THE HIGH COURT

COMMERCIAL

[2023] IEHC 179

[2017 No. 2256 P.]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

RAYMOND BRADLEY, TERENCE DOYLE AND SINEAD BYRNE PRACTISING UNDER THE STYLE AND TITLE OF MALCOMSON LAW SOLICITORS, PHILIP MORRISSEY AND PROPERTY REGISTRATION AUTHORITY

DEFENDANTS

AND

ALL PERSONS CONCERNED

JUDGMENT of Mr. Justice David Barniville, President of the High Court, delivered on the 14th April, 2023

Index

1. Introduction

1. This is my judgment on an application issued in February 2020 by the plaintiff, Allied Irish Banks plc (*"*AIB*"*), and by a non-party to the proceedings, Everyday Finance Designated Activity Company (*"*Everyday*"*), for various orders arising out of a Settlement Agreement dated 31st January, 2020, made between a number of parties, including some of the parties to these proceedings and to related proceedings, including AIB, Everyday and the fourth named defendant, Philip Morrissey (*"*Mr. Morrissey*"*), (the *"*Settlement Agreement*"*). For ease of reference, I will refer to this application as the *"*AIB/Everyday application*"*.

2. The parties to the Settlement Agreement are AIB, Everyday, Mr. Morrissey, Dan Morrissey (IRL) Limited (In receivership) (*"*DMIL*"*), the receivers of DMIL, namely, Paul McCann and Stephen Tennant (the *"*Receivers*"*) and a company called Plazamont Limited (*"*Plazamont*"*). The Settlement Agreement was intended to resolve the disputes between the parties to the agreement which were and are the subject of three sets of proceedings, including these proceedings in which the AIB/Everyday application was brought.

3. As I explain below, the first to third named defendants, Raymond Bradley, Terence Doyle and Sinead Byrne, who are described in the title to these proceedings as practising under the style and title of Malcomson Law Solicitors, but who are partners in the firm (the *"*Malcomson Law Defendants*"*) are not parties to the Settlement Agreement, although they are parties to these proceedings and previously acted as solicitors for Mr. Morrissey and DMIL until differences arose between them in

2015/2016. The fifth named defendant, the Property Registration Authority (the "PRA") is also not a party to the Settlement Agreement. The PRA was joined as a party to the proceedings solely for the purpose of ensuring that it would be bound by any orders the court might make in relation to the various properties the subject of the Settlement Agreement. In fact, one of the orders sought in the AIB/Everyday application is an order removing the PRA as a defendant to the proceedings. There was no dispute between the parties as to the making of that order.

4. Before identifying the various orders sought in the AIB/Everyday application, I must observe that the application is quite an unusual one and has taken various twists and turns in the period since it was issued. As I noted above, these proceedings are one of several sets of proceedings brought by and against DMIL and Mr. Morrissey arising out of the provision of loan facilities to DMIL by AIB dating back, at least, to 2009, which were guaranteed by Mr. Morrissey and by other members of the Morrissey family and arising out of the appointment by AIB of the Receivers as receivers over the assets of DMIL in June 2014 and the conduct of the receivership by the Receivers, including the grant of a license by the Receivers to Plazamont to operate a part of the quarry formerly operated by DMIL at Clonmelsh, Co. Carlow. The relevant loan facilities were transferred by AIB to Everyday in June 2019, pursuant to a global deed of transfer dated 14th June, 2019. That transfer is why one of the orders sought is substituting Everyday for AIB as plaintiff in the proceedings.

5. The stated basis for the AIB/Everyday application is that three of these sets of proceedings (including the proceedings in which the application was brought) were settled by the Settlement Agreement as between the parties to that agreement (which, as noted, do not include the Malcomson Law Defendants), that Mr. Morrissey agreed to consent to various orders as part of the Settlement Agreement, that he did so

consent in writing and that senior counsel on his behalf informed the court on two occasions, on 31st January, 2020 and 10th February, 2020, that Mr. Morrissey was consenting to the orders sought in the application.

6. Mr. Morrissey's consent to the orders being sought by AIB and Everyday was conveyed to the court at a time when he was represented by a firm of solicitors (Farrell McElwee) and by junior and senior counsel. In addition to the two occasions just mentioned, my notes disclose that senior counsel reiterated to the court that Mr. Morrissey was consenting to the orders sought in the application on three subsequent dates, 13th March, 2020, 16th March, 2020 and 21st May, 2020. However, the relationship between the solicitors and Mr. Morrissey appears to have broken down in the months following the Settlement Agreement. At some point prior to the end of June 2020, Mr. Morrissey informed the solicitors of his apparent desire to continue the various proceedings, notwithstanding the Settlement Agreement. In those circumstances, his solicitors applied to come off record as solicitors for Mr. Morrissey in each of the three sets of proceedings, including the proceedings herein. Those applications were heard by me on 24th June, 2020, two days before the first day of the hearing of the AIB/Everyday application. In light of matters raised by Mr. Morrissey at the hearing of the solicitors' applications to come off record, I deferred ruling on those applications until the first day of the hearing of the AIB/ Everyday application. At the conclusion of the first day's hearing of that application, I ruled on the solicitors' applications and permitted them to come off record as solicitors for Mr. Morrissey. Mr. Morrissey did not oppose those applications.

7. Mr. Morrissey represented himself on the various dates on which the AIB/Everyday application was heard. As will be seen, notwithstanding his consent in the Settlement Agreement to the orders sought in the AIB/Everyday application and notwithstanding

that he signed a Consent Letter expressly consenting to those orders and notwithstanding the fact that his senior counsel conveyed to the court on, at least, two occasions that Mr. Morrissey was consenting to the orders sought in the application, Mr. Morrissey sought in the period between first and second days of the hearing of the application to "withdraw" from the Settlement Agreement and to ventilate several issues of concern which he had in relation to AIB, Everyday, the Receivers, Plazamont and the Malcomson Law Defendants. In the course of his various submissions, Mr. Morrissey accepted that he had signed the Settlement Agreement and had consented to the orders being sought by AIB and Everyday. His indication that he wished to "withdraw" from the Settlement Agreement (or, as he termed it, the "Proposed Settlement Agreement") came during the gap between the first and second days of the hearing of the AIB/Everyday application when I had adjourned the hearing to enable certain further material to be put before the court. It was then necessary for me to require further submissions to be provided by the parties on the issue as to whether it was open to Mr. Morrissey, in the particular circumstances, to withdraw his consent to the orders sought by AIB and Everyday. The entitlement of Mr. Morrissey to withdraw his consent to the orders sought is an issue which must be determined in this judgment.

8. The firm of Malcomson Law Solicitors previously acted as solicitors for Mr. Morrissey and DMIL. Differences arose between them and they ceased acting as Mr. Morrissey's solicitors in April 2016. The Malcomson Law Defendants (who are some of the members of that firm) were not parties to the Settlement Agreement and did not participate in the mediation in December 2019 which led to the Settlement Agreement, as it was not possible to agree terms for their participation. The Malcomson Law Defendants do not oppose some of the orders sought in the

AIB/Everyday application and indeed consent to a number of those orders. They oppose, with varying degrees of vehemence, some of the other orders sought.

9. In the period since the court reserved judgment on the AIB/Everyday application in late September 2020, Mr. Morrissey has sought to issue, at least, three further motions in the various proceedings which AIB/Everyday maintain were settled with Mr. Morrissey and the other parties to the Settlement Agreement. I am not dealing with any of those motions. This judgment concerns the AIB/ Everyday application only.

2. The Proceedings

10. As noted above, these proceedings are but one of a number of different sets of proceedings involving some or all of the parties referred to earlier. These proceedings were commenced by AIB in March 2017. In the proceedings, AIB sought various orders against the Malcomson Law Defendants and Mr. Morrissey. The orders sought included a declaration that Mr. Morrissey's agreement to provide security over certain property situate at Clonmelsh, Co. Carlow (the "Clonmelsh Property") (excluding his family home) contained in a Facilities Agreement dated 20th August, 2009 (as amended by a number of amendment and restatement letters dated 3rd May, 2011, 16th November, 2011, 26th September, 2012 and 12th February, 2013) (the "Facilities Agreement") constituted an equitable mortgage in favour of AIB. Under the Facilities Agreement, AIB agreed to provide certain loan facilities to DMIL. Under a guarantee dated 5th June, 2008, Mr. Morrissey agreed to guarantee DMIL's liabilities to AIB up to the amount €24,970,000 together with interest. Under a restatement letter of 3rd May, 2011, restating and amending the terms of the Facilities Agreement, Mr. Morrissey agreed to provide a legal charge over the Clonmelsh Property (excluding his family home) in favour of AIB.

11. AIB also sought an order setting aside a charge granted by Mr. Morrissey in favour of the Malcomson Law Defendants on 17th December, 2015 (the "Malcomson Law Charge"). AIB sought a declaration that the Malcomson Law Charge was void and had no effect as against AIB and against Mr. Morrissey. It also sought an order setting aside the Malcomson Law Charge over the charged properties. AIB did so in circumstances where it obtained summary judgment on consent against Mr. Morrissey on 17th December, 2015, in the sum of €24,970,000, together with costs. That judgment was registered as a number of judgment mortgages in favour of AIB on 7th January, 2016, against the Clonmelsh Property and against an additional property in Co. Wicklow. Under s. 117 of the Land and Conveyancing Law Reform Act 2009, the judgment mortgages registered by AIB would be subject to the Malcomson Law Charge if that charge were valid. AIB sought to challenge the validity of the Malcomson Law Charge on various grounds and sought the reliefs just mentioned in respect of that charge.

12. AIB also sought an order declaring that the judgment mortgages stood "well charged" against the properties. It also sought an order for the sale of the relevant properties (excluding Mr. Morrissey's family home, Clonmelsh House and certain other retained lands) and an order appointing the Receivers to receive Mr. Morrissey's interest in the properties (excluding Clonmelsh House and those retained lands) and conferring certain powers on the Receivers, including the power to take possession of the relevant properties, to receive the rents and profits from the properties and to sell them.

13. Separately, the Malcomson Law Defendants and Mr. Morrissey disputed the claims made by AIB and contested AIB's entitlement to the reliefs sought in the proceedings. Mr. Morrissey admitted in his defence many of the allegations made by AIB in

respect of the circumstances in which the Malcomson Law Charge was allegedly executed. The Malcomson Law Defendants denied those allegations and served a notice of indemnity and contribution on Mr. Morrissey in July 2017.

14. In addition to these proceedings commenced by AIB, Mr. Morrissey commenced two other sets of proceedings in the High Court against the Receivers (both of which were also entered in the Commercial List). In 2017, Mr. Morrissey commenced proceedings against DMIL, the Receivers and Plazamont (High Court record number 2017 No. 2361 P). Those proceedings have been termed the "Quarry Proceedings". In addition, in 2019, Mr. Morrissey commenced proceedings in respect of DMIL pursuant to s. 438 of the Companies Act 2014 (High Court record number 2019 No. 294 COS). Those proceedings have been described as the "Directions Proceedings".

15. A mediation took place between a number of the parties to the various proceedings on 9th December, 2019. The parties who attended and were represented at the mediation were: AIB, Everyday (to whom AIB had assigned and transferred all of its rights and entitlements under the Facilities Agreement, Mr. Morrissey's guarantee and the security provided, under the global deed of transfer dated 14th June, 2019), the Receivers, Mr. Morrissey and Plazamont. The Malcomson Law Defendants did not attend the mediation. This was explained by Mr. Bradley in an affidavit which he swore in response to the AIB/Everyday application as being because the draft mediation agreement furnished by AIB in advance of the mediation provided that Everyday, rather than AIB, would be the counterparty to any mediation. That was unacceptable to the Malcomson Law Defendants having regard to the nature of the claims being made by AIB against them.

16. The parties who attended the mediation did not reach agreement on the day of the mediation. However, significant progress was made and negotiations continued over

the following weeks. Ultimately, the Settlement Agreement was executed by the parties on 31st January, 2020, by AIB, Everyday, DMIL, the Receivers, Mr. Morrissey and Plazamont. AIB and Everyday maintained that the agreement was and is confidential to the parties. It was not exhibited to the affidavits sworn for the purposes of grounding the AIB/Everyday application. However, a number of its terms were outlined to the court in submissions made on behalf of AIB and Everyday and by Mr. Morrissey himself. A copy of the Settlement Agreement was ultimately provided to the court on 1st July, 2020, without objection by the Malcomson Law Defendants (who are not parties to the Settlement Agreement) or by Mr. Morrissey (who is a party to the agreement). The position adopted by the Malcomson Law Defendants was that they did not object to a copy of the Settlement Agreement being provided to the court and were prepared to leave to me the decision as to whether it was necessary, in the interests of justice, to provide a copy of the Settlement Agreement to them. In the event, I was satisfied that it was not necessary, in the interests of justice, that a copy of the Settlement Agreement be provided to them. I was satisfied that there was sufficient material before the court, and available to all of the parties to the AIB/Everyday application, to enable the application to be fairly and justly determined without the necessity to provide a copy of the Settlement Agreement to the Malcomson Law Defendants. I should add that, although Mr. Morrissey was aware that the Settlement Agreement was to be provided to the court only and not to be circulated to any other parties, he exhibited a copy of the Settlement Agreement to an affidavit he swore on 16th July, 2020, (the day before the resumption of the hearing of the AIB/Everyday application). In error, he provided that affidavit (together with the exhibits) to all of the parties to the application, including the Malcomson Law Defendants. Quite properly, it was accepted by the

Malcomson Law Defendants that Mr. Morrissey ought not to have sent them a copy of the Settlement Agreement and they confirmed that they would correspond further with AIB/Everyday's solicitors with a view to destroying the copy of the document they had received from Mr. Morrissey.

17. While AIB and Everyday did not exhibit a copy of the Settlement Agreement to the affidavits sworn for the purposes of grounding the application, as I outline later, they did explain on affidavit what Mr. Morrissey had agreed to in the Settlement Agreement so far as was relevant to the orders which were being sought in the AIB/Everyday application. They also exhibited a copy of the Consent Letter signed by Mr. Morrissey (which it was said on affidavit on behalf of AIB and Everyday was signed on the execution of the Settlement Agreement on 31st January, 2020) (the "Consent Letter"). The Consent Letter confirmed Mr. Morrissey's consent to the making of the orders set out in appendix 1 to the letter, confirmed that Mr. Morrissey had taken independent legal advice prior to signing the letter and set out in appendix 1 that the consent orders to be made were those set out in Schedule 3 of the Settlement Agreement.

3. AIB/Everyday Application

18. The AIB/Everyday application was issued on 6th February, 2020. It had an initial return date of 10th February, 2020. It was adjourned from time to time to enable the Malcomson Law Defendants to respond and, thereafter, for the further exchange of affidavits between the parties. The hearing of the application was severely disrupted by the Covid-19 pandemic and the application was ultimately heard on various dates between 26th June, 2020 and 29th September, 2020. AIB and Everyday rely on the fact that senior counsel for Mr. Morrissey informed the court on 31st January, 2020

and 10th February, 2020 (the latter date being the first return date of the motion) that Mr. Morrissey was consenting to the orders sought in the application. The only reason that orders were not made on the application at the time was because of the fact that the Malcomson Law Defendants were opposing some of the orders sought and a hearing of the application was, therefore, necessary for the court to consider those objections. As noted, the hearing was severely disrupted by the Covid-19 pandemic and had to be adjourned on a number of occasions.

19. The orders sought in the AIB/Everyday application may be summarised as follows:

(i) An order pursuant to O. 17, r. 4 RSC substituting Everyday for AIB as the plaintiff in the proceedings or, alternatively, an order pursuant to O. 15, r. 13 and r. 14 adding Everyday as a plaintiff and removing AIB as a plaintiff.

(ii) In the alternative, an order pursuant to O. 17, r. 4 or, alternatively, O. 15, r. 13 and r. 14 adding Everyday as a co-plaintiff to the proceedings and providing that the proceedings continue with AIB and Everyday as co-plaintiffs.

(iii) An order pursuant to O. 15, r. 13 and r. 14 removing the PRA as the fifth named defendant to the proceedings.

(iv) An order pursuant to O. 28, r. 1 granting Everyday and/or AIB liberty to deliver an amended plenary summons and an amended statement of claim (in the form exhibited to the grounding affidavit) and dispensing with the need to reserve proceedings on the defendants.

(v) An order on the consent of AIB, Everyday and Mr. Morrissey noting that Mr. Morrissey will consent to the making of the orders set out in Schedule 1 of the notice of motion. Schedule 1 of the notice of motion contains orders listed at paras. (i) – (v) which were, in turn, set out in the same numbered paragraphs of Schedule 3 of the Settlement Agreement. What was sought, therefore, was

an order recording Mr. Morrissey's consent to the orders set out in paras. (i) – (v) of Schedule 1 of the notice of motion and Schedule 3 of the Settlement Agreement.

