

THE HIGH COURT

[2025] IEHC 12

Record No. 2018 6632P

Between

WESLEY CURRAN & GRAHAM O'DONNELL

Plaintiffs

and

**ULSTER BANK IRELAND DAC, ROYAL BANK OF SCOTLAND GROUP PLC, EAMONN
RICHARDSON & KIERAN WALLACE**

Defendants

Judgment of Mr. Justice Conor Dignam delivered on the 13th day of January 2025

Introduction

1. This judgment deals with the costs of the defendants' application to strike out or dismiss the plaintiffs' proceedings on a number of different grounds. That application is dealt with in a previous judgment (*Curran & O'Donnell v Ulster Bank Ireland DAC & Ors [2023] IEHC 513*). This judgment must be read together with that earlier substantive judgment.

2. The application was made on behalf of all of the defendants and I, therefore, deal with the question of the defendants' costs or the plaintiffs' costs against them on the basis of a single Order for costs.

3. The defendants' application was to strike out or dismiss the plaintiffs' proceedings on the grounds that (i) they disclose no reasonable cause of action and/or are unsustainable and/or frivolous and vexatious and/or bound to fail; (ii) they are res judicata; (iii) they constitute an abuse of process; (iv) the plaintiffs are estopped from maintaining the proceedings; and (iv) the proceedings are statute barred. The last of these was not pursued.

4. The specific bases for the application were (i) the plaintiffs' claim is an abuse of process on the grounds that it is res judicata or that an issue estoppel arises as it is an attempt to re-

litigate matters which were or could have been raised in previous proceedings; (ii) the plaintiffs are not entitled to maintain the proceedings due to having been adjudicated bankrupt in England; (iii) the proceedings are bound to fail on the merits.

5. I decided that insofar as these proceedings raise, or seek to raise points, which were raised in earlier proceedings (“the 2013 proceedings”) they are an abuse of process and should to that extent be dismissed or the plaintiffs are estopped from raising them. I determined that, save for one of the claims against the receivers (the third and fourth named defendants), the defendants had not established that the other aspects of the plaintiffs’ claim, i.e. those not raised in the 2013 proceedings, were bound to fail and I therefore refused to dismiss them. These issues were a claim of conspiracy (encompassing claims of misrepresentation, breach of contract, negligence and breach of duty), and claims against the receivers for breach of contract and breach of duty. I held that the breach of contract claim against the receivers was unsustainable. I further decided that the proceedings should be stayed pending an appropriate application being made in England rather than being struck out or dismissed on the basis of the plaintiffs’ bankruptcies in England. The nature of such application is a matter for English law and for the plaintiffs and their legal advisors.

The Parties’ Positions

6. Both sets of parties made written and oral submissions. I have considered them in full. It is sufficient to summarise them.

7. The defendants submit that they are entitled to their costs because (a) the entirety of the plaintiffs’ claim cannot proceed – and therefore was wrongly brought – in the absence of some application being made in the plaintiffs’ English bankruptcies, and (b) even if the plaintiffs can rectify the situation with their bankruptcies and the case can proceed, the overwhelming majority of their case has been dismissed on abuse of process or estoppel grounds. When the “event” is identified the defendants are the successful party because they had to bring the application “*in order to secure a substantive or procedural entitlement, which could not be obtained without the hearing concerned...The proceedings, or the relevant application as the case may be, [is] justified by the result.*” (*Veolia Water UK plc v Fingal County Council (No. 2) [2007] 2 IR 81* (paragraph 12)). They have therefore been “entirely successful” in the application and this is not affected by the fact that they did not succeed on each individual point (*MD v ND [2015] IESC 66*). The Court should only depart from the position that costs should follow the event on the basis that they were not successful on each individual point if it is clear that the unsuccessful points were “unmeritorious” and materially increased the costs of the hearing. It was submitted that the points upon which they were not successful were not unmeritorious and they did not materially prolong the motion because there was a very substantial overlap between points. They seek the following:

- The costs of the motion and the proceedings to date;
- The costs of the proceedings up to the date that the plaintiffs obtain such relief in their English bankruptcies and/or from the English Courts which entitles them to maintain these proceedings (if possible); and
- All of the costs attendant upon the Court's Order that the plaintiffs are not entitled to proceed with any claim which was the subject of the 2013 Proceedings, including any amendments to the pleadings etc.

