THE HIGH COURT
COMMERCIAL

[2024] IEHC 347
2017 No. 2256 P.

BETWEEN

EVERYDAY FINANCE DAC

PLAINTIFF

AND

RAYMOND BRADLEY, TERENCE DOYLE AND SINEAD BYRNE PRACTISING UNDER THE STYLE AND TITLE OF MALCOMSON LAW SOLICITORS AND PHILIP MORRISSEY AND ALL PERSONS CONCERNED

DEFENDANTS

JUDGMENT of Mr. Justice David Barniville, President of the High Court, delivered on the 7th June, 2024

1. Introduction

1. This is my judgment on a costs issue. It follows the judgment which I delivered on an application brought by Allied Irish Banks plc ("AIB"), the then-plaintiff in the proceedings, and Everyday Finance Designated Activity Company ("Everyday"), then a non-party to the proceedings, for various reliefs arising out of a settlement agreement dated 31st January, 2020 (the "Settlement Agreement"). I delivered judgment on that application on 14th April, 2023, (*Allied Irish Banks plc & Anor v. Bradley & Ors* [2023] IEHC 179 (the "Principal Judgment")).

2. One of the matters addressed in the Principal Judgment was an application to substitute Everyday for AIB as the plaintiff in the proceedings. An order was duly made making that substitution. Everyday, therefore, now appears as the plaintiff in the title to the proceedings in this judgment.

3. The Principal Judgment was delivered electronically. I listed the matter for mention on 26th April, 2023, for the purposes of making orders and to deal with any

consequential applications. I directed the solicitors for AIB/Everyday to prepare and circulate a draft order reflecting the terms of the Principal Judgment in advance of that date. That direction was complied with. On 26th April, 2023, the matter was put back to be further dealt with on 12th May, 2023, to allow the parties time to consider the draft order and to make submissions in relation to it.

4. Prior to the adjourned date, the first to third named defendants (defined and described in the Principal Judgment as the "Malcomson Law Defendants", a description which I also use in this judgment) confirmed their agreement to the draft order, save in relation to costs (the draft had provided for the Malcomson Law Defendants and Mr. Morrissey to pay the costs of the application).

5. When the matter appeared before me again on 12th May, 2023, the Malcomson Law Defendants were not in a position to deal with the issue of costs and sought a further short adjournment. Counsel on their behalf did set out their preliminary position which was that costs should not be awarded against the Malcomson Law Defendants and Mr. Morrissey on a joint and several basis. I granted the adjournment sought and, on the basis that AIB/Everyday were presumptively entitled to their costs, having been entirely successful in the application, I directed that the Malcomson Law Defendants and Mr. Morrissey furnish written submissions on the issue of costs which were then to be replied to by AIB/Everyday. Those directions were all complied with. I received helpful written submissions from the parties. The costs issue was then heard by me on 13th June, 2023. Since the issue was not straightforward, I reserved judgment on the costs issue.

6. Leaving aside the issue of costs, the High Court order giving effect to my judgment was made on 12th May, 2023, and perfected on 9th June, 2023. It was then amended by way of the "slip rule" under O. 28, r. 11 RSC on 31st July, 2023. That amendment

is not relevant to the costs issue which I have to determine here. On 12th May, 2023, I also refused Mr. Morrissey's application for a stay on the order and a further application which he wished to make (by way of a separate motion) seeking to review and set aside my judgment.

7. Mr. Morrissey appealed those orders to the Court of Appeal. He also sought a stay from the Court of Appeal. In a judgment delivered on 14th July, 2023, Costello J. in the Court of Appeal refused Mr. Morrissey's application for a stay. In a further detailed judgment delivered by Whelan J. on behalf of the Court of Appeal on 8th March, 2024, that Court dismissed Mr. Morrissey's appeals and affirmed the orders which I had made in the High Court. The Court of Appeal directed that Mr. Morrissey should be liable for one set of costs in respect of the appeals (*Everyday Finance DAC v Bradley & Ors* [2024] IECA 54).

8. Having reserved judgment on the costs of the AIB/Everyday application in the High Court, this judgment now deals with that issue.

2. Factual and Procedural Background relevant to Costs Issue

9. The factual and procedural background relevant to the issue of costs which I have to decide in this judgment was set out in detail in the Principal Judgment. A description of the proceedings commenced by AIB against the various defendants including the Malcomson Law Defendants and Mr. Morrissey was set out at paras. 10 – 17 of that judgment. A full account of the AIB/Everyday application was provided at paras. 18 – 46 of the Principal Judgment. In that section of the judgment, I outlined the relief which was sought in the AIB/Everyday application and the evidence provided to the court on behalf of AIB/Everyday and on behalf of the other parties involved in the application, being the Malcomson Law Defendants and Mr. Morrissey. I also

outlined the route which the application took before being ultimately decided by me in the Principal Judgment.

