sheehan, said in this evidence that he had come to the view that “*the only realistic prospect for pursuing the return of the deposit was JCS*”³¹ and Mr Hickey gave evidence of having advised Dr Sheehan that “*if there is any claim for recovery of these deposit monies that claim rests with JCS*”;³² furthermore, Talos’ own advice was that any claim brought by it had little prospect of success). That is hardly surprising. The Deposit had been paid by JCS. The fact the funds for the Deposit had been advanced by way of loan by Talos and that payment of the Deposit was effected directly between Clifford Chance and the Special Liquidators does not alter the fact that the obligation to pay the Deposit was an obligation of JCS, not an obligation of Talos, nor does it alter the fact that the funds used to pay the Deposit were, as a matter of law, the funds of JCS. However, the evidence fell some way short of suggesting that such a claim was likely to succeed (and JCS’s own advisors, Mason Hayes and Curran, were notably downbeat in their assessment of any such claim when advising the JCS board that it should accept the offer of a €1.7 million payment). Be that as it may, IBRC agreed to repay a significant proportion of the Deposit, on the terms set out in the IBRC Settlement Agreement.

136. The IBRC Settlement Agreement contained mutual waivers and releases. Talos (*inter alia*) waived and released all claims it might have against IBRC and the Special

³¹ Day 4, page 8.

³² Day 3, page 112.

Liquidators (and *vice versa*). But only JCS had any entitlement to receive any payment under the Agreement. Had the promised payment not been made, only JCS would have had the right to take action to enforce its payment. Talos would have had no standing to do so. Just as it has been said that “*those who are left in possession of the battlefield have won*”, it appears to me that the crucial indicator of what potential liability was being settled here is the identity of the party who, on performance of the IBRC Settlement Agreement, was left in possession of the sum paid by IBRC in order to obtain the release of any claims against it (and against the Special Liquidators). That party was JCS, not Talos. Under the Agreement, Talos did not have any claim to any part of that sum. In the language of section 17(2) “*the amount of the consideration paid for the release or accord*” was paid by IBRC to JCS, not to Talos. That, in my view, is the only reliable guide to identifying for the purposes of the 1961 Act the “*injured party*” to whom IBRC was responsible.

137. Neither the fact that the engagement that led to the IBRC Settlement Agreement was initiated by Talos nor the fact that the settlement monies were ultimately paid over to Talos in partial discharge of JCS’s liabilities to it provides any basis on which the court could properly characterise the IBRC Settlement Agreement as settling a claim by Talos or for regarding Talos as the “*injured party*” in this context. The character of the payment must be assessed objectively, by reference to the terms of the IBRC Settlement Agreement, and not by reference to the discussions which preceded that Agreement. In any event, the evidence of the negotiating parties – Mr Livingstone and Mr Wallace – was entirely consistent with the terms of the Agreement. Their evidence was also entirely inconsistent with any suggestion that the Agreement was anything other than a

genuine agreement or that it reflected some “*arrangement of convenience*” intended to disguise the “*reality*” that IBRC was making a payment to Talos.

138. As for the fact that the settlement amount was subsequently paid on to Talos, that payment was not made pursuant to the IBRC Settlement Agreement but rather under the separate Facility Agreement governing the relationship of Talos and JCS as lender/borrower. Under the IBRC Settlement Agreement, the sum paid to JCS was its property absolutely. The Agreement did not purport to restrict how the monies were to be applied by JCS. Any such restrictions – *de jure* or *de facto* – arose from the terms of the Facility Agreement and from the fact that JCS was significantly indebted to Talos as of the end of October/start of November 2015.
139. It follows that I would reject this aspect of Dr Sheehan’s appeal. Dr Sheehan and IBRC were not “*concurrent wrongdoers*” within the meaning of section 11(1) of the 1961 Act because to the extent that, for the purposes of the 1961 Act, IBRC is to be considered as a wrongdoer, it was a wrongdoer *vis a vis* JCS, not Talos and had no responsibility to Talos for any damage that it may have suffered arising from advancing the Deposit Loan to JCS. Section 17(2) therefore has no application in the circumstances here.
140. In light of that finding, it is not necessary to consider any issue concerning the concept of “*the same damage*”.
141. The appeal from the dismissal of the section 17(2) claim also fails.

