THE SUPREME COURT

[Appeal No: 78/18]

Clarke C.J.
O'Donnell J.
MacMenamin J.
Dunne J.
Charleton J.

Between/

University College Cork – National University of Ireland

Plaintiff/Appellant

and

The Electricity Supply Board

Defendant/Respondent

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Judgment of Mr. Justice Clarke, Chief Justice, delivered the 25th of March, 2021.

1. **Introduction**

1.1 This Court has already given judgment on the appeal brought by the plaintiff/appellant ("UCC") arising from the decision of the Court of Appeal to reverse a High Court finding of negligence against the defendant/respondent ("the ESB"). For the reasons set out in the majority judgments (a joint judgment of Clarke C.J. and MacMenamin J. together with a separate concurring judgment of Charleton J.), the Court allowed UCC's appeal (see- *University College Cork v. Electricity Supply Board* [2020] IESC 38) against the judgment of the Court of Appeal (see- *University College Cork- National University of Ireland v. Electricity Supply Board* [2018] IECA 82), which had overturned the decision of the High Court finding the ESB negligent (see- *University College Cork- National University of Ireland v. Electricity Supply Board* [2015] IEHC 598). As noted in the judgments in this Court, there was also a cross appeal brought by the ESB which sought, in substance, to reinstate in one form or another an additional finding of the High Court to the effect that UCC was guilty of contributory negligence which contribution had been measured by the High Court at 40%.

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1.2 Obviously, in light of the view which the Court of Appeal took on the negligence claim brought by UCC, the question of contributory negligence did not arise. It should be pointed out that UCC did not contest all of the findings of fact made by the High Court which gave rise to its conclusion that UCC was guilty of contributory negligence measured at 40%. However, there was argument before the Court of Appeal on at least some of the bases on which the High Court had found and assessed contributory negligence. Notwithstanding the fact that contributory negligence was no longer relevant, the Court of Appeal did make some observations

concerning two elements of the finding of the High Court in that regard. While it will be necessary to refer to those matters in due course, the views expressed by the Court of Appeal were to the effect that the High Court was in error to hold UCC guilty of contributory negligence on those specific grounds. The ESB does not seek to go behind the finding by the Court of Appeal to the effect that the High Court was incorrect in law in respect of the two matters to which reference has been made. However, the facts which underlay those findings are said by the ESB to remain relevant to this appeal for reasons to which it will be necessary to turn.

1.3 In all those circumstances it would appear that there are three categories of findings of fact, or of mixed law and fact, which were made by the High Court and which remain relevant to the cross appeal brought by the ESB to this Court. That appeal seeks, as already noted, to reinstate the finding of contributory negligence made by the High Court. The findings in question are:-

(i) Findings of the High Court against UCC which were not the subject of an appeal to the Court of Appeal and which must now be taken to stand;

(ii) Findings of the High Court which were appealed to the Court of Appeal but which were not the subject of a specific determination by the Court of Appeal so that those issues remain alive before this Court; and

(iii) The two findings of the High Court to which reference has already been made which were overturned by the Court of Appeal and in respect of which no appeal has been brought to this Court so that those

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findings can no longer provide a basis for a determination of contributory negligence at least in the manner held by the High Court.

1.4 Before going on to canvas the issues which do remain alive before this Court, it is necessary to comment on a ruling made as a result of a case management hearing which was conducted before the full panel of this Court assigned to hear both the appeal which has already been determined and this cross appeal (see- *University College Cork v. Electricity Supply Board* [2020] IESC 66, ("the case management ruling")).

1.5 In addition, it is important to note that, prior to the hearing of the cross appeal, the parties also raised with the Court certain questions concerning the scope of the issues which were intended to be remitted back to the High Court in light of the majority judgments given in respect of the appeal. For reasons which I hope will become clear, there is at least some interaction between those questions and one of the issues which the Court will have to consider on this cross appeal. A hearing in respect of the issues raised concerning the remittal took place at the same time as the hearing of the cross appeal and it is, therefore, convenient to set out my views on the questions thus raised in respect of the remittal in the course of this judgment.

2. **The Case Management Ruling**

2.1 As appears from the case management ruling, a number of issues were canvassed before the Court. One issue concerned whether the cross appeal should go ahead at all. For the reasons set out in the case management ruling, the Court determined that the cross appeal should go ahead as planned although it was acknowledged that there might be some issues, depending on the view which the

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Court takes on certain questions, which could not properly be finally determined at this stage.

2.2 Next the Court considered the question of whether the ESB is entitled to rely on s.35(1)(i) of the Civil Liability Act, 1961. The issue raised by UCC in that regard suggests that the ESB is now seeking to rely on an argument not raised in either the High Court or the Court of Appeal. As set out in the case management ruling, that issue has been left over to be considered as part of the substantive hearing so that it remains one of the issues for debate and consideration.

2.3 Third, an issue arose as to whether, on the basis of the text of its application for leave to appeal, it could be said that it is open to the ESB to seek to argue before this Court that an apportionment of liability in respect of contributory negligence in excess of 40% should be determined by this Court to be the appropriate attribution of liability. For the reasons set out in the case management ruling, this Court determined that it was open to the ESB to seek to persuade the Court that a higher percentage of contribution should be attributed to UCC while also acknowledging that two of the bases on which the High Court came to its conclusion as to a 40% contribution are no longer in the picture.

2.4 Finally, it is clear that there may be a question as to whether it is appropriate for this Court, at this stage, to reach a final conclusion on the proper apportionment of liability as and between the parties in circumstances where this Court has already remitted back to the High Court certain issues concerning the finalisation of the claim brought by UCC against the ESB.

2.5 In those circumstances the issues which remain for determination by this Court on the cross appeal are as follows:-

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(i) Whether the ESB is entitled to rely, on the cross appeal, on the provisions of s.35(1)(i) of the Civil Liability Act, 1961;

(ii) If so, whether contributory negligence can be found against UCC on that basis;

(iii) The resolution of those issues between the parties concerning elements of the contributory negligence found against UCC by the High Court which were appealed to the Court of Appeal but which were not the subject of a determination or comment by that court and which, therefore, remain open for debate between the parties before this Court;

(iv) In light of such elements of contributory negligence as may remain held against UCC, either by virtue of findings of the High Court which were not appealed or such matters, if any, as this Court may determine are properly held against UCC notwithstanding the disputes between the parties in that regard, whether it is possible at this stage, and without knowing the precise findings which the High Court may make on those matters which have been remitted back to it, to reach a conclusion as to the appropriate determination of the extent of any contributory negligence which is held to lie against UCC; and

(v) In the event that the Court is persuaded that it can reach such a conclusion, then it will be necessary for the Court to determine the appropriate percentage.

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2.6 As already mentioned it will also be necessary to address the issue, which does not arise in the context of the cross appeal as such, concerning the scope of the matters which have been remitted to the High Court arising out of the majority judgments in respect of the appeal

2.7 In those circumstances it is necessary to address, insofar as relevant to those issues, the findings of the High Court and of the Court of Appeal.

3. The High Court and the Court of Appeal

3.1 The ESB suggest that the following findings of the High Court formed part of the overall assessment of that Court as to the contributory negligence of UCC.

3.2 The trial judge found that there was more that UCC could have done in advance to prepare for the flood events of November 2009 in order to protect its property against flood damage. Despite the fact that the river Lee had experienced a long and regular history of flooding prior to November 2009, and would undoubtedly flood again, the trial judge found that UCC had failed to prepare for fluvial flooding of any kind. UCC's buildings had flooded twice previously, in 1978 and 1990, and it was held that these previous flood events should have heightened UCC's awareness of flood risk. Following the 2009 flood, UCC spent €2 million implementing flood defences and put in place a detailed emergency response plan. In the trial judge's view, these measures could, and should, have been carried out before 2009. The trial judge also concluded that UCC bore the sole responsibility for its failure to conduct a Flood Risk Assessment in respect of its lower lying buildings at any time in advance of the flooding in 2009.