(vi) An order on the consent of AIB, Everyday and Mr. Morrissey, granting the reliefs set out at Schedule 2 of the notice of motion. Schedule 2 of the notice of motion set out five numbered orders and reliefs at paras. (vi) – (x). Those orders and reliefs were the similarly numbered orders set out in Schedule 3 of the Settlement Agreement. The only difference between the orders and reliefs set out in Schedule 2 of the notice of motion when compared with those equivalent paragraphs in Schedule 3 of the Settlement Agreement is that the Settlement Agreement set out certain powers which the Receivers were to have upon their appointment at paras. (I) – (VII) whereas those powers (together with some additional powers) were not set out in para. (x) of Schedule 2 of the notice of motion but rather in para. (10) of the notice of motion (which also included a number of additional powers).

(vii) An order that the Receivers appointed by the court under para. (x) of Schedule 2 of the notice of motion (and para. (x) of Schedule 3 of the Settlement Agreement) should have certain powers in respect of the Clonmelsh Property (but excluding Mr. Morrissey's family home and certain other retained lands which were outlined in red on maps A and B appended to the notice of motion and to the Settlement Agreement) including the power to take possession of the properties, to receive the rents and profits of the properties, to sell the properties, to execute contracts and other documents on behalf of and in the name of Mr. Morrissey to give effect to the sale of the properties, to discharge all necessary and proper costs, charges and expenses of the receivership, to

pay the renumeration of the receivers, to maintain proper and complete accounts with respect to the receivership and to pay the net proceeds of the receivership to Everyday after retaining certain monies referred to at para. 11 of the notice of motion in reduction of the monies due and owing by Mr. Morrissey and declared well charged in the proceedings (para. 10 of the notice of motion).

(viii) An order that, upon the sale by the Receivers of the Clonmelsh Property (excluding the family home and the retained lands) in accordance with their powers, a sum be withheld by the Receivers from the proceeds of sale pending the determination of the proceedings, to abide by such order as the court should make, such retained sum to be sufficient to discharge the amount claimed by the Malcomson Law Defendants to be secured by their alleged charge over the Clonmelsh Property (para. 11 of the notice of motion).

20. The evidence provided to the court in respect of the AIB/Everyday application was as follows: The application was grounded on an affidavit sworn by Ronan Hopkins on behalf of Everyday. In his affidavit, Mr. Hopkins set out the background to the various disputes between AIB, DMIL, Mr. Morrissey and the Malcomson Law Defendants. He referred to and exhibited the Facilities Agreement under which AIB granted loan facilities to DMIL as well as the guarantee under which Mr. Morrissey agreed to guarantee DMIL's liabilities to AIB up to €24,970,000, together with interest. He also referred to and exhibited the letter of 3rd May, 2011, under which Mr. Morrissey agreed to grant a legal charge over the Clonmelsh Property (excluding his family home). He referred to and exhibited a copy of the instrument which is alleged to have created the Malcomson Law Charge granted by Mr. Morrissey in favour of the Malcomson Law Defendants on 17th December, 2015, under which it is

alleged Mr. Morrissey charged certain properties including the Clonmelsh Property and additional properties in Co. Carlow (CW6086F) and Co. Wicklow (WW8963) in favour of the Malcomson Law Defendants. The Malcomson Law Charge was registered in the Land Registry on 6th February, 2016, against Mr. Morrissey's interest in those properties with the payment to the Malcomson Law Defendants of the principal sum of €969,963.00 with interest on that sum at the rate of 2.5% per annum payable half yearly on 1st January, 2016 and 1st June, 2016 and after 1st November, 2016, at the rate of 10% per annum payable half yearly on 1st January and 1st June of each and every year. The instrument comprising the Malcomson Law Charge stated that the principal sum was not to be called in until 1st November, 2016, unless the interest was not paid within seven days after it became due. The instrument further stated that Mr. Morrissey covenanted for the payment of the principal sum and assented to the registration of the Malcomson Law Charge as a burden on those properties. As I have indicated, one of the reliefs sought in the proceedings is an order setting aside the Malcomson Law Charge on various grounds including that it was made with the intention of defrauding AIB, that it was procured by undue influence and fraud, and was a manifestly improvident transaction (claims which are strenuously disputed by the Malcomson Law Defendants).

21. Mr. Hopkins also referred to the global deed of transfer dated 14th June, 2019, between AIB and Everyday under which AIB transferred all it rights and interests in (among other things) the Facilities Agreement and the guarantee and any security related thereto. He exhibited a redacted copy of the global deed of transfer. Schedule 1 to the global deed of transfer was unredacted and made clear that the loan facilities and guarantee relating to DMIL and Mr. Morrissey were transferred to Everyday. Mr. Hopkins referred to and exhibited the communications sent on behalf of the AIB and

on behalf of Everyday to DMIL and Mr. Morrissey concerning the effect of the global deed of transfer. Unlike some cases, there was no issue on this application as to the validity of the global deed of transfer or that it transferred the loan facilities and guarantee concerning DMIL and Mr. Morrissey to Everyday. Mr. Hopkins then explained in his affidavit why, on the basis of the transfer of AIB's interest in the loan facilities and the guarantee, it was necessary that Everyday should be made the plaintiff in the proceedings in substitution for AIB. Mr. Hopkins also outlined why it was necessary to remove the PRA as a defendant to the proceedings. No wrongdoing was being alleged by AIB against the PRA. The PRA was joined as a defendant solely for the purpose of ensuring that it would be bound by the orders sought in the proceedings, including an order requiring the removal of the Malcomson Law Charge from the relevant folios. Mr. Hopkins exhibited draft amended pleadings to reflect the requested substitution of AIB for Everyday and the removal of the PRA as a defendant.

22. Mr. Hopkins then referred to the mediation in December 2019, which was attended by the parties referred to earlier, at which negotiations to settle these proceedings as well as the Quarry Proceedings and the Directions Proceedings took place. While the Malcomson Law Defendants did not attend the mediation (for reasons mentioned earlier and explained in Mr. Bradley's replying affidavit), progress was made and further negotiations took place in the weeks after the mediation, leading to the Settlement Agreement being executed by the parties on 31st January, 2020 and to Mr. Morrissey signing the Consent Letter on the same date (a copy of which Mr. Hopkins exhibited to his affidavit). Mr. Hopkins explained that while the precise terms of the Settlement Agreement were subject to confidentiality obligations which restricted its disclosure, certain orders were being sought on consent on foot of the Settlement

Agreement and that the agreement provided for Mr. Morrissey to attend before the court for the court to make orders striking out the various proceedings with no order as to costs as well as vacating existing costs orders and resolving and concluding the proceedings.

23. Mr. Hopkins then went through the various orders which were being sought for the purpose of giving effect to the Settlement Agreement on consent as between AIB, Everyday, the Receivers of DMIL, Mr. Morrissey and Plazamont. I have referred earlier to the different orders sought. Mr. Hopkins explained that Mr. Morrissey was consenting to the orders sought at paras. (i) – (x) of the statement of claim with some variations and amendments to reflect the terms agreed in the Settlement Agreement (including the agreement by AIB and Everyday to permit Mr. Morrissey to retain his family home and the retained lands). Mr. Hopkins expressed the view, on the advice of Everyday's solicitors, that the orders sought in Schedule 2 to the notice of motion could be made on consent against Mr. Morrissey notwithstanding the absence of consent by the Malcomson Law Defendants and, indeed, notwithstanding their objections to those orders. He asserted that those orders would not prejudice the Malcomson Law Defendants in any way. With respect to the orders sought in Schedule 1 of the notice of motion, Mr. Hopkins explained that while Mr. Morrissey was consenting to those orders, including orders setting aside and invalidating the Malcomson Law Charge, those orders were also being sought against the Malcomson Law Defendants and directly affected their interests. It was accepted, therefore, by Everyday and AIB that final orders could not yet be made in respect of those paragraphs (which reflected the reliefs sought at paras. (i) – (v) of the prayer for relief in the statement of claim) and that the court would ultimately have to determine the

issues relevant to those reliefs. AIB and Everyday were, therefore, asking the court to make an order formally noting Mr. Morrissey's consent to those orders.

24. With respect to one of the orders sought on the consent of AIB, Everyday and Mr. Morrissey, namely, the order referred to para. (x) of Schedule 2 to the notice of motion, appointing Mr. McCann and Mr. Tennant as Receivers to receive the interest of Mr. Morrissey in the Clonmelsh Property (excluding the family home and the retained lands) and conferring powers on the Receivers, AIB and Everyday were asking the court to make that order appointing the Receivers to receive Mr. Morrissey's interest in that property (subject to the exclusions mentioned) and to confer powers on them, including the power to sell the relevant land. It was noted that, under the terms of the Settlement Agreement, AIB, Everyday and the Receivers agreed that following the sale of the Clonmelsh property (but excluding Mr. Morrissey's family home and the retained lands), a sum would be withheld by the Receivers from the proceeds of sale of those lands which would be sufficient to discharge the amount claimed by the Malcomson Law Defendants as being secured by the Malcomson Law Charge which, it was noted, purported to secure a liability of €969,963 (as well as interest, although that was not specifically mentioned by Mr. Hopkins in his affidavit). It was suggested by Mr. Hopkins that those orders, including an order requiring the Receivers to retain a sum sufficient to discharge the amount claimed by the Malcomson Law Defendants (notwithstanding that their entitlement to receive any sum under the relevant charge was disputed by AIB and Everyday and also by Mr. Morrissey) would remove any possible prejudice to the Malcomson Law Defendants. It was explained that any sum over and above the amount which would be retained by the Receivers pending the determination of issues relevant to the validity of the Malcomson Law Charge, could then be distributed by

the Receivers to Everyday and applied towards reducing Mr. Morrissey's liability on foot of the judgment obtained against him in December 2015.

25. Mr. Bradley swore a replying affidavit on behalf of the Malcomson Law Defendants in response to the AIB/Everyday application on 24th February, 2020. Mr. Bradley summarised the Malcomson Law Defendants' response to the application in his affidavit.

26. With respect to the application to substitute Everyday for AIB, the Malcomson Law Defendants had no objection to the joinder of Everyday as a co-plaintiff but objected to Everyday being substituted for AIB or to any other order which would allow AIB effectively to discontinue its claim against the Malcomson Law Defendants without any consequences in terms of costs or other orders. The basis for that objection was the nature of the allegations made by AIB against the Malcomson Law Defendants including the allegations that the Malcomson Law Charge had been procured by way of fraud or that it was void on other grounds, including undue influence, and made with the intention of defrauding AIB or was a fraudulent disposition. Mr. Bradley was critical of the manner in which AIB maintained its case in relation to the charge notwithstanding that, during the course of the proceedings, there was a partial waiver of privilege by Mr. Morrissey in respect of one of three written attendance notes of a meeting attended by Mr. Bradley and Mr. Morrissey on 17th December, 2015, at which the relevant deed of charge was executed. Mr. Bradley asserted that the attendance note clearly showed that the deed was freely executed by Mr. Morrissey in circumstances where he was advised of his entitlement to take independent legal advice. That note, he said, was in the possession of AIB since March 2019. Notwithstanding that assertion, Mr. Bradley stated that AIB continued to maintain its proceedings against the Malcomson Law Defendants and continued to make

extremely serious allegations against them with potentially very serious consequences in terms of their reputation. It would, therefore, be inappropriate if AIB were to be entitled to be released from the proceedings and from any consequences arising from the serious allegations it had made and was maintaining against the Malcomson Law Defendants simply on the basis that it had sold on or transferred the relevant facilities and security to Everyday.

27. With respect to the removal of the PRA as a co-defendant, the Malcomson Law Defendants had no objection to that order. Similarly, with respect to the amendment to the pleadings, the Malcomson Law Defendants did not object to the amendments save insofar as they related to the substitution of Everyday for AIB, which they were opposing.

28. With respect to the orders sought to be made on the consent of Mr. Morrissey, the Malcomson Law Defendants were objecting to the orders referred to in Schedule 2 of the notice of motion, including the declaration sought that the letter of 3rd May, 2011, gave rise to an equitable mortgage in favour of AIB as well as the well charging orders and the appointment of the Receivers with the powers to sell the relevant property. Mr. Bradley maintained that the rights of the Malcomson Law Defendants would be adversely affected by the making of an equitable mortgage declaration, insofar as AIB was maintaining that the equitable mortgage would take priority over the Malcomson Law Charge. Mr. Bradley asserted that the Malcomson Law Defendants were entitled to be heard in relation to the claimed creation and existence or otherwise of the alleged equitable mortgage and that it would be inappropriate for orders to be made in relation to that issue with the consent only of AIB, Everyday and Mr. Morrissey.

29. In the course of his replying affidavit, Mr. Bradley outlined the circumstances in which it was said that Mr. Morrissey executed the Malcomson Law Charge by way of security for the sum of almost €970,000 allegedly due by Mr. Morrissey to Malcomson Law, in respect of legal services rendered by the firm to Mr. Morrissey or from which he had benefited. The firm had acted as Mr. Morrissey's solicitors for more than 40 years. Mr. Bradley disputed all of the allegations made in the proceedings by AIB (and supported by Mr. Morrissey) in relation to the circumstances in which the Malcomson Law Charge was executed. The Malcomson Law Defendants served a notice of indemnity and contribution on Mr. Morrissey in respect of the allegations made surrounding the execution of the charge (many of which allegations had in turn been admitted by Mr. Morrissey in his defence).

30. Mr. Bradley referred to and exhibited correspondence exchanged between his firm and AIB in relation to the circumstances surrounding the execution of the charge and the allegations made by AIB. He noted that there was an ongoing dispute as between Mr. Morrissey and the firm in relation to an issue of legal professional privilege which was the subject of an interlocutory application before McDonald J. which had been adjourned on a number of occasions, to facilitate discussions between the parties. The Malcomson Law Defendants were maintaining that Mr. Morrissey had waived privilege over his file. Mr. Bradley stated that Mr. Morrissey had waived privilege over one attendance note in respect of the meeting on 17th December, 2015, at which Mr. Morrissey agreed to execute the Malcomson Law Charge. Mr. Bradley maintained that the attendance note did not support the allegations made by AIB and Mr. Morrissey concerning the circumstances in which the charge was executed. AIB had been asked to withdraw the allegations but had refused to do so. It was contended that, apart altogether from the issue as to whether the Malcomson Law Charge took

priority over the judgment mortgages registered in favour of AIB and the alleged equitable mortgage the subject of the declaration being sought by AIB in the proceedings, the allegations made by AIB in the proceedings called into question the professional integrity and honesty of the firm and, in particular, of the Malcomson Law Defendants. He contended that, in those circumstances it would be inappropriate to allow AIB to substitute another party in its place in the proceedings and, thereby to avoid any adverse consequences which might arise in the event that the Malcomson Law Defendants successfully defended the proceedings. Mr. Bradley also contended that AIB was aware of the nature and extent of the fees owed by Mr. Morrissey to the firm in respect of work done for him and for his benefit. He contended that AIB was estopped from denying the extent of Mr. Morrissey's indebtedness to the firm.

31. Mr. Bradley also addressed in more detail, in his replying affidavit, the basis on which the Malcomson Law Defendants were objecting to the court making a declaration (with the consent of Mr. Morrissey) that an equitable mortgage was created in respect of the Clonmelsh Property arising from the restated facility letter of 3rd May, 2011. Mr. Bradley contended that the Malcomson Law Defendants would be prejudiced by the making of that declaration on the basis that it would adversely affect their security and that, consequently, no declaration should be made without the Malcomson Law Defendants having an opportunity to be heard and to make submissions in relation to that relief. Mr. Bradley also sought to make various points in relation to the terms of the letter of 3rd May, 2011, in support of his contention that an equitable mortgage was not created. I address those points later in this judgment when considering the legal submissions advanced by the Malcomson Law Defendants. Mr. Bradley noted that, while Mr. Morrissey was consenting to the declaration sought, he had, prior to the Settlement Agreement, consistently maintained the position that no equitable

mortgage existed over the Clonmelsh Property. His defence to the proceedings contained a detailed denial of the creation of an equitable mortgage and of any intention to create such a mortgage. Mr. Bradley noted that, in the course of cross examination by AIB in earlier proceedings in October 2016, Mr. Morrissey had denied on oath that the letter of 3rd May, 2011, imposed any obligation on him to provide security over the Clonmelsh Property and stated that other security had, in fact, been given to AIB instead. Mr. Bradley contended that the issue as to whether an equitable mortgage arose was a mixed question of law and fact and one which potentially affected the property rights of the Malcomson Law Defendants both in relation to the priority of their security and the enforceability of their charge over the Clonmelsh Property. He maintained that that issue should be left over to be determined at the trial of the proceedings.

