

THE HIGH COURT

[2021] IEHC 842

Record No. 2011/219MCA

IN THE MATTER OF
CUSTOM HOUSE CAPITAL LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF
THE COMPANIES ACTS 1963 – 2012 ON THE APPLICATION OF THE
INVESTOR COMPENSATION COMPANY DAC

JUDGMENT of Mr. Justice Heslin delivered on the 13th day of October, 2021

Introduction

1. On 21 October 2011 an order was made that Custom House Capital Limited (“CHC”) be wound up, pursuant to the provisions of the Companies Acts, 1963 – 2009. Mr. Kieran Wallace, a Chartered Accountant and Insolvency Practitioner, was appointed as official liquidator and administrator (hereinafter “the Liquidator”, or where the context requires, “the Administrator”) within the meaning of the Investor Compensation Act, 1998 (as amended) (hereinafter “the 1998 Act”).
2. The Investor Compensation Company DAC (hereinafter “ICCL”) is an independent statutory body established under the 1998 Act to provide compensation to customers of failed investment firms in the circumstances prescribed by the 1998 Act.
3. The present application is brought by ICCL pursuant to s. 231 of the Companies Act, 1963 and/or pursuant to the inherent jurisdiction of this court, seeking directions as regards the scope and operation of the ICCL’s right of subrogation pursuant to s. 35 of the 1998 Act, in circumstances where the ICCL has paid, or will pay, compensation to the clients of CHC who have suffered a “net loss” within the meaning of s. 30(1) of the 1998 Act.

4. The backdrop to the present application concerns a disagreement which emerged as between the ICCL and the Liquidator as to the scope of the ICCL's subrogation rights pursuant to s. 35(5) of the 1998 Act. This gave rise to correspondence in 2018 wherein the Liquidator asserted the view that s. 35(5) of the 1998 Act confers on the ICCL only a right of subrogation in respect of company assets in the liquidation. The interpretation contended for by the ICCL is that its right to subrogate to the claim of a compensated investor extends to the investor's right to maintain claims, not only as against company assets, but also as against certain client assets held by CHC. The ICCL's position was articulated as follows in a letter dated 13 March, 2018 sent by their solicitors to the Liquidator's solicitors: -

“It is the nature of subrogation that a subrogated claim carries the same status as the original claim. Therefore, if a client's claim is into the client assets held by the CHC or the assets of CHC then our client's subrogated claim should logically flow against those same assets. Our client does not accept that its subrogated claim is limited by the Act in the manner outlined in your letter. The nature and extent of our client's subrogated claim has been accepted by the receiver and administrators of W&R Morrough and by the Liquidator and administrators of Money Markets International Stock Brokers Limited (in Liquidation) (“MMI”). In the case of W&R Morrough this resulted in significant payments from the client bank accounts of W&R Morrough to our client on foot of its subrogated claim. The cash held in the client account of MMI have not yet been distributed in full and our client maintains its subrogated claim against that cash.”

5. Having regard to the differing interpretations contended for by the Liquidator and the ICCL, the latter sought an order directing the Liquidator to bring an application for directions to this court, in order to determine the scope of the right of subrogation. This gave rise to a judgment delivered by Ms. Justice Finlay Geoghegan on 31 January 2019 wherein she refused to direct the Liquidator to bring such an application but observed that if the ICCL is entitled and determines to bring such an

application, it “*will have to identify the compensated clients (or at least a representative sample thereof) and the rights of those clients to which it claims to be entitled to be subrogated in relation to client assets not yet returned.*” The court also commented on the fact that, if ICCL decided to make such an application, further information might be required from Mr. Wallace, *qua* Liquidator or Administrator. The court was satisfied that the infirmity in the then application was that the directions sought by ICCL did not relate to identified claims. The court indicated that the application was being refused because:

“... *there is not a properly identified factually-based dispute between ICCL and one or more compensated clients in relation to particular claims made by ICCL to be subrogated to specified rights of those clients to the return or transfer of their client assets remaining under the control of CHC, which would enable a court to properly consider and decide the many complex issues which will arise on any such disputed claims.*”

6. Thereafter, ICCL applied to this court, by motion dated 30 July 2019, for an order pursuant to s. 231 of the 1963 Act directing the Liquidator to provide the information sought and, by order made on 08 August 2019 (Pilkington J.), the Liquidator was directed to provide certain information and a stay was placed on distributions of client assets that form part of the statutory calculation of net loss in respect of all clients of CHC who have made a claim for compensation and are eligible investors.

7. The present application is brought pursuant to s. 231(3) of the 1963 Act which empowers creditors to “*apply to the court in relation to any exercise or proposed exercise*” of the Liquidator’s power “*to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.*”. The ICCL asserts *inter alia* that, in light of its right of subrogation pursuant to s. 35(5) of the 1998 Act, it is a creditor in the liquidation.

8. It is common case that Mr. Wallace did not take account of estimated future recoveries of misappropriated assets when calculating eligible investors’ net losses to date. The stance maintained by the ICCL is that the calculation of ‘net loss’ pursuant to s. 30(1) must take into account actual

recoveries and estimated future recoveries from the date of the commencement of the liquidation (hereinafter the “Determination Date”) and the delivery of a statement (or, if an interim statement is delivered, a final statement) to the ICCL specifying the relevant investor’s net loss and compensatable loss. The ICCL also maintains that, to the extent an interim statement is delivered, such an interim statement must take account of estimated future recoveries. In other words, the ICCL’s position is that events *after* the Determination Date are relevant to the proper calculation of net loss.

9. In the manner which will be explained in more detail, the foregoing are the key issues which arise in the present application, namely, the proper approach to the calculation of ‘net loss’ pursuant to s. 30(1) of the 1998 Act; the scope of the ICCL’s subrogation rights pursuant to s. 35(5) of the 1998 Act; as well as certain issues arising if it is determined that the ICCL is correct in what it contends for. This is clear from the questions posed in the ICCL’s Motion to which I will shortly refer.

10. For the purposes of the present application, Mr. Wallace, *qua* Liquidator, adopted the position that his role was limited to providing information. Thus, in his capacity as the Liquidator, Mr. Wallace was not represented at the hearing. Mr. Wallace, *qua* Administrator participated at the hearing, adopting the stance that he was not required to take into account actual and/or estimated future recoveries of money owed or belonging to the clients of CHC when calculating “net loss” for the purposes of s. 30(1) of the 1998 Act. Mr. Wallace’s attitude, *qua* Administrator, is that any such recoveries *after* the Determination Date (in the present case, 21 October 2011, when this court ordered the winding up of CHC) must not be taken into account when calculating net loss.

The *legitimi contradictores*

11. Appropriate *legitimi contradictores* were identified for the purposes of the present application, namely, Mr. Michael Nugent and Mr. Roger Day (hereinafter the “*Legitimi Contradictores*”). The compensation claims of 574 clients of CHC have been certified and paid to date. On 22 April 2013, Mr. Nugent received €20,000 compensation from the ICCL. In the present proceedings, he represents

the interests of eligible investors who have already received compensation. Mr. Day represents 1,372 eligible investors in CHC who have made a claim for compensation under the 1998 Act, but whose claims have not yet been certified by the Administrator and, therefore, have not yet received any compensation from the ICCL.

The questions arising in the present application

12. As appears from the relevant motion issued on behalf of the ICCL on 10 December 2019, the following are the specific questions which the court is asked to address:

- (1) Whether the calculation of net loss under s. 30(1) of the 1998 Act is to take into account, *inter alia*, actual recoveries and/or estimated future recoveries of client assets between the Determination Date and the delivery of a final statement by the Administrator certifying the net loss and compensatable loss of an eligible investor (hereinafter “the Net Loss Issue”). ICCL maintains that such recoveries of assets after the Determination Date must be taken into account by the Administrator when calculating net loss.
- (2) Whether the ICCL’s right of subrogation pursuant to s. 35 of the 1998 Act extends to client assets or whether it is confined to the assets of CHC. ICCL contends that its subrogation rights extend both to client assets and non-client assets. ICCL clarifies this by emphasising that it does not contend that it subrogates to all client assets held or maintained by CHC on behalf of investors but, rather, that it subrogates only to those client assets which form part of the statutory calculation of net loss (hereinafter “Net Loss Client Assets”).
- (3) If the ICCL’s right of subrogation extends to client assets (specifically, Net Loss Client Assets), whether it applies equally to such assets (as contended for by the ICCL) or whether it is allocated between such assets by reference to a purported allocation of the compensation payment as between those assets (the “Allocation Issue”).

- (4) If the ICCL’s right of subrogation extends to client assets, whether, in respect of eligible investors such as Mr. Day who have applied for compensation under the 1998 Act but whose claims (or part thereof) have not yet been certified, any distribution of client assets that have formed or will form or may form part of the calculation of net loss must take account of the ICCL’s right of subrogation (hereinafter “the Distribution Issue”). The ICCL submits that any such distribution should be net of the ICCL’s asserted right to participate in disbursements of client assets.
- (5) Whether the ICCL’s rights of subrogation, whether under the 1998 Act or otherwise, apply to the Net Loss Client Assets of eligible investors who have been overpaid compensation because (subject to the determination of the Net Loss Issue) either the calculation of net loss did not take into account relevant actual or future estimated recoveries, or because future recoveries were taken into account but were underestimated (hereinafter “the Overcompensation Issue”). The ICCL maintains that it is entitled, by way of subrogation, to the restitution of any overpayment of compensation.

The structure of this judgment

13. In terms of structure, this judgment looks first at the legislative framework which provides the backdrop to the application. Having looked at certain contents in the proposal by the European Commission and the subsequent Directive as well as relevant sections in the 1998 Act and certain of the 2015 Regulations made under same, I then refer to the affidavits and experts reports which comprised the evidence before the Court. Throughout this judgment, I will make reference to key submissions made in respect of the questions this Court was asked to address, particularly in the final section of the judgment which comprises the discussion and decision.

Legislative framework

14. To understand the legislative context in which the present application is brought, it is necessary to look at certain provisions in Directive 97/9/EC of the European Parliament and of the

Council of 3 March 1997 on Investor-Compensation Schemes (hereinafter “the Directive”). It will also be necessary to look at certain provisions in the 1998 Act which, it is not in dispute, was introduced to give effect in this jurisdiction to the Directive. It will also be necessary to look at certain provisions in the Investor Compensation Act, 1998 (return of investor funds or other client property) Regulations 2015 [S.I. No. 407 of 2015]. Before setting out relevant provisions from the foregoing, it is appropriate to set out an extract from the original proposal by the Commission of the European Communities (“the Commission”) for a Council Directive (COM (93) 38, Brussels, 22 September 1993).

The Commission’s proposal for a Directive

15. The following is an extract from the Commission’s proposal in relation to what became the Directive (p. 4):

“To begin with, no system of supervision can ever be watertight and, however good the prudential rules may be, failures will sometimes occur. In particular, no rules can prevent fraud, although good supervision will expose it sooner rather than later.

Two cases of failure should be distinguished:

(a) Failure of the investment firm without fraud.

In this first case, investors’ securities held by the investment firm for safekeeping and administration or pending delivery to clients or pending disposal should not be at risk.

Ownership of such securities remains with the investor, who should be able to recover them without undue difficulty.

On the other hand, clients’ funds held by the investment firm, following the disposal of securities or pending the purchase of securities, may be impossible to recover if they become part of the mass of assets of a bankrupt firm. In that case the investor would simply have a claim in the bankruptcy proceedings. A compensation scheme should allow the investor to

obtain some compensation without having to wait for the completion of those (normally lengthy) proceedings.

(b) Failure of the investment firm as a result of fraud.

Any firm may have the misfortune to suffer occasional dishonesty on the part of an employee. The firm would normally make good any loss to clients immediately and might well have insurance covering such an eventuality. Any problems in such cases should be dealt with between the investor and the firm, with the involvement if necessary of the supervisory authority. There should be no need in such a case for the intervention of an Investor Compensation Scheme.

On the other hand, the discovery by the competent authorities of serious fraud throughout a firm involving misappropriation of clients' assets would probably lead to its closure and winding-up.

If clients' money and/or securities had been misappropriated and if, as is likely in such cases, the firm's assets were insufficient to meet investors' claims there would be a role for the Investor Compensation Scheme.

It could of course be argued that risk is an inherent part of any investment operation and that the investor should take due care in his choice of and relations with an investment firm. No one, after all is obliged to purchase investment services.

On the other hand, it is clearly difficult for the smaller investor in particular to gauge accurately the financial and management strength of an investment firm.

Furthermore, the knowledge that an Investor Compensation Scheme is available can help maintain confidence in the markets and encourage smaller investor interest and involvement in them."

I will return to the Commission's proposal later in this judgment, in particular, in the discussion and decision section.

The Directive (Recitals)

16. The recitals of the Directive include the following: -

(2) Whereas Directive 93(22) EEC lays down prudential rules which investment firms must observe at all times, including rules the purpose of which is to protect as far as possible investor's rights in respect of money or instruments belonging to them;

(3) Whereas, however, no system of supervision can provide complete protection, particularly where acts of fraud are committed;

(4) Whereas the protection of investors and the maintenance of confidence in the financial system are an important aspect of the completion and proper functioning of the internal market in this area; whereas to that end it is therefore essential that each Member State should have an investor – compensation scheme that guarantees a harmonised minimum level of protection at least for the small investor in the event of an investment firm being unable to meet its obligations to its investor clients.

.....

(8) Whereas, therefore, every Member State should be required to have an investor – compensation scheme or schemes to which every such investment firm would belong;

Whereas each scheme must cover money and instruments held by an investment firm in connection with an investor's investment operations which, where an investment firm is unable to meet its obligations to its investor clients, cannot be returned to the investor; whereas this is entirely without prejudice to the rules and procedures applicable in each Member State as regards the decisions to be taken in the event of the insolvency or winding – up of an investment firm;

.....

(11) Whereas a harmonised minimum level of compensation of ECU 20,000 for each investor should be sufficient to protect the interests of the small investor where an investment firm is

unable to meet its obligations to its investor clients; Whereas it would therefore appear reasonable to set the harmonised compensation at ECU 20,000; Whereas, as in Directive 94/19/EC, limited transitional provisions might be required to enable compensation schemes to comply with that figure since this applies equally to Member States which, when this Directive is adopted, do not have any such schemes;

(12) Whereas the same figure was adopted in Directive 94/19/EC;

(13) Whereas in order to encourage investors to take due care in their choice of investment firms it is reasonable to allow Member States to require investors to bear a proportion of any loss; Whereas however, an investor must be covered for at least 90% of any loss as long as the compensation paid is less than the Community minimum;

....

(19) Whereas the investor must be compensated without excessive delay once the validity of his claim has been established; Whereas the compensation scheme itself must be able to fix a reasonable period for the presentation of claims; Whereas, however, the fact that such a period has expired may not be invoked against an investor who for good reason has not been able to present his claim within the time allowed;

...

(25) Whereas, in conclusion, a minimum degree of harmonisation of investor – compensation arrangements is necessary for the completion of the internal market for investment firms since it will make it possible for investors to do business with such firms with greater confidence, especially firms from other Member States, and make it possible to avoid any difficulties caused by host Member States applying national investor – protection rules that are not coordinated at Community level; Whereas a binding Community Directive is the only appropriate instrument for the achievement of the desired objective in the general absence of investor – compensation arrangements corresponding to the coverage of Directive

93/22/EEC; Whereas this Directive effects only the minimum harmonisation required, allows Member States to prescribe wider or higher coverage if they desire and gives Member States the necessary latitude as regards the organisation and financing of investor – compensation schemes;

HAVE ADOPTED THIS DIRECTIVE:”

17. It is clear from the foregoing that what is at issue concerns a minimum level of protection directed very much towards the “investor”, with a minimum level of compensation for each investor being set at €20,000 or 90% of the loss, whichever is the lesser. It is equally clear that an emphasis has been laid on *prompt* payment of such compensation.

The Directive (Articles)

18. Article 2 of the Directive makes clear what cover an investor – compensation scheme shall provide, in that Article 2(2) states as follows: -

“2. A scheme shall provide cover for investors in accordance with Article 4 where either:

- the competent authorities have determined that in their view an instrument firm appears, for the time being, for reasons directly related to its financial circumstances, to be unable to meet its obligations arising out of investors' claims and has no early prospect of being able to do so,

or

- a judicial authority has made a ruling, for reasons directly related to an investment firm's financial circumstances, which has the effect of suspending investors' ability to make claims against it,

whichever is the earlier”.

19. For present purposes, there is no doubt that a judicial authority has made a ruling in the foregoing sense, in circumstances where the relevant winding – up order was made on 21 October

2011 in respect of CHC. Thus, the second of the events envisaged by Article 2(2) has occurred. The balance of Article 2(2) states as follows: -

“Cover shall be provided for claims arising out of an investment firm's inability to:

- repay money owed to or belonging to investors and held on their behalf in connection with investment business,

or

- return to investors any instruments belonging to them and held, administered or managed on their behalf in connection with investment business, in accordance with the legal and contractual conditions applicable”.

Article 2(4)

20. Article 2(4) provides as follows: -

“4. The amount of an investor's claim shall be calculated in accordance with the legal and contractual conditions, in particular those concerning set off and counterclaims, that are applicable to the assessment, on the date of the determination or ruling referred to in paragraph 2, of the amount of the money or the value, determined where possible by reference to the market value, of the instruments belonging to the investor which the investment firm is unable to repay or return”.

21. Considerable emphasis is laid on Article 2(4) by the *legitimi contradictores* in support of the proposition that what is required is to look at the amount of the claim of a particular client as at the date of the commencement of the winding – up and any recoveries made during the course of the winding – up are not relevant. In other words, the assertion is made by the *legitimi contradictores* that compensation is paid based on the position as at the date of the winding – up, rather than by reference to the financial loss actually suffered. For the ICCL, it is submitted that Article 2(4) does no more than state that, in determining an investor’s claim, it is necessary to look at the legal and contractual conditions which were in force at the date of the commencement of the winding up and

that they are the rules which apply when determining the value of the investor's claim. ICCL contend, however, that this does not mean ignoring actual or estimated recoveries in the course of the winding – up. Doing so, submits the ICCL, could result in a situation where an investor is compensated for a loss he or she may not in fact have suffered at all.

Article 4

22. Article 4 is also of relevance and provides as follows: -

“1. Member States shall ensure that schemes provide for cover of not less than ECU 20 000 for each investor in respect of the claims referred to in Article 2 (2). . . .

2. A Member State may provide that certain investors shall be excluded from cover by schemes or shall be granted a lower level of cover. Those exclusions shall be as listed in Annex I.

3. This Article shall not preclude the retention or adoption of provisions which afford greater or more comprehensive cover to investors.

4. A Member State may limit the cover provided for in paragraph 1 or that referred to in paragraph 3 to a specified percentage of an investor's claim. The percentage covered must, however, be equal to or exceed 90% of the claim as long as the amount to be paid under the scheme is less than ECU 20,000”.

23. Before proceeding further, it is uncontroversial to say that it is the foregoing approach which was taken in this State as per the 1998 Act. In other words, a relevant investor is entitled to receive €20,000 or 90%, whichever is the lesser.

Article 9

24. The emphasis on compensating investors as soon as possible is clear from the contents of Article 9 which states as follows: -

“1. The compensation scheme shall take appropriate measures to inform investors of the determination or ruling referred to in Article 2 (2) and, if they are to be compensated, to compensate them as soon as possible. It may fix a period during which investors shall be

required to submit their claims. That period may not be less than five months from the date of the aforementioned determination or ruling or from the date on which that determination or ruling is made public.

The fact that that period has expired may not, however, be invoked by the scheme to deny cover to an investor who has been unable to assert his right to compensation in time.

2. The scheme shall be in a position to pay an investor's claim as soon as possible and at the latest within three months of the establishment of the eligibility and the amount of the claim.

In wholly exceptional circumstances and in special cases a compensation scheme may apply to the competent authorities for an extension of the time limit. No such extension may exceed three months...”

Article 12

25. Article 12 of the Directive provides as follows: -

“Without prejudice to any other rights which they may have under national law, schemes which make payments in order to compensate investors shall have the right of subrogation to the rights of those investors in liquidation proceedings for amounts equal to their payments”.

26. The ICCL comprises one of the “schemes” referred to in Article 12. During the hearing, the phrase “*liquidation proceedings*” (which appears in Article 12 of the Directive and in s. 35 (5) of the 1998 Act) has been the subject of a range of submissions. In short, the *legitimi contradictores* suggest that what is at issue is the rights of investors as against the *company’s* assets, not rights as against what might be called *client* assets. It is argued on behalf of the *legitimi contradictores* that the right of subrogation enjoyed by the ICCL, within the meaning of Article 12, is limited only to subrogation of claims against company–owned assets and would not extend to subrogation of claims against client assets, such as funds into which the monies of numerous clients had been invested i.e. “mixed funds”. The interpretation contended for by the *legitimi contradictores* is said by the ICCL to be wholly inconsistent with the provisions of Article 2(2) which, in the manner examined earlier, referred to a

judicial authority making a ruling, the effect of which was to suspend the ability of investors to make “claims” against an investment firm. For the ICCL, it is submitted that these are claims for the repayment of monies, with no distinction made in Article 2(2) between client and non – client assets. Rather, “claims” includes for the repayment of monies, howsoever held, submits the ICCL. With regard to the proposition that the words “*subrogation to the rights of those investors in liquidation proceedings*” confines ICCL’s subrogation rights to claims only against the company’s assets, the ICCL emphasised two matters. Firstly, a decision by Finlay Geoghegan J., given in these proceedings on 09 October 2012, and secondly, the definition of “*liquidation proceedings*” per the 1998 Act.

Judgment of Ms. Justice Finlay Geoghegan [2012] IEHC 382

27. In the present liquidation, an issue arose as to whether the Liquidator was entitled to look to client assets in order to be paid certain of his fees in the winding – up, in circumstances where work had been done in seeking to reconcile client claims to the various mixed funds. In opposition to the Liquidator’s application it was contended that, because client assets do not belong to the company, the relevant work was not liquidation work and, thus, the Liquidator was not entitled to fees in respect of same. From para. 40 of Finlay Geoghegan J.’s decision, the learned judge stated as follows: -

“40. It is true that many descriptions of the duties of a liquidator refer to the administration of the assets of the company, in particular, their realisation and distribution of the proceeds to those entitled, normally creditors in accordance with the relevant priorities. A liquidator has, in addition, currently a number of statutory duties which go beyond the core function of realisation and distribution.

41. However, it appears to me that what is required of a liquidator to wind up the affairs of a particular company will always depend upon the nature of the business or other activity conducted by the company prior to the making of the winding up order. Having regard to the business of CHC, the obligation to wind up the affairs of CHC requires the Liquidator to engage in an orderly termination of the involvement of CHC in the investment and

management of the client funds formerly under its control. A general description of such a task involves the return to the clients or transfer at their direction of the investments or cash to which they have a beneficial entitlement. The precise work done will depend, firstly, upon the nature of the investments and the contractual arrangements between CHC and the clients (which may have been terminated by the winding up order) and third parties. Secondly, it will depend upon what is required to be done to identify the investments or cash to which each client is beneficially entitled”.

28. At para. 42, Finlay Geoghegan J. commented on the manner in which the task was complicated by two factors which arose on the relevant facts and, at para. 43, she stated as follows: -

“43. Accordingly, I am satisfied that the Liquidator is correct in the decision he made that as part of the winding up of CHC, he is obliged to arrange for the orderly distribution of client funds held in investment vehicles provided by or under the control of CHC, either to those beneficially entitled or, where appropriate, to a qualified person or product at their direction”.

29. The learned judge then referred to submissions by those opposed to a payment of fees out of client assets as well as the submissions made by the Liquidator (the former being referred to in the judgment as the “dissenting clients”). At para. 48, Finlay Geoghegan J. held as follows: -

“48. Whilst I can understand that the dissenting clients who held equities and segregated cash accounts with stockbrokers may consider that this work was unnecessary as it did not tell them anything new, nevertheless, in my judgment, having regard to the facts referred to in the inspectors' reports and the practice within CHC of receiving initial investments into pooled client accounts and then paying the money out to a stockbroker or financial institution, the reconciliation process undertaken by the Liquidator was a reasonable and appropriate step for him to have taken prior to distributing or transferring equities and segregated cash accounts. His obligation, as part of the winding up of the affairs of CHC, is to facilitate or

effect the transfer of investments or cash to or at their direction of those beneficially entitled. He had to be satisfied that it was the relevant client's money and not another client's money which had been transferred to the stockbroker or other financial institution from the pooled client account”.

30. It is emphasised on behalf of the ICCL that the application before this Court concerns such pooled client accounts. It is submitted that it is clear from the judgment of Finlay Geoghegan J. and consistent with Article 2(2) of the Directive that the work involved in the liquidation of CHC is not merely limited to the realisation and distribution of assets owned by the company. Rather it involves dealing with the pooled client accounts and the submission is also made that the “*investors’ claims*” are not merely claims against company-owned assets in respect of any shortfall in the relevant investment, but also includes claims against pooled accounts for the return of the relevant investor’s proportionate share of that pooled account. All are said to be claims in the liquidation and rights in the liquidation proceedings. All are said by the ICCL to be subrogated pursuant to Article 12 of the Directive and pursuant to s. 35 of the 1998 Act.

1998 Act – certain definitions

31. Section 2(1) of the 1998 Act sets out the definition of “*liquidation proceedings*” as follows: -

“*liquidation proceedings’ includes –*

- (a) a compulsory or court liquidation under the Companies Acts,*
- (b) a creditor’s voluntary liquidation under the Companies Acts,*
- (c) any receivership or analogous process,*
- (d) bankruptcy proceedings under the Bankruptcy Act, 1988, and,*
- (e) any scheme of arrangement in consequence of the appointment of an examiner;”.*

32. It will be recalled that Article 12 of the Directive requires that, under national law, the relevant scheme (in this case the ICCL) “*shall have the right of subrogation to the rights of those investors in*

liquidation proceedings for amounts equal to their payments". Plainly, "*liquidation proceedings*" is given a very wide definition in s. 2(1) of the 1998 Act which is the domestic legislation giving effect to the Directive and extends to a wide range of insolvency processes including "*any receivership or analogous process*". Counsel for the ICCL submits that, in a receivership, a receiver is appointed by the charge-holder to realise the secured assets which have been charged by the company in favour of the debenture-holder and the receiver does not deal with unencumbered assets and does not deal with ordinary unsecured creditors of the company. Thus, it is submitted on behalf of the ICCL that, when asking what claims an investor might have in "*liquidation proceedings*" as defined in the 1998 Act, such claims would include (a) the right to a return of any segregated assets which are exclusively the investors' and also (b) a right to payment out of pooled funds of the investors' proportionate share, i.e. what are described as client assets. On behalf of the ICCL it is submitted that the rights of investors in liquidation proceedings to which the ICCL is subrogated necessarily means the rights to *client* assets because, in a receivership, that is the only right a client can have in the receivership, being a right to claim the return or repayment of specific client assets or their share of client assets.

33. Section 2(1) of the 1998 Act also includes a definition of a "*ruling*" which plainly includes a situation where a court has determined that a liquidator be appointed. Section 2(2) expressly provides that: -

"A word or expression that is used in this Act and is also used in the Investor Compensation Directive has, unless the contrary intention is indicated, the same meaning in this Act as it has in that Directive".

Section 12 of the 1998 Act – the objects and powers of the ICCL

34. Section 12 (1) of the 1998 Act specifies the objects and powers of the ICCL in the following terms: -

"(1) The principal objects of the Company shall be stated in its memorandum of association to be—

- (a) *to establish and maintain, having consulted the supervisory authority, arrangements for the making of payments to clients of investment firms in accordance with this Act,*
- (b) *to maintain a fund or funds out of which payments shall be made in accordance with this Act and, where appropriate, the Investor Compensation Directive, and to meet such other payments or expenses as may be paid out of the fund or funds in accordance with this Act,*
- (c) *to advise the supervisory authority on matters relating to compensation for clients of investment firms, and*
- (d) *to process claims for compensation by clients of investment firms as expeditiously as possible and to ensure that compensation is paid without undue delay”.*

35. It is common case that the ICCL is funded by way of contributions made by regulated investment firms, enabling it to pay compensation to relevant investors. Given the questions which this Court has to determine, there are certain sections in the 1998 Act of critical relevance, in particular s. 30 (1).

Section 30 of the 1998 Act

36. Section 30 (1) of the 1998 Act states as follows: -

“(1) In this Part—

“compensatable loss” means 90 per cent of the amount of an investor's net loss or €20,000 whichever is the lesser;

“net loss”, in relation to every client of an investment firm, means the amount of the liability of the investment firm in respect of—

- (a) *money owed to or belonging to the client and held on behalf of the client by the investment firm in connection with the provision of investment business services by the investment firm, and*

(b) *investment instruments, belonging to a client of the investment firm, and held, administered or managed by that firm for the client, in connection with the provision of investment business services by that firm to the client, the value of the investment instruments being determined, so far as possible, by reference to their market value,*

on the day of a determination made under section 31 (3) or a ruling, as appropriate, which the investment firm is unable to discharge in accordance with the legal and contractual conditions applicable but shall not include . . .”

37. The exclusions referred to thereafter are not of relevance in the present proceedings. The words “*on the day of a determination made under section 31 (3)*” are of particular significance. The relevant determination is the date of the winding-up order which in the present case was 21 October 2011. The *legitimi contradictores* argue that the foregoing phrase means that one looks at the amount owed to the investor at the date of the commencement of the winding-up and that this determines what is the net loss in respect of which compensation can be paid. That interpretation excludes any consideration of estimated or actual future recoveries. In other words, the foregoing interpretation is that events after the date of the winding-up order are not relevant to a calculation of net loss. For the ICCL, it is argued that the correct interpretation of the section is that it refers to determining the amount of the liability of the investment firm to the client as of, in the present case, 21 October 2011 but does not rule out the taking into account of estimated and actual future recoveries. The *legitimi contradictores* argue, however, that “*the day of a determination*” applies both to the ascertainment of the *claim* (i.e. the liability of the company to the investor) and also the *loss* (i.e. that it determines the net loss for which compensation can be paid). For the ICCL, it is argued that the foregoing is to misinterpret s. 30 (1). It is submitted that if the Oireachtas truly intended the words “*on the day of a determination*” to apply to the words which follow that phrase (there being no dispute that the phrase applies to the words which precede it), s. 30(1) would have been worded differently. The ICCL

contend *inter alia* that, in order to have the meaning asserted by the *legitimi contradictores*, s. 30(1) would have said: - “*net loss means the amount of the liability of the investment firm in respect of... [(a) and (b)]... which the investment firm is unable to discharge on the day of a determination made under s. 31 (3)*”. As well as submitting that the meaning contended for by the ICCL is the proper result of a literal interpretation of the words used in this section, it is submitted that this interpretation is entirely consistent with the purpose of the 1998 Act and the purpose of the Directive to which it gives effect.

Section 33 of the 1998 Act

38. The appointment of an administrator (in the present case, Mr. Wallace) is dealt with under s. 33 of the 1998 Act, subs. (3) of which provides as follows:-

“(3) The Administrator shall deliver to the Company, or, where appropriate, to the operator of the compensation scheme concerned –

(a) a statement or

(b) if an interim statement is delivered under subsection (3B), a final statement, specifying the names of eligible investors and the net (if any) and the compensatable loss (if any) of each of those eligible investors.

(3A) As a prelude to complying with subsection (3), the Administrator may, if the Company or the operator of the relevant compensation scheme so agrees, deliver an interim statement specifying names of eligible investors and the estimated net losses (if any) and the estimated compensatable loss (if any) of each of those investors.

(3B) On, or as soon as practicable after, delivering a statement in accordance with subsection (3) or (3A), the Administrator shall deliver a copy of the statement to the supervisory authority.”

Interim Statements

39. It is not in dispute that, as originally enacted, the 1998 Act did not provide for the delivery interim statements. On 12 May 2000, Laffoy J. delivered a decision in *Re Money Markets Ltd (In Liquidation)* (Unreported, High Court, Laffoy J., 12 May 2000). That case concerned the 1998 Act and the court's decision was made on the application of the Liquidator of the relevant company, Money Markets International Stockbrokers Ltd (In Liquidation) (or "MMI"). The Liquidator had also been appointed as administrator and the issue which arose in the case and the way the court resolved it was as follows:-

"The necessity for this application is that Mr. Kavanagh, as administrator, is not in a position at this juncture to furnish a definitive statement of the names of eligible investors and of the net loss of each such investor and the compensatable loss of each such investor to the Company. In section 30 of the Act of 1998 the expression "compensatable loss" is defined as meaning 90% of the amount of an investor's net loss or 20,000 ECUs whichever is the lesser. In essence, Mr. Kavanagh's difficulty is that he is not in a position at this juncture to calculate "net loss" in relation to an eligible investor because questions have arisen in relation to the precise liability of MMI to each client and these questions are the subject of applications for directions to this Court in the winding up, questions relating to, inter alia, the operation of set offs within MMI, stamp duty refunds and trading of fully paid for stocks in margin trading by MMI in respect of United States securities.

.....

It was urged by Mr. Gleeson, on behalf of Mr. Kavanagh, and by Mr. Murray, on behalf of the Company, that, notwithstanding that the Act of 1998 makes no provision for the Administrator delivering an interim statement, the emphasis in both the Directive and in the Act on the expeditious settlement of claims of eligible investors against the Company must mean that in cases of difficulty there is power to deliver an interim statement. If such were not the case, it was submitted, the whole purpose of the Act would be frustrated. I agree with the

interpretation of the Act of 1998 which recognises a power in the Administrator to deliver an interim statement.”

40. It is submitted on behalf of the ICCL that the ability on the part of administrator to deliver an interim statement recognises that things are not “set in stone” as of the date of the commencement of the winding-up and that, subsequent to that date, issues might well arise which could go to an adjustment of what might be said to constitute the extent of a particular investor’s loss. For the ICCL it is submitted that an interim statement may paint either too pessimistic or too optimistic a picture of the ultimate outcome of the liquidation. The submission is made that, when the Liquidator issues an interim certificate in the first place, they should take into account recoveries actually made and also recoveries estimated to be made in the future in the course of the winding-up. For the ICCL it is also submitted that if the ultimate outcome of the winding-up turns out to be more optimistic than the Administrator originally envisaged when issuing the interim certificate, that this should be reflected in the final certificate. In other words, it is submitted that if the investor has been paid more compensation than what ultimately turns out to be his or her compensatable loss, the ICCL submits that it is entitled to be subrogated to recover the amount of any access paid.

41. It is important to note that the implied right, as found by Laffoy J., on the part of the Administrator to issue an interim certificate is now explicitly provided for in the 1998 Act. This can be seen in s. 34, which I will look at presently. Before doing so, it is appropriate to note that s. 33A provides that the court shall, on appointing a liquidator, receiver etc. in respect of an investment firm, also appoint same as administrator of the firm. It is not in dispute that the Liquidator was also appointed as the Administrator and it is *qua* Administrator that Mr. Wallace participates in the present application.

Section 34 of the 1998 Act – Payment of Compensation

42. Section 34 of the 1998 Act, under the heading “*Payment of Compensation*”, states as follows:-

“(1) In the case of an investment firm in respect of which the supervisory authority has made a determination under section 31 or a court has made a ruling, where the investment firm was not a member of a compensation scheme approved of under section 25 at the time of the determination or ruling, the Company shall pay to each eligible investor an amount equal to the compensatable loss of that eligible investor.”

43. The phrase “*compensatable loss*” has the meaning assigned to it by s. 30(1) of the 1998 Act and it will be recalled that this means 90% of the amount of an eligible investor’s net loss or €20,000, whichever is the lesser. Subsection (2) is in similar terms but addresses the position where the investment firm was a member of a compensation scheme. Subsection (3) goes on to state the following:-

“(3) If the Administrator has delivered an interim statement in accordance with section 33(3A), the Company or operator of the compensation scheme concerned may make provisional compensation payments under this section on the basis of that statement. If, in relation to an eligible investor, the amount of compensation paid on the basis of that statement is less than that specified in the final statement delivered in accordance with section 33(3), the Company or operator of the compensation scheme concerned shall make a further compensation payment to the investor in respect of the outstanding balance.”

44. In the foregoing manner, the Oireachtas has explicitly dealt with a situation where an interim statement underestimates the compensatable loss. It is uncontroversial to point out that Section 34 does not address the situation where an interim statement overstates what turns out to be an investor’s loss if same were to be determined at, say, the ultimate conclusion of the liquidation proceedings. On behalf of the ICCL, it is submitted that, in the same manner as ‘under-compensation’ must be addressed by way of a payment of the balance as provided for in s. 34(3), what the ICCL characterise as ‘over-compensation’ must result in a recoupment of the excess. That, however, is not explicitly provided for in Section 34 or anywhere else in the 1998 Act or in the Directive. What must happen if

too little has been paid by way of compensation is explicitly dealt with but s. 34 is silent in relation to the situation where an interim certificate ‘overestimated’ (from the ICCL’s perspective) the investor’s loss.

45. The Directive emphasises the importance of prompt payment of compensation to investors. Despite the undoubted entitlement on the part of an administrator (pursuant to s. 33(3A) of the 1998 Act) to deliver interim statements and the undoubted right (pursuant to s. 34(3)) to make a provisional compensation payment on foot of such interim statements, an administrator is not obliged to do so. Moreover, even where an administrator decides to issue interim statements, he or she is entirely at large in relation to the timing.

46. For the sake of completeness, it should be observed that subsection (8) of s. 34 allows for an appeal to the court against statements of compensatable loss, as follows: -

“(8) The Company or the operator of the compensation scheme concerned may appeal to the Court against a statement of compensatable loss delivered in accordance with section 33(3) or 33(3A) on the ground that the loss has not been properly calculated in accordance with section 30. However, the right conferred by this subsection may be exercised only after consultation with the supervisory authority.”

Section 35 of the 1998 Act

47. Under the heading “*Further Provisions relating to Payment of Compensation*”, s. 35 of the 1998 Act begins as follows: -

“(1) Subject to subsections (2) and (3), the Company or a compensation scheme approved of under section 25 shall make payments under section 34 in respect of compensatable losses of which it has been informed by the Administrator under section 33 (3) as soon as practicable and at the latest within three months of the date on which the Administrator advises the Company or compensation scheme of the amount of an eligible investor’s compensatable loss.”

48. Of relevance to the question of timing is that, in the present case, no final statements have been issued. Some 540 interim statements have been issued to investors, including Mr. Nugent, who has received a payment on foot of the foregoing, whereas some 1,372 investors have made claims for compensation but have not received either an interim certificate or a final certificate and, thus, have not received any compensation payment from the ICCL.

Section 35(5) and (5A) of the 1998 Act

49. Subsection (5) of s. 35 is of particular relevance in the present case and states as follows:-

“(5) Where the Company or the operator of an investor compensation scheme approved under section 25 has made a payment under section 34 to an eligible investor, the Company or operator shall be subrogated to the rights of that eligible investor in liquidation proceedings against the investment firm for an amount equal to the amount paid by the Company or operator under section 34 to that eligible investor.”

50. The wording used in the foregoing subsection echoes that used in Article 12 (which referred to schemes having *“the right of subrogation to the rights of those investors in liquidation proceedings”*). Subsection (5A) of s. 35 goes on to provide the following: -

(5A) *If-*

(a) *an eligible investor proves a claim in the liquidation proceedings referred to in subsection (5), and*

(b) *the amount proved exceeds the amount of compensation paid by the Company, or by the operator of a compensation scheme approved under s. 25,*

the claim of the eligible investor and the subrogated claim of the Company, or operator of the compensation scheme, for the amount of the excess rank equally in those proceedings and are to be paid proportionately. If the assets are insufficient to meet those claims, they are to abate in equal proportions”.

51. On behalf of the ICCL, it is submitted that the word “*proves*” as found in s. 35 (5A)(a) does not refer to a “proof of debt” as it might be understood in respect of an unsecured claim against unencumbered assets. Further, insofar as the *legitimi contradictores* might seize on the word “proves” to argue that its subrogation rights are limited to proof of debt against unencumbered assets of the company, that is to misread the legislation in the context of the Directive to which it gives effect. It is pointed out that the word “*proves*” is not to be found in the Directive itself which makes clear that the scheme “*shall have the right of subrogation to the rights of those investors in liquidation proceedings for amounts equal to their payments*” without limiting the foregoing subrogation right to proofs of debt. Subsection (5A)(a) speaks of proving a claim in liquidation proceedings referred to in subs. (5) and I have already quoted subs. 5 *verbatim*.

52. The definition of “*liquidation proceedings*” for the purposes of the 1998 Act is a very wide one, in the manner previously examined and it plainly encompasses a range of insolvency processes. For the ICCL, it is submitted that the reference in s. 35 (5A) to proving a claim should not be given the narrow interpretation of proving an unsecured debt but, rather, refers to the investor submitting a claim for a return of money or investments, an example being a claim for the return of monies which formed part of pooled funds into which the relevant investor’s monies had been invested, i.e. what has been referred to in the present application as “client assets”. That submission seems to me to ignore the significance of the words “*against the investment firm*” which appear in subsection (5) which refers to subrogation “*... to the rights of that eligible investor in liquidation proceedings against the investment firm for an amount equal to the amount paid...*” and this is something which will be discussed more fully later in this judgment.

53. During the hearing, reference was also made to Regulations which were made in 2015 pursuant to the 1998 Act and it is appropriate to refer to certain of these at this juncture.

Investor Compensation Act 1998 (Return of Investor Funds or Other Client Property)
Regulations 2015 S.I. No. 407 of 2015)

54. The foregoing (hereinafter “the 2015 Regulations”) contain *inter alia* the following: -

“Regulation 5. Ascertainment of client monies, client instruments, etc. and claims of clients in relation to them

5. (1) *As soon as practicable after being appointed, an Insolvency Officer shall take all steps that are open to the Insolvency Officer to identify, record, and to the extent necessary reconcile, the transactions of the investment firm with a view to identifying—*

(a) *the client monies, client investment instruments, or documents of title in respect of such investment instruments which are held or which ought to be held on behalf of clients by the investment firm or by a nominee;*

(b) *the claims of the clients of the investment firm against those client monies, client investment instruments or documents of title in respect of such investment instruments (whether or not such client monies, client investment instruments or documents of title continue to exist)”.*

On behalf of the ICCL, it is submitted that the role identified in Regulation 5 of the 2015 Regulations echoes the analysis of the functions of a liquidator in the winding up of a company of this type as was explained by Finlay Geoghegan J. in her 09 October 2012 decision from which I quoted earlier (see *Re: Custom House Capital Ltd. (in liquidation)* [2012] IEHC 382, paras. 40, 41 and 48).

55. Regulation 6 of the 2015 Regulations states as follows: -

“Regulation 6. Distribution of client monies, client investment instruments or documents of title in respect of them

Subject to Regulations 157 and 158 of the European Communities (Markets in Financial Instruments) Regulations 2007 (S.I. No.60 of 2007), and to section 52(7) of the Act of 1995, the Insolvency Officer shall distribute client monies, client investment instruments or documents of title in respect of such investment instruments, as expeditiously as possible, in accordance with the provisions of this Part”.

56. It is not in dispute that the foregoing reference to the “MIFID Regulations” and s. 52(7) of the Investment Intermediaries Act 1995 concern the limited circumstances in which an Insolvency Officer, such as a liquidator, can apply to the court to have certain of his costs and expenses paid from client assets. Such an application was made in the present case and was unsuccessful. I am satisfied that nothing turns, for the purposes of the application which this Court has to decide, on the fact that the court (Finlay Geoghegan J.) declined, in particular circumstances, to permit the Liquidator to deduct any of his fees and expenses from client funds. It is clear that the decision made not to allow for the payment of the Liquidator’s fees and expenses out of client funds was in fact, or circumstance, specific rather than based on a matter of principle. Para. 78(ii) of the judgment delivered by Finlay Geoghegan J. on 09 October 2012 included the following conclusion: -

“(ii) the Liquidator may have recourse to client funds for the discharge of reasonable expenses incurred in the distribution of client money and investment instruments pursuant to s. 52(7) of the Investment Intermediaries Act (as amended) or Regulations 157 and 158 of the MiFID Regulations”;

57. On behalf of the ICCL, it is submitted that the right, subject to court approval, on the part of the Liquidator to have recourse to *client* funds reinforces that the Liquidator’s rights and the rights of investor clients in the present liquidation extend beyond merely dealing with unencumbered assets and extend to the dealing with rights in respect of client assets and, thus, support the position contended for by the ICCL.

58. Regulation 7 of the 2015 Regulations provides as follows: -

“Regulation 7. Cases where specific client can be identified as owner of investment instruments, etc.

(1) Where—

- (a) *the investment firm or its nominee has held, administered or managed investment instruments or documents of title in respect of such investment instruments (whether in writing or in electronic form), and*
- (b) *it is possible to identify a specific client as the owner thereof,*

the Insolvency Officer shall, subject to the subsequent provisions of this Part, take all such steps as may be necessary to transfer the investment instruments or the documents of title to the client or, where the Insolvency Officer so requires, to a broker who is nominated by the client”.

59. On behalf of the ICCL it is emphasised that if, for example, it is possible to identify a particular investment (such as a portfolio of shares) owned exclusively by a particular investor, the ICCL can assert no rights of subrogation against such an investment. This is in circumstances where, being owned exclusively by the relevant investor, there is no loss suffered and, thus, no claim to compensation made in respect of that investment, as against the ICCL. In the foregoing example, the shares would fall to be returned to the relevant investor who had been identified as the owner.

60. Regulation 8 of the 2015 Regulations states as follows: -

“Regulation 8. Cases where instruments not identified under Regulation 7: classification of them and ranking of claims

(1) With the exception of the investment instruments, or documents of title in respect of them, identified in accordance with Regulation 7, all client investment instruments or documents of title in respect of them held by an investment firm or its nominee shall be classified, in so far as practicable, by the Insolvency Officer by reference to an identified class of investment instruments issued by an identified issuer of those investment instruments.