8. The plaintiffs' position is they are entitled to their costs or alternatively that the Court should make an Order for 50% of the plaintiffs' costs with the balance of their costs only being reserved to the trial of the action. They submit that the defendants sought a single category of relief, i.e. the dismissal of the proceedings, and therefore they should bear the costs because they did not obtain that relief. They submit that even if one takes it that the defendants achieved partial success in that some of the causes of action have been dismissed and the Court has stayed the proceedings, they are not the reliefs that were sought. They also submit that even if the defendants are taken to have achieved partial success, the overly broad way the defendants cast the application (which the plaintiffs describe as a "blunderbuss approach"), means that on the authority of *Veolia Water UK plc v Fingal County Council (No. 2) [2007] 2 IR 81* the plaintiffs should be awarded a portion of their costs attributable to "*the superfluous arguments raised by the defendants with the balance of their costs only reserved to the trial of the action.*" They say that the Court should exercise its discretion under Order 99 Rule 2(1) and 3(1) of the Rules of the Superior Courts and the principles identified in *Veolia Water UK plc v Fingal County Council (No. 2) [2007] 2 IR 81* and *Chubb European Group SE v The Health Insurance Authority [2020] IECA 183* to "*proportionately calibrate an order as to the costs of these proceedings based on the respective success of the application*" (paragraph 3.6 of the plaintiffs' written submissions).

Applicable Principles

9. There was little dispute between the parties as to the applicable principles. They agreed that the costs regime is contained in the Legal Services Regulation Act 2015 and Order 99 Rule 2 and 3 of the Rules of the Superior Courts which came into force on the 3rd December 2019, and that the jurisprudence which preceded those provisions is of relevance. It is not necessary to set the principles out at any great length but it is necessary to refer to them briefly.

10. Section 168 of the Legal Services Regulation Act 2015 provides, inter alia:

“(1) Subject to the provisions of this Part, a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings—

(a) order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings, or ...

(2) Without prejudice to *subsection (1)*, the order may include an order that a party shall pay—

(a) a portion of another party’s costs,

(b) costs from or until a specified date, including a date before the proceedings were commenced,

(c) costs relating to one or more particular steps in the proceedings,

(d) where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings, and

(e) interest on costs from or until a specified date, including a date before the judgment...”

11. Section 169 of the Act provides, inter alia:

“(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—

(a) conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases,

(d) whether a successful party exaggerated his or her claim,

(e) whether a party made a payment into court and the date of that payment,

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.

(2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order...”

12. Order 99 Rules 2 and 3 of the Rules of the Superior Courts now (since 3rd December 2019) provide, inter alia:

"2. Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules:

(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.

(2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.

(3) The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall 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...

3.

(1) The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable.

(2) For the purposes of section 169(1)(f) of the 2015 Act, an offer to settle includes any offer in writing made without prejudice save as to the issue of costs."

13. This is the statutory framework governing the question of costs. Some assistance is to be derived from the jurisprudence in respect of costs which preceded these provisions, commencing with *Veolia*, as in some respects these provisions reflect that jurisprudence. There are, of course, important differences also. For example, Murray J in *Chubb European Group SE v The Health Insurance Authority [2020] IECA 183* noted two important possible distinctions: Clarke J could be said to have limited his approach to "complex cases" whereas the Act contains no such express limitation; and under the pre-2015 Act law costs presumptively followed the event whereas under the Act the prima facie entitlement to costs is limited to the party who is 'entirely successful' and winning the 'event' and being 'entirely successful' may not mean the same thing. Murray J nonetheless endorsed the continuing validity of the principles in *Veolia* in the context of sections 168 and 169.

14. In *Veolia*, Clarke J held that the starting point for the determination of costs is to determine what the 'event' is and that costs should follow the event but that the award of costs is always discretionary and that the court always remains open to depart from "what otherwise

might be the normal course in respect of an order for costs in a particular case "by virtue of special or unusual circumstances". He also held that in complex cases even where a party was successful it may be appropriate and necessary for the court to fashion a costs order which does "more than simply award costs to the winning side." He also said (at paragraph 12-14):

"12 ... it seems to me that the starting point of any consideration of costs has to be to identify what the "event" is and, thereby, identify the winning party. In the ordinary way, if the moving party required to bring ... a particular interlocutory application...in order to secure a substantive or procedural entitlement, which could not be obtained without the hearing concerned, then that party will be regarded as having succeeded even if not successful on every point. The proceedings, or the relevant application as the case may be, will have been justified by the result. Where the winning party has not succeeded on all issues which were argued before the court then it seems to me that, ordinarily, the court should consider whether it is reasonable to assume that the costs of the parties in pursuing the set of issues before the court were increased by virtue of the successful party having raised additional issues upon which it was not successful...