10. AIB/Everyday based their application on the Settlement Agreement and the consent provided by Mr. Morrissey in that agreement to the orders sought in the application and in a separate letter of consent. That consent was conveyed to the court on behalf of Mr. Morrissey by his senior counsel on 31st January, 2020 and 10th February, 2020. The latter date was the first return date of the AIB/Everyday application. As I noted in the Principal Judgment (at paras. 18 and 147), the only reason that orders were not made on the AIB/Everyday application on or shortly after that return date was because the Malcomson Law Defendants were opposing some of the orders sought. A hearing of the application was, therefore, necessary in order for the court to consider those objections.

11. Mr. Morrissey was not objecting to the orders at that stage. It was not until 26th June, 2020, that, having parted company with his solicitors with leave of the court, Mr. Morrissey opposed the orders sought by AIB/Everyday (as outlined at para. 42 of the Principal Judgment). Mr. Morrissey also sought to withdraw his consent to the orders sought by AIB/Everyday.

12. The Malcomson Law Defendants opposed most of the orders sought in the AIB/Everyday application, including (a) the order substituting Everyday as a plaintiff in place of AIB, (b) the declaration sought that AIB had an equitable mortgage over the relevant property and a well charging orders over that property, (c) the appointment of receivers with power to sell the relevant property (subject to a requirement on the part of the receivers to retain sufficient funds to discharge the alleged charge relied on by the Malcomson Law Defendants (the "Malcomson Law Charge")).

13. When Mr. Morrissey sought to withdraw the consent he had provided in the Settlement Agreement and in the separate letter of consent, the Malcomson Law Defendants supported Mr. Morrissey's position and objected to the court making orders on foot of his consent. The Malcomson Law Defendants maintained their opposition to those orders and sided with Mr. Morrissey on the issue as to his entitlement to withdraw his consent.

14. For the detailed reasons set out in the Principal Judgment, I was satisfied that AIB/Everyday were entitled to all of the orders sought in their application. I rejected the opposition to the making of those orders advanced by the Malcomson Law Defendants and by Mr. Morrissey. I rejected the submissions advanced by the Malcomson Law Defendants and by Mr. Morrissey on the issue of Mr. Morrissey's entitlement to withdraw his consent and I concluded that it was not open to him to do so. I summarised the reasons for my conclusions and for the orders which I made at paras. 165 – 170 of the Principal Judgment. I made orders giving effect to the conclusions set out in the Principal Judgment on 12th May, 2023 (the order was perfected on 9th June, 2023). As outlined earlier, I left over the issue of costs for further submissions and heard those submissions on 13th June, 2023.

3. The Costs Dispute

15. Not surprisingly, AIB/Everyday sought their costs of the application on the grounds that they were "*entirely successful*" in the application within the meaning of that term in s. 169(1) of the Legal Services Regulation Act 2015 (the "2015 Act"). The Malcomson Law Defendants did not ultimately oppose the making of an order for costs against them and against Mr. Morrissey. However, they maintained that the costs should not be ordered on a joint and several basis against them and Mr.

Morrissey. They contended that they should be treated separately and distinctly from Mr. Morrissey in any costs order to be made by the court. They also asked for their costs to be measured or apportioned as between them and Mr. Morrissey. In addition, they sought a stay on any order for costs affecting them pending the determination of the proceedings against them (those proceedings remain to be tried). Mr. Morrissey's position was that the court should refuse to make any order for costs against him for a number of reasons. Those reasons were essentially directed to the merits of his underlying dispute with AIB, the receivers and others. He further contended that if, contrary to his principal contention, costs were awarded against him, any order for costs made should not be made against him and the Malcomson Law Defendants on a joint and several basis but should be limited to the issues with which he was concerned.

4. Decision on Costs Issue

(a) AIB/Everyday Entitlement to an Order for Costs

16. There was no dispute between AIB/Everyday, on the one hand, and the Malcomson Law Defendants, on the other, as to the legal principles and provisions to be applied in the making of an order for costs. While Mr. Morrissey did not express his agreement with those principles, in my view, there can be no dispute as to the relevant governing principles and provisions.

17. The power to award costs is provided for now in ss. 168 and 169 of the 2015 Act and in the recast O. 99, r. 2(1) RSC. Order 99, rule 2(1) provides that the costs of and incidental to every proceeding is in the discretion of the court. Section 168(1) of the 2015 Act provides that the court may order a party to proceedings to pay the costs of or incidental to the proceedings of one or more other parties to the proceedings,

subject to further details which are spelt out in the remaining provisions of Part 11 of the 2011 Act.