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3.3 Furthermore, UCC's response to warnings it had received from the ESB on 19 November 2009 was found by the trial judge to be inadequate. Despite having received express warnings directly from the ESB by email and by telephone regarding an increased flood risk on the 19th of November 2009, along with public warnings being issued on radio and television, the trial judge held that UCC did not take reasonable measures to protect its property, either by erecting barriers or by moving valuable property from locations at high risk of flooding

3.4 The trial judge noted that, as a result of what he considered to be UCC's lack of preparation, the university only had 100 sandbags (and no demountable barriers) at its disposal as a means of flood defence on the night of the 2009 flooding event, which measures proved insufficient to prevent damage to its property. Furthermore, UCC was held not to have put any plan in place for removing valuable and sensitive items of artwork and equipment, which UCC was further held to have inappropriately stored in basement locations.

3.5 In addition, the trial judge found that UCC had also placed unreasonable reliance on an unjustified belief that its campus was free from flood risk. In the High Court, Mr Poland, UCC's director of estates, gave evidence to the effect that no precautions were taken on the evening of the flood due to a mistaken belief on his part that the flood risk had been "designed out" of UCC's buildings. However, the trial judge determined that this belief was not based on any advice, professional or otherwise, and that, in this regard, the cause of the failure to prepare and implement protective measures against the flooding was UCC's alone. None of the above findings of primary fact were contested as such by UCC. However, there was debate as to the proper analysis of the consequences of those findings for the correct

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assessment of the liability of UCC for contributory negligence together with disputes over the inferences which could properly be drawn from those primary facts.

3.6 The trial judge also referred to some fifty or more examples of occasions where UCC was put on notice of flood risk at its buildings. He stated that, from 1991, UCC had received what the he described as “a blizzard of information advising it of fluvial flood-risk to its campus.”

3.7 The trial judge made a reference to UCC being a “sophisticated property developer and designer”. For the purposes of the present appeal, the ESB submit that the trial judge did not in fact consider UCC to be a property designer, nor does the ESB now seek to submit that this is the case. The ESB therefore submitted that this reference is a “canard”, which had no impact on the extent of the liability for which the trial judge found UCC to be responsible. However, UCC, for its part, submitted that the trial judge’s reference to it as a “property designer” cannot be disregarded so easily. UCC argued that it is directly germane to the findings of the High Court, on which the ESB now seeks to rely, that the trial judge (incorrectly on UCC’s case) regarded it as being a type of designer.

3.8 Finally, while the ESB unequivocally accepted that UCC is not a property designer, it suggested that the High Court found UCC contributorily negligent on the basis that UCC could be identified with the wrongdoings of its designers. The trial judge found UCC vicariously liable for the negligent acts and omissions of its professional advisors on the basis of s. 35(1)(a) of the Civil Liability Act, 1961, which will be discussed in further detail below. While this finding was later reversed on appeal, the ESB submitted that a similar conclusion can now be reached by this Court under s. 35(1)(i) of the Act.

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3.9 As noted earlier, UCC did not appeal against all of those findings and it is, therefore, said that the only elements of the determination of the High Court in relation to contributory negligence which remain open for debate before this Court are, firstly, whether the High Court erred in considering UCC to be a property designer and, secondly, whether the High Court was correct to find that there were fifty or more occasions since 1978 when UCC had been put on express notice and had failed to respond to the flood risk at the buildings it had constructed or acquired.

3.10 On the basis of its findings, the High Court, as already noted, determined the contribution of UCC to be 40%. However, as also already noted, two of the bases on which the High Court reached that conclusion as to the apportionment of contributory negligence were the subject of criticism by the Court of Appeal and are no longer pursued on this appeal by the ESB. Those findings were as follows.

3.11 The trial judge rejected UCC's submission that, by engaging ostensibly competent professionals to advise it in relation to the construction of its buildings, it had absolved itself of any liability in contributory negligence in respect of such construction. This would equate, it was held, to the ESB bearing responsibility for the wrongdoing of designers who acted for UCC. As the buildings were owned and constructed by UCC, the trial judge determined that it was primarily UCC's responsibility to ensure that it adopted an approach to its own campus which allowed for the flood risks. Taking into account the particular facts of the case, notably the fact that UCC is a large property developer situated in a city built on a floodplain and, therefore, possessed local knowledge about the regular history of flooding in Cork City, the trial judge concluded that UCC could not escape liability in contributory negligence purely on the basis that it had engaged professional advisors.

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3.12 The trial judge concluded that the designers, architects and engineers appointed and instructed by UCC were its agents, as they were acting under UCC's authority when they negligently (as he held) designed and constructed the relevant buildings on its specific instructions and without regard to flood alleviation and/or appropriate avoidance measures. On this basis, in accordance with s. 35(1)(a) of the Civil Liability Act, which provides that "a plaintiff shall be responsible for the acts of a person for whom he is, in the particular circumstances, vicariously liable", the trial judge determined that UCC was vicariously liable for the actions of its advisors.

3.13 Before the High Court, UCC had relied on the judgment of Fennelly J. in *KBC Bank Ireland Plc. v. BCM Hanby Wallace (A Firm)* [2013] IESC 32, 3 IR 759 in support of its submission that a plaintiff cannot be held liable in contributory negligence where the relevant plaintiff has engaged the services of ostensibly competent external experts. In response to this argument, the trial judge held that the judgment in *KBC* does not provide a blanket rule of absolution. In his view, the relationship between the experts on UCC's Buildings Committee and the external professionals hired by UCC, whose work was ultimately supervised by that Committee, could not be compared to the 'classic' relationships of doctor/patient or solicitor/client. Rather, the trial judge concluded that, when a plaintiff is not an 'unskilled' member of the public and it seeks to fix a defendant with the liability of the plaintiff's professional advisors, the balance of what is just and reasonable shifts and the plaintiff cannot escape all liability through the engagement of such advisors.

3.14 These findings by the High Court were subsequently reversed in the judgment of Ryan P., speaking for the Court of Appeal. While Ryan P. declined to express any view on the substantive issue as to whether it might be contributorily negligent to

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have built on a flood plain in circumstances of possible flooding caused by the negligence of others, he stated that he was not satisfied that general knowledge by the members of the Buildings Committee, or corporately by the college itself, actually rendered them vicariously liable for any potential negligent acts and omissions of its independent professional advisors. In the view of Ryan P, the circumstances in which the general rule set out by Fennelly J. in *KBC*, absolving a plaintiff from contributory negligence where it has appointed a professional expert, can be displaced are rare and unusual. On this basis, he accepted that it was not UCC's function to supervise the expert work of its advisors.

3.15 However, as noted earlier, while the ESB does not seek to revisit those findings of Ryan P., it does suggest that liability for the negligence found by the High Court in respect of the relevant professional advisers can be attached to UCC under s.35(1)(i) of the Civil Liability Act, 1961, as opposed to under s.35(1)(a) as found by the High Court.

3.16 On a more general level, it may perhaps be that a key difference between the parties stems from a dispute as to the proper characterisation of, or weight to be attached to, the various relevant findings of the High Court in an overall assessment of the determination of contributory negligence against UCC made by that Court and, importantly, the assessment of the percentage of liability to be attached to it. The ESB relies on the fact that there are a significant number of findings which either were not appealed or which it says should be sustained by this Court. UCC argues that the matter should not be approached on the basis of the numbers of individual findings of the High Court but rather on the basis of the importance of those findings both in respect of the overall determination of contributory negligence and in respect

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of the attribution of a particular percentage of contribution arising from any such finding.