13. Where the court is so satisfied, then the court should attempt, as best it can, to reflect that fact in its order for costs...

14 ...where it is clear that the length of the trial of whatever issues were before the court was increased by virtue of the raising of issues upon which the party who was successful in an overall sense, failed, then the court should, again ordinarily, award to the successful party an amount of costs which reflects not only that that party should be refused costs attributable to any such elongated hearing, but should also have to, in effect, pay costs to the unsuccessful party in relation to whatever portion of the hearing the court assesses was attributable to the issue upon which the winning party was unsuccessful."

15. In *MD v ND [2015] IESC 66* Clarke J stated that:

"It is clear, therefore, that the proper application of the *Veolia* principles does not involve the Court in simply determining that an otherwise successful party was unsuccessful on one or more points raised. It is necessary, in order to depart from the principle that costs follow the event, that it be 'clear' that the raising of those additional unmeritorious points actually and materially increased the costs of the case...

The Court must not only be satisfied that the otherwise successful party has raised unmeritorious points but also that it is clear that the raising of those points has materially increased the costs of the litigation as a whole."

16. Similarly, Clarke CJ said in *Connelly v An Bord Pleanála [2018] IESC 36* that:

"6. [...] the Court would wish to emphasise strongly that it is important for parties generally to recall that the starting point for a consideration of costs in any case must be the result. Ultimately, Mr. Connelly won the case and successfully resisted the appeal. It is neither

necessary nor appropriate, in the context of costs, to attempt to parse and analyse in detail all of the issues which may have been canvassed in the course of proceedings or appeals and identify a number of issues on which one or other party might be said to have succeeded in whole or part. Rather, the overall approach identified in *Veolia Water* and confirmed on many occasions since, is that the starting point has to be to decide whether the plaintiff or applicant has to come to court to achieve something which they could not otherwise have achieved or whether a defendant or respondent had come to court to resist a claim found to be unmeritorious...

7. ... what the *Veolia* jurisprudence suggests, however, is two things. First it is important to discourage parties from, as it were, throwing the kitchen sink into every case thus significantly increasing the costs and the amount of court time and resources which require to be deployed in resolving the case. Just because a party turns out to have one good point does not justify raising a large number of unmeritorious points...

8. (However/...) That proposition needs to be qualified by reference to the fact that an otherwise successful party should not be deprived of full costs unless it can be shown that it is clear that the raising of unmeritorious points added materially to the overall cost of the proceedings. In making that assessment it will rarely be appropriate to attempt either a very precise calculation of the extent to which costs may have been increased or, indeed, an overly meticulous approach to identifying the precise issues or variations on issues, which were canvassed. To take that approach would be counterproductive in that it would turn every costs application into a major further hearing resulting in even more costs..."

17. It is, of course, important to note that the language used in the pre-2015 Act authorities refers to issues which are "unmeritorious" whereas under the Act there is more of an emphasis on whether it was reasonable to raise a point (section 169(1)(b)).

18. Murray J, in considering the principles that applied pre-October 2019, said in his judgment in *Chubb European Group SE v The Health Insurance Authority [2020] IECA 183* (paragraphs 9-15) that:

"9. The judgment of Clarke J (as he then was) in *Veolia* envisages three different scenarios relevant to the allocation of the costs of the full trial of an action.

10. As analysed by Clarke J the first is a case where an 'event' can be identified and in which all costs of the case follow that event. This is the default position even where the party who succeeds on the 'event' has not prevailed on every issue in the case or succeeded in every argument it has advanced...For these purposes, Clarke J related success on the event to the securing of a 'substantive or procedural entitlement which could not be obtained without the hearing concerned'... A party who has thus succeeded on the 'event' so understood should normally obtain their costs, even if not successful 'on every point' for two principal reasons...

11. The second situation arising from *Veolia* is where an 'event' is identified, but where the party who has prevailed on that event has not been successful on an identifiable issue or issues which have materially increased the costs of the case. In that circumstance the successful party may obtain his costs but may suffer two deductions – one in respect of his own costs in presenting that issue, and the other requiring him to set off against such costs as are ordered in his favour, the costs of his opponent in meeting it...Both *Veolia* and *MD* make it clear that an order splitting costs in this way is very much the exception where the winner of an event has been identified and, in particular, should only be made where (a) the proceedings involve multiple issues and therefore are (as variously suggested in the judgment) 'complex'... and/or not 'straightforward'...(b) where the raising of the issues on which the otherwise successful party failed to prevail could have affected the overall costs of the litigation 'in a material extent'...and (c) where the Court can readily separate and identify the costs so arising.