18. Section 169, which bears the marginal note *"costs to follow event"*, provides for the general rule that a party who is *"entirely successful"* in the proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise. Section 169(1) goes on to refer to some circumstances in which the court might order otherwise. They include the *"particular nature and circumstances of the case"* and the *"conduct of the proceedings by the parties"*, including various particular types of conduct or behaviour which are set out, by way of example, at paras. (a) – (g) of s. 169(1). None of those circumstances are present in this case.

19. There is, therefore, a presumptive entitlement to an award of costs in favour of a party who has been *"entirely successful"* in the proceedings. That principle also applies to the cost of interlocutory applications or proceedings where the court is required, by O. 99, r. 2(3), to make an award of costs *"save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application"*.

20. It is debatable whether, at least insofar as Mr. Morrissey is concerned, the AIB/Everyday application could properly be described as an interlocutory application, although it might be properly treated as such from the perspective of the Malcomson Law Defendants. However, I do believe that it is possible justly or fairly to adjudicate on the parties' entitlement to and liability for the costs of the AIB/Everyday application and, irrespective of whether it is treated as an interlocutory application or otherwise, it cannot be disputed that AIB/Everyday were *"entirely successful"* in their application and obtained all of the relevant reliefs which they were seeking in the application. On that basis, therefore, AIB/Everyday are presumptively entitled to an

order for costs against the Malcomson Law Defendants and Mr. Morrissey, having regard, in particular, to the provisions of s. 169(1) of the 2015 Act and O. 99, r. 2(1). AIB/Everyday should, of course, be treated as one party for the purposes of any costs order I make and I assume that the costs order should be in favour of Everyday. That should be confirmed for the purposes of the final order to be made.

21. The principles to be applied in light of those statutory provisions are those summarised by Murray J. in the Court of Appeal in *Chubb European Group S.E. v. Health Insurance Authority* [2020] IECA 183 (*"Chubb"*). Having adverted to the possibility that, in some interlocutory applications, it might not be possible to decide who won the "event" in the application (a difficulty which does not exist here), Murray J. then identified a number of general principles applicable to the costs of proceedings (as opposed to the cost of interlocutory applications). Since in this case it is clear that AIB/Everyday were the winners of the *"event"* and were *"entirely successful"* in the application, the principles set out by Murray J. are, in my view, equally applicable to the issue of costs which I have to decide here.

22. The principles, as summarised by Murray J., are as follows:

"(a) The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and O.99, r.2(1)).

(b) In considering the awarding of costs of any action, the Court should 'have regard to' the provisions of s.169(1) (O.9, r.3(1)).

(c) In a case where the party seeking costs has been 'entirely successful in those proceedings', the party so succeeding 'is entitled' to an award of costs against the unsuccessful party unless the court orders otherwise (s.169(1)).

(d) In determining whether to 'order otherwise' the court should have regard to the 'nature and circumstances of the case' and 'the conduct of the proceedings by the parties' (s.169(1)).

(e) Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s. 169(1)(a) and (b)).

(f) The Court, in the exercise of its discretion may also make an order that where a party is 'partially successful' in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (s.168(2)(d)).

(g) Even where a party has not been 'entirely successful' the court should still have regard to the matters referred to in s.169(1)(a)-(g) when deciding whether to award costs (O.99, r.3(1)).

(h) In the exercise of its discretion, the Court may order the payment of a portion of a party's costs, or costs from or until a specified date (s.168(2)(a))."

23. In a later judgment in the Court of Appeal, *Higgins v. Irish Aviation Authority* [2020] IECA 277 (*"Higgins"*), Murray J. explained that, in applying the provisions of s. 168 and s. 169 of the 2015 Act, the court had to address four questions:

(a) Has either party to the proceedings been 'entirely successful' in the case as that phrase is used in s.169(1)?

(b) If so, is there any reason why, having regard to the matters specified in s.169(1)(a) – (g), all of the costs should not be ordered in favour of that party?

(c) If neither party has been 'entirely successful' have one or more parties been 'partially successful' within the meaning of s. 168(2)?

(d) If one or more parties have been 'partially successful' and having regard to the factors outlined in s.169(1)(a)-(g) should some of the costs be ordered in favour of the party or parties that were 'partially successful' and if so, what should those costs be?"

24. In concluding that AIB/Everyday are presumptively entitled to an award of costs against the Malcomson Law Defendants and Mr. Morrissey on the basis that they have been *"entirely successful"* in their application, I have considered and applied the general principles summarised by Murray J. in *Chubb* and have asked myself the questions identified by Murray J. in *Higgins*.