3.17 Clearly, having regard to the fact that the issues raised concerning the scope of the matters remitted back to the High Court arise out of the judgment of this Court on the appeal, no aspects of the respective judgments of the High Court or the Court of Appeal are relevant to that question.

3.18 In those circumstances it is necessary to briefly outline the position of the parties.

4. The Position of the Parties

(i) The Section 35 Issue

4.1 As noted earlier, the first dispute between the parties which needs to be resolved concerns the question of whether the ESB should be entitled to seek to rely on s.35(1)(i) of the Civil Liability Act, 1961. In that context it is important to start by setting out the argument which the ESB seeks to make.

4.2 As identified earlier, the High Court, relying on s.35(1)(a) of the 1961 Act, had determined that UCC were fixed with liability in respect of certain findings of negligence made against their professional advisers. The Court of Appeal held that the High Court had erred in that regard. The ESB does not seek to invite this Court to disagree with the views expressed by the Court of Appeal. However, the ESB does seek to utilise those findings by the High Court, of negligence on the part of the relevant professional advisers, in a different way.

4.3 Section 35(1)(i) provides as follows:-

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"35.—(1) For the purpose of determining contributory negligence— …

(i) where the plaintiff's damage was caused by concurrent wrongdoers and the plaintiff's claim against one wrongdoer has become barred by the Statute of Limitations or any other limitation enactment, the plaintiff shall be deemed to be responsible for the acts of such wrongdoer;".

4.4 On that basis, and at the level of principle, it is clear that a plaintiff may be found guilty of contributory negligence in circumstances where that plaintiff has not joined a concurrent wrongdoer and where the claim against the relevant concurrent wrongdoer has become statute barred. In substance, a plaintiff will be fixed with a contribution which might otherwise have been found as against the non-joined and statute barred concurrent wrongdoer.

4.5 On that basis, the ESB seeks to argue that this Court should treat UCC as being contributorily negligent under s.35(1)(i) for the negligence found by the High Court against the relevant professional advisers. The first question, which as pointed out in the case management ruling has been left over to the hearing of the cross appeal, is as to whether it is appropriate to permit the ESB to now raise that argument.

4.6 The proper approach to new or refined arguments sought to be raised before an appellate court is as set out in the judgment of O'Donnell J. in *Lough Swillly Shellfish Growers Co-operative Society Ltd & Atlanfish Ltd v. Bradley & Ivers* [2013] IESC 16, 1 IR 227. From that judgment, it is clear that there is a spectrum of relevant circumstances ranging, at one end, from a situation where what is contended to be a "new" argument is simply a refinement or evolution of an argument fully ventilated in lower courts. It is inevitably the case that there may be some adjustment in the

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precise focus of the argument when cases go on appeal or, in current circumstances, on a second appeal.

4.7 At the other end of the spectrum are cases where there would be likely to be real prejudice caused by allowing a new argument to be made, given that other evidence or a different approach might reasonably have been expected to have been taken by the opposing party had the new argument been canvassed in lower courts. In like vein, there may be cases where it can fairly be said that the new argument sought to be relied on was either abandoned in lower courts or is inconsistent with the case previously made.

4.8 In essence, the ESB contends that the factual findings of negligence made by the High Court against UCC's professional advisers form the basis for both the erroneous finding of the High Court that UCC could have that negligence attributed to it on an agency basis, but also to a finding of contributory negligence under s.35(1)(i). On that basis, it is said that this case lies at the end of the spectrum at which the Court should allow the ESB to canvas what might, it was argued, be properly described as a refinement of the case made in the High Court in the sense that it is suggested that the contention now sought to be put forward involves no more than providing a different legal route for attributing the negligence of UCC's professional advisers to UCC itself.

4.9 Against that argument UCC suggests that, while the question of s.35 of the Civil Liability Act, 1961 (and in particular s.35(1)(a)) was raised in the lower courts, it is said that no reliance was placed on the subsection now sought to be invoked, being s.35(1)(i), and that, for that reason, no determination was made by either of the lower courts as to contributory negligence being possibly attributed to UCC under that

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subsection. In addition, it is said that there was no, or at least no sufficient, evidence placed before the High Court to enable a conclusion to be reached that any claims which might have existed against the relevant professional advisers were statute barred at any material time. On that basis, UCC argues that there would be prejudice in allowing the ESB to now rely on s.35(1)(i) and that there is, in any event, an insufficient factual basis established to enable the Court to reach a conclusion of liability on that basis. On one view it may well be the case that any potential proceedings against the professional advisors in question might only have become statute barred after the proceedings had been heard in the High Court.

4.10 It follows that this Court will have to consider whether it is appropriate to allow the ESB to rely on s.35(1)(i) and, if so, whether that section can properly be said to have been shown to entitle the ESB to attribute to UCC any negligence found by the High Court against UCC's professional advisers.

(ii) The extent of any contributory negligence against UCC.

4.11 Subject to the decision of the Court in respect of the s.35 issue, the remaining questions concerning UCC's potential liability in contributory negligence stem from findings of the High Court which either were not appealed to the Court of Appeal or, if so appealed, and leaving aside the findings of the High Court found to be in error by the Court of Appeal, are said to be correct.

4.12 The central findings of the High Court on which the ESB seeks to place reliance can be summarised in the following way. In a first category of allegation, it is said that a number of findings of fact of the High Court justify the conclusion that UCC was unprepared for the flooding which occurred in 2009 and so left itself unable to protect its property on the occasion in question. In the same category, it is also said

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that the High Court determined that UCC relied on an unjustified and unreasonable belief that its campus was free from flood risk which belief, it was argued, contributed to its failure to engage in flood prevention. In similar vein, it is said that UCC did not conduct a flood risk assessment for the campus and had not, in advance, put in place any adequate measures to be deployed in the event of an impending significant flood event.

4.13 It may be appropriate to consider these matters as different aspects of a contention that UCC was, at the time in question, negligently unprepared to meet a foreseeable and significant flood risk.

4.14 A second category of findings relied on by the ESB involve a contention that UCC did not respond appropriately to the risk of flooding when warnings were given in the immediate run up to the events of 19 November. A significant number of findings of fact of the High Court are relied on for this proposition.

4.15 A third set of contentions relies on findings by the High Court which suggest that UCC may have been negligent in placing sensitive and valuable equipment and artwork in vulnerable locations, in particular, in basements. In addition, it is said that at least some of these materials could, and should, have been moved when flooding was imminent.

4.16 In response UCC said the following. UCC submitted that the ESB was negligently indifferent to the risks posed to UCC's property by the flood event of November 2009 and that this so called negligent indifference is considerably more blameworthy than any alleged lack of preparation on UCC's part. UCC argues that the warnings issued by the ESB were "wholly deficient" on the basis that they failed to properly communicate the fact that the anticipated flooding posed a risk to persons

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and property or to give a final estimate of the volume of water expected to be released from the dams. UCC submits that the ESB gave these inadequate warnings despite being aware, at all material times, of the likely scale of the flooding.

4.17 It was further said by UCC that the ESB's submissions, concerning contributory negligence on UCC's part arising from its alleged lack of preparedness, contain notable errors. First, UCC argued that, contrary to what is submitted by the ESB, it did take action to respond to the warnings it had received of the risk of flooding from the ESB. It was submitted by UCC that the evidence demonstrated that Mr Prendergast, a buildings officer at the university, inspected the river level on three separate occasions on 19 November following warnings he had received from the ESB and that, based on the river level at those times, he judged that there was no cause for concern. Mr Prendergast also requested that the university's general service staff patrol the river bank throughout the day to monitor river levels. UCC, therefore, argued that it was incorrect for the ESB to suggest that it had taken no action to in response to warnings.