142. Before leaving this aspect of the appeal, I re-iterate that no issue was raised on this appeal as to the manner in which the JCS monies were allocated by Talos. Nor was it suggested that Talos had benefitted from any double-recovery or over-recovery.

Other Issues

143. I turn now to the complaints made by Dr Sheehan about the statements made by the Judge in his Judgment.
144. Before addressing these further, however, I should deal with the conflict of interest issue adverted to by Dr Sheehan in his submissions. On Day 3 of the hearing the Judge disclosed to the parties that, “*several years before*”, while in private practice, he had given partnership advice to AMOSS, the solicitors for Talos (Twomey J was, of course, a well-known expert in partnership law and author of the leading Irish text on that subject). Mr Simons was (and is) a partner in AMOSS. The Judge explained that he had been prompted to make the disclosure when he did because it had become apparent to him in the course of the previous day’s hearing, and in particular from the evidence of Mr Shannon, that there was a conflict between his evidence and the evidence that was going to be given by Mr Simons and “*if this Court were to prefer Mr. Simons’ evidence, a former client of mine, over the evidence of Mr. Shannon, who was not a client of mine, this could have a very significant impact on the outcome of the case.*” Therefore, he went on, while he did not have any actual conflict or interest in the outcome of this trial, “*there could be a perception that I might have a bias in favour of*

one witness' evidence over another witness' evidence because one was a former client of mine and one was not.” The Judge then rose to allow instructions to be taken from the respective parties.

145. Counsel duly took instructions and Mr Dunleavey told the Court that his client (Talos) had no difficulty with the Judge continuing to deal with the case and Mr Cush SC (for Dr Sheehan) indicated that that was his client’s position also and that “*we are anxious to proceed*”. The hearing then proceeded.

146. In these circumstances, in the absence of any suggestion that the disclosure made by the Judge was either inaccurate or incomplete – and no such suggestion has been made – it is not open to Dr Sheehan at this stage to attempt to revive this issue or to maintain, as he did in argument, that there was a “*definite conflict*” and/or that the Judge’s subsequent determination of his claim demonstrated such a conflict. If authority is needed for that proposition, it is supplied by *Corrigan v Irish Land Commission* [1977] IR 317. Here, in contrast to *Corrigan*, the potential conflict was brought to the attention of the parties by the Judge and Dr Sheehan, who was at that stage represented by solicitor and counsel, *expressly* waived any objection to him proceeding with the trial. Having done so, it is much too late to seek to make such an objection now.

147. For completeness, I would note that Dr Sheehan was mistaken in suggesting that the fact that Mr Simons was going to give evidence was first indicated in the course of the hearing. As Mr Dunleavey explained, Mr Simons had provided a detailed witness

statement prior to the commencement of the trial and Dr Sheehan was accordingly on notice of the fact that Talos proposed to call him as a witness.

148. The principal complaint made by Dr Sheehan relates to the Judge’s references to the possibility of an *Isaac Wunder* Order being made against Dr Sheehan and the suggestion in that context that Dr Sheehan was a “*serial litigant*”. In my view, there is undoubted force in that complaint. Giving the principal judgment in the Supreme Court in *Defender Limited v HSBC France (formerly HSBC Institutional Trust Services (Ireland) Limited)* [2020] IESC 37, [2021] 1 ILRM 1, O’Donnell J (as he then was) noted “*there is no reason to deprecate private parties seeking to litigate claims in courts when they cannot resolve them otherwise.*” That is, he went on to observe, “*a core function of the administration of justice.*” An important part of the administration of justice, he continued, is that “*a party, in particular the losing party, should believe that his or her case was fairly ventilated and considered.*” (at para 24).
149. Of course, the right of access to the courts is not absolute and other rights and interests are also engaged in this context, including the right of citizens “*to be protected from unnecessary harassment and expense*” and courts would be failing in their duty if they allowed their processes “*to be repeatedly invoked in order to reopen issues already determined or to pursue groundless and vexatious litigation*”: *Riordan v Ireland (No 4)* [2001] 3 IR 365, at 370. That is the basis on which the courts have jurisdiction to make an *Isaac Wunder* order.
150. Here, it was not suggested by Talos that Dr Sheehan’s claim against it sought to “*reopen*