25. AIB/Everyday have undoubtedly been *"entirely successful"* in their application and, in my view, there is nothing in the *"nature and circumstances of the case"* or in the *"conduct of the proceedings"* by the parties which would disentitle AIB/Everyday from obtaining an order for costs against the Malcomson Law Defendants and Mr. Morrissey.

26. The Malcomson Law Defendants relied on the judgment of Holland J. in the *EPUK Investment Limited v. Environmental Protection Agency* [2023] IEHC 138 (*"EPUK"*). In his judgment in that case, Holland J. set out a number of principles relevant to the exercise by the court of its discretion to depart from what he called the *"default rule"* that a party who is *"entirely successful"* in the proceedings or who has *"won the event"* should get its costs. I agree with the non-exhaustive summary of principles which a court can and should consider in deciding whether to depart from that default rule. However, none of those principles persuade me that there is any basis to depart from the default rule or to displace the presumptive entitlement of AIB/Everyday to their costs in this case. In fact, the Malcomson Law Defendants did not really rely on those principles as a basis for persuading the court not to make an order for costs

against them but rather they were relying on them by analogy in an attempt to persuade the court not to make an order for costs against them and Mr. Morrissey on a joint and several basis. However, having considered those principles, it does not seem to me that they are relevant to the issue as to whether costs should or should not be ordered on a joint and several basis against a number of defendants who have unsuccessfully resisted an application or unsuccessfully defended proceedings.

27. As I have already indicated, AIB/Everyday were *"entirely successful"* on all of the issues raised in their application which were opposed by the Malcomson Law Defendants and Mr. Morrissey.

28. Mr. Morrissey's position, once his solicitors came off record, was to oppose all of the orders being sought in the AIB/Everyday application and to seek to withdraw his consent to the various orders referred to in the Settlement Agreement and in the letter of consent.

29. The Malcomson Law Defendants unsuccessfully opposed all of the substantive orders sought in the AIB/Everyday application. First, their objections to the substitution of Everyday as a plaintiff in place of AIB were rejected and an order in the terms sought was made. Second, the Malcomson Law Defendants' objections to the making of a declaration that AIB had an equitable mortgage and should make a well charging orders over the relevant property were rejected and the orders sought in this regard were made. Third, the Malcomson Law Defendants' objections to the appointment of the receivers with a power to sell the relevant property were rejected and orders were made appointing the receivers with the powers sought and with provision for the receivers to retain sufficient funds to meet the Malcomson Law Charge in the event that it is ultimately found to be valid and enforceable following the trial of the proceedings as between Everyday and those defendants. Fourth, the Malcomson Law

Defendants' objections to the court proceeding to make the orders sought by AIB/Everyday with the consent of Mr. Morrissey contained in the Settlement Agreement and in the letter of consent, in circumstances where Mr. Morrissey sought to resile from or withdraw that consent, were rejected. I concluded that it was not open to Mr. Morrissey to withdraw his consent for the detailed reasons set out in the Principal Judgment.

30. AIB/Everyday were, therefore, *"entirely successful"* on all of those issues and the Malcomson Law Defendants were wholly and entirely unsuccessful. This is not a case in which any of the parties involved were *"partially successful"* on any of the issues determined by me in the Principal Judgment. And, as I have already indicated, this is not a case in which any of the disapplying factors or considerations set out in s. 169(1) apply. Therefore, AIB/Everyday are entitled to an award of costs against the Malcomson Law Defendants and against Mr. Morrissey.

(b) Costs on a Joint and Several Basis

31. It is then necessary to consider whether that order for costs should be made against the Malcomson Law Defendants and Mr. Morrissey on a joint and several basis, as AIB/Everyday contend, or whether the court should seek to apportion costs as between those defendants.

32. In addressing that issue, I would at the outset make the general point that the costs order which the court makes must be *"fair and just"* (as stated by Clarke J. in *John Ronan & Sons v. Clean Build Limited (In Voluntary Liquidation) & Ors* [2011] IEHC 499 (*"John Ronan"*)) and the court should *"attempt to do justice to the parties"* when fashioning the appropriate order for costs to be made (again to adopt the terminology used by Clarke J. in *Veolia Water UK plc v. Fingal County Council (No. 2)* [2006] IEHC 137; [2007] 2 I.R. 81 (*"Veolia"*) at para. 2.2, p. 84).

33. I agree with AIB/Everyday that the normal and default position where a party is entirely successful in an application or in proceedings against more than one party is that the order for costs should be made against the unsuccessful parties on a joint and several basis, unless the respective responsibilities of each of the unsuccessful parties can readily and justly be identified and set apart: See, for example, *Dublin City Council v An Bord Pleanála* [2021] IEHC 34 (per Humphreys J. at paras. 8(ii) and (iii)).