4.18 UCC also argued that Mr Poland's belief that the flood risk had been "designed out" of UCC's buildings was a reasonable one. UCC submitted that this belief was based, at least in part, on information published by the ESB in a brochure stating that its dams offered a high level of protection from fluvial flooding.

4.19 Furthermore, UCC argued that a statement it made, which is now relied on by the ESB, to the effect that there was further action it could have taken in order to limit the flood damage to its property should not be viewed as a concession on its part. It was submitted by UCC that this statement was made in the context of also stating, "… even if the ESB had given us (the appropriate) information on the morning of the 19th

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of November" and, therefore, it is more properly viewed as a mere statement on the scale of the flood.

4.20 In response to the ESB's submission that UCC "…took virtually no anticipatory steps to safeguard its property", UCC argued that it did in fact take measures to prevent flooding. UCC contests the ESB's assertion that it did not lay sandbags until after 7:30pm on 19 November, stating that sandbags were laid from early afternoon and that, as of 10pm that night, the sandbags were still maintaining a watertight barrier.

4.21 In respect of the ESB's submission that UCC did not begin to remove items from its basements until five hours after flooding had commenced in these areas, UCC asserted that the evidence does not support this claim. UCC also submitted that, given the scale of the flooding and the fact that many of the items in the basements were immovable, there was little it could have done to prevent the damage to these items caused by the flooding.

4.22 In light of the Court's conclusions concerning the issues which arise in respect of s.35(1)(i) of the Civil Liability Act, 1961 and of the Court's conclusions in respect of the various items of contributory negligence which are argued to be sustained or sustainable against UCC, it will then be necessary for the Court to consider whether it is in a position, at this stage, to reach an assessment as to the appropriate apportionment of liability.

(iii) The Allocation of Liability

4.23 As already identified in the case management ruling, an issue has arisen as to the extent to which it may be possible or appropriate for this Court, at this stage, to

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reach a definitive conclusion on the allocation of liability. The reason for the potential difficulty (which the ESB argues should prevent any definitive allocation at this stage) is the fact that UCC's substantive claim against the ESB has been remitted back for further consideration by the High Court in light of the findings set out in the majority judgments delivered in respect of the appeal.

4.24 It is well settled that, in apportioning liability between concurrent wrongdoers, a court is required to assess the relative blameworthiness of the parties concerned. Clearly, in light of such conclusions as this Court may reach in relation to the contented for contributory negligence of UCC, this Court will be in a position to assess the blameworthiness of UCC in that regard. The question really turns on the extent to which it is now possible to assess the relative blameworthiness of the ESB in respect of its negligence (and thus measure that blameworthiness against that of UCC) without knowing the findings which the High Court will make in respect of the matters remitted back to it. The ESB argues that no such assessment could properly be made at this stage. On the other hand, UCC argues that the only matters remitted back are questions of the calculation of damages which, it is said, do not have any bearing on the assessment of blameworthiness of the ESB. On that basis, UCC suggests that this Court should be in a position to reach a definitive assessment on the allocation of liability.

4.25 It is at this point that it is necessary to consider the questions arising out of the proper effect of the majority judgments given in respect of UCC's appeal. Those questions turn on the extent of the matters which have been remitted back to the High Court as a result of those judgments. It is important for the Court to give the greatest possible clarity to the High Court so as to avoid any misunderstanding about the scope

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of the matters which remain properly before that court as a result of the remittal back. However, it is also important for this Court to give such clarity where it is obvious that it may have an impact on the question of whether it is possible, at this stage, to reach a conclusion as to the relative blameworthiness of the parties. The greater the scope of the matters which have been remitted back, then the greater the potential that there may be for it not to be possible for this Court, at this stage, to reach any relative assessment of the blameworthiness of the respective parties. It is for that reason that it is appropriate to consider the question of the scope of the remittal back before assessing whether it is possible, at this stage, to reach a definitive assessment as to the relative liabilities of the parties in negligence.

4.26 Clearly, if the Court ultimately concludes that it is in a position to make such an assessment, then it will be necessary to consider the relative blameworthiness of both parties and reach a conclusion as to that assessment.

4.27 In that context. it may be that the Court will have to consider a particular aspect of the potential liability of the parties in the particular circumstances of this case. In a straightforward set of proceedings involving a contention of contributory negligence arising from, for example, a motor accident, the issues are likely to be relatively straightforward. If two drivers are each partly to blame for an accident, then a court has to assess the blameworthiness of the driving of the respective parties and determine an appropriate apportionment. The damages, to which that apportionment will be applied, will simply involve an assessment of the injuries and financial loss of both drivers.

4.28 On one view, the situation in this case may be somewhat more complex. The types of loss which may ultimately be found against the ESB will inevitably depend

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on an assessment of the difference between what would have happened had the ESB acted in a non-negligent way and what actually happened. It may, for example, turn out that the High Court ultimately concludes that a certain level of flooding would have occurred even in the absence of negligence on the part of the ESB but that the flooding was worse (or perhaps significantly worse) because of that negligence. The precise consequences of the difference between those two scenarios (that which actually happened and the counter factual of what would have happened in the absence of negligence on the part of the ESB) might conceivably impact differently in respect of loss resulting from damage to different parts of the campus.

4.29 For example, some of the loss might be found to be either wholly or very substantially likely to have occurred even in the absence of negligence. Clearly if there were to be a finding that all of a particular heading of loss would have been incurred even in the absence of negligence then there would be no causal link established between the negligence of the ESB and that loss so that no damages could be awarded under that heading. The question might then arise as to whether it would be appropriate to include an assessment of the extent to which UCC might have negligently contributed to that same loss in the overall mix of assessing UCC’s contribution. It may be necessary for this Court to reach a conclusion as to the proper approach to take in that regard and to place the Court’s assessment of that proper approach in the mix in considering whether it is appropriate now to reach a final conclusion on the allocation of liability.

4.30 Finally, it may be necessary for this Court to consider what should happen in the event that it does not feel that it is possible or appropriate to reach a definitive conclusion on the question of the apportionment of liability at this stage.

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(iv) The Scope Issue

4.31 In order to understand the position of the parties on the scope issue, it is necessary to recall that the majority judgments in this Court on the appeal ultimately upheld the finding of negligence made by the High Court against the ESB but did so on the basis of defining a somewhat different duty of care to that adopted by Barrett J. in his judgment. For its part, UCC argued that the only matters remitted back are really questions of quantification of damages being, on its case, concerned with assessing the value of the actual damage caused by the negligence of the ESB. In that regard UCC placed reliance on the fact that the High Court order directing a modular trial required the module which was ultimately the subject of the judgment of Barrett J. to deal both with liability and causation.

4.32 On the other hand, the ESB argued that it will be necessary for the High Court to look again at the question of the actual damage which can be attributed to the negligence of the ESB as found by this Court. There was undoubtedly significant evidence tendered at the original trial before the High Court which sought to clarify the extent to which additional flooding (and, therefore, damage to property) could be attributed to the manner in which the ESB operated the Lee Dams. However, the ESB argued that this evidence was all predicated on a finding of negligence based on the argument which found favour in the High Court which was to the effect that, in substance, the ESB's duty of care was such that it was required to spill water through its dams in a manner designed to seek to keep the level in the dams at TTOL and not higher. ESB, therefore, argued that it will be necessary for the High Court to assess whether, applying the duty of care found in the majority judgments of this Court on the appeal, the ESB was, in substance, required to seek to keep the level of water in its

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dams at or very close to that level or whether some different (and potentially higher) level might nonetheless have complied with the ESB's duty of care. On that basis. it was argued that the precise findings of the High Court on causation in respect of individual aspects of flooding are not necessarily sustained at this stage for, on the basis of that argument, it might be possible that the High Court, when considering the matters remitted back, might not necessarily come to the same conclusion concerning the level of flooding which would have occurred without negligence as had originally been determined by Barrett J. It was said that this is a logical possibility having regard to the different duty of care which this Court fixed on the ESB.