32. Finally, with respect to the suggestion by Mr. Hopkins that a sufficient sum would be set aside from the proceeds of sale to discharge any sum which might be due to the Malcomson Law Defendants on foot of their charge, Mr. Bradley referred to a previous suggestion by his firm to AIB in March 2017, in which it was indicated that if the sum of almost €970,000 were set aside in an escrow account pending the determination of the issues in dispute between the parties, the Malcomson Law Defendants would agree to discharge their charge to facilitate an urgent sale of the Clonmelsh Property. AIB had indicated in response that the proposal was incomplete, but stated that it would, nonetheless, be considered. However, no response was subsequently provided by AIB. Prior to making that point, Mr. Bradley made the additional point that, while Mr. Hopkins had confirmed that the sum of almost €970,000 would be retained from the proceeds of sale of the Clonmelsh quarry lands and which would be sufficient to cover any sums allegedly secured by the Malcomson

Law Charge, the charge also provided for the payment of interest which was not covered by the proposal and confirmation provided by Mr. Hopkins. On that basis, the order sought was opposed by the Malcomson Law Defendants.

33. Mr. Hopkins swore a second affidavit on 5th May, 2020, in which he took issue with certain matters concerning the background to the dispute and to the AIB/Everyday application contained in Mr. Bradley's affidavit. He contended that the Malcomson Law Charge was invalid for the reasons advanced in the proceedings by AIB (and supported by Mr. Morrissey). Mr. Hopkins contended that Malcomson Law had actual notice of the prior commitment by Mr. Morrissey to provide security in respect of the Clonmelsh Property as the firm had acted for DMIL and Mr. Morrissey at the time of the grant of the loan facilities by AIB, including the time of the restated facility letter of 3rd May, 2011. Mr. Hopkins also disputed the account and interpretation of the correspondence between Malcomson Law and AIB and its solicitors in relation to the circumstances surrounding the execution of the Malcomson Law Charge in December 2015. He disputed the interpretation of the attendance notes relied on by Mr. Bradley and referred to certain documentation including an internal email allegedly sent by Mr. Bradley in February 2015 which, Mr. Hopkins contended, evidenced that the express intention of the Malcomson Law Defendants in seeking the charge over the properties was to obtain priority over the debts owed by Mr. Morrissey to AIB and to improve the firm's negotiating position vis-à-vis AIB.

34. Mr. Hopkins then proceeded to address the various grounds of objection advanced by Mr. Bradley to the reliefs being sought in the AIB/Everyday application. I will address the points made by Mr. Hopkins when considering the legal submissions of the parties later in my judgment.

35. On the issue as to whether provision would be made for interest in the sum to be retained from the proceeds of sale of the Clonmelsh Property to cover the monies allegedly secured by the Malcomson Law Charge, Mr. Hopkins asserted that the Malcomson Law Defendants should confirm to the court the amount (including interest) they maintained was currently secured by the charge and that the plaintiff and the proposed Receivers would comply with any order which the court was prepared to make in relation to the withholding of sums from the proceeds of sale of the Clonmelsh property. Provided such a sum was retained, it was contended that no possible prejudice would be caused to the Malcomson Law Defendants or to the firm.

36. Mr. Bradley swore two further affidavits in respect of the application. In an affidavit sworn on 22nd June, 2020, he stated that there was a *"considerable amount of documentary evidence"* arising from the time during which it is alleged Mr. Morrissey granted an equitable mortgage to AIB. In addition, he stated that Mr. Morrissey communicated with Malcomson Law in relation to his dealings with AIB on issues which might have a bearing on the question as to whether an equitable mortgage exists. However, Mr. Bradley explained that he was not in a position to put any of that information before the court on the grounds of *"solicitor/client confidentiality, legal professional privilege in respect of this evidence currently being maintained by* [Mr. Morrissey]*"*. Mr. Bradley stated that he wrote to Mr. Morrissey on a number of occasions prior to the hearing of the motion requesting that, in light of the Settlement Agreement, Mr. Morrissey would agree to waive legal professional privilege or consent to such material being put before the court. However, he had not received any response from Mr. Morrissey.

37. Mr. Bradley swore a further affidavit on 3rd July, 2020. In that affidavit, he provided a calculation of the interest allegedly secured by the Malcomson Law Charge and

exhibited a report prepared by Seagrave-Daly & Lynch Limited, Consultant Actuaries, dated 3rd July, 2020, which calculated the interest allegedly arising under the Malcomson Law Charge, together with interest under the Courts Act, at €440,581. While there was no further replying affidavit on behalf of AIB or Everyday in response to that affidavit, it was made clear to the court by counsel at the resumed hearing of the application on 17th July, 2020, that AIB and Everyday did not agree with the interest calculation relied on by Mr. Bradley for a number of reasons. First, issue was taken with the inclusion of Courts Act interest in circumstances where the Malcomson Law Charge did not refer to such interest and also that the Courts Act does not provide for the payment of interest upon interest. Second, objection was taken to the fact that interest was calculated on a compound basis which, it was said, was not provided for in the Malcomson Law Charge. There was, therefore, no agreement in relation to the interest figure.

38. The hearing of the AIB/Everyday application was severely disrupted by the Covid-19 pandemic. Counsel instructed by Farrell McElwee, the solicitors then acting for Mr. Morrissey in these proceedings and in the two other proceedings referred to in the Settlement Agreement, informed the court on, at least, two occasions, on 31st January, 2020 and, on the return date for the AIB/ Everyday application, 10th February, 2020, that Mr. Morrissey was consenting to the orders sought by AIB and Everyday in the AIB/Everyday application. However, in view of the opposition of the Malcomson Law Defendants to various of the orders sought, it was necessary to give some further time to the hearing of the application. On that basis, it was listed for hearing on 18th March, 2020, with directions being given to enable the hearing to proceed that day. However, the advent of the Covid-19 pandemic in Ireland and the consequent effect on the listing of cases meant that that hearing could not proceed. It was relisted for a

remote hearing on 21st May, 2020. For various Covid-19 related reasons, that hearing was adjourned. The application was subsequently relisted for hearing on 26th June, 2020 and was heard over the course of various days over the following months.

39. Mr. Morrissey's solicitors, Farrell McElwee, brought three applications to come off record as solicitors for Mr. Morrissey in these proceedings as well as in the two other proceedings referred to in the Settlement Agreement, the Quarry Proceedings and the Directions Proceedings. Those applications were heard remotely by me on 24th June, 2020. The basis on which those applications were made was that the relationship between the firm and Mr. Morrissey had broken down. Mr. Morrissey informed the firm of his desire to continue the prosecution of his case in those proceedings and the other two proceedings.

40. At the hearing of the applications to come off record, senior counsel instructed by Farrell McElwee on behalf of Mr. Morrissey confirmed that on each occasion the AIB/Everyday application was before the court, the firm's instructions were that Mr. Morrissey was consenting to the orders being sought. Mr. Morrissey did not oppose the orders sought by his solicitors . He confirmed that he had signed the Consent Letter and the Settlement Agreement. He maintained that a number of items to be attended to in Settlement Agreement remained outstanding. Mr. Morrissey had prepared a lengthy statement which had not been provided in advance to AIB, Everyday, the Malcomson Law Defendants or Plazamont. Mr. Morrissey read from parts of the statement at the hearing of his solicitors' applications to come off record. Ultimately, I directed that a copy of the statement be provided to the other parties. That was done in advance of the first day of the hearing of the AIB/Everyday application on 26th June, 2020.

41. I do not propose to reproduce the contents of Mr. Morrissey's statement in full save to say that it contains Mr. Morrissey's account of the establishment of the quarry business by his father in the 1960s and the relationship which Mr. Morrissey and DMIL had with AIB, including the appointment of the Receivers to DMIL and the conduct of the receivership by the Receivers. Mr. Morrissey was very critical of the Receivers and the manner in which they carried out the receivership. He was also very critical of Plazamont with whom the Receivers had entered into a licence to operate the Clonmelsh quarry. Mr. Morrissey referred to the circumstances in which the Malcomson Law Charge was allegedly created in December 2015, and reiterated the criticisms he made in respect of that alleged charge before the High Court in October 2016 and what he had said on affidavit sworn in April 2016. Mr. Morrissey also alleged that funds were not accounted for in the receivership and contended that his debt had been *"massively overpaid"*. He contended, therefore, that the judgment obtained against him in December 2015 (with his consent) should be set aside and that the monies allegedly not accounted for from the receivership should be repaid. At the conclusion of his statement, Mr. Morrissey asked the court *"not to ratify consent orders pending the outcome* [of] *my cases"*. Mr. Morrissey subsequently exhibited a copy of his statement to an affidavit he swore on 16th July, 2020.

42. The first day of hearing of the AIB/Everyday application was 26th June, 2020. Senior counsel for AIB and Everyday elaborated on the written submissions which those parties had furnished in advance of the hearing and explained the basis on which it was contended that the consent orders sought should be made. Senior counsel for the Malcomson Law Defendants opposed the making of some of the orders but not others. Counsel for Plazamont supported the application and the consent orders which were being sought in the application. Mr. Morrissey opposed the orders. He accepted that

he had entered into the Settlement Agreement and had signed the Consent Letter although he pointed out that Clause 3.1 of the Settlement Agreement provided that the agreement was conditional upon certain things, including the provision by him of additional security and the approval of the court. Mr. Morrissey also acknowledged that he had consented to the summary judgment in favour of AIB in the sum of just short of €25m in December 2015. However, he maintained that AIB and the Receivers should be accountable for the manner in which, he maintained, the receivership had been conducted. Mr. Morrissey effectively repeated much of what was said in the statement which had, by that stage, been circulated to the other parties. He also requested that a copy of the Settlement Agreement be provided to the court (it had not been exhibited to the AIB/Everyday application on the grounds of commercial sensitivity). The Malcomson Law Defendants did not object to AIB and Everyday providing a copy of the Settlement Agreement to the court. At the conclusion of the hearing that day, I ruled that a copy of the Settlement Agreement should be provided to the court. I also ruled that the Malcomson Law Defendants should provide evidence of the interest they maintained was covered by the Malcomson Law Charge. I was also told that it was hoped that a mediation would take place between AIB and Everyday and the Malcomson Law Defendants in early July. For those reasons, the continued hearing of the application was put back to 17th July, 2020.

43. A copy of the Settlement Agreement was provided to the court by AIB and Everyday's solicitors on 1st July, 2020. As I have already mentioned Mr. Bradley swore a supplemental affidavit providing details of the interest which it was alleged was covered by the Malcomson Law Charge. Mr. Morrissey wrote a series of letters to the parties on 6th July and 10th July, 2020. In a letter to McCann Fitzgerald, solicitors for AIB and Everyday, dated 6th July, 2020, Mr. Morrissey referred to the

"Proposed Settlement Agreement" and stated *"for the purpose of clarity, I hereby withdraw from the Proposed Settlement Agreement"*. He stated that *"this agreement was predicated on information unavailable to me but within the knowledge of the plaintiffs thereby prejudicing me in my capability of conscientiously executing same"*. Mr. Morrissey wrote a similar letter to Plazamont's solicitors on 10th July, 2020. He sought an adjournment of the hearing on 17th July, 2020, to allow him to advance his objections to the application on affidavit. AIB and Everyday opposed the adjournment request. Mr. Morrissey had by that stage sworn an affidavit on 16th July, 2020, in which he said that he had confirmed his withdrawal from the *"Proposed Settlement Agreement"*. He referred to and exhibited certain documentation in relation to the receivership of DMIL and contended that large sums of money were allegedly unaccounted for in the course of the receivership. Mr. Morrissey exhibited a copy of his statement. He contended that the *"Proposed Settlement Agreement"* seriously prejudiced him. He also referred to the fact that the Malcomson Law Defendants had commenced separate summary proceedings against him. He sought further time to advance his objections to the AIB/Everyday application.

44. The application was before the court again on 17th July, 2020. I was informed that a mediation did take place between AIB and Everyday and the Malcomson Law Defendants but, unfortunately, was unsuccessful. I was informed that there was a dispute in relation to the question of interest allegedly arising on foot of the Malcomson Law Charge. It was also clear that an issue had arisen as to whether or not Mr. Morrissey was entitled to withdraw his consent to the orders sought on the AIB/Everyday application and that that was an issue which would have to be determined by me. Another issue which arose was that Mr. Morrissey had exhibited a copy of the Settlement Agreement to his affidavit of 16th July, 2020, which he had

then served on the other parties, notwithstanding that the direction I made (with the agreement of all of the parties) was that a copy of the Settlement Agreement would be provided to the court only and not circulated to the parties. It was accepted by the Malcomson Law Defendants that Mr. Morrissey ought not to have sent a copy of the Settlement Agreement to them. In light of these developments, it was necessary for the court to give further directions to enable the AIB/Everyday application to be determined. In my ruling that day, I indicated that I had serious doubts as to whether there was any entitlement on the part of Mr. Morrissey to withdraw from the Settlement Agreement and to withdraw the consent to the orders which had been communicated to the court on his behalf. However, I accepted that that was an issue which had to be determined and I gave further directions to enable the parties to provide written submissions on that issue.

45. In compliance with the directions made, I received written submissions from Mr. Morrissey, AIB and Everyday, Plazamont and the Malcomson Law Defendants, on the issue as to whether Mr. Morrissey was entitled to withdraw his consent to the orders sought in the AIB/Everyday application. Mr. Morrissey also swore a second affidavit on 9th September, 2020, in which he exhibited a large volume of material. That affidavit was not directed by the court. In it, Mr. Morrissey continued to criticise the Receivers for the conduct of the receivership of DMIL as well as continuing his criticisms of Plazamont. He sought to introduce issues which, in my view, were entirely irrelevant to the AIB/Everyday application. The ultimate conclusion in his affidavit was that in his view, there should be a surplus in the receivership of DMIL and that there should, therefore, be no need for the *"Proposed Settlement Agreement"*. He contended that the debt owed to AIB was *"settled in full"*.

46. The AIB/Everyday application was back before the court on 15th September, 2020. The Malcomson Law Defendants applied for an adjournment of the application in light of the material just received from Mr. Morrissey in the form of his second affidavit and the large volume of exhibits. I acceded to that application and the matter was adjourned to 29th September, 2020. On that date, I heard further submissions on the issue of Mr. Morrissey's entitlement to withdraw his consent. In the course of those submissions, senior counsel for the Malcomson Law Defendants observed that in light of some of the material relied on by Mr. Morrissey, there might be further issues between the Malcomson Law Defendants and AIB and Everyday in the proceedings continuing as between those parties. Those issues did not appear to me to be relevant to the matters which I had to decide on the AIB/Everyday application. I ultimately reserved judgment on the application.

4. Framework for the Determination of AIB/Everyday Application

47. In light of the somewhat unusual nature of the application and the various developments which have taken place during the course of the hearing of the application, I propose to approach my decision on the application in the following way.

48. I will first address the objections advanced by the Malcomson Law Defendants to the three main areas of disagreement between them and the moving parties on the application, AIB and Everyday. As I have already observed, there are certain aspects of the application to which the Malcomson Law Defendants do not object, including the removal of the PRA as a defendant in the proceedings. However, the Malcomson Law Defendants oppose (i) the substitution of Everyday for AIB as plaintiff in the proceedings; (ii) the making by the court of a declaration that an equitable mortgage

was created by Mr. Morrissey by means of the restated facility letter dated 3rd May, 2011, (iii) the making of a declaration that the judgment obtained by AIB against Mr. Morrissey in December 2015, stands well charged against his interest in the Clonmelsh Property (excluding the family home and the retained lands) on foot of the judgment mortgages registered by AIB; and (iv) the appointment of the Receivers to receive the interests of Mr. Morrissey in the Clonmelsh Property (excluding the family home and the retained lands) and conferring on them powers, including the powers to sell the property and to retain a sum sufficient to discharge the amount claimed by the Malcomson Law Defendants to be secured by the Malcomson Law Charge over the relevant properties pending the determination of the proceedings.

49. I propose to deal with these issues first because when the AIB/Everyday application was issued and on the first number of occasions on which it was before the court, the application was presented on the basis that Mr. Morrissey was consenting to the orders sought in the application. During the course of the application and while it was at hearing, Mr. Morrissey sought to withdraw his consent. As explained earlier, that meant that the court had to seek further submissions from the parties on the issue as to whether it was open to Mr. Morrissey to do so. Having considered the objections raised by the Malcomson Law Defendants, I will then consider the issue as to whether it was open to Mr. Morrissey to withdraw his consent.