issues already determined” or involved the pursuit of “*groundless and vexatious litigation*” such as might engage the High Court’s jurisdiction to make an *Isaac Wunder* order against Dr Sheehan and no application for such an order was made by Talos. In my judgment in *Houston v Doyle* [2020] IECA 289 (Donnelly and Binchy JJ agreeing), I expressed the view that there may be circumstances where, even in the absence of such an application, a court might consider it appropriate to make such an order. However, I went on to observe (at para 69) that “*courts should tread very cautiously in this context, lest their fundamental role as impartial decision-makers be blurred and the court is perceived, however unfairly, as having ‘entered into the ring’*”, adding that “*the circumstances in which it may be necessary or appropriate for a court to consider making any form of Isaac Wunder of its own motion are likely to be rare indeed*” and that “[w]here such circumstances appear to arise, that context makes it particularly important that the party that would be affected by any such order is given an adequate opportunity to be heard before any decision is made.”

151. While no such order was made by the Judge here, the statements made by him in his Judgment – a Judgment published not just to the immediate parties and their advisors but to the world at large – were very critical of Dr Sheehan and suggest to the reader that a basis for making such an order existed. Dr Sheehan was not on notice that the Judge was going to address this issue and he and his legal team had no opportunity to be heard or to address the Judge’s concerns and criticisms. That was not an appropriate or fair procedure and in the circumstances the Judge ought not to have addressed this issue in his Judgment.

152. The tenor and terms of the criticisms made by the Judge were also unfortunate. The State makes available a system of courts to adjudicate on (*inter alia*) civil claims between private parties. It is regrettable that the pursuit of such claims should be characterised by the Judge as the pursuit of “*private disputes or private agendas*” or “*private grievances*”, the apparent implication being that the parties to such claims have no legitimate claim to access to the courts. That is emphatically not so. The resolution of such claims is a core part of the administration of justice which, under Article 34 of the Constitution, is (with some limited qualifications) exclusively committed to the courts established by it. The recent decision of the Supreme Court in *Zalewski v Workplace Relations Commission* [2021] IESC 24 highlights the critical place of Article 34 in the constitutional order of the State.
153. Nor are litigants to be criticised merely for being involved in complex and contentious litigation that necessarily takes substantial time and resources to resolve. It is as much the duty of the courts to hear and determine complex claims as it is to resolve more straightforward ones. Courts are, of course, entitled to subject such claims to case management with a view to the effective use of their resources (see, for instance, the observations of Charleton J in *Defender*). The courts are also entitled to prevent their resources being wasted through vexatious litigation. However, it is not the case that, simply because certain claims are complex and require significant amounts of court time, that involves the “*monopolising*” of court resources or gives rise to any necessary inference that court time is being wasted and/or the process of the court is being abused.
154. The litigation involving Blackrock Clinic was certainly complex, involving multiple

parties, actions, issues and applications. At the centre of the litigation was a very valuable asset. The litigation was extremely contentious. It is hardly surprising that the resolution of that litigation has required significant court time and in any event there was and is no basis for suggesting that Dr Sheehan somehow bore sole responsibility for the litigation.