4.33 As already noted, it is important for this Court to provide that clarity to the High Court, but it is also important to determine that dispute as it may feed into the question of whether this Court has sufficient information about the relative culpabilities that can properly be placed on both parties so as to reach an assessment concerning the appropriate apportionment of liability with which those parties are to be fixed.

4.34 Following on from that description of the position of the parties, I propose first to consider the issues which arise in respect of s.35(1)(i) of the Civil Liability Act, 1961.

5. Can the ESB rely on Section 35(1)(i)?

5.1 There is no doubt that the ESB did not, in any material way, seek to rely on this particular subsection of s.35 at the trial or, indeed, before the Court of Appeal. As noted earlier, the ESB's case is that it is simply relying on findings of the trial judge to demonstrate a different legal route towards establishing the general proposition that UCC can be liable in contributory negligence in respect of the acts or

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omissions of its professional advisors. As also noted earlier, the High Court held that UCC was so liable on the basis of agency. The Court of Appeal disagreed and the ESB does not seek to reopen that aspect of the case. However, the ESB now says that those professional advisors were concurrent wrongdoers and that the claims against them are now statute barred so that UCC must be fixed with responsibility for any negligence which can properly be attributed to those advisors. On that basis, it is further said that, the negligence of those advisors having been established to the satisfaction of the High Court, the ESB's argument as to how UCC can now be fixed with a finding of contributory negligence in respect of those acts and omissions is simply an evolution of refinement of the original case such as to place the issue at the end of the spectrum identified in *Lough Swilly* at which the Court will ordinarily lean in favour of allowing a new argument to be made.

5.2 Counsel for the ESB was asked to indicate why the issue now sought to be relied on was not raised at the trial. It would appear that the answer is that it was unlikely that the claims in question would have been held to have been statute barred at the time of the trial so that, it is said, the case now sought to be advanced could not have been then made. That explanation seems to me to give rise to another fundamental difficulty. What the ESB now seeks to do is to rely on a legal position which it would appear would not have been available to it at the trial but which has only arisen since then. I do not rule out the possibility that there may be cases where the justice of the situation is such that a court may be required to entertain an argument which would not have been available at a trial but which has become available in the interval between trial and appeal. But in my view great care needs to be exercised to ensure that no injustice would flow from allowing such a course of action to be adopted. In that context, it is important to note the argument put forward

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by counsel for UCC, which suggested that it would have been possible to plead, on a contingent basis, reliance on s.35(1)(i) so as to put UCC on notice of the possibility that such an issue might arise either at the trial, if the timing of the trial were ultimately such that the statute issue might have arisen by that time, or on any appeal which might subsequently be taken. Counsel for the ESB did not accept that such a pleading would be appropriate.

5.3 Without deciding the merits of the pleading question concerning the possibility of what might be described as a contingent pleading, it does seem to me that it is appropriate to have regard to the fact that the ESB did not put UCC on any form of notice that it might, in the future, rely on s.35(1)(i) should the situation arise that a potential claim against any of the relevant professional advisors became statute barred. While not necessarily decisive, it seems to that the absence of any notice in that regard is a material factor to be taken into account in assessing the justice of allowing a new argument to be made.

5.4 The other significant component of the issue concerns the question of whether it can safely be said that the trial would not have been conducted in any materially different way had UCC been on such notice. On the ESB's side, reliance is placed on the fact that there was extensive evidence concerning the advice given by the relevant professionals and debate as to whether that advice was negligent. Thus the question of whether those professionals were negligent was undoubtedly before the High Court.

5.5 However, in my view, the real question is as to whether it is reasonably possible that the run of the case would have been different had the potential invocation of s.35(1)(i) been placed fairly on the table by the ESB in advance of the

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trial. The first leg of the analysis of the question must be to note that, had notice been given of the intention to rely on s.35(1)(i), UCC would undoubtedly have had to consider whether it would be wise to seek to join the relevant professionals as co-defendants. Any party who becomes aware that a defendant to proceedings which it has brought might potentially rely on s.35(1)(i) would have to consider such a matter. The answer to that question is not, I accept, black and white. The fact that it was clear that the ESB sought to fix, admittedly on an agency basis, UCC with responsibility in contributory negligence for the allegations which it intended to make against the relevant professional advisors means that the possible negligence of those advisors was undoubtedly in the frame in one way at least. However, there seems to me to be a difference between the situation of a plaintiff who is faced with a counterclaim for contributory negligence based on a contended for responsibility for acts or omissions of advisors on an agency-basis, on the one hand, and a suggestion that responsibility may have to be borne because a claim against such advisors has become statute barred, on the other. If the latter suggestion is made at a time before the claim has or might become statute barred, then the risk of the invocation of s.35(1)(i) would undoubtedly have to be factored in to any assessment of the appropriateness or otherwise of joining the professional advisors in question. In those circumstances it seems to me that it is reasonable to assume that notice of the potential intent to place reliance on s.35(1)(i) would at least have been an additional factor to be taken into account by UCC in making any decision about joining the relevant advisors.

5.6 The second leg of the analysis concerns the question of whether there would have been any reality to the run of the case being different even if those advisors had been joined as co-defendants. Obviously, UCC defended itself against the accusations of negligence against its advisors, although it is fair to say that a principal

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focus of that defence was the suggestion that it was not responsible, in law, for any negligence which might be established. It again seems to me to be reasonable to conclude that there would have been a real possibility that the defence of those allegations of negligence would have been differently conducted had the professional advisors in question been themselves parties to the action rather than potential witnesses.

5.7 Taking all of those factors into account, I am satisfied that there is a material risk of prejudice to UCC by allowing the ESB to now, belatedly, rely on s.35(1)(i). In those circumstances, it does not seem to me that the justice of the case would be met by allowing the ESB to so rely and I would propose that the arguments put forward by the ESB in reliance on the findings of negligence against the professional advisors in question as made by the High Court should not be entertained on this appeal.

5.8 It follows that I would also propose that it is unnecessary to consider the extent of any such negligence for, in light of the findings of the Court of Appeal which were not appealed to this Court and of my view that the ESB should not now be allowed to alter the legal basis for seeking to fix UCC with liability in respect of any negligence which might be established against those professional advisors, the issue of such negligence is no longer relevant.

5.9 It is next necessary to turn to an assessment of the remaining bases on which the ESB contends that there are sustainable findings of contributory negligence against UCC.

6. Contributory Negligence against UCC

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6.1 Before going on to detail and assess the matters relied on by the ESB in that regard it is, perhaps, important to emphasise one matter at this stage. The role of an appellate court in assessing the facts is well settled. Other than those cases where there may be a suggestion that a finding of fact by a trial judge cannot be sustained on the evidence, an appellate court is bound by the findings of fact of the trial judge. The principal focus of any argument on appeal should be grounded, therefore, in the facts as found by the trial judge rather than in the evidence tendered at the trial. That evidence can, of course, be relevant if there are real arguments as to whether the factual determinations by the trial judge can be sustained. It is also permissible to rely on evidence tendered if that evidence was not challenged at the trial and can be taken to have been accepted by the parties even if not specifically mentioned in the judgment of the Court. However, with the exception of challenges to the sustainability of the findings of fact of the trial judge (an issue which does not really arise on this appeal), this Court is properly confined to the facts determined by the trial judge or facts in respect of which unchallenged evidence was given. Any reliance on evidence beyond such matters is not permissible. This Court can, of course, assess whether inferences drawn from facts found are themselves sustainable or whether legal conclusions arising from the facts were properly drawn. Having made those observations, I now turn to the issues which arise under this heading.