(2) All claims against each such class of investment instruments shall then rank equally among themselves against such instruments.

(3) To the extent that the claims of clients against any class of investment instruments to which paragraph (1) applies are not satisfied, or to the extent that there are insufficient investment instruments in any one class to satisfy the claims of clients against that particular class of instruments, the client claims to the investment instruments within that class shall abate rateably.

(4) In such circumstances, any shortfall suffered by the clients shall be dealt with as if it were a claim against the client monies (other than any common fund referred to in Regulation 9(3)) held by or on behalf of the investment firm or by a nominee. . .”.

61. The foregoing Regulation refers to situations involving what might be called “pooled funds” and Regulation 9 is also of relevance to pooled funds, providing *inter alia* as follows: -

“Regulation 9. Claims in respect of client monies — general rule and exceptions to it

(1) Save in cases where a client’s monies have not been mixed with any other client monies of an investment firm, all claims of clients in respect of client monies shall, subject to paragraph (3), rank equally among themselves against the client monies held by or on behalf of the investment firm or by a nominee, and in the event that such client monies are insufficient to meet such claims, the claims shall abate rateably.

(2) For the avoidance of doubt, claims against client monies for the purposes of these Regulations include—

- (a) each instance of a client having given money to the investment firm and the purpose for which the money was so given having failed;*
- (b) any claims against client monies arising under Regulation 8(3); and*
- (c) any other proprietary claim in respect of investment instruments where there are insufficient instruments available to satisfy that claim.*

(3) Notwithstanding, paragraph (1), where an Insolvency Officer is satisfied that a particular account or fund of an investment firm represents the proceeds of monies provided by an

identifiable body of clients of the investment firm for an identifiable class of investment instruments (referred to subsequently in this Part as a “common fund”), the common fund shall be dealt with in the same manner as if it were a class of investment instruments of the kind to which Regulation 8(1) applies.

(4) Accordingly, the claims of all persons who contributed to the common fund shall rank equally among themselves against the common fund.

(5) To the extent that—

(a) the claims of clients against the common fund are not satisfied, or

(b) there are insufficient monies available in the common fund to satisfy the claims of clients against that common fund,

the claims of clients against the common fund shall abate rateably and any shortfall suffered by the clients may then be claimed against the client monies (other than other common funds) held by or on behalf of the investment firm.

(6) Nothing in this Part shall prevent a client of an investment firm from seeking the return of monies held by or on behalf of the investment firm or by a nominee where such monies have not been mixed with any other client monies of the investment firm”.

62. Some emphasis is also laid by the ICCL on Regulations 15 and 16. Regulation 15 begins as follows: -

“Regulation 15. Time within which claims must be submitted, exclusion of claims, etc.

(1) In this Regulation “client assets” means the client monies, client investment instruments, or documents of title relating to such investment instruments which are held or ought to be held on behalf of clients by the investment firm or by a nominee.

(2) The power conferred by paragraph (3) may be exercised in relation in some or all of the client assets as the Insolvency Officer, in his or her discretion, thinks fit.

(3) *In order to expedite the return of client assets, the Insolvency Officer may fix a time within which clients of the investment firm are to submit to the Insolvency Officer a proof of their claims against client assets”.*

63. It is emphasised on behalf of the ICCL that the reference in Regulation 15(3) to clients submitting “*a proof of their claims against client assets*” reflects the provisions of s. 35(5A)(a) in which the words “*an eligible investor proves a claim in the liquidation proceedings*” were used. The submission is made on behalf of the ICCL that, insofar as the word “*proves*” is relied upon in support of the proposition that the ICCL’s subrogation rights are only against company-owned assets, such a proposition is undermined including by the wording in Regulation 15(3) which makes clear that reference to proving a claim concerns proving a claim against client assets. Emphasis is also laid on the contents of Regulation 16, which provides as follows: -

“Regulation 16. Provisions supplemental to Regulation 15

(1) In this Regulation “client assets” has the same meaning as it has in Regulation 15.

(2) Where the power under Regulation 15(3) has been exercised in relation to some only of client assets, references in this Regulation to client assets shall be read as references to those of the client assets in relation to which that power has been exercised.

(3) Where proof of a claim is submitted after the time fixed under Regulation 15(3) but before any distribution or return of client assets is made, the Insolvency Officer shall treat the proof of claim as if it had been made before the time fixed under that provision.

(4) Where client assets are returned by the Insolvency Officer, being client asset proofs in respect of which—

(a) have been submitted within the time fixed under Regulation 15(3), or

(b) are treated under paragraph (3) of this Regulation as having been submitted within that time,

the person to whom the assets are returned acquires good title to them.

(5) Where proof of a claim is submitted by a client after the time fixed under Regulation 15(3) and after any distribution or return of client assets has been made, the Insolvency Officer shall determine whether the client would have received client assets as part of the distribution ...”.

64. On behalf of the ICCL it is pointed out that the “*proof*” referred to in Regulation 16, just as in Regulation 15, is concerned with proof of a claim in respect of client assets. The submission is made that this terminology is entirely consistent with that used in s. 35(5A) of the 1998 Act and underscores that, once the ICCL has made a payment of compensation to an investor, it is subrogated to that investor’s rights in respect of client assets.

65. Having looked at the legislative context in which this application is brought and having referred to certain of the submissions made in respect of the proper interpretation of relevant provisions, I now turn to the evidence which was before the court, comprising the various affidavits sworn in the present application and the exhibits thereto, including experts reports proffered on behalf of the *legitimi contradictores*.

Affidavit of Michael Fagan sworn 10 December 2019

66. Mr. Fagan is the chief operations officer of the ICCL and his affidavit was sworn to ground the present application for directions. I have carefully considered the contents of this affidavit and all exhibits thereto. It is not necessary to comment on same on a paragraph-by-paragraph basis. It is appropriate to note, however, that in the “*Introduction*” section (paras. 1-13), Mr. Fagan, *inter alia*, refers to the various questions which arise for determination in the present application and he indicates the ICCL’s attitude in respect of each question. He also explains the approach taken in his affidavit which is divided into various sections under relevant headings. He avers, *inter alia*, that the failure by an Administrator, under the 1998 Act, to take account of actual recoveries and/or estimated future recoveries when calculating “net loss” may result in eligible investors receiving compensation from the ICCL in respect of assets that, although not available for distribution on the commencement of

the liquidation, are or are expected to be recovered and, therefore, available for distribution in the course of the liquidation. He also avers that the Liquidator appears to have calculated “net loss” without regard to actual and/or estimated future recoveries (and the foregoing is the factual position).

67. Mr. Fagan goes on to aver that the foregoing results in the potential ‘overpayment’ of compensation to a large number of eligible investors. Mr. Fagan also makes clear that the ICCL’s position is that its statutory right of subrogation extends to *client* assets encompassed by the definition of net loss, namely, (a) money owed to or belonging to the clients of CHC and held on their behalf by CHC in connection with the provision of investment business services; and (b) investment instruments belonging to the clients of CHC and held, administered or managed by CHC for them in connection with the provision of investment business services, that formed or ought to have formed part of the calculation of net loss under s. 30 (1) of the 1998 Act (i.e. what ICCL describe as “Net Loss Client Assets”).

68. Mr. Fagan also refers *inter alia* to worked examples of how the ICCL’s right of subrogation applies to distributions of Net Loss Client Assets under the interpretation contended for by the ICCL. He also explains *inter alia* that, where an eligible investor has been, according to the ICCL, overcompensated, the ICCL must, in order to prevent what Mr. Fagan refers to as “*unjust enrichment*” of that eligible investor, be entitled in any distribution of Net Loss Client Assets, or any payment out from the company assets, to receive back the amount of that overcompensation in full by way of subrogation. He goes on to make clear that the ICCL’s position is that it would then rank *pari passu* with the eligible investor for the balance of the compensation paid. He also avers that, as regards the 1,372 persons whose claims have not yet been certified by the Liquidator, any distribution of Net Loss Client Assets must take account of the ICCL’s right of subrogation. He refers, *inter alia*, to an order currently in force requiring the Liquidator to withhold €20,000 from such persons (being the maximum amount of compensation payable to each, pursuant to the 1998 Act).

69. Mr. Fagan’s affidavit helpfully sets out the “*Background*” (paras. 14-23) to what he describes as “*the Subrogation Issues*”. Among the correspondence exhibited by him which passed between the ICCL and the Liquidator in respect of the subrogation issue is a letter from the ICCL to the Liquidator dated 23 September 2013. This was sent following receipt, from the Liquidator, of interim statements certifying compensatable loss under s. 33 of the 1998 Act which resulted in the payment of what is described as “provisional compensation” by the ICCL to eligible investors. Mr. Fagan draws particular attention to the following extract from the said letter wherein the ICCL notified the Liquidator as follows:

“Pursuant to s. 35(5) of the Act, I hereby formally notify you of the subrogated claims of the ICCL in respect of clients to whom compensation payments have been made on foot of the above interim Statement. Please ensure that any future dividend or other distribution being made in respect of these amounts is made payable to the ICCL.”

70. Mr. Fagan goes on to refer to the divergence of views which emerged between the ICCL and the Liquidator regarding the scope of the ICCL’s subrogated claims and he refers to correspondence beginning in February 2018 in this regard. He refers also to the ICCL having sought, in December 2018, an order directing the Liquidator to bring an application for directions to determine the scope of the right to subrogation and he refers to the judgment delivered by Finlay Geoghegan J. on 31 January 2019 ([2019] IEHC 43). In the said judgement, the learned judge made reference to the need for a properly identified factually based dispute between the ICCL and one or more compensated clients so as to enable the court to properly consider and decide the many complex issues arising.

71. Mr. Fagan refers to engagement as between the ICCL and the Liquidator with regard to obtaining necessary information and he refers to a 30 July 2019 application for an order pursuant to s. 231 of the 1963 Act directing the Liquidator to provide certain information. Reference is also made to the order dated 08 August 2019 (Pilkington J.) directing the Liquidator to provide information which also placed a stay on distributions of client assets that form part of the statutory calculation of

net loss in respect of all clients of CHC who had made a compensation claim and are eligible investors. Mr. Fagan avers that the stay on distributions operated until 09 October 2019, at which point it was modified by the court to instead require the Liquidator to withhold €20,000 (the maximum amount of compensation payable under the 1998 Act) from distributions to clients who had made a claim for compensation and are eligible investors.

72. Mr. Fagan makes averments (para. 24) under the heading “*Jurisdiction*”. Among other things he asserts that this court has jurisdiction to hear and determine the application pursuant to s. 231 (3) of the 1963 Act which empowers creditors to “*apply to the court in relation to any exercise or purported exercise*” of the Liquidator’s power “*to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets*”. He refers to the judgment of Finlay Geoghegan J. delivered on 31 January 2019 wherein the learned judge declined to express a view on the entitlement of the ICCL to bring an application pursuant to s. 231 (3) and he notes that the Liquidator’s submissions in the December 2018 directions application did not contest the entitlement of the ICCL to bring, or the jurisdiction of the court to determine, an application pursuant to s. 231 in respect of the proper scope of the ICCL’s right of subrogation pursuant to s. 35 of the 1998 Act. Mr. Fagan asserts that the ICCL is a creditor in the liquidation, by virtue of its right of subrogation pursuant to s. 35 (5).

73. Section IV of Mr. Fagan’s affidavit is entitled “*Calculation of net loss*” and he makes averments under that heading from paras. 25 to 36, inclusive. He avers *inter alia* that the calculation of “net loss” under s. 30 (1) of the 1998 Act is fundamental to the operation of the statutory compensation scheme and, having referred to the fact that the Liquidator did not take into account the impact of potential future asset recoveries on the net loss (or actual loss) of eligible investors and that the Liquidator did not take account of estimated future recoveries of misappropriated assets when calculating eligible investors’ net losses to date, he avers to the ICCL’s position on this issue at para. 26 of his affidavit in the following terms:

“26. The position of the ICCL is that the calculation of net loss under s. 30 (1) must take into account, inter alia, actual recoveries and estimated future recoveries of Net Loss Client Assets between the Determination Date and the delivery of a statement (or, if an interim statement is delivered, a final statement) to the ICCL specifying that investors’ net loss and compensatable loss. To the extent an interim statement is delivered it is the ICCL’s position, as outlined below, that such an interim statement must naturally take account of estimated future recovery. This position has been communicated to the Liquidator, including by way of letter dated 28th November, 2019. In that letter the ICCL also sought confirmation from the Liquidator that, as regards the outstanding c. 1,372 claims for compensation, he will take account of any actual or potential future recoveries of assets forming part of the calculation of net loss when issuing statements of net loss and compensatable loss. It is not anticipated that this should present any difficulty to the Liquidator in circumstances where his report dated 15 May 2018 stated, at p. 27, that ‘future certifications will be completed as and when client assets are reconciled throughout 2018 however in some cases it may be necessary to await the outcome of future recoveries of misappropriated funds before certification is completed’. I beg to refer to a copy of the said report at Tab 4 of the Booklet. The calculations of net loss are not only critical to the 574 payments of compensation made to date (including Mr. Nugent) but is also critical to the c. 1,372 outstanding claims (including Mr. Day’s claim)”.

74. One of the exhibits to Mr. Fagan’s affidavit comprises the Liquidator’s report dated 15 May 2018. The “*Executive summary*” of same states *inter alia* the following with regard to “*Reconciliation on Pooled Assets/Recovery and Distribution of Misappropriated Moneys*”:

“- To date c.€3.2 million in misappropriated moneys has been recovered from the Munich Parkstadt and Munich X3 funds.

- *It is estimated that a further c. €10 million in misappropriated moneys will be recovered from the sale of property assets during the course of 2018.*
- *A further estimated c. €20 million will only be recovered on an ultimate disposal or refinance of the relevant Funds by newly appointed investment managers after the Funds have transferred out of CHC's management."*

75. With regard to the foregoing, the submission is made on behalf of the ICCL that a simple mathematical calculation will confirm that some €33.2 million (€3.2 million + €10 million + €20 million) in terms of recoveries were identified by the Liquidator in his 15 May 2018 Report, including actual as well as estimated recoveries. The ICCL submits that this €33.2 million of recoveries must be taken into account and in the context of determining compensatable loss for investors. It is uncontroversial to point out that the Liquidator's 15 May 2018 Report issued 6 years and 7 months *after* CHC was wound-up by order made on 21 October 2011. It is equally uncontroversial to say that the information contained in the Liquidator's May 2018 report regarding estimated future recoveries was not available in October 2011 or in the months (or indeed years) that followed. I make this observation in light of the undoubted emphasis in the Directive on the *prompt* payment of compensation to eligible investors i.e. payment within months, not years. The issue of timing is one I will return to later in this judgment. The same 15 May 2018 report also contains the following under the heading "*Future certification*":

“Future certification

The Court judgment in July 2017 paves the way for the remaining certifications to be completed contemporaneously with the reconciliation and distribution of the remaining client assets.

- *Future certification will be completed as and when Client Assets are reconciled throughout 2018 however in some cases it may be necessary to await the outcome of future recoveries of misappropriated funds before a certification can be completed."*

76. On behalf of the ICCL it is submitted that, when preparing his 15 May 2018 report, the Liquidator plainly understood that one of the factors which he had to take into account, in terms of certifying client claims for submission to the ICCL in respect of the payment of compensation, was “*future recoveries of misappropriated funds*”. It is submitted that this accords entirely with the interpretation of the legislation contended for by the ICCL and that it ensures that the certification process is based on the fact of actual recoveries. In an affidavit sworn subsequently by Mr. Wallace, he asserts that the foregoing statement is being read out of context and I will presently refer to that affidavit.

77. Mr. Fagan proceeds in his grounding affidavit to set out, *inter alia*, reasons why, according to the ICCL, the calculation of net loss must take into account actual recoveries and estimated future recoveries of misappropriated assets between the Determination Date and the date of final certification of the investor’s net loss and compensatable loss. These include the following:

- A significant risk of overpayment of compensation insofar as investors may be paid compensation in respect of assets that, although they could not be returned on the Determination Date, are subsequently recovered and returned to the investor;
- The exclusion of assets recovered in the liquidation, when certifying net loss, fails to reflect the reality of the liquidation and eligible investors’ actual losses;
- A methodology which limits assessment of the investment firm’s ability to discharge liabilities to the Determination Date is inconsistent with the wording of s. 30 (1) and the overall purpose of the legislation;
- The Directive is concerned with assets that cannot be returned and the payment of compensation in respect of assets that can be returned at some stage during the course of the liquidation does not align with the overall purpose of the Directive or the 1998 Act;
- If net loss is calculated without regard to actual or potential future recoveries post-Determination Date, it could lead to a situation where, even if the full extent of assets that

were misappropriated as at the Determination Date are recovered and returned to the client, that client would still be entitled to receive compensation in respect of those assets.

78. At this juncture it is appropriate to note that the expert evidence in the form of reports by Dr. Luis Correia da Silva of Oxera Consulting (prepared for Mr. Day) and the report of Paul Jacobs of Grant Thornton (prepared for Mr. Nugent) acknowledge the possibility that an investor might receive a compensation payment *and* ultimately end up recovering their assets. This is what the ICCL characterise as ‘overpayment’ of compensation. Thus, the submission is made on behalf of the ICCL that it is wholly unrealistic if, to determine what are the monies or investment instruments which an investment firm is unable to return to a client, one looks only at the position pertaining as of the date of the commencement of the winding-up and one ignores the recoveries that are, in fact, made in the course of the winding-up and which may result in the actual loss being less than originally anticipated or, according to the ICCL, no loss arising. It is fair to say that the foregoing submission by the ICCL assumes that someone who has been deprived of access to their assets (even for a protracted period which, in the present case, could be over a decade) but who ultimately receives back their assets at the end of a liquidation process is someone who has sustained no loss whatsoever and, thus, any compensation payment made to them would amount to ‘overpayment’ to which they have no entitlement. This is an issue I will return to in this judgment having regard to the expert evidence to the effect that even someone in that position may have sustained actual loss.

79. At para. 32 of his affidavit Mr. Fagan refers to the Liquidator’s report dated 20 November 2019 which report refers *inter alia* to the recovery of misappropriated assets, s. 4 of the report noting *inter alia* that: “Generally, it is expected that c. €28 million of misappropriated monies with a further €3.8 million in recoveries of amounts advanced by the Mezzanine bond will be recovered over the course of the liquidation from European SPVs and Destiny Syndicated Property Funds ... a further c. €5m may be recovered in respect of amounts advanced by the Mezzanine Bond to the former CHCQIF ...remaining recoveries of misappropriated monies will depend on the timing of property

sales/refinancing in the future from properties which are now managed by third party investment managers on behalf of clients.” Having regard to the foregoing it is not in dispute that, as of November 2019, the Liquidator anticipated some €37 million in terms of recoveries and it is these recoveries which Mr. Fagan avers must form part of the calculation of net loss. He goes on to aver that payment of compensation, without taking these actual and/or estimated future recoveries into account, would fail to reflect the reality of an eligible investor’s actual losses in the liquidation. Mr. Fagan acknowledges *inter alia* that there is the potential for considerable delay in the certification of claims if net loss must take account of future recoveries. He goes on to aver that such delay could occur if, instead of certifying net loss on the basis of estimates of future recoveries, the Liquidator were to await actual recoveries of misappropriated assets before certifying net loss. He asserts that such an approach would be misconceived, having regard to the imperative of timely certification of investors’ claims for compensation and the facility for interim statements based on estimates under the 1998 Act.

80. Earlier, I looked at the provisions of s. 33 and it is clear that s. 33 (3A) of the 1998 Act allows for interim statements to be issued containing an estimation of a net loss and estimated compensatable loss. Mr. Fagan refers to these provisions in particular, which would enable for the making of “*provisional compensation payments*” by the ICCL. It will be recalled that s. 34 (3) makes clear that if the Administrator has delivered an interim statement in accordance with s. 33 (3A) a provisional compensation payment can be made. There is, however, no obligation to issue interim statements and no entitlement on the part of an investor to receive an interim statement or interim payment. It is a fact that many investors in the present case (i.e. those 1, 372 eligible investors represented by Mr Day) have received nothing despite the passage of almost a decade since the winding-up Order. It is hardly controversial to suggest that this runs contrary to the emphasis placed by the Directive on the importance of prompt payment of compensation to eligible investors.

81. Mr. Fagan goes on to emphasise that, given the potential for uncertainty and inaccuracy, including the potential for overpayment of compensation, final statements of net loss should only be issued on the basis of final figures for actual or future recoveries of Net Loss Client Assets. At para. 36 he avers that any potential underpayment or overpayment of compensation arising from (a) revised estimates of future recoveries, or (b) recoveries actually made, could be addressed by way of a further payment to an eligible investor under s. 34 (3) of the 1998 Act or by the operation of the ICCL's right of subrogation in the manner discussed later in his affidavit.

82. In para. 38 of his affidavit, Mr. Fagan summarises the ICCL's position in respect of its asserted subrogation right as follows: -

“Pursuant to s.35(5) of the 1998 Act, the ICCL has a statutory right of subrogation to an eligible investor's claim in the liquidation proceedings of CCH where the ICCL has paid compensation to that eligible investor. The scope of that subrogated claim – in particular whether it applies to client assets or is restricted to the company assets of CHC – is the principal focus of the application herein. The asserted position of the ICCL is that its right to subrogate to the claim of such an eligible investor extends to that investor's right to maintain claims against CHC's assets and the client assets held by CHC that form part of the calculation of the eligible investor's net loss. The ICCL does not step into the shoes of the eligible investor for all and any rights that the eligible investor may have against an investment firm for the return of client assets. Rather, it only subrogates to the eligible investor's claim in respect of the client assets, whether monies or investment instruments, which have been or which ought to have been taken into account in the calculation of net loss. Moreover, where the ICCL steps into the shoes of an eligible investor it does so on a para passu basis (save, it is submitted, to the extent that the eligible investor has been overcompensated) such that distributions in respect of assets taken into account in the

calculation of net loss are shared proportionately between the ICCL and the eligible investor.”

83. Mr. Fagan goes on to assert that the ICCL’s right to subrogate to a compensated investor’s claim extends both to client assets and non-client assets. He clarifies that this is subject to the ICCL only subrogating to the client’s claim in respect of assets (whether monies or investment instruments) which are, or ought to be, taken into account when calculating net loss. He confirms, by way of example, that the ICCL’s right of subrogation would *not* extend to client assets which (a) were not the subject of any misappropriation, (b) could have been returned by CHC but for the intervening liquidation, and (c) which the Liquidator is in a position to return in full. The foregoing is said to flow from the fact that the statutory obligation to compensation under the 1998 Act is limited to the amount of the investment firm’s liability in respect of money owed or belonging to a client or investment instruments belonging to a client, which the investment firm is unable to discharge on the Determination Date in accordance with its legal and contractual obligations. Mr. Fagan makes clear that the ICCL’s position is that the statutory duty to compensate does not cover money or investment instruments that the investment firm was, on the relevant date, able to return to the client in accordance with its legal and contractual obligations. Consequently, from the ICCL’s perspective, the subrogated claim does not extend to such assets.

84. Later in his affidavit, Mr. Fagan refers to how the ICCL’s right of subrogation should operate in circumstances where the compensated client is due distributions in respect of numerous client assets (money and/or investment instruments) which have suffered net loss. He makes clear that the ICCL’s position is that, in circumstances where there is no factual or statutory allocation of compensation as between what the ICCL refers to as Net Loss Client Assets, the subrogated claim applies equally to all such Net Loss Client Assets on an aggregate basis. Having referred to correspondence which passed between the ICCL and the Liquidator on the issue of the allocation of

compensation payments as between different client assets that had suffered net loss, Mr. Fagan went on to refer to certain “*worked examples*”.

Worked example of the subrogation claim contended for by the ICCL

85. For the sake of clarity, it is appropriate to quote *verbatim*, paras. 45 to 52 inclusive, from Mr. Fagan’s affidavit wherein he sets out a worked example illustrating the operation of the ICCL’s subrogated claim against client assets, in accordance with the interpretation of the legislation contended for by the ICCL:

“45. Once the ICCL has paid compensation to a client, if that client is entitled to distributions of residual client assets encompassed by the calculation of net loss (i.e. Net Loss Client Assets) and the client’s proven claim in the liquidation proceedings exceeds the amount of compensation paid, the ICCL is entitled to participate in those distributions pro rata with the client.

46. By way of illustration of the operation of the subrogated claim against client assets, consider the distributions to be paid from the pooled bank accounts. The affidavit sworn by the Liquidator on 1 March, 2017 that 11 pooled bank accounts were in operation as at the date of the commencement of the liquidation, three of which are referred to as the ‘Client Asset Pooled Bank Accounts’. Per that affidavit, cash belonging to over 3,400 clients (although this number may be less if a single client had monies in more than one account) was held in those accounts. The affidavit outlines that the balance in the Client Asset Pooled Accounts as at December 2016 amounted to approximately €6.5m and that an estimated amount of €11.9m was misappropriated from those accounts. Consequently, the total client claims against the Client Asset Pooled Bank Accounts appeared to amount to approximately €18.4m with only €6.5m then available to meet such claims.

47. For the purpose of this example it is assumed that, net of the permitted costs of recovering the misappropriated cash, a total amount of €2.5m of the misappropriated cash is recovered

for distribution to the relevant clients thereby increasing the cash available to meet their claims to €9m. On the basis of the Order of the High Court (Finlay Geoghegan J) on 31 July, 2017 such funds must be distributed to the relevant clients on a pro rata basis such that each of the 3,400 clients will receive an aggregate distribution of approximately 50% of their claim for the return of cash held in the Client Asset Pooled Bank Accounts.

48. Inevitably a substantial number of these clients will be eligible under the 1998 Act and have claims for net loss certified by the Liquidator in respect of the shortfall on their claims. It is the position of the ICCL that where a client has a legal right to the repayment of €100,000 from a Client Asset Pooled Bank Account the subrogated claim would operate as follows:

- (a) client has a claim for €100,000 against a Client Asset Pooled Bank Account;*
- (b) with only a 50% distribution available, the client will have a net loss of €50,000;*
- (c) assuming all other criteria are satisfied, the Liquidator will certify a compensable loss in the amount of €20,000 (the statutory minimum);*
- (d) the ICCL will then pay compensation in the amount of €20,000 to the client triggering its subrogated claim under s.35(5);*
- (e) on the basis that the client's claim (€100,000) exceeds the amount of the compensation (€20,000) the client's residual claim and the ICCL's subrogated claim rank equally and abate proportionately against the available assets (20% to the ICCL and 80% to the client) in accordance with s.35(5) A;*
- (f) consequently, on the distribution by the Liquidator the client will receive a distribution of €40,000 from the Client Asset Pooled Bank Account (80% share) and the ICCL will receive a distribution of €10,000 (20%);*
- (g) in total, the client will receive €60,000 and the ICCL will make a net payment out of €10,000.*

49. Furthermore, the ICCL also submits that the balance of its subrogated claim in the above example remains exercisable, on the same proportional basis, against other distributions of Net Loss Client Assets (including other Client Asset Pooled Bank Accounts that form part of the calculation of net loss) and non-client assets (to the extent they are available).

50. This issue merits further consideration. Take an example where two different client assets held by the investment firm on behalf of the client could not be returned on the relevant date in accordance with the applicable legal and contractual conditions such that both assets formed part of the statutory calculation of net loss. Net loss has been certified by the Liquidator, the calculation of which (ought to have) encompassed both assets and compensation of €20,000 has been paid in accordance with the following table:

		Asset 1	Asset 2
A	Claim in Liquidation	€100,000	€50,000
B	Assets available for distribution at the determination date/March 2019.	€20,000	€40,000
C	Future recoveries (base case).	€10,000	€5,000
D	Total amount available for distribution (B+C)	€30,000	€45,000
E	Net Loss (-D)	€70,000	€5,000
F	Combined Net Loss	€75,000	
G	Compensation Paid (90% of F or €20,000)	€20,000	
H	Subrogation % $G/(A+A)$	13.33%	
I	Value of Subrogation (H&D+D)	€10,000	

51. In respect of Asset 1 the net loss was €70,000; in respect of Asset 2 the net loss was €5,000. It is the position of the ICCL that where compensatable loss is certified it relates to

the aggregate of the client's net loss (in contradistinction to being allocated between the different assets that make up the calculation of net loss). Therefore, in this example, the €20,000 compensation payment cannot be solely attributed to Asset 1 (even though in practice the net loss suffered in respect of Asset 1 could consume the full limit of compensation). The ICCL's subrogated claim applies equally to distributions in respect of both assets. There is no legislative basis for (nor is there any record of a practice of) the allocation of compensation payments as between different assets forming part of the statutory calculation of net loss. The ICCL has so far assumed that distributions are taking place simultaneously. However, by way of example, if the full €45,000 distribution in respect of Asset 2 was distributed prior to the Asset 1 distribution, the ICCL's right of subrogation would apply thereto and the ICCL would receive 13.33% or €6,000 from that distribution. The balance of the ICCL's subrogated claim would remain exercisable against any further distributions in respect of Asset 2 and all distributions in respect of Asset 1 on a proportional basis (i.e. the ICCL would receive 13.333% of such distribution until its subrogated claim is satisfied).

*52. If the Liquidator distributes an asset captured by the ICCL's subrogated claim without regard thereto, the ICCL's subrogated claim would apply to distributions of other Net Loss Client Assets in order to recover the amount of the distribution which ought to have been paid on foot of the first distribution. The right of subrogation in this context operates in an analogous fashion to its operation in the context of the overpayment of compensation as discussed in the following section. Thus, for example, if the distributions in respect of Asset 1 above are available and made prior to Asset 2 distributions, that the Liquidator pays the full amount (€30,000) to the client without deducting the €4,000 due to the ICCL, the ICCL will proceed to receive €10,000 from the distribution of Asset 2 (€4,000 + (€45,000 * 13.333%)).”.*

86. It is made clear in Mr. Fagan’s affidavit that the ICCL has assumed, for the purposes of the foregoing example and in the other tables and calculations referred to in his affidavit that, subject to clarification by the Liquidator, the amounts of the Net Loss Client Assets available for distribution on 29 March, 2019 as provided by the Liquidator to the ICCL are the same as the amounts of the Net Loss Client Assets that were available at the Determination Date.

87. In paras. 53 to 60, Mr. Fagan addresses what he describes as “*Subrogation and Overcompensation*” and, in addition to articulating the position contended for by the ICCL, he sets out worked examples. It is appropriate, therefore, to quote from those paragraphs as follows: -

“53... the ICCL further submits that its right of subrogation applies in circumstances where an eligible investor has been overcompensated. This may arise for example if the net loss certified by an administrator does not take account of actual or potential recoveries of misappropriated assets post-Determination Date (as appears to have occurred in the liquidation of CHC) or if an interim statement of net loss underestimated future recoveries.

54... Much depends on two factors: (i) the final level of actual recoveries of misappropriated assets in the liquidation; and (ii) the basis upon which the Liquidator calculates net loss...as outlined...below, one of the proposed legitimi contradictores, Mr. Day, will be overcompensated if the Liquidator proceeds to calculate Mr. Day’s net loss without regard to actual recoveries of misappropriated assets post-Determination Date.

55. Furthermore it is the ICCL’s position that where an eligible investor has been overcompensated the ICCL must, in order to prevent unjust enrichment of that eligible investor, be entitled in any distribution of Net Loss Client Assets or any payment out from the company assets to receive back the amount of that overcompensation in full by way of subrogation. The ICCL would then rank pari passu with the eligible investor for the balance of the compensation paid...”.

56. By way of worked example the ICCL has adopted the worked example discussed at para. 48 above which can be summarised as follows below:

<i>Summary of worked example re compensatable loss</i>	
<i>Claim in the Liquidation</i>	<i>€100,000</i>
<i>Assets available for distribution at the Determination</i> <i>Date/March 2019</i>	<i>€50,000</i>
<i>Certified Net Loss (interim)</i>	<i>€50,000</i>
<i>Compensatable Loss/Provisional Compensation Paid</i>	<i>€20,000</i>

57. For the purposes of considering overpayments and subrogation I have assumed that following the interim certificate of net loss (€50,000) and a payment of provisional compensation by the ICCL (€20,000) additional recoveries of assets are made such that an additional €35,000 of Net Loss Client Assets are available for distribution to the client (the 'Additional Recoveries'). In that case, and in adopting the ICCL's approach to the calculation of net loss the position would be as follows: -

<i>Worked Example re Additional Recoveries and Overpayment</i>	
<i>Claim in the Liquidation</i>	<i>€100,000</i>
<i>Assets available for distribution at the Determination</i> <i>Date/March 2019</i>	<i>€50,000</i>
<i>Additional Recoveries</i>	<i>€35,000</i>
<i>Total Net Loss Client Assets Available for Distribution</i>	<i>€85,000</i>
<i>Revised Net Loss</i>	<i>€15,000</i>
<i>Revised Compensatable Loss/Compensation Payable</i>	<i>€13,500</i>
<i>Overpayment of compensation</i>	<i>€6,500</i>

58. In this example the ICCL has overpaid compensation in the amount of €6,500 in circumstances where the future Additional Recoveries were not taken into account in the interim certification of net loss (as appears to have occurred in this Liquidation). This could equally occur where future recoveries are underestimated.

59. It is the ICCL's position that its subrogated claim should operate such that the overpayment of compensation is recovered in full from the Net Loss Client Assets available for distribution (such that the overpayment is resolved) and that its subrogated right for the correct amount of compensation paid would rank *pari passu* in the distribution of the Net Loss Client Assets. This can be illustrated as follows:

<i>Worked Example re Overpayments and Subrogation</i>	
<i>Claim in the Liquidation</i>	€100,000
<i>Total Net Loss Client Assets Available for distribution (including Additional Recoveries)</i>	€85,000
<i>Overpayment of Compensation</i>	€6,500
<i>Net Amount of Compensation Paid by the ICCL/Amount of Residual Subrogated Claim</i>	€13,500
<i>Subrogated Claim % (calculated per the Worked Example 48 above)</i>	13.5%
<i>Amount of Residual Subrogated Claim (13.5% of €85,000)</i>	€11,475
<i>Return to Eligible Investor</i>	
<i>Total Net Loss Client Assets available for Distribution</i>	€85,000
<i>Plus Compensation Paid</i>	€20,000
<i>Less Overpayment of Compensation</i>	€6,500
<i>Less Residual Subrogated Claim</i>	€11,475

<i>Total Return to Eligible Investor</i>		€87,025
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60. This represents the same outcome for clients as if the Additional Recoveries had been accounted for in full on the interim certifications of net loss (as would be the case when they are taken into account on final certification) as illustrated below:

<i>Worked Example re Additional Recoveries but no Overpayment</i>		
<i>Claim in the Liquidation</i>		€100,000
<i>Total Net Loss Client Assets Available for distribution (including Additional Recoveries)</i>		€85,000
<i>Certified Net Loss</i>		€15,000
<i>Net Amount of Compensation Paid by the ICCL/Amount of Residual Subrogated Claim</i>		€13,500
<i>Subrogated Claim % (Calculated per the Worked Example at paragraph 48 above)</i>		13.5%
<i>Amount of Residual Subrogated Claim (13.5% of €85,000)</i>		€11,475
<i>Return to Eligible Investor</i>		
<i>Total Net Loss Client Assets available for Distribution</i>	€85,000	
<i>Plus Compensation Paid</i>	€15,000	
<i>Less Subrogated Claim</i>	€11,475	
<i>Total Return to Eligible Investor</i>		€87,025"

88. At paras. 61 and 62, Mr. Fagan avers that any distribution by the Liquidator of client assets which forms part of, or will form part of, the statutory calculation of net loss, must take account of the ICCL's subrogated claim. He avers that the ICCL maintain that position with regard to the

compensation claims of 574 clients of CHC which have been certified and paid to date as well as the compensation claims of some 1,372 further clients of CHC which have yet to be certified by the Liquidator. Mr. Fagan avers that if the Liquidator calculates net loss and distributes Net Loss Client Assets or seeks to distribute client assets that will or may form part of the calculation of net loss prior to calculating net loss without taking account of actual or prospective subrogated claims of the ICCL, this would frustrate the statutory scheme and the s.35(5) right of subrogation and would render the ICCL’s subrogated claim valueless. He also avers that interim certification of net loss should have taken place at an earlier stage in the liquidation in which case the problem of distributing Net Loss Client Assets to prospective recipients of compensation would not have arisen.

89. From paras. 63 to 66 inclusive, Mr. Fagan makes averments in relation to the identification and appointment of each *legitimus contradictor*, Mr. Nugent having been identified to represent the interests of eligible investors who have already received a payment of compensation and Mr. Day having been identified to represent the interests of those whose claims have not yet been certified by the Liquidator and thus, who have not received any compensation from the ICCL. From para. 67 to 85, Mr. Fagan sets out an analysis, from the ICCL’s perspective, having regard to the information provided by the Liquidator in respect of the claims of Mr. Nugent and Mr. Day respectively. It is appropriate therefore, to quote the following from Mr. Fagan’s affidavit.

“A. Claim of Mr. Michael Nugent.

On the basis of the information provided by the Liquidator in September 2019, the ICCL understands Mr. Nugent’s outstanding claims in the liquidation of CHC (in respect of Net Loss Client Assets) to be as follows: -

<i>Michael Nugent’s Claim – Liquidator’s Figures</i>				
	Client Asset	Destiny PRSA	Destiny PRSA	Total
	Gross Savings	Cash	Equity	

<i>Claim in liquidation</i>	€55,825	€25,910	€52,313	€134,048
<i>Assets Available for Distribution at the Determination Date/March 2019</i>	€35,047	€15	€16,254	€51,316
<i>Estimated Recovery and Future Distributions (base case)</i>	<i>Not considered</i>	<i>Not considered</i>	<i>Not considered</i>	<i>Not considered</i>
<i>Total Net Loss</i>	<i>Figure not provided</i>	€46,651	<i>Figure not provided</i>	€46,651

68. Whilst the net loss figure provided for Mr. Nugent in the information provided in September 2019 presents as an anomaly regarding the amount of Mr. Nugent's net loss (being greater than his claim in respect of the destiny PRSA cash) it is the same as the total net loss figure specified in the interim statement for Mr. Nugent presented by the Liquidator to the ICCL and may be assumed to be a calculation of his total net loss across the relevant assets on an interim basis by the Liquidator. Mr. Nugent has been paid €20,000 provisional compensation on foot of that interim statement. In any case it is readily apparent that Mr. Nugent's net loss significantly exceeds that amount regardless of the approach taken to calculating net loss (as evidenced below).

69. For completeness the ICCL has undertaken a detailed calculation of Mr. Nugent's net loss on the basis of the methodology set out...above and the information received from the Liquidator in 2019 (including estimated future recoveries (base case) which is illustrated in the below table):

<i>Michael Nugent's Claim – ICCL's Figures</i>				
	<i>Client Asset</i>	<i>Destiny PRSA</i>	<i>Destiny PRSA</i>	<i>Total</i>
	<i>Gross Savings</i>	<i>Cash</i>	<i>Equity</i>	
<i>Claim in liquidation (A)</i>	€55,825	€25,910	€52,313	€134,048
<i>Assets Available for Distribution at the Determination Date/March 2019 (B)</i>	€35,047	€15	€16,254	€51,316
<i>Estimated Recovery and Future Distributions (base case) (C)</i>	€7,744	€9,650	€13,743	€31,137
<i>Total Net Loss (per the ICCL) (A-B+C)</i>	€13,034	€16,244	€22,316	€51,594

70. The ICCL's calculation differs from the net loss calculation that the ICCL understands the Liquidator to have adopted which excludes recoveries of Net Loss Client Assets Post-Determination Date.

71. It may also be noted that Mr. Nugent has received and/or will receive distributions of assets from the liquidation that did not suffer any net loss. The ICCL asserts no claim against such assets. This is consistent with the position of the ICCL that it is not asserting a right of subrogation against assets that do not form part of the calculation of net loss.

72. The position of Mr. Nugent in the liquidation and the application of the full scope of the ICCL's subrogated claim thereto can be summarised as follows: -

- (a) Mr. Nugent has a total claim in the liquidation in respect of assets forming part of the calculation of net loss in the amount of €134,048;
- (b) Mr. Nugent has received €20,000 compensation from the ICCL;
- (c) Mr. Nugent will, on the Liquidator's current estimates, receive a total cash distribution in the amount of €82,453 in respect of assets forming part of the calculation of net loss;
- (d) in accordance with s.35(5) A of the 1998 Act, the ICCL is entitled to participate on a pari passu basis in that distribution on the basis of the following formula:-

Amount of Compensation Paid

Eligible Investor's claim in the liquidation re
assets forming part of the calculation
of net loss)

X

Amount of distribution of assets forming part of
the calculation of net loss

= ICCL's Subrogated Claim.

$$(\text{€}20,000/\text{€}134,048) * \text{€}82,435 = \text{€}12,302$$

(e) therefore, on the basis of the above figures and estimates provided by the Liquidator, Mr. Nugent would receive €70,510.98 directly from the liquidation of CHC (in addition to the €20,000 compensation payment) and the ICCL would receive €12,302 from the liquidation of CHC.

73. Mr. Nugent's circumstances present the opportunity for the court to consider the application of the ICCL's subrogated claim to various Net Loss Client Assets. The previous paragraph deals with distributions of Net Loss Client Assets to Mr. Nugent on an aggregate basis as if the three specified assets were available for distribution at the same time. In reality, however, it may be that recoveries of one or more of the Net Loss Client Assets would be available for distribution to Mr. Nugent in advance of others, in which case the ICCL's subrogated claim would operate as follows.

74. If the entire (estimated) distribution of €42,791 in respect of Client Asset Gross Savings is available before the (estimated) distribution of €9,665 in respect of Destiny PRSA Cash and the (estimated) distribution of €29,997 in respect of Destiny PRSA Equity, the ICCL's right of subrogation would apply on a proportional basis to each of those distributions in turn calculated in a percentage as:

Amount of Compensation Paid

Eligible Investor's Claim in the Liquidation re:

Assets forming part of the Calculation

Of Net Loss

X

100 = ICCL's Subrogated Claim %

$$(\text{€}20,000/\text{€}134,048) * 100 = 14.92\%$$

75. Thus, upon the first distribution (€42,791) from Client Asset Gross Savings, the ICCL would receive 14.92% of the distribution or €6,384.29.

76. The balance of the ICCL's subrogated claim would apply to further distributions of Net Loss Client Assets in accordance with the above formula (i.e., the ICCL will receive 14.92% of each such distribution) until its subrogated claim is satisfied.

90. From paras. 77 to 85, Mr. Fagan addressed Mr. Day's claim for compensation which has not yet been certified by the Liquidator and he set out an analysis of the position from the ICCL's perspective, based on information received. It is appropriate to quote the following from Mr. Fagan's affidavit:-

"B. Claim of Mr. Roger Day

77. Mr. Day's claim for compensation has not yet been certified by the Liquidator.

78. On the basis of the methodology set out... above and information received from Mr. Day directly (he having received that information, including estimated feature recoveries (base case), from the Liquidator) regarding Mr. Day's outstanding claim in the liquidation, the ICCL has estimated Mr. Day's net loss in the liquidation of CHC as set out below: -

Roger Day's Claim – ICCL's Calculation

	<i>Client Asset Gross Savings Account</i>
<i>Claim in liquidation (A)</i>	<i>€12,299</i>
<i>Assets available for distribution at the Determination Date/March 2019 (B)</i>	<i>€7,721</i>

<i>Estimated Recovery and Future Distributions (base case) (C)</i>	<i>€1,706</i>
<i>Total Net Loss (per the ICCL) (A-(B+C))</i>	<i>€2,872</i>
<i>Compensatable Loss/Compensation Payable (90% of Total Net Loss)</i>	<i>€2,584.80</i>

79. For full illustrative purposes the ICCL has also calculated Mr. Day's net loss on the basis of methodology that the ICCL understands that the Liquidator has used to date in calculating net loss (i.e. calculating net loss without regard to estimated future recoveries after the Determination Date):

Roger Day – Liquidator's Assumed Calculation

	<i>Client Asset Gross Savings Account</i>
<i>Claim in liquidation (A)</i>	<i>€12,299</i>
<i>Assets available for distribution at the Determination Date/March 2019 (B)</i>	<i>€7,721</i>
<i>Estimated Recovery and Future Distributions (base case) (C)</i>	<i>Not considered</i>
<i>Total Net loss (per Liquidator) (A-B)</i>	<i>€4,578</i>
<i>Compensatable Loss/Compensation Payable (90% of Total Net Loss)</i>	<i>€4,102.20</i>

80. *It is apparent from the foregoing that the different approaches to calculating net loss can result in significant variances between the amount of an eligible investor's net loss and the compensation payable by the ICCL.*

81. *The ICCL understands that Mr. Day also has an outstanding claim in the liquidation of €18,467 in respect of the Client Asset Current Account which the Liquidator has indicated will be returned in full to Mr. Day the relevant monies having been recovered in the course of the liquidation. Separately, the ICCL understands that Mr. Day has received distributions of assets from the liquidation that did not suffer any net loss. The ICCL is not asserting a right of subrogation against such assets.*

82. *On the basis of the above information, the position of Mr. Day in the liquidation and the application of the full scope of the ICCL's subrogated claim thereto can be summarised on a preliminary basis as follows:*

- (a) Mr. Day has a claim in the liquidation in respect of the Client Asset Gross Savings Account (which will or may form part of the calculation of his net loss) in the amount of €12,299.00*
- (b) Mr. Day will receive an estimated distribution (B+C) in the amount of €9,427 in respect of the Client Asset Gross Savings Account;*
- (c) Mr. Day would (on certification by the Liquidator) be entitled to compensation in the amount €2,585 in respect of the (ICCL estimated) net loss (90% of net loss);*
- (d) In accordance with section 35(5A) of the 1998 Act, the ICCL is entitled to participate on a pari passu basis in that distribution on the basis of the following formula:*

$$\left(\frac{\text{Amount of Compensation Paid}}{\text{Eligible Investors Claim in the Liquidation re assets forming part of the calculation of net loss}} \right) \times \left(\text{Amount of Distribution of Assets forming part of the calculation of Net Loss} \right) = \text{ICCL's subrogated claim}$$

$$(\text{€}2,585/\text{€}12,299) * \text{€}9,427 = \text{€}1,981$$

(e) Therefore, on the basis of the limited figures and estimates outlined above for illustrative purposes only, Mr. Day would receive €7,446 directly from the liquidation of CHC (in addition to the €2,585 compensation payment) and the ICCL would receive €1,981 from the distribution from the Client Asset Gross Savings Account.