34. As the authorities, such as *Veolia*, *John Ronan*, *EPUK* and *Heather Hill Management Co. clg v. An Bord Pleanála* [2022] IESC 43; [2022] 2 ILRM 313 make clear, a court should generally only allocate costs as between a number of unsuccessful parties in more complex litigation involving a variety of issues and not in straightforward litigation where doing so would inevitably give rise to further satellite litigation on the issue of the proper allocation of costs as between the various unsuccessful parties. This is not such a complex case. The bottom line is that the Malcomson Law Defendants and Mr. Morrissey opposed the orders sought in the AIB/Everyday application and, despite the differences between them and the different bases on which they sought to do so, they were both unsuccessful in their opposition. It does not seem to me, in those circumstances, that there would be anything unfair or unjust in ordering that they be responsible for the costs of the AIB/Everyday application on a joint and several basis. However, it is necessary briefly to address the grounds on which the Malcomson Law Defendants contended that such an order would be unfair and inappropriate.

35. First, the Malcomson Law Defendants claim that a costs order on a joint and several basis would be unfair to them since they would likely have to bear the burden of the order for costs made against Mr. Morrissey in the event of his inability to pay all or

any of the costs. I do not accept that such an eventuality would be unfair on the Malcomson Law Defendants. In circumstances where the Malcomson Law Defendants actively participated in opposing the orders sought by AIB/Everyday (albeit not always on the same grounds as Mr. Morrissey) and urged the court not to proceed to make orders in circumstances where Mr. Morrissey sought to withdraw his consent, there is, in my view, nothing unfair in requiring the Malcomson Law Defendants to bear the costs of their opposition.

36. I agree with AIB/Everyday that it would be unjust if they, as the entirely successful party, were precluded from recovering the full costs of the application from the Malcomson Law Defendants in the event that Mr. Morrissey were unable to pay those costs or any of them. In other words, it would be fairer for the burden of the costs to fall on the Malcomson Law Defendants, as unsuccessful parties, than on AIB or Everyday, should Mr. Morrissey be unable to pay any or all of the costs.

37. Further, insofar as it was suggested by the Malcomson Law Defendants that the court should consider measuring the costs to be borne by them, if that was intended to mean that the court should try to calculate those costs, then evidence should have been put before the court to enable this to be done. However, I suspect that what they may have meant was that the court should try to separate out and apportion responsibility as between them and Mr. Morrissey for the costs of unsuccessfully defending the AIB/Everyday application. As I explained below, it would not be appropriate or fair for me to do so at this stage, in circumstances where they and Mr. Morrissey each opposed the orders being sought by AIB/Everyday.

38. Second, and following on from the point just made, I agree that it would not be appropriate for the court to engage in the exercise of *"salami-slicing"* or dividing up responsibility for the costs as between the Malcomson Law Defendants and Mr.

Morrissey in this case. As I mentioned earlier, that is an exercise which can more appropriately be done in complex litigation involving multiple parties and several issues. The AIB/Everyday application does not fall into that category and, in principle, I do not agree that that is an exercise which should readily be undertaken in circumstances such as these. In light of the position taken by the Malcomson Law Defendants and by Mr. Morrissey in response to the AIB/Everyday application, the most straightforward and, in my view, the most fair and just approach to take is for costs to be ordered against them on a joint and several basis.

39. Third, I reject the attempt by the Malcomson Law Defendants to distance themselves from their opposition to the orders sought in the AIB/Everyday application and to leave Mr. Morrissey alone in the direct line of fire, as far as costs are concerned. As I have pointed out, and as was stated in the Principal Judgment, when the AIB/Everyday application was first returnable before the court in February 2020, the only parties opposing the orders sought in the application were the Malcomson Law Defendants. That remained the position up until late June/early July 2020, when, having parted company with his solicitors, Mr. Morrissey sought to oppose the application and to withdraw the consents he had provided in the Settlement Agreement and in the letter of consent. As I pointed out at paras. 18 and 147 of the Principal Judgment, the only reason why the orders sought by AIB/Everyday were not made on 31st January, 2020 or on 10th February, 2020, was because of the opposition raised by the Malcomson Law Defendants to some of the orders sought in the application. If they had not opposed those orders, it would have been possible to deal with the application on or soon after the first return date and it would not have been necessary to proceed to a multi-day hearing of the application later that year.