6.2 As noted earlier, there were essentially three grounds, or groups of grounds, on which it was said that the finding of the trial judge, to the effect that UCC was guilty of contributory negligence, could be sustained. It is appropriate to deal with each in turn.

6.3 The most extensive set of grounds for suggesting liability on the part of UCC concerned the allegation that UCC was ill-prepared for what was described as a

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foreseeable and significant flood risk. There were a number of elements to this contention. First it was said that UCC cannot escape some element of liability in respect of its decision to build in locations which are contended to have been subject to foreseeable risk of flooding. Next it was said that UCC had failed to carry out any appropriate flood risk assessment and was, therefore, erroneously of the view that all flood risk had been eliminated. As a consequence, it was argued that there were insufficient flood prevention measures in place. I propose to address each of those contentions in turn.

6.4 I have already dealt with one aspect of the potential exposure of UCC to liability in relation to the design and location of some of its newer buildings. For the reasons addressed in the judgment of the Court of Appeal, it is clear that UCC is not vicariously liable for the actions of its professional advisors. For the reasons addressed in this judgment, it is clear that UCC cannot be made liable in these proceedings for the actions of those advisors on the basis of s.35(1)(i) of the 1961 Act. The question remains, however, as to whether there may not still be a residual potential liability on the part of UCC in relation to the location and design of the buildings in question.

6.5 It will be recalled that these issues arose in both the High Court and the Court of Appeal in the context of the judgment of Fennelly J. in *Byrne Wallace*. That judgment is authority for the proposition that there may be circumstances where a plaintiff cannot be held to be guilty of contributory negligence where the plaintiff concerned has engaged the services of ostensibly competent experts. The core question under this heading is as to whether the engagement of such ostensibly competent experts provides an absolute defence to an allegation of contributory negligence in all circumstances or whether there may be cases where, notwithstanding

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employing such experts and acting on their advice, there may nonetheless be a residual potential liability on the part of the plaintiff in question.

6.6 It seems to me that the answer to this question depends on the extent to which it could reasonably be expected that a person in the position of the plaintiff in question (including, as here, a legal person or institution) might be in a position to make or contribute to the decisions themselves.

6.7 There may well be situations where a person could not reasonably be expected to exercise any care of their own in relation to particular decisions or actions and where it would follow that it would be reasonable for the person concerned not to exercise any judgement of their own but rather to rely entirely on the views of experts. On the other hand, there are many circumstances in which persons might be expected to be able to exercise some judgement of their own but where it might equally not be unreasonable to supplement their own judgement with the assistance of expert advice. Persons may, for example, have particular expertise in a field of endeavour which has a legal aspect to it but may wish either to have their own views confirmed or supplemented by taking the advice of lawyers. One would expect a builder to know how to build a house but there might be aspects of that project where it would be reasonable for a builder to take expert architectural or engineering advice. Many more examples could be given.

6.8 In those circumstances it does not seem to me that there is a black and white answer to the question of whether a person can be entirely absolved from any potential liability by employing and acting on the advice of ostensibly competent experts. There may well be cases where that is so but there may also be cases where the party concerned must be held to retain some obligation in law to protect their own

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interests, in the sense that it may not be possible to fully avoid exposure to a finding of contributory negligence solely by engaging appropriate experts.

6.9 It must be recalled that *Byrne Wallace* was concerned with an allegation of contributory negligence made against a client who had sued its own professional advisors for negligence in the manner in which the matter in question had been handled. It is easy to see how a professional advisor cannot be heard to seek to place part of the blame on its own client where that client has sought and acted on the advice of the professional adviser concerned.

6.10 The situation here is, of course, different. The question is as to the extent to which UCC may be able to avoid a contention that it was partly responsible for the damage caused to its premises by relying on the fact that the location and design of certain of the buildings concerned was entrusted to professional advisors. If the only element of contributory negligence contended for concerned the location and design of the buildings in question, then I would have held that UCC would be entitled to escape from a finding of contributory negligence on the basis that the location and design of the relevant buildings was entrusted to ostensibly competent advisors. It must, of course, be noted that, had the issue of s.35(1)(i) of the 1961 Act been properly before the courts, UCC might, nonetheless, well have been fixed with liability in respect of any negligence established in respect of the location and design of the buildings in question. However, for the reasons already addressed, those issues do not properly arise on this appeal.

6.11 However, the allegations of contributory negligence against UCC are not confined to the location and design of specific buildings but are more wide-ranging. It does not seem to me that the fact that UCC employed ostensibly competent

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professionals to design certain of their buildings necessarily affects other aspects of the contention of contributory negligence.

6.12 First, it is clear that flooding from the river Lee in Cork was a well-known phenomenon. Obviously rivers which are prone to flooding give rise to special risk to neighbouring landowners and occupiers. The risk is not, of course, necessarily the same in respect of all land adjoining the river for the historical pattern of flooding may affect the level of risk applying to different plots of land. Nonetheless it is impossible to ignore the fact that flooding risk from the river Lee must have been a matter within the reasonable contemplation of anyone owning or occupying land close to its banks. It would not need an expert to alert Cork city landowners to that risk although, of course, expert opinion might assist with assessing the risk and, indeed, putting in place appropriate protective measures. Those factors seem to me to lean towards a finding that a person owning or occupying land near the banks of a river known to be prone to flooding may not be fully able to escape a potential liability in contributory negligence simply because relevant experts were employed. It is simply common sense that such owners and occupiers need also take care of their own interests.

6.13 But equally importantly regard must be had to the fact that UCC was not in the position of an ordinary owner of a small plot of land who decides to build a one-off house (still less someone who buys a house long since built) but rather was a major land occupier in what must undoubtedly have been a vulnerable area. UCC is also a significant institution with potential expertise of its own available within its staff. In saying that, it does not seem to me to be necessary to attempt to revisit the question of whether UCC can be described as a designer of the buildings for that issue is no longer before the Court. However, the extent of UCC's land holding and its own

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available expertise is, in my view, relevant to the assessment of whether it can be heard to say that it has entirely absolved itself of any potential responsibility by employing experts. In my view those factors also tend to suggest a residual obligation on the part of UCC to look after its own interests and to remain potentially liable even though experts are employed.

6.14 While it may be that UCC was entitled to take comfort from the fact that its more recent buildings were designed by ostensibly competent experts, it nonetheless seems to me that the trial judge was correct to hold that UCC was guilty of contributory negligence in failing to carry out a comprehensive risk assessment in respect of flooding. It would be highly likely that any such assessment would have made recommendations concerning appropriate measures which could be adopted to minimise the risk of damage should flooding occur. A major land occupier in an area where there is a foreseeable risk of flooding does, if it wishes to avoid the risk of a finding of contributory negligence, have an obligation to carry out such an assessment and to take advice on any measures which could and should be adopted. It also seems to me that the trial judge was entitled to conclude, on the evidence, that the carrying out of an assessment and the taking of action on the sort of recommendations which were likely to have ensued, would have had the effect of at least reducing the risk of flooding causing damage.