50. Having considered those issues, I will then set out my conclusions on the AIB/Everyday application.

5. Consideration and Assessment of the Objections of the Malcomson Law Defendants

(a) Substitution of Everyday for AIB

51. AIB and Everyday rely on the provisions of O. 17, r. 4 or, in the alternative, O. 15, rules 13 and 14, for the court's jurisdiction to substitute Everyday for AIB as a plaintiff in the proceedings. While the notice of motion seeks, in the alternative, an order joining Everyday as a co-plaintiff to the proceedings, the applicants have made clear that their preferred relief is an order substituting Everyday for AIB. The basis on which the substitution application is made is that AIB's interests in the loan facilities, the guarantee and all related security were transferred by it to Everyday under the global deed of transfer dated 14th June, 2019. AIB and Everyday rely on the judgment of Costello J. in the Court of Appeal in *Stapleford v. Lavelle* [2016] IECA 104, in which the court noted that the intention of the Supreme Court of Judicature Act (Ireland) Act 1877 (the "1877 Act"), was to remove the formal necessity of joining an assignor in any proceedings brought by an assignee to enforce the assigned chose in action. AIB and Everyday rely on a number of cases in which the courts have confirmed the principles to be applied in the case of an application to substitute an entity to which loan facilities and securities have been assigned in place of the assigning entity. The cases relied on include *Bank of Scotland plc v. McDermott* [2019] IECA 142, and *AIB plc v. McKeown* [2020] IEHC 155. It is contended that these cases set out the principles governing the substitution application. It is further contended that, regardless of whether the applicants had to demonstrate the validity of the assignment on a *prima facie* basis or on the balance of probabilities, the test is met in this case in circumstances where none of the objections advanced by the Malcomson Law Defendants are directed to the validity of the assignment provided for in the global deed of transfer. AIB and Everyday maintain that there is no good

reason why AIB should be required to remain as a co-plaintiff in the proceedings. Its continued involvement in the proceedings is, they submit, entirely unnecessary since all its rights in the relevant facilities, guarantee and securities have been assigned to Everyday.

52. With respect to the grounds of objection advanced by the Malcomson Law Defendants in opposing the substitution application, AIB and Everyday contend that there is no basis for any of the objections raised. With respect to the objection advanced on the grounds that AIB is making very serious allegations against the Malcomson Law Defendants and has adopted the very serious allegations made by Mr. Morrissey, AIB and Everyday argue that that does not amount to a good reason not to make the substitution order. If substituted as plaintiff in place of AIB, Everyday would be stuck with the case which AIB was making against the Malcomson Law Defendants and that case would stand or fall on its merits, irrespective of whether or not Everyday was substituted for AIB as the plaintiff in the proceedings. They rely on dicta of Kelly J. in the High Court in *IBRC v. Comer* [2014] IEHC 671, in support of that proposition. In that case, Kelly J. stated that the assignee to be substituted for IBRC in the proceedings would *"take over the entitlement to prosecute the proceedings, subject to all of the imperfections that may have been present when the action was constituted between IBRC and the defendants…"* (para. 30). The second and related ground of objection advanced by the Malcomson Law Defendants was that, at the conclusion of proceedings and should the court reject the allegations made by AIB against the Malcomson Law Defendants, they would be entitled to recover costs against AIB on a solicitor-client or some other punitive basis. AIB and Everyday accepted that if that eventuality arose, Everyday as the successor of AIB as plaintiff, would have to meet such an application and would

have to meet any such punitive costs orders. They submitted, therefore, that the court should not refuse the substitution application on the basis of any of the objections raised by the Malcomson Law Defendants.

53. In response, the Malcomson Law Defendants noted that none of the case law on the substitution or joinder of parties had addressed a situation like this, where very serious allegations were made by the party which it was sought should be substituted for the new party as plaintiff in the proceedings. The allegations made by AIB against the Malcomson Law Defendants in the proceedings include serious allegations of fraudulent behaviour and unconscionable conduct. AIB also adopted and pursued allegations made by Mr. Morrissey, including the allegation that Mr. Bradley and a colleague in the firm had, when seeking to obtain Mr. Morrissey's signature on the instrument creating the Malcomson Law Charge, produced a blank sheet of paper which Mr. Morrissey was then asked to sign. This, it was submitted, amounted to an accusation that those involved had forged a document. These allegations were such that, if upheld, they would expose the Malcomson Law Defendants to the possibility of losing their practising certificates (and, effectively, of being struck off the Roll of Solicitors). They argued that, having made these serious allegations, AIB ought not to be permitted to walk off the pitch leaving Everyday behind as the sole plaintiff in the proceedings. They submitted that the court should retain AIB as a plaintiff in the proceedings to enable the Malcomson Law Defendants to defend their good name and reputation in response to the allegations made by AIB. In support of that submission, the Malcomson Law Defendants rely on the decision of the Supreme Court in *Grant v. Roche Products (Ireland) Limited* [2008] 4 I.R. 679. They argued that it was necessary to retain AIB as a plaintiff in the proceedings in order that they could fully defend their good name and reputation. It was accepted that AIB is entitled, pursuant

to the provisions of the 1877 Act, to assign the relevant facilities, guarantees and securities to Everyday. However, that did not mean that AIB was entitled, by assigning those interests to Everyday, to remove itself from the proceedings, in circumstances where the Malcomson Law Defendants are entitled to vindicate their good name against AIB which had initiated and maintained the these proceedings containing serious allegations of fraud and unconscionable conduct against them. On that basis, it was said that an order should be made joining Everyday as a co-plaintiff to the proceedings along with AIB and not substituting Everyday in place of AIB.

54. The Malcomson Law Defendants rely on a second, and related, objection to the substitution application. That objection is based on the fact that, if the allegations made by AIB against the Malcomson Law Defendants (which are strenuously denied by them) were to be rejected by the court, that might warrant an order for costs being made against AIB on a solicitor-client basis as provided for in O. 99, r. 10(3). In that regard, the Malcomson Law Defendants rely on *Trafalgar Developments Limited & Ors v. Mazepin & Ors* [2020] IEHC 13 (Barniville J.) and *Doyle v. Donovan* [2020] IEHC 119 (Simons J.). They note that one of the factors which a court would have regard to in deciding whether to make an order for costs on a solicitor-client or on some other punitive basis is the court's desire *"to mark its disapproval or displeasure at the conduct of the party against which the order is made"* (para. 15 of *Dunnes Stores v An Bord Pleanála* [2016] IEHC 697, quoted at para. 47 of *Trafalgar*). They argue that if AIB were removed as a plaintiff in the case, it would prejudice them in making an application for such an order for costs.

55. Having initially consented to the substitution order, Mr. Morrissey included in his written submissions of 11th August, 2020, an objection to that order, without indicating the basis upon which he was objecting.

56. I am satisfied that, notwithstanding the objections advanced by the Malcomson Law Defendants and, belatedly, by Mr. Morrissey, I should make the substitution order sought by AIB and Everyday. I do not believe that the Malcomson Law Defendants would be prejudiced, either in terms of their ability to defend their good name and reputation in response to the allegations made and maintained by AIB or in relation to their ability to seek an order for costs on a solicitor-client or some other punitive basis, in the event that the allegations are ultimately rejected by the court. Before explaining in more detail why I have come to that view, I should set out my findings on the correct jurisdictional basis for making this substitution order and also the approach which I have taken to the standard of proof and the assessment of the evidence in respect of the application.

57. It is now well established that the jurisdictional basis for making an order substituting an assignee for an assignor in the case of an assignment of loan facilities and securities is O. 17, r. 4, RSC and not O. 15, rules 13 and 14. That is clear from the judgment of Baker J. in the High Court in *IBRC v. Lavelle* [2015] IEHC 321. In that case, having considered the relevant authorities, Baker J. held that O. 17, r. 4 permits an application to be made to add or substitute a party who has taken a legal assignment of a loan book from the original plaintiff in proceedings. The Court of Appeal upheld that decision, on appeal, in *Stapleford Finance Limited v. Lavelle* [2016] IECA 104. The Court of Appeal concluded that Baker J. was correct in holding that she had the power to substitute the relevant party as the sole plaintiff in the proceedings under that provision of the RSC and that she had not erred in law in making the order. That conclusion was endorsed by Murray J. in his judgment for the Court of Appeal in *Pepper Finance Corporation (Ireland) Limited v. Macken & Anor* [2021] IECA 15.

58. As to the standard of proof to be adopted on a substitution application, in the case of an assignment of loan facilities, guarantees and security rights, the court will generally require that the applicant for such an order demonstrates a *prima facie* case as to the validity of the assignment and the consequent entitlement of the assignee to be substituted for the assignor in the proceedings. That was the approach taken by Kelly J. in *IBRC v. Comer*. It was also the approach taken by the Court of Appeal in *IBRC v. Halpin* [2014] IECA 3. That is clearly the approach to be taken where the opposing party has the opportunity of challenging the validity of the assignment at a later substantive hearing, whether that hearing is on an application for judgment or on an application for an order for possession (see, for example, *Bank of Scotland plc v. O'Connor* [2017] IECA 24, and *Pepper Finance Corporation (Ireland) Limited v. Macken*). However, when the opposing party will not have any opportunity at a subsequent hearing to raise issues in relation to the validity of the assignment, such as where the substitution order is sought for the purposes of enforcing an existing judgment where there would be no opportunity at trial or at a subsequent hearing to raise issues in relation to the proofs adduced in support of the application for judgment, it has been held that the *prima facie* standard of proof is not appropriate and that the correct standard in such circumstances is that applicable in civil proceedings generally, namely, proof of entitlement on the balance of probabilities (see, for example, *Bank of Scotland plc v. McDermott* [2019] IECA 142).

59. The debate as to the relevant standard of proof generally arises where one side wishes to dispute the validity of the assignment which is relied on as the basis for the substitution application. That is not the case here. Neither the Malcomson Law Defendants nor Mr. Morrissey have disputed the validity of the assignment provided for in the global deed of transfer. There is, therefore, no issue about the validity or

effectiveness of the assignment or transfer of the facilities, guarantee or security by AIB to Everyday. I should make clear that not only have these matters been demonstrated to me on the evidence (summarised earlier) on a *prima facie* basis but, for the avoidance of any doubt, I confirm that I am also entirely satisfied on the basis of that evidence on the balance of probabilities that AIB's interest in those facilities, the guarantee and the security have been validly transferred or assigned by AIB to Everyday.

60. In considering the force of the two separate but related objections raised by the Malcomson Law Defendants to the substitution order, it is necessary that I refer to some basic principles on the legal effect of an assignment such as that provided for in the global deed of transfer. The first is that, as explained by the Court of Appeal in *Stapleford Finance Limited v. Lavelle*, the legislative intent of 1877 Act, would be defeated if the assignee of a chose of action could not be substituted as plaintiff in the proceedings for the assignor. In giving judgment for the Court of Appeal in that case, Costello J. stated:

> *"Since the Supreme Court of Judicature Act (Ireland) 1877 it has been possible legally to assign a chose in action. The intent of the statute is to do away with the formal necessity of joining the assignor in any proceedings brought by the assignee to enforce the chose in action. The legislative intent is defeated if the rules of court do not provide for of the substitution of the assignee of the chose in action as plaintiff in proceedings commenced by the assignor. This is so in* [the] *case of a statute dating back to 1877 in respect of* [an] *application which Kelly J.* [in *Comer*] *described as common place."* (per Costello J. at para. 20)

61. Therefore, O. 17, r. 4 clearly provides for the assignor to be substituted as plaintiff for the assignee.

62. The second relevant principle is that stated by Kelly J. in *Comer* which is that the assignee who is substituted for the assignor in such circumstances takes over the entitlement to prosecute the proceedings *"subject to all of the imperfections that may have been present when the action was constituted as between* [the assignor] *and the defendants…"* (per Kelly J. at para. 30). The effect of a substitution order is to bring to an end the entitlement of the assignor to further prosecute the proceedings and for that entitlement to pass, on the making of the order, to the assignee. The assignee, however, takes the assignment and the entitlement to further prosecute the proceedings, subject to all of the disadvantages and difficulties to which the assignor was subject at the time of the assignment. That second principle is, in my view, of critical relevance to my assessment of the force of the two objections raised by the Malcomson Law Defendants to the substitution application.

63. I turn now to consider the first of those objections. That is that the court should not make the substitution order because of the very serious allegations made by AIB against the Malcomson Law Defendants in the proceedings in connection with the creation of the Malcomson Law Charge. It is true that AIB have made very serious allegations against the Malcomson Law Defendants in the proceedings and adopted very serious allegations made by Mr. Morrissey against those defendants. However, it does not seem to me that it is necessary in order for the Malcomson Law Defendants to be in the position fully to defend their good name and reputation to require AIB to remain as a plaintiff in the proceedings in circumstances where it has assigned or transferred all of its interests in the proceedings and in the underlying facilities and securities to Everyday. It will be a matter for Everyday to decide

whether to stand over the allegations made by AIB against the Malcomson Law Defendants. Everyday will be subject to whatever difficulties or burdens which AIB may have faced in making those allegations and will be required to prove them in just the same way as AIB had it remained as a plaintiff in the proceedings. That is the effect of the second principle referred to above which was pithily stated by Kelly J. in *Comer*. It will obviously be a matter for Everyday to satisfy itself that it has a basis for maintaining the very serious allegations against the Malcomson Law Defendants since, as things stand, the proceedings will continue against those defendants.

64. In my view, AIB is entitled to be substituted for Everyday as plaintiff in the proceedings as that is the logical effect and consequence of the transfer and assignment provided for in the global deed of transfer. There is no useful purpose for AIB to remain as a plaintiff in the proceedings in light of that transfer. Nor do I believe that the Malcomson Law Defendants have a right or entitlement to require AIB to remain on as a plaintiff.

65. While they have relied on the decision of the Supreme Court in *Grant v. Roche Products (Ireland) Limited*, I do not believe that that decision supports the position advanced by the Malcomson Law Defendants in this case. It was fairly acknowledged by the Malcomson Law Defendants, that the facts of that case and the issue which the Supreme Court had to decide there were fundamentally different to those which arise in this case. *Roche* was a case in which the plaintiff, as personal representative of his deceased son, brought a fatal action under s. 48 of the Civil Liability Act 1961, claiming that his son committed suicide having taken a prescribed drug manufactured and distributed by the Roche defendants. He alleged that the drug caused his son to become extremely depressed and withdrawn as a result of which he committed suicide. It was alleged that depression was a known side effect of the drug. The

Roche defendants delivered a defence fully denying liability. Subsequent to the delivery of that defence, the Roche defendants offered a sum of money to the plaintiff which they claimed represented all of the damages to which the plaintiff would be entitled in the proceedings together with the plaintiff's costs and the costs of the other defendants. The offer was rejected by the plaintiff who wished the proceedings to go to trial. The Roche defendants then brought a motion seeking an order staying the proceedings or restraining the continued prosecution of the proceedings on the grounds that the open offer made represented all of the relief sought by the plaintiff in the proceedings and that, in those circumstances, the continued prosecution of the proceedings would be an abuse of the process of the court. The Roche defendants failed in the High Court and on appeal to the Supreme Court. In his judgment for the Supreme Court, Hardiman J. held that it was not an abuse of process for the plaintiff to continue with the prosecution of the proceedings. He held that Article 40.3 of the Constitution required that the right to life of the plaintiff's son be vindicated and that that could be done only by hearing, in accordance with law, the plaintiff's statutory claim that his son's death was caused by the wrongdoing of the Roche defendants and by the court accepting or rejecting that proposition after a proper hearing. He further held that a finding that a death was caused by the wrongful act of another person was a finding which conferred a tangible benefit on the relatives of the deceased.

66. It can be seen, therefore, that *Roche* case involved very different facts and circumstances from the present one. I am afraid I cannot accept the analogy for which the Malcomson Law Defendants contend. If Everyday is substituted for AIB as the plaintiff in the proceedings, and if it is satisfied that there is a basis for doing so, it will continue the prosecution of the proceedings against the Malcomson Law Defendants and those defendants will presumably continue to defend the proceedings.

If Everyday is not satisfied there is a basis for the claims it will presumably seek to discontinue them and would, in such a case, have to bear the appropriate costs consequences, whatever they may be. Everyday will be in precisely the same position as AIB in making that decision.