83. Mr. Day's circumstances in the liquidation also present the opportunity for the Court to consider the application of the ICCL's subrogated claim in a potential overpayment scenario. If the Liquidator calculates Mr. Day's net loss without regard to actual and/or potential future recoveries of client assets, it is clear to see that Mr. Day would receive an overpayment of compensation in respect of the Client Asset Gross Savings Account.

84. The overpayment in respect of the Client Asset Gross Savings Account would be the difference between €2,584.80 and €4,120.20 – €1,517.40.

85. In order to recoup this overpayment, the ICCL would have to participate in the distributions to Mr. Day in respect of the Client Asset Gross Savings Account to recover the overpayment in full before participating pro rata in the remaining distributions per the methodology outlined..."

91. The concluding section of Mr. Fagan's affidavit involves a setting out, at para. 86(a) to (f) of specific questions for determination and he seeks the relief per the ICCL's motion. Before looking at

the next affidavit in sequence, it is appropriate to recall that the Directive set a cap as regards the payment of compensation, namely 90% of the amount of an eligible investor's net loss or €20,000 whichever is the lesser. The ICCL submit that a compensation payment in excess of the foregoing cannot lawfully be made, having regard to the terms of the 1998 Act which implements the Directive. The ICCL argue that any payment which an investor receives in excess of what the ICCL regard as that investor's 'actual loss', when all recoveries are ultimately taken into account, constitutes an unlawful 'overpayment'. That submission, however, focusses on what the ICCL consider to be actual loss. At this juncture it is appropriate to point out that 'actual loss' appears nowhere in the 1998 Act. Rather, the 1998 Act is concerned with the payment of 'compensatable loss' to an eligible investor and this is derived from the concept 'net loss' as defined. in the said Act. Thus, if the proper interpretation of s. 30(1) does not requires that the calculation of net loss must take into account, *inter alia*, actual recoveries and estimated future recoveries between the Determination Date and the delivery of a final statement certifying net loss and compensatable loss, the concept of 'overpayment' is misconceived (focussing as it does on the ultimate outcome of the liquidation proceedings and a final calculation which can only be done at that stage, regardless of how many years the proceedings may take and focussing on the concept of actual loss, as opposed to net loss, statutorily defined). As I commented earlier, what the ICCL regard as actual loss does not take any account of the fact that an investor may well have been deprived entirely of access to their assets for many years. The evidence before this court illustrates that. It seems clear that despite this reality, the ICCL maintain that if an investor ultimately recovers their assets, even after a decade without access to them, there is no actual loss. In the manner explained later in this judgment, there is uncontroverted evidence to the contrary.

The Administrator's Affidavit sworn 01 April 2021

92. In his capacity as administrator, Mr. Wallace swore an affidavit on 01 April 2021. At para. 4 thereof, he made clear that he had not taken into account actual and/or estimated future recoveries of

money owed to or belonging to the clients of CHC in certifying compensatable loss within the meaning of the 1998 Act to date. At para. 5, he averred that the *legitimi contradictores* are those clients who will suffer a reduction in the level of their assets that will be returned to them if the ICCL are successful in obtaining the directions sought in relation to the scope and operation of the right of subrogation asserted.

93. The Administrator referred in his affidavit to certain correspondence between the relevant parties in respect of the subrogation issue from February 2018 and he referred also to the application for directions brought before the court which Finlay Geoghegan J. determined in her judgment dated 31 January 2019. He went on to refer to an application concerning information relating to compensated clients as sought by ICCL and to the order made by Pilkington J. on 08 August 2019 concerning such information. The Administrator averred, *inter alia*, that what he referred to as the Net Loss Issue was not raised by ICCL until 2019 and he referred, *inter alia*, to correspondence from his solicitors, Messrs. McCann Fitzgerald and from the solicitors for the ICCL, Messrs. William Fry. This included a reference to a letter dated 01 July 2020 from McCann Fitzgerald in which it was asserted that the ICCL was made aware of the manner in which net loss was calculated through a series of update reports as regards the Administrator's progress on the certification of compensation claims which reports set out the methodology employed by the Administrator and did not record any potential future recoveries of monies misappropriated from investments or funds or estimates thereof. The letter also asserted, *inter alia*, that ICCL had changed its position with respect to the approach to be taken by the Administrator in the calculation of net loss. It was pointed *inter alia* that previous advises given by ICCL's solicitors of 08 March 2013 made no suggestion that actual or anticipated recoveries should be taken into account and it was also asserted that the ICCL did not avail of the right of appeal pursuant to s. 34(8) against any statement of compensatable loss delivered.

94. The Administrator also referred to, *inter alia*, a 31 July 2020 letter from William Fry, solicitors for the ICCL, in which it was asserted, *inter alia*, that the ICCL was not previously aware

that the Administrator had not been taking account of actual and/or potential recoveries of misappropriated assets after the Determination Date when calculating net loss and that the first intimation that this was the case was when the ICCL received information obtained from the Liquidator on foot of the order of 08 August 2019. The letter also asserted, *inter alia*, that the Administrator's progress reports did not expressly state that any recovered assets post-Determination Date would not be or should not be taken into account by the Administrator when calculating net loss and that the progress reports and advices referred to by the Administrator's solicitors pre-dated any suggestion in the liquidation reports that there be actual or potential recoveries of assets in the liquidation that would benefit clients. The letter also asserted, *inter alia*, that there had been no change of position on the part of the ICCL and that the approach in calculating net loss had been adopted in other cases under the 1998 Act, an example being the W&R Morrogh Receivership (a case in which no judicial consideration of the interpretation of the net loss of subrogation issues was given, but where the validity of the approach contended for by the ICCL was accepted). The letter also asserted that the decision to pursue the net loss issue in para. 4 of the notice of motion (as opposed to appealing any calculation of net loss under s. 34(a) of the 1998 Act) was reasonable and appropriate in circumstances where the question of the proper method of calculating net loss is inextricably linked to the subrogation issues.

95. At para. 17, the Administrator averred, *inter alia*, that the 1998 Act does not say or provide that, in the calculation of net loss pursuant to s. 30(1) account must be taken of actual recoveries and estimated future recovers (of net loss client assets) between the Determination Date and the delivery of a statement (or if an interim statement is delivered, a final statement). The Administrator went on to assert that net loss means the liability of the investment firm to the relevant client on the day of a determination, i.e. on the date of the commencement of the liquidation, which the investment firm is unable to discharge. The Administrator went on to aver, at para. 18, that actual recoveries and/or estimated future recoveries are not specifically mentioned, because any such recoveries would not be

in existence as of the Determination Date, being the point in time at which net loss is calculated under s. 30(1), in the Administrator's view.

96. At para. 19, the Administrator asserted that the distribution of recovered assets is currently being delayed pending determination of the net loss and subrogation issues in circumstances where the statute does not provide for what ICCL now argues on these issues. At para. 20, the Administrator accepted that on his (and the Liquidator's) view of the issues, being a view shared by the *legitimi contradictores*: "*there is a theoretical risk of a potential overpayment by ICCL to eligible investors depending on the level of recoveries of assets ultimately made by the Liquidator on behalf of that eligible investor*". The Administrator went on to assert that the foregoing risk and the prejudice it may cause to ICCL needed to be weighed against several factors which he identified as follows:-

- (i) That ICCL cannot yet point to any case where overpayment has in fact occurred in the 574 cases where provisional compensation has been paid;
- (ii) That the approach contended for by ICCL prejudices eligible investors by delaying the distribution of recoveries and/or delay in the certification of claims, notwithstanding that the imperative in the act of timely certification of investor's claims for compensation;
- (iii) That, against the background of the aim of the Directive, the impact of a risk of overpayment should be assessed against the prejudice to investors which would flow from ICCL's current interpretation of the net loss and subrogation issues and that the ICCL is funded by some 3,100 members and is a financially sound organisation to cover the purpose for which it was established;
- (iv) That, as against this, CHC's investors were retail investors, many of whom were pension investors and who will have lost more than the capped compensation amount will offer; and that the delay in receiving what is rightfully due to investors coupled with the delay in waiting for future recoveries should not be the cost borne by

investors; and that the approach contended for by the ICCL should be rejected in favour of allowing the compensation process and the liquidation to proceed as efficiently as possible.

97. At para. 21, the Administrator averred that, from a practical standpoint, if the ICCL's interpretation of the net loss issue is correct, but its interpretation of the subrogation issues is not correct, this could potentially cause difficulties in future liquidations in which the ICCL is involved, in terms of how an estimate of future recoveries could be given, and at what stage. He asserted that in order to prevent a risk of overpayment, an administrator would have to apply an estimate of future recoveries that is either completely accurate (which is unlikely to be workable) or only certify claims once actual recoveries are received and that, otherwise, ICCL could potentially have recourse against the Administrator for an overpayment, raising a liability risk to the Administrator in carrying out his functions. As regards the foregoing, the ICCL submit that the 1998 Act allows for the issuing of an interim certificate and places no limitation on how many further or updated interim certificates might be issued as, for example, more information becomes available. The ICCL also submits that it is only in respect of the final certificate that the Administrator would have to ensure that a final calculation as of that date was accurate.

98. The final section of the Administrator's affidavit identifies the reason why Mr. Wallace has separate legal representation in his roles as liquidator and administrator and no issue arises in respect of the foregoing.

Report by Dr. Louis Correia da Silva (retained by Mr. Day)

99. I now turn to the next affidavit in sequence, being a short affidavit sworn by Dr. Louis Correia da Silva, economist of Oxera Consulting LLP, Oxford, United Kingdom. Dr. da Silva is a professional economist who was retained on behalf of Mr. Roger Day in order to provide an expert opinion on the questions raised in the 10 December 2019 notice of motion brought by the ICCL. Dr. da Silva exhibits his report which is dated 12 April 2021. I have carefully considered the entirety of Dr. da Silva's

report. Plainly, Dr. da Silva is a very highly qualified and most experienced professional economist. Among other things, his report states the following at para. 1.9 and 1.10: -

“1.9 In relation to the current dispute, I led a comprehensive review for the European Commission of National Investor Compensation Schemes established in accordance with the EU Investor Compensation Scheme Directive (ICD) in 2005. This study remains the key reference study on investor compensation schemes in Europe and is still cited by the European Commission on its website. I provided a comparative description and evaluation of the national investor compensation schemes with respect to their operating performance, financial positions, and ultimately the level of protection that they afford to investors.

1.10 Since delivering that study for the European Commission, I have advised various parties on matters relating to the design and regulation of national financial compensation schemes, including on issues related to funding and the eligibility of claimants. My experience covers the role of compensation schemes in a range of financial sectors . . .”

100. Having set out his understanding of the financial background and of the stances adopted by the relevant parties, Dr. da Silva refers, at para. 1(c) of his report to the instructions received by him, namely, to provide expert analysis and opinions on six matters which he proceeds to list. It is fair to say that these six matters are the very issues which this Court is asked to determine and these can fairly be said to be or to involve questions of law. Dr. da Silva does, however, state very clearly, including at para. 1.29, that *“I do not attempt to opine on the correct interpretation of any legislation, which is a matter of law”*.

101. At para. 1.30, Dr. da Silva refers to issues which he has also been instructed to examine, namely, the worked examples and valuation methodologies referred to in Mr. Fagan’s affidavit and Dr. da Silva was asked to identify any aspects of the worked examples which he considered to be inaccurate or to be *“. . . inconsistent with the economic and financial principles underlying the*

provisions and purpose of the 1998 Act". It is uncontroversial to say that whether or not the approach taken by the ICCL is consistent with the 1998 Act is a matter for this Court to determine.

102. Dr. da Silva summarises his conclusions at Section 1 E and it is appropriate to quote as follows from that section wherein Dr. da Silva identifies each relevant issue and proceeds to set out his opinion as well as making reference to certain instructions received by him. The following is a verbatim quote beginning from p. 10 of his report: -

“Issue (1) concerning the calculation of net loss.

1.33 This issue is discussed in section 3 of this report.

1.34 I am instructed by Ivor Fitzpatrick to assume that the proper legal interpretation of s. 30 (1) of the 1998 Act is that the “net loss” in respect of investment instruments must be calculated on the basis of the market value of those investments as it is known at the Determination Date. I am also instructed to assume that the ICCL’s proposal that the net loss be calculated on the basis of facts which were not in existence on the Determination Date is not legally correct.

1.35 From an economic and financial perspective, my opinion is that the calculation of net loss under s. 30(1) of the 1998 Act should not take into account any estimated future recoveries. Including such uncertain levels of recoveries would effectively transfer to investors the risk associated with the ex – post – realisation of recoveries being different to original estimates, when investors have little means to manage those risks. This approach is consistent with the 1998 Act as well as with (i) the objective of investor compensation schemes (s. 2 B) and (ii) the regulatory precedents that I have reviewed (s. 3 E). The potential costs to the investment firms (and taxpayers) of this approach could be mitigated in several ways (ss. 3 F and 4 D)”.

103. With regard to the foregoing, the submission is made on behalf of the ICCL that an opinion proffered by Dr. da Silva on the basis of an instruction given to him to assume that the proper legal

interpretation of s. 30(1) of the 1998 Act as contended for by the ICCL is incorrect, is an opinion of no probative value. It is also submitted on behalf of the ICCL that an opinion based on an economic and financial perspective is not relevant to the meaning and effect in law, of the relevant section. It is uncontroversial to say that Issue (1) is essentially a legal issue and it is for this Court to determine the proper interpretation of s. 30(1) of the 1998 Act insofar as “net loss” is concerned. It should be said, however, that Dr. da Silva does not purport to offer any view on the proper interpretation of any legal provision. His view as an expert economist is, however, uncontroverted in circumstances where the ICCL has chosen not to proffer any expert evidence.

104. Dr. da Silva goes on to offer the following summary in respect of his views concerning the second issue: -

“Issue (2) concerning the extent of the ICCL’s subrogation rights in relation to Net Loss Client Assets

1.36 This issue is discussed in s. 4 of this report.

1.37 I understand from the judgment of Ms. Justice Finlay Geoghegan that “neither the Directive nor the 1998 Act defines what is meant by subrogation in s. 35(5) of the 1998 Act”.

[Judgment delivered 31 January 2019, para. 13]. Ms. Justice Finlay Geoghegan remarks: -

I have noted in the course of considering this application, the different approaches [to subrogation] taken in the UK for the purposes of implementing its obligations under the Directive [judgment of Finlay Geoghegan J. delivered 31 January 2019, para. 20]

1.38 For my analysis, I am instructed by Ivor Fitzpatrick to assume that the 1998 Act (Return of Investor Funds or other Client Property) Regulations 2015 (S.I. no. 407/2015) (“the Regulations) means that client’s claims to assets which could have been dealt with under Regulations 7,8 and 9 are to be treated as proprietary claims which are for the return of client property. I am also instructed to assume that the ICCL’s right of subrogation does not extend to claims made by clients of CHC to such assets because they are not claims in the liquidation.

1.39 Specifically, I understand that proprietary claims are for the return of client property and not claims in the liquidation against company assets.

1.40 For reference, Regulation 10 states that: -

Any claim of clients of an investment firm which remains wholly or partly unsatisfied after the operation of the foregoing provisions of this Part shall rank as an unsecured claim against the non-client assets of the investment firm (referred to subsequently in these Regulations as the “general assets”). [S.I. no. 407/2015 – Investor Compensation Act 1998 (Return of Investor Funds or other Client Property) Regulations 2015, Regulation 10].

1.41. Therefore, if the claims of particular investors are found by the Court to be proprietary claims, then it is my understanding that such claims are not claims in the liquidation and are not therefore subject to the subrogation rights of the ICCL under s. 35 of the 1998 Act. In this case, the ICCL’s subrogation rights have minimal value due to the minimal value of CHC’s assets.

1.42 Finally, it is important to consider the potential adverse impact of subrogation rights on market confidence, which is a central goal of compensation schemes set out in the recitals to the EU ICD. This is because current investors and prospective investors are likely to be concerned that an official body is taking monies or assets that belong to private individuals, especially if such views were fanned by adverse press coverage.

Issue (3) concerning the extent of the ICCL’s right of subrogation in relation to investors”.

105. On behalf of the ICCL it is submitted that, in circumstances where Dr. da Silva has been asked to make a factual assumption to the effect that the ICCL is wrong with regard to the subrogation claim contended for, any opinion expressed by Dr. da Silva on this issue is of no probative effect, being predicated on an assumption rather than based on independent analysis. It is also submitted on behalf of the ICCL that Dr. da Silva could not make a useful contribution by way of independent analysis as

the issue is a legal one, concerning the proper interpretation of ss. 35(5) and 35(5A) of the 1998 Act, in the context of the Directive to which the Act gives effect and having regard to the 2015 Regulations made pursuant to the Act. Similarly, and with particular reference to Dr. da Silva's statement at para. 1.41, it is submitted on behalf of the ICCL that an opinion based on what the expert has been told to assume is of no assistance to the court and, insofar as an opinion is expressed as to law, Dr. da Silva is not qualified to proffer same. As regards para. 142, the submission is made on behalf of the ICCL that the task for this Court is to analyse and interpret legislation which is in being and Dr. da Silva's comments as to how the public might view things or as regards "adverse press coverage" have no probative weight. Issue (2) is a legal issue, involving the interpretation of legislation and Dr da Silva does not purport to offer a view as to the proper interpretation of any section from a legal perspective. His views as an expert economist are, however, uncontroverted.

106. The following comments are made by Dr. da Silva by way of a summary of his views concerning the third issue to which he refers: -

"Issue (3) concerning the extent of the ICCL's right of subrogation in relation to investors

1.43 This issue is discussed in Section 4 of this report.

1.44 If the court is of the view that the ICCL's right of subrogation extends to client assets, I am of the view that this should be limited such that the rights only extend to those assets for which compensation is paid. If the ICCL's rights were to extend to all client assets, a situation could arise whereby a class of investors who had not received compensation could receive less distribution, due to the ICCL's application of subrogation rights.

1.45 For example, consider a scenario where there is a pooled bond portfolio and an unpooled equity portfolio, and investors have invested in either one of the portfolios or both portfolios. Suppose that the equity portfolio suffers from asset misappropriation and the bond portfolio does not.

- *If the ICCL's subrogation rights extend to the assets for which a specific owner cannot be identified (e.g. due to misappropriation and/or negligence) the ICCL would have subrogation claims against the equity portfolio, whose investors suffered from losses.*
- *If the ICCL's subrogation rights extend to all client assets, the ICCL would have subrogated claims against both the equity portfolio and the bond portfolio, as some investors who invested in the equity portfolio have also invested in the bond portfolio. Since the bond portfolio is pooled, the ICCL would have subrogated claims against the pooled account, which also holds assets of investors who are not subject to misappropriation (i.e. investors who only invested in the bond portfolio, not the equity portfolio). As a result, the bond – only investors who are not receiving compensation would, unless all client monies are recovered, receive less distribution from the Liquidator, due to the ICCL's exercise of subrogation rights”.*

107. On behalf of the ICCL, it is emphasised that, in the manner explained in Mr. Fagan's affidavit, if an asset or a class of assets does not give rise to a claim for compensation, there is no question of the ICCL asserting any right to subrogation as against such an asset or class of assets. It is submitted on behalf of the ICCL that its right of subrogation can only extend to assets or classes of assets in respect of which a claim to compensation has arisen. In the circumstances, it is submitted on behalf of the ICCL that para. 1.45 addresses something which is not an issue, given that the ICCL are not asserting subrogation rights against assets which do not give rise to a claim for compensation. There does not appear to be any dispute between the parties that, if this Court is of the view that, properly interpreted, the legislation confers on the ICCL a right to subrogation which extends to client assets, there is no question of the ICCL contending for such a right to extend beyond assets for which compensation is paid.

108. Dr. da Silva continues, from para. 1.46, to summarise his views in respect of the fourth issue as follows: -

“Issue (4) concerning the application of subrogation rights across multiple assets

1.46 This issue is discussed in section 4 of this report.

1.47 There are two possible approaches to the application of subrogation rights across multiple assets (i) the ICCL’s approach, i.e. equal subrogation rights on an aggregated basis, where net loss and compensation paid are calculated by considering the investor’s overall financial position across all assets; and (ii) an alternative approach, where the allocation of subrogation rights across assets is based on net loss and compensation paid.

1.48. In my view, the latter approach is more aligned with the purpose of investor compensation schemes, which is to provide compensation to investors based on their level of net loss. The primary purpose of the scheme is to protect investors and thereby maintain market confidence. The scheme is not set up to generate investment returns (above the cost of compensation payments) for its members.

1.49 Therefore, I consider it more appropriate to allocate subrogation rights based on the level of net loss and compensation paid in respect of each asset”.

109. On behalf of the ICCL, it is submitted that Dr. da Silva has not addressed the specific question which arises, namely, to the extent that the ICCL’s right of subrogation extends to client assets (i.e. client assets giving rise to a claim for compensation, or “Net Loss Client Assets” as these have been described by the ICCL), whether such a right of subrogation applies equally to Net Loss Client Assets or whether it is allocated between different assets by reference to the level of loss in respect of each of such assets, or otherwise. The submission is made on behalf of the ICCL that in response to the question “*how do you apportion the subrogation?*” Dr. da Silva has not answered the question, but has addressed a different question which does not arise. Dr. da Silva’s report goes on to summarise his views on a fifth issue as follows: -

“Issue (5) concerning the over – compensation of investors

1.50 This issue is discussed in section 4 of this report.

1.51 The ICCL holds that “over – compensation” exists if (i) recoveries are excluded from the calculation of net loss, and (ii) such recoveries are distributed to investors after the Determination Date. The difference between the amount of compensation that would have been paid if recoveries had been included in the calculation of net loss and the amount of compensation actually paid is referred to by ICCL as “over – compensation” (hereinafter “the supposed over – compensation”). The precise definition of what ICCL terms over – compensation is set out in para. 53 of the affidavit.

1.52 To be clear, I am instructed to assume that the ICCL’s view that recoveries after the determination date should be included in the calculation of net loss is not legally correct. I do not form my own view on the appropriate legal application of subrogation rights. The specific instructions are set out in my response to issue (i).

1.53 While the correct application of subrogation rights is a matter of law for the Court to determine, in sections 4(c).1 and 4(c).2, I use two sets of worked examples to show the asset distribution to investors and the ICCL under different approaches.

1.54 As illustrated in my examples in section 4(c), under the ICCL approach to calculating net loss (i.e. including recoveries), investors would be significantly exposed to the uncertainties and possible delays associated with recoveries, and this exposure increases as the expected recovery increases. In the most extreme scenario where the Liquidator expects investors to fully recover their losses, the ICCL would not have paid investors any compensation, even when investors are only able to receive part of or even none of their total claim in a timely manner and with certainty. This outcome for the investors is inconsistent with the purpose of the investor compensation scheme as set out in section 2B which is to increase investor confidence through prompt compensation payments.

1.55 This exposure to recoveries is mitigated if expected recoveries are excluded from the calculation of net loss.

1.56 In my worked examples, under the ICCL's approach and the ICCL's application of subrogation rights but excluding recoveries, investors would ultimately have received broadly the same amount of distribution. The ICCL would have also recovered broadly the same percentage of costs. However, there are two differences with respect to distribution. Specifically, under the ICCL's application of subrogation rights but excluding recoveries, these manifest as follows.

- Importantly, the investors are paid more promptly at the expense of the ICCL, which is required to make more up – front compensation payments and faces a potential delay to its cost recoveries. This is because, under this scenario, the ICCL is only able to exercise its subrogation rights on recoveries when these recoveries are realised and available for immediate distribution to investors. This approach is more consistent with the objective of investor compensation schemes and ensures that investors are not exposed to the uncertainties associated with recoveries, which are outside their control to manage. As I show in Section 4D, the potential delays in cost recoveries are unlikely to have a material financial impact on the ICCL. I note that delays may create significant liquidity constraints for investors.*
- An observation from my worked examples is that the ICCL's net cost is slightly higher (Table 4.3) this is due to greater pay – outs to investors both at and after the Determination Date.*

1.57 Under my approach to subrogation, where subrogation rights do not apply to proprietary claims, investors would receive more distribution both on and after the Determination Date, at the expense of higher costs for the ICCL. In the scenario where the Liquidator expects investors to fully recover their losses, investors would have received more than their original

claim. This could still be reasonable. As I discuss in more detail in para. 6.2, to the extent permitted by law, it may also be appropriate for the ICCL to compensate investors for the costs (including opportunity costs) of negligence, miss – selling and mismanagement by CHC. This consideration is particularly relevant for the present case, where the cohort of investors represented by Mr. Roger day have not received any compensation from the ICCL, despite having filed their claim application as early as 2011. I explained the concept of opportunity cost in section 2D, and assessed the significance of these costs in the presence of long payment delays in section 5D”.

110. In circumstances where Dr. da Silva refers at para. 1.52 to instructions given to him the ICCL submits that Dr. da Silva’s views as to why future recoveries ought not to be taken into account for the purposes of a calculation of net loss all appear to be from a policy perspective as to what Dr. da Silva would like to see by way of a regime for investor compensation. As regards Dr. da Silva’s comments at para. 1.54, the submission is made on behalf of the ICCL that Dr. da Silva appears to have ignored what Mr. Fagan averred in his grounding affidavit, wherein Mr. Fagan recognised that if one were to wait for all recoveries before issuing any statements and certifying any loss, that would involve significant delay for investors which the ICCL does not want to see arising. The submission was made that, for this reason, interim statements can be issued and interim payments can be made, thereby addressing the delay issue, according to the ICCL. The ICCL made payments to all investors for whom certificates have been issued to date and there is no evidence from which the court could hold that, were further certificates, interim or final, to be issued, that the ICCL would not make prompt payment in respect of same. Nor is there evidence from which this Court could conclude that that the Administrator was in a position to issue interim statements which he failed to issue, and it will be recalled that there is no statutory obligation on an administrator to issue same. The fact remains, however, that 1,372 eligible investors have, a decade after the winding up order was made, received nothing.

111. It is acknowledged on behalf of the ICCL that under Dr. da Silva’s approach to subrogation, where subrogation rights do not apply to proprietary claims, investors would receive more both on and after the Determination Date, at the expense of higher costs for the ICCL. It is not acknowledged that that is the correct approach arising from the proper interpretation of the legislation. Issue is also taken, on behalf of the ICCL, with Dr. da Silva’s view that it “*could still be reasonable*” for investors to be paid, in fact, more than the amount of their losses. It is submitted that no legal basis has been identified to support the proposition that a payment of compensation in excess of actual loss is reasonable and the submission is also made that Dr. da Silva is not qualified to advance an opinion as to what the law permits.

112. As I observed earlier, the 1998 Act is not concerned with ‘actual loss’ (as ultimately determined at the conclusion of a liquidation process which can take many years), but with concepts created by statute i.e. ‘compensatable loss’ as derived from ‘net loss’. Insofar as Dr. da Silva offers the view that it may be appropriate for the ICCL to compensate investors for the costs, including opportunity costs, of negligence, mis-selling and mismanagement, the submission is made on behalf of ICCL that none of those comprise a heading of loss provided for in either the Directive or the 1998 Act, insofar as paying compensation to an investor is concerned. That is true, but this Court is entitled to take from Dr. da Silva’s evidence that an investor who is deprived of access to his or her assets is someone who, in fact, suffers loss (such as the costs of lost opportunity). In its focus on what it regards as ‘actual loss’ the ICCL take no account of this. Indeed, it is clear from the ICCL’s averments and submissions that they regard someone who ultimately recovers their assets, whether a decade post winding-up or otherwise, as someone with no actual loss. The foregoing issue seems to me to be one of particular relevance to an analysis of the asserted equitable right of subrogation based on the alleged unjust enrichment of investors which the ICCL also contends for in the present application and which is discussed later in this judgment.

113. With regard to the emphasis placed by Dr. da Silva on the cohort of investors represented by Mr. Day not having received any compensation from the ICCL, despite having filed claims as early as 2011, it is submitted on behalf of the ICCL that Dr. da Silva fails to address the fact that the ICCL can only issue compensation payments when interim or final statements are issued and no such statements have been issued in respect of the cohort of investors represented by Mr. Day. It is a fact that no such statements have been issued in respect of Mr. Day and the investors he represents but that fact does not at all address the fact of this delay which, on any analysis runs entirely contrary to the emphasis placed in the Directive on the prompt payment of compensation. It seems fair to observe at this juncture that the inescapable logic of the ICCL's position (in circumstances where no investor has a right to receive an interim statement or interim payment) is that such delay, although unfortunate, is entirely permissible because the focus must be on the accuracy of calculations taking account of what is or is not recovered during the course of the liquidation proceedings and this requires that, *inter alia*, actual recoveries during the course of the entire liquidation to be taken into account in a calculation of 'net loss'.

114. Dr. da Silva's views on a sixth issue are then summarised as follows: -

“Issue (6) concerning the distribution of monies

1.58 This issue is discussed in Sections 4 and 5 of this report.

1.59 With respect to the distribution of monies under the ICCL's approach to subrogation rights and my approach (based on my instruction, where subrogation rights do not apply to proprietary claims), my opinions on issue (5) also apply to issue (6).

1.60 In section 5, I provide further analysis on how the application of subrogation rights affect the distribution of investor's assets and investor confidence. My analysis shows that delays in compensation pay – outs significantly undermine the economic interest of investors which creates an inconsistency with the objective of investor compensation schemes”.

115. Again, the submission is made on behalf of the ICCL that Dr. da Silva's opinion on the issue is explicitly qualified by the instructions given to him and so his views do not assist the Court. The submission is also made that the issue in question, like all of the issues, are legal in nature.

116. A seventh issue in respect of which Dr. De Silva offers his views (summarised from para. 1.61, onwards of his report) concerns the *“Worked examples”* in the affidavit of Mr. Fagan. Commenting on those which appear in section C of Mr. Fagan's affidavit, Dr. De Silva states inter alia, as follows: -

“1.65 A significant point about the worked examples in the affidavit of Michael Fagan is that, although they are based on the supposition that expected recoveries should be deducted in the calculation of net loss, they do not consider the possibility of recoveries ultimately being less than expected. This possibility, if realised, would result in under-compensation and this outcome is just as likely as the supposed over-compensation, even if the net loss amount is smaller than €20,000. This risk of investors being under-compensated is a major drawback of the ICCL's approach, given the goals of the Investor Compensation Scheme to protect investors and maintain market confidence.”

117. The submission is made by the ICCL that the foregoing comments by Dr. da Silva ignore the fact that an interim certificate can be issued with an estimate as to what the future recoveries are expected to be and, in the event that actual recoveries turn out to be less, the risk of the investor being under-compensated is entirely avoided by the reality of actual recoveries, as made during the course of the winding-up, being reflected in the final certificate. Thus, the investor would receive a top-up compensation payment from the ICCL so as to ensure they received the full amount of compensation to which they were entitled (being 90% of the actual loss or €20,000 or whichever is the lesser). The evidence before this Court, however, is that for 1,372 eligible investors, no interim statements have ever been issued and no interim payment of compensation has ever been made. Nor is there any obligation on the Administrator to issue or any right on the part of an eligible investor to receive

same. This Court is entitled to accept Dr. da Silva's evidence that 'under-compensation' is just as likely as what the ICCL regard as 'over-compensation', having regard to the interpretation contended for by the ICCL. Dr. da Silva also stated *inter alia*, the following:

"1.66 In addition to the risk of under-compensation, bringing recoveries into account exposes investors to delays, and the associated opportunity costs, as set out in s.2D. These opportunity costs could be significant if investors are facing liquidity constraints..."

118. On behalf of the ICCL it is again submitted that delays can be avoided if interim certificates are issued, but I have already observed that there is no obligation on an administrator to issue interim statements and none have, in fact, been issued to the 1,372 eligible investors whom Mr Day represents. It is acknowledged on behalf of the ICCL that, to the extent a 'top-up' payment was required, same would need to await the final certificate but, submits the ICCL, a material amount of compensation due could be paid on foot of an interim certificate, with the final certificate and any payment due on foot of same ensuring that the investor gets precisely what they are entitled to. Thus, it is submitted, the risks identified by Dr. da Silva have a remedy within the statutory framework. It seems to me that, were there an obligation on an administrator to issue interim statements, the foregoing submission might have greater force but the reality, as the facts in the present case illustrate, is that delay, indeed very substantial delay, may well arise. Delay in the payment of compensation, contrary to the provisions of the Directive, is the inevitable consequence of the interpretation contended for by the ICCL. Indeed, according to the ICCL, even where an eligible investor received an interim payment which turned out to be less than was properly due, the investor could not ultimately receive the entire sum due to them until the conclusion of the liquidation proceedings.

119. Insofar as Dr. da Silva refers again to "*opportunity costs*", it is emphasised on behalf of the ICCL that compensation for loss of opportunity is not something provided for in the Directive or in the statute and would constitute an *ultra vires* category of compensation. It is of course correct that neither the Directive nor the Act refer to compensation for lost opportunity costs. That does not mean

that an investor who has been deprived, for years, of access to his or her assets has not, in fact, suffered loss, such as the cost of lost opportunity. On Dr. da Silva's uncontroverted evidence, such loss may well arise even if the investor in question ultimately recovers their assets. Dr. da Silva also states inter alia, the following: -

“1.69 If the supposed over-compensation turns out to be permanent, I note that this outcome may still be reasonable. For example, even if investors receive more than their total claim in the liquidation, they may be worse off than they would have been if CHC had not failed. This is due to the costs (including opportunity costs) of negligence – mis-selling and mismanagement by CHC.”

The submission is made on behalf of the ICCL that it is not permitted to compensate for loss of opportunity, negligence, mis-selling or mismanagement and it is only permissible to compensate for the failure on the part of the investment firm to return the investments to the investor. It is also submitted that Dr. da Silva had failed to identify the legal basis upon which compensation, in excess of that prescribed by the 1998 Act, could lawfully be paid to an investor.

120. The foregoing submissions seems to me to ignore two things; firstly, that the 1998 Act is concerned with the payment of 'compensatable loss' with reference to 'net loss', both concepts being creations of the statute (and neither being 'actual loss' which is the focus of the ICCL's submissions) and, secondly, even an investor who receives a compensation payment from the ICCL and who ultimately recovers their entire assets may in fact have suffered an actual loss. Dr. da Silva's evidence is that despite receiving what the ICCL characterise as overcompensation, such investors "*may be worse off*" than if the investment firm, in this case CHC, had not failed. The foregoing is uncontroverted evidence and undermines the ICCL's view that an investor who receives a compensation payment and who ultimately recovers their assets (e.g. at the conclusion of the liquidation proceedings, years after the winding-up order) is someone who cannot have suffered any 'actual loss' and is someone who must be regarded as having been 'overcompensated'.

121. As Dr. da Silva makes clear from para. 1.74 of his report and illustrated in the worked examples contained in section 6B “*Mr. Day receives less distribution of monies under the ICCL approach*” (as does a Mr. C, being another member of the cohort of investors represented by Mr. Day, none of whom have yet received anything). No issue is taken with the accuracy of the calculation but the ICCL submit that the question is not as to the outcome in mathematical terms of the two different approaches, but which of those approaches is legally correct. The submission is made that an approach which may be more beneficial for Mr. Day does not, of itself, render that approach to be the legally correct one having regard to a proper interpretation of the legislation and that is, of course, true as a matter of principle. There is, nevertheless, uncontroverted evidence that the approach contended for by the ICCL offers less protection to investors, including to Mr. Day.

122. At para. 1.77, Dr. da Silva makes the point that if this Court decides that the ICCL’s subrogation rights extend only to Mr. Day’s claim against company assets, not to claims against client assets, the ICCL’s subrogation rights would have “*minimal value, due to the minimal value of CHC’s assets*”. This is in circumstances where the court understands that there are, in fact, no company owned assets. The submission is made on behalf of ICCL, however, that the foregoing is determinative of nothing and the key question is as to the extent of the ICCL’s subrogation rights having regard to a proper interpretation of the legislation.

123. At para. 1.80, Dr. De Silva states *inter alia*, the following: -

“1.80...I understand that in Ireland, investors are able to claim compensation by filing (i) a complaint with the Financial Services and Pensions Ombudsman of Ireland, (ii) a direct lawsuit against CHC, or (iii) a claim with the ICCL. Since CHC is now in liquidation and has ‘minimal’ assets, complaints through the Ombudsman are unlikely to result in material financial compensation. Lawsuits can be expensive for individual investors and, again, CHC lacks the assets to pay significant damages. This leaves (iii) as the only useful means to obtain redress for negligence, mis-selling and mismanagement, if it is available.”

The submission is made on behalf of the ICCL that the foregoing is not what the Directive or the 1998 Act relate to or provide for, in that the Directive relates to the inability of the investment firm to return the investments to the investor and the legislation is not concerned with negligence or mis-selling or mismanagement. Rather, submits the ICCL, it is to do with the inability to return assets to an investor, something which could arise for no fault at all or, as in the present case, where there has been misappropriation of assets. The submission is made on behalf of the ICCL that Dr. da Silva mis-analysed the purpose behind the scheme. It is appropriate to make clear that neither Dr. da Silva's views aforesaid, nor the objection taken to them by the ICCL, are determinative of any question this Court must decide, the key question being the proper interpretation of the relevant legislation.

124. Dr. da Silva continues at para. 1.80 to state *inter alia*, the following: -

“Indeed, the ICCL’s information booklet notes that ‘the ICCL was set up to give investors a way to claim compensation without the need for expensive legal action’. To the extent permitted by law, which I do not opine on, my view on balance, from a public policy perspective, is that it is reasonable for the ICCL to compensate investors for the costs (including opportunity costs) of negligence mis-selling and mismanagement, in order to increase market confidence among investors. This approach would increase compensatable loss for investors, subject to the statutory maximum compensation of €20,000.”

Dr. da Silva's views provide evidence that even those investors who ultimately recover all their assets may in fact have suffered loss. Underpinning the ICCL's approach is the proposition that someone who ultimately recovers their entire assets (regardless of how many years they were deprived of access to same) is someone without any actual loss and, thus, argue the ICCL, any compensation paid to them is overcompensation. The evidence of Dr da Silva undermines the foregoing proposition.

125. It will be recalled that Mr. Nugent represents the cohort of investors who have received compensation payments from the ICCL. Mr Nugent's claim in the liquidation amounts to €134, 048.00 and he received a compensation payment of €20,000.00 on 22 April 2013. The eighth issue in

respect of which Dr. da Silva summarises his views (from para. 1.8 onwards) concerns **“Information disclosed by the Liquidator in respect of investors represented by Mr. Nugent”** and Dr. da Silva states as follows: -

“1.82 I find that out of the 568 investors whose net loss was reported by the Liquidator, under the base case of recoveries, 322 investors would receive more compensation if the recoveries were excluded in the calculation of net loss. Under the downside case of recoveries, 288 investors would receive more compensation if recoveries were excluded in the calculation of net loss. The total amount of the supposed over-compensation is around €1.3m and €0.6m for the base and downside recoveries cases, respectively.”

126. Later at para. 1.85, Dr. da Silva states as follows: -

“I also note that, as set out in para. 4.64, for the CHC case the ICCL expects a claim of €4.7m from the Excess of Loss Insurance. Given that the ICCL can claim up to €100m from the Excess of Loss Insurance for Fund A, the ICCL is unlikely to incur any additional out-of-pocket costs associated with supposed over-compensation.”

The submission is made on behalf of the ICCL that the question of what insurance it does or does not decide to put in place in order to protect its own position, is of no relevance and that prudent fiscal management on the part of the ICCL is irrelevant to the proper interpretation of the legislation and does not permit investors to receive from the ICCL more than they have, in fact, lost.

127. Counsel for the ICCL drew the court’s particular attention to the contents of certain sections in the body of Dr. da Silva’s report. At para. 2.2, Dr. da Silva states *inter alia*, that: -

“The main objective of an investor compensation scheme is to maintain market confidence, which could be eroded if retail investors are not compensated in the event of a failed investment firm being unable to return their money or instruments. For the ICCL it is submitted that the foregoing is not entirely correct. In other words, the maintenance of market confidence is not the ‘main objective’ of an investor compensation scheme. As per recital

four of the Directive, twin objectives are identified, namely ‘the protection of investors and the maintenance of confidence in the financial system’. The submission is made on behalf of the ICCL that the maintenance of confidence in the financial system arises through the protection of investors but it is the payment of compensation which results in that confidence being maintained and the submission is also made that no compensation can lawfully be paid other than in accordance with the Directive and the 1998 Act which gives effect to same.”

Counsel for the ICCL highlights similar comments made by Dr. De Silva in the body of his report, as follows: -

“...the main purpose is to increase market confidence among investors” (para. 10);

- *“the underlying objective of an investor compensation scheme is to maintain market confidence”* (para. 2.17).

Counsel for the ICCL also highlights references, in the body of Dr. da Silva’s report, to the instructions given to him to assume that the legal interpretation contended for by the ICCL is incorrect (e.g. para. 3.12). At para. 3.17, Dr. De Silva states *inter alia*, that: -

“...to preserve investor’ confidence, it is appropriate to exclude expected recoveries from the calculation of net loss, so that investors can receive more compensation with less delay.”

The submission is made on behalf of the ICCL that investor confidence may well be preserved by investors receiving more compensation with less delay but the point at issue is what the legislation entitles an investor to receive, having regard to the ICCL’s obligations and rights. At para. 3.18, Dr. da Silva states *inter alia*, that *“since the ICCL is better equipped than the investors to absorb these risks...it is reasonable from an economic standpoint that the ICCL bears more of the up-front compensation risk...”*. The submission is made on behalf of the ICCL that this is an articulation of an economic view having no relevance to the proper interpretation of the legislation at issue.

128. Having presented a number of *“Worked Examples”* based on certain assumptions, Dr. da Silva states *inter alia*, at para. 3.28 that: *“These examples show that the inherent uncertainties of recovery*

could result in a range of different outcomes, including both ‘over-compensation’ and ‘under-compensation’ of investors.” He goes on in that paragraph to state that *“Since investors face equal upside and downside risks, I find Mr. Fagan’s description of over-compensation as ‘unjust enrichment’ questionable. In any case, even if ‘unjust enrichment’, were considered an acceptable term, it would be fully counterbalanced by the equal presence of ‘unjust impoverishment’.* With regard to the foregoing, the submission is made on behalf of the ICCL that if their contended-for approach is correct, there should neither be over-compensation, nor under-compensation because both possibilities are addressed if estimated and actual recoveries are taken into account by way of interim and final certificates, respectively. The submission is made that the approach contended for by the ICCL is one which achieves certainty and avoids any of the uncertainties suggested by Dr. da Silva. Regarding the possibility of under-payment of compensation, the ICCL’s submission was to say that if the Liquidator estimates a recovery of x, but in fact the actual recovery is x-y, such that the interim payment to the investor by the ICCL was less than their full entitlement, it is addressed by a ‘top-up’ payment of the relevant balance of compensation once the final statement is issued. As regards the foregoing submission, three comments seem appropriate. Firstly, it will be recalled that Mr. Day and the 1,372 investors he represents have, in fact, never received interim statements or interim payments despite the passage of a decade since the winding up order made in October 2011. Secondly, no eligible investor has any right to any interim statement or interim payment. Thirdly, the approach contended for by the ICCL involves delay and would, if the ICCL are correct, mean that finality in terms of an eligible investor’s entitlement to compensation, could only occur at the end of the liquidation process, however long that might be, notwithstanding the emphasis on prompt payment which appears in the Directive and in the Commission’s proposal regarding same.

129. It is submitted by the ICCL that what Dr. da Silva contends for is an approach which creates the risk that an investor might be over-compensated. It is also emphasised on behalf of the ICCL that if estimated and actual future recoveries are not taken into account, the investor is exposed to a risk

of an adverse outcome. The following example is given on behalf of the ICCL: If, at the date of the winding-up, an investor has an asset worth €100,000 but, because of events which occur after that point (e.g. a liquidator successfully makes an application that client assets be used to pay his fees or the value of the asset is adversely affected e.g. an uninsured building suffering fire damage) an investment worth €100,000 at the start of the liquidation could be worth substantially less or nothing by the end of the liquidation. It is submitted on behalf of the ICCL that in such a scenario, an investor who should otherwise have received up to €20,000 gets nothing from the ICCL. The foregoing scenario is one I will return to later in this judgment. For present purposes it is sufficient to say that it is accepted on behalf of the *legitimi contradictores* that where the date of the winding up order is the relevant one for the purposes of determining an eligible investor’s entitlement to compensation, what occurs thereafter is not relevant.

130. The ICCL also draw particular attention to para. 4.8 of Dr. da Silva’s report where he states *inter alia* that “Neither is it clear to me whether the ICCL’s position is that its subrogated rights entitle it to recover amounts up to the amount it paid to investors, or to recover more than the amount it paid to investors.” It is emphasised on behalf of the ICCL that nothing averred by Mr. Fagan or in the ICCL’s submissions is intended to suggest that the ICCL seeks to recoup more than the amount of the compensation actually paid out by it.