6.15 I am, therefore, satisfied that it is appropriate to fix UCC with contributory negligence relating to the failure to conduct and act on a flood risk assessment. The assessment of the extent to which liability for that contributory negligence should be apportioned between the parties will, for the reasons set out elsewhere in this judgment, be a matter for the trial judge hearing this case when it is remitted back to the High Court. In addition, again for the reasons set out elsewhere in this judgment,

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it is possible that the trial judge will consider it appropriate to reach a different assessment as to the apportionment of such liability in respect of damage occurring in relation to different properties within UCC's estate. However, it is important to emphasise that only certain of the findings of contributory negligence made by Barrett J. can now be said to be upheld. While the trial judge hearing the matter on remittal back is, of course, free to reach whatever conclusion is considered appropriate as to the appropriate apportionment of liability, the factual basis for the apportionment to be attributed to UCC must have regard only to those aspects of contributory negligence which have been affirmed on appeal. However, it is important to emphasise that the trial judge hearing the matter on remittal back is not bound by the assessment of 40% reached by Barrett J. in respect of the contributory negligence which he found to be present. Rather, the trial judge should assess the apportionment of contributory negligence afresh but having regard only to those elements of contributory negligence which remain in place against UCC as a result of the appellate process.

6.16 The next general heading under which it is said that UCC was guilty of contributory negligence concerned the finding of the trial judge that UCC had not responded adequately to warnings of the impending risk of serious flooding. I am satisfied that the findings of the trial judge in that regard were sustainable on the evidence. It is not fair to characterise UCC as having failed to take any action. However, this factor goes only to the assessment of the degree of culpability on the part of UCC but is not such as can allow UCC to escape from a finding of contributory negligence under this heading.

6.17 Finally, there is the question of the placement of certain equipment and other valuable material in locations which, it was argued, were particularly at risk should

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flooding occur. There are, perhaps, two aspects to that issue. The first concerns the placing of the materials in question in the first place. The second involves whether some of the materials could have been moved had more prompt action been taken. It does seem to me that the general obligation which I have identified, which would have required UCC to take reasonable care for its own property in the context of the risk of flooding should it wish to avoid a finding of contributory negligence, also means that care should have been exercised to minimise the extent to which damage might be caused in the event that flooding occurred. Some degree of contributory negligence must, therefore, be attributed to UCC under this heading. However, in my view, the proper way to approach this aspect of the claim made by the ESB in respect of contributory negligence is that it should be assessed in the context of individual heads of claim. To the extent that any particular damage to materials is shown to be causally connected to the negligence of the ESB identified in the principal judgment then a separate assessment should be made as to the extent to which UCC may be contributorily negligent to the damage to each individual item or set of items by virtue of its location and also the question of whether it could and should have been moved to a safer position so as to avoid damage. I would not, in those circumstances, take this aspect of contributory negligence into account in an overall assessment of the liability of the parties but rather would deploy it as part of the assessment in respect of the damages attributable to particular items of loss incurred.

6.18 It will be necessary to turn shortly to the question of the precise matters which will require to be determined in the High Court when these proceedings are reheard in that court as a result of the referral back by this Court, in light of the principal judgment and having regard to certain findings in this judgment. I will, in that context, set out the reasons why I propose that the assessment of the relative

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blameworthiness of the parties should be amongst the matters remitted back to the High Court and also will propose the methodology which I suggest the High Court should be required to adopt in assessing that liability by reference to damage at different locations on UCC's property. However, at this stage it is important to emphasise that the factual and legal basis for attributing contributory negligence to UCC should now be taken to be definitively determined by reference to the original judgment of the High Court as varied by both the judgments in the Court of Appeal and in this Court. Those questions are no longer open and should not be revisited on foot of any remittal back. In light of the observations contained in this section of this judgment, it will, of course, be necessary for the trial judge to assess the blameworthiness of UCC and the relative apportionment of liability between UCC and ESB. However, the legal and factual basis for that assessment, insofar as it relates to the liability of UCC, as opposed to the quantification of the apportionment of liability between the parties, is not a matter which remains open. In that context it is important to observe that, unless specifically overturned on appeal, any relevant finding of the trial judge concerning contributory negligence remains undisturbed.

6.19 In light of those conclusions it is next necessary to determine the question, posed earlier in this judgment, as to whether it is now possible or appropriate for this Court to apportion liability. As also already noted, that question is at least partly interlinked with the scope of the remittal of the appeal to which reference has already been made. I consider it appropriate to address that later question first.

7. Scope of the Remittal

7.1 As already noted, the issue here really turns on the extent to which the High Court, in considering the matters remitted back to it by this Court as a result of the

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Court's findings on the appeal, has to look again at the question of the damage actually caused by the ESB's found negligence as opposed merely looking at the quantification of the damages which must be awarded in respect of the damage already determined by the High Court to be causally linked to that negligence.

7.2 It seems to me that the arguments of the ESB in this regard are well made. The basis on which the majority judgments of this Court found that the ESB was guilty of negligence involve the imposition of a duty of care which was, at least in some respects, different to that identified by Barrett J. in his judgment. Barrett J.'s assessment of the causal links between the negligence that he found and the damage caused was necessarily influenced by the nature of the duty of care which had found favour in the High Court and an assessment of the consequences of the breach of that duty of care. It cannot be ruled out that an assessment of the consequences of a breach of the somewhat different duty of care identified by this Court might lead to different conclusions as to the extent of the damage causally linked to the established breach of that duty. Such issues frequently arise in complex negligence actions.

7.3 For example, a claim in clinical negligence in a medical context may involve a series of points in time at which it might be asserted that a different course of action or different advice ought have been given so as to comply with any relevant duty of care. However, the consequences for the ultimate outcome for the patient can often be quite different depending on the precise point in time at which the Court assesses that negligence occurred. For example, if a court finds against the plaintiff in respect of allegations of negligence in respect of earlier times during a relevant sequence and only finds against the defendant in respect of late occurring acts, omissions or advice, the causal link between that late occurring negligence and the ultimate outcome of the entire process from the patient's perspective may only be capable of being established

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in relation to a relatively minor part of the adverse outcomes. Put another way, there can be cases where confining a finding of negligence to a late part of a continuing process may lead to the conclusion that much of the adverse consequences would have occurred in any event even in the absence of negligence. On the other hand, a finding that negligence occurred at a much earlier stage in the same process might legitimately lead to the conclusion that a significantly better, or even completely benign, outcome might have ensued. Other examples beyond those arising in clinical negligence can be given. Causation is not assessed by reason of a finding of negligence simpliciter but rather has to be assessed in light of the precise finding of negligence made. Different findings of negligence in respect of the same events can, at least in principle, give rise to different causal effects.

7.4 It is important that I emphasise that I am not suggesting that the causal links identified by Barrett J. may not ultimately be established to be the same, or as near as makes no practical difference to the same, as the causal links that may be established to flow from the negligence identified by this Court. However, that will not necessarily be the case. It will be for the High Court to determine what the practical result on the ground would have been had the ESB not acted negligently in breach of the duty of care identified by this Court in the majority judgments. That assessment may lead to the same conclusion as reached by Barrett J. on causation, or it may lead to a different conclusion. But the possibility of such a different conclusion cannot be ruled out.

7.5 I would, therefore, propose that this Court make clear that it is open to the High Court, on the remittal back of the issues which were the subject of the appeal, to consider whether the causal link determined by Barrett J. in his judgment remains sustainable in light of the somewhat different duty of care identified by this Court. If

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the High Court is satisfied that there is no material difference in that regard, then the findings of Barrett J. remain in place. However, if the High Court is not so satisfied then it will be necessary for the trial judge to assess the different level of damage that would have occurred if the ESB had not been negligent in the manner determined by the majority judgments of this Court.

7.6 Having reached those conclusions, it is next necessary to return to the question of whether, in all the circumstances, it is appropriate for this Court to make a final determination as to the apportionment of liability at this stage or whether that matter also requires to be remitted back to the High Court.