67. There is no impediment or obstacle in the way of the Malcomson Law Defendants in defending the proceedings or in making any appropriate costs application. If anything, it might be said that there is a greater risk of the case against them being weakened by the departure of AIB as a plaintiff in the proceedings unless, of course, such evidence as AIB would have relied upon in support of the allegations is made available to and can be relied on by Everyday. But in those circumstances, there is nothing preventing the Malcomson Law Defendants continuing to defend the proceedings and continuing to deny the serious allegations made against them. The replacement of AIB by Everyday as a plaintiff does not affect that entitlement. That is quite different to what was at issue in *Grant*. If the Supreme Court had acceded to the Roche defendants' application, it would have meant that the plaintiff would not have been in a position to continue to prosecute the case and seek to vindicate the constitutional right to life of his deceased son and would have been deprived of the opportunity of obtaining the tangible benefit which a finding that a death was caused by the alleged wrongful act of another person would confer on the plaintiff in that case and on other relatives of the deceased. The situations are, therefore, quite different in my view. I do not accept, therefore, that the *Grant* case affords any support for the Malcomson Law Defendants' objection to the substitution order sought.

68. In addition to this, the Malcomson Law Defendants have not counterclaimed in the proceedings but I was informed during the hearing that it was their intention to commence separate proceedings against AIB and Mr. Morrissey. If such separate

proceedings have been or are to be commenced, they will also provide an appropriate forum for the Malcomson Law Defendants to vindicate their rights to good name and reputation. It is not necessary to keep AIB in as a plaintiff in these proceedings in order for the Malcomson Law Defendants to have the opportunity of doing so. Nor should AIB be compelled to remain as a plaintiff in the proceedings in circumstances where its interests have all been assigned and transferred to Everyday.

69. I now turn to the second and related objection to the substitution application which is that the Malcomson Law Defendants will in some way be prejudiced by the removal of AIB as a plaintiff in the proceedings in circumstances where they may wish to make an application for an order for costs on a solicitor-client basis or on some other punitive basis in the event that the serious allegations made against them are ultimately rejected by the court following a trial. They wish to rely on the principles which were summarised in *Trafalgar Developments Limited & Ors v. Mazepin & Ors* and approved subsequently in *Doyle v. Donovan*. I do not accept that this objection provides a valid basis for refusing to substitute Everyday for AIB. It was correctly accepted by counsel for AIB and Everyday that if the circumstances merited the making of an order for costs on a solicitor-client or some other punitive basis then such order can be made against and met by Everyday in just the same way as if the order had been made sought against AIB. That again is the logical consequence of the fact that Everyday takes all of the rights and entitlements under the global deed of transfer subject to all of the "*imperfections*" that may have been present at the time of the transfer or assignment. Such *"imperfections"* would include the making of serious unfounded allegations against another party, particularly where that other is a professional person. The position is, therefore, if the Malcomson Law Defendants successfully defend these serious allegations made by AIB, in the event that they are

maintained by Everyday, they will not in any way be prevented or hampered in making whatever costs application they may feel is appropriate, including an application for costs on a solicitor-client basis in accordance with the principles set out in *Trafalgar*. I am not satisfied, therefore, that this ground of objection provides a valid basis for refusing the application to substitute Everyday for AIB as the plaintiff in the proceedings.

70. Finally, Mr. Bradley raised another ground of objection to the substitution order in his replying affidavit. That objection was based on a plea advanced by the Malcomson Law Defendants that AIB was, at all material times, aware of Mr. Morrissey's alleged indebtedness to the firm and that AIB is estopped from denying that liability. It was asserted by Mr. Bradley in his replying affidavit that it would be inappropriate in those circumstances to discharge AIB from the proceedings. That point was not developed in written submissions or in the oral submissions made by senior counsel for the Malcomson Law Defendants at the hearing. However, it seems to me that the same problem exists with this objection as with the two that I have just addressed. The answer to the objection is that if the circumstances are such that an estoppel can be raised by the Malcomson Law Defendants against AIB, then it can equally be raised by them against Everyday. This will be another so called *"imperfection"* to which Everyday will have taken its rights and entitlements under the global deed of transfer. If there is a basis for the Malcomson Law Defendants to raise an estoppel against AIB, it can similarly raise that as a defence against Everyday once it is substituted as plaintiff in place of AIB (although he did agree to counsel to consent to a substitution order in the Settlement Agreement).

71. For these reasons, I am satisfied that it is appropriate that I make an order substituting Everyday for AIB as the plaintiff in the proceedings. I am not satisfied that the

Malcomson Law Defendants have raised any valid objections to that order. Nor is it dependent in any way on the consent or otherwise of Mr. Morrissey but arises on foot of the global deed of transfer to which I have referred.

(b) Declaration Re Equitable Mortgage and Well Charging Orders

72. The second area in which there is significant disagreement between AIB and Everyday and the Malcomson Law Defendants concerns the orders sought in the AIB/Everyday application arising from the restated facility letter of 3rd May, 2011. AIB and Everyday seek a declaration that that facility letter constituted an equitable mortgage by Mr. Morrissey in favour of AIB over the Clonmelsh Property but excluding Mr. Morrissey's family home as well as a consequential order directing the PRA to register the equitable mortgage as the burden on each of the relevant folios in which the Clonmelsh Property is registered. AIB and Everyday also seek a declaration that the judgment amount of just under €25 million, together with interest, stands well charged against Mr. Morrissey's interest in the Clonmelsh Property, excluding the family home, pursuant to the equitable mortgage.

73. These were orders to which Mr. Morrissey agreed to consent in the Settlement Agreement and to which he consented in the Consent Letter. The orders are found in Schedule 2, paras. (vi) and (viii) of the notice of motion, Schedule 3, paras. (vi) and (viii) of the Settlement Agreement and in Appendix 1 of the Consent Letter. The Malcomson Law Defendants dispute the entitlement of AIB and Everyday to obtain these orders on various grounds which I will address below.

74. I should add for completeness that another order sought in the AIB/Everyday application is a declaration that the judgment sum of just under €25m together with costs and interest (or such other sum as may be found to be due and owing on inquiry) stands well charged against Mr. Morrissey's interest in the Clonmelsh Property,

excluding the family home and certain retained lands, pursuant to judgment mortgages registered by AIB on 7th January, 2016. While the Malcomson Law Defendants accept that the court has the power to declare Mr. Morrissey's indebtedness to AIB to be well charged against the Clonmelsh Property pursuant to those judgment mortgages, but not pursuant to the alleged equitable mortgage, they maintain that AIB has not provided evidence as to the current indebtedness of Mr. Morrissey to AIB and also argue that such a declaration ought not to be granted at an interlocutory stage of the proceedings. I will briefly address the points raised by the Malcomson Law Defendants in respect of this well charging order at the end of this section of the judgment.

75. Another ground of objection initially advanced by the Malcomson Law Defendants was that the Settlement Agreement had not been provided to the court. As noted earlier, a copy was provided to the court, with the agreement of the Malcomson Law Defendants and Mr. Morrissey.

76. The basis on which AIB and Everyday contend that the court should declare that the restated facility letter of 3rd May, 2011, created an equitable mortgage is as follows. In the first place, they contend that Mr. Morrissey agreed to consent to such a declaration in the Settlement Agreement and consented to it in the Consent Letter. Leaving aside Mr. Morrissey's consent (and the issue as to whether he is entitled to withdraw that consent), AIB and Everyday contend that the letter of 3rd May, 2011, as a matter of law, gave rise to an equitable mortgage over the relevant property. They rely on the fact that the letter was signed by Mr. Morrissey on behalf of DMIL and, separately, by Mr. Morrissey in his own capacity (as he was a guarantor of the debt owing to AIB). They rely on the terms of Appendix 1 to the letter where, beside the heading *"Security"*, the letter stated that the obligations of DMIL to AIB in respect of the

relevant loan facilities were to be secured by certain specified means which were satisfactory to AIB including, at item 12, a *"legal charge over property at Clonmelsh, Co. Carlow from Philip Morrissey (see below)"*. The letter then stated *"for the avoidance of doubt"* that the family home of Mr. Morrissey (and those of the other members of the Morrissey family referred to) were to be *"specifically excluded"* from the security listed above and that AIB would have no security interests over those residences.

77. AIB and Everyday rely on the legal principle that where an owner of land has entered into an agreement to create a legal mortgage, an equitable mortgage is created over the relevant land until the legal mortgage is formally executed. They rely on the judgment of Laffoy J. in the High Court in *ACC v. Malocco* [2000] 3 I.R. 191.

78. They contend that all of the parties to letter of 3rd May, 2011, namely, AIB (and its assignee, Everyday), DMIL and Mr. Morrissey all accepted, as of the date of the Settlement Agreement and the AIB/Everyday application, that the letter had the effect of creating an equitable mortgage over the Clonmelsh Property excluding the family home. They further maintain that the Malcomson Law Defendants and the firm itself, who were not parties to the letter, have no basis for disputing that the letter created an equitable mortgage. They point out that they are not yet seeking orders as to (a) the validity of the Malcomson Law Charge or (b) the priority of that alleged charge with respect to the equitable mortgage (and the judgment mortgages). While Mr. Morrissey was consenting to orders in relation to those two matters, AIB and Everyday accepted that they would have be pursued against the Malcomson Law Defendants at the trial. However, they do seek a declaration that the letter of 3rd May, 2011, created an equitable mortgage over the relevant property as well as a declaration that the judgment sum is well charged against Mr. Morrissey's interests in

the property pursuant to the equitable mortgage, with a view to facilitating the sale of the property.

79. They contend that a recognition of the existence of the equitable mortgage does not, in and of itself, prejudice the Malcomson Law Defendants as both the validity of the Malcomson Law Charge and the priority of that alleged charge over the equitable mortgage are matters to be determined at the trial as between Everyday and the Malcomson Law Defendants. They submit that if the Malcomson Law Defendants succeed on those issues at the trial, they will be entitled to recover all sums secured by the Malcomson Law Charge, irrespective of whether the court makes the consent orders sought in the form of declarations with respect to the creation of the equitable mortgage and that the judgment sum stands well charged pursuant to that equitable mortgage.

80. AIB and Everyday contend that the Malcomson Law Defendants have not put forward any arguable grounds for opposing the declarations sought with respect to the equitable mortgage allegedly created by the letter of 3rd May, 2011. They address each of those objections and contend that none of them have any validity. They maintain that, in deciding whether to make consent declarations that an equitable mortgage was created, the court is entitled to take account of the absence of any arguable defence raised by the Malcomson Law Defendants.

81. In response, the Malcomson Law Defendants submit that it is not appropriate to make the declarations sought at this stage of the proceedings and that the court should decline to do so until after the issues have been thrashed out at the trial. They maintain that sufficient reasons have been advanced which should persuade the court to decline to make the declarations sought at this stage of the proceedings. They contend that they are entitled to be heard on the issue, as the existence or otherwise of

an equitable mortgage could affect the priority to which the Malcomson Law Charge is entitled. They further contend that it would be inappropriate to grant the declaration sought with respect to the equitable mortgage at an interlocutory stage of the proceedings and that such declaratory relief should only be granted by the courts with great care and caution. In this regard, they rely on cases such as *Eugene F. Collins v. Gharion* [2013] IEHC 316 (Birmingham J.), *Lett & Co. Limited v. Wexford Borough Council* [2016] 1 I.R. 418 (Supreme Court) and *Tyrell v. Gibney* [2019] IECA 168 (Court of Appeal). They also rely on dicta of Sir Robert Megarry V.C. in *Malone v. Commissioner of Police of the Metropolis* [1979] 2 WLR 700, where he stated that the court should only grant a declaration of rights *"after the full process of law has been employed to ascertain the complete facts and the contentions"*. They rely on the fact that there continues to be an issue as to disclosure of documentation which is the subject of a claim to legal professional privilege maintained by Mr. Morrissey.

82. The next ground of objection advanced by the Malcomson Law Defendants is that Mr. Morrissey, who at the time of the AIB/Everyday application was consenting to the declarations sought, had previously denied AIB's claim that an equitable mortgage existed and had contended that AIB varied the terms of the letter of 3rd May, 2011, did not require him to create a legal charge in favour of AIB and had waived any requirement that he do so. Mr. Morrissey had also given evidence on oath that he was not obliged to give security over the Clonmelsh Property.

83. Next, they maintain that while Mr. Morrissey signed the letter as a director of DMIL and acknowledged his guarantee, as well as the obligation of DMIL to provide the security set out in the letter, Mr. Morrissey did not actually agree to provide the security relied on by AIB but rather agreed that DMIL was required to provide that

security. The next point advanced was that the letter is insufficiently certain as to which lands were to be charged and so, it is said, the court cannot determine that an equitable mortgage was created over the property as alleged by AIB and Everyday. In support of that objection, reliance is placed on *Duffy v. Ridley Properties Limited* [2008] 4 I.R. 282 (Supreme Court). It is then said that the conditions precedent in the letter of 3rd May, 2011, were never fulfilled and that that letter was superseded by subsequent facilities which were secured otherwise than by any charge over the Clonmelsh Property. Further, it is asserted that the security specified in the letter was not, in fact, provided prior to the date of expiry of that letter. Finally, they contend that Mr. Morrissey, having repeatedly and consistently maintained, prior to the Settlement Agreement, that no equitable mortgage arose in favour of AIB over the Clonmelsh Property, both in his pleadings in the proceedings and under oath in other proceedings, is estopped from maintaining that an equitable mortgage was created and he should not be entitled to reverse his position on that issue.

84. Mr. Morrissey's position on this part of the AIB/Everyday application was, initially, to consent to the orders sought, but then to seek to withdraw his consent on the basis outlined earlier, and as set out in his statement and in the affidavits he swore in July and September 2020. His ultimate position was that the debt owed to AIB was *"settled in full"*.

85. Having considered the submissions made by the parties, I am satisfied that I can and should make the declarations sought by AIB and Everyday with respect to the letter of 3rd May, 2011, and the equitable mortgage created by that letter. I accept the submissions advanced by AIB and Everyday in support of their entitlement to the reliefs sought in this part of their application. I attach significance to the fact that Mr. Morrissey agreed in the Settlement Agreement to consent to these orders and

consented to them in the Consent Letter (and I address whether he is entitled to withdraw that consent later in this judgment and conclude that he is not so entitled). I have also considered all of the objections raised by the Malcomson Law Defendants in response to the reliefs sought by AIB and Everyday with respect to the letter of 3rd May, 2011, and I am satisfied that none of those objections should be upheld. I now explain my reasons for reaching those conclusions.

86. The first issue to be addressed is whether the letter of 3rd May, 2011, is capable of and does create an equitable mortgage over the relevant lands by Mr. Morrissey in favour of AIB. The second issue is whether the court can and should grant a declaration in relation to the creation and existence of an equitable mortgage at this stage in the proceedings. The third and final issue is whether, assuming that the court can make such a declaration at this stage of the proceedings, it should do so.

(i) Whether the letter of 3rd May, 2011, creates an equitable mortgage

87. The terms of the letter of 3rd May, 2011, are, in my view, sufficient to create an equitable mortgage by Mr. Morrissey in favour of AIB over the lands and properties referred to as the "Clonmelsh Property" which exclude Mr. Morrissey's family home at Clonmelsh. I have set out earlier that the relevant terms of the letter relied upon by AIB and Everyday. Appendix 1 of the letter sets out the terms in which the earlier facility letter of 20th August, 2009, was amended and restated by the letter of 3rd May, 2011. Beside the heading entitled *"Security"*, it was agreed that the obligations of DMIL to AIB in respect of the facilities provided to the company would be secured by certain means which included Mr. Morrissey's guarantee (referred to at item 4) and a legal charge to be given by Mr. Morrissey over property at Clonmelsh, Co. Carlow (item 12). It was expressly stated that the family homes of Mr. Morrissey and other members of his family were to be *"specifically excluded"* from the security to be

provided and that AIB would have no security interests over those residences. Mr. Morrissey signed the letter of 3rd May, 2011, which incorporated appendix 1 and the agreement in relation to the security to be provided, in two places, first on behalf of DMIL and second in his personal capacity. Mr. Morrissey was clearly agreeing in his personal capacity to provide the legal charge referred to at item 12 of appendix 1. I do not accept that there is any uncertainty about the fact that it was Mr. Morrissey who was agreeing to the grant of the legal charge or in relation to the description of the property concerned. In my view, the property is adequately described and it is made clear that Mr. Morrissey's family home was to be excluded. I agree with AIB and Everyday that any possible uncertainty in the description of the property the subject of the charge (and I do not accept that there is such uncertainty) is cleared up by the map (map A) referred to in para. (vi) of the Settlement Agreement and para. (vi) of Schedule 2 of the notice of motion which was appended to those documents.

88. I am also satisfied that, as a matter of law, the agreement by Mr. Morrissey to provide the security referred to in the letter of 5th May, 2011, is sufficient to give rise to the creation of an equitable mortgage.