12....

13. ...even where proceedings have been lengthened by the unsuccessful agitation of issues by the party obtaining relief, the Court might in an appropriate case determine to simply withhold costs from the successful party in respect of the issues on which it failed, rather than to also deduct the costs of its opponent (see for an example of this *Fyffes plc v DCC plc* [2006] IEHC 32). As the law has developed, this must be the exception rather than the rule. It is not an appropriate approach to adopt where those issues have been a focus of significant attention in the case, and have occupied a substantial part of the hearing.

14. The third scenario arises where the Court cannot identify with confidence which party has succeeded on the 'event'. This will arise where 'there are two equally valid ways of looking at which party might be said to have been successful' ... Where this happens, the appropriate course of action is for the Court to base its award of costs on an assessment of how much of the hearing might be attributable to the issues on which each party succeeded with the costs attributable to the presentation of the general background to the case being allocated proportionately across the range of issues to which that background applies...

15. This means that there may be cases in which the costs outcome differs very significantly depending upon whether the court decides that there is an 'event'. When a winning party on an event is identified, that party will – irrespective of the number of issues on which it prevails - obtain all of the costs of presenting of what Clarke J. described as 'the general legal and background issues that were applicable to all ... grounds' (*Veolia* at para. 3.12). However, where it is deemed that it is not possible to determine the 'event', the same costs of the same hearing are liable to be allocated quite differently with those 'general legal and background' costs being distributed across the various issues to which they were applicable."

19. It is clear from Whelan J's judgment in *Jackson Way Properties Ltd v Smith & Ors* [2023] IECA 234 that the principle that "costs follow the event" continues to be the starting position though this must be seen in the context of the express terms of the statutory regime.

20. In *Word Perfect Translation Services Ltd v Minister for Public Expenditure and Reform* [2023] IECA 189 Donnelly J said on behalf of the Court (paragraph 94), inter alia:

“It must also be borne in mind that the costs hearing ought not to be an exercise in nit-picking a broad-brush-stroke approach must be taken. If it is not, there is a danger that costs applications will spiral out of control and have implications for the overall administration of justice. A court, having heard the trial and adjudicated upon the case, will be in an excellent position to make the decision based upon what the court has seen and heard. If necessary, admissible inter partes correspondence can be handed into court.”

Discussion and Conclusion

21. Section 169(1) of the 2015 Act provides that a party who is entirely successful is prima facie entitled to their costs. Neither party was entirely successful. This is so whether the matter is approached by reference to the 2015 Act or the traditional approach of identifying the “event” and determining who was successful in relation to that event. As is clear from the authorities above, a party may be held to have been entirely successful or to have succeeded in the “event” even if they did not win every point (though that may lead to the Court having to consider whether to make a more nuanced costs Order). However, in this case, neither party was entirely successful in the sense that the defendants did not fully achieve the relief they sought and the plaintiffs did not fully succeed in resisting relief.

22. Thus, neither party has a prima facie entitlement to their costs as provided for by section 169(1) or by treating the starting point as costs following the event.

23. Nonetheless, it is possible to assess the parties’ respective degrees of success. This must be a significant consideration in the determination of costs, not least because section 168(2)(a), (c) and (d) provide that a court may order that a party shall pay “a portion of another party’s costs” and “where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings”. In my view, the defendants achieved a significant degree of success in the application particularly when measured against what Clarke J said in *Veolia*:

“In the ordinary way, if the moving party required to bring either the proceedings as a whole (where the costs of the litigation as a whole are under consideration) or a particular interlocutory application (where those costs are involved) in order to secure a substantive or procedural entitlement, which could not be obtained without the hearing concerned, then that party will be regarded as having succeeded even if not successful on every point. The proceedings, or the relevant application as the case may be, will have been justified by the result.”