131. Among the various tables included in Dr. De Silva’s report is the following:

<i>“Table 4.4 Summary of Economic Outcome for Investors and the ICCL, assuming Full Recovery of all Losses</i>				
<i>Calculation of net loss</i>	<i>Including recoveries</i>		<i>Excluding recoveries</i>	
<i>Distribution/Application of Subrogation</i>	<i>No proprietary claim (ICCL)</i>	<i>95% proprietary claim (Dr.</i>	<i>No proprietary claim (ICCL)</i>	<i>95% proprietary claim (Dr.</i>

		<i>Correia da Silva)</i>		<i>Correia da Silva)</i>
<i>To investors in timely manner and with certainty, at the determination date, (percentage of total claim).</i>	50%	50%	85%	100%
<i>To investors, if recoveries are distributed (percentage of total claim).</i>	100%	100%	100%	120%
<i>To ICCL (percentage of total cost).</i>	100% (no compensation paid)	100% (no compensation paid)	100%	25%
<i>To ICCL (net cost) (€)</i>	0	0	0	€15,000
<i>Cap on distribution to the ICCL (€)</i>	N/A	N/A	N/A	€5,000"

132. In the foregoing analysis, Dr. da Silva assumes that 95% of the investor’s claim constitutes a proprietary claim. The foregoing illustrates, *inter alia*, that if recoveries after the commencement of the winding-up are excluded from the calculation of net loss, it is possible that an investor who ultimately recovers their entire asset by the conclusion of the liquidation process could end up with 120% of a €100,000 investment (i.e. having received compensation of €20,000 from the ICCL). It was submitted that on behalf of the ICCL that no legal basis can be found anywhere within the Directive or the act for such a scenario. Again this submission involves a focus on what it regards as ‘actual loss’ and - leaving aside entirely the uncontroverted evidence that such an investor may have in fact sustained actual loss notwithstanding the ultimate recovery of their investment and may in fact still be worse off than had the investment firm not gone into liquidation – the 1998 Act refers not to

‘actual loss’ but to ‘net loss’ and ‘compensatable loss’ both of which concepts are statutorily defined and will be examined closely in this judgment.

133. Dr. da Silva went on to state in his report (para. 4.45) that “...under the ICCL approach to calculating net loss (i.e. including recoveries), investors would be significantly exposed to the uncertainties and possible delays associated with recoveries. In the most extreme scenario where the Liquidator expects investors to fully recover their losses, the ICCL would not have paid investors any compensation up front, even though investors are only able to receive 50% of their total claim in a timely manner with certainty. Such an outcome is inconsistent with the purpose of the investor compensation scheme...” Elsewhere in the report, he considers *inter alia*, “funding options available to the ICCL” as well as “lessons learned from the UK FSCS” neither of which, submits the ICCL are relevant issues insofar as the proper interpretation of the legislation is concerned. Later in this judgment I will refer again to Dr. da Silva's report but I now turn to the affidavit sworn by Mr. Day who retained him.

Affidavit of Mr Roger Day sworn on 21 April 2021

134. Mr. Day, a retired businessman and a client of CHC prior to it being placed into liquidation, swore an affidavit on 21 April, 2021. He avers, *inter alia* that his role in the present application is to act as *legitimus contradictor* in respect of a cohort of some 1,372 investors who have made claims for compensation to the ICCL which have not yet been certified by the Administrator. From para 5 onwards, he refers to the provision he made for his retirement and confirms that, as of 20 November 2020, the value in a privately administered pension trust (i.e. an Approved Retirement Fund, or “ARF”) was €656,520.73. He refers at para. 6 to his retirement in 2003 at which point 25% of the sum held in the ARF was withdrawn on a tax-free basis as was legally permitted, with the balance of the fund (approximately €492,000) given under the control of CHC and €63,604.55 invested in an Approved Minimum Retirement Fund (“AMRF”). He avers at para. 7 that €100,000 was invested by the ARF in certain property and at para. 8 he avers that, prior to its liquidation, his investment with

CHC, as described in a CHC portfolio valuation of 26 November 2010 recorded a portfolio value of €450,544.13.

135. Mr. Day avers, at para. 9, that at the commencement of the liquidation in October 2011, CHC held assets totalling approximately €1.1billion under management and €24 million in cash held in designated client accounts. He goes on to refer to the Liquidator deciding that, in the case of certain segregated assets accounts, these assets should be either transferred back to the client or, where required, onto an appropriate product. Mr. Day avers that the Liquidator proposed to levy a charge of €225,000 for his services which charge would have come from 0.5% of each of the customer's funds and that this was opposed by a number of clients of CHC, including Mr. Day. At para. 10 he refers to Finlay Geoghegan J's decision of 09 October 2012 refusing the Liquidator's application for payment of fees out of client assets and he avers that, following that judgment, approximately €265,000 was released to him by the Liquidator.

136. At para. 12, Mr. Day avers that he has suffered losses in respect of the aforementioned Property which he contends are due to the actions of the Liquidator and he proceeds, from paras. 13 to 19, to detail the circumstances. It is clear from Mr. Day's averments that he maintains that he has sustained certain losses as a result of the position maintained by the Liquidator and dissatisfaction is expressed about what Mr. Day regards as a failure to provide adequate explanations in respect of certain issues. At para. 19, Mr. Day avers that the significance of these matters in the context of the present application for directions can be addressed by way of legal submissions, but he emphasises that the losses he has sustained as a result of the liquidation of CHC include loss associated with the Property. At this juncture, it is appropriate to say that the issues raised by Mr. Day concerning complaints directed towards the Liquidator are not issues which this court can or should determine for the purposes of the present application. Mr. Day plainly has sincerely held views regarding issues of great concern to him but it is important for this Court to focus on the questions and issues which it is obliged to determine in the present application.

137. From para. 20, onwards, Mr. Day refers to a claim in respect of sums in current and deposit accounts which totalled approximately €27,000 as at the commencement of the liquidation, which he identifies as follows:

- Client Asset Gross Savings Account: €12,299.
- Client Asset Current Account: €18,467.

138. At para 21, Mr. Day refers to para. 81 of Mr. Fagan’s affidavit with regard to the first sum and at para. 22 Mr. Day avers that he wrote to the Liquidator in respect of the aforesaid sums on 21 February 2017. He exhibits that letter calling for the release of the said funds and he also refers to the same issue being raised in a letter to the Liquidator of 22 January 2018 which also comprises an exhibit to his affidavit. At paras. 23 and 24, Mr. Day refers to the orders made by Pilkington J. on 08 August 2019 and 09 October 2019 and, at para. 25, he avers that the said orders have had the effect of preventing the Liquidator from returning to him the sum of €18,467 despite that these are “segregated” sums with Mr. Day as the identified owner of the funds. He goes on to aver that it is unclear to him why the sum of €18,467 has not already been returned to him by the Liquidator and he asserts that the operation of the aforesaid orders subjects him and others in a similar position to unnecessary inconvenience and economic hardship.

139. At para. 26, he avers that certification has not taken place, despite the liquidation having been in being for approximately ten years, nor has any indication been given as to the Administrator’s view as to their qualification for compensation or the quantum of same and para 26 of his affidavit concludes with the averment that the investors understand that their claims are acceptable to the Administrator in principle and that quantum remains outstanding, with the issue of subrogation then arising and he asserts that such a timeline is inconsistent with the objectives of the Scheme as identified in Dr. da Silva’s Report.

140. Section C of Mr. Day’s affidavit, comprising paras. 28 to 38, concerns his “*position on directions motion*”. There, he refers to the order made by Pilkington J. on 01 July 2020 appointing

him as *legitimus contradictor*. He also refers to leave having been granted to retain Oxera Consulting LLP and he refers to Dr. da Silva's Report. It is appropriate to quote, *verbatim*, paras. 30 to 36, inclusive, from Mr. Day's affidavit, wherein he makes clear the position of the cohort of investors which he represents:

“30. I am advised that the questions in respect of which directions are sought in the within motion for directions are principally matters for legal submission before this Honourable Court. However, I am advised that it is appropriate to summarise what my position as legitimus contradictor will be on the hearing of the Application, on the basis of the legal advice I have received and the Expert Report, in respect of the central questions raised in the Application.

31. First, on the question of whether the calculation of net loss under section 30(1) of the Investor Compensation Act, 1998 (the Act) must take into account, inter alia, actual recoveries and estimated future recoveries of net loss client assets between the determination date and the delivery of a final statement certifying net loss and compensatable loss, my position will be that the calculation of net loss under s. 30(1) of the 1998 Act should not take into account any actual or estimated future recoveries as to do so would be inconsistent with the wording and purpose of the Act.

32. Second, on the question of whether the ICCL's right of subrogation pursuant to s. 35 of the 1998 Act is restricted to the assets of CHC or whether it extends also to client assets, my position will be that the ICCL's right of subrogation extends only to any claim that I, or any investor, submits in the liquidation in respect of the assets of CHC and does not extend to any claim in respect of assets which are assets of the clients of CHC. I am advised that claims in respect of client assets are not claims in the liquidation (within the meaning of section 35) and are more properly characterised as proprietary claims.

33. *Third, if the ICCL's right of subrogation extends to client assets, on the question of whether such right extends only to an eligible investor's Net Loss Client Assets and, if so, whether it is confined to those Net Loss Client Assets of that eligible investor in respect of which compensation has actually been paid, my position will be that this should be limited such that the rights only extend to those assets for which compensation is paid. If the ICCL's rights were to extend to all client assets, a situation could arise whereby a class of investors who has not received compensation could receive less distribution, due to the ICCL's application of subrogation rights.*

34. *Fourth, if the ICCL's rights of subrogation extend only to Net Loss Client Assets, on the question of whether such right applies equally to such assets or whether it is allocated between different assets by reference to the level of loss in respect of each such asset or on any other basis, my position will be that the scheme of the Act requires that subrogation rights be allocated based on the level of net loss and compensation paid in respect of each asset.*

35. *Fifth, on the question of whether, and if so how, the ICCL's right of subrogation applies to the Net Loss Client Assets of eligible investors who have been overpaid compensation either as a result of a calculation of net loss that does not take into account actual future estimated recoveries of net loss client assets or in circumstances where the calculation of net loss underestimated future recoveries (or otherwise), my position will be that it is not inconsistent with the statutory scheme for investors in certain circumstances to receive more than their original claim.*

36. *Sixth, if the ICCL's right of subrogation extends to client assets, on the question of whether, in respect of eligible investors who have applied for compensation under the 1998 Act but whose claims (or a part thereof) have not yet been certified, any distribution of client assets that have formed or will form or may form part of the statutory calculation of that loss under s. 30(1) must take into account the ICCL's right of subrogation, my position will be that*

such an interpretation would lead to delays in compensation pay-out significantly undermine the economic interests of investors, which creates an inconsistency with the objective of investor compensation schemes.”

The next affidavit in sequence was sworn by Mr. Paul Jacobs and it is to this I now turn.

Affidavit and Report of Paul Jacobs – instructed by Mr. Nugent

141. Mr. Jacobs is a forensic accountant with Grant Thornton, chartered accountants, and, at the request of Mr. Nugent, he prepared a report, which is dated 21 April 2021 and which he exhibits in an affidavit sworn on 22 April 2021. Paragraphs 1.1 to 1.8 comprise a setting out of relevant background including the identification, at para. 1.5, of the questions posed in para. 86 of Mr. Fagan’s affidavit (namely questions (a) to (f) which I quoted verbatim earlier in this judgment). From paras. 1.9 to 1.13, Mr. Jacobs refers to his instructions and, from paras. 1.14 to 1.24, Mr. Jacobs summarises his conclusions. Given their relevance to the present application, it is appropriate to set these out in full, as follows:-

“1.14 In my opinion the following are reasonable conclusions to be drawn from the work that I have carried out:

1.15 The worked examples in the Fagan Affidavit (paras. 44 to 85) are arithmetically correct, except for a few minor errors, which appear to be typographical errors, which I identify in my report. I am instructed that Mr. Michael Nugent disputes the basis upon which the ICCL calculations are made.

1.16 Mr. Kieran Wallace has confirmed to me that there is no prospect of the liquidation allowing a dividend to be paid to creditors.

1.17 My analysis of the sample of five clients provided in Appendix 2 (updated) to the McCann Fitzgerald letter to Peter Nugent & Co [letter dated 15 January 2021 – updated Appendix 2 provided by KPMG on 8 March 2021] shows:

- (a) *the ICCL Subrogation amount would range from €7,482.93 to €12,227.49 (the highest being Mr. Michael Nugent) with the average of all five clients being a subrogation amount of €10,103; and*
- (b) *there was significant variation in the key performance indicators that I initially used to compare the ICCL subrogation methodology (% of net loss, % of compensatable loss, and % of market value/claim in liquidation).*

1.18 The Fagan Affidavit understandably provides the ICCL's figures, or calculations, for two clients being Mr. Michael Nugent and Mr. Roger Day. In the context of my instructions, in my opinion as a matter of methodology significant insight can be provided by considering a much larger population of clients. As explained in this Report, I have conducted analysis over 531 clients using the ICCL methodology (see further below at paragraph 1.20 below). Having analysed a wider population of 531 clients, and assuming that each of the assets/funds in the spreadsheet entitled "Information relating to court order dated 8 August 2019 v03 (redacted).xlsx" ...is an appropriate asset/fund to be included in the calculation of Net Loss, then:

- (a) *the average subrogation amount under the ICCL methodology would be €5,437;*
- (b) *in nearly 50% (247/531) of the clients the ICCL subrogation would represent between 30% and 39% of the compensatable loss figure (with the vast majority are between 37% and 39%);*
- (c) *in nearly 90% (474/531) of the clients the ICC subrogation amount would represent between 30% and 59% of the compensatable loss figure; and*
- (d) *my analysis of 531 clients includes claims in liquidation ranging from less than €5,000 to over €1 million. In 51% of the 531 clients the value of the claim in liquidation is less than €34,999. Although somewhat subjective, it therefore appears that smaller sized investors make up a significant proportion of the 531*

clients that I have reviewed. My analysis (see Section 5, paragraph 5.27) clearly shows that the percentage that the ICCL subrogation amount represents of the claim in liquidation, decreases as the value of the claim in liquidation increases.

For example, for clients with a claim in liquidation:

- (i) between €5,000 and €14,999, then the subrogated amount on average will be €1,838.39 being 21%;*
- (ii) between €45,000 and €54,999, then the subrogated amount on average will be €8,445.65 being 17%;*
- (iii) between €85,000 and €94,999, then the subrogated amount on average will be €8,695.99 being 10%; and*
- (iv) between €95,000 and €194,999, then the subrogated amount on average will be €9,498.47 being 7%.”*

142. It is also appropriate to note that, just as Mr. Jacobs confirmed that the worked examples in Mr. Fagan’s affidavit are arithmetically correct, there is no suggestion that the analysis carried out by Mr. Jacobs is other than mathematically accurate. Mr. Jacobs continues his conclusions from para. 1.19, as follows: -

“1.19 I have embarked upon comparing the position of investors applying the ICCL methodology (see Section 5):

- (a) Applying the groupings of the Claim in Liquidation (rounded) there is a range of outcomes for those clients in these respective groupings, as shown by the total amount payable to the investor as a percentage of the Claim in Liquidation (see Section 5, Table 5.8).*
- (b) In the course of that analysis, I also compared the position if I was to assume that there would be no ICCL subrogation amount deducted from the investor. I identified that if there was no ICCL subrogation amount then smaller clients*

(e.g. for these purposes with a Claim in Liquidation of €34,999 or less) would receive at least 94% of their Claim in Liquidation. Under the ICCL methodology, the highest return is 76%.

(c) In the context of analysing clients with similar levels of “net loss”, my analysis shows:

- that there is no one or any size that fits all, i.e. the amount payable to investors will not only be determined by the Claim in Liquidation, but by the specific fund/assets invested in, and the application of the ICCL methodology, and that smaller and larger clients can be in a position of having a similar value of Net Loss notwithstanding the amount invested; and*
- it is instructive to note that from my analysis in Section 5 (see paragraphs 5.69 to 5.74) that clients with near identical figures for ICCL Net Loss, would after the effect of the ICCL subrogation amount, end up in the position whereby the ultimate loss (i.e. ICCL net loss after ICCL compensatable loss and after ICCL subrogation) are different between the respective clients.*

1.20 As explained in this Report, I have conducted analysis over 531 clients using the ICCL methodology. I have endeavoured to be careful to use the phrase “ICCL methodology” because I recognise in fairness to Mr. Michael Fagan that the ICCL proposes that six questions for determination (paragraph 86 of the Fagan Affidavit), the resolution of which may necessitate a change to my calculations (and indeed his own analysis). I have assumed, for the purposes of my illustrative calculations (noting that Mr. Michael Nugent disputes the basis upon which the ICCL calculations are made), the following:

- (a) ICCL’s right of subrogation pursuant to section 35 of the 1998 Act extends to client assets. I say this, but I also assume that it will be up to the ICCL to make a claim in this regard;*

- (b) *The ICCL will seek to include all client assets included in the spreadsheet “Information relating to Court Order dated 8 August 2019 v03 (redacted).xlsx” ...but were not included by the Liquidator as part of the interim certification process (i.e. the “net loss by fund (redacted).xlsx” spreadsheet):*
- (i) *I note the Fagan Affidavit does not analyse the two Excel Spreadsheets beyond Mr. Michael Nugent and Mr. Roger Day.*
 - (ii) *However, I am guided in my interpretation by the Fagan Affidavit’s calculation of the ICCL position for Mr. Michael Nugent where the Client Asset Gross Savings fund/asset is included when it did not feature in the Liquidator’s certification process...*
- (c) *For similar reasons, I have assumed that the ICCL will seek to include the Estimated Recovery and Future Distributions (base case) in respect of the assets referred at sub-paragraph (b) above...*

1.21 *In practical terms that there would be a “true up” when the Liquidator would be in a position to confirm that estimated figures have become actual figures (see my further comments below in terms of the timeframes involved). I have assumed a “true up”, but I am not in a position to confirm whether or not this is what the ICCL envisages.”*

143. It is clear from the submissions made on behalf of the ICCL that what Mr. Jacobs describes as a ‘true up’ is precisely what the ICCL envisages i.e. that, whereas payments can be made by the ICCL to investors on foot of interim statements, there would be a ‘truing-up’ by way of final certification once actual recoveries had been determined. As previously observed, a ‘true up’ of the type envisaged by the ICCL could not happen until the very end of the liquidation process, regardless of how many years that took.

144. Having referred again, in para. 1.22, to the assumptions made and to the fact that it is for the court to determine the questions posed, which determination could affect methodology, Mr. Jacobs continues from para. 1.23 to summarise his conclusions in the following terms:-

“1.23 I would comment specifically in relation to issue (c) at paragraph 86 of the Fagan Affidavit, which states: “If it extends to client assets, whether the ICCL’s right of subrogation extends only to an eligible investor’s Net Loss Client Assets and, if so, whether it is confined to those Net Loss Client Assets of that eligible investor in respect of which compensation has actually been paid “in the context that Mr. Kieran Wallace has explained the process that he went through as part of the interim certification process, to pin or tie the ICCL’s right of subrogation to those assets in which compensation has actually been paid, would appear to put investors at risk of any adverse impact of the Liquidator’s decision to choose which funds/assets for a particular client/investor would be used for the interim certification process. In particular I note...

(a) The Liquidator would not have known these implications from certain fund selections, bearing in mind that the impression I have gained is that a focus for the Liquidator was to establish, amongst other things, what the level of compensatable loss was, and in some circumstances €20,000 could be reached by including say Fund A, or Fund B.”

145. It does not appear to be disputed that the approach which the Liquidator has in fact taken is that, if he has found in a specific fund that the investor gets to the €20,000 level, he has not necessarily had particular regard to the position in relation to other funds. On behalf of the ICCL, no criticism is directed towards the Liquidator in relation to this approach, but it is made clear that this was not done at the behest of the ICCL and, furthermore, that it would be useful for the Liquidator to complete the process of analysing all net loss in respect of all clients, in the context of speeding up the certification process. Paragraphs 1.23(b) of Mr. Jacobs’ conclusions continues as follows:-

“1.23 ...

- (b) *The loss factor for the funds/assets could be, and are likely to be different, which means that the financial outcome through the application of the ICCL subrogation methodology between otherwise two comparable investors/clients could be quite different.*
- (c) *In the context of what I have learned from conducting a much wider analysis (531 clients etc.) as opposed to confining my analysis to two (Mr. Michael Nugent and Mr. Roger Day) clients, or six (five clients shown on the McCann Fitzgerald Appendix 2 plus Mr. Roger Day), in my view there is not sufficient analysis available in order to adequately assess the implications if the ICL subrogation in some way being tied to the assets in respect of which compensation has already been paid. A much more extensive analysis would be required, and if required I request a reasonable opportunity to carry out such an analysis.*
- (d) *Mr. Kieran Wallace has noted that he has certified the claims for 574 clients for compensation to date, and there remains 1,372 compensation claims that have not yet been certified or determined. Could these 574 clients be disadvantaged as a result? Could Mr. Kieran Wallace be put in the position of having to certify the remaining 1,372 compensation claims after the judgment of the Court, and there being any inconsistency in the fund/asset selection where the 574 clients were disadvantaged in some way? What assurance procedures would be required to implement to ensure the existing 574 were not disadvantaged or indeed advantaged?*

(e) *As an account, and a Partner, it seems to me that there are a number of issues concerning Proposed Questions (c) that need to be considered, amongst a number of concerns.*

1.24 Taking the ICCL position in the round, it would seem that in respect of actual and estimated future recoveries, to avoid any situation where an estimate changed to produce an actual recovery less than an estimated recovery, as a matter of practicality on one view it appears that the calculation of ICCL compensatable loss to the investor could only be done at or near the conclusion of the liquidation. In complex liquidations, it appears that this could leave investors waiting for potentially for a long period of time. Alternatively, the Liquidator seemingly would have to make interim distributions and endeavour to avoid situations (I do not know if this is possible) to deal with the risk that actual recoveries were less than estimated recoveries. Even on this basis, it seems to me that in order to achieve this, a number of investors could be still waiting under end, or near end, of the liquidation for a full payment of their compensatable loss.”

146. Mr. Jacobs then identifies the sources of information in respect of his report and, at 1.27, Mr. Jacobs refers to the averment made by Mr. Wallace (at para. 4 of his affidavit sworn 01 April 2021) wherein Mr. Wallace confirms that actual and/or estimated future recoveries of money owed to or belonging to the clients of CHC has not been taken into account by him in certifying compensatable loss within the meaning of the 1998 Act, to date. I have carefully considered the entirety of the report prepared by Mr. Jacobs and during the hearing the summary was opened in full. Counsel for the ICCL also opened internal p. 50 (paras. 5.38 to 5.41) where Mr. Jacobs addresses “*Overpayment of Compensation*” and sets out his findings. Given the relevance of this evidence, it is appropriate to quote verbatim internal p. 50 of the Jacobs’ report, as follows: -

“5.38 The Fagan Affidavit states at paragraph 57:

“For the purposes of considering overpayments and subrogation I have assumed that following the interim certification of net loss (€50,000) and payment of provisional compensation by the ICCL (€20,000) additional recoveries of assets are made such that an additional €35,000 of Net Loss Client Assets are available for distribution to the client (the ‘Additional Recoveries’).”

5.39 *The Fagan Affidavit example is*

<i>Table 5.6 – Fagan Affidavit worked example re Additional Recoveries and overpayment</i>	<u>Amount in €</u>
<i>Claim in the Liquidation</i>	<i>100,000</i>
<i>Assets Available for Distribution at the Determination Date/March 2019</i>	<i>50,000</i>
<i>Additional Recoveries</i>	<i>35,000</i>
<i>Total Net Loss Client Assets Available for Distribution</i>	<i>85,000</i>
<i>Revised Net Loss</i>	<i>15,000</i>
<i>Revised Compensatable Loss/ Compensation Payable</i>	<i>13,500 (@90% of €15,000)</i>
<i>Overpayment of Compensation</i>	<i>6,500 (€20,000 less €13,500)</i>

5.40 *Using the same dataset of 531 clients, I sought to identify clients with a similar profile to that set out in the Fagan Affidavit example at paragraph 57. Selecting those clients with Compensatable Loss of €20,000 (per KPMG) and with a Revised Net Loss ranging between*

€14,151 and €15,882 (being approximations for the figure of €15,000 adopted in the Fagan Affidavit example taking €15,000 plus or minus €1,000 as parameters):

- I have identified just 14 such cases, and
- the average overpayment is €6,501.52 which is in line with the €6,500 set out in the Fagan Affidavit.

5.41 Although I recognise that the Fagan Affidavit worked example at paragraph 57 is hypothetical and illustrates the calculation methodology, in my view it is not representative of the 531 clients. Analysing the same population of 531 clients, and applying the ICCL methodology as set out in the worked example at paragraph 57 of the Fagan Affidavit, in just over 50% of the cases I analysed there was either no overpayment of compensation under the ICCL methodology or the potential overpayment is less than €100 (being an arbitrary amount selected by me). In respect of the balance of clients, under the ICCL methodology would range from €100 up to levels in the order of commensurate with the Fagan Affidavit example. My calculations are illustrative and are taken without prejudice to my instructing solicitor’s legal arguments etc.”

147. Table 5.1 which appears in Mr. Jacobs’ report (page 41) comprises an analysis of the claims of 531 clients by amount, as follows:

“Table 5.1- analysis of claim in liquidation by amount

Claim in Liquidation (€)	Claim in Liquidation Jacobs (rounded) (\$)	Number of Clients
Under 5,000	0	122
Between 5,000 and 14,999	10,000	65
Between 15,000 and 24,999	20,000	46
Between 25,000 and 34,999	30,000	36
Between 35,000 and 44,999	40,000	23

Between 45,000 and 54,999	50,000	29
Between 55,000 and 64,999	60,000	26
Between 65,000 and 74,999	70,000	17
Between 75,000 and 84,999	80,000	17
Between 88,000 and 94,999	90,000	15
95,000 to 194,999	100,000 to 190,000	76
195,000 and above	200,000 and above	59
	Grand total	531

148. It is clear from the foregoing analysis that there are a substantial number of what could fairly be considered to be “small” investors in the cohort of 531 looked at by Mr. Jacobs. His analysis confirms that 122 investors have claims under €5,000, whereas in 51% of the 531 cases, the value of each claim in the liquidation is less than €34,999.

149. Elsewhere in his report, Mr. Jacobs conducted an analysis showing the average ICCL subrogation amount as a percentage of the claim in liquidation. This is set out at Table 5.3 which appears on internal page 43 of the report, as follows:

“Table 5.3 – Average ICCL subrogation amount as a % Claim in Liquidation (market value)”

Claim in Liquidation (€)	Rounded claim in Liquidation (€)	Average ICCL subrogation amount as a % claim in Liquidation	Average subrogation amount €
Under 5,000	0	20.96%	280
Between 5,000 and 14,999	10,000	20.51%	1,838
Between 15,000 and 24,999	20,000	21.10%	4,129
Between 25,000 and 34,999	30,000	20.83%	6,124

Between 35,000 and 44,999	40,000	18.89%	7,438
Between 45,000 and 54,999	50,000	17.13%	8,446
Between 55,000 and 64,999	60,000	14.54%	8,623
Between 65,000 and 74,999	70,000	12.09%	8,562
Between 75,000 and 84,999	80,000	11.42%	9,141
Between 85,000 and 94,999	90,000	9.69%	8,696
95,000 to 194,999	100,000 to 190,000	7.26%	9,498
195,000 and above	200,000 and above	2.91%	8,972

150. As Table 5.3 illustrates (and as Mr. Jacobs comments at para. 5.30 in his report), under the methodology contended for by the ICCL, the subrogation amount represents a higher percentage of the claim in liquidation for smaller investors compared with larger investors. That being so, the evidence is that, if the ICCL’s interpretation is correct, smaller investors will be disproportionately negatively affected more than larger investors. As Mr. Jacobs comments “...*the average ICCL subrogation amount as a % claim in liquidation is approximately 21% for each of the groupings between €5,000 and €34,999. The average ICCL subrogation amount as a percentage claim in liquidation then declines as the claim in liquidation amount increases.*” To say the foregoing is not to suggest that the task this court faces is to conduct a merits-based analysis. The questions put to this court can only be determined with reference to the interpretation of the relevant legislation.

151. It is uncontroversial to say at this juncture, however, that all parties agree that the Directive to which the 1998 Act gives effect was focused on the protection of investors, in particular “*small investors*”, in the manner provided for in the Directive. In paragraph 5.60 of his report dated 21 April 2021, Mr Jacobs makes clear that, but for the interpretation contended for by the ICCL and the

subrogation amounts to which they assert a claim, smaller investors would merely be compensated in full. The following is a verbatim quote from para 5.60:

“...Table 5.8 shows that for clients who have a Claim in Liquidation of €20,000 that after applying the ICCL methodology (including subrogation), clients in this group will receive between 72% and 74% of the Claim in Liquidation. If I was, for illustrative purposes, to exclude the ICCL amount of subrogation, then the amount payable to investors would obviously increase and range between 94% and 96% of the claim in liquidation i.e. they would be nearly compensated in full.”

Thus, if the ICCL is not correct in what it asserts, the consequence will be greater protection for the smaller investor. The key questions which this Court must decide hinge on the correct interpretation of provisions in the 1998 Act, in particular, the literal meaning of the words used. That said, it is appropriate for the court to have regard to the consequences of contending interpretations urged on it, in circumstances where differing interpretations of the statute are contended for and I will return to this topic later in this judgement.

Client 420

152. It is not in dispute that Mr. Nugent is identified as “*client 420*” in information including spreadsheets which were furnished to Mr. Jacobs and examined by him in the context of the report he prepared. Among the facts established by that information is that the certification of Mr. Nugent’s loss, thereby entitling him to receive a payment of €20,000 from the ICCL, was made by the Liquidator in respect of the “*Destiny PRSA Cash*” fund. It is also a matter of fact that Mr. Nugent had other funds/assets. At para. 4.18 (b) of his report, Mr. Jacobs states, *inter alia*, that “*it is apparent that having determined a Net Loss of €87,241.10 that under the Liquidator’s methodology Mr. Wallace formed the view that compensatable loss of €20,000 was due on this single asset/fund being Destiny PRSA Cash i.e. without having to take into account Select II Destiny PRSA Cash for that purpose.*”

153. From para. 5.48 to 5.54, inclusive of his report, Mr. Jacobs analysed the effect of the ICCL methodology on clients in a similar position to Mr. Nugent. In the manner Mr. Jacobs explains, from para. 5.51 onwards (and illustrated in Table 5.7 on internal page 54 of his report) despite two clients having a *similar* net loss and thus, both being entitled to the lesser of 90% or €20,000, the ICCL approach results in materially *different* subrogation amounts. The following is an extract from Table 5.7 which is entitled: -

“Clients with the same assets and compensatable loss as Mr. Nugent”:

	Client 158	Client 322	Client 420 Nugent
Total			
Determined Holding @ Liquidation (€) A	89,586.98	118,826.14	134,866.08
Future Distributions (bc) (€)	40,474.06	65,867.55	82,453.63

154. As Mr. Jacobs makes clear in para. 5.48, his analysis was with regard to clients similar to Mr. Nugent meaning that, based on the information furnished to him, clients “...that (a) invested in the same funds/assets as Mr. Michael Nugent, and (b) have the same Compensatable Loss (whether under the ICCL or KPMG methodology) of €20,000. The relevant funds/assets are: client asset gross savings, Destiny PLSA cash and Destiny PLSA Equity.” At para 5.53, Mr. Jacobs states the following:

“5.53 In respect of contrasting the ICCL net loss against the ICCL subrogation amount, if I consider the five clients with ICCL net loss in and around the figure for Mr. Michael Nugent (€52,412.45):

- *the five clients and their respective ICCL net loss figures are: client 158 (€49,112.87), client 220 (€57,187.45), client 251 (€56,972.03), client 322 (€52,958.59), and client 366 (€55,581.22);*
- *and in all cases, the ICCL subrogation amount is lower than that of Mr. Michael Nugent (the closest being €11,086.37 (client 322) which contrasts to €12,227.48 for Mr. Michael Nugent.”*

155. In light of the foregoing analysis, it is not in dispute that, as a matter of fact, if the methodology contended for by the ICCL in the present application is employed, investors in a similar position to each other i.e. who invested in the same funds/assets and who have the same compensatable loss of €20,000 will, nevertheless, end up with materially different subrogation amounts.

Different outcomes despite similar net loss figures

156. Elsewhere in his report Mr. Jacobs identified the fact that materially different outcomes (in terms of the ICCL subrogation amount and the total amount payable to the investor under the ICCL methodology, both in value and also as a percentage of the claim in liquidation) would result from the implementation of the approach contended for by the ICCL, notwithstanding the similarity in terms of net loss figures and the identical ICCL compensatable loss figures of two investors. Mr. Jacobs illustrates this at Table 5.12 on internal page 60 of his report. There he set out a worked example concerning clients identified as 208 and 257, both of whom had very similar levels of ICCL net loss (client 208: €34,292 and client 257: €34,274). In the worked example at Table 5.12, both have a compensatable loss of €20,000 and a very similar net loss after compensation (but before ICCL subrogation), namely €14,292 (client 208) and €14,274 (client 257). Despite the foregoing similarity, employing the approach contended for by the ICCL results in materially different subrogation amounts (€7,461 in respect of client 208 and €12,883 for client 257). The ultimate effect in terms of net loss after compensation and after ICCL subrogation is also materially different as between both investors namely €21,753 (client 208) as opposed to €27,157 (client 257). As Mr. Jacobs states at

para. 5.71: “Notwithstanding the similarity in ICCL net loss figures (€34,292 and €34,274) and the identical ICCL compensatable loss figure (€20,000), the outcomes under the ICCL methodology would be significantly different. By “outcomes” I refer to the ICCL subrogation amount, the total amount payable to the investor under the ICCL methodology (both in value and also a percentage of the claim in liquidation).

157. It is fair to say that the contents of the report prepared by Mr. Jacobs evidences that if the approach contended for by the ICCL is applied, this methodology will result in material differences and what can fairly be called arbitrary distinctions as between different investors, in the sense that two different investors who start from a virtually identical position in terms of net loss and compensatable loss may end up in materially different situations in terms of the protection afforded to them pursuant to the scheme. If the ICCL is correct in what it contends to be the proper interpretation of the 1998 Act, it seems to me that the ‘downstream’ consequences of applying the ICCL’s approach are not something this court can remedy, but the evidence before this Court is undoubtedly that arbitrary distinctions between investors who start from similar positions is a feature of what the ICCL contend for.

Affidavit of Michael Nugent

158. I note the contents of an affidavit sworn on 22 April 2021 by Mr Nugent. As well as referring to his role as *legitimus contradictor* and to his engagement of Mr Jacobs, Mr Nugent describes the nature of his investments with CHC, his portfolio having been valued at €392,990.52 as of 30 April 2010. Paragraphs 8 to 21 set out details of same and Mr Nugent avers that the value of the relevant investments at the time of CHC’s winding-up was €123,997.34 made up of ‘Destiny PRSA Cash’ (€30,794.38), ‘Destiny PRSA Equity fund’ (€55,702.96) and additional cash (invested in ‘Client Assets Gross Savings’) of €37,500.00. Mr Nugent refers to a slight discrepancy, identified in Mr. Jacobs’ report, between Mr Fagan’s valuation of his claim in the liquidation in the affidavit sworn by him, as against information provided to Mr Nugent by the Liquidator. Mr Nugent also avers, inter

alia, that he has not been able to get from the Liquidator a full explanation of what he describes as the changing figures given in respect of his investments, a proper running statement of account or a clear understanding of the true history of dealings with his investments or losses. From para. 22 to 29 Mr. Nugent refers to the payment of €20,000 which he received from the ICCL by cheque on 22 April 2013, following a claim for compensation which he made on 13 November 2011. Among other things Mr Nugent notes that in paragraph 68 of Mr Fagan's affidavit, the foregoing is described as "*€20,000 provisional compensation*" and Mr Nugent avers that nowhere in the letter dated 22 April 2013 enclosing the cheque was it stated that the compensation was provisional. From paragraph 30 onwards, Mr Nugent makes averments under the heading of the "*ICCL's Delay In Bringing The Within Application*" and he avers inter alia to the application which gave rise to the 9 October 2012 decision by Finlay Geoghegan J. which refused orders permitting the Liquidator to deduct, from the funds of those described as dissenting clients, any sum in respect of fees costs and expenses. Mr. Nugent also referred to a further application brought in 2014 by the Liquidator pursuant to the MiFID Regulations in respect of which application Mr Nugent acted as *legitimus contradictor*, along with four other investors, giving rise to the decision by Finlay Geoghegan J. on 22 December 2014. Mr. Nugent also referred to further applications and decisions by Finlay Geoghegan J. on 26 July 2017 and 31 January 2019.

159. At para. 42 Mr. Nugent refers to the interim statements of compensatable loss issued by the Liquidator, as Administrator, to the ICCL between 19 October 2012 and 9 May 2018. At para. 43 Mr. Nugent refers to what he understands to be 16 reports as submitted by the Liquidator to the Court between November 2011 and July 2020. Paragraphs 44 to 54 of Mr. Nugent's affidavit appear under the heading "*ICCL's Engagement*" wherein Mr. Nugent refers to certain correspondence. Mr. Nugent notes, inter alia, that when the ICCL wrote to the Liquidator on 23 September 2013, confirming that it had issued payments to 100 claimants and formally notified Mr. Wallace of its subrogated claim, the ICCL did not detail the nature of same and did not specify whether its claim in respect of

compensation paid to investors was subrogated to client assets or to company assets. Mr Nugent notes that it was only in 2018, some five years after the formal notification of subrogation claims by the ICCL, that it began to clarify its position in respect of subrogation. Mr. Nugent refers to the Liquidator confirming that the dispute between him and the ICCL, regarding the scope of the latter's subrogation right, came about in February 2018. Mr Nugent refers inter alia, to the December 2018 application by the ICCL concerning the scope of its subrogation right, which gave rise to the decision by Finlay Geoghegan J. ([2019] IEHC 43). At paragraphs 55 to 58 Mr. Nugent makes averments in relation to his "*Engagement with the Liquidator*" and he exhibits correspondence in that regard. At paragraphs 59 to 65, Mr Nugent makes averments under the heading "*Concerns as to delay reinforced by the Liquidator's affidavit*". In summarising matters at paragraph 66 and 67, Mr. Nugent characterises the assertions made by the ICCL as being "*very much at the eleventh hour*" in the context of a liquidation ongoing since 2011 and he avers that the ICCL's delay is a relevant factor weighing against the position it advances. Paragraphs 68 to 80 concern information sought for the purpose of the present application, Mr. Nugent being identified as "*Client 420*" on the relevant spreadsheets (as referred to in the report by Mr. Jacobs). From paragraph 81 onwards, as well as referring to the contents of the report by Mr. Jacobs, Mr. Nugent makes observations and assertions for the purpose of objecting to the position adopted by the ICCL. It is fair to say that these observations are reflected in the detailed written submissions and in the comprehensive and skilled oral submissions made on his behalf by Ms. Donnelly SC.

Second affidavit of Michael Fagan

160. I have carefully considered the contents of the second affidavit sworn by Mr. Fagan on 26 May 2021 in which he responded to the affidavits sworn by the Administrator, Mr. Day, and Mr. Nugent as well as the expert reports provided by Dr. da Silva and Mr. Jacobs from paragraphs 6 to 23, Mr. Fagan addresses the "Oxera" report prepared by Dr. da Silva. Among other things Mr. Fagan asserts that pre-suppositions fundamentally undermine the assistance which the report might have

provided in determining the questions which arise for consideration in the present application. In addition, issue was taken with specific paragraphs, in particular, where Dr. da Silva expresses views in relation to investor costs, including opportunity costs, of negligence, mis-selling and mismanagement. Mr. Fagan takes issue with what is described as the policy arguments advanced by Dr. da Silva which, he asserts, are not of probative value in the context of the issues for determination. Among other things, at para. 22 and 23, Mr. Fagan avers that he did consider, in his grounding affidavit, the possibility of ‘*under-compensation*’. He goes on to explain, with reference to paragraph 36 of his grounding affidavit, that “... *Where any underpayment of compensation arises following revised estimates of future recoveries or lower than expected actual recoveries resulting in a greater compensatable loss than that certified on an interim basis, a further payment of compensation can be made by the ICCL to the eligible investor under section 34(3) of the 1998 act upon receipt of final statements from the Administrator at the conclusion of the insolvency process or upon receipt of additional interim statements pending final statements from the Administrator or at the conclusion of the insolvency process*”. The foregoing illustrates that, from the ICCL’s perspective, the “*conclusion of the insolvency process*” is critical insofar as compensation payable under the 1998 Act is concerned. In paragraphs 24 to 30 of Mr Fagan’s second affidavit, he comments on the report of Mr Jacobs. No issue is taken in relation to the accuracy of any calculations in either of the reports by the two experts. Mr. Fagan does not proffer any expert evidence or call into question the expertise of Dr. da Silva and/or Mr Jacobs. It is fair to say that, in addition to comments in the nature of submissions on the issues arising the present application, Mr Fagan’s second affidavit again sets out the ICCL’s contended-for approach, in particular as regards the calculation of ‘net loss’ and what the ICCL regard as ‘overcompensation’ as well as the manner in which the ICCL maintain their contended for subrogation right should apply. With regard to the question of delay, Mr Fagan emphasises that the ICCL cannot pay compensation to an eligible investor unless and until it receives a statement, interim or final, from an administrator or under the 1998 Act. It is averred that delays as regards compensation

payments could be avoided by the delivery of earlier and more interim statements , upon receipt of which “...the ICCL would make provisional compensation payments to eligible investors. Final statements could then be delivered, with either subrogation in respect of overpayment of compensation are a further payment in the event of underpayment, at the conclusion of the liquidation.”

Second affidavit and supplemental report of Dr. da Silva

161. On 11 June 2021, Dr. da Silva swore a short second affidavit following his consideration of Mr Fagan’s second affidavit and he exhibited a Supplemental Report, also dated 11 June 2021. Among other things, Dr da Silva stated the following with regard to ‘Under-compensation’:

“4.2 Mr Fagan argues that the risk of under compensation is mitigated when the ICCL make further payments to investors, following subsequent adjustments to the expected future recoveries. This argument disregards the importance of time.

4.3 it is generally accepted that money and other assets have a ‘time value’. The present value of money in hand today is higher than the present value of money that will be in hand at some point in the future, and I used an example to illustrate this concept in section 5 of my expert report.

4.4 Even if the ICCL eventually pays extra compensation to investors when recoveries are lower than expected, the investors will in the meantime still suffer liquidity risks, before the ICCL receives the final statements are revised interim statements from the Administrator. These liquidity risks can have real consequences such as forcing individuals to sell their homes.”.

In section 8 of his Supplemental Report, Dr. da Silva made clear that he found the notion of ‘overcompensation’ as used by Mr Fagan on behalf of the ICCL to be “confusing and inaccurate” and he went on to state, *inter alia*, the following with regard to ‘Overcompensation’:

“8.2 It is time inconsistent to say that later recovery of the assets converts the original compensation into overcompensation, because at the point when the compensation is paid the ICCL is subrogated to the rights of the investor...”

8.4 The statement in MF2 that ‘the effective use of interim statements militates against delay’ is inconsistent with the additional time and cost it would take for the Liquidator to conduct multiple valuation exercises.

8.5 it seems odd to me that investors who end up with far less money than they originally had are considered to be ‘overcompensated’ by the ICCL...

8.6... The total amount of overcompensation, as defined by Mr Fagan, in the present case represents a small percentage of the total net loss suffered by investors (3.7% and 1.9% for the base and downside cases respectively for the 568 investors whose net loss was reported by the Liquidator)...”

Supplemental affidavit of Kieran Wallace

162. In his capacity as Administrator, Mr. Wallace swore a short supplemental affidavit on 25 June 2021 responding to certain averments made in the second affidavit of Mr. Fagan. Mr. Wallace repeats his confirmation that he has not been taking into account actual or estimated recoveries in the calculation of ‘net loss’ for certification purposes. He refers to a quote from a report dated 15 May 2018 which he issued qua liquidator and to which Mr. Fagan referred at paragraph 44 of his second affidavit (i.e. *“future certifications will be completed as and when client assets are reconciled throughout 2018 however in some cases it may be necessary to wait the outcome of future recoveries of misappropriated funds before certification is completed”*). Mr. Wallace averred that the quote extracted from the aforesaid report was out of context and he went on to aver that the foregoing was said against the backdrop of a significant reconciliation process which took place between 2018 and 2019 with respect to the identification and apportionment of misappropriated funds in pooled accounts to clients, averring that the reconciliation process commenced on foot of directions given to

the Liquidator, regarding the appropriate reconciliation methodology, by Finlay Geoghegan J in her 26 July 2017 judgement. Among other things, Mr Wallace averred that “*The reconciliation (and not recovery) of misappropriated and/or pooled assets is relevant to the concept of Net Loss because unless and until assets were reconciled with a client, the Liquidator was not in a position to determine what was ‘owed or belonging to the client’ as at the determination date for the purposes of certification*”. Mr Wallace emphasised that the relevant report does not say, and cannot be taken to mean, that the Administrator is or has ever been of the view that actual or potential future recoveries after the determination date ought to have been taken into account in calculating net loss. Further averments were made in the context of the Administrator objecting to the relief at number 4 as sought in the ICCL’s Motion. Mr. Wallace also swore a short affidavit on 25 June 2021 explaining his decision not to participate actively in the ICCL’s application in his capacity as official liquidator.