40. I do not accept the submission advanced on behalf of the Malcomson Law Defendants that the substitution of Everyday as a plaintiff in place of AIB was a matter for AIB itself to address. The Malcomson Law Defendants did strongly oppose the substitution order sought and their grounds of opposition were considered in detail, and ultimately rejected, in the Principal Judgment. I also reject the submission advanced on their behalf that the issue concerning the equitable mortgage was a matter between the plaintiff and Mr. Morrissey only, which did not concern the Malcomson Law Defendants. The true position, as reflected in the Principal Judgment, is that the Malcomson Law Defendants advanced several objections to the granting of a declaration that an equitable mortgage had been created and to the making of well charging orders. Those objections were addressed at paras. 72 – 117 of the Principal Judgment. The attempt by the Malcomson Law Defendants to distance themselves from that issue is fundamentally inconsistent with the approach which they took at the hearing of the application, as reflected in the Principal Judgment.

41. I am further of the view that the Malcomson Law Defendants cannot distance themselves from the dispute concerning the appointment of receivers over the relevant property. That issue was addressed at paras. 118 – 130 of the Principal Judgment. While the principal objections advanced by the Malcomson Law Defendants to the appointment and powers of the receivers effectively fell away during the course of the hearing of the application, the objections raised by them prevented the orders sought being made at or around the return date of the application back in February 2020.

42. Finally, in this context, I do not accept the submission advanced on behalf of the Malcomson Law Defendants that the issue of Mr. Morrissey's entitlement to withdraw his consent was a matter as between Mr. Morrissey and AIB/Everyday with

which they were not involved. While it would be correct to say that this issue *should* have been a matter as between Mr. Morrissey and AIB/Everyday, that is not how things emerged in the course of the application. As noted at paras. 44 – 46 of the Principal Judgment, the Malcomson Law Defendants made written and oral submissions on the issue and urged the court not to make the orders sought by AIB/Everyday, in circumstances where there was a dispute between Mr. Morrissey and AIB/Everyday on the interpretation of the Settlement Agreement. The Malcomson Law Defendants went so far in their submissions as to address the cases relied upon by AIB/Everyday in support of their contention that it was not open to Mr. Morrissey to withdraw his consent. When Mr. Morrissey sought to withdraw his consent in correspondence prior to the resumed date of the hearing of the application on 17th July, 2020, the Malcomson Law Defendants could have taken the position that that issue did not concern them. However, as is clear from paras. 45 and 46 of the Principal Judgment, they did not do that. On the contrary, they provided written submissions on the issue and, on 15th September, 2020, applied for and were granted an adjournment of the resumed hearing of the application in light of further material which Mr. Morrissey had provided in an affidavit sworn on 9th September, 2020. They also advanced oral submissions on the withdrawal of consent issue at the resumed hearing on 29th September, 2020 in opposing the case being made by AIB/Everyday.

43. In my view, in light of the Malcomson Law Defendants' active participation in opposing most of the orders (and all of the disputed orders) sought in the AIB/Everyday application, it is not appropriate or fair, particularly to AIB/Everyday as the *"entirely successful party",* to attempt to divide up and apportion liability as

between the Malcomson Law Defendants and Mr. Morrissey in terms of the costs order that should be made in favour of AIB/Everyday.

44. I am satisfied that I should make the costs order on the basis that the Malcomson Law Defendants and Mr. Morrissey are jointly and severally liable for the costs incurred by AIB/Everyday in the application.

5. Stay Application

(a) Application by Mr. Morrissey

45. At the end of his oral submission to the court at the hearing of the costs application, Mr. Morrissey applied for a stay on any order for costs made against him pending the determination of his appeal. As noted earlier, that appeal was heard in November 2023 and determined by the Court of Appeal in March 2024. Mr. Morrissey's appeal was dismissed. In those circumstances, there is, in my view, no basis on which I could or should grant a stay to Mr. Morrissey on the order for costs which must be made against him.

(b) Application by the Malcomson Law Defendants

46. The Malcomson Law Defendants also sought a stay on any order for costs made by the court. They relied on certain dicta of Simons J. in *Carey v. Sweeney & Anor* [2021] IEHC 751 (*"Carey"*). In that judgment, Simons J. dealt with the costs of a motion to amend the statement of claim. The court ordered that the plaintiff was entitled to recover a percentage of his costs with the relevant defendant being entitled to its costs of having to file an amended defence. The court granted a stay on execution on foot of the orders for costs pending the determination of the proceedings on the basis that that was the standard approach to be adopted in such a case. The Malcomson Law Defendants rely on the statement by Simons J. that it would be

"unsatisfactory for parties to 'cash in' costs order obtained during the course of proceedings".