24. Firstly, the defendants succeeded in persuading the Court that insofar as these proceedings raise, or seek to raise, points which were previously raised in the 2013 Proceedings – the construction of the Facility Letter and the Supplemental Facility Letter and the existence and effect of the alleged collateral contract (see paragraphs 126 – 127 and 164 – 165 of the substantive judgment) – they are (or, in the case of the existence of the alleged collateral contract, would be - see paragraph 164 of the substantive judgment) an abuse of process and should be dismissed. While I identified the plaintiffs’ conspiracy claim (encompassing the claims of misrepresentation, breach of contract, negligence and breach of duty) as the plaintiffs’ core complaint, the claims relating to the construction of the facility and the existence and effect of the alleged collateral contract amount to a very significant part of the plaintiffs’ claim against the Bank in these proceedings. The application to dismiss the proceedings, including these parts of the claim, was fully and vigorously opposed by the plaintiffs. Thus, the defendants “*secured a substantive or procedural entitlement, which could not be obtained without the hearing concerned*”. In relation to the claims against the receivers I decided that the claim of a breach of contract could not be sustained on the basis that it was bound to fail, and in relation to the claim of a breach of duty it should not be dismissed as being bound to fail. In relation to the first of these, I noted when preparing this judgment that I did not state in the “Conclusion” section of the substantive judgment that the claim of breach of contract against the receivers should be dismissed but that is clear from paragraph 203 of the judgment.

25. Secondly, I placed a stay on the entirety of the proceedings, including the claims against the receivers, pending an appropriate application being made in the plaintiffs’ English bankruptcies. Of course, this is not the relief that was sought and does not have the direct effect of dismissing the plaintiffs’ proceedings. However, it seems to me this is a procedural benefit to the defendants which is grounded on the facts and evidence grounding the application to dismiss. Furthermore, in the event that an application is not brought in the English bankruptcies or such application is not granted, the plaintiffs will be precluded from prosecuting these proceedings. Relief on the basis of the English bankruptcies was fully contested by the plaintiffs and therefore it could only have been achieved by this hearing. Finally, I must also have regard to the fact that this whole issue was complicated by the fact that the plaintiffs did not plead in the Statement of Claim that they were acting as a partnership and only pleaded this issue in their Reply (see paragraphs 49-80 of the substantive judgment).

26. In my view, when these matters are taken together, the defendants can only be seen as having achieved a significant degree of success and that must be one of the factors to be taken into account in adjudicating on the issue of costs.

27. These are also matters which took up a significant amount of time at the hearing (see *Chubb*).

28. However, an Order for the full costs of the application in favour of the defendants would not be appropriate and would not properly reflect the outcome. It would not reflect the fact that the plaintiffs were successful in arguing that parts of their claims against the Bank and against the receivers should not be dismissed. Nor would it reflect the fact that the relief in respect of the entirety of the proceedings was a stay rather than an Order dismissing the proceedings.

29. I address the consequences of the first of these below. I do not believe that the second of these is of very great weight. As noted at paragraph 80 of the substantive judgment, I held that while the plaintiffs could not maintain the proceedings due to the English bankruptcies, it would not be appropriate to dismiss them because a step could be taken to resolve that issue and that, by analogy with Clarke J's statement in *Moffitt v Agricultural Credit Corporation plc* [2007] IEHC 245 (paragraph 3.1) in relation to a claim being saved by an appropriate amendment to the pleadings, the plaintiffs should be given an opportunity to take the necessary step. Continuing the analogy, if a court hearing an application to dismiss decided that the claim could be saved by an amendment and therefore ordered such amendment rather than dismissing the proceedings, and that amendment had not been sought or suggested by the plaintiff, the fact that the proceedings were not dismissed could not be a very weighty factor in determining the issue of costs against the defendant. At no stage during the hearing did the plaintiffs indicate that they wished to take the step of making an application in the bankruptcies. At the hearing, the plaintiffs also made the point that the defendants had not sought a stay in correspondence prior to the motion being brought. This is a factor, but would be of much greater weight if the plaintiffs had taken the position that the application could be addressed by the Court giving them an opportunity to make the application in the bankruptcies.

30. It is also necessary, of course, to consider the fact that the defendants raised certain issues upon which they were not successful, e.g., that the plaintiffs' claim in conspiracy was an abuse of process either on the basis that it was res judicata or precluded on *Henderson v Henderson* grounds, or was bound to fail, and the claim of breach of duty against the receivers. These issues naturally meant the hearing lasted longer than it would have if those points had not been raised. However, it is clear from *Veolia* that the issues raised must have been unmeritorious and have unduly prolonged the proceedings. The Court must also be able to identify the costs relating to the unsuccessful points and how much extra time was added by those points being raised. In my view, even on the basis of the pre-2015 Act law, "unmeritorious" connotes something more than the mere fact that the party was unsuccessful on the issue. As is clear from my substantive judgment, even on issues on which the defendants were unsuccessful, it could not be said that there was no merit to the points. Importantly, as noted above, section 169(1)(b) requires the Court to consider whether it was reasonable for a party to raise an issue. It follows from my substantive judgment that, while the defendants were unsuccessful on certain points, it was reasonable to raise them. Furthermore, there was

a significant degree of overlap in the issues and the arguments such that it would not be possible to forensically or accurately identify the portions of the hearing that was taken up with those specific points.