Discussion and decision

163. I want to express my sincere thanks to Senior Counsel, Junior Counsel and to their respective instructing solicitors for the very detailed written submissions which were provided. I also want to express particular thanks to Mr. MacCann SC (for the ICCL), to Mr. Fitzpatrick SC (for Mr. Day), to Ms. Donnelly SC (for Mr. Nugent) and to Ms. Smith SC (for the Administrator), each of whom made oral submissions with great clarity, skill and sophistication and which were of great assistance to this Court. I have carefully considered the entirety of the written and oral submissions and was grateful to receive a daily transcript of the hearing, which I reviewed carefully. Rather than attempting to detail in this judgment what were, between them, 136 pages of written legal submissions, I will refer during the course of the following analysis to certain of the main submissions made on the issues.

164. The first issue or question which must be determined in the present application is the proper approach to the calculation of ‘net loss’ pursuant to s. 30(1) of the 1998 Act. The ICCL contends that, when calculating net loss, the Administrator must take into account actual recoveries and estimated future recoveries of client assets *after* the Determination Date.).

The ‘literal rule’ of interpretation

165. Before looking more closely at specific statutory provisions, it is appropriate to state that, as counsel for Mr Nugent submits, the principal rule of statutory interpretation is the literal rule. In other words, the guiding principle is that words used in legislation should be given their ordinary and plain meaning. Section 5 of the Interpretation Act, 2005 (hereinafter “the 2005 Act”) recognises the primacy of the literal rule. Section 5 of the 2005 Act is entitled “*Construing ambiguous or obscure provisions, etc.*” and begins as follows:-

“(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—

(i) in the case of an Act to which paragraph (a) of the definition of “Act” in section 2 (1) relates, the Oireachtas, or

(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.”

166. Section 5(2) provides likewise, but in respect of the interpretation of a statutory instrument. Numerous authorities make clear that the starting point, in terms of interpreting legislative provisions, is the ordinary and natural meaning of the words therein. It is fair to say that a literal approach constitutes the ‘general rule’, in respect of which s. 5 of the 2005 Act allows an exception where a literal interpretation would defeat the intention of the legislature.

167. A wealth of authority emphasises the primacy of the literal rule. In *Howard v. Commissioners of Public Works* [1994] 1 IR 101, Blaney J. (at 151-153) quoted with approval the following passage from *Craies on Statute Law* (7th Ed, 1971, at 65):-

“The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense.” (emphasis added).

More recently, in *CM v. Minister for Health and Children* [2017] IESC 76, McKechnie J. stated as follows (from para. 57):-

“[57] As might be obvious, if the objective intent of parliament is self-evident from the ordinary and natural meaning of the words or phrases used, then the task is at an end, and the court’s function has been performed. Whilst it has long been said that the words themselves, in their plain meaning, best declare such wish, that and multiple other similar expressions must be properly understood. I would therefore add the following, as being part of and complementary to this primary approach to legislative construction. The Court may:

(i) Look at any legislative history of relevance; indeed, in D.B., Geoghegan J. felt that the non-statutory scheme established in December 1995 was ‘...for all practical purposes a legislative antecedent and part of the [1997 Act’s] legislative history’ (p. 58).

(ii) Consider the subject matter being dealt with, the provisions put in place for that purpose, and the harm, injury or damage – the legislative objective – which the same were intended to address. What Lord Blackburn said as far back as 1877 remains as apt today as when it was first stated:

‘The tribunal that has to construe an Act of a Legislature, or indeed any other document, has to determine the intention as expressed by the words

used. And in order to understand those words it is material to inquire what is the subject-matter with respect to which they are used, and the object in view.'

(Direct United States Cable Company v. Anglo-American Telegraph Company (1877) 2 App. Cas. 394).

In 1953, Lord Goddard C.J. in R v. Wimbledon Justices, ex parte Derwent [1953] 1 Q.B. 380 stated that:

'...the court must always try to give effect to the intention of the Act and must look not only at the remedy provided but also at the mischief aimed at ...'

(iii) Have regard to both the proximate and general context in which the phrase or provision occurs, including any other such phrase or provision, or indeed the Act as a whole, which may illuminate the correct meaning of the disputed provision. In In Re Macmanaway [1951] A.C. 161, Lord Radcliffe said at p. 169 that:

'The primary duty of a court of law is to find the natural meaning of the words used in the context in which they occur, that context including any other phrases in the Act which may throw light on the sense in which the makers of the Act use the words in dispute.'

(iv) Have regard to the long title of and preamble to the Act (see, for example, East Donegal Co-Operative Livestock Mart Ltd v Attorney General [1970] I.R. 317 and Minister for Agriculture v Information Commissioner [2000] 1 I.R. 309).

[58] Accordingly, a consideration of both the narrower and broader context of any disputed provision, including the subject matter of the legislation itself, is an integral part of the literal approach, as is the legislative history, the subject matter of the Act and, to use an almost

obsolete phrase, the ‘mischief’ which was sought to be remedied by its provisions. In identifying such matters, the same is not intended, quite evidently, as a prescriptive ruling on this approach.”

168. Two years later, in *Dunnes Stores v. Revenue Commissioners* [2019] IESC 50, McKechnie J. summarised succinctly the proper approach, as follows:-

“63. As has been said time and time again, the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail.”

169. It is the foregoing principles which must guide this Court in the approach to the interpretation of the 1998 Act. In short, this Court must look to the words used in the Act, in their proper context, including the purpose of the Act and the text of the Act as a whole. It is only in circumstances where the provisions are obscure or ambiguous or where a literal interpretation would be absurd or would fail to reflect the intent of the Oireachtas that the literal rule can be departed from.

The Marleasing principle of interpretation

170. The foregoing principles would not appear to be at all in controversy, nor is there any disagreement between the parties that, in circumstances where the 1998 Act was enacted to implement the Directive, the former must be interpreted in a manner consistent with the latter. In Case C-106/89 *Marleasing* ECLI:EU:C:1990:395, the Court of Justice of the European Union (hereinafter “the CJEU”) stated that, when applying national law, national courts must do so “*as far as possible, in the light of the wording and the purpose of the directive*” to achieve the result of the Directive. In *Nathan v. Bailey Gibson Ltd* [1998] 2 IR 162, Hamilton C.J. stated (at 174): “*It is also well established that national or domestic Courts in interpreting a provision of national law designed to implement the*

provisions of a directive, should interpret their national law in the light of the wording and the purpose of the Directive in order to achieve the results envisaged by the Directive.”

171. As the learned author points out in *Statutory Interpretation in Ireland* (Dodd, 14.71-14.72):
“Irish Courts are required to interpret national law in a manner consistent with European law. This is known as the doctrine of indirect effect or the Marleasing principle of interpretation. The effectiveness of European law can be achieved by interpreting and applying national provisions in conformity with European law.”

172. In *Commissioners for HM Revenue & Customs v. IDT Card Services Ireland Limited* [2006] EWCA CIV 29, Arden LJ stated as follows: -

“When European Union legislation has to be examined, the courts often have no difficulty in finding that the meaning is clear on any basis. The English courts have with practice also become accustomed to looking at the travaux préparatoires and asking advocates to produce them. They are also becoming more accustomed to looking at a few of the different language versions of Directives.... the court should have regard to the objectives of the legislation. English statutes rarely contain statements of their objectives because they are often found not to be reliable guides to the detailed points of interpretation that tend to arise on English statutes. However, European Union directives frequently have long preambles setting out the purpose or reasons for the measures and what it is intended to achieve. This point is an indication that the objectives of a measure have a greater normative force under Community law than they would under English law.”

173. It is not in dispute between the parties that, for the purposes of interpreting the 1998 Act, this Court must have regard to the contents of the Directive and is entitled to look, also, at the travaux préparatoires, i.e. the Commission’s proposal in respect of what became the Directive. Earlier in this judgment, I quoted from same, being a document dated 22 September 1993, comprising a *“Proposal*

for a Council Directive on investor compensation schemes” as presented by the European Commission. It is appropriate to look again at the travaux préparatoires, or proposal, as follows.

Proposal for a Council Directive on Investor Compensation Schemes

174. The first page of the Commission’s proposal dated 22 September, 1993 states *inter alia*, as follows:

“Article 9 of the Commission’s original investment services proposal, which was presented in January, 1989, included investor compensation arrangements among the prudential rules to be drawn up and enforced by the Member States.

The basic requirement was that each investment firm was to be ‘a member of a general compensation scheme designed to protect investors who are prevented from having claims satisfied because of the bankruptcy or default of the investment firm’”.

175. It is fair to say that the foregoing makes explicit that the need for an investor compensation scheme arises by virtue of *“the bankruptcy or default of the investment firm”*. In other words, the liquidation of an investment firm is what gives rise to the need for an investor compensation scheme. The second page of the same document expands on the need for such a scheme and outlines arguments for and against, as well as explaining clearly why the Commission believed there was a need for investor compensation scheme including: *“To begin with, no system of supervision can ever be watertight and, however good the prudential rules may be, failures will sometimes occur. In particular, no rules can prevent fraud...”*. The Commission drew a distinction between on the one hand *“(a) Failure of the investment firm without fraud”*, and, on the other hand: *“(b) Failure of the investment firm as a result of fraud”*. The Commission also distinguished very clearly between two types of claims. The first related to *“...investor’s securities held by the investment firm for safe keeping...”*. The Commission commented that *“ownership of such securities remains with the investor”*. The foregoing is plainly a reference to what is commonly called a proprietary claim. Insofar as the investment firm holds specific assets belonging to specific investors, the Commission

was clear that these were to be returned to those investors, not being company assets. The Commission went on to recognise a second type of claim, which it described in the following manner: *“On the other hand, client’s funds held by the investment firm, following the disposal of securities or pending the purchase of securities, may be impossible to recover if they become part of the mass of assets of a bankrupt firm. In that case, the investor would simply have a claim in the bankruptcy proceedings. A compensation scheme should allow the investor to obtain some compensation without having to wait for the completion of those (normally lengthy) proceedings.* The foregoing extract refers, not to a proprietary claim by an investor for the return of their own funds, but to what, in the Irish context, would be a claim in a liquidation against the assets of an insolvent firm.

176. It is uncontroversial to say that the Commission’s proposal did not focus on the concept of *actual loss* nor did the proposal suggest that actual loss be matched, in whole or in part, by a payment to address same. On the contrary, the proposal speaks only of the investor obtaining *“some compensation”* and to receive it promptly. It is entirely uncontroversial to say that if one were to calculate actual loss, it could well take years to do so and entirely consistent with the focus not being on actual loss or actual compensation to meet such loss, the Commission’s proposal explicitly recognises how lengthy corporate insolvency proceedings would normally be and focuses on limited compensation, not tied to actual loss, being made available to investors without them *“having to wait”* for the completion of lengthy proceedings.

177. At the risk of stating the obvious, there is nothing in the Commission’s proposal which suggests that there should be an initial interim payment pending a definitive working-out, months (or, far more likely, years) later, of ‘actual loss’ and, thus, what actual compensation is payable with reference to that actual loss. Nor is there any hint that any monies paid to a relevant investor might ultimately be repayable years down the line when actual loss had been worked out and a ‘true up’ of the sort contended for by the ICCL had been done. It is also clear from the Commission’s proposal that the focus was on providing certain limited protection, in particular to the smaller investor, to

achieve the twin-aims of maintaining market confidence and encouraging smaller investor interest. This is clear from internal page five of the Commission's proposal which states *inter alia*, the following: -

“It could of course be argued that risk is an inherent part of any investment operation and that the investor should take due care in his choice of and relations with an investment firm. No-one, after all is obliged to purchase investment services. On the other hand, it is clearly difficult for the smaller investor in particular to gauge accurately the financial and management strength of an investment firm. Furthermore, the knowledge that an investor compensation scheme is available can help maintain confidence in the markets and encourage smaller investor interest and involvement in them.”

The fact that the Commission's proposal was not concerned with actual compensation for actual loss is plain from *inter alia*, the reference in the final paragraph on page 5 wherein the Commission state *inter alia*, that “...it seems reasonable and indeed necessary to provide for some minimum investor compensation arrangements throughout the community covering the case where an investment firm fails and is unable to return to investors the money or securities belonging to them.”

178. It can also be said that the foregoing, as well as being concerned with “*minimum investor compensation arrangements*” is focused on such compensation entitlements arising, not when a lengthy liquidation process has completed but “*where an investment fails and is unable to return to investors the money or securities belonging to them*” (emphasis added). The foregoing is reflected in what is stated on internal p.9 of the Commission's proposal wherein, with reference to Article 2, the following is *inter alia*, stated:

“The entry into operation of the investor compensation scheme is triggered by an official decision in the firm's home Member State establishing that the firm is unable or likely to be unable to meet its commitments to its clients.

Although the decision may be taken in the context of winding-up proceedings, the payment of compensation must be independent of the progress of such proceedings.” (emphasis added).

179. It will be recalled that the Commission recognised the distinction between, on the one hand, what are proprietary claims and, on the other hand, claims by an investor against company assets in the context of winding-up proceedings. In the foregoing paragraphs, the Commission states very clearly that the investor compensation scheme is triggered by an official decision in the Member State’s jurisdiction that the firm *is* unable to meet its liabilities, i.e. it is triggered by a winding-up order (such as was made, in the present case, on 21 October, 2011). The paragraphs quoted above also make explicit that the payment of compensation under the scheme is independent of and, thus, *not* dependent on the progress of winding-up proceedings.

“Independent of”

180. It is uncontroversial to say that if the payment of compensation is explicitly “*independent of*” the progress of winding-up proceedings, it could hardly be the case that the amount of such payment depends on the final outcome of those winding-up proceedings, yet this is the ICCL’s position (as it submits that what is or is not due to an eligible investor can only be determined with certainty at the very end of the winding up process and taking into account such recoveries as were or were not made in respect of each investor throughout the entire process). The ICCL’s reference to the possibility that interim statements and interim payments could be made ignores the fact that none have been for the 1,372 investors represented by Mr. Day (who have no right to same) and, thus, is not an adequate answer to the delay which is an unavoidable consequence of what they contend for, delay running entirely contrary to the contents of the Commission’s proposal and the contents of the subsequent Directive. Nor does the use of interim statements, even on the ICCL’s case, mean that the focus shifts away from the final outcome of the liquidation process, regardless of how many years that might take. On the contrary, according to what is contended for by the ICCL, the final outcome is critical as it is only then that there can be the certainty, with reference to the factual position, which, according to

the ICCL is required before it is known what any eligible investor is actually due to receive by way of a compensation payment. In essence, the ICCL's focus on what it considers to be 'actual loss' means that the ultimate outcome of the liquidation process is critical. Yet, when the Commission referred in the proposal to "*the payment of compensation*", it was plainly referring to such limited compensation as provided for in the scheme. In other words, it was not referring to actual compensation for actual loss (or what the ICCL regard as actual loss). To say that the said compensation "*must be independent of*" the progress of winding-up proceedings against the investor firm is to say that, regardless of how long those proceedings might take and regardless of the outcome of those proceedings (as regards actual loss, or otherwise) the payment of such compensation as is provided for in the scheme to a qualifying investor is an entirely separate matter which is unaffected by matters which may or not arise during the progress of the winding-up proceedings which, as the Commission was very well aware, is normally a lengthy process.

181. In my view, what the Commission had to say in proposing the Directive undermines the proposition that the focus was on actual loss or that payments under the scheme were in any way dependent upon recoveries which might ultimately be realised through liquidation proceedings. It is uncontroversial to say that it is only when a liquidation process has been completed that it is possible to say, definitively, what each relevant investor's actual loss has been in the context of such recoveries which have or have not been made during the liquidation proceedings. The submission made on behalf of the ICCL is that, properly interpreted, the 1998 Act regards as crucial, the final outcome which can only be determined at the very end of the liquidation proceedings. The ICCL urge on this Court an interpretation of 'net loss' which, it submits, requires a taking into account of actual or estimated recoveries such that any entitlement on the part of an investor to compensation under the scheme is firmly tied to what will ultimately be the outcome in the liquidation insofar as their actual loss is concerned. I have no hesitation in saying that the ICCL's focus on the ultimate outcome of a winding-up process runs entirely contrary to the thrust of the Commission's proposal in respect of

the Directive which focused on the importance of limited compensation, not tied to actual loss, being paid promptly to qualifying investors without in any way being dependent upon the outcome of a winding-up process, so that the twin-aims of protecting small investors and promoting market confidence could be achieved.

182. On internal page 10 of the Commission’s proposal, the following is stated with regard to Article 2(4):

“Article 2(4) determines how the investor claim is to be evaluated. As far as money is concerned, the value of the claim will always correspond to the amount of money the firm actually owes to the client. As regards securities the valuation should be that at the time the obligation to return them arises or the value at the time the failure of the firm is established. Subsequently of course the market value of securities may rise or fall. Such a risk is inevitable, but the compensation scheme has to be able to determine exactly its liabilities.”

183. In the present case, the failure of CHC was established as of 21 October 2011 when the relevant winding-up order was made by this Court. The Commission’s proposal for a Directive makes very clear that the assessment of value insofar as an investor’s claim is concerned, arises at *that* juncture. It will be recalled that, under the 1998 Act, an eligible investor is entitled to receive “*compensatable loss*” which means 90% of an eligible investor’s “*net loss*” or €20,000, whichever is the lesser. The ICCL contend that the proper interpretation of the term “*net loss*” requires a taking into account of events which occur *after* the determination date (*i.e.* after the date of the winding-up order). The ICCL contend that if more assets are ultimately recovered, the compensation payable under the scheme must be revised downwards and they also contend that if events subsequent to the determination date increased an eligible investor’s loss, the compensation payable under the scheme should be revised upwards (subject to the “*cap*” of €20,000 or 90% of net loss, whichever is the lesser). The proposition that events which post-date the winding-up order must be taken into account for the purposes of valuing an eligible investor’s claim and the ICCL’s liability regarding same,

receives no support whatsoever in the Commission's proposal. In my view, that proposition is wholly undermined by what the Commission had to say when proposing the Directive as the Commission stated the polar opposite of what is contended for on behalf of the ICCL.

184. Moreover, the Commission plainly applied their minds to the reality that things may change *after* what, in the present case, is the date of a winding-up order (noting in particular that the market value of securities may rise or fall but making clear that the valuation should be carried out at the time the failure of the firm is established). Notwithstanding an obvious awareness that events could change post the winding-up of an investment firm, the Commission came down in favour of a specific date being the one upon which an investor's claim and the scheme's liability should be determined. The reason for this was also made explicit in the proposal, namely "*the compensation scheme has to be able to determine exactly its liabilities*" (p. 10) The foregoing principle wholly undermines the proposition that events which occur *after* the relevant determination date (in the present case 21 October, 2011) affect the liability on the part of the compensation scheme in question. Plainly aware of the fact that future events could affect, up or down, actual liability, the Commission clearly felt that it was more important to determine liabilities on the part of a Scheme with certainty with reference to a specific date (the context, of course, being the twin-aims served by having investor compensation schemes and, in the manner explained by the Commission, the focus being squarely on small investors, limited compensation which was not tied to actual loss, and the requirement for speedy payment wholly independent of liquidation proceedings against the relevant firm).

The Directive

185. Turning again to the Directive, it will be recalled that at the start of this judgment I quoted extensively from the recitals and articles. It is not necessary to repeat all of those quotes again. It is, however, important to note that recital (4) of the Directive does not speak of actual compensation for actual loss. Rather it refers to each Member State having a Scheme that guarantees a harmonised "*minimum level of protection at least for the small investor in the event of an investment firm being*

unable to meet its obligations to investor clients". Several observations seem to me to be merited. Firstly, the Directive is clearly not focussed on actual loss having to be determined as a condition of a qualifying investor's entitlement to receive or to retain compensation such as is provided for in a Scheme. What is at issue is a minimum level of protection. Secondly, in circumstances where the Directive is explicit about the need for speed, an element of the aforesaid protection is the prompt payment. Furthermore, and entirely consistent with what appeared in the travaux préparatoires i.e. the Commission's proposal concerning the Directive, the entitlement to receive this minimum level of protection arises in the event of an investment firm being unable to meet its obligations i.e. it arises where, as in the present case, a winding-up order has been made. A further point is that the focus is on the small investor. Indeed, that phrase is repeated throughout the Directive. The concept of "*small*" is relative but if one compares to the price of, for instance, an average house (or, for that matter, an average car) the very maximum payment a qualifying investor could receive under a Scheme envisaged by the Directive could fairly to be said to be a small payment. This seems to me to be important, given the contents of the Directive. I say this because the Directive is not focussed on large investors and nowhere refers to actual loss. Rather, what is at issue is a relatively small payment, to be made with speed, so as to offer a minimum level of protection to those considered to require it in the context of furthering the aims of the Directive and, that being so, nowhere in the Directive is there anything to suggest a granular analysis of actual loss incorporating estimated future recoveries with a netting-off years down the line once an insolvency process has reached its terminus.

Article 2(2)

186. Article 2(2) has been set out earlier in this judgment and it makes clear that cover under the Scheme must be provided when, for present purposes "*– (a) judicial authority has made a ruling...which has the effect of suspending investor's ability to make claims against...an investment firm*". That occurred, in the present case, on 21 October 2011. It is plain that what in the present case was a winding-up order, must be made *before* an eligible investor's right to compensation under

the Scheme arises. Despite this, it is contended on behalf of the ICCL that the date of the winding-up order does *not* determine the investment firm's inability to meet its obligations to its clients. The submission is made on behalf of the ICCL that what occurs thereafter - and throughout what could be the many years up to the very end of a liquidation process - is of fundamental relevance to an eligible investor's entitlement to receive and/or to retain compensation. Those submissions on behalf of the ICCL receive no support whatsoever from the contents of the Directive and, in my view, are undermined by the plain wording therein. It seems to me to be very clear that Article 2(2) provides that the right on the part of an eligible investor to receive compensation under a Scheme arises where there has already been a judicial determination that the relevant investor firm *is* unable to meet its obligations to its clients, namely, in the form of the winding-up order which issued in the present case. The Directive does not say or suggest that one must wait until the very end of the winding-up process to determine, at that juncture, the investment firm's inability to meet its obligations to its clients insofar as actual loss is concerned, with actual recoveries over the course of the entire process being taken into account for that calculation (and compensation only retainable or receivable by an eligible investor once a 'true up' has been completed in the wake of the concluded liquidation proceedings).

187. Article 2(2) is also explicit as to the cover which shall be provided for claims and two types of claims are identified. The first concerns the investment firm's inability to "*repay money owed to or belonging to investors and held on their behalf...*" and the second concerns such a firm's inability to "*return to investors any instruments belonging to them and held, administered or managed on their behalf...*". Both claims are said by Article 2(2) to be "*in accordance with the legal and contractual conditions applicable*". The foregoing are the last words used in Article 2(2) and they plainly refer to the *claims* for which *cover* shall be provided. It is also clear that such cover must be provided for claims *arising out of an investment firm's inability to repay or return* the monies or instruments referred to. The date at which this inability falls for determination is clearly when *a*

judicial authority has made a ruling, and not otherwise. It is also worth observing that the language used in Article 2(2) concerning claims by investors for the return of assets belonging to them is not used later in the Directive (or anywhere in the 1998 Act) to describe the right of subrogation which is conferred upon the ICCL.

“in accordance with the legal and contractual conditions applicable”

188. The words “*in accordance with the legal and contractual conditions*” which appear in Article 2(2) of the Directive, appear again in Article 2(4) which states that: “*The amount of an investor’s claim shall be calculated in accordance with the legal and contractual conditions, in particular those concerning set off and counter-claims, that are applicable to the assessment, on the date of the determination or ruling referred to in paragraph 2, of the amount of the money or the value, determined where possible by reference to the market value, of the instruments belonging to the investor which the investment firm is unable to repay or return.*” There is no doubt about the fact that, for present purposes, the “*determination or ruling*” is the winding-up order dated 21 October 2011. Article 2(4) makes very clear that an investor’s claim must be calculated in accordance with the legal and contractual conditions applicable to the assessment on that date.

189. A fundamental submission made on behalf of the ICCL is that an investor’s claim is *not* valued as of the determination date. The ICCL submits that all Article 2(4) does is to require that the legal and contractual conditions in accordance with which an investor’s claim is to be calculated are those which apply as of the determination date., i.e. as of 21 October 2011, but, submits the ICCL, that is not when the quantum of an investor’s loss for the purposes of a claim against the scheme (and, thus, the ICCL’s liability) is determined. Regardless of the skill and subtlety with which this submission is made on behalf of the ICCL, I cannot agree with it. Article 2(4) uses the words:- “*The amount of an investor’s claim shall be calculated in accordance with the legal and contractual conditions... that are applicable to the assessment, on the date of the determination or ruling referred to in paragraph 2 of the amount... which the investment firm is unable to repay or return.*” (emphasis added).

190. The ICCL submit that, per Article 2(4), the rules in force on the winding-up date determine the value of an investor’s claim and it is submitted that the quantification of compensatable loss payable to the investor is not, according to Counsel for the ICCL, “*artificially frozen in time*” with reference to the position which pertained on that date. In the manner explained above, I am bound to reject this submission in circumstances where Article 2(4) goes on to refer, in the final words thereof, to the claim “...*which the investment firm is unable to repay or return*” (emphasis added). That present tense “*is*” refers to the date of a ruling, i.e. the date of the winding-up order in the present case.

191. The foregoing makes clear that the *assessment* takes place on the *determination* date which, for present purposes, is 21 October 2011. The reason for this was made clear in the Commission’s proposal which, despite recognising the “*risk*” that events post the determination date could alter matters, made clear that “*the compensation scheme has to be able to determine exactly its liabilities*” (see p. 10 of the Commission’s proposal). In short, the valuation of an investor’s claim and, thus, the determination of the scheme’s liability in respect of same, falls to be determined with reference to a single date, being what Article 2 refers to as a *ruling*, i.e. the date of the winding-up order.

192. I am entirely satisfied that the Directive does not envisage a bifurcation of matters (i.e. a calculation of an investor’s claim with reference to terms and conditions applicable on the date of a winding-up order, but with the value of that claim and the liability of the ICCL not determined at that juncture, but at a future point, possibly years later). On the contrary, the Directive is clear that the valuation is carried out on the *determination* date. The foregoing interpretation is not only consistent with the words used in the Directive and with the views expressed by the Commission in the travaux préparatoires, it is also consistent with a core principle in the Directive, namely, the importance of prompt payment of what is limited compensation to the qualifying investor which compensation is not linked to actual loss.

Article 8 (3)

193. It is uncontroversial to say that the hiving-off for a much later date of the determination of a claim of an investor is wholly inconsistent with the requirement that compensation be paid speedily. Just one example of the importance placed on prompt payment can be seen in Article 8(3) which states that: *“Where an investor is not absolutely entitled to the sums or securities held, the person who is absolutely entitled shall receive the compensation, provided that that person has been or can be identified before the date of the determination or ruling referred to in Article 2 (2).”* As counsel for Mr. Day submits, such is the significance of the date of the determination or ruling (for present purposes, the date of the winding-up order) that, even if there is a dispute as to who is entitled to the compensation, there is a *“hard”* deadline that such dispute must be worked out with reference to the date of the *determination*. As counsel for Mr. Day also submits, if it was the case that the Directive envisaged that the determination of the amount payable in compensation was to take place on a date *later* than the winding-up order, it was open to the Directive to state that where there is a dispute as to who is entitled to receive the compensation, the parties have until the end of the liquidation proceedings to work that out. That is not what the Directive provides. Any such dispute must be resolved with reference to the *determination* date and this is because the Directive envisages that the right to compensation is determined as of that date and as of no other.

Article 9

194. The importance of the date of the determination or ruling as referred to in Article 2 of the Directive (in the present case, the date of the winding-up order), is emphasise once more in Article 9. This provides that the scheme shall *“inform investors of the determination or ruling referred to in Article 2(2) and, if they are to be compensated, to compensate them as soon as possible”*. The foregoing, in my view, undoubtedly links the compensation payable to an investor to the date of a judicial ruling, as well as emphasising the need for prompt payment, wholly undermining the submissions made on behalf of the ICCL as regards the interpretation of ‘net loss’ contended for.

Three months

195. Article 9(2) also seems to me to be of particular significance and it states that: “*The scheme shall be in a position to pay an investor’s claim as soon as possible and at the latest within three months of the establishment of the eligibility and the amount of the claim.*” The foregoing speaks of paying “*an investor’s claim*”. It does not refer to an interim payment. It does not speak of actual loss. There is also a very explicit emphasis on speedy payment being made. The Directive is clear that the payment must be made within three months of eligibility and the amount of the claim being established. This obligation created by the Directive seems to me to be utterly inconsistent with the submission made on behalf of the ICCL to the effect that, properly interpreted, the 1998 Act envisages a situation where it is only at the very end of the winding-up process that a final statement will be issued by an administrator at which point it will then be known what the relevant investor is actually entitled to receive (or retain if an interim statement and interim payment had issued) and, at that juncture, there would either be (a) a recovery *from* the investor or (b) an additional payment *to* the investor (subject to the “cap” of the lesser of €20,000 or 90% of net loss) or (c) confirmation that neither party needed to make a payment to the other (in the event that a final ‘true up’ confirmed what had been understood when an earlier interim statement and interim payment issued).

196. Carefully considering all of the evidence, this Court is entitled to conclude that there is absolutely no reality whatsoever in the approach contended for by the ICCL being one which is capable of occurring within the three months referred to in Article 9(2). On the facts of the present case, almost a decade after the relevant winding-up order was made there are 1,372 investors (the cohort represented by Mr. Day) who have made claims for compensation to the ICCL which have neither been certified by the Administrator nor paid. It is uncontroversial to say that what has occurred in the present case (i.e. no payments made to the majority of investors despite the passage of ten years) is utterly at odds with the principles emphasised in the Directive.

197. I also regard myself as bound to reject the submission made on behalf of the ICCL that the principle of prompt payment, so clearly referred to in the Directive, is adequately addressed by the

issuing of interim certificates by an administrator. I say this because, even though Laffoy J. recognised, in her 12 May 2000 judgment in *Re Money Markets Ltd (In Liquidation)*, the entitlement of an administrator, under the 1998 Act, to deliver interim statements, and even though s. 33(3A) of the 1998 Act provides that an administrator *may* if the ICCL agrees, deliver interim statements, nothing in the 1998 Act *requires* the delivery of such interim statements. To deliver an interim statement is not mandatory, elegantly illustrated by the fact that a decade after the winding-up order, no interim statement has been provided to any of the 1,372 investors represented by Mr. Day. The fact that it is open to an administrator, with the ICCL's consent, to decide to issue an interim certificate, or not, also illustrates that what is contended on behalf of the ICCL is that the 1998 Act, properly interpreted, entitles the ICCL to make no payment of compensation whatsoever until the very end of the completion of the winding-up proceedings, regardless of how many years that may take. I have no hesitation in saying that this is a stance which is entirely undermined by the explicit provisions in the Directive, against which the provisions in the 1998 Act fall to be interpreted.

Article 9(2)

198. The importance of speedy payment under the scheme is also underscored by the following words in Article 9(2) of the Directive: *“In wholly exceptional circumstances and in special cases a compensation scheme may apply to the competent authorities for an extension of the time limit. No such extension may exceed three months.”* Thus, even with an extension to cover wholly exceptional circumstances and special cases, compensation must be paid to an investor within six months. The foregoing principle is impossible to reconcile with the interpretation contended for on behalf of the ICCL to the effect that the definition of ‘net loss’ in the 1998 Act envisages a calculation of actual loss such that, regardless of how many years the winding-up proceedings may take, it is open to the Administrator to wait until the very end of the proceedings before issuing a final statement which would trigger, only at that stage, any payment to an eligible investor.

199. Throughout the submissions made on behalf of the ICCL, emphasis is laid on the words “*compensation*” and “*loss*”, the submission being that the 1998 Act must be concerned with *actual* loss and that the only compensation properly payable must be in response to an actual loss. Similarly, it is submitted that in circumstances where the Commission deemed it reasonable for the investor to bear 10% of the loss, the intention must have been, says the ICCL, that this refers to 10% of *actual* loss. In short, it is submitted that the concept of actual loss infuses the entire of the *travaux préparatoires*, the Directive and the Act. I must disagree, not least because the Oireachtas could have referred, but plainly did not refer, to actual loss. It was open to the Oireachtas to make clear that actual loss was the concept around which everything hinged. They rejected that approach in favour of developing two statutory concepts which are extensively and clearly defined, but which differ entirely from the concept of actual loss. The Act is not concerned with *compensation* and *loss* or *actual loss* as loosely understood. Rather, the Act is concerned with very specific statutory constructs of ‘net loss’ and ‘compensatable loss’, determined, not with reference to the ultimate outcome of liquidation proceedings, but on the date of a winding up order. Having looked at the proposal and the Directive, I now turn again to the Act.

The 1998 Act

200. The 1998 Act defines a “*ruling*” as follows:-

“ruling” means a decision made by a court in relation to an investment firm for reasons which are directly related to the financial circumstances of the investment firm which has the effect that clients of the investment firm are precluded for the time being from pursuing claims against the investment firm for the return of money owed to or belonging to the client and held on behalf of the client by the investment firm in connection with the provision of investment business services and for the return of investment instruments belonging to the client and held, administered or managed by the investment firm on behalf of the client in connection with the provision of investment business services;

The language used in this definition reflects the two different types of claims referred to in Article 2(2) of the Directive. I will presently look again at s. 30(1) of the 1998 Act to see where the term *ruling* is used in context.

S. 30 (1)

201. Earlier in this judgment, I set out the relevant part of s. 30(1) which begins with a definition of “*compensatable loss*”, given as follows :-

“In this Part—

“compensatable loss” means 90 per cent of the amount of an investor’s net loss or €20,000 ECUs whichever is the lesser;”

It will be recalled that neither the Directive, nor the Commission’s proposal regarding same, referred to ‘actual loss’ being the basis upon which compensation was payable to an investor under a scheme. Nowhere does the 1998 Act define or refer to actual loss. Rather, a payment to an eligible investor is in respect of ‘compensatable loss’ which is a specifically defined term in the Act which depends on another statutorily defined term, being ‘net loss’. Although I quoted the relevant extract from earlier, it is appropriate to do so again for the sake of clarity, given the significance of the term ‘net loss’ to the questions put to this Court. Net loss is defined in section 30(1) of the 1998 Act as follows:-

“In this Part—

...

“net loss”, in relation to every client of an investment firm, means the amount of the liability of the investment firm in respect of—

- (a) money owed to or belonging to the client and held on behalf of the client by the investment firm in connection with the provision of investment business services by the investment firm, and*
- (b) investment instruments belonging to a client of the investment firm, and held, administered or managed by that firm for the client, in connection with the*

provision of investment business services by that firm to the client, the value of those instruments being determined, so far as possible, by reference to their market value,

on the day of a determination made under section 31 (3) or a ruling, as appropriate, which the investment firm is unable to discharge in accordance with the legal and contractual conditions applicable but shall not include- ...”

202. The foregoing definition recognises the difference between two different types of claims and mirrors the wording found in Article 2(2) of the Directive. Net loss is defined as the amount of the liability of the investment firm in respect of both types of claims on the day of a *ruling* (i.e. on the date of the winding-up order which, in the present case is, of course, 21 October 2011). On behalf of the ICCL, it is submitted that the words which come afterwards, i.e. the words “*which the investment firm is unable to discharge*” are of crucial significance. It is said on behalf of the ICCL that this imports the principle of actual loss into the definition and the submission is made that net loss must, therefore, take account of actual and estimated future recoveries. Regardless of the skill with which the submission is made, I am satisfied that it does not represent the literal meaning of the words used in a statute plainly designed to give effect to the Directive.

Is unable

203. It will be recalled that Recital (19) of the Directive emphasised the importance of investors being compensated “*without excessive delay*”, whereas Article 9(2) made clear that the scheme must be in a position to pay an investor’s claim “*as soon as possible and at the latest within three months*” of eligibility and the amount of the claim being established. It will also be recalled that the 22 September 1993 Travaux Préparatoires made clear that “*the entry into operation of the investor compensation scheme is triggered by an official decision in the firm’s home Member State establishing that the firm is unable or likely to be unable to meet its commitments to its clients*” (emphasis added). The foregoing plainly refers to what, in the present case, is the date of the winding-

up order. There is an absolute consistency between the contents of the Directive and the contents of s. 30 of the 1998 Act. The term “*is unable*” employs the present tense. A winding-up order deems that the firm “*is unable*” to meet its obligations. The present tense is also used in the Commission’s 22 September 1993 proposal. It is used, too, in the Directive, an example being recital (11) which refers to a harmonised minimum level of compensation to protect the interests of small investors “*where an investment firm is unable to meet its obligations to its investor clients*” (emphasis added). That focus on the present and the deliberate use of the present tense is also reflected in s. 30 which defines net loss as being the liability of the investment firm in respect of money owed or belonging to the client and held by the firm, and investment instruments belonging to the client “*...on the day of a determination made under s. 31(3) or a ruling, as appropriate, which the investment firm is unable to discharge in accordance with legal and contractual conditions applicable but shall not include...*” (emphasis added).

The present tense

204. The focus of the travaux préparatoires and the Directive and the 1998 Act is on the position which pertains as soon as a determination or ruling is made. Net loss is determined with reference to that date, i.e. the date of the winding-up order because this is when the firm “*is unable*” to discharge its liabilities. The 1998 Act does not use the future tense. Section 30(1) could have defined net loss with reference to an investment firm’s liability “*...on the day of a determination made under section 31(3) or a ruling, as appropriate, which the investment firm is or may be in the future unable to discharge in accordance with the legal and contractual conditions applicable but shall not include...*”. If the Oireachtas intended the foregoing, they could have used such language. They did not. They did not, because the intention which can readily be derived by the words employed in s. 30, was not to introduce into s. 30 a second unmentioned and utterly different day than the determination date. This is because the focus of the 1998 Act (against the backdrop of a similar focus which is plain from the Directive and the travaux préparatoires) is on what happens at the *start*, not the *end* of

insolvency proceedings in respect of an investment firm. That this is so, is reflective of the aims of the Directive being the protection of investors, in particular smaller investors and the maintenance of market confidence.

205. The proper interpretation of s. 30(1) is that the investment firm's inability to discharge its obligations is, for the purposes of the definition of 'net loss', to be determined with reference to the day of the *ruling* (i.e. date of the winding-up order). It is on the date of the winding-up order that the court has ruled that the firm *is* insolvent and *is* unable to meet its obligations to investors. The words which follow the word "*ruling*" in the definition of "net loss" are: "*which the investment firm is unable to discharge in accordance with the legal and contractual conditions applicable...*" Article 2 of the Directive made clear that the legal and contractual conditions applicable are those "*...that are applicable to the assessment, on the date of the determination or ruling referred to in paragraph 2, of the amount... which the investment firm is unable to repay or return*". It is clear that the reference in s. 30(1) to the legal and contractual conditions applicable, is a reference to such conditions as applied at the date of the determination or ruling (i.e. the date of the winding-up order).

Same date

206. In submissions made with enormous skill, counsel for the ICCL contends that an investor's claim against an investment firm is the only thing to be determined with reference to the date of any winding-up order on a proper interpretation of s. 30(1) and he goes on to submit that the liability of the ICCL, on a proper construction of s. 30, falls to be determined on an entirely different date, namely at the very end of the insolvency proceedings. If that was the intention of the Oireachtas, it does not emerge from a literal meaning of the words which the legislature used. Despite the undoubted ingenuity with which the ICCL contend for a different interpretation, I am entirely satisfied that the plain meaning of the words used in s. 30(1) are that net loss means the amount of the liability of the investment firm, to the relevant investor, on the day of a winding-up order, with the applicable legal and contractual conditions also referable to the same date. I am entirely satisfied that a literal

interpretation of s. 30(1) does not allow for the importation of the concept of actual loss which nowhere appears in the 1998 Act, the Directive which it implements, or in the travaux préparatoires which preceded same. The calculation of net loss pursuant to s. 30(1) of the 1998 Act does not require the taking into account by the Administrator of actual recoveries and estimated future recoveries. It does not render a later date relevant (indeed crucial on the ICCL's case). If the Oireachtas intended to link the payment of compensation under the Scheme to a calculation of actual loss (leaving aside the fact that this would run contrary to the provisions of the Directive), the legislature could have said so, but plainly did not. The Act is clear and s. 30(1) is not at all concerned with actual loss. The ICCL is not being asked to compensate for actual loss. Rather, it is called on to make a maximum payment of €20,000 and whether an eligible investor gets less than that is determined with regard to what the 1998 Act calls "compensatable loss", which depends on another statutorily defined term, i.e. "net loss" which is explicitly to be calculated with reference to the date of a ruling (which in the present case was a winding-up order made on 21 October 2011).

Aims of the Directive

207. Having regard to the literal meaning of the words used, I am unable to interpret s. 30(1) to mean that an investor's claim is valued on the date of the winding-up order but the ICCL's liability to make a payment to the investor is calculated with reference to events which may or may not arise during the course of what may well be many years thereafter. In the manner previously touched on in this judgment, the interpretation contended for is not only one which, in my view, does violence to the language used but it is an interpretation which fundamentally runs contrary to core principles in the Directive, in particular, the principle of prompt payment. If it was truly the case that, properly interpreted, s. 30(1) required a taking into account of actual recoveries and estimated future recoveries between the date of a winding-up order and the future date (e.g. a decade later) when a final statement will be issued to each investor by an administrator certifying their net loss and compensatable loss with reference to the recovery of assets in the years which succeeded the winding-up order, it would

set at nought a fundamental aim of the Directive which is to provide a minimum level of compensation to protect the interests of small investors where an investment firm is unable to meet its obligations to its investor clients. On the interpretation contended for by the ICCL, even a decade after a court had determined that the investment firm in question was unable to meet its obligations, there is no obligation on the ICCL to make any payment to the small or any investor. Rather, everything must wait for a granular working-out of the outcome of liquidation proceedings. On a proper interpretation of s. 30(1), this is simply not so and the answer to the first question which this Court is called upon to determine is undoubtedly in the negative.

The syntax argument

208. A key submission made on behalf of the ICCL is to suggest that, if the words “*on the day of a determination*” were meant to qualify the words “*which the investment firm is unable to discharge*”, then the words “*on the day of a determination*” would have appeared with a comma and after the words “*which*” (in the phrase “*which the investment firm is unable to discharge*”) or, in the alternative, would have appeared after the words “*is unable to discharge*”. I regard myself as obliged to reject that submission, not least because of the word “*is*” which appears in the phrase “*which the investment firm is unable to discharge*”. The foregoing is plainly a reference to the present. It is a reference to the date that when the court ruled that the company could not discharge its liabilities (i.e. the date of the winding-up order), being the relevant determination date. The future tense is not used. The Oireachtas, had they intended future events to play a role, could have said so. They could have used the words “*which the investment firm is or in the future may be unable to discharge*”. They did not make that choice and the proper interpretation of ‘net loss’ is for the position on the day of the winding-up order to be looked at, with what happens subsequently being of no relevance to the calculation of ‘net loss’ or to ‘compensatable loss’ which is derived from it. When section 30(1) is read, precisely as drafted and in the context of the Directive to which it gives effect, the literal meaning of the term net loss is perfectly clear and an investor’s claim as well as the ICCL’s liability

are to be determined with reference to one date and one and the same date (which, in the present case, is the date of the winding-up order made on 21 October 2011).

No two-stage process

209. The Oireachtas had the opportunity, if it so wished, to make provision for a ‘netting-off’ or so called ‘true -up’ exercise at a future date (i.e. based on actual recoveries and actual loss throughout the course of liquidation proceedings) and plainly rejected any such approach. Thus, the Oireachtas did not envisage a two-stage process, beginning with a preliminary exercise whereby an interim statement would be issued with an interim payment taking into account actual recoveries up to that stage and what was then anticipated to be future recoveries, be that months or years later (an exercise which, in itself, would require considerable time and effort, but one which, on the ICCL’s case, was only part of the story in that no investor who received any such payment from the ICCL on foot of such an interim certificate could ever use it confidently because, according to the ICCL, it was a payment which was only preliminary and conditional upon a final ‘true-up’ at a future, possibly distant future, date). None of this is so. None of this is provided for in the Act. The plain wording in s. 30(1) entirely rules out what the ICCL contend for.

S. 31

210. In the present case, this Court made a ruling in 2011 and it will be recalled that the definition of *ruling* was referred to earlier. As to a *determination* (as opposed to a ruling) s. 31 of the 1998 Act is of relevance. The “*supervisory authority*” for the purposes of that section is the Central Bank and s. 31(1) provides as follows:-

“31.(1) Where it appears to the supervisory authority that an investment firm is unable for the time being, for reasons which are directly related to its financial circumstances, to meet its obligations arising from claims by clients and to have no reasonably foreseeable opportunity of being able to do so, the supervisory authority shall serve notice on the investment firm that it proposes to make a determination to that effect.”

It is clear from the foregoing that the determination by the Central Bank, just as a ruling by the court, is that the firm in question “*is unable*” to meet its obligations to clients. The date of such a determination or ruling is an essential part of the architecture of the 1998 Act insofar as the entitlement of eligible investors to receive payments for compensatable loss is concerned.

S. 33

211. Earlier in this decision I quoted, verbatim, from s. 33 of the 1998 Act which deals with the appointment of an administrator where the Central Bank has made a determination or where the court has made a ruling. It is appropriate to quote subss. (3) and (3A) of s. 33 as follows:-

“(3) The Administrator shall deliver to the Company, or, where appropriate, to the operator of the compensation scheme concerned—

(a) a statement, or

(b) if an interim statement is delivered under subsection (3B), a final statement, specifying the names of eligible investors and the net loss (if any) and the compensatable loss (if any) of each of those investors.