89. The relevant legal principle is described in J.C.W. Wylie *"Irish Land Law"* (4th edn, Bloomsbury Publishing 2022) at para. 12.43 as follows:

> *"As part of its general policy of giving effect to contracts for the creation of legal estates, equity will enforce a contract to create a legal mortgage by its usual remedy of a decree of specific performance. Because of this special approach, equity goes further and says that, until the legal mortgage is actually created by the appropriate method, the intended mortgagee has an equitable mortgage on the land. Thus, in Eyre v. McDowell* [(1861) 9 HLC 619] *it was held that a covenant by a debtor to the effect that, if the debt was*

not paid by a certain date, the creditor could, by entry, forclosure, sale or mortgage, levy the amount from the lands of the debtor, was held to create such an equitable mortgage."

90. The equivalent passage in the 3rd edition of Wylie (para. 12.41) was cited with approval by Laffoy J. in the High Court in *ACC Bank plc v. Malocco* [2000] 3 I.R. 191. Laffoy J. stated that the principle described in that passage *"properly records the longstanding jurisprudence"* of the Irish Courts (at para. 29).

91. In my view, Mr. Morrissey's agreement to grant a legal charge over the relevant property at Clonmelsh (excluding his family home) falls within that principle and did, therefore, give rise to the creation of an equitable mortgage by Mr. Morrissey in favour of AIB in respect of the relevant property. It should be noted that an agreement to create a legal charge must now also comply with s. 51 of the Land and Conveyancing Law Reform Act 2009 (which replaced s. 2 of the Statute of Frauds (Ireland) 1695). The agreement must, therefore, be evidenced in writing and signed by the party to be charged or his authorised agent. That requirement is undoubtedly satisfied by the terms of the letter of 3rd May, 2011.

92. As a matter of fact and law, therefore, in my view, the letter of 3rd May, 2011, is sufficient to create an equitable mortgage over the relevant lands in favour of AIB.

(ii) Whether the court can grant the declaration sought in respect of the equitable mortgage at this stage

93. I am satisfied that the court does have jurisdiction to make the declaration sought in relation to the creation by Mr. Morrissey of the equitable mortgage over the relevant property in favour of AIB. Section 155 of the Chancery (Ireland) Act 1867 (the "1867 Act"), provided that no suit in court should be open to objection on the ground that a merely declaratory decree or order was sought and that it was lawful to the

court to make binding declarations of right without granting other or consequential relief. Those provisions were repeated in O. 19, r. 29 RSC which provides:

> *"No action or pleading shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may, if it thinks fit, make binding declarations of right whether any consequential relief is or could be claimed or not."*

94. The circumstances in which a court can grant declaratory relief were discussed by Walsh J. in the Supreme Court in *Transport Salaried Staffs' Association & Ors v. CIE* [1965] I.R. 180. Having referred to s. 155 of the 1867 Act and to O. 19, r. 29, Walsh J. continued:

> *"In modern times the virtues of the declaratory action are more fully recognised than they formerly were and English decisions and dicta in recent years have indicated a departure from the conservative approach to the question of judicial discretion in awarding declarations. A discretion which was formerly exercised 'sparingly' and 'with great care and jealousy' and 'with extreme caution' can now, in the words of Lord Denning in the Pyx Granite Co. Ltd.* [(1958) 1 Q.B. 554 at 571] *be exercised 'if there is good reason for so doing,' provided, of course, that there is a substantial question which one person has a real interest to raise and the other to oppose. In Vine v. The National Dock Labour Board, Viscount Kilmuir L.C.* [(1957) 2 WLR 106]*, at p. 112, cites with approval the Scottish tests set out by Lord Dunedin in Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.* [(1921) 2 A.C. 438]*, who said, at p. 448:*
>
> > *'The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure*

> *a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.'*
>
> *It is also to be observed that the fact that the declaration is needed for a present interest has always been a consideration of great weight."* (per Walsh J. at pp. 202 – 203)

95. That passage was cited with approval recently by Costello J. in the Court of Appeal in *Recorded Artists Actors Performers Limited v. Phonographic Performance (Ireland) Limited* [2022] IECA 8. At para. 59 of her judgment in that case, Costello J. noted that "*[w]hile the grant of a declaration is a discretionary remedy, it will normally be granted once the plaintiff's legal argument is upheld*". The Court of Appeal in that case held that the requirements for a declaration as set out in the *Transport Salaried Staffs' Association* case were satisfied and that the court should exercise its discretion to grant the declarations sought.

96. I am satisfied that the court does have the jurisdiction to grant the declaration sought with respect to the equitable mortgage under s. 155 of the 1867 Act and O. 19, r. 29. The court has the power to make the declarations sought *"if there is good reason for so doing"* provided that there is or was a substantial question which one person had a real interest to raise and the other to oppose, as outlined by Walsh J. in the *Transport Salaried Staffs' Association* case. In the present proceedings, when the proceedings were commenced by AIB, they included a claim for a declaration as to the creation of an equitable mortgage by means of the letter of 3rd May, 2011. That claim was initially opposed by Mr. Morrissey. However, he then entered into the Settlement Agreement and agreed to consent to the declaration sought and consented to the declaration in the consent letter. I do not believe that that consent deprives the court of the power to grant the declaration. In my view, the court does have the power in

those circumstances to grant the declaration. Next, it is necessary to consider whether the court should do so at this stage of the proceedings.

(iii) Whether the court should now make the declaration sought

97. I am satisfied that the court should exercise its discretion to grant the declaration sought at this stage of the proceedings and that there is *"good reason for so doing"*. The principal reason (but not the only reason) is that AIB and Everyday, on the one hand, and Mr. Morrissey, on the other, were consenting to the order, at the time the AIB/Everyday application was issued. While Mr. Morrissey has sought to withdraw his consent, that is an issue I consider later in this judgment. For present purposes, I proceed on the basis that Mr. Morrissey has consented to the declaration. The Malcomson Law Defendants contend that the court should not make a declaration with respect to the creation of an equitable mortgage at this stage. I have referred to the various grounds of objection advanced by them earlier and I will deal with those in a moment. In support of their contention that the court should not make a declaration at this stage of the proceedings but should leave over any consideration of that issue until the trial of the action as against the Malcomson Law Defendants, they rely on a number of cases. However, I do not believe that those cases afford any support for the objection raised and I consider them now.

98. The first case relied on was *Eugene F. Collins v. Gharion* [2013] IEHC 316. In that case, the plaintiff firm brought an application for a declaration pursuant to s. 3 of the Legal Practitioners (Ireland) Act 1876 (the "1876 Act"), to the effect that the firm was entitled to a charge on funds held by the defendant in respect of an unpaid balance of costs claimed to be due by the defendant to the firm. The defendant contended that there were no fees due to the firm as an agreement had been reached in relation to fees and an agreed amount paid. The High Court (Birmingham J.) held that it was clearly

implicit in s. 3 of the 1876 Act that it had the be established that some fees were due. That issue was *"hotly disputed"* by the parties in the application. Birmingham J. refused to grant the declaration sought on the interlocutory application. He stated at para. 24 as follows:

> *"However, in my view where there is such a fundamental dispute on the facts, it would not be appropriate to make a declaration at an interlocutory stage. The order sought is by any standard a significant one. It has implications, not just for the solicitor and the client but also for third parties. In Mount Kennett Investment Company v. O'Meara [2012] IEHC 167 (Unreported, High Court, Clarke J. 29th March, 2012)* [Clarke J.] *commented as follows:-*
>
> > *'Finally, it is well established that a charging order under s.3 gives the relevant solicitor priority over all other creditors and all claims except that of a purchaser for value without notice of the right of the solicitor to a charging order.'"*

99. As a consequence of the *"fundamental dispute on the facts"*, Birmingham J. stated at para. 25:

> *"It seems to me that an order so potentially far reaching is not one that is appropriately made at interlocutory stage where there is a major disagreement as to fact which remains unresolved."*

100. That is not the case here. There was, at the time the AIB/Everyday application was issued, no *"fundamental dispute on the facts"* between AIB and Everyday, on the one hand, and Mr. Morrissey, on the other. There was no *"major disagreement as to fact"* which remained unresolved at that stage. Mr. Morrissey clearly signed the letter of 3rd May, 2011. Further, Mr. Morrissey entered into the Settlement Agreement in which he agreed to consent to the declaration sought with respect to the equitable

mortgage. He signed the Consent Letter confirming his consent to the orders sought in the application, including the declaration with respect to the equitable mortgage. He confirmed his consent to the court on a number of occasions before purporting to change his position and withdraw his consent during the course of the hearing of the application.

101. The Malcomson Law Defendants have not raised any factual issues with respect to the creation of the equitable mortgage and I do not accept that they have been precluded from doing by reason of the dispute which existed (and may still exist) in relation to a claim of legal professional privilege maintained by Mr. Morrissey. The Malcomson Law Defendants have not indicated, even in broad terms, the facts they would wish to raise in order to demonstrate a factual dispute relevant to the creation of the equitable mortgage and the making of a declaration in relation to its creation. In those circumstances, I do not believe that the *Collins* case is of any assistance to the Malcomson Law Defendants.

102. Nor is the decision of the Supreme Court in *Lett & Co. Limited v. Wexford Borough Council* [2016] 1 I.R. 418. In that case, the Supreme Court was asked to make a declaration under s. 3 of the 1876 Act following its determination of an appeal. One of the grounds of objection to the Supreme Court making a declaration under s. 3 of the 1876 Act was that there was a factual dispute between the parties as to the quantum of the relevant costs. That objection was rejected on the facts, as the solicitors were merely seeking a charge in respect of the taxed party and party costs which were the subject of a pending taxation process. The Supreme Court did not consider the decision in *Collins* to be relevant to the application as the firm in that case was *"seeking a declaration at an interlocutory stage, which, understandably, the High Court was not prepared to grant"* (per Dunne J. at para. 33, p. 434). Of course,

the reason why the High Court in *Collins* was not prepared to grant the declaration was because of the fundamental dispute between the parties on the facts and, in particular, on whether any fees at all were due to the firm. The Supreme Court was, however, prepared to make the declaration in *Lett* and did not accept in that case that there was a relevant dispute on the facts. The Supreme Court decision does not rule out the possibility of the court granting a declaration at an interlocutory stage although the circumstances in which the court would do so would be few and far between.

103. The final case on which the Malcomson Law Defendants rely in this context is *Tyrell v. Gibney* [2019] IECA 168. In that case, the appellants, who were litigants in person, issued a motion in the Court of Appeal seeking a trial in the Court of Appeal of certain points of law and asked that court to deal with that motion before dealing with the appeal. Among the alleged points of law raised by the appellants was that they were entitled to certain declaratory orders *"declaring and clarifying"* certain matters which they claimed were relevant to the appeal. The Court of Appeal, understandably, refused to grant the reliefs sought on the motion. In her judgment for the court, Costello J. stated that the declarations sought were *"in the nature of legal submissions rather than declaratory of the rights of the parties"*. She continued:

> *"Declarations are not granted on interlocutory motions but rather at the end of plenary hearings. It is not open to this court to grant those reliefs on the motion of the appellants brought for the first time before this court."* (at para. 11)

104. Those comments must be read in the context of the motion brought by the appellants and the declaratory orders which they were seeking. It is not the case that declarations can never be sought at an interlocutory stage although it will be pretty

rare for the court to grant a declaration at that stage rather than waiting until the conclusion of the trial. As noted earlier, however, the court has a discretion to grant a declaration where there is good reason for doing so and where it is satisfied that there is or was a genuine question before the court. I am satisfied that there certainly was a genuine issue between AIB and Mr. Morrissey with respect to the creation of an equitable mortgage by the letter of 3rd May, 2011. That issue was ventilated by the parties in their respective pleadings in the case. It was then resolved by the parties in the Settlement Agreement and Mr. Morrissey's agreement to consent to the orders sought, including a declaration with respect to the creation of the equitable mortgage. I do not believe that the court is precluded from granting the declaration sought on the AIB/Everyday application or that it must wait until the trial of the action as against the Malcomson Law Defendants before doing so. If I felt that the Malcomson Law Defendants were prejudiced by making the declaration at this stage, I would be of a different view. However, I do not accept that they are or would be prejudiced. I am satisfied that the circumstances merit the making of the declaration at this stage of on the basis of the legal principles discussed earlier.

105. I will briefly now address the remaining main points of objection raised by the Malcomson Law Defendants in position to the granting of the declaration in relation to the equitable mortgage. First, contrary to their contention to the contrary, the Malcomson Law Defendants have been heard on this application and on the issue as to whether the court should make a declaration with respect to the creation of an equitable mortgage by Mr. Morrissey. Their submissions have been taken into account and I am not persuaded that there is any need to leave over the making of the declaration until the trial takes place as between Everyday and those defendants.

106. Second, I do not accept that the Malcomson Law Defendants are prejudiced in dealing with this issue by reason of the dispute which existed (and which may well still exist) as between them and Mr. Morrissey on the issue of legal professional privilege. I accept the submission made on behalf of AIB and Everyday that the Malcomson Law Defendants have not put forward on affidavit (or indeed in submissions) any indication as to what facts or material they would wish to rely on in order to dispute this issue but are unable to do so by reason of Mr. Morrissey's maintenance of a claim to legal professional privilege. No attempt has been made by the Malcomson Law Defendants to put meat on the objection and to provide the court with any factual basis for concluding that they are prejudiced in addressing this issue or are precluded from putting forward facts to dispute the creation of the equitable mortgage by Mr. Morrissey by reason of his assertion of legal professional privilege. In those circumstances, I do not accept that there are fundamental facts or disputes between the parties which might preclude the court from making the declaration sought at this stage or to persuade the court to exercise its discretion to decline to make the declaration until after the trial takes place as between Everyday and the Malcomson Law Defendants.

107. Third, while it is the case that Mr. Morrissey did previously dispute the creation of an equitable mortgage and addressed this issue in his response to the claims advanced by AIB, he withdrew his objection and consented to the orders sought in the AIB/Everyday application, including the declaration in relation to the creation of the equitable mortgage, in the Settlement Agreement and in the Consent Letter. There was nothing to preclude Mr. Morrissey from doing so and his change of position in that respect cannot, in my view, confer any enforceable right on the Malcomson Law Defendants or otherwise preclude the court from making the declaration sought.

108. Fourth, I do not accept that Mr. Morrissey did not sign his agreement to the letter of 3rd May, 2011 and to the security to be granted under that letter. He signed the letter in two places. First, as a director of DMIL and second, in his personal capacity.

109. Fifth, for reasons already outlined, I do not accept that the property referred to in the description of the legal charge which Mr. Morrissey agreed in the letter to grant is or was uncertain or insufficiently described. I am satisfied that it was sufficiently described and that is particularly so when read with the map (map A) appended to the notice of motion and also to the Settlement Agreement.

110. Sixth, I do not accept that there is any basis for the objection raised by the Malcomson Law Defendants that conditions precedent in the letter were not fulfilled. I agree with AIB and Everyday that the conditions precedent in the letter (and in the appendix thereto) were matters for the benefit of AIB and not for the benefit of Mr. Morrissey or the Malcomson Law Defendants. Indeed, no attempt was made in Mr. Bradley's affidavits, in the Malcomson Law Defendants' legal submissions or in oral submissions to identify any particular condition precedent which remained unfulfilled thereby undermining the equitable mortgage created by the letter.

111. Seventh, I do not accept the submission that the relevant part of the facility letter which provided for the creation of the equitable mortgage by Mr. Morrissey was superseded by subsequent facility letters. While Mr. Bradley asserted that the terms of the letter of 3rd May, 2011, were subsequently extended and varied by subsequent facility letters, he did not point to any provision in those subsequent facility letters which removed Mr. Morrissey's agreement to grant the relevant charge over the property at Clonmelsh excluding his family home. I have reviewed the facility letters exhibited by Mr. Hopkins and it does not appear to me that Mr. Morrissey's agreement to grant the legal charge over that property was ever removed or materially

varied. I do not accept, therefore, the fact that there were subsequent facility letters in any way affects the creation of the equitable mortgage by the letter of 3rd May, 2011.

112. Eighth, the contention that the fact that Mr. Morrissey did not grant a legal charge over the property, notwithstanding his agreement to do so in the letter of 3rd May, 2011, means that the letter did not create an equitable mortgage is difficult to follow and, in my view, cannot be accepted. The reason why AIB sought a declaration in the proceedings that an equitable mortgage was created was precisely because Mr. Morrissey did not execute a legal charge over the relevant property in its favour, having agreed to do so under the terms of the letter. Had he done so, there would have been no need to seek declarations in relation to the creation of an equitable mortgage.