47. Simons J. explained what he meant by that (at para. 15) as follows:

> *"This is because the final costs position may be different at the end of the proceedings. A party which has, for example, lost a number of interlocutory applications along the way may ultimately be successful on the substantive issues in the case. In such a scenario, it is proper that the various costs orders be set-off against each other, with the outstanding balance being paid to which ever party is appropriate."*

48. The Malcomson Law Defendants sought a stay on any order for costs made against them on the basis outlined by Simons J. in *Carey*. They noted that an allegation of fraud was being made against them in the proceedings which have yet to be heard and decided by the court. They pointed out that the final costs position might be different at the end of the proceedings and that AIB/Everyday should be prohibited from *"cashing in"* a costs order at this stage.

49. AIB/Everyday opposed the Malcomson Law Defendants' application for a stay on any costs order made against them. They relied on the judgment of the Court of Appeal in *Permanent TSB Groups Holding plc v. Skoczylas* [2020] IECA 152 (*"Permanent TSB"*). In that case, the unsuccessful appellant to the Court of Appeal sought a stay on an order for costs pending the determination of other proceedings which he had brought. The Court of Appeal refused to grant that stay. The Court referred to the important role of costs in the administration of justice in this jurisdiction, and the policy considerations underpinning O. 99 RSC (and now also ss. 168 – 169 of the 2015 Act) as explained by the Supreme Court in *Godsil v. Ireland* [2015] IESC 103; [2015] 4 I.R. 535. The Court noted that a party who is successful in

civil proceedings is ordinarily entitled to an award of costs against the unsuccessful party (s. 169(1) of the 2015 Act) and that the principles discussed in *Godsil* applied to the execution of orders for costs and not merely to the making of such orders. The Court then stated, at para. 44 of its judgment, AIB/Everyday as follows:

> *"To hold otherwise would be to fundamentally undermine the role of costs, and the function of costs orders, in the administration of justice. The making of costs orders would be an entirely hollow protection for successful litigants if such orders were not, in general, immediately enforceable. A successful party has a legitimate expectation that where costs are awarded in his favour that he may take all lawful steps to recover those costs from the unsuccessful party. Where it is sought to suspend that entitlement by the granting of a stay, the onus clearly rests on the party seeking such a stay to satisfy the court that it is in the interests of justice to do so. Such stays are, of course, frequently granted pending appeal. Such a stay has been ordered by this Court but the additional stay now sought by* [the appellant] *is quite different in nature and scope."*

50. AIB/Everyday relied on that passage in *Permanent TSB* opposing the Malcomson Law Defendants' application for a stay on any order for costs which I make against them. AIB/Everyday argued that those defendants failed to put forward any sufficient basis to discharge the onus of establishing that a stay on any such cost order would be appropriate. They noted that the Malcomson Law Defendants did not argue or provide any evidence demonstrating that the immediate enforceability of such a costs order would prejudice or impede their ability to defend the proceedings against them. While the Malcomson Law Defendants did argue that they might obtain an order for costs at the trial against Everyday if they were to successfully defend the proceedings

which could then set off that order against any order which I might make on this application, AIB/Everyday observed that such a submission could be made in every case involving an interlocutory costs order and that would mean that all interlocutory costs orders would be the subject of a stay. They argued that it was also relevant that both Everyday and the Malcomson Law Defendants are both a "*mark*" for costs in the sense that there could be no suggestion that Everyday would not be in a position to discharge any costs order that might be made in favour of the Malcomson Law Defendants should they successfully defend the proceedings. Without prejudice to that principal contention, AIB/Everyday argued that if a stay were granted, it should not prevent the adjudication of costs on foot of a costs order made by the court.

51. As the Court of Appeal noted in *Permanent TSB*, when a court is asked to stay an order, it is being called upon to exercise its discretion and to maintain the balance of justice between the parties. In exercising that discretion, the court must consider all of the circumstances of the case. In the case of an application for a stay of an interlocutory order or a final order which is under appeal, the proceedings will not have come to an end and further judicial consideration of the merits of the issues in the proceedings is envisaged. The Court of Appeal noted that, in those circumstances, the court must have regard to the possibility of the *status quo* being reversed, whether at the trial of the action, (in the case of an interlocutory order) or on any appeal (para. 54). Having referred to the relevant authorities which provide detailed guidance as to how the court's discretion should be exercised when dealing with a stay application, including *Redmond v. Ireland* [1992] 2 I.R. 362; [1992] ILRM 291, *Emerald Meats Limited v. Minister for Agriculture* [1993] 2 I.R. 443, *O'Toole v. RTE* [1993] ILRM 454, and *Danske Bank v. McFadden* [2010] IEHC 119, the Court of Appeal then stated:

> *"The essential task of the court in that context is to try to fashion the order which balances the interests of the parties, pending hearing or appeal, in a way that gives rise to the least risk of injustice and seeks to avoid irreparable harm to either party in the period before the rights of the parties are finally determined."* (para. 55)

52. The Court of Appeal noted that different considerations arise when a stay is sought in respect of a final order to those which arise in the case of an interlocutory order. In the former case, the rights of the parties have been finally determined and the court is seeking to uphold the rights of the successful party, on the one hand, and to *"temper the immediate impact of the final decision which may fall very heavily on the loser"*, on the other. However, in such a case, the court is not *"undoing or undermining the outcome of the litigation"* (para. 56). The Court continued:

> *"Thus, while the court still retains a discretion to stay a final order, the starting point must be to uphold the vindicated rights of the successful litigant; it is essentially affording the unsuccessful litigant a degree of mercy, it is not protecting his or her interests from any possible future harm arising from the successful litigant enforcing the rights established by the litigation."* (para. 57)

53. In the case of an order for costs made against the Malcomson Law Defendants, the order is closer to one made on an interlocutory basis than a final order. A trial still has to take place as between Everyday and the Malcomson Law Defendants. The Malcomson Law Defendants may ultimately successfully defend the proceedings and, if they do, it is quite likely that an order for costs will be made in their favour. While I accept that very little evidence has been put forward by the Malcomson Law Defendants in support of their application for a stay, it is highly relevant that a trial as between Everyday and the Malcomson Law Defendants must still take place. The

proceedings have, therefore, not come to an end and there will be further consideration by a court of the merits of the proceedings. Following the guidance given by the Court of Appeal at para. 54 of its judgment in *Permanent TSB*, I must have regard to the possibility that an order for costs may be made in favour of the Malcomson Law Defendants should they successfully defend the proceedings.

(c) Summary of Conclusions on the Stay Applications

54. It seems to me that in exercising my discretion and in seeking how best to maintain the balance of justice between AIB/Everyday, on the one hand, and the Malcomson Law Defendants, on the other, the fairest approach to adopt is to grant a stay on the enforcement or execution of the order for costs against the Malcomson Law Defendants, pending the determination of these proceedings in the High Court. I should make clear, however, that that stay does not prevent AIB/Everyday seeking to have the costs adjudicated by a legal costs adjudicator under the 2015 Act. The stay is on the obligation to pay the costs on foot of the costs order.

55. I have concluded, therefore, that in the exercise of my discretion and in seeking how best to maintain the balance of justice between all of the parties, I should refuse Mr. Morrissey's application for any stay on the order for costs I am making but should grant a stay on the execution of the costs order as against the Malcomson Law Defendants. There may ultimately be an issue to be resolved as between the Malcomson Law Defendants and Mr. Morrissey as to the fair allocation of costs as between them. However, that is not an issue which I have to decide in the context of this application. The consequence of all of this is that it is open to AIB/Everyday to enforce the costs order as against Mr. Morrissey. It is also open to them to have the costs adjudicated and to enforce the order against Mr. Morrissey. It is also open to

them to have the costs adjudicated but not to enforce payment of the costs on foot of such adjudication pending the determination of the proceedings in the High Court.

6. Summary of Conclusions

56. In summary, for the reasons set out in this judgment, I have concluded that as AIB/Everyday were *"entirely successful"* in their application and the Malcomson Law Defendants and Mr. Morrissey were wholly and entirely unsuccessful in resisting that application, AIB/Everyday are entitled to an order for costs against the Malcomson Law Defendants and Mr. Morrissey. None of the disapplying factors or consideration set out in s. 169(1) apply. There is, therefore, no basis on which AIB/Everyday should be deprived of their costs. There will be one set of costs on the AIB/Everyday side. I am assuming that the order for costs will be in favour of Everyday but that should be confirmed for the purposes of the final order to be made.

57. The order for costs should be on the normal default basis, namely, on a joint and several basis. For the reasons I have explained earlier, it is not appropriate or fair at this stage to seek to allocate responsibility for the costs to which AIB/Everyday are entitled as between the Malcomson Law Defendants and Mr. Morrissey. The costs order should, therefore, be on a joint and several basis.

58. Again, for reasons which I have set out, I have concluded that Mr. Morrissey is not entitled to any stay on the orders for costs. He has already unsuccessfully appealed to the Court of Appeal from the Principal Judgment and from the consequent orders. I have concluded that the Malcomson Law Defendants are entitled to a stay on execution on foot of the costs order pending the determination of these proceedings in the High Court.

59. This judgment will be delivered electronically. I will list the matter for the making of final orders at 10.45 am on 19th June, 2024.