(3A) As a prelude to complying with subsection (3), the Administrator may, if the Company or the operator of the relevant compensation scheme so agrees, deliver an interim statement specifying names of eligible investors and the estimated net losses (if any) and the estimated compensatable loss (if any) of each of those eligible investors.”

Interim statements

212. Nothing in s. 33 alters the date on which the estimate is to be carried out, as regards estimated net loss and estimated compensatable loss of any investor. Nothing in s. 33 confers on the Administrator or on the ICCL the entitlement to depart from what is mandated by s. 30(1) as regards what is meant by net loss and compensatable loss, the former being determined with reference to the date of the ruling, i.e. winding-up order. As previously observed in this judgment, the power to issue interim statements is a discretionary one and, as counsel for Mr. Day submits, one can readily

understand why, in certain circumstances, an administrator might decide to issue an interim statement (e.g. if there were conflicting views as to what the market value was of a particular asset on the day of the winding-up order). Nothing in s. 33, or in Laffoy J.'s decision in *Re Money Markets International* entitles the Administrator to take into account events which post-date the winding-up order in the context of assessing net loss or compensatable loss. Nothing in s. 33 imports the concept of actual loss into the 1998 Act. It is also worth observing that the necessity for an interim certificate in *Re Money Markets International* was because of the Administrator's inability to calculate net loss in relation to eligible investors because questions had arisen such as "...the operation of set offs within MMI, stamp duty refunds and trading of free paid for stocks in margin trading by MMI in respect of United States Securities". It is uncontroversial to say that set-off rights concern events pre-dating a winding-up order and there is nothing in Laffoy J.'s decision to suggest that the Administrator in that case was entitled to look at events *after* the relevant winding-up order and to take those into account for the purposes of net loss. On the contrary, it is clear that the relevant administrator had difficulty working out the consequences of events which occurred before the winding up and, for that reason, could not, at that juncture, value the loss. Laffoy J.'s decision in *Re Money Markets International* is most certainly not authority for the proposition that an administrator can issue an interim statement for the purposes of looking at events post-dating the winding-up order in the context of calculating net loss on the basis of such subsequent events before issuing a final certificate. Such an approach is simply not provided for in the 1998 Act.

S. 34 of the 1998 Act

213. The interpretation contended for by the ICCL also seems to me to be undermined by the explicit provisions of s. 34 of the 1998 Act. I have repeatedly observed that there is no mandatory obligation on an administrator to deliver an interim statement in accordance with s. 33(3A). Where such an interim statement is delivered, however, it must be followed by a final statement delivered in accordance with s. 33(3). In that respect one sees the Act providing for a two – step process which,

of course, is what is argued on behalf of the ICCL as consistent with the proper interpretation of the 1998 Act and the requirements of the Directive. In the scenario contended for by the ICCL, however, the interim certificate would be issued in the context of what was then known or believed to be the position about recoveries and expected future recoveries, with the final certificate taking account of what, in fact, had occurred during the course of the liquidation proceedings and reflecting what the ICCL contend to be the “true - up” which they say is required under the 1998 Act. Thus, they argue, the final certificate would either see a payment made by the ICCL to the relevant investor to make up for any ‘underpayment’ of compensation which had been made at the interim statement stage or a payment by the investor of any ‘overpayment’ taking into account actual recoveries during the course of the months (but far more likely, years) of the entire proceedings. Entirely at variance with the foregoing submission made on behalf of the ICCL, s. 34 envisages the former but most certainly not the latter. In other words, when the Oireachtas specifically considered the question of what was to happen when a final statement issued (in circumstances where an interim statement had earlier been delivered) the Oireachtas made clear that the Act should provide for an investor to receive a further payment from the ICCL if it turned out that the initial payment under the interim certificate was less than the investor’s entitlement.

‘true-up’

214. Despite plainly considering events *post* the determination date, i.e. after the date of the winding-up order, the only payment the Oireachtas envisaged was one *by* the ICCL to an investor, not otherwise. The Oireachtas could have made, but plainly did not, make any provision for any payment by an investor *to* the ICCL. Nor did the Oireachtas envisage any ‘true – up’ at the very end of the liquidation process, such that payments might flow in either direction, with reference to actual loss as determined at the very end of the proceedings. Not having made any such provision, this Court is entitled to take the view that the intention of the Oireachtas as expressed in the 1998 Act is that no account was to be taken, for the purposes of calculating net loss and, therefore, compensatable loss,

of the recovery of assets during the course of the liquidation. The Oireachtas never intended that, years after the winding up order, there would be a reconciliation exercise, hinging around the concept of actual loss, the result of which could see an otherwise eligible investor deprived of compensation which had been paid to him or her years earlier (e.g. if such an investor received a compensation payment immediately after a winding up order in respect of an investment firm, as the Directive envisaged). It should also be emphasised that, on the ICCL's case, it does not even have the obligation to make such a payment at any time until the ultimate conclusion of the liquidation proceedings regardless of how long they may take. That is in circumstances where there is no obligation under the 1998 Act placed on an administrator to issue any interim statement. Thus, if the ICCL were to be correct, there is not even an adjustment made, at the very end of the proceedings, with reference to an interim payment which was furnished to an investor, years before. Rather, it is legitimate for the investor to receive nothing at any stage until the very end of proceedings and, even then, not to receive the sum which represented compensatable loss as calculated with reference to the date of the winding up order but, rather, a potentially lesser sum despite nothing in the 1998 Act providing for such a deduction. Insofar as the ICCL argue that the eligible investor could receive at the very end of the proceedings a potentially greater sum than their actual loss, two observations arise; firstly, the 1998 Act places an upper "cap" on compensation, i.e. €20,000 or 90% of net loss; secondly, the ICCL's submissions assume that an investor who both receives a compensation payment and, years later, recovers their assets is someone without any actual loss whereas the evidence before this Court is that even an investor in that position may have sustained an actual loss and may be in fact in a worse position than if the investment firm had not failed. Regardless of the foregoing, it is the literal interpretation of the words used in the 1998 Act which compels this Court to answer the first question in the negative.

Acute need

215. At the risk of stating the obvious, if the position contended for by the ICCL were correct, it is perfectly permissible for an eligible investor to receive nothing at all at the point in time when the limited compensation envisaged by the Directive and provided for under the 1998 Act is most acutely required i.e. in the immediate wake of a winding-up order in respect of the investment firm. It is fair to say that the focus of the Directive is not on a granular analysis being conducted, down to the last Euro or Cent, as to the loss suffered by investors. Rather the Directive aims to ensure that within a limited number of months of a ruling by a court that an investment firm is unable to meet its liabilities, a guaranteed minimum amount of compensation, not linked to actual loss, is paid promptly to investors so as to provide a minimum level of protection to such consumers thereby also furthering the Directive's aim.

'Arguably absurd'

216. Among the submissions made on behalf of the ICCL is that a calculation of net loss with reference to the determination date is inconsistent with the wording of s. 30(1), the overall purpose of the 1998 Act and the purpose of the Directive. It is also submitted that, as a matter of logic and fairness, the calculation of net loss should reflect the actual loss of an investor and it is submitted that to disregard recoveries realised during the course of the insolvency proceedings is "*arguably absurd*". Despite this submission, it is not suggested on behalf of the ICCL that the present situation is one involving s. 5 of the 2005 Interpretation Act. The ICCL does not urge the court to depart from the literal meaning of the Statute. On the contrary, it is submitted on behalf of the ICCL that the literal meaning is the one they contend for, i.e. that 'net loss' must take into what ultimately turns out to be an eligible investor's actual loss. In the manner previously explained in this judgment, there is uncontroverted evidence that even an investor who receives a compensation payment and who also ultimately recovers 100% of their assets (e.g. years after a winding-up order was made) is someone who may have sustained an actual loss (flowing from having been denied access to their assets for the relevant period) and is someone who may still be in a worse financial position than if the

investment firm had not failed. The ICCL has not engaged with that reality. The ICCL assume that such an individual has, and can have, no actual loss, yet the evidence before this court is to the contrary. To say the foregoing is not to say that the purpose of the Scheme is to compensate for such loss. Nor is it to suggest that the evidence of such actual loss on the part of those who might receive both a compensation payment and, ultimately, the return of their investment, was determinative of any question this Court was asked to answer. It is merely to point out that, as a matter of fact, the evidence before this court undermines the ICCL's proposition that every investor who, say, received a compensatable loss payment of €20,000 in the wake of a winding-up order and who ultimately recovered 100% of a €100,000.00 investment, howsoever many years later, is someone with no actual loss. The evidenced before this court entitles me to hold otherwise.

217. Leaving the forgoing issue entirely to one side, the ICCL submits that any issue of delay caused by reason of the Administrator having to take account of actual recoveries and having to estimate future recoveries could be dealt with in circumstances where the ICCL submits that "*the effective use of interim statements would reduce the possibility of delay*". I repeat what I have said in relation to interim statements i.e. it is not mandatory for an administrator to issue any such statements and no investor has a right to receive an interim statement. Thus, there is no right to an interim payment, even on the ICCL's case. I am entirely satisfied that a literal interpretation of s. 30 does not support the position contended for on behalf of the ICCL.

Re-writing the 1998 Act

218. Ms. Smith SC for the Administrator, who made submissions on the net loss issue (in circumstances where the Administrator is not affected by the subrogation issue), draws the court's attention to the decision of Hardiman J. in *Gooden v. St. Otteran's Hospital* [2005] 3 IR 617, wherein the learned judge made clear that, in construing statutory provisions, it was essential for the court to avoid "*rewriting or supplementing*" same. Hardiman J. went on to state: "*The court must always be reluctant to appear to be doing either of these things having regard to the requirements of the*

separation of powers.” It was clear that the court in *Gooden*, which involved the interpretation of provisions in the Mental Treatment Acts of 1945 and 1953 (and which involved a purposive interpretation of one and a literal interpretation of another), only went as far as it did, given “*the essentially paternal character of the legislation in question*”. It was clear that the nature of the legislation, in the Supreme Court’s view, rendered less complicated the application of a purposive construction than would otherwise be the case. There is no question of the legislation in the present case being of a paternal character. The court in the present case is, I am satisfied, being invited by the ICCL to re-write the provisions of the 1998 Act in the manner they contend for and what they contend for is inconsistent with the literal meaning of the words used by the Oireachtas.

219. Both ‘net loss’ and ‘compensatable loss’, both are statutory terms. As Ms. Smith submits, the court can and should confine itself to the four corners of the 1998 Act when considering the meaning of those terms. In other words, to properly interpret the meaning of those terms, there is no need to import the concept of ‘actual loss’. I fully accept that submission. To understand net loss (and compensatable loss which flow from same), does not require the introduction of an entirely different concept of ‘actual loss’ (or, more properly, what the ICCL regard as actual loss despite the evidence that those whom the ICCL regard as having no actual loss may well have sustained same even where such an investor received both a compensation payment and, ultimately, recovered their assets). The definitions contained in s. 30(1) are clear and they are detailed. They tell the Administrator what is to be taken into account in the calculation of net loss (compensatable loss being derived from the former). The Oireachtas could have said, but plainly did not say, that net loss “*includes*” or “*includes but is not limited to*” the wording in the definition given. Instead, the definition is both detailed and self-contained. If the Oireachtas wished for other concepts to be included, they could have provided for it, but they did not. It is wholly apparent that these statutory definitions do not refer to ‘actual loss’. Indeed, actual loss can be found nowhere in s. 30. Had the Oireachtas intended for actual loss to form part of the calculation of net loss, the legislature could have provided for this. Plainly, they

did not. The legislature was not concerned with actual loss. They decided upon an entirely different concept. By way of illustration, the Oireachtas could have provided for a payment to an eligible investor of a portion of actual loss, in that the Oireachtas could have said that compensatable loss means “90% of the amount of an eligible investor’s actual loss or €20,000, whichever is the lesser”. Very obviously, it did not take this course. The formula chosen by the Oireachtas does not refer to or involve actual loss (which, self-evidently, could only be determined with certainty at the very *end* of the process). Critically, the Oireachtas made clear by the words used in the 1998 Act that the concept of ‘net loss’ was one arising at the *start* of the process. That decision was, of course, entirely consistent with the provisions of the Directive and the travaux préparatoires which preceded it.

The start not the end

220. There was one, and only one, date referred to in s. 30 which triggers payment to an eligible investor, namely, the day of a determination or a ruling. For present purposes, that means the date of the winding-up order made by this Court on 21 October 2011. There is no reference to any other date. There is no reference to the date of the final completion of liquidation proceedings, the latter being, of course, a ‘red letter’ day if the focus of s. 30 was on the calculation of actual loss which, as I say, could only be determined at the very *end* of the process. Rather, compensation is payable at the *start* of the process with reference to, in the present case, a winding-up order and this is wholly consistent with the approach taken in the travaux préparatoires and in the Directive. If this Court were to interpret s. 30(1) of the 1998 Act in the manner contended for by the ICCL the consequence would also be to defeat the essential aims of the Directive. I say this because it would render permissible a situation where no payment whatsoever was made to an eligible investor until the end of a liquidation process, which could readily take many years and in the present case has not been completed despite the passage of a decade. As I have observed, the ability on the part of an administrator, with the consent of the ICCL, to issue (or not) interim certificates is no answer, given that there is no obligation to issue any interim certificate. The interpretation contended for on behalf of the ICCL seems to me to

offend the purpose of the 1998 Act and the Directive to which it gives effect. There is simply no suggestion in s. 30 that the statutory definition of ‘net loss’ has any relationship to the concept of actual loss and it is uncontroversial to say that both concepts will, in reality, be separated in time by a period of years, perhaps many years, as in the present case. It is equally uncontroversial to say that the Directive focuses on prompt payment at an early stage in furtherance of the dual purposes of providing limited but nonetheless important compensation to investors, particularly smaller investors, thereby furthering a second aim of market confidence. The interpretation contended for, as well as being impermissible and breaching the literal rule, is one which would fundamentally frustrate the objects of a Directive. By contrast, the literal interpretation of s. 30(1) which I am satisfied is the correct one, avoids all such problems. By not introducing (impermissibly) the concept of actual loss into an interpretation of net loss, the aims of the Directive are furthered, not frustrated. The assessment of loss and liability with reference to the Determination Date i.e. the date of the winding up order ensures that eligible investors can get the payments to which they are entitled in a prompt fashion.

Rhetorical questions

221. If the Oireachtas intended that actual loss was fundamental to the understanding and calculation of net loss, Ms. Smith for the Administrator rhetorically asks why did the Oireachtas not say so? She also asks, rhetorically, why did the Oireachtas not provide for a “true-up” if it intended that there be one? The answer, of course, that the Oireachtas had no such intention and, therefore, did not make any such provision in s. 30. Nor did the Minister make any such provision in the 2015 Regulations made pursuant to the 1998 Act. If there was an intention that there be a “true-up”, the Oireachtas could have made provision for this in s. 30(2) wherein there is a setting-out of what is and is not to be deducted in the calculation of net loss. Actual loss plays no part, but s. 30(2) underlines what is the determination date (i.e. here, the date of the winding-up order), which is the one and only date around which the calculation of net loss hinges, including with regard to set-off rights, in the manner provided in s. 30(2)(a). In short, the approach taken by the Oireachtas gave effect to the terms of the

Directive whereas what is contended for on behalf of the ICCL would undermine the latter's objectives. It is of course true that the three-month time limit referred in Article 9(2) does not mean that certain things will not have to happen before such a time limit commences. This is clear, including from the reference to the three-months running from the "*establishment of the eligibility and the amount of the claim*". This does not, however, provide the ICCL with a basis for importing into the Directive, or the 1998 Act, that which is not there (i.e. an impermissible focus on the *end* of the process which will inevitably be imported if the ICCL's conception of actual loss were fundamental to a calculation of 'net loss', which it is not). The true position is that the focus is on the *start* of the process, i.e. the determination date when the firm "is" unable to meet its liabilities and a winding-up order has been made to that effect, not the end (when, according to the ICCL, a 'true up' takes place, 'over'-payment must be returned by an investor and any 'under'-payment is dealt with then by means of a 'top up', assuming an earlier interim payment which turned out to be less than the investor's due, having regard to the final outcome of the liquidation process). The suggestion that the end date of the liquidation proceedings is in any way relevant must be rejected. I am obliged to reject the submissions which seek to introduce a second date into s. 30(1) where one and only one date is referenced in that section and which not only does violence to the words used, but introduces uncertainty, complexity and delay where there currently are none.

November 2019

222. Although not determinative of the question posed to this Court, it appears to be the case that the first time the ICCL suggested that actual or anticipated future recoveries were required to be taken into account in the context of a calculation of net loss was in November 2019. The court does not have evidence before it as to the approach adopted by the ICCL to the calculation of net loss prior to that date or, for that matter, in respect of other liquidations, notwithstanding that the fact that it is 23 years since the 1998 Act was introduced.

The first question answered in the negative

223. Nothing, however, turns on the foregoing and this Court's answer to the first question flows from the proper interpretation of s. 30(1). In my view, even if this Court had no regard whatsoever to the Directive which the 1998 Act gives effect to, the answer to the first question in the present application would have been the same by virtue of a literal interpretation of the words used in s. 30(1). It is beyond doubt, however, that the Directive and the Act reflect a specific intention to protect investors, particularly small investors, in a specific and limited manner but in a timely fashion. The relevant exercise is not one which involves or turns in any way on the calculation of actual loss. The Directive and the Act make clear that loss on the part of an investor and liability on the part of the ICCL fall to be determined on the self-same date, namely the day of the ruling (in this case the winding-up order).

Dr. da Silva's report and what the ICCL contend for

224. It seems to me to be appropriate to return to the contents of Dr da Silva's report in which he comments on what the ICCL contend for with regard to net loss. In section 1 of his report, Dr. da Silva refers to his qualifications and at para. 1.9 the following is stated: -

"1.9 In relation to the current dispute, I led a comprehensive review for the European Commission of National Investor Compensation Schemes established in accordance with the EU Investor Compensation Scheme Directive ("ICD") in 2005. This study remains the key reference study on investor compensation schemes in Europe and is still cited by the European Commission on its website. I provided a comparative description and evaluation of the National Investor Compensation Schemes with respect to their operating performance, financial positions, and ultimately the level of protection that they afford to investors".

225. Having regard to Dr. da Silva's qualifications and experience, none of which is in dispute, it is fair to say that few people could be more qualified than Dr. da Silva to comment on the consequences of the interpretations of the 1998 Act contended for by the ICCL. It might also be observed at this juncture that the ICCL decided against calling any expert evidence and confined themselves to the

averments made by Mr. Fagan, including the worked examples contained in his affidavits, as well as legal submissions made with great sophistication and skill by their senior counsel as to the literal meaning of the 1998 Act.

226. From para. 1.28 onwards, Dr. da Silva makes clear what his instructions were and he sets out what are, in effect, the six questions which this Court has been called upon to answer. These are undoubtedly questions of law but it does not appear to me that there is anything inappropriate about Dr. da Silva (a) referring to the questions; (b) making clear what his instructions are as regards those questions; and, (c) providing his expert opinion as regards the consequences of the interpretation contended for by the ICCL in the context of those question which the court is asked to answer. It is also perfectly clear from para. 1.29 that Dr. da Silva is not attempting to opine on the correct interpretation of any legislation and that he properly accepts that the question of interpretation is a legal issue and one for the court alone. I do not accept that it is fair to criticise Dr. da Silva for providing his views with regard to the objectives of the Directive and whether the consequences of what is contended for on behalf of the ICCL would accord with those objectives. I do not accept that the mere fact Dr. da Silva makes clear that for the purposes of his report, he is instructed to assume that the interpretation contended for by the ICCL is incorrect, means that this Court can or should disregard the expert views proffered by Dr. da Silva which do not constitute opinions on the correct interpretation of legislation. From para. 2.9 onwards, Dr. da Silva provides his view on the objectives of investor compensation schemes, as follows: -

“2.9 The investment market is subject to high levels of ‘information asymmetries’ between investors and investment firms. Investors have no easy means of determining whether an investment firm is committing fraud and misappropriating their assets, as they cannot observe what the investment firm is doing with their funds.

2.10 Investor compensation schemes exist as the last resort when the firm fails despite all other forms of protection. It acts as an investor protection tool, rather than a risk prevention

tool. As discussed in section 2B, the main purpose is to increase market confidence among investors.

2.11 If retail investors of ?? do not get compensated, this will have a chilling effect on investment with other investment firms. In other words, there are ‘negative externalities’ (or spill – over effects) associated with a fraudulent event in one investment firm on other investment firms. An event of fraud in one investment firm could lead to the retail investor community as a whole becoming more concerned about the risk of having their assets stolen, causing them to withdraw investments from other delegated investment managers.

2.12 The scheme is set up to provide speedy compensation through the mechanisms of ‘risk - sharing’ (between investors and the investment firms) and ‘risk mutualisation’ (between the insolvent and the solvent investment firms).

2.13 Retail investors are unable to manage the risks of their investments if they are subject to misappropriation. Therefore, investment firms, recognising the value of maintaining market confidence, bear (via the scheme) some of the risks of this taking place. The risk borne by scheme members is limited by the design of the scheme rules, including the cap on compensation payments (less than €20,000 in the case of the ICCL), the less than 100% pay – out ratio (90% in the case of the ICCL), the eligibility criteria (certain investor types are unable to claim), and the rights of subrogation by the investment scheme (discussed further in s. 4).

2.14 Speedy compensation is important, as delay can cause significant ‘opportunity costs’ for investors. A slow pay – out not only exposes directly affected retail investors to liquidity risks and other consequences (such as the inability to fund retirement and costly buying, which are discussed further in s. 5), it also signals to other retail investors that the risks associated with their delegated retail investments are higher than they otherwise might have thought. The timing of cash flows matters. If a compensation scheme is to be a success, in terms of market

confidence, it must pay compensation quickly. If it does not, its main objective of increasing market confidence will be undermined”.

227. The emphasis placed by Dr. da Silva on the speedy compensation of eligible investors is not merely the opinion of an expert. It accords precisely with the Commission’s view in the travaux préparatoires, the contents of the Directive, the provisions in the 1998 Act and, for that matter, the contents of the 2015 Regulations made thereunder. Yet the inescapable consequence of the interpretations contended for by the ICCL is that speed is not at all important. On the interpretation contended for by the ICCL (which, for the reasons set out in this judgment, I am satisfied is incorrect) the focus of the Oireachtas was on the *end* of the liquidation proceedings, not the *start*. On the interpretation contended for by the ICCL, there is uncertainty as to the timing of a compensation payment and complete uncertainty as to the quantum of the compensation payment which an eligible investor can hope to retain until the very end of the liquidation proceedings, regardless of how long they take. The expert views set out by Dr. da Silva illustrate the negative effect of uncertainty and delay on market confidence and it cannot be in dispute that the twin-aims of the Directive, to which the 1998 Act gives effect, is to provide some protection to investors (i.e. paid speedily with no question of a ‘claw-back’ years later) thereby promoting market confidence. The consequences of the ICCL’s contended for interpretation of net loss was also discussed at para. 3.8 of Dr. DaSilva’s report in the following terms:-

“3.8 Following a conversation with representatives from the Liquidator’s office, I understand that actual (expected) recoveries are the amount of monies that are (or are expected to be) available for distribution to eligible investors following the liquidation of misappropriated assets identified as at the Determination Date. These assets may exist in various forms (e.g. cash, shares, money market instruments or funds) and they can only be distributed once the Liquidator can identify and trace them back to the misappropriated accounts of eligible investors. The process of identification and tracing creates uncertainties

and potentially lengthy delays in the valuation process. Assets prices may also fluctuate before or after liquidation. As a result, the value of expected recoveries is inherently uncertain up to the point of distribution to investors.”

228. The uncertainty Dr. da Silva refers to is something with which the ICCL cannot disagree. Their interpretation of the 1998 Act inevitably means that nothing is certain until the very end of the liquidation process, because it is only then one will know what the actual recoveries were and at that juncture there would be a “*true-up*”, with the ICCL paying more to the investor or the investor paying more to the ICCL, the third option being that no adjustment was required in respect of such compensation as had been paid to the investor. The foregoing is not provided for in the Act. It is not, however, the only uncertainty created by the approach adopted by the ICCL. There would be uncertainty at different stages, according to the ICCL’s view because, leaving aside the fact that the 1998 Act does not require any interim statement or payment to be made, on the ICCL’s case, an initial assessment would be done. They suggest (to my mind optimistically) that this would be, say, six months after the determination date, at which point a view would be taken both in respect of actual recoveries and estimated future recoveries and a conditional or preliminary compensation payment could be made. It is appropriate to note that on the facts in the present case, the very first time there was an estimate concerning expected recoveries was as of March 2018, almost seven years after the initial winding-up order. Leaving that fact aside, under the ICCL’s model, there would not even be an initial payment of preliminary or interim compensation until estimated future recoveries had been taken into account. This is not what the 1998 Act provides for. It is not what the Oireachtas intended. It is to introduce uncertainty and delay which simply does not arise if the 1998 Act is properly construed and it runs contrary to the fundamental objectives of the Directive, which Dr. DaSilva commented on as follows at para. 3.16 of his report:-

“3.16 As discussed in section 2D, one key objective of investor compensation schemes is to minimise the investors’ risk exposures to the delays and uncertainties of recoveries. Speedy

compensation is important as delay can cause significant opportunity costs for investors and endanger investor confidence. A slow pay-out exposes directed affected retail investors to liquidity risks and other consequences (such as inability to fund retirement and costly borrowing, which are discussed further in section 5). Certainty also matters. Delays and uncertainties could signal to current and future generations of retail investors that the risks associated with their delegated investments are higher than they otherwise might afford, thereby undermining investor confidence, which is harmful to the interests of investment firms.

3.17 Therefore, to preserve investor confidence, it is appropriate to exclude expected recoveries from the calculation of net loss, so that investors can receive more compensation with less delay. I discuss why the ICCL's concerns on the supposed over-compensation are misplaced in section 3D."

229. Section 3D of Dr. da Silva's report comprises an analysis of the worked examples which are included in Mr. Fagan's affidavit, using the assumptions applied by the ICCL. From paras. 3. 21 to 3.23, Dr. da Silva comments on the worked example contained in Mr. Fagan's affidavit wherein Mr. Fagan assumed that an investor's total claim in liquidation comprised €150,000 (divided between assets 1 and 2, of €100,000 and €50,000, respectively). In that example, Mr. Fagan assumed that there would be €60,000 worth of assets available for distribution at the determination date (€20,000 for asset 1 and €40,000 for asset 2). He also assumed that there would be future recoveries totalling €15,000 (€10,000 for asset 1 and €5,000 for asset 2). Mr Fagan's example contends that, if recoveries for both assets increase from €15,000 to €75,000 after the determination date (i.e. additional recoveries of €60,000), the updated combined net loss would be €15,000 (€75,000 minus €60,000) and the compensation paid should (according to the ICCL) have been €13,500 (i.e. 90% of €15,000) as opposed to the €20,000 paid in this example. Mr. Fagan notes that under this scenario, there would be a supposed over-compensation of €6,500 (being the difference between the compensation paid at the determination date, of €20,000, and the compensation which Mr. Fagan argues should have been

paid after the determination date, i.e. €13,500). At para. 3.23, Dr. Da Silva observes that, because the claim in liquidation used in Mr. Fagan’s example exceeded €150,000, there was no possibility of ‘under-compensation’, even if the recovery turned out to be smaller than expected at the determination date. For example, if the recovery turned out to be ‘nil’ in Mr. Fagan’s example, the investors would still get compensation of €20,000, because the investor’s net loss remains above the statutory maximum compensation of €20,000 with, or without, recoveries. At para. 3.24, Dr. Da Silva makes the points that Mr. Fagan did not consider scenarios in his affidavit where the investor lost less than €20,000 and he proceeds to set out worked examples which illustrate the risk of under-compensation if one were to apply the methodology contended for by the ICCL. Table 3.3 of Dr. Da Silva’s report comprises a worked example employing the same methodology as used by Mr. Fagan but assuming alternative net loss as at the determination date. Dr. da Silva sets this out as follows:-

	Calculation	Asset 1	Asset 2
Claim in Liquidation	[A]	€100,000	€50,000
Assets available for Distribution at the Determination Date/March 2019	[B]	€80,000	€40,000
Future Recoveries (base case)	[C]	€10,000	€5,000
Total amount available for Distribution	[D] = [B] + [C]	€90,000	€45,000

Net Loss	$[E] = [A] - [D]$	€10,000	€5,000
Combined Net Loss	$[F] = [E] + [E]$	€15,000	
Compensation Paid	$[G] = \text{Min} (\text{€}20,000, 90\% * [F])$	€13,500	

230. At para. 3.26 and Table 3.4, Dr. da Silva went on to assume that there were no recoveries after the determination date and this illustrated that an investor who received €13,500 at the determination date but who suffered an actual loss of €30,000 should have received a payment of €20,000 and, thus, were under-compensated to the tune of €6,500 employing the ICCL’s approach (i.e. what Dr. Da Silva describes as “*the correct amount based on ex-post information*”). For the avoidance of doubt, none of the Administrator or *legitimi contradictores* argue for this approach. All accept that, by reason of the fact that the Oireachtas deliberately took no account of actual or future estimated recoveries and did not import the concept of actual loss into the calculation of net loss, which is properly calculated as of the date of the winding-up order, and on no other date, there is no entitlement to a “top-up” payment with reference to events in the years succeeding the determination date. The *legitimi contradictores* and the Administrator also acknowledge that even where an interim statement has been delivered in accordance with s. 34, the proper construction of s. 34(3) does not import into the legislation a consideration of events which post-date the determination date. In other words, even where s. 34(3) applies, there is no consideration of what the ICCL regard as ‘actual loss’. In my view, the foregoing is the correct interpretation. Section 34(3) properly interpreted in the context of the overall Act in which it appears, means that any provisional compensation payment and any further compensation payment can only be on the basis of a calculation of net loss which is referable to the position as of the determination date, not subsequent events. For this reason, I am entirely satisfied that the example deployed on behalf of the ICCL, of the shopping centre burning down in the months

or years following the winding-up order, is not a scenario which s. 34 can address. This is for the simple reason that s. 4 does not import into the legislation the concept of actual loss referable to events which post-date the winding-up order, in the same manner that a proper interpretation of s. 30 rules-out actual loss playing a role in the calculation of net loss.

Certain comment regarding worked examples

231. Having carefully considered the entire of the worked examples put before the court by Mr. Fagan on behalf of the ICCL, as well as the analysis of same by Dr. da Silva and Mr. Jacobs (and I will presently return to the latter's report) it is fair to say that it is possible for an infinite number of worked examples to be proffered to illustrate a relatively small number of issues. For instance, if expected future recoveries are factored-in to a calculation of net loss, it is entirely possible that an investor will received less than they are due at a time when, it is uncontroversial to say, that investor most needs the minimum level of compensation which the Directive provides for and which the 1998 Act was intended to give effect to. A simple example is where the claim in liquidation is €100,000 and the assets available as of the determination date come to €60,000. In that scenario, the net loss is €40,000 and the eligible investor would be due a payment of €20,000 with such a payment to be made within three months, according to the Directive. Let us imagine that such an estimate was €30,000, rather than €40,000 (leaving aside that even on the very optimistic view canvassed by the ICCL a minimum of six months from the determination date would seem to be required before there could be even an initial calculation of estimated future recoveries, but the evidence suggests that in a complex case years rather than months might well be needed before even an initial assessment). Leaving aside also, the fact that no investor has a *right* to receive an interim statement or an interim payment, were the Administrator to take this €30,000 of expected future recoveries into account when calculating net loss for the purposes of an interim statement and an initial payment, it would reduce the net loss from €40,000 to €10,000. Thus, instead of receiving €20,000 the investor would receive just €9,000

(i.e. 90% of €10,000) at a time when, according to the Directive, the limited financial support which it provides for, is most needed by the investor, in particular the small investor.

232. The worked examples before the court also illustrate other points some of which are very obvious if one starts from the proposition that the future is unknown. For example, the expected recoveries (of €30,000 in the foregoing example) may not in fact materialise. On the evidence before this Court, it could also take many years before this is known because, on the case made by the ICCL, it will only be at the very end of the liquidation proceedings that any supposed wrongs are righted, insofar as ‘over’ or ‘under’ payments of compensation being addressed by way of ‘top up’ payments at the conclusion of the liquidation, based on the granular analysis of actual loss, as the ICCL see it. In the foregoing scenario, therefore, the investor who had received €9,000 at some earlier point (although with no realistic prospect of receiving that initial payment with the speed the Directive requires) would ultimately receive a ‘top up’ payment of €11,000 (and if the relevant liquidation proceedings took as long as the present case, he or she could expect to receive that payment over a decade after the winding up order). The worked examples also illustrate that in the scenario where €60,000 of assets were available at the determination date in respect of a claim in the liquidation of €100,000, the eligible investor who was paid €20,000 as provided for under the Directive and the Act, could conceivably find themselves, by the very end of the liquidation process, in a situation where €10,000, €20,000, €30,000, €40,000 (or sums in between) had ultimately been recovered by the end of the liquidation proceedings. Thus, there is a possibility of such an investor being (according to the ICCL) “over” compensated to the extent that recoveries by the end of the liquidation process exceeded the €20,000 compensation paid.

233. Two points seem appropriate to make. Firstly, this possibility was plainly contemplated by the Oireachtas and, indeed, in the Directive (and by the Commission when proposing it). It could not be otherwise, when the entitlement to compensation under a Scheme - and, in the domestic context, the calculation of net loss - is made referable to a specific day, being the determination date when a

winding up order is made, as in the present case. There was, however, a conscious rejection of the taking-account of what would or could happen *after* that specific date and this was done in furtherance of the need for certainty in the context of the requirement to ensure that eligible investors, particularly the small investors which the Directive intended to protect, received compensation promptly. A second and related point is also that there is a “cap” on the compensation payment. Compared, as I observed previously to, say, house prices or even car prices, the maximum limit of the compensation payment is not large. Thus, the extent to which an individual investor could ever be “over” compensated is plainly limited.

234. Another point it seems appropriate to make is that many of the investors with whom the Scheme is concerned will be small investors and the evidence before this Court is that, of the 531 investor claims analysed by Mr. Jacobs, 122 of them had claims in the liquidation for amounts under €5,000; a further 65 investors had claims between €5,000 and €14,999; a further 46 investors had claims between €15,000 and €24,999; 36 investors had claims between €25,000 and €34,999. Thus, in 51% of the 531 claims analysed by Mr. Jacobs, the total value of the claim in the liquidation is less than €34,99. What the worked examples demonstrate is that, whether one employs the methodology contended for by the ICCL or whether one employs what I am satisfied is the correct approach based on a literal meaning of s. 30 of the 1998 Act, there is scope for “under” or “over” payment of compensation, depending on one’s perspective. The Oireachtas was plainly alive to that possibility but the proper approach which emerges from the interpretation of the 1998 Act in the context of the Directive to which it gives effect, means that investors, including smaller investors receive, promptly, a limited amount, but a certain amount, of compensation when they most need it. There is no question of a delay in receiving that compensation being “baked in” to the legislation, yet this is a consequence of what the ICCL contend for. On the contrary, such a delay (which would necessarily arise if there were to be an initial and it has to be said complex analysis taking into account, inter alia, what future recoveries are expected, in the context of an interim certificate and payment, followed by a ‘true up’

at the very end) was rejected in favour of speed and certainty with regard to a payment of compensation to investors who were entitled to rely on that albeit limited compensation and to regard it as theirs (not a conditional payment subject to being removed later via the taking of their assets).

235. Section 34(3) plainly indicates the intent of the Oireachtas which was to ensure that no investor would ever be *under*-compensated. Thus, explicit provision was made for a ‘top up’ payment to an investor if that was required. Importantly, Section 34 could have, but did not, alter the key date by reference to which compensation is to be paid, namely the date of a determination or ruling i.e. the date of the winding up order. Similarly, the Oireachtas could have decided to have regard to future events post – dating the determination date (i.e. winding up order date) but they very obviously decided against this. Thus, the Oireachtas consciously provided for a top up payment to guard against a situation where any investor was undercompensated but ruled out the requirement of any such investor to repay compensation or to have any deduction from the compensation paid, events post-dating the determination date not being relevant, as is clear from the terms of the 1998 Act.

Exhibit “MF2” Table A

236. It is also fair to say that certain worked examples proffered on behalf of the ICCL, based on their contended-for interpretation of the 1998 Act, illustrate scenarios wholly at variance with the core objectives of the Directive. For example, exhibit “MF2” to the second affidavit of Mr. Fagan, sworn by him on 26 May 2021, sets out certain examples from ICCL’s perspective. An original investment is identified as €100,000 for the purposes of the example at Table A. For the purposes of this example, the original investment of €100,000 is deemed to be €40,000 as of the determination date which, for the purposes of the example, is given as 01 January 2021 (the Determination Date obviously being the date of the winding-up order). The worked example continues by referring to an interim statement dated 01 June 2021 (i.e. six months after the Determination Date in this hypothetical example). To digress slightly, a period of six months being required to draw up an interim statement would seem to be extremely optimistic. I say this in circumstances where a decade into the present

winding-up, no interim statement has been issued to any of the 1,372 eligible investors represented by Mr. Day. Six months is, however, already beyond the three-months within which payment of compensation must be made, according to the Directive. The worked example continues by providing that, as of 31 August 2021 (i.e. 8 months after the determination date/winding up order) a compensation payment is made of €20,000 taking into account, according to the ICCL, estimated future recoveries. The worked example ultimately provides for a final statement issuing as of 01 September 2023 (i.e. 2 years and 8 months after the determination date) followed by a final compensation payment (if any) by 30 November 2023 (2 years and 10 months after the determination date). In this particular worked example, there is no change, in that €20,000 represented the estimated future recoveries and, thus, on a “*true-up*”, neither side makes any further payment.

Exhibit “MF2” Table B

237. Further worked examples are given with similar timelines. The example given at Table B assumes the same original investment amount to be €100,000 and assumes the same residual asset value of €40,000 as at the Determination Date. The example then gives a figure of €27,000 in respect of actual recoveries on the date of interim certification with estimated future recoveries of €15,000 on that date. An interim compensation payment of €18,000 is made in this example, six months after the determination date. Over two years later, matters are looked at again, by which point actual recoveries turned out to be only €10,000 (as against the €15,000 which had been estimated in respect of future recoveries in June 2021). In the ICCL’s example, there is an increase of €5,000 in the total net loss for the purposes of final certification, resulting in an increased payment in November 2023 (i.e. almost three years after the Determination Date) of €3,800. I am entirely satisfied, for the reasons explained in this judgment, that there is no entitlement on the part of any investor to have matters calculated twice and to receive a top-up payment years after the original compensation payment, calculated with reference to actual recoveries as per this example proffered by Mr. Fagan on behalf of the ICCL. Other examples are then given by Mr. Fagan which would, according to the ICCL’s

view of the 1998 Act, require investors to repay sums which, in the examples given, range from €3,800 to €4,500.

Conditional compensation

238. The basis for the alleged obligation to repay these sums is because it turned out that, in the years which succeeded the Determination Date, actual recoveries were greater than the estimate recoveries envisaged when an interim statement was delivered. Thus, on the ICCL's view of life, and leaving aside the fact that there is no obligation to deliver any interim statement and make any interim payment, the examples furnished on behalf of the ICCL illustrate that any such initial payment of compensation would be conditional only and would be something no investor could confidently retain. This is because years, quite possibly many years, later, a material portion of same could be taken back (the methodology being, according to the ICCL, a deduction from client asset payments otherwise due to the investor). To my mind, this offends fundamental principles which underpin the Directive and, indeed, the 1998 Act. It introduces uncertainty where there is none and where none was intended. It introduces the concept of actual loss which nowhere features in the Directive or in the 1998 Act. It complicates very significantly the whole process by introducing granular analyses at two different points being, on the ICCL's example, some six months after the Determination Date and, again, years later when the liquidation proceedings have finally come to an end. It also involves a prejudice, where none was intended, to the claims of investors for the return of their own assets and is wholly inconsistent with a fundamental principle of the Directive which was to afford some protection to investors, particularly small investors.

German Shopping Centre example

239. In the manner previously examined, there is nothing in the travaux préparatoires, the Directive or the 1998 Act which ties the payment of compensation to the ongoing or future progress of the liquidation proceedings or to the outcome of same, in the manner contended for by the ICCL. Rather, the payment is entirely independent of the liquidation and it is a payment calculated with reference

to a very specific date, namely, the date of the winding-up order in the present case. The worked examples exhibited by Mr. Fagan reflect, of course, the submissions made on behalf of the ICCL that “net loss” must take account of events subsequent to the date of the winding-up order and the submission that such an approach is of real benefit to the investor. As to this supposed benefit, an example was given of the investor whose assets comprise, at the date of the winding-up order, a shopping centre in Germany. In the example cited, as of the determination date, 100% recovery was expected yet, subsequent to the date of the winding-up order, the German shopping centre burns down and, not being insured, the relevant investor (who had no net loss on the date of the winding-up order) ultimately loses their entire assets. On behalf of the ICCL, it was submitted that the investor in such a scenario will get nothing and “*this can’t be right*”. I take an entirely different view and agree with the submission made by Ms. Smith, on behalf of the Administrator, that in this German shopping centre example, the investor is not entitled to any payment under the 1998 Act. As Ms. Smith points out, if the German shopping centre is not insured, that is not a matter for the compensation regime laid down by the Directive and given effect to by the 1998 Act. The scheme does not exist to compensate for fire risk. The Directive does not have the aim of protecting investors from the risks inherent in all investments. In this example proffered on behalf of the ICCL, the loss is not caused by any issue which the scheme is designed to protect investors against, fire risk being one inherent in any property investment. In this example, the investor had an asset which, on the determination date (i.e. the date of the winding-up order) was worth 100% and, therefore, the investor has no entitlement to compensation under the scheme. Presumably, the investor may have an action against such entity as should have ensured that adequate fire insurance cover was in place. If that entity was CHC, the investor could well have a claim in negligence and, quite possibly, an unsecured claim against the investment firm in respect of their loss. However, just as the travaux préparatoires made clear that the rise and fall of the value of securities subsequent to the determination date is not to be taken into account, no account can be taken of changes, even dramatic changes, in the value of assets *post* the

date of the winding-up order, as in the German shopping centre example. In response, counsel for the ICCL very fairly acknowledged what Ms. Smith had to say in respect of the German shopping centre example but went on to assert that there were other instances where, *post* the date of the winding-up order, assets available to investors could well be depleted, the example of the payment of a liquidator's fees out of client assets being cited. That very specific instance does not, it seems to me, provide any basis whatsoever for suggesting that the definition of 'net loss' can be given other than a literal meaning having regard to the words used and the context in which they appear. The literal meaning rules out a taking into account of events post-dating the date of the winding up order in the present case. Thus, estimated future recoveries as well as what ultimately may or may not turn out to be actual recoveries (as calculated at the very end of the liquidation proceedings) play no part in the calculation of 'net loss' as of the determination date (in this case 21 October 2011).

Delay

240. This Court has uncontroverted evidence before it that if the approach contended for by the ICCL is correct, there will inevitably be delay. In addition to Dr. da Silva's evidence, Mr. Wallace has averred as much at para. 20(iv) of his affidavit sworn on 01 April 2021 in his capacity as Administrator wherein he avers, *inter alia*, that:-

“The Delay in receiving what is rightfully due to investors in recovered assets coupled with the delay in waiting for future recoveries should not be the cost borne by investors because of risks that: (A) Investors may ultimately fair better in realisations than otherwise initially thought; and (B) ICCL's scope to recoup in full what it paid to an eligible investor might be jeopardised. While that might not be considered fair by ICCL, it allows the compensation process and the liquidation to proceed as efficiently as possible.”

Delay runs counter to a fundamental principle which underpins the Directive and which emphasises the need for prompt payment to eligible investors. The incontrovertible fact that delay (and I am entitled to hold, very considerable delay) will be the consequence of the ICCL's interpretation,

fortifies me in the view that this interpretation is incorrect, the avoidance of such delay being a fundamental aim of the Directive and the 1998 Act which gives effect to it.

Indemnity

241. It is only if the methodology contended for by the ICCL is correct, that the Administrator has placed upon him, or her, the potentially enormous, complex and delay-ridden task of trying to assess, *inter alia*, expected recoveries for the purposes of interim statements and interim payments while, at the same time, not being provided with any indemnity in the 1998 Act, should the Administrator get his, or her, calculations wrong. In my view, the complete absence of any reference to such an indemnity on the part of an administrator of an investor compensation scheme (none appearing in the travaux préparatoires, the Directive, 1998 Act or the 2015 Regulations) also fortifies me in the view that the approach contended for by the ICCL is simply not correct and cannot emerge from a proper interpretation of the wording used in the 1998 Act.

Fluidity

242. During the submissions made with such sophistication and skill on behalf of the ICCL, great emphasis was laid on the ability of an administrator to issue interim certificates. In an attempt to meet the arguments that nothing in s. 30 renders relevant anything which post-dates the date of the winding-up order, in the context of calculating net loss, counsel for the ICCL submitted that s. 33 recognises what he described as the “*fluidity*” of what might be compensatable loss. Interim certificates are *not*, however, about computing ‘actual loss’. Nor do they reflect a proposition that net loss is a fluid concept (i.e. one where events *after* the date of a winding-up order are relevant). Rather the ability on the part of an administrator to issue an interim certificate recognises that it may be difficult for the Administrator to calculate ‘net loss’ (from which ‘compensatable loss’ is derived) at a particular point in time. Thus, the issuing of interim statements can address situations involving, for example, issues around set-offs and counterclaims and one can readily envisage a situation where an administrator might decide to use interim statements (e.g. where, due to false accounting, the relevant investment

firm's books and records were not reliable, or where set-offs or counterclaims affected the ability of the Administrator to calculate net loss at a particular point in time). Nothing in the 1998 Act, however, suggests that any date other than the date of the winding-up order is the appropriate one for the purposes of calculating net loss, even if a decision is taken to issue interim statements. It also has to be said that what is urged on behalf of the ICCL as regards the use of interim certificates will also take time, and plenty of it, with significant delay introduced by reason of the proposed use of interim certificates in the manner contended for by the ICCL, which delay simply does not arise if the 1998 Act is given its literal meaning.