113. Ninth, I reject the submission advanced by the Malcomson Law Defendants that Mr. Morrissey's change of position, from disputing the creation and existence of an equitable mortgage, to agreeing to orders including a declaration that such an equitable mortgage was created by the letter of 3rd May, 2011, give rises to some form of estoppel in favour of the Malcomson Law Defendants. In my view, it does not. I agree with AIB and Everyday that no attempt was made by Mr. Bradley in his affidavits or in the written and oral submissions advanced by the Malcomson Law Defendants to properly ground any estoppel claim whereby Mr. Morrissey would be estopped from consenting to the orders, including the relevant declaration.

114. Finally, and perhaps most importantly, I am not satisfied that the making of the declaration sought with respect to the creation of the equitable mortgage in any way prejudices the position of the Malcomson Law Defendants and, in particular, the priority which might properly attach to the Malcomson Law Charge. The respective priorities as between the equitable mortgage which will be the subject of the

declaration I intend to make and the Malcomson Law Charge is a matter which must await the trial as between Everyday and the Malcomson Law Defendants. I want to make quite clear that the orders I make on the application are not, in any way, intended to affect that issue.

115. A related declaration sought in the AIB/Everyday application is a declaration that the sum of just short of €25m (together with costs and interests) (or such other sum as may be found to be due and owing on inquiry) stands well charged against Mr. Morrissey's interest in the Clonmelsh Property but excluding his family home and certain other retained lands other retained lands which are outlined in red on another map (map B) appended to the notice of motion and also to the Settlement Agreement itself, pursuant to judgment mortgages registered by AIB on 7th January, 2016. Again, this is an order to which Mr. Morrissey agreed to consent in the Settlement Agreement, consented to in the Consent Letter and indicated his consent to the court, through counsel, on a number of occasions prior to seeking to withdraw that consent during the course of the hearing of the application. The Malcomson Law Defendants contend that the court should not make declaration in relation to the judgment mortgages at an interlocutory stage for the same reasons relied on in respect of the declaration concerning the equitable mortgage. They also maintain that AIB and Everyday have not provided evidence as to the current indebtedness of Mr. Morrissey to AIB.

116. For the same reasons as I set out above in relation to the making of a declaration with respect to the equitable mortgage, I am satisfied that I can and should make the relevant declaration with respect to the judgment mortgages. I am satisfied that there is good reason for me to do so in the circumstances, having regard to Mr. Morrissey's consent to the declaration in the Settlement Agreement and in the Consent Letter and

as communicated to the court by his counsel on a number of occasions. I am not satisfied that there is any relevant factual dispute which would preclude me from making this declaration at this stage of the proceedings. Furthermore, I am also satisfied that the Malcomson Law Defendants are not and will not be prejudiced, in terms of the priority they claim in respect of the Malcomson Law Charge, if the well charging declaration is made by me at this stage. The respective priorities will be determined at the trial between Everyday and the Malcomson Law Defendants.

117. I am also satisfied on the basis of the evidence before the court on this application, and the absence of any suggestion by the parties to the contrary, that the relevant requirements for the making of well charging orders and declarations have been satisfied. I accept that under s. 117(2) of the Conveyancing Law Reform Act 2009, one of the orders I can make is an order for the taking of an account of other encumbrances affecting the relevant property and for the making of inquiries as to the respective priorities of any such encumbrances. The declaration sought with respect to the judgment mortgages expressly envisages that the court would direct an inquiry as to the sum which remains due and owing by Mr. Morrissey on foot of the judgment obtained against him by AIB on 17th December, 2015. Subject to anything further which the parties might wish to add following consideration of this judgment, it may be necessary for me to direct that an inquiry be conducted on that issue by the Examiner. However, subject to the final determination of that issue, I am satisfied that it is appropriate for me to make the well charging declaration sought in the AIB/Everyday application.

(c) Appointment of Receivers and Powers

118. The third issue in which there is controversy between AIB and Everyday, on the one hand, and the Malcomson Law Defendants, on the other, concerns the application by AIB and Everyday for the appointment of Mr. McCann and Mr. Tennant as Receivers to receive the interest of Mr. Morrissey in the Clonmelsh Property, excluding his family home and the retained lands, and conferring on the Receivers certain powers.

119. In the Settlement Agreement and in the Consent Letter, Mr. Morrissey agreed to an order appointing the Receivers for that purpose and conferring on them, certain powers which are now referred to at para. 10(I) – (VII) of the notice of motion. Those powers include the power to take possession of the relevant properties, to receive the rents and profits from them, to sell those properties or any of them and so on. In addition, at para. 10(VIII) – (XII) of the notice of motion, AIB and Everyday seek certain additional powers including the powers to execute contracts and other documents on behalf of and in the name of Mr. Morrissey in order to give effect to the sale of the properties, to discharge necessary and proper costs, charges and expenses of the receivership, to pay the Receivers' remuneration, to maintain proper and complete accounts in relation to the receivership and to pay the net proceeds of the receivership to AIB (and now following its substitution, Everyday) after retaining a sum sufficient to provide for any entitlement the Malcomson Law Defendants might have under the Malcomson Law Charge, in reduction of monies due and owing by Mr. Morrissey and declared well charged in the proceedings. AIB and Everyday contend that the court should make those orders on the basis of the consent as between them and Mr. Morrissey and that there is a basis for doing so, in any event, on the basis of the declarations sought with respect to the equitable mortgage and the judgment mortgages (which I am prepared to grant). AIB and Everyday submit that

no valid objection has been raised by the Malcomson Law Defendants in response to this part of the application. They contend, with respect to Mr. Morrissey, that he is not entitled to withdraw his consent.

120. AIB and Everyday contend that their proposal that a sum be withheld to provide for any sum that might ultimately be found properly secured by the Malcomson Law Charge, is very similar to a proposal made by Malcomson Law in March 2017, and that such an arrangement would avoid any possibility of prejudice to the Malcomson Law Defendants. They assert that if the court were ultimately to conclude that the Malcomson Law Charge is valid and that it has priority over the equitable mortgage created by Mr. Morrissey in favour of AIB and the judgment mortgages registered by AIB, the monies retained could be paid over to the Malcomson Law Defendants on foot of their charge. If the court were ultimately to conclude, after a trial between Everyday and the Malcomson Law Defendants, that the Malcomson Law Charge was not valid or that it did not have the priority asserted by the Malcomson Law Defendants, then the monies retained could be paid over to Everyday. AIB and Everyday point to the fact that Mr. Bradley's affidavits sworn in response to the AIB/Everyday application did not identify any basis for opposing this part of the AIB/Everyday application. AIB and Everyday rely on either or both the declaration in relation to the creation of the judgment mortgage and the well charging declaration with respect to the judgment mortgages in support of their entitlement to this relief and contend that there is no basis for any party to oppose the appointment of Receivers to realise the value of the Clonmelsh Property, excluding Mr. Morrissey's family home and the retained lands, on foot of either the equitable mortgage or the judgment mortgages. They make clear that the court has not been asked to determine

any priority issue as between the equitable mortgage and judgment mortgages and the alleged Malcomson Law Charge.

121. In his first affidavit in response to this part of the AIB/Everyday application on behalf of the Malcomson Law Defendants, Mr. Bradley referred to the previous proposal by Malcomson Law in March 2017 that, if the sum of €969,963 were set aside in an escrow account pending determination of the issues between the parties, the Malcomson Law Defendants would agree to discharge the deed of charge in order to facilitate an urgent sale of the Clonmelsh Property. He noted that there was no substantive response to that proposal and nothing further was heard in relation to it until the AIB/Everyday application was brought following the mediation (and Settlement Agreement). Mr. Bradley disputed the contention that the retention of the sum of €969,963 from the proceeds of sale would be sufficient to discharge the Malcomson Law Charge since the charge secured both that principal sum and interest which became due under the charge. That was the only objection raised on affidavit by Mr. Bradley.

122. As noted earlier, in his second supplemental affidavit, Mr. Bradley exhibited an actuarial report from Seagrave-Daly Lynch Limited which suggested that a sum of €440,581 had accrued in respect of interest under the charge (up to 1st June, 2020). I noted earlier that that figure was disputed subsequently by AIB and Everyday (but not on affidavit). No updated figure has been provided to the court by either side to this dispute.

123. In their written submissions, the Malcomson Law Defendants suggest that while the RSC do provide for the sale of property and for the appointment of a receiver or receivers, that is generally only where some urgency exists or where there is some jeopardy to the assets which, they say, does not arise here. In oral submissions at the

hearing, counsel confirmed that the Malcomson Law Defendants accepted that the court had the power to appoint receivers although he suggested that given the issues which Mr. Morrissey had raised in relation to the receivers proposed, Mr. McCann and Mr. Tennant, the court should consider nominating other persons to act as receivers. The principal objection raised at the hearing in response to the appointment of receivers and the sale of the Clonmelsh Property (excluding Mr. Morrissey's family home and the retained lands) was that the sum which AIB and Everyday were proposing should be retained to cover the claim by the Malcomson Law Defendants on foot of the Malcomson Law Charge was insufficient and did not include interest.

124. Similarly with the other orders sought in the AIB/Everyday application, Mr. Morrissey sought to withdraw his consent to the orders for the reasons set out in his statement and in the two affidavits which he swore following the commencement of the hearing of the application. That is the issue I address in the next section of the judgment. I conclude there that Mr. Morrissey was not entitled to withdraw his consent.

125. The principal objections to the appointment of the Receivers with the powers referred to in notice of motion effectively fell away during the course of the hearing of the application and the focus turned to the proposal that a sum be retained to cover any sustainable claim which the Malcomson Law Defendants might have on foot of the Malcomson Law Charge, should that charge be found to be valid at the trial and to have priority over the equitable mortgage and the judgment mortgages. However, before dealing with that issue, I should briefly explain why, in my view, the court does have the power to and should make orders appointing the Receivers with the powers referred to in the notice of motion.

126. The statutory power to appoint a receiver is found in s. 28(8) of the 1877 Act. It provides as follows:

> *"A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just…"*

127. Order 50, rule 6 RSC reproduces in very similar terms the provisions of s. 28(8) of the 1877 Act. Order 50, rule 6(1) provides that the court can (amongst other things) appoint a receiver by an interlocutory order *"in all cases in which it appears to the court to be just or convenient so to do"*. Order 50, rule 6(2) provides that any such order may be made *"either unconditionally or upon such terms and conditions as the Court thinks just"*. These provisions were recently discussed by the Supreme Court in the context of the appointment of a receiver by way of equitable execution in *ACC Loan Management Limited v. Rickard* [2019] 3 I.R. 557. The Supreme Court confirmed in that case that s. 28(8) of the 1877 Act used broad terminology and did not restrict the jurisdiction of the court to appoint a receiver to circumstances permitted by the pre-Judicature Act Courts of Chancery. The Supreme Court stressed the flexibility of the power to appoint a receiver under the 1877 Act and under the RSC (see, in particular, the observations of MacMenamin J. at para. 74, pp. 589 – 590). MacMenamin J. stressed that a flexible interpretation of the words in s. 28(8) of the 1877 Act and in the RSC enabled a court to do *"justice"* which he described as *"a value that takes priority over 'convenience'"*.

128. I am satisfied on the basis of (a) Mr. Morrissey's consent, (b) the declaration and orders made in relation to the creation and existence of an equitable mortgage, (c) the

declaration and orders made in relation to the judgment mortgages, (d) the lengthy history of the dispute between the parties and the need for finality following the Settlement Agreement, and (e) the absence of any prejudice to the Malcomson Law Defendants on the basis of the order which I make directing the Receivers to retain certain monies, it would be *"just"* and *"convenient"* and would enable the court to do *"justice"* in the case, that I should make an order appointing Mr. McCann and Mr. Tennant as Receivers to receive the interest of Mr. Morrissey in the Clonmelsh Property, excluding Mr. Morrissey's family home and the retained lands, and conferring on them the powers referred to at para. 10(I) – (XII) of the notice of motion brought in respect of the AIB/Everyday application. I do not believe that it is necessary to appoint as receivers persons other than Mr. McCann and Mr. Tennant on the grounds advanced by the Malcomson Law Defendants. It seems to me that by virtue of their familiarity with the issues, having been appointed as receivers to DMIL, they are best placed to be the receivers appointed over Mr. Morrissey's interests in the relevant property.

129. I would not make those orders if I were of the view that the Malcomson Law Defendants would be prejudiced. I do not believe that they would be prejudiced if I make the further orders sought at para. 11 of the notice of motion providing for a sum to be withheld to cover their claim under the Malcomson Law Charge (which claim is disputed by AIB and Everyday). There is an issue between the parties as to how the total sum which should be retained to cover the principal sum and any interest arising under the Malcomson Law Charge should be calculated.

130. In light of the unfortunate delay in the delivery of this judgment, it seems to me that the most appropriate order to address this issue is to direct that the Receivers retain the sum of €1.5m, or such other sum as may be agreed between the parties from the

proceeds of sale pending the determination of the validity of and the priority to be given to the Malcomson Law Charge at the trial as between Everyday and the Malcomson Law Defendants. In the event of a continuing dispute between the parties as to the amount of interest which may properly arise under the Malcomson Law Charge, that will be an issue which will have to be determined by the trial judge. In addition to the order I have just indicated, I will require an undertaking from the Receivers that in the event that the sum of €1.5m is found to be insufficient to cover the full extent of the Malcomson Law Defendants' entitlement under the Malcomson Law Charge, they will ensure that the full amount found to be due and owing to the Malcomson Law Defendants is paid to them. The precise form of order in that regard can be further discussed with counsel following consideration of this judgment.

7. Whether Mr. Morrissey can withdraw his consent to the orders in the AIB/Everyday Application

131. The final issue which I have to determine is whether it is open to Mr. Morrissey to withdraw his consent to the orders sought in the AIB/Everyday application. I have touched on this issue at various points in the judgment and have set out earlier the circumstances in which Mr. Morrissey has sought to withdraw his consent to those orders. It might be helpful, however, briefly to summarise the position again here.

132. Following the mediation on 9th December, 2019, the Settlement Agreement was executed by AIB, Everyday, Mr. Morrissey, the Receivers of DMIL and Plazamont. Mr. Morrissey accepts that he signed the Settlement Agreement. A copy of the Settlement Agreement was provided to the court but not to the Malcomson Law Defendants on the basis that they were not a party to it and there were confidential and commercially sensitive matters contained in it. Under the Settlement Agreement, Mr. Morrissey agreed to consent to the making of certain orders. Those are the orders

now sought in the notice of motion and in schedules 1 and 2 thereto. They also set out in schedule 3 of the Settlement Agreement itself. Mr. Morrissey agreed to provide and did provide the Consent Letter in which he consented to the making of the orders set out in schedule 3 of the Settlement Agreement (which were also then set out in schedules 1 and 2 to the notice of motion). He confirmed that he had obtained independent legal advice prior to signing the Consent Letter and also agreed that the letter was governed by Irish law.

133. The Settlement Agreement contained certain conditions precedent in clause 3.1. That clause provided that the agreement was *"conditional upon and shall not take effect until the date upon which all of"* the following four matters were completed. Those four matters were:

(a) All parties had to have executed the Settlement Agreement;

(b) Mr. Morrissey had to grant certain "*additional security*";

(c) Mr. Morrissey had to provide the Consent Letter to AIB and Everyday; and

(d) The High Court had to have made the consent orders as against Mr. Morrissey.

134. The conditions precedent in (a) and (c) have been satisfied. The condition precedent in (b) has not been satisfied in that Mr. Morrissey has not granted the "*additional security*" which he agreed to grant under the Settlement Agreement. The condition precedent at (d) has not yet been satisfied in that the court has not yet made the consent orders as against Mr. Morrissey as (i) the Malcomson Law Defendants have contested many of the orders sought in the AIB/Everyday application and it was necessary to have a contested hearing, to decide the disputed issues and to deliver this judgment and, (ii) Mr. Morrissey has belatedly sought to withdraw his consent to the orders sought in that application, and that issue also had to be considered by the court.

135. The date on which all of the conditions precedent are completed is described in clause 3.1 as the *"Effective Date"*. Clause 4 contains express obligations requiring Mr. Morrissey to cooperate. Those obligations are expressly stated to be *"with effect from the Effective Date"*. They include an irrevocable agreement by Mr. Morrissey to consent to the consent orders (clause 4.2(a)). In attempting to withdraw his consent, Mr. Morrissey has argued that the conditions precedent have not been complied with as he has not yet provided the "*additional security"* referred to in clause 3.1(b) and the court has not yet made the consent orders referred to in clause 3.1(d).