8. Should Apportionment Be Decided Now?

8.1 It seems to me that a number of factors need to be taken into account in reaching an assessment as to whether it is safe for this Court to now make a definitive assessment of the apportionment of liability between the parties. I consider that the appropriate test to be applied is one of safety. Is there any real risk that the evidence which will be tendered before the High Court when the matters already remitted back to it are under consideration, coupled with such determinations as that court may make in respect of that evidence, could have a legitimate and material effect on the proper assessment of the appropriate apportionment? If there is any such real risk, then it would not be appropriate for this Court to now make that apportionment.

8.2 The first matter that needs to be considered concerns the fact that, at least in general terms, the evidence previously tendered at the original trial demonstrated that the effect of particular levels of flooding on different properties within UCC's campus was not the same. It will, of course, be necessary for the High Court to assess, in light of the determination of the duty of care on the ESB identified in the majority

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judgments of this Court on the appeal, whether, and if so to what extent, it can be shown that damage, or additional damage, was caused to each particular property because of the negligence of the ESB. Inevitably, that exercise will require the High Court to assess the water levels which would have arisen without negligence, compare those levels to the levels which actually occurred, and determine what was the effect, in terms of damage to property, of the difference.

8.3 However, it may also be possible to make a similar assessment in respect of the effect on the flooding of each individual property of the items of contributory negligence found in the judgment of this Court on this cross appeal. In respect of each property did, in fact, any of those established items of contributory negligence actually contribute to the damage to the specific property in question? In my view, this case is not like the standard motor accident claim in which all of the damage, whether physical or otherwise, is attributable to the negligence of two drivers.

8.4 In the context of complex proceedings such as these, there are at least three possibilities in respect of any damage which might be found by the High Court to be causally linked to the ESB's negligence, insofar as that damage relates to any specific property on UCC's campus. First, it might, at least in theory, be held that none of the items of contributory negligence identified in this judgment in fact contributed to the damage at a specified property. Second, it might be held that only some of the items of contributory negligence identified in this judgment actually contributed to the damage at a specified property. Third, it might be found that all of the items of contributory negligence identified in this judgment had an effect on the damage at a specified property. In my view, a complex case such as this, unlike the simple motor accident case, requires a more sophisticated analysis of that type. The need for such

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an approach leads me to the view that such an analysis needs to be first carried out by the High Court.

8.5 Next, it cannot be ruled out that evidence, which might be tendered when the matter is remitted to the High Court, as to ESB's negligence in light of the duty of care identified in the majority judgments of this Court on appeal, might have some impact on the assessment of the overall blameworthiness of the ESB which is, of course, an important factor which must go into the mix in apportioning liability. There would not seem to be any basis for suggesting that the blameworthiness of the ESB could be different in respect of different properties within UCC's estate. The consequence of the ESB's negligence was that more water came downstream into Cork city in a very short period of time than would have been the case had the Lee Dams been managed in a different way. While the causal link between the presence of that additional water and any particular item of claimed damage may be a matter which will require careful analysis when the High Court reconsiders these issues, it does not seem to me that the blameworthiness of the ESB for the presence of that additional water could differ materially between one property and the next, although an assessment of that overall blameworthiness will require the Court to consider that question in light of the duty of care identified by this Court as opposed to the duty of care adopted by the High Court at the original trial. That, too, is a factor which would cause me to lean against assessing the appropriate apportionment at this stage.

8.6 In those circumstances, I do not consider that this Court should reach a definitive assessment on such apportionment but rather should remit that matter also back to the High Court.

8.7 Before leaving this topic I would, however, offer one additional observation. These proceedings have been before the courts for a considerable period of time and

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have already occupied a large amount of court days across three jurisdictions. That is not a criticism of anyone but rather simply reflects the complexity of the case both as to the facts and the law. However, in those circumstances, I consider it important to emphasise that only those matters which have been specifically remitted back should be canvassed before the High Court. The fact that the case has been remitted back cannot provide an opening for either side to seek to revisit matters which have been definitively determined by the process to date. Nor should any additional evidence be led which is not strictly necessary to resolve the limited issues which will then be before the High Court. There is no reason why reliance cannot be placed on the evidence already led at the original trial to the extent that such evidence either went unchallenged or was the subject of findings of fact by the trial judge where that evidence remains relevant to the assessment to be carried out on the remittal back. In essence, the matters which the High Court will have to consider are these:-

(a) Whether there is any basis for suggesting that the additional level of flooding caused by the negligence of the ESB identified by this Court is different to the additional level of flooding identified by Barrett J. at the trial.

(b) If not, then the findings of Barrett J. on causation stand. If so, then the High Court will have to reassess causation but only to the extent mandated by the different level of flooding found to be due to the different duty of care identified by this Court.

(c) A quantification of the damages attributed to such additional flooding as is determined to be due to the ESB's negligence (whether on the basis of the causal links determined by Barrett J. or an alternative assessment of causation).

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(d) An assessment, in respect of each property location at which damage is found to have been caused by the negligence of the ESB, of the extent, if any, to which the contributory negligence identified in this judgment of the Court can be said to be material.

(e) In respect of each such property, an assessment of the relative blameworthiness of the parties in light of the findings of negligence against the ESB (having regard to the duty of care identified by this Court) and in light of such items of contributory negligence as also identified in this judgment as are found to have contributed to the damage at the location in question.

For the avoidance of doubt, I do not see that it would be appropriate to seek to go behind the findings of this Court in respect of contributory negligence as against UCC other than to assess whether, and if so to what extent, that negligence might be material in relation to the damage at any particular property.

8.8 I would expect the parties to be of assistance to the High Court in ensuring that only those issues are debated and that, within the parameters of those questions, the evidence (whether deriving from the original trial and the findings of fact of the trial judge in that context, or new evidence) is presented in the most efficient way possible.

9. <u>Conclusions</u>

9.1 For the reasons set out in this judgment, I am not persuaded that it is appropriate to permit the ESB to seek to place reliance on the provisions of s.35(1)(i) of the 1961 Act as a means of seeking to fix UCC with liability in contributory negligence for the actions of UCC's professional advisers. Having regard to that finding and of the view expressed by the Court of Appeal, not appealed to this Court

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by the ESB, that UCC could not be found liable for any negligence determined by the High Court in respect of those professional advisers on the basis of agency, I propose that no regard can now be had to any such negligence in determining the extent of contributory negligence on the part of UCC.

9.2 For the further reasons set out in this judgment, I have concluded that some, but not all, of the bases on which the High Court determined that UCC was guilty of contributory negligence are sustained on the evidence.

9.3 I have also set out my views on the scope of the matters which have properly been remitted back to the High Court as a result of the majority judgments given by this Court on the appeal in this case. For the reasons which I have sought to analyse, I am satisfied that it is possible (although it is not necessarily the case) that the question of causation may have to be revisited by the High Court having regard to the fact that the majority judgments of this Court imposed a different duty of care on the ESB than that found originally by the High Court and it follows that it is possible that the consequences caused by a breach of that duty of care may differ from the consequences caused by the duty of care identified by the High Court.

9.4 In light of that conclusion and for other reasons analysed in this judgment, I have concluded that it would not be appropriate for this Court to now seek to reach a definite conclusion as to the apportionment of liability between the parties and would propose that that matter also be remitted back to the High Court.

9.5 Finally, I have set out in some detail the matters which I consider remain for debate when these proceedings are back for hearing before the High Court in the hope that this may prove of assistance in ensuring that these long-running proceedings are brought to a close as quickly as possible. In that context I have set out some observations as to the matters which are, and importantly which are not, still alive for

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further debate when the matter is remitted back. It will be a matter for the President of the High Court to determine whether these proceedings return to the same judge who heard this case originally or whether a different judge should be charged with the matters remitted back.

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