'windfall'

243. At various stages in the submissions made on behalf of the ICCL, the term "windfall" was used. For the reasons detailed in this judgment, I do not believe that such a descriptor is appropriate. A consideration of the words used in s. 33 of the 1998 Act entitles me to take the view that the Oireachtas was well aware that the possibility existed whereby an investor might receive a compensation payment yet, ultimately, might also be paid back their investment. Despite this, the Oireachtas clearly did not incorporate into the architecture of the 1998 Act any provision for a repayment of any sum by an investor to the ICCL. Nowhere does the 1998 Act suggest that the so-called 'overpayment issue' exists or that such an alleged issue (not recognised in the 1998 Act) would or could be addressed in the manner contended for by the ICCL. In this regard, I am entitled to take the view that what was expressed by the Oireachtas as being their intention, also indicates what was *not* their intention. There is nothing in the 1998 Act suggesting that there be any ability on the part of the ICCL to obtain repayments from any investor at any stage, be that in circumstances where the interim statement overestimated the compensation, or in any other scenario.

liquid

244. This Court cannot be blind to the type of investor likely to be adversely affected by a winding-up order in respect of an investment firm. It is uncontroversial to say that these include small investors

and older investors, including pensioners, who have made provision for their retirement or those planning for same. If the ICCL is correct in the interpretations contended for, no such investor, indeed, no investor whatsoever, could ever confidently use their payment in respect of compensatable loss. Why? The answer is because, if the ICCL is correct, the investor would need to keep that money in 'liquid' form because the investor runs the risk, until the very end of the liquidation proceedings and the ultimate outcome of the liquidation is known, that they may need to repay some (or, in an extreme example, all) of same to the ICCL. Thus, how could the eligible investor, be they pensioner or otherwise, use the compensatable loss payment to meet a then current payment obligation, regardless of how pressing? This seems to me to be a further illustration of the fact that what the ICCL argue for defeats a fundamental aim of the Directive and the 1998 Act.

Prejudice

245. Among the submissions made on behalf of the ICCL is that, given the delays which have already taken place, it cannot be suggested that what the ICCL is proposing would be "*more prejudicial to investors*". The foregoing submission seems to me to ignore the central point that what the ICCL contend for is inconsistent with the literal meaning of the words used in the 1998 Act and if the ICCL was correct in the interpretations contended for (which it is not) it would inevitably result in material delay which would offend the fundamentally important principle of speed as regards the payment of compensation to qualifying investors (something referred to including in recital (19) and Article 9 of the Directive).

Payment of a Liquidator's Fees out of Client Assets

246. The fact that investors may, under statute, have to face a situation where a liquidator's fees are paid out of client assets does not permit this Court to interpret the terms of the 1998 Act other than in a manner consistent with the literal meaning of the words read in their proper context. Having answered in the negative the first question which was put to this Court, I now turn to the second question which this Court was asked to address.

The second question – the ICCL’s subrogation rights

247. The second question was whether the ICCL’s right of subrogation pursuant to s. 35 of the 1998 Act extends to client assets or whether it is confined to the assets of CHC. ICCL contends that its subrogation rights extend *both* to client assets and non-client assets (asserting that the ICCL subrogates to those client assets which form part of the statutory calculation of net loss, being what the ICCL calls “Net Loss Client Assets”). The answer to the second question hinges on the proper interpretation of s. 35 of the 1998 Act which I set out earlier in this decision but which, for the sake of convenience, I repeat hereunder.

Section 35(5)

248. The relevant extract from s. 35(5) provides that: -

“Where the Company or an investor compensation scheme approved of under section 25 has made a payment under section 34 to an eligible investor, the Company or compensation scheme shall be subrogated to the rights of that eligible investor in liquidation proceedings against the investment firm for an amount equal to the amount paid by the Company or the compensation scheme under section 34 to that eligible investor”.

The words “*liquidation proceedings*” appear in s. 35(5) and it will be recalled that the same words appear in Article 12 of the Directive which stated that: -

“Without prejudice to any other rights which they may have under national law, schemes which make payments in order to compensate investors shall have the right of subrogation to the rights of those investors in liquidation proceedings for amounts equal to their payments”.

Subrogation

249. Subrogation is not defined in the 1998 Act or in the Directive and no definitive encapsulation of the concept has been opened to the Court. It is fair to say that, in basic terms, the concept involves one party assuming the rights of another by operation of law and the phrase “*to stand in the other’s shoes*” is often deployed in the context of a consideration of subrogation. Thus, in the insurance

context, an insurer can be subrogated to the rights of the insured and can maintain an action against a third party who caused the loss suffered by the insured where the insured has been paid by the insurer. For present purposes, the difficulty does not stem from any lack of clarity as to the *concept* of subrogation or the lack of a definition in the Directive or the 1998 Act. Rather, the key question and, thus, the central difficulty, concerns the *extent* of the rights enjoyed by the ICCL, in particular, what is meant by the rights of the eligible investor “...in liquidation proceedings against the investment firm...” in question. That being so, it is appropriate to recall that the Commission was plainly aware of the distinction between, on the one hand, an investor’s claim for the return of securities held by the investment firm where ownership of the assets in question remained with the investor and, on the other hand, an investor’s claim concerning assets which have become part of the mass of assets of the investment firm. The distinction was explicitly recognised in the Commission’s proposal dated 22 September 1993 which I examined earlier.

Proposal

250. When proposing the Directive, the Commission made clear (p. 2, para.1 of the 22 September 1993 proposal) that the basic requirement was that each investment firm must be “*a member of a general compensation scheme designed to protect investors who are prevented from having claims satisfied because of the bankruptcy or default of the investment firm*”. Thus, the investor compensation scheme only comes into play where the investment firm is in bankruptcy, i.e. liquidation. The Commission went on (p. 4) to envisage two types of claims; firstly, an investor’s claim for the return of his or her own assets where ownership of such securities remains with the investor; and, secondly, client’s funds held by the investment firm, following the disposal of securities or pending the purchase of securities which became part of the mass of assets of a bankrupt firm and “*In that case the investor would simply have a claim in the bankruptcy proceedings*”. It is the foregoing claim, i.e. an investor’s claim against the assets of the firm (not an investor’s claim in respect of the return of their assets) which is reflected in the provisions of Article 12 of the Directive

which provides that “*schemes which make payments in order to compensate investors shall have the right of subrogation to the rights of those investors in liquidation proceedings for amounts equal to their payments*”. The foregoing rights were not envisaged by the Commission in its proposal and were not provided for in the Directive as relating to what can be called ‘proprietary claims’ outside of a liquidation. The distinction between the two types of claims (i.e. claims against a company -v- proprietary claims), which was recognised in the Commission’s proposal and is reflected in the Directive, also constitutes a fundamental principle of Irish law and is reflected in the wording used in the 1998 Act.

liquidation of a company - European Law

251. In the manner explained, it is clear from the Commission’s 22 September 1993 proposal that it was aware of the distinction between, on the one hand, a claim by an investor for the return of their own assets (i.e. a proprietary claim) and, on the other hand, a claim in winding-up or liquidation proceedings, being a claim against the assets of an investment firm. It is equally clear that the concept of liquidation proceedings, as understood in European law, reflects the position in this jurisdiction. In Case 3624/89 d’Urso EU: C: 1991 329, the Court of Justice of the European Union (“CJEU”) stated with regard to the compulsory administrative liquidation procedure (at para. 31): “*Like insolvency proceedings, that procedure is designed to liquidate the debtor's assets in order to satisfy the body of creditors . . .*” The foregoing clearly suggests that the CJEU understood the concept of corporate insolvency or liquidation proceedings as concerning the company’s assets, and only the company’s assets in the context of meeting creditor claims. The opinion of the Advocate General delivered on 16 July 1996 in Case C – 319/94 Dethier Equipment EU: C: 1996 291 concerned *inter alia* employee rights in the context of transfers of undertakings effected by a company in voluntary liquidation which continued to trade. The Advocate General (Mr. Lenz) took no issue with the national court’s explanation (para. 32): “. . . *that liquidation of a company must be taken to entail all the steps which, following dissolution of a commercial company, are aimed at paying creditors out*

of the corporate assets and distributing any balance to the members". Again, the foregoing clearly suggests that, as understood by the CJEU, liquidation proceedings involve the realisation of a company's assets, and only the company's assets, to satisfy claims by creditors of that company. There is no suggestion that, at a European level, liquidation proceedings against a company involve assets of third parties being made available to satisfy claims against the company. The distinction between a proprietary claim, and a claim made in liquidation proceedings against company assets, is undoubtedly a fundamental feature of the law in this jurisdiction.

Article 12 and s. 35(5)

252. Article 12 of the Directive makes clear that the rights to which the ICCL should be subrogated to, are the rights of investors in liquidation proceedings (being, therefore, their claims against *company* assets, not investor claims for the return of their *own* assets i.e. not proprietary claims). What is seen in the travaux préparatoires and in Article 12 of the Directive is reflected in s. 35 of the 1998 Act. If the Oireachtas intended that the ICCL, upon payment of compensatable loss to an investor, would stand in that investor's shoes in respect of the investor's claim for the return of their *own* assets, the Oireachtas could have said so. It did not.

Proprietary claims

253. Proprietary claims are well understood by the law in this jurisdiction and counsel for Mr. Day refers, in particular, to the following extract from "*Proprietary Rights and Insolvency*" (Callanan, Oxford University Press, p. 18 at para. 1.61): -

"Proprietary Claims

[1.6.1] This section is concerned with the principle that a person with a proprietary interest is not affected by pari passu sharing. It explains the principle and discussed examples of its application over the last three hundred years; and it then analyses the importance of the distinction between personal and proprietary rights in an insolvency and of the need to keep the distinction clear.

The Principle

[1.62] The pari passu sharing principle requires the assets of a debtor to be applied in discharge of his liabilities pari passu. It is a fundamental element of this principle that it is the debtor's assets which are used for this purpose, not those of other persons.

[1.63] Two examples illustrate how this operates in practice:

- A owns securities which are held for B for safekeeping. B enters into insolvency proceedings. The securities belong to A, not B. A can recover them. They are not available for the payment of B's liabilities.*
- B owes A money and has charged his house to A to secure that liability. B enters into insolvency proceedings. A is entitled to have the house sold and the net proceeds applied in payment of the secured liability. Only if there is a balance then remaining is it available for the payment of B's other creditors.*

[1.64] In neither case has the pari passu sharing principle been breached. In both cases, A has a proprietary interest in the asset concerned. As a result, to the extent of that proprietary interest, the asset is taken outside B's insolvency and cannot be used to pay his liabilities.

[1.65] In the first example, A's proprietary interest is absolute. He owns the securities outright. He is not a creditor of B. He is simply entitled to get his asset back.

[1.66] In the second example, A is a creditor of B, and A's proprietary interest is held by way of security. A has a security interest in the house, not an outright interest. His rights over the asset are therefore limited. To the extent that the value of the asset exceeds the amount of the secured liability, B has an equity of redemption in the asset, which is available for his other creditors".

liquidation proceedings - the assets of an insolvent company

254. The phrase “*liquidation proceedings*” has a very particular meaning in Irish law. In *Re: Buzzreel Ltd.* [2014] 1 IR 770, Clarke J. (as he then was) commented as follows in relation to liquidation proceedings: -

“1.1 When any company goes into liquidation by virtue of insolvency the risk to creditors is obvious. A principal, if not the principal, feature of the relevant insolvency laws governing such liquidations is a desire to ensure that, to the greatest extent possible, creditors will be paid. It is, however, principally for the Liquidator to attempt to dispose of the assets of the insolvent company to the best advantage of the liquidation and to ensure that the funds thereby realised are paid to the creditors in the order of priority determined by law”.

It is so well – established as to be unnecessary to point out that liquidation proceedings are concerned with the disposal of the assets of the insolvent *company*. A claim by an investor for the return of their *own* assets is entirely different in nature to a creditor’s claim in liquidation against company assets. The very purpose of liquidation proceedings is to realise the assets of an insolvent company to the best advantage of the liquidation, ensuring that such funds are distributed to creditors in accordance with the priority they enjoy in respect of receiving payment from the company out of its assets, so realised. Later in his judgment in the same case, Clarke J. (as he then was) referred to the Supreme Court’s decision in *Re: Hibernian Transport Cos. Ltd.* [1972] IR 190 and, commenting on the judgment delivered by Walsh J., the learned judge stated as follows: -

“In his reasoning he recited at p. 202 the non-contentious principle that:

‘It is the purpose of liquidation proceedings to realise the assets for as much as it is possible to obtain as this inures for the benefit of creditors, and all other parties who are interested in the assets’.

What is at issue is, of course, the realisation of company assets for the benefit of creditors of the company, rather than proprietary claims in respect of identifiable assets owned by identified investors.

Widely drafted definition of ‘liquidation proceedings’

255. As discussed earlier in this judgment, the term “*liquidation proceedings*”, as defined in s. 2(1) of the 1998 Act includes a compulsory court liquidation, a creditor’s voluntary liquidation, any receivership or analogous process, bankruptcy proceedings and any scheme of arrangement following the appointment of an examiner. Plainly, the definition extends to a wide range of insolvency processes. On behalf of the ICCL, it is submitted that a claim in respect of client assets is also a claim in liquidation proceedings, with emphasis laid on the widely drafted definition of liquidation proceedings which is found in the 1998 Act. The ICCL submit that the proper interpretation of s. 35(5) and (5A) is that there is no limitation whatsoever on its subrogation rights and that they extend to all rights of an eligible investor in respect of any and all claims, be they in respect of the return of client assets or company assets.

liquidation proceedings against the investment firm

256. Crucially, however, s.35(5) includes the words “*against the investment firm*” after the words “*the rights of that eligible investor in liquidation proceedings*”. To my mind, the submissions made on behalf of the ICCL ignore the presence and significance of these words “*against the investment firm*” which the Oireachtas included in s. 35(5). Regardless of how wide the definition of ‘liquidation proceedings’ undoubtedly is, for the purposes of the 1998 Act, nothing in that statute alters the nature of liquidation proceedings *against* a company. In other words, the widely drafted definition of liquidation proceedings does not mean that liquidation proceedings *against* a company (in this case against the ‘investment firm’) are other than as described by Clarke J (as he then was) in *Buzzreel*. Thus, they are proceedings which are concerned with the realisation of *company* assets for the benefit of creditors, not the realisation of assets which are not owned by the company in question (e.g. assets owned by clients/creditors of the insolvent company). Despite how wide the definition of liquidation proceedings undoubtedly is, it does not transform a proprietary claim into something else.

257. The widely-drafted definition does mean of course that, for the purposes of s. 35(5), ‘liquidation proceedings’ includes the present proceedings which have been in being since the 21 October 2011

winding-up order. The fundamental issue raised by the second question concerns the rights of the eligible investor “*in liquidation proceedings against the investment firm*” and I cannot interpret the plain meaning of the words used in s. 35(5) and (5A) as extending to the rights of the eligible investor for the return of their *own* assets. The assets belonging to an eligible investor cannot be used to pay the liability of the insolvent investment firm. They are not the firm’s assets. Subrogation rights, as provided for in s. 35 extend, I am entirely satisfied, only to the rights of eligible investors as “*against the investment firm*” (such as unsecured claims against non-client assets of the investment firm with which Regulation 10 of the 2015 Regulations is concerned and I will presently look at the said Regulations). It seems to me that this interpretation reflects not only the literal meaning of the words used in the 1998 Act but also the objectives of the Directive.

258. I cannot ignore the presence in s. 35(5) of the words “*against the investment firm*” which appear in the phrase “. . . *the company or operator shall be subrogated to the rights of that eligible investor in liquidation proceedings against the investment firm for an amount equal to the amount paid by the Company or operator . . .*”. What is an investor entitled to claim for in liquidation proceedings *against* the investment firm? An investor is entitled to claim, in liquidation proceedings against the firm, payment of a sum of money due from that firm’s assets. In my view, the rights of an investor against the firm plainly refers to the rights of the investor as against the firm’s assets, not the investor’s rights as against investor – owned assets. Even if the general law of subrogation allows, in certain circumstances, one party to be subrogated to the interests of another in respect of a proprietary claim, that does not transform the meaning of s. 35(5) and (5A) into something which is contrary to the literal meaning of the words used. The fact that liquidation proceedings is given a very wide definition in the 1998 Act does not mean that liquidation proceedings against the insolvent firm is to be interpreted as a claim against investor – owned assets, rather than company assets. To do so would ignore the very words used in the section as well as a basic principle of company law as understood in this jurisdiction.

259. Regardless of how wide the definition of liquidation proceedings undoubtedly is in the 1998 Act, s. 35(5) is specifically concerned with the rights of an eligible investor in such proceedings *against* the investment firm. Subsection (5A) does not repeat the words “*against the investment firm*” but it speaks of an eligible investor who “*proves a claim in the liquidation proceedings referred to in subs. (5)*”, quite obviously being a reference to a claim in liquidation proceedings *against* the investment firm.

What the Oireachtas did not say in s. 35(5)

260. The Oireachtas was plainly aware of the distinction between a proprietary claim by an investor for the return of money owed to or belonging to that investor but held on behalf of that investor by the investment firm (a proprietary claim) as distinct from a claim in liquidation proceedings against an insolvent investment firm’s assets. The Oireachtas could have said it in s. 35(5), but clearly did *not* say, for example, that “*...the Company or operator shall be subrogated to the rights of that eligible investor to recover money, investment instruments or assets belonging to the investor held by the investment company for an amount equal to the amount paid by the Company or operator under section 34 to that eligible investor*”. Rather, it provided that the ICCL would be “*...subrogated to the rights of that eligible investor in liquidation proceedings against the investment firm for an amount equal to the amount paid by the Company or operator under section 34 to that eligible investor*”.

261. Nor did the Oireachtas, for example, take the wording used in the definition of “*net loss*” in s. 30(a) and (b), which, of course, determines the extent of “*compensatable loss*” and employ that wording again in s. 35 in order to grant to the ICCL subrogation rights in respect of an investor’s proprietary claim. On the contrary, the Oireachtas chose a materially different approach and its intention is manifest from the plain meaning of the words used in s. 35(5). In short, the Oireachtas confined the ICCL’s subrogation rights to those of the eligible investor “*in liquidation proceedings against the investment firm*” for an amount equal to the amount paid by the Company or operator

under s. 34 to that eligible investor and that cannot be interpreted to mean a claim by an investor in respect of investor-owned assets.

Reversal of direction

262. If what was contended for on behalf of the ICCL as regards s.35(5) was correct (and, for the reasons set out in this judgment, it is not) it would, as counsel for Mr. Nugent submits, amount to a ‘reversal of direction’ (i.e. a taking money *from*, as opposed to the giving money *to*, investors who have suffered losses) compared to every other provision in the 1998 Act. There is no indicator elsewhere in the Act to suggest that the silence on the part of the Oireachtas with regard to explicitly conferring on the ICCL any right to make a claim in respect of investor – owned assets, was other than deliberate.

S. 35(5)(A) of the 1998 Act

263. Adopting a literal interpretation of s. 35(5) I am forced to reject what is contended for by the ICCL. Their right of subrogation extends only to the investor’s rights in liquidation proceedings, namely, rights to claim in liquidation proceedings against company assets, specifically the assets of CHC. Turning to s. 35(5)(A), it will be recalled that this subsection states as follows: -

“If –

- (a) *An eligible investor proves a claim in the liquidation proceedings referred to in subs. (5), and*
- (b) *The amount proved exceeds the amount of compensation paid by the Company, or by the operator of a compensation scheme approved under s. 25,*

The claim of the eligible investor and the subrogated claim of the Company, or operator of the compensation scheme, for the amount of the excess rank equally in those proceedings and are to be paid proportionately. If the assets are insufficient to meet those claims, they are to abate in equal proportions”.

Once more, the Oireachtas chose to use particular language which has a very specific meaning under Irish law. To *prove a claim in liquidation proceedings* does not mean demonstrating an entitlement to the return of one's own assets.

proves a claim in the liquidation proceedings

264. The words in s. 35(5)(A) “*proves a claim in the liquidation proceedings*” comprises the use by the Oireachtas of wording which is used elsewhere with reference to the procedures for submitting creditor's claims in a winding – up process against a *company* in liquidation (see Order. 74, rr. 54 & 55 of the Rules of the Superior Courts). This is consistent with the proposition that, insofar as s. 35 contemplates the ICCL “stepping into the shoes” of an investor to whom it has paid statutory ‘compensatable loss’, this right of subrogation extends only as regards that investor's right to make a claim in a winding up of the *company*, but does not give the ICCL a right to demand that the investor's own property be transferred to it. The ICCL is subrogated to the rights of the eligible investor *against* the investment firm. An investor's claim for the return of his or her property, whether readily identifiable or pooled with other client – owned assets, is not a claim in the liquidation *against* the insolvent company. It is not a claim against the company's assets which the investor *proves in the liquidation proceedings*. Rather, it is a proprietary claim for the return of the investor's own property which is, for very obvious reasons, presented to the Liquidator but it is a claim which stands outside the liquidation proceedings and the fact that the Liquidator may well carry out work with regard to it and, in certain circumstances, may even be paid fees out of investor assets, does not change the nature of the claim and does not mean the right to subrogation which is clearly expressed in s. 35 to be as regards an investor's claims *against* a company becomes a right exercisable against the investor, i.e. their assets.

A second opportunity

265. As counsel for Mr. Day also pointed out, s. 35(5)(A) constituted a second opportunity for the Oireachtas to state that, where the amount proved is less than the amount of compensation paid by

the ICCL, the investor must repay the compensation not covered by the amount proved or recovered in the liquidation. The Oireachtas did not take what was a second opportunity to require an eligible investor to return to the ICCL monies which, on the latter's case, represents "over-payment" of compensation. The Oireachtas did not do so because, as is clear from the literal meaning of the words used by the Oireachtas, that was not their intention. This fortifies me in the view that events which post – date the winding up order play no part in the determination of an eligible investor's entitlement to be paid compensatable loss as defined in s. 30.

The second question and a literal interpretation of s. 35

266. A literal interpretation of s. 35(5) and (5A) demonstrates that the ICCL (subject to making a payment to an eligible investor under s. 34) shall be subrogated to that investor's rights in liquidation proceedings *against the investment firm*, i.e. against company. It does not mean the ICCL enjoys that investor's claim against their own assets. I simply cannot interpret an eligible investor's claim in respect of assets owned by them as constituting a claim in liquidation proceedings *against the investment firm*, i.e. against the company. The interpretation which results from the literal meaning of the words used in s. 35 appears to me to be consistent with the provisions of the Directive. Article 12 of the Directive requires that schemes which make payments to compensate investors "*shall have the right of subrogation to the rights of those investors in liquidation proceedings for amounts equal to their payments*". The Directive does not provide that such a subrogation right extends to an investor's claim for the return of their own assets. Presumably it could have, but it certainly does not. It is true that the term "*liquidation proceedings*" is not defined in the Directive but the underlying purpose of the Directive is plainly to protect investors, in particular the small investor and in my view this supports the proposition that the term employed in s. 35 of the 1998 Act "*liquidation proceedings against the investment firm*" cannot be interpreted to permit the ICCL to lay claim to client monies i.e. monies of the very investors which the Directive was designed to protect.

The 2015 Regulations

267. In my view, the outcome of a literal interpretation of s. 35 of the 1998 Act requires this Court to answer the second question in the negative. ICCL’s right of subrogation does not extend to client assets and its confined to the assets of CHC. That this is so, is also reflected in the contents of the 2015 Regulations made pursuant to the 1998 Act. The “Introductory Text” makes clear that the Minister for Finance, in exercise of the powers conferred on him by s. 33 B of the 1998 Act made the relevant regulations: “...*following consultation with the Central Bank of Ireland and the Investor Compensation Company Ltd...*”. As counsel for Mr. Day submits, despite the ICCL being involved in the foregoing consultation prior to the introduction of the Regulations, none provide or envisage the ICCL having any subrogation rights in respect of *client* assets, nor do the Regulations contemplate any payment by the Liquidator to the ICCL in respect of subrogation rights asserted by the latter against client assets. Earlier in this judgment I quoted certain of the 2015 Regulations verbatim and it will be recalled that they make specific reference to proprietary claims.

Regulations 5, 6, 7 and 8

268. Regulation 5 deals with the “*Ascertainment of client monies, client instruments, etc. and claims of clients in relation to them*”. The fact that such work is involved in a liquidation of this nature does not render client assets other than client assets. Regulation 5 is merely a recognition that the task of reconciling various client claims against client assets must be undertaken. Regulation 6 concerns “*Distribution of client monies, client investment instruments or documents of title in respect of them*”. Again, nothing in Regulation 6 alters the fact or nature of a proprietary claim. Regulation 7 concerns “*Cases where specific client can be identified as the owner of specific investment instruments, etc*”. Once more, this does not alter the nature of that client’s claim in respect of the return of their property. It does not render the client–owned asset an asset owned by the company in liquidation. It does not expose that investor–owned asset to claims by creditors of the company. Regulation 8 concerns “*Cases where instruments not identified under Regulation 7: classification of them and the ranking of claims*”. Once more, this Regulation relates to proprietary claims. It does not alter the nature of

them. Rather, it makes clear that when it is not possible to identify a specific owner, client instruments should be separated into classes and the claims of each client in respect of those classes of investment instruments rank equally amongst themselves. The foregoing echoes the approach taken by Finlay Geoghegan J. in her 2017 decision but, as I say, certainly does not change the nature of a proprietary claim or render client claims in respect of client assets claims in the liquidation i.e. against company assets.

Regulation 9

269. Regulation 9 concerns claims in respect of client monies and it is perfectly clear that each of the types of claims referred to in Regulation 9 (2) constitute proprietary claims. Regulation 9(2) states as follows: -

“For the avoidance of doubt, claims against client monies for the purposes of these Regulations include –

- (a) each instance of a client having given money to the investment firm and the purpose for which the money was so given having failed;*
- (b) any claims against client monies arising under Regulation 8(3); and,*
- (c) any other proprietary claim in respect of investment instruments where there are insufficient instruments available to satisfy that claim”. (emphasis added)*

As counsel for Mr. Day emphasises, the word “*other*” which appears in Regulation 9(2)(c) is significant and most certainly does not confine the definition of a proprietary claim to that which is referred to in Regulation 9(2)(c). On the contrary, the claims described in the preceding sub – paragraphs are also proprietary claims and it is plain that Regulation 9(2) uses the word “*include*” before citing specific examples of proprietary claims in sub – paras (a), (b) and (c). Thus, for the ICCL to contend that investor claims for the return of investment instruments constitute claims for the payment of debts in liquidation is not only without foundation, but plainly undermined by the

terms of the Regulation as well as being entirely inconsistent with the literal meaning of the words used in the 1998 Act, in particular, s. 35 thereof.

Regulation 10

270. Regulation 10 concerns “*Cases in which claims remain unsatisfied after the operation of*” the preceding Regulations and it is useful to repeat the wording from Regulation 10 which is as follows:-

“Any claim of clients of an investment firm which remains wholly or partially unsatisfied after the operation of the foregoing provisions of this Part shall rank as an unsecured claim against the non – client assets of the investment firm (referred to subsequently in these Regulations as the ‘general assets’).”

It is the foregoing which constitutes a claim in the liquidation. In other words, if there are no more client assets but there are still client claims in respect of client assets, these unsatisfied client claims shall constitute unsecured claims in the liquidation against the general assets of the company. It is perfectly clear that everything which precedes Regulation 10 concerns work which the relevant Insolvency Officer must carry out with respect to proprietary claims. Doing so, however, does not alter the nature of what are, and remain proprietary claims. Nothing in the Regulations creates or recognises or is consistent with any right of subrogation in favour of the ICCL against *client* assets. This is despite the fact that the 2015 Regulations were introduced by the relevant Minister, in accordance with the Minister’s powers pursuant to s. 33(B) of the 1998 Act, following consultation with the ICCL.

S. 33(B) of the 1998 Act

271. Section 33(B) of the 1998 Act is entitled “*Power to make regulations for return of investor’s funds or investment instruments*”. Subs. (1) of s. 33(B) states as follows: -

“The Minister may, following consultation with the Bank and the Company, make regulations providing for the return of investor’s funds or investment instruments, as the case may be,

following the appointment of an administrator where the Minister considers it necessary to do so in order to provide for their efficient, equitable and prompt return”.

Nothing in s. 33(B), which plainly concerns the return of investor assets to investors, and nothing in the 2015 Regulations made thereunder, provides or suggests any subrogation right in favour of the ICCL in respect of those investor assets. Nowhere is there any provision, in the 1998 Act or the 2015 Regulations which states or suggests that, where the ICCL has paid compensation, any of the investor’s funds or investment instruments go to the ICCL, not the investors.

client assets -v- general assets

272. The 2015 Regulations draw a very clear distinction between a client’s claim in respect of their own assets and an investor’s unsecured claim against non – client assets of the firm. Regulation 15(1) defines “*Client assets*” as being “*client monies, client investment instruments, or documents of title relating to such investment instruments which are held or ought to be held on behalf of clients by the investment firm or by a nominee*”. It is these which, according to Regulation 6, must be distributed “*as expeditiously as possible*”. By contrast, Regulation 3 makes clear what constitutes “*general assets*”. Regulation 3 provides that “*general assets*” shall be read in accordance with Regulation 10 which provides: “*Any claim of clients of an investment firm which remains wholly or partly unsatisfied after the operation of the foregoing provisions of this Part shall rank as an unsecured claim against the non – client assets of the investment firm (referred to subsequently in these Regulations as the ‘general assets’*”. Thus, the rights of an investor in liquidation proceedings against the investment firm appears to have the same status as that of an unsecured creditor. It is clear from the foregoing that, as well as a very clear distinction being drawn in the Regulations between “*client assets*” and “*general assets*”, the Regulations make clear that client assets are to be distributed in the first instance and, to the extent that a client’s claim is unsatisfied, that investor will have a claim against the general assets which is classified as an unsecured claim in the liquidation. Nothing in the

architecture of the Regulations provides for or suggests that the ICCL would subrogate to claims in respect of client assets.

The consequences of the approach contended for by the ICCL

273. The report prepared by Mr. Jacobs evidences that, but for what the ICCL assert, smaller investors will receive greater protection. His report also evidences that the consequences of the approach contended for by the ICCL would be (a) to disadvantage smaller investors; (b) to affect smaller investors disproportionately, when compared to larger investors (c) resulting in arbitrary and unequal treatment of investors with similar losses and (d) would undermine a fundamental purpose of the 1998 Act and the Directive to which it gives effect, because it would result in the payment of *less* compensation than mandated by both. To see an illustration of the latter, it is useful to refer to Table 2.3 which can be found on internal p. 16 of the report prepared by Mr. Jacobs. There, the author sets out a calculation with regard to Mr. Nugent's claim using the methodologies contended for by the ICCL as per paras. 47 to 52 of Mr. Fagan's first affidavit.

Table 2.3 of the report by Mr. Jacobs

274. Mr. Nugent's claim comprises a grand total of €134,048 in the manner explained in Table 2.3 (on internal p.16 of the 21 April 2021 report by Mr. Jacobs) and there is no dispute between the parties as to the accuracy of any figures employed by Mr. Jacobs. That grand total is made up of claims in respect of 'Destiny PRSA Cash' (€25,910); 'Destiny PRSA Equity' (€52,313) and 'Client Asset Gross Savings' (€55,825). From the grand total of €134,048, the ICCL proposed to subtract, first, the figure of €51,316 comprising assets which, as of March 2019 were calculated by the Administrator as available for distribution at the determination date. A second sum, namely €31,137, is proposed to be subtracted on the basis that it represents estimated future recoveries. This leaves a total potential recovery for Mr. Nugent of €82,453 according to what the ICCL contend for. Thus, as Table 2.3 illustrates, if net loss is calculated with reference to estimated recoveries and future

distributions, Mr. Nugent's net loss will be €134,048, minus €82,453 i.e. €51,595. Mr. Nugent received compensation from ICCL of €20,000 on 22 April 2013.

The effect on Mr. Nugent of the subrogation right asserted by the ICCL

275. Using ICCL's methodology, it is proposed that, instead of Mr. Nugent receiving €82,453 on the basis of ICCL's interpretation of its subrogated rights, Mr. Nugent will receive €70,510.94 under the approach contended for by the ICCL. This is because ICCL contends that it is entitled to receive €12,302 out of the monies currently estimated to be returned to Mr. Nugent. This effectively means that ICCL would recoup from Mr. Nugent's recoveries €12,302 out of the €20,000 which it initially paid to Mr. Nugent. It cannot be in dispute that one of the principal objects of the ICCL is to maintain a fund out of which payments shall be made in accordance with the 1998 Act. The ICCL accept as much in submissions. Despite this, on the approach contended for by the ICCL, the sum which it would in fact pay Mr. Nugent out of the fund would be €7,698. This is despite the fact that Mr. Nugent still faces a loss of €51,595.

Breach of the 1998 Act

276. It will be recalled that s. 34(2) of the 1998 Act mandates that the ICCL pay each eligible investor an amount equal to their compensatable loss. Their compensatable loss is, of course, defined in s. 30(1) as 90% of an investor's net loss or €20,000, whichever is the lesser. The worked example set out by Mr. Jacobs at Table 2.3, employing the methodology contended for by the ICCL, demonstrates that even if "net loss" is calculated on the basis that it includes actual recoveries and estimates future recoveries, (as the ICCL contends it should be) it still leaves Mr. Nugent with a net loss of €51,595 but ultimately receiving compensation of just €7,698. That figure is neither 90% of Mr. Nugent's net loss of €51,595, nor is it €20,000. 90% of Mr. Nugent's net loss (if net loss is calculated using the ICCL's contended for methodology) is the sum of €46,435.50. In short, the consequences flowing from the ICCL's interpretation of the relevant statutory provisions results in Mr. Nugent receiving significantly less than the ICCL is statutorily obliged to pay pursuant to the 1998 Act.

Consequences and statutory construction

277. The foregoing fortifies me in the view that the interpretation contended for by the ICCL is incorrect. It is incorrect having regard to the literal meaning of the words used by the Oireachtas but the evidence also demonstrates that what is contended for by the ICCL would, in fact, breach the terms of the 1998 Act and run contrary to the provisions of the Directive. When the court is being asked to interpret statutory provisions and when differing interpretations are contended for, it is legitimate for the court to have regard to the consequences of the interpretations urged on it. Counsel for Mr. Day directed the court's attention to certain extracts on this topic from "*Statutory Interpretation in Ireland*" (Dodd, Tottel Publishing, Ch. 7). The following is an extract in which the learned author comments on the role which the consequences of different contended for interpretations have a role to play in statutory construction: -

"[7.01] The consequences that flow from alternative constructions of a statute are legitimate considerations in interpretation. Certain types of consequences are presumed not to be intended by the legislature. It is presumed that the legislature does not intend its provisions to have absurd, inconvenient, anomalous, illogical, futile or pointless results. Interpretations that give rise to easy evasion or impossibilities are also presumed not to be intended. The intention to create such results is typically not attributed by the courts to the legislature in the absence of words plainly intending such results. This chapter commences by examining the role of consequences in interpretation generally.

Consequences generally

[7.02] Appealing to consequences, in terms of logic, is known as argumentum ad consequentiam [argument to the consequences] and is an argument that concludes a promise (typically a belief) to be either true or false based on whether the premise leads to desirable or undesirable consequences. Courts may consider the legal or factual consequences arising from an advocated interpretation. Consequences aid interpretation where a provision is

ambiguous, thereby requiring the court to evaluate alternatives. The consequences of alternative interpretations can indicate which of the interpretations are likely to best reflect the legislature's intention. Where the consequences of a provision fail to confirm with expected norms, it may lead to further examination by the courts. Considering the consequences can affirm or raise a doubt about the correctness of a particular interpretation. A submitted legal meaning may be criticised for failing to take account of the consequences that flow from it and for achieving the very consequence that a court is asked by a litigant to avoid. Consequences also play an important role in the exceptional cases where courts depart from the literal meaning”.

In my view, the learned authors comment to the effect that considering the consequences can affirm the correctness of a particular interpretation is very apposite in the present case. In the manner examined above, there is evidence before the court, in the form of the analysis by Mr. Jacobs which demonstrates that, in fact, the consequences of the statutory interpretation contended for by the ICCL would be to deprive Mr. Nugent of the compensation to which he is entitled under the 1998 Act and the Directive. The evidence is also that the approach contended for by the ICCL provides less protection, in particular to the smaller investor as well as resulting in arbitrary distinctions, as to compensation, for investors with similar losses. Thus, the evidence is that what the ICCL argue for runs contrary to the provisions of the 1998 Act and the policy aims of the Directive. There is further evidence of relevance on this topic.

Table 5.5

278. Table 5.5 on internal p. 48 of the report prepared by Mr. Jacobs is entitled “*Average ICCL subrogation amount as a % of compensatable loss*”. There, Mr. Jacobs illustrates that he has calculated, in respect of 531 clients, ICCL’s subrogation claim as a percentage of their compensatable loss. As illustrated on Table 5.5, under ICCL’s methodology, it proposes to “claw back” between 40.55% and 51.13% of the compensatable loss. It will be recalled that compensatable loss, per s.

30(1), means 90% of net loss, or €20,000, whichever is the lesser. In circumstances where, according to the interpretation contended for by the ICCL, it is entitled to take back up to *half* of the compensatable loss paid, the result is that the ICCL will not be paying 90% of the net loss. In other words, the analysis carried out by Mr. Jacobs demonstrates that the problem faced by Mr. Nugent will be faced by many other investors, in that the interpretation contended for by the ICCL has, as a consequence, a breach of a fundamental principle in the Act and in the Directive. Once more, this fortifies me in the view that the interpretation contended for by the ICCL is incorrect.

Certain conclusions reached by Mr. Jacobs

279. It is also appropriate to quote the conclusions reached by Mr. Jacobs in s. 5 of his report (section 5 being where he applied the ICCL methodology to the data concerning investors with which he had been furnished). The following is a verbatim extract (from p.62/63): -

“My Conclusions (From Section 5)

5.75 In my opinion the following are reasonable conclusions to be drawn from the work that I have carried out in this section:

- (a) Average subrogation amount under the ICCL methodology is €5,437 (see para. 5.29).*
- (b) In nearly 50 % (247/531) of the clients the ICCL subrogation amount represents between 30% and 39% of the compensatable loss figure (see para. 5.32 above). In nearly 90% (474/531) of the clients, the ICCL subrogation amount represents between 30% and 59% of the compensatable loss figure (see para. 5.34 above).*
- (c) My analysis of 531 clients includes claims in liquidation ranging from less than €5,000 to over €1 million. In 50% of the 531 clients the value of the claim in liquidation is less than €34,999. Although somewhat subjective, it therefore appears that smaller sized investors make up a significant proportion of the 531 clients reviewed. My analysis clearly shows that the percentage that the ICCL*

subrogation amount represents of the claim in liquidation, decreases as the value of the claim in liquidation increases. For example, for clients with a claim in liquidation: -

- Between €5,000 and €14,999, then the subrogated amount on average will be €1,838.39 being 21%;*
- Between €45,000 and €54,999 then the subrogated amount on average will be €8,445.65 being 17%;*
- Between €85,000 and €94,999 then the subrogated amount on average will be €8,695.99 being 10%*
- Between €95,000 and €194,999, then the subrogated amount on average will be €9,498.47 being 7%.*

5.76 I have embarked upon comparing the positions of investors applying the ICCL methodology:

- (a) Applying the groupings of the Claim in Liquidation (rounded) there is a range of outcomes for these clients in these respective groupings, as shown by the total amount payable by the investor as a percentage of the Claim in Liquidation (see Table 5.8).*
- (b) In the course of that analysis, I also compared the position if I was to assume that there would be no ICCL subrogation amount deducted from the investor. I identified that if there was no ICCL subrogation amount then smaller clients (e.g. for these purposes with a Claim in Liquidation of €34,999 or less) would receive at least 94% of their claim in liquidation. Under the ICCL methodology, the highest return is 76%.*
- (c) In the context of analysing clients with similar levels of “net loss”, my analysis shows: -*

- *That there is no one size that fits all i.e. the amount payable to investors will not only be determined by the Claim in Liquidation, but by the specific fund/assets invested in and the application of the ICCL methodology, and that smaller and larger clients can be in a position of having a similar value of net loss notwithstanding the amount invested;*
- *It is instructive to note that both Tables 5.12 and 5.13 show that clients with near – identical figures for ICCL Net Loss, would after the effect of the ICCL’s subrogation amount, end up in the position whereby the ultimate loss (i.e. ICCL Net Loss after ICCL Compensatable Loss and after ICCL subrogation) figures are different between the respective clients”.*

It is clear from the foregoing that the methodology contended for by the ICCL, based on its asserted interpretation of the 1998 Act, breaches a fundamental provision of the Act, resulting in eligible investors receiving *less* than the compensatable loss due to them and also resulting in inconsistent treatment of investors with anomalous outcomes clearly illustrated by the fact that investors with near – identical figures in respect of ICCL net loss would ultimately fare very differently as a result of the effect of the ICCL subrogation amount contended for.

Different outcomes for investors with similar losses

280. Materially different outcomes as between investors with near – identical figures in respect of net loss can fairly be described as arbitrary and I have no hesitation in saying that this could not have been the intention of the Oireachtas. Nor is it an outcome which flows from the proper interpretation of the 1998 Act. A literal interpretation of its provisions in the context in which the 1998 Act arises, demonstrates that the interpretation contended for by the ICCL does violence to the language used. The only way this Court could answer the first two questions in the affirmative would be to impermissibly import into the 1998 Act a range of concepts and terms (including actual loss, actual recoveries, estimated future recoveries etc.) which nowhere appear and were simply not intended.

MiFID and the payment of a liquidator's fees from client assets

281. It is perfectly true that the MIFID Regulations of 2007 allow that, where the assets of an investment firm have been exhausted, a liquidator, receiver, administrator, examiner or official assignee “*may have recourse or right against client money or client financial instruments or documents of title relating to such financial instruments received, held or paid on behalf of a client by an investment firm in respect of such reasonable expenses are incurred . . . in the carrying out of their functions . . .*” under the said Regulations, or under the 1999 Act. Commenting on this in her 09 October 2012 judgment ([2012] IEHC 382), Finlay Geoghegan J. stated inter alia that: “. . .*the Oireachtas in the Investment Intermediaries Act (as amended), and the Minister in making the MiFID Regulations, has expressly addressed a liquidator's right to recourse to client assets, including where a liquidator of an investment firm may be involved in the distribution of client monies and client investments. In that situation, the Court is given a statutory jurisdiction to make orders in certain circumstances that a liquidator have recourse to client funds or investments for the purpose of discharging reasonable expenses . . . This Court is constrained to exercise the relevant statutory jurisdiction given it*”. Nothing in the judgment delivered by Finlay Geoghegan J. on 09 October 2012 provides any support, in my view, for the ICCL’s assertion that the proper interpretation of s. 35(5) is that the ICCL’s subrogation rights extend to *client* assets, as opposed to client claims against *company* assets. In the manner examined by Finlay Geoghegan J., an insolvency such as the present one undoubtedly involves the Liquidator carrying out certain work in respect of claims by investor clients in respect of the return of investor – owned assets. That does not change the nature of the claim of an investor, in respect of their own assets, to a claim against company assets. Nor does it alter the understanding of liquidation as a concept. The fact that a liquidator, in circumstances where there are insufficient company assets to discharge his or her fees, may apply to have fees paid out of client assets in circumstances where part of the work done by a liquidator in a case of this nature required the Liquidator “. . . *to be satisfied that it was the relevant client’s money and not another client’s*

money which had been transferred to the stockbroker or other financial institution from the pooled client account” (per Finlay Geoghegan J. at para 48) does not change the *nature* of a proprietary claim. The fact that client assets may, in certain circumstances, go to discharging a liquidator’s fees does not mean that an investor’s claim for the return of their own assets suddenly becomes a claim by the investor against company assets. The claims are entirely different in nature and remain unaltered, regardless of what funds are used to discharge a liquidator’s fees, be they client or company assets.

Pro rata

282. Similar comments apply in relation to the 2017 decision by Finlay Geoghegan J. wherein she took the view that, because there was insufficient evidence to enable the Liquidator to establish the specific entitlements of each client, that their claims should be paid out on a *pro rata* basis. That entirely understandable approach is most certainly not authority for the proposition that investor claims in respect of investor-owned funds ceased to be proprietary claims and/or that there was a radical alteration in the nature of the claims. Rather, it was a decision concerning the manner in which proprietary claims, which remained such, were to be dealt with. In the absence of any other fair or reasonable means of dealing with these proprietary claims, the learned judge took a specific course of action very specific circumstance which, on any analysis represented the fairest approach in the circumstances which pertained.

Clear statutory language

283. It is uncontroversial to say that for a liquidator of an insolvent investment firm to be entitled to have access to client funds to discharge his or her fees has been expressed in clear statutory language, as was appropriate and necessary given that it represents a significant departure from what would otherwise be the norm. No such statutory language provides that the ICCL’s subrogation right extends to claims against *client* assets, despite the fact that this would undoubtedly be a radical departure from the norm in the context of liquidation proceedings. Moreover, the fact that s. 35(5)

specifically uses the words “*against the investment firm*” means that the subrogation right concerns, and only concerns, a claim “*against the investment firm*”. The ordinary meaning of the words used is that s. 35(5) concerns a claim which, if it succeeds, will be paid out of the investment firm’s assets.