31. In all of those circumstances, this is a case which falls squarely within the approach described by Donnelly J, i.e., "a broad-brush-stroke approach". Taking all of the above considerations into account, i.e., that while the defendants were not entirely successful, they were successful in significant respects, the plaintiffs' success in resisting the dismissal of parts of their claim, the fact that the proceedings were prolonged somewhat by the raising of points which were not successful but that these did not unduly prolong the hearing, were not unreasonable points and it is not possible to identify precisely what proportion of the hearing was taken up with these points, it seems to me that the defendants are entitled to an Order for costs but this must be discounted to reflect the above factors. As noted by Murray J in *Chubb*, as an exception to the general rule, in certain circumstances (i.e. where the party has prevailed on the event but has not been successful on an identifiable issue or issues) the losing party on the event may nonetheless be entitled to an Order for the costs attributable to those points and this should be the general approach. For the reasons set out above, it is not possible to say that either party has been entirely successful. Nonetheless, if the matter is considered on the basis that the defendants have succeeded overall but lost on certain issues, in my view, this case is one of the cases in which the Court should depart from the general approach. That general approach applies where, inter alia, the Court can readily separate and identify the costs so arising. There was considerable overlap between the different issues and it is not possible to separate and identify the costs so arising. In those circumstances, it seems to me that the matter is appropriately addressed on the basis of a reduction in the amount of costs to which the defendants are entitled. Taking a broad-brush approach, it seems to me that the appropriate Order is an Order in favour of the defendants for 50% of the costs of the application.

32. The defendants have also sought an Order for the costs of the proceedings to date, the costs of the proceedings up to the date that the plaintiffs obtain relief in the English bankruptcies which entitles them to maintain these proceedings, and the costs attendant upon the decision that the plaintiffs are not entitled to proceed with any claim which was the subject of the 2013 proceedings, including any amendments to the pleadings. It seems to me that to a very large extent these must be sought in the alternative as otherwise there would be duplication.

33. I do not believe that an Order for the costs of the proceedings to date is appropriate in circumstances where the entire proceedings have not been dismissed. Nor do I believe that an Order for the costs of the proceedings up to when the plaintiffs obtain relief in their English bankruptcies permitting them to maintain the proceedings is appropriate at this stage. If such relief is obtained then the proceedings will continue (with the exception of those parts that I

have dismissed) and I have great difficulty in seeing why the plaintiffs should be denied the opportunity of seeking the costs of the proceedings prior to that date if they are ultimately successful. I understand that the logic of the defendants' argument is that the proceedings should not have been issued without relief from the English courts and therefore the plaintiffs should have to pay the costs of those proceedings for the period prior to that relief. I am of the view that this would be unduly harsh if the plaintiffs are entitled to maintain the proceedings on foot of an English court Order. I am also not satisfied that I should award all of the costs attendant upon the decision that the plaintiffs are not entitled to proceed with any claim which was the subject of the 2013 proceedings. I think this would require an analysis of the pleadings to identify how much of the costs of those pleadings related to the 2013 issues and how much related to the other claims. It is, however, appropriate to award the costs of the amendment of the pleadings as these are readily identifiable and the need for them was brought about directly by the plaintiffs including claims which I have held are an abuse of process.

34. I will therefore make an Order providing for 50% of the defendants' costs of the application and an Order providing for their costs occasioned by the amendment of the pleadings. In respect of the Order for 50% of the costs, it is my provisional view that it is appropriate to place a stay on the execution of that Order pending determination of the proceedings or further Order, in circumstances where the defendants were not entirely successful and if the plaintiff secures relief in their English bankruptcies the proceedings will continue. It is necessary for that stay to be subject to further Order in case such relief is not obtained. This is a provisional view and if either party wishes to make submissions on this point I will, of course, provide an opportunity for them to do so provided they notify the registrar within fourteen days of delivery of this judgment.