155. I also regard as unfortunate the comments made by the Judge about the New York litigation and the English litigation and the weight he seems to have given to the comments made by Flaux J in the English High Court. I express no view as to whether Flaux J was entitled to make the comments he did, having regard to the material before him. In my view, however, those comments had no relevance to any issue that the Judge had to decide. The Judge was not concerned with the allegations made in the New York litigation or the basis (if any) for those allegations. The Judge was, rather, concerned only with adjudicating on the claims made by Dr Sheehan in these proceedings. As I have said, it was not suggested that those claims were “outrageous” or “vexatious” or an “abuse of process” and it was regrettable that this language found its way into the Judgment in the way it did.

156. The other objections made by Dr Sheehan have considerably less force. It was at all times Talos’ position that Dr Sheehan’s failure to notify it of the redemption of Mr Duffy’s loans constituted a misrepresentation and it was one of the acts of default that Talos relied on before Ryan J in order to establish its entitlement to demand repayment of the Deposit Loan from JCS and payment under the Guarantee from Dr Sheehan. It appears from the detailed judgment of Ryan J that these specific defaults were not

contested: para 58. The Judge also referred to documentary material which, on its face, appears to support Talos' position and while it is said that the Judge had erred in stating that Dr Sheehan had misrepresented the position to Talos, nothing has been said to substantiate that bald assertion. In any event, this statement was made by the Judge as part of his general narrative and does not appear to have played any role in the Judge's assessment of the issues for adjudication before him.

157. Finally, there is the Judge's reference to *Cooke v Cronin*. The Judge clearly appreciated that the principles in *Cooke v Cronin* had no application where a solicitor is not being sued but is simply a witness for a party (para 132). He appears to have referred to *Cooke v Cronin* because, in his view, the "underlying rationale" implied "that, at a minimum, particular care should be taken by litigants and their professional advisers before making serious allegations against a professional who is not a party to the litigation" (para 133). That proposition appears to me to be uncontroversial: serious allegations – and an allegation of deceit/fraudulent misrepresentation is, on any view, a serious allegation to make against *any* person, whether a professional or not – should be made only after careful consideration and upon reasonable grounds. I doubt whether *Cooke v Cronin* adds any real support to that proposition but it does not need any such support. The real point being made by the Judge in this context is that made in paragraph 134 of his Judgement, namely that there were no sufficient grounds for the very serious allegations made by Dr Sheehan against Mr Simons and that those "unfounded" allegations were potentially detrimental to his professional reputation and practice. As I have made clear already, the Judge was, in my view, fully entitled to conclude that the allegations that Mr Simons had been guilty of fraudulent misrepresentation were

“*unfounded*” and it is obvious that such allegations were potentially damaging to Mr Simons.

158. It is asserted in Dr Sheehan’s notice of appeal that the Judgment was indicative of the Judge having formed an “*antipathy*” to him. While I have been critical of certain of the statements made by the Judge, I do not accept that the Judgement demonstrates antipathy to Dr Sheehan. The Judge deals carefully and thoroughly with the claims made by Dr Sheehan. For the reasons set out above, the Judge’s conclusions on the merits of these claims cannot be impeached. I do not understand that the Court is asked to set aside the Judgment on grounds of bias or unfairness. No argument to that effect is advanced in Dr Sheehan’s submissions and in my view there is no proper basis on which such an order might be made here. Insofar as the Judge was critical of Dr Sheehan *qua* litigant, this Court’s judgment suffices to vindicate Dr Sheehan’s position.

CONCLUSIONS AND ORDER

159. It follows that Dr Sheehan's appeal must be dismissed.

160. As his appeal has been entirely unsuccessful, it would appear to follow that Dr Sheehan should be required to pay the costs of the appeal. If he wishes to contend for any different order, he will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms I have suggested, Dr Sheehan may be liable for the additional costs of such hearing: In default of receipt of such application, an order in the terms proposed will be made.

Whelan and Binchy JJ have authorised me to indicate their agreement with this judgment and with the orders proposed