Impermissible judicial law-making

284. If what was contended for on behalf of the ICCL was correct, it is also remarkable that the 1998 Act is entirely silent on how such a subrogated claim on the part of the ICCL should be apportioned as between different assets and this silence appears to me to be entirely consistent with what I am satisfied constitutes the literal meaning of s. 35, namely, that the ICCL’s right of subrogation is restricted to the assets of CHC. Absent the type of language found, for example, in the MiFID Regulations to which Finlay Geoghegan J. referred, it would be an impermissible exercise in judicial law making to write into s. 35 provisions which are not there and it would run contrary to the well-understood meaning of liquidation proceedings (which is, in essence, involves a realization of *company* assets in order to pay *company* debts), for this Court to confer upon the ICCL a right against *client* assets.

W& R Morrogh (in Receivership) [2001/168 COS]

285. I have reached the views expressed in this judgment based on a literal interpretation of the words used in the 1998 Act. These views remain unaltered notwithstanding the fact that the court’s attention was drawn by counsel for the ICCL to an order made on 19 January 2011 (Murphy J.) in *W&R Morrogh (In Receivership)* [2001/168 COS]. The said order referred to a Motion issued by a Mr. Grace, the receiver of W&R Morrogh (referred to in the order as “*the Firm*”). The operative part of the order included the following:-

“*THE COURT DOTH MAKE the following Declarations:-*

1. *THE COURT DOTH DECLARE that the above entitled proceedings constitute liquidation proceedings against the Firm within the meaning of section 35(5) of the Investor Compensation Act, 1998 (hereinafter referred to as “the 1998 Act”), and that accordingly,*

ICCL has an entitlement to make a claim in the Receivership pursuant to the rights conferred upon it by section 35(5) of the 1998 Act;

2. *and THE COURT DOTH DECLARE that where there are insufficient assets available to pay ICCL the full amount of its claim, any payment to be made to ICCL pursuant to section 35(5) of the 1998 Act should not exceed the amount that would have been payable to the individual client of the Firm had not that client been compensated by ICCL pursuant to the 1998 Act;*

3. *and THE COURT DOTH FURTHER DECLARE that, having regard to the provisions of paragraphs 6-9 and 13 of the curial part of the Order of the Court made herein dated 31 July, 2003, ICCL, in making any subrogated claims against the client accounts of the Firm, must exclude any amount in respect of a claim for shares sold to effect a client's contribution to the costs of the Receivership;*

4. *and IT IS ORDERED that the Receiver be at liberty to decline to make a payment to any client of the Firm or any party subrogated to the rights of that client unless the value of the claim exceeds the gross value of €30;*

5. *and IT IS ORDERED that the Receiver should be entitled to his costs and expenses relating to the present application and Order, such costs to be submitted by the Receiver to the Court in due course for measurement and approval."*

This Court has no information as to the underlying facts; what arguments were or were not made; what decisions preceded the order; what was decided or the reasons for it. Nor are there any pleadings in relation to the foregoing case before this Court. There are no other orders available to this Court and, to the extent that it appears that an order made in an entirely separate matter acknowledged the ICCL's right to maintain a claim in respect of client assets, I am entirely satisfied that such an order is not determinative of the questions which this Court has been asked to decide.

The answer to the second question – a summary

286. Having regard to the plain meaning of the words used in the 1998 Act, it is clear that the Oireachtas did not intend that the rights of an investor in liquidation proceedings against the investment firm included the investor's rights to claim for the return of the investor's own assets (which, not being company assets, constitute claims outside the liquidation and do not constitute claims "*against the investment firm*"). The 2015 Regulations reflect the foregoing. That liquidation proceedings involve the making available to creditors of a company's assets, as opposed to client assets, certainly appears to be something understood by the Commission.

Interpreting s. 35 in context does not permit me to hold that the ICCL's subrogation right extends to client assets held by CHC. If that was the intention of the Oireachtas, it could have, and I am satisfied would have, stated that in clear terms. It did not do so and it does not appear to me to be legitimate to read into s. 35 a meaning which would do violence to the words used and would run contrary to a fundamental principle of Irish law that a claim in liquidation *against* an insolvent company is a claim against that company's assets, not a claim against the assets of clients of that firm. Despite how widely drafted the definition of liquidation proceedings is, pursuant to s. 2(1) of the 1998 Act, there is no doubt about the fact that it includes "*a compulsory or court liquidation under the Companies Acts*". Section 5(5) is explicit that it refers to rights of investors in liquidation proceedings *against* the company. It does not refer to rights of investors against investors or their assets. It is also fair to say that the 2015 Regulations are entirely consistent with the foregoing interpretation of s. 35 and explicitly recognise the principle that client assets will never form part of the general assets of the insolvent company for distribution to creditors. Thus, the 2015 Regulations make detailed provisions for both the return of client property where the owner can be separately identified and for the return to clients of the proceeds of the pool of client assets, where the owner cannot be separately identified. In the second scenario, the pool of client assets remains the property of and for the benefit of the clients and the distribution is *inter se*. Even where the owner of client property cannot be identified, the default position is not that such property becomes part of the general assets of the company and

nothing in the 2015 Regulations refers to or purports to deal with any entitlement on the part of the ICCL to exercise subrogation rights in respect of client property. It is also fair to say that there is consistency as between the travaux préparatoires, the Directive, the 1998 Act and the 2015 Regulations on the issue. There is no right of the ICCL to be subrogated to the rights of investors in respect of investor claims for investor assets. There is no entitlement on the part of the ICCL to have client assets diverted to them, rather than distributed to the owners of those assets. The 2015 Regulations make no such provision and this is because the 1998 Act does not confer on the ICCL any right of subrogation in respect of investor or client assets. For these reasons, I am satisfied that the answer to the second question is in the negative. This Court cannot hold that the ICCL has a right of subrogation over claims by investors for the return of their assets. In its approach to the calculation of net loss, the ICCL asserted that actual recoveries and estimated future recoveries must form part of the calculation (i.e. the inescapable logic being that the ultimate position at the very end of the liquidation proceedings is crucial to a determination of net loss which, in turn, determines compensatable loss). When it came to asserting subrogation rights, it was clear that the ICCL asserted such rights over funds which may not, in fact, have ever formed any part of the certification of loss and, thus, did not form the basis for the payment of compensation to those investors who received it at an earlier stage. For the reasons detailed in this judgment, I am satisfied that the ICCL has no subrogation rights in respect of investor assets. I am satisfied that a literal interpretation of s. 35 produces a negative answer to the second question posed by the ICCL in the present motion. A purposive approach to interpretation does not appear to me to be appropriate or necessary, having regard to the plain meaning of the words used, in particular the words “*against the investment firm*” with regard to the rights of the eligible investor in liquidation proceedings to which the ICCL subrogates. Even if a purposive approach were to be taken, I am satisfied that such an approach could not support the interpretation contended for by the ICCL.

Further questions – certain comments

287. In the manner explained in this judgment, I am satisfied that the ICCL is incorrect in relation to their interpretation of the 1998 Act, both in respect of the calculation of ‘net loss’ and the extent of their contended for subrogation right. That being so, the remaining questions appear to me to fall away. It is also fair to say that there are no statutory provisions addressing certain issues raised by the ICCL such as what the ICCL describe as the ‘allocation issue’. This is, of course, because the 1998 Act does not envisage that the ICCL will have the alleged subrogated claim in respect of client assets. Not having a subrogation right to make claims against client assets, there is no question of the ICCL having the right to participate in a disbursement of client assets in order to take client monies from those disbursements. It is also fair to say that there is no language in the 1998 Act or in the 2015 Regulations which addresses or envisages any such proposition. In my view, a proper interpretation of the provision in the 1998 Act mean that the concept of ‘overcompensation’ is an inappropriate one. When the Oireachtas applied its mind to the situation involving an interim certificate and an interim payment having been made pursuant to s. 34(3) it provided only for a top – up payment to the eligible investor to ensure that there that there was no question of receiving less compensation than the investor was due. Nothing in the Act, or in the Directive, provides for any repayment by an eligible investor of any amount at any stage, regardless of what may or may not happen beyond the crucial date around which everything revolves for the purposes of the calculation of compensatable loss, namely the determination date, being the date of the winding-up order in the present case. Nor is there any right to recover what the ICCL refer to as ‘overcompensation’, provided for in the 2015 Regulations.

288. What the ICCL refer to as the ‘distribution issue’ does not apply, in circumstances where the ICCL is not correct in asserting that its subrogation right extends to client assets. It is submitted on behalf of the ICCL that when the legislature enacted amendments to the 1998 Act so as to allow for interim certificates, the Oireachtas was anticipating that compensation “*would not be unlawfully paid to a client*”. Implicit in that submission is that everything hinges on ‘actual loss’. It does not. Net loss

and compensatable loss are both statutory constructs, divorced from what the ICCL regard as actual loss, and deliberately made referable to the date of a winding-up order so as to ensure certainty and promptness as regards the payment of a limited amount of compensation to those it was deemed appropriate to compensate quickly. It is self-evident that subsequent events could ultimately mean that actual loss differed from net loss on the determination date. That does not mean that where the former ultimately (perhaps many years later) turns out to be less than actual loss, that the investor was overcompensated or received unlawful compensation. The concepts of actual loss and net loss are deliberately disconnected concepts, the latter playing no role in the Directive or the 1998 Act which gives effect to it. It will also be recalled that in the Commission's proposal, it was emphasised in the clearest of terms that "*the payment of compensation must be independent of the progress of liquidation proceedings in respect of an investment firm*". In short, instead of this Court having been asked to construe statutory language, the ICCL's approach was to say that if it was correct in respect of the 'net loss' and 'subrogation' issues, there were further questions which it wanted the Court to answer. In my view, that would have involved an impermissible 'filling-in' of gaps in legislation. It would have, it seems to me, have involved impermissible judicial law-making, the Oireachtas having enacted no provisions which provided (or potentially provided once contending interpretations had been decided upon) any answers to the questions raised. The 1998 Act and the 2015 Regulations had nothing to say in relation to the further questions raised. The reason no primary or secondary legislation addressed the questions and was there to be interpreted is because the ICCL was wrong in relation to both the 'net loss' and 'subrogation' issues and it was only if ICCL was right that the balance of the questions arose.

The ICCL's asserted right to equitable subrogation

289. The ICCL also submits that if this Court is not with them in terms of the interpretation of s. 35 (5) which they contend for, the ICCL asserts "*a right to equitable subrogation in order to prevent overcompensation*". It is clear that what the ICCL regard as 'overpayment' or 'overcompensation'

constitutes any payment which an eligible investor might ultimately receive in excess of what the ICCL regard as actual loss. The ICCL characterise any payment in excess of the return of an investor's assets (no matter how long that might take) as being a situation where that investor receives "*more in compensation than the statute allows for*". Again, I must point out that there is a flaw in what the ICCL regard as an investor with no actual loss, given the evidence before this court that even the investor who receives both a compensation payment and, ultimately, their full assets, is someone who may have sustained actual loss and who may in fact be in a worse position than if the investment firm had not failed. The purpose of the Directive and the 1998 Act and what it intends to compensate for is plainly a separate issue to whether an eligible investor has or has not sustained actual loss (taking account of all relevant matters including the period during which that investor was deprived of access to their own assets even and the loss(es) flowing from same) even if they ultimately recovered their assets by the end of the liquidation process. The ICCL's submissions fail to engage with the reality of such actual loss. Furthermore to say that such a scenario involves 'overpayment' or payment in excess of what the statute allows is a fundamental mischaracterisation which fails to acknowledge the important fact that the Oireachtas made an active decision that 'compensatable loss' would be paid to an eligible investor and this would be based on 'net loss', both concepts being statutorily defined and neither being referable to 'actual loss'. Why this was so is clear from the principles set out in and underpinning the Directive. Before proceeding further, it is useful to recall that in just over 50% of the 531 cases which Mr. Jacobs analysed on behalf of Mr. Nugent, there was either no 'overpayment' of compensation (using the ICCL's own methodology) or else the so-called 'overpayment' amounted to less than €100. The ICCL's methodology which produced the foregoing outcome was, of course, to take into account actual and future anticipated recoveries. For the reasons detailed in this judgment, that is not the correct approach as it does not flow from the correct interpretation of the relevant provisions in the 1998 Act.

Loss due to not having access to funds

290. The position facing an investor when a winding-up order is made in respect of an investment company is that they are unable, at that juncture, to have their assets returned to them. The court has uncontroverted evidence before it that not having one's assets available involves a very real cost. Dr. DaSilva's report states, *inter alia*, as follows:-

“5.19 I understand that many of the investors in the class represented by Roger Day believed that their investments held by CHC could be withdrawn with limited, if any, notice. For example, I understand from my conversation with the Liquidator that the cash savings accounts related to this case were instant access (i.e. the investors held money in these accounts with the understanding that funds could be withdrawn at any time). I understand that other investments were in self-administered pension funds which permitted withdrawals once a year.

5.20 In the present case, nearly ten years have passed since the appointment of an administrator and liquidator. During this time the investors have not been able to withdraw their funds. This has resulted in a significant opportunity cost for the investors, as they could have otherwise invested their funds in alternative assets (and, in turn, benefitted from the associated risks and returns of those assets), or used the funds (e.g. to pay household bills, mortgage payments, university fees, etc.).

5.21 Moreover, investors' investment preferences are likely to have changed in the past ten years. They suffer further costs when they are denied the right to make investment decisions, and are forced to remain invested in ways that deviate from their preferences.

5.22 Finally, there is an argument for eligible investors to be compensated with an additional amount to compensate them for lost investment opportunities, on a risk-adjusted basis, over and above their net loss.

5.23 To conclude, my opinion is that:

- (i) *It is important for compensation payments to be speedy in order to meet the objective of the compensation scheme;*
- (ii) *If the delay in compensation payment is long, investors may end up being worse off with the compensation scheme than without the scheme;*
- (iii) *It is in the interest of both investors and the members of the investor compensation scheme to ensure speedy payment...*”

In addition to the foregoing uncontroverted evidence, Mr. Nugent has made the following averments at para. 102 of his affidavit:-

“102. ...it should be borne in mind that the investors will all, invariably, have suffered further significant losses by reason of their assets being frozen in this liquidation for a period exceeding, in most cases, ten years, during which time former investments were reduced to cash, and denied the opportunity to grow through investment, as had been intended. Further losses will have been incurred by the practice of the Liquidator, particularly in the early stages of the liquidation, of reducing investments to cash at a time when a values were at a very low point following the financial crisis, and so denied the possibility of availing of the inevitable recovery in value which did follow. Further losses have been incurred by the investors by the practice of the Liquidator in imposing “fees” and charges on the investors, as outlined above in the context of my own situation.”

291. Mr. Nugent represents a cohort of 574 investors who received compensation payments. Mr. Day represents those 1,372 eligible investors whose claims have not yet been certified and who have received no payments. It will be recalled that, among the averments made by Mr. Day is that, even segregated assets comprising sums where Mr. Day has been identified as the owner of the relevant funds, have not been returned to him. Mr. Day retained Dr. DaSilva and I have referred to his findings. In short, the evidence before this Court allows for the conclusion that investors suffer loss if they are unable to access their funds, a winding-up order having been made. It is impossible for this Court to

calculate the loss which each and every investor has sustained, but it is fair to say that the evidence demonstrates that relevant investors have suffered a very real loss of this type, in the manner explained by Dr. da Silva. This is so, even if, a decade after the winding-up order was made, the investor in question ultimately receive their original investment (in addition to such payment of compensatable loss as they received at an earlier stage). In other words, based on the evidence before this Court, it is not accurate to say that an investor who eventually gets their investment back a decade after a winding-up order, suffered no actual loss and, thus, any compensation they received from the ICCL must be regarded as ‘overcompensation’ or ‘overpayment’. For this Court to take such a view would be to ignore the evidence before it. Thus, even if one were to follow the logic of the ICCL’s argument and even if one were to view all things through the lens of actual loss, this Court could not hold that somebody who received a €20,000 compensation payment in the wake of a winding-up order and who, years later, ultimately recovered their full investment in fact received payment in excess of their actual loss. For this Court to reach such a finding would be to ignore Dr. da Silva’s uncontroverted evidence as well as the averments by the *legitimi contradictores*. It would be to ignore the very real loss flowing from the unavailability of a relevant investor’s assets throughout the years when the liquidation proceedings were ongoing and up to the point of final repayment. The submission made on behalf of the ICCL that someone in the foregoing position has received “*more in compensation than the statute allows for*” is fundamentally wrong. It is wrong because the individual in the foregoing scenario will have received precisely the compensation which the statute allows for, being compensation which is not calculated with reference to actual loss (even on the ICCL’s flawed view of that concept) but determined on the date of the winding-up order and based on the statutory concept of ‘net loss’, which in turn determines ‘compensatable loss’.

292. On Day 6 (transcript p. 109), counsel for the ICCL put very clearly his client’s argument with regard to the alternative right of subrogation asserted, stating the following: “*And we submit that the right of subrogation in section 35(5) is broad enough and flexible enough in and of itself to provide*

a legal basis for addressing any compensation that may have arisen. And it is only in the alternative... if the court did not find with us in terms of that interpretation of section 35(5), that we say we would have a right to equitable subrogation in order to prevent overcompensation." (emphasis added). I have already rejected the proposition that the ICCL enjoys the subrogation right in s. 35(5) contended for by the ICCL. Having regard to the evidence before it, this Court simply cannot hold that any investor has been or will be 'overcompensated' even if, in addition to a statutory payment, such an investor were ultimately to receive their investment back. It seems to me that to receive what one is entitled to under statute cannot fairly be characterised as being 'overpaid' or 'overcompensated'. Thus, the proposition that an individual investor who has received or who is entitled to receive a payment of 'compensatable loss' under the 1998 Act, in precisely the manner provided for in the said Act, has been or will be 'overpaid' or 'overcompensated' (even if they ultimately recover their entire assets, e.g. by the end of the liquidation), is in my view fundamentally flawed for the reasons set out in this judgment.

293. In light of the foregoing, I cannot hold that any alternative right of subrogation, in equity or otherwise, arises. Even if I am entirely wrong in the foregoing view, it seems to me that before this Court could fairly or safely take a view that any individual investor had, in fact, received or stands to receive *more* than their 'actual loss' (actual loss playing, of course, no part whatsoever in the determination of rights and liabilities under the 1998 Act) it would first be necessary that the investor's loss (e.g. as a result of not having access to their own assets) be quantified. Key issues would seem to include a determination of the relevant investor's actual loss (including such loss as flowed from the lack of access, for the relevant period, to their assets even if same were ultimately recovered years later) and whether that loss was greater than, the same as, or less than, the sum representing the statutory compensation paid to them (where their claim had already been certified and payment made) or payable to them (whenever their claim were to be certified). In short, as well as being satisfied that the ICCL is entirely wrong to focus on 'actual loss' in circumstances where

payment of compensation is not determined with reference to actual loss, even if it *were*, the proposition that there has been or will be any ‘overcompensation’ referable to actual loss ignores the very real loss flowing from an investor not having access to their funds for years and this would need to be quantified in each specific case where there was an allegation that overpayment or overcompensation, referable to actual loss, had occurred. Thus, it seems to me that there is a fundamental flaw in the ICCL’s assertion of an equitable right to subrogation because it is based on the premise that there has been overcompensation. That simply has not been established as a matter of fact, even taking fully on board the possibility that an investor with assets of, say, €100,000 might receive a €20,000 payment in respect of compensatable loss *and* ultimately recover, years later, assets of €100,000. It should be added that the foregoing example is not at all commonplace, having regard to the evidence before this Court. The crucial point, however, is that the ICCL has simply ignored the very real losses which such investors - be they in retirement or planning for their retirement, or otherwise - will have sustained as a result of being unable to access funds which, but for the winding-up of the investment firm, they would have been able to access. Lest I be entirely wrong in the foregoing views, I now propose to look at the equitable right to subrogation which has been asserted by the ICCL.

Unjust enrichment

294. Central to the ICCL’s assertion of a right to equitable subrogation in the present circumstances is the proposition that there has been ‘unjust enrichment’ of relevant investors. Among the many authorities referred to in the written submissions is the case of *Corporation of Dublin v. Building and Allied trade Union* [1996] 1 IR 468. There is no dispute between the parties that, as identified by Keane J. in the foregoing decision, unjust enrichment involves the following four elements:-

- (i) The enrichment of the defendant;
- (ii) At the plaintiff’s expense;

- (iii) In circumstances in which the law requires restitution (i.e. the “unjustness” of the enrichment); and
- (iv) The absence of defences or other policies to deny restitution.

Enrichment

295. As to the first element, ICCL submits that the: *“payment of an amount of compensation to investors in excess of what is envisaged by the 1998 Act represents an enrichment of investors in the specific context. That enrichment is at the expense of the ICCL (or rather, at the expense of the fund which it is the duty of the ICCL to maintain).”* The 1998 Act envisaged that investors would receive compensatable loss, meaning 90% of an eligible investor’s net loss or €20,000, whichever is the lesser. Once again, it is necessary to emphasise that ‘net loss’ is a statutory construct, being a definition which does not hinge on actual loss and is not calculated with reference to the *end* of the liquidation process, but the *start*, being the point at which, it is uncontroversial to suggest, funds are most acutely needed by investors who cannot access them. On the evidence before this Court, the ICCL have not established that any investor will receive payment of an amount of compensation in excess of what is envisaged in the 1998 Act. That is true, regardless of what assets the individual investor may or may not ultimately recover by the end of the liquidation process. Thus, I am not at all satisfied that the ICCL has established that there has been any ‘enrichment’ whatsoever, much less ‘unjust enrichment’. In short, for the 1998 Act to work precisely as the said Act intended does not seem to me to involve enrichment at all, because it does not involve a payment of compensation in excess of what the very Act envisages. Furthermore, in the manner explained, the ICCL’s narrow view of what constitutes ‘actual loss’ ignores the evidence that investors who may ultimately recover their assets by the end of the liquidation and who also receive compensation payments may have suffered actual loss and this actual loss has not been considered by ICCL. It has not been demonstrated that such loss is less than any compensation paid to an investor in the foregoing scenario, underlining that enrichment has not in my view been established as a matter of fact.

Policy concerns

296. Counsel for Mr. Nugent also draws the court's attention to an extract from "*The Law of Unjust Enrichment*" (Geoff & Jones, 9th Ed., Sweet & Maxwell) wherein the learned authors (at 4.04) state that: "*Whether the defendant's financial position has improved is a relevant consideration for the courts... but policy concerns may also need to be taken into account.*" It is entirely uncontroversial to say that significant policy concerns underpin the 1998 Act and were expressed in the Directive and, indeed, in the travaux préparatoires and these, in my view, weight against this Court being in any position to find that a payment of 'compensatable loss' to any investor which is consistent with the statutory definitions of same and of 'net loss' represents enrichment. It seems to me that it simply represents a payment of what is due to the relevant investor, as envisaged by the 1998 Act and could not fairly be characterised as a payment *in excess* of what is envisaged, given what is meant by net loss. Furthermore, any supposedly excessive 'enrichment' of any individual investor, even an investor who received €20,000 by way of a compensation payment and ultimately received back the entire of their investment, could only be determined if that investor's loss, flowing from being deprived of the access to their investment had been determined and was found to be less than the payment they received. To say the foregoing is not to say that such an investor would have paid in excess of their entitlement or that they would have been unjustly enriched. It seems to me that the policy concerns representing the aims of the Directive, as given effect to in the 1998 Act, argue against the proposition that someone who has received a payment under the 1998 Act to which they were entitled has been enriched (even if, for example, they ultimately recovered their entire assets by the end of the liquidation process and their actual loss, including that which flowed from not having access to their assets during the relevant period was less than the compensation payment made to them). To hold that someone in the foregoing position had been enriched seems to me to make a finding which undermines the policy aims underpinning the Directive as given effect to by the 1998 Act and fortifies

me in the view that no eligible investor who has received a payment under the 1998 Act in the manner the said Act provides for, consequent on the collapse of an investment firm, has truly been ‘enriched’.

Opportunity

297. Counsel for Mr. Nugent also drew the court’s attention to the decision of the House of Lords in *Sempra Metals Ltd v. IRC* [2008] AC 581 wherein a majority of the House of Lords held a claim in unjust enrichment would lie to recover the “time value” of money and it was implicitly accepted that the defendant in that case was better off because he gained the opportunity to use money. The converse is the situation here. The expert evidence demonstrates that investors are worse off because they are denied access to their investment. Thus, even an investor who, a decade after the winding-up order, receives their investment back (in addition to such compensation payment as they received pursuant to the 1998 Act) may not in fact have gained anything. It is entirely possible that they are still in a net loss position. The point is that the question of any alleged ‘enrichment’ could only be determined after such losses as they have suffered as a result of being denied access to their assets for a period of years has also been taken account of.

298. For all the foregoing reasons, the ICCL has not demonstrated that there has been any enrichment and I am satisfied that element (i) as articulated in the *Corporation of Dublin* case is not satisfied.

At the expense of

299. As to the second element highlighted in the *Corporation of Dublin* case, namely, whether enrichment was at the expense of the ICCL, it is important to note that the principle requires “that the plaintiff should have sustained a loss through the provision of something for the benefit of some other person with no intention of making a gift, that the defendant should have received some form of enrichment, and that the enrichment has come about because of the loss” (per Clyde L.J. in *Banque Financière de la Cite v. Parc (Battersea) Ltd & ors.* [1999] 1 AC 221 at 237). Counsel for Mr. Nugent draws the court’s attention to the decision of the UK Supreme Court in *Revenue and Customs v. The*

Investment Trust Companies [2017] 2 WLR 1200 (hereinafter “*ITC*”) which case concerned whether a restitutionary claim against HMRC was available to various investment trust companies for overpayment of VAT, where the tax had been paid to management companies on the mistaken assumption that the services being provided were subject to VAT and were not exempt. The claim was advanced on the basis that HMRC had been unjustly enriched at the expense of the companies. Reed L.J. held that the investment trust companies did not have a right of subrogation. In the present case, the ICCL submit that investors have been enriched at their expense. In the judgment in *ITC*, Reed L.J. analysed the nature of the requirements in this regard, holding (at 124, para. 43):-

“The nature of the various legal requirements indicated by the ‘at the expense of’ question follows from that principle of corrective justice. They are designed to ensure that there has been a transfer of value, of a kind which may have been normatively defective: that is to say, defective in a way which is recognised by the law of unjust enrichment (for example, because of a failure of the basis on which the benefit was conferred). The expression ‘transfer of value’ is, however, also too general to serve as a legal test. More precisely, it means in the first place that the defendant has received a benefit from the claimant. But that is not in itself enough. The reversal of unjust enrichment, usually by a restitutionary remedy, is premised on the claimant’s also having suffered a loss through his provision of the benefit.”

Before proceeding further, it is appropriate to note that in the present case, there will be a transfer of value but it would be precisely in the manner dictated by statute and in accordance with statutory definitions of ‘net loss’ and ‘compensatable loss’ which are utterly independent of concepts of actual loss and, in temporal terms, wholly independent of what may or may not be the final outcome of liquidation proceedings, given that net loss is determinable as of the date of the winding-up order so as to facilitate certainty and prompt payment of the limited compensation provided for under the Directive to which the 1998 Act gives effect, regardless of what the ultimate outcome of insolvency

proceedings may or may not be years later. In *ITC*, Reed L.J. went on to hold as follows (at 1224, para. 71):-

“Returning, then, to the question whether the unjust enrichment of the Commissioners was at the expense of the Lead Claimants, and focusing on whether there was a transfer of value from the Lead Claimants to the Commissioners, the answer is in the negative. There was a transfer of value, comprising the notional £100, from the Lead Claimants to the Managers, under the contract between them. It was defective, because it was made in performance of a contractual obligation which was mistakenly believed to be owed. There was a subsequent transfer of value, comprising the notional £75, from the Managers to the Commissioners. It was also defective, because it was made in compliance with a statutory obligation which was inapplicable because it was incompatible with European Union law. These two transfers cannot be collapsed into a single transfer of value from the Lead Claimants to the Commissioners.”

300. Applying the foregoing logic to the facts in the present case, there would have been a transfer of value (i.e. of statutory compensation) from the ICCL to the investor, pursuant to the 1998 Act. If this was defective, ICCL submits that it was because of a mistaken calculation by the Administrator. If there is a subsequent transfer of value (i.e. the return of client assets) from the Liquidator to the investors, this is not *at the expense of* the ICCL. Similar to the position in *ITC*, there are two distinct transactions which, it seems to me, cannot be collapsed into a single one. Thus, in respect of the alleged overcompensation, there is in fact no transfer of value from the ICCL to the investors and element (ii) as articulated in the *Corporation of Dublin* case is not satisfied in my view.

Unjustness

301. The third element in respect of a cause of action of unjust enrichment, according to *Corporation of Dublin*, is that there must be an *unjust* element to the enrichment. In the manner already examined, I do not believe that the ICCL has established enrichment at all, nor am I satisfied

that the ICCL has established that any such enrichment (as regards alleged ‘overpayment’) was at the *expense* of the ICCL or involved any transfer of value from the ICCL to investors. I am also satisfied that no *unjust* factor or element has been demonstrated. The starting point must be the definition or ‘net loss’ and I fail to understand how any investor whose loss is calculated in accordance with the definition of net loss and who, therefore, is paid ‘compensatable loss’, as per s. 30(1) of the 1998 Act, receives this statutory payment *unjustly*. There is nothing unjust about it. There is nothing inappropriate and, thus, there has been no mistake. It is simply an example of the statute operating in the manner in which the Oireachtas intended it to operate and the foregoing seems to me to be entirely consistent with the provisions of the Directive.

Mistake

302. In *Vanguard Auto Finance Ltd v. Browne & ors* [2015] 1 ILRM 191; [2014] IEHC 465, Barton J. stated the following (from para. 70):-

“[70] The law of restitution recognises certain categories of “unjust” enrichment which may be categorised as follows:

- (a) Mistake, where an enrichment is conferred on the defendant by reason of the plaintiff’s mistake.*
- (b) Contracts discharged by breach, where the plaintiff seeks to recover a benefit that was conferred by him as part of his contractual performance, the contract itself having been discharged by breach of either the plaintiff or the defendant.*
- (c) Contracts discharged by frustration, where the plaintiff seeks to recover a benefit that was conferred by him as part of his contractual performance, the contract itself having been discharged by frustration.*
- (d) Legally recognised transactions which are void, voidable or otherwise ineffective where the plaintiff seeks to recover a benefit that was conferred by the plaintiff but where the transaction becomes unenforceable in law.*

(e) *Claims for the recovery of money or the recovery of a non-money benefit and where the plaintiff has discharged the defendant's debt.*

(f) *Restitution for "wrongs".*

In the present case, counsel for the ICCL made clear that his client was "*relying upon a mistake by the Administrator in over-certifying*", also characterising this as a mistake made by the ICCL in circumstances where it *bona fide* relied "*upon the statements issued by the Administrator which have overstated the quantum of the compensation*" (see Day 6, transcript p. 110). The foregoing is, in truth, one and the same thing, the so-called mistake relied upon being that of the Administrator and this is clear from the written submissions furnished on behalf of the ICCL wherein (at para. 100) it is stated that: "*The "unjust" factor is the mistake of the Administrator, be that of fact or law, in either calculating net loss on an erroneous basis (by disregarding recoveries) or by underestimating future estimated recoveries.*" Before proceeding further, it is important to state that the proper interpretation of s. 30 means that recoveries or estimated future recoveries play no part in the calculation of net loss. Thus, there is no *mistake* on the part of an administrator who disregards same. For this reason, there is, in fact, no mistake, even on the part of the Administrator (although the law appears to be clear in requiring that the relevant mistake, for the purposes of establishing unjust enrichment, must be on the part of the plaintiff). This is explained in *Vanguard* wherein Barton J. stated the following (at para. 73):-

"[73] Historically it was said that for a plaintiff to succeed in such a claim it was necessary for the plaintiff to establish that the mistake was such that if true it would have made the plaintiff liable to make the payment and that there had to be a mistake of fact rather than a mistake of law. The distinction between mistakes of law and mistakes of fact was abrogated by the judgment of the House of Lords in Kleinwort Benson Ltd v. Lincoln City Council (1999) 2 A.C. 349 where the court held that in order for the plaintiff to succeed it was necessary to establish that the benefit conferred arose as a result of the plaintiff's mistake and that this was

irrespective of whether or not the plaintiff believed that there was a liability to confer the benefit in question and whether or not the benefit was conferred as a result of a mistake of law. It is an essential requirement, however, that there be a mistake and not just a doubt as to the plaintiff's liability to make the payment.” (emphasis added)

303. Having regard to the foregoing, I accept the submission on behalf of Mr. Nugent that it is not open to the ICCL to rely on an alleged mistake, not by it, but on the part of the Administrator for the purposes of grounding an unjust enrichment claim, thus presenting another, to my mind, insurmountable difficulty for the ICCL insofar as what they contend for. I would, however, emphasise that for the Administrator to calculate net loss in a manner which disregards recoveries and estimated future recoveries does *not* involve any mistake. Doing so is entirely consistent with the proper interpretation of the requirements of s. 30 of the 1998 Act. Thus, a payment made in accordance with the proper interpretation of the 1998 Act's provisions neither involves mistake nor, to my mind, enrichment, still less unjust enrichment.

Palm tree justice

304. In the present case, I am entirely satisfied that the ICCL has not met the essential elements of the claim advanced by way of unjust enrichment and, in this regard, it is appropriate to quote a further passage from Barton J.'s decision in *Vanguard*, wherein, referring to the judgment of Keane J. in *Dublin Corporation v. Building and Allied Trade Union*, the learned judge stated as follows:-

“[75] Two essential preconditions for the application of the doctrine are required to be met, namely the enrichment of the defendant at the expense of the plaintiff and that the enrichment should be regarded as unjust. As to the difficulties arising in determining whether or not any given enrichment is unjust and if so as to whether there are any reasons why even if unjust restitution should nevertheless be denied to a plaintiff, Keane J. delivering the judgment of the court observed at p 558:

‘As to the first of these difficulties, the law, as it has developed, has avoided the dangers of palm tree justice by identifying whether the case belongs in a specific category which justifies so describing the enrichment: possible instances are money paid under duress or as a result of a mistake of fact or law or accompanied by a total failure of consideration.’”

Defences

305. For the reasons detailed in this judgment, I am satisfied that the ICCL has not established (i) enrichment; (ii) that same was at the expense of the ICCL, (iii) any unjust element. Furthermore, for an action in unjust enrichment to succeed, there must be no defences available. On this topic, Keane J., in *Dublin Corporation v. Building and Allied Trade Union*, cited with approval the decision of Henchy J. in *Murphy v. the Attorney General* [1982] IR 241, wherein (at p. 314) Henchy J. stated:-

“Over the centuries the law has come to recognize, in one degree or another, that factors such as prescription (negative or positive), waiver, estoppel, laches, a statute of limitation, res judicata, or other matters (most of which may be grouped under the heading of public policy) may debar a person from obtaining redress in the courts for injury, pecuniary or otherwise, which would be justiciable and redressable if such considerations had not intervened.”

I accept the submission made on behalf of Mr. Nugent that, in the present case, there are, under the heading of defences, at least two bars to ICCL’s assertion of equitable subrogation against client assets on unjust enrichment grounds. The first is public policy, the second being delay in the context of the specific circumstances in the present case. Hoffman L.J. stated in *Banque Financière* that a claimant may not be entitled to subrogation on the grounds of unjust enrichment where *“there are... reasons of public policy for denying a remedy”*. Counsel for Mr. Nugent draws the court’s attention to the decision in *Burston Finance v. Speirway Ltd (In Liquidation)* [1974] 1 WLR 1648 which is cited by the learned authors in *“The Law of Unjust Enrichment”* (at 7.113), where a charge granted to a lender which had financed the purchase of property by a company was rendered ineffective by

statute as a result of non-registration. The lender unsuccessfully sought priority in the company's liquidation via the alternative route of subrogation to the unpaid vendor's lien. The learned authors explained this decision "*on the basis that, even if the statutory invalidation of the security has caused the consideration for the lender's advance to fail, allowing subrogation would have intolerably undermined the invalidating statutory provision*". I accept the submission that the equitable subrogation right contended for by the ICCL is wholly at odds with the policy and purpose behind the Directive. In my view, such a claim cannot succeed because the ICCL have failed to establish the essential elements of unjust enrichment, but even if they had established elements (i), (ii) and (iii), there is undoubtedly a public policy which argues against the subrogation right contended for because it would plainly undermine an explicit purpose of the 1998 Act which gave effect to the Directive.

306. In addition to the foregoing, it cannot be disputed that there has been a very significant passage of time since the winding-up order was made in the present case. That is not to attribute blame to any individual or entity but delay of a decade could hardly be said to be other than material, significant and, on the evidence, delay which has caused very real loss to investors who have been unable to access their assets. Not having established the essential elements in respect of a claim for unjust enrichment, the question of available defences does not arise, but even if every other element had been established, it is by no means clear that delay would not operate as a bar to the equitable right of subrogation contended for on behalf of the ICCL. At the very least, this is a 'live' consideration which means that there can be no question of this Court holding in favour of the ICCL in respect of a non-statutory subrogation right grounded on alleged unjust enrichment.

307. As counsel for Mr. Nugent submits, the English Court of Appeal in *Cheltenham & Gloucester Plc v. Appleyard* [2004] EWCA Civ. 291 held that subrogation rights may be subject to the equitable bar of laches and the learned authors in "*The Law of Unjust Enrichment*" state (at 7.136) that it follows that the related bar of acquiescence can also be a bar to subrogation. This Court's attention is also drawn to the remarks made by Finlay Geoghegan J., at para. 22 of her judgment delivered on 31

January 2019 in the present proceedings (see [2019] IEHC 43) that ICCL’s application was being brought seven years after the commencement of the liquidation and, in this context, the learned judge referred (at 21) to the “*potential prejudice to those to whom compensation has been paid if ICCL now assert a right to be subrogated to certain of their rights*”. Counsel for the ICCL submits that “*it is manifestly unjust that, where the legislation has specified a maximum amount of compensation to which you’re entitled, either as an absolute amount or as a percentage of your loss, it is unjust that you would receive compensation greater, from the statutory body, greater than that which the statute allows*”. The flaw in the foregoing submission is, of course, because it assumes, quite wrongly, that the statute is concerned with ‘actual loss’ (more accurately, the ICCL’s view as to what constitutes actual loss) and it assumes that the reference point as regards compensation paid or payable is the actual loss suffered by an investor which, it cannot be disputed, is something only knowable with certainty at the very end of the liquidation proceedings. That is not the focus of the Act and net loss is to be determined at the start, not the end of the process, in order that fundamentally important principles laid down in the Directive and given effect to in the 1998 Act, can be actioned. The foregoing submission also ignores the expert evidence in this case, including Dr. da Silva’s view that if assets belonging to an investor were identified after the calculation of net loss and the payment of compensatable loss to that investor “*it does not mean that the compensation was ‘overcompensation’... it is time-inconsistent to say that later recovery of the assets converts the original compensation into ‘overcompensation’...*”. The ICCL’s submission wholly ignores the materially important element of *time* in circumstances where the expert evidence before this Court is that being deprived of one’s assets for years has a cost. To say the foregoing is not for this Court to fall into the error of regarding the purpose of the Directive or the 1998 Act as being to compensate for negligence, breach of contract, lost opportunity or any other of the potential claims which an individual investor may have flowing from either the loss of the funds or the fact that they were denied access to their funds for a period of years. It is, however, to recognise that it is a complete over-

simplification on the part of the ICCL to suggest that someone ‘lucky’ enough to receive, a decade after a winding-up order, their original investment and who has also received a compensation payment is *ipso facto* someone who has been ‘overcompensated’. This issue is of particular relevance when it comes to an analysis of the alternative right of subrogation asserted by the ICCL which, for the reasons explained in this judgment, is not a right the ICCL enjoys.

308. In short, the claim advanced by the ICCL by way of equitable subrogation, as well as being flawed for the reasons previously detailed, takes no account of such loss as investors may have suffered during the period when they were denied access to their assets and it seems to me that if the ICCL were ever to contemplate a specific action against a specific individual investor who they regarded as having been ‘overpaid’, such an account must be taken. In making the foregoing comment, I want to emphasise once more that I cannot take the view that receiving a payment precisely in line with the very statutory definitions which were decided upon by the Oireachtas constitutes or can constitute ‘overpayment’ regardless of what does or does not happen after the date of the winding-up order, being the date at which the entitlement to such compensation is determined. In other words, even though this court is not being asked to rule on any claim by the ICCL brought against any individual investor, I fail to see how any eligible investor who receives a payment in line with the terms of the 1998 Act could have been ‘overpaid’, regardless of what may or may not occur after the determination date for that payment.

The Administrator’s position

309. It is fair to say that some criticism has been directed at the Administrator in respect of the time the liquidation has taken, including the delay in certifying the claims of the 1,372 investors whom Mr. Day represents. As against that, Counsel for the Administrator directs the court’s attention to the various reports issued by Mr. Wallace, the first of these being 05 March, 2012, Mr. Wallace having been appointed in October, 2011. It seems to me that Mr. Wallace has been attempting to address matters as promptly as possible, given the undoubted complexity of the matter and it also seems fair

to say that certain issues have arisen which have caused delay. Previous decisions given by Finlay Geoghegan J. illustrate that significant issues and questions have arisen which required determination during the course of these liquidation proceedings. Carefully considering the entirety of the evidence before the court, I do not believe it would be fair for me to attribute blame to anyone for what has undoubtedly been a very significant passage of time, nor is that the focus of the present application. The delay is plainly very significant and may fairly be described as 'extraordinary' or 'inordinate' in the sense of being out of the ordinary. That does not mean it is 'culpable' delay for which any individual or party can be blamed. One can have nothing but sympathy for individual investors but, fairly considered, there is nothing before the court which would allow it to hold that Mr. Wallace, be that *qua* administrator or liquidator, has been acting other than entirely properly, in a *bona fide* manner and with a view to discharging his various responsibilities appropriately. In short, it is no function of this Court, in the present application, to ascribe any blame for such delays or to take a view as to whether or not any statement, interim or otherwise, could or should have been issued earlier. It would be wholly unfair to blame anyone for where matters stand in what is, on any analysis, an extremely complex matter, in which a very considerable amount of work has plainly been done to try and reconcile claims.

Motivation

310. It is fair to say the ICCL's motivation in bringing the present application has been questioned, with the suggestion made on behalf of Mr. Day that the present application constituted an attempt to delay further the point at which the amount of compensation payable to investors is confirmed. In my view, it is appropriate to make the following comments. Firstly, even though the questions which this Court has been asked to determine are questions raised in respect of a scheme which was established over two decades ago by virtue of the 1998 Act, the questions are undoubtedly significant and the ICCL is entitled to seek and to receive answers. Having regard to the evidence before the court, it would be unfair for this Court to ascribe any improper motive to the ICCL with regard to posing the

questions they have asked. At the heart of the present case is a statutory body, which performs a very important function, seeking directions as to the proper interpretation of statutory provisions. That these questions were not asked earlier is not determinative of anything this Court was asked to decide.

Jurisdiction

311. It is appropriate to comment on the issue of jurisdiction, particularly given that different approaches were taken to this issue during the hearing. Counsel for Mr. Day made clear that there was no challenge raised by his client in respect of the jurisdiction on the part of the ICCL to raise the questions posed. Counsel for Mr. Nugent and Counsel representing the Administrator indicated that jurisdiction was challenged, in particular, on the basis that the ICCL is not a creditor entitled to bring the present Motion. I take the view that, in circumstances where this Court's inherent jurisdiction is also invoked, it would be utterly inappropriate for this Court, following a fully contested six-day hearing, to decide that the court had no jurisdiction to consider the questions posed. It is fair to say that all relevant parties engaged in the most fulsome of manner, by means of (i) detailed affidavits; (ii) experts' reports commissioned by the *legitimi contradictores*; (iii) extensive and detailed written submissions; and (iv) oral submissions made with skill and, having regard to that engagement, I take the view that the outcome to the present application cannot be for this Court to say that it has no jurisdiction to determine questions which have been very comprehensively argued before it, during the course of six days. As well as being satisfied that this Court's inherent jurisdiction extends to dealing with the questions posed, I also take the view that the ICCL has sufficient jurisdiction to bring the motion as a creditor of the company in the following manner. The ICCL is subrogated to the rights of investors to whom it has paid compensation, to the extent of an unsecured claim in the liquidation as against the assets of the company. In that respect, the ICCL is a creditor of the company.

Conclusion

312. For the reasons detailed in this judgment, I am satisfied that the ICCL is not entitled to the reliefs sought in paragraphs 4 to 7 of the Notice of Motion dated 10 December 2019. Whereas Mr.

Fagan, on behalf of the ICCL, set out 6 questions (at para. 86 of his 10 December 2019 Affidavit), the answers to same are as follows. Question (a) must be answered in the negative, i.e. the calculation of ‘net loss’ under section 30 (1) of the 1998 Act must not take into account *inter alia* actual recoveries and estimated future recoveries of what the ICCL describe as Net Loss Client Assets between the Determination Date and the delivery of a final statement certifying net loss and compensatable loss. As to question (b) the ICCL’s right of subrogation pursuant to section 35 of the 1998 Act is restricted to the assets of CHC. Nor has the ICCL established any right to equitable subrogation as a consequence of alleged unjust enrichment, or otherwise. In light of the foregoing, questions (c), (d), (e) and (f) do not arise and all relief sought by the ICCL must be refused.

313. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: *“The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate.”* Having regard to the foregoing, the parties should correspond with each other with regard to the appropriate form of the final order, including as to costs. 7 days should be sufficient in that regard. In default of agreement between the parties on any issue, short written submissions should be filed in the Central Office within a further 14 days, i.e. within 21 days from the date of this judgment.