136. On the same day as the Settlement Agreement was executed and the Consent Letter signed by Mr. Morrissey, 31st January, 2020, counsel for Mr. Morrissey informed the court of the settlement and of Mr. Morrissey's consent to the orders to be sought under the Settlement Agreement. The AIB/Everyday application was issued on 6th February, 2020. The matter was again before the court on the return date of that application, 10th February, 2020. Mr. Morrissey's consent to the orders being sought on that application was again confirmed to the court on 10th February, 2020. There is no dispute about any of that.

137. There were delays in the hearing of the AIB/Everyday application as a result of the Covid-19 pandemic. It was listed for hearing on 18th March, 2020, and 21st May, 2020, before being again adjourned to 26th June, 2020. It was first indicated to the court that there was an issue on Mr. Morrissey's side on 19th June, 2020, when the court was informed that Mr. Morrissey's solicitors intended applying to come off record in these and in the other two proceedings referred to earlier. The applications to come off record were heard on 24th June, 2020. They have been described earlier. It was in the course of those applications that Mr. Morrissey submitted his statement to the court. While the statement did not expressly indicate that Mr. Morrissey

wished to withdraw the Consent Letter previously provided or his agreement to the terms of the Settlement Agreement, Mr. Morrissey did state at the very end of the statement that he was asking the court *"not to ratify consent orders pending the outcome* [of his] *cases"*.

138. The AIB/Everyday application commenced at hearing on 26th June, 2020. Mr. Morrissey made oral submissions in the course of that application in which he expressly acknowledged signing the Settlement Agreement and providing the Consent Letter and did not withdraw either. The solicitors were permitted to come off record that day and the hearing was adjourned with certain directions being made by the court.

139. Following that, Mr. Morrissey wrote to the solicitors for AIB and Everyday on 6th July, 2020, in which he purported to *"withdraw from the Proposed Settlement Agreement"* and stated that the agreement was *"predicated on information unavailable to* [him] *but within the knowledge of the plaintiffs thereby prejudicing* [him] *in* [his] *capability of conscientiously executing same"*. A similar letter was sent on 10th July, 2020, to Plazamont's solicitors. Mr. Morrissey swore his first affidavit in response to the AIB/Everyday application on 16th July, 2020, in which he sought a further adjournment and an opportunity to file a further affidavit. Following a further hearing on 17th July, 2020, the court adjourned the application further to 15th September, 2020, and directed that submissions be exchanged on the issue as to whether Mr. Morrissey was entitled to withdraw his consent to the orders sought. Mr. Morrissey provided his submissions on 11th August, 2020 (although, as we will see, they did not address the issue as to whether he should be permitted to withdraw his consent). AIB and Everyday provided their submissions on that issue on 28th August, 2020. Plazamont provided its submissions sometime thereafter and the Malcomson

Law Defendants' submissions were furnished on 4th September, 2020. Mr. Morrissey put in a further affidavit on 9th September, 2020, which I have referred to earlier. In that affidavit, he contended (at para. 22) that what he referred to as *"limited financial information"* provided in July 2020 was not available to him when the negotiations which led to the Settlement Agreement commenced.

140. There is nothing in Mr. Morrissey's submissions which addresses his entitlement to withdraw the Consent Letter and the consent to the orders sought on the AIB/Everyday application communicated to the court by his counsel on, at least, two occasions on 31st January, 2020, and 10th February, 2020. Trying as best I can to disentangle Mr. Morrissey's historical complaints about AIB, the Receivers of DMIL and Plazamont, the essential point which Mr. Morrissey appeared to be making in the course of his various submissions to the court on the hearing of the application was that the Settlement Agreement remained conditional in that two of the conditional precedents had not been satisfied, namely, (a) he had not provided the "*additional security*" which he agreed to provide under the Settlement Agreement (clause 3.1(b)) and (b) the court had not yet made the consent orders against him (clause 3.1(d)). Mr. Morrissey's position, therefore, appeared to be that he was not contractually obliged to consent to the orders until those conditions precedent were satisfied (including the court making the consent orders) and there was, therefore, nothing to prevent him from changing his position and opposing the orders sought in the AIB/Everyday application.

141. In response, AIB and Everyday contend that the court must proceed to make the consent orders notwithstanding Mr. Morrissey's attempted change of position. They make that case for a number of reasons:

(i) Mr. Morrissey has already provided formal consent to the consent orders in the form of the Consent Letter and expressly to the court through his counsel. The consent provided in the Consent Letter and by his counsel was, they maintain, unequivocal, unconditional and was clearly intended to be binding and irrevocable.

(ii) Mr. Morrissey has failed to identify any legal basis for the purported withdrawal of the consent previously provided in the form of the Consent Letter and through counsel. They submit that despite being given every opportunity, Mr. Morrissey has failed to offer any legal basis justifying him withdrawing his agreement to the consent orders. They claim that the assertion in Mr. Morrissey's letter of 6th July, 2020, that the Settlement Agreement was predicated on information which was not available to him at the time of the agreement but was within the knowledge of the plaintiffs does not afford a good basis for Mr. Morrissey to withdraw from the Settlement Agreement or to withdraw the Consent Letter. They point out that he has not identified any significant information which was not available to him at the time of the Settlement Agreement. They further point to the fact that with the benefit of legal advice and after extensive negotiation, Mr. Morrissey agreed to resolve these proceedings and the other two sets of proceedings with AIB, Everyday and the Receivers.

(iii) The making of the consent orders was a condition of the Settlement Agreement and they maintain that Mr. Morrissey is obliged not to prevent the fulfilment of that condition.

(iv) AIB and Everyday rely on a number of English cases and legal authorities, to the effect, that where a settlement agreement is conditional on a consent order

being made by the court (a) the parties are under an implied obligation to ask the court to make the agreed order, (b) the parties are not entitled to withdraw that consent before the order is actually made, and (c) the court has jurisdiction to make an order in the terms consented to even if one of the parties purports to withdraw its consent before the court has the opportunity of making the consent order. AIB and Everyday rely on cases including *Mackay v. Dick* (1881) 6 App Cas 251, *Smallman v. Smallman* [1972] Fam 25, *Howard & Wyndham Plc. v. Healthworks Ltd* [1989] EWCA Civ J0821-1 as well as extracts from *Foskett on Compromise*.

(v) They also point out that Mr. Morrissey has an express obligation under the Settlement Agreement to do everything necessary to perfect the agreement and that that necessarily involves an obligation to cooperate in the making of the consent orders by the court. AIB and Everyday rely on certain provisions of the Settlement Agreement, including clause 21.1, in support of that submission.

(vi) They further contend that Mr. Morrissey is estopped from withdrawing his consent. They submit that Mr. Morrissey has made repeated unequivocal representations to the court that he was consenting to the consent orders. They relied on those representations by applying to the court to make the consent orders and, in doing so, incurred substantial costs, time and effort. They claim that it would be grossly unjust if Mr. Morrissey were permitted to resile from his representations and to withdraw his consent several months after the Settlement Agreement for no proper reason. AIB and Everyday rely on the principles applicable to estoppel by representation or conduct summarised in *Doran v. Thompson* [1978] I.R. 223.

142. Plazamont supports the position adopted by AIB and Everyday. It relies on some additional authorities, including the judgment of the Court of Appeal in *Geaney v. O'Connor* [2016] IECA 95, in which Peart J. in that court noted that the fact that a litigant regrets having settled a case is not a sufficient reason to set aside a judgment and that *"parties who settle their claims are entitled to finality"*. Plazamont also relies on the judgment of Clarke J. in the Supreme Court in *Mulrooney v. Shee* [2013] IESC 20, on the legal effect of the settlement of proceedings which is that proceedings can no longer be litigated. Plazamont agrees with AIB and Everyday that (a) where settlement agreements are conditional on an agreed court order being made, there is an implied obligation on the parties to the settlement agreement to ask the court to make the agreed order, (b) that parties have no right to withdraw from the settlement agreement before the approval of the court is obtained, and (c) that a party cannot frustrate the settlement agreement coming into effect by subsequently refusing to consent to the agreed order. It too relies on the fact that Mr. Morrissey has already given his consent to the orders in the form of the Consent Letter. It also relies on the express obligation contained in clause 21.1 of the Settlement Agreement requiring the parties to the agreement to take such steps *"as may be required in order to implement the transactions contemplated by this Agreement and/or to perfect this Agreement"*. It contends that by reason of the implied obligation on Mr. Morrissey and by reason of the express obligation contained in clause 21.1, Mr. Morrissey is precluded from preventing any of the conditions precedent in clause 3.1 being fulfilled.

143. Mr. Morrissey is, Plazamont contends, under an obligation to perform such acts as are reasonably necessary to fulfil the conditions precedent set out in clause 3.1 of the Settlement Agreement. Plazamont maintains that the relevant consent has already been given by Mr. Morrissey and that he is precluded from withdrawing that consent.

Mr. Morrissey is, therefore, Plazamont argues, precluded from attempting to withdraw his consent to the making of the consent orders (which has already been given by way of the Settlement Agreement and the Consent Letter) or by relying on his refusal to grant the "*additional security*" (which is in any event solely for the benefit of Everyday) as provided for in clause 3.1(b) of the Settlement Agreement in order to attempt to collapse the Settlement Agreement in order that he can continue to prosecute the other proceedings compromised by the Settlement Agreement, namely the Quarry Proceedings and the Directions Proceedings.

144. The Malcomson Law Defendants make the point in their submissions that they have not had sight of the Settlement Agreement and are not, therefore, in a position to make submissions as to its meaning and effect apart from the provisions referred to by the other parties both in open court and in their written submissions. They maintain the position that the court should, in any event, decline to make the consent orders sought by AIB and should allow the matter to proceed to plenary hearing. They refer to the fact that Mr. Morrissey and AIB and Everyday appear now to have differing interpretations of the terms of the Settlement Agreement and of the parties' respective obligations under it and that, in those circumstances, there exists a legal dispute which ought not to be resolved at the interlocutory stage of the proceedings but should be dealt with at the trial.

145. The Malcomson Law Defendants refer in their submissions to the point made by Mr. Morrissey that the Settlement Agreement is subject to conditions precedent, including the provision by Mr. Morrissey of "*additional security*" and the court making the consent orders. They maintain that, as Mr. Morrissey appears strongly to contend that certain conditions precedent have not been satisfied, the court ought not to make the orders sought on the basis of the Settlement Agreement, although they make the

reasonable point that they are limited in the submissions they can usefully make with respect to the Settlement Agreement or Mr. Morrissey's claimed entitlement to withdraw his consent.

146. The Malcomson Law Defendants then make some observations in relation to the case law relied on by AIB and Everyday in support of their contention that it is not open to Mr. Morrissey to resile from his agreement to consent to the orders sought in the AIB/Everyday application. They contend that the court should decline to make the orders sought on the application and should leave all matters over to the trial.

147. I have carefully considered the submissions advanced by all of the parties on this issue and have a clear view on how this issue should be resolved. Having signed the Settlement Agreement and having given his consent in the Consent Letter to the orders referred to in the Settlement Agreement and sought in the AIB/Everyday application and having communicated that consent to the court, through his counsel, on at least two occasions, on 31st January, 2020, and 10th February, 2020, and having not resiled from that position over the course of the following several months until just before or during the hearing of the application, it would, in my view, be totally wrong and grossly unjust to permit Mr. Morrissey to withdraw his consent to those orders. The only reason why orders were not made at a much earlier point in time following the execution of the Settlement Agreement and even, potentially, on 31st January, 2020 or on 10th February, 2020, being the first return date of the AIB/Everyday application, was because of the opposition raised by the Malcomson Law Defendants to some of the orders sought in the application and then the arrival of the Covid-19 pandemic which severely impacted upon the hearing and determination of the application. It would be completely inappropriate and extremely unfair to AIB and Everyday, and to the other parties to the Settlement Agreement, to permit Mr.

Morrissey to exploit the opposition mounted by the Malcomson Law Defendants to some of the orders sought in the application and the delays in having the application listed for hearing and then heard, by allowing Mr. Morrissey to withdraw his consent or for the court to recognise as valid his purported withdrawal of the consent contained in the Consent Letter and as communicated to the court. Conversely, it would not be unfair, in my view, to Mr. Morrissey to prevent him from withdrawing his consent or for the court to reject the purported withdrawal of the consent, in circumstances where, with the benefit of solicitors and counsel, he participated in a mediation and engaged in extensive negotiations over several weeks before agreeing to and executing the Settlement Agreement, signing the Consent Letter and instructing his counsel to inform the court of his consent to the orders referred to in the Settlement Agreement and in the notice of motion. This is particularly so where Mr. Morrissey has not put forward any legal basis whatsoever for impugning the consent in the Consent Letter as communicated to the court, or in the Settlement Agreement itself, save to make the point that it is conditional upon certain matters, two of which have already happened, one of which is the subject of this application (i.e. the court making the consent orders referred to in the notice of motion) and another which is completely within his control (i.e. the provision of the additional security which he agreed to give in the Settlement Agreement).

148. As I explain below, I conclude that this approach is itself a breach of, at least, one of the express provisions of the Settlement Agreement which has been disclosed to the other parties and referred to in submissions, namely, clause 21.1, and, in any event, is a breach of an implied term of the agreement to cooperate to enable performance of the agreement or, alternatively, not to prevent fulfilment of the conditions in the

agreement, including the requirement for the provision by Mr. Morrissey of additional security.

149. Nor is this outcome unfair in any way to the Malcomson Law Defendants who did not participate in the mediation or in the subsequent negotiations and who are not a party to the Settlement Agreement and who have had the opportunity of ventilating all of their objections to the orders sought in the AIB/Everyday application, which objections have been carefully considered by me in the course of this judgment. While understandably limited in what they could say about the precise terms of the Settlement Agreement, the terms of that agreement relevant to the issue as to whether Mr. Morrissey is entitled to withdraw his consent to the orders sought in the application were referred to AIB and Everyday in their written submissions and oral submissions to the court as well as being referred to by Mr. Morrissey. I am satisfied that it was not really a matter for the Malcomson Law Defendants to argue whether or not Mr. Morrissey should be permitted to withdraw his consent to the orders sought in the application as they were not parties to the mediation, the negotiations, the Settlement Agreement or the Consent Letter. Nor, in my view, was there any unfairness as a result of the fact that a copy of the Settlement Agreement was not provided to the Malcomson Law Defendants (save in error by Mr. Morrissey).

150. I now discuss briefly the legal basis for my conclusion that Mr. Morrissey is not entitled to withdraw his consent and that the court should not recognise the validity of his purported withdrawal of that consent.

151. Clause 3 of the Settlement Agreement is headed *"Conditions Precedent"*. Clause 3.1 provides that the agreement is *"conditional upon and shall not take effect until the date upon which all of the following are completed"*. That date is referred to as the *"Effective Date"*. The matters which had to be completed were listed at paras. (a) –

(c). The conditions referred to at (a) and (c) were complied with as of 31st January, 2020. The parties executed the Settlement Agreement (para. (a)). Mr. Morrissey provided the Consent Letter to AIB and Everyday (para. (c)). The provision of the Consent Letter in itself should be sufficient to enable the court to make the consent orders sought unless there is some valid basis for withdrawing the consent, which in my view there is not. The conditions referred to at paras. (b) and (d) have not yet been satisfied. The matter referred to at para. (b) is that Mr. Morrissey was to have granted certain *"additional security"* which is defined in the agreement. The matter referred to at para. (d) is that the court should have made the consent orders against Mr. Morrissey. That, of course, is the purpose of the AIB/Everyday application in which the court is being asked to make the consent orders as against Mr. Morrissey.

152. Clause 21.1 of the Settlement Agreement provides that:

> *"Each party undertakes to perform, execute and deliver such further acts and documents as may be required in order to implement the transactions contemplated by this Agreement and/or to perfect this Agreement."*

153. This express term is not stated to be subject to any condition precedent and is expressed in unqualified terms. The obligation to perform, execute and deliver the various acts and documents referred to in clause 21.1 would, in my view, clearly extend to the provision by Mr. Morrissey of the *"additional security"* referred to in clause 3.1(b). Mr. Morrissey is, therefore, under an express contractual obligation to perform, execute and deliver such acts and documents as may be necessary to put in place that *"additional security"*. The purpose of doing so would, of course, be so as to enable the transactions contemplated by the Settlement Agreement to be implemented or to perfect the agreement within the meaning of clause 21.1. Mr. Morrissey is, therefore, contractually bound not to prevent the conditions referred to

in clause 3.1 being satisfied such as by failing to put in place the *"additional security"* or by purporting to withdraw his consent to the consent orders as set out in the Consent Letter. Mr. Morrissey cannot rely on his own breach of clause 21.1 to prevent the conditions referred to at clause 3.1(b) and (d) being fulfilled.

154. Even if the express term contained in clause 21.1 of the Settlement Agreement did not exist, there would, in my view, be a basis for implying a term into the agreement requiring the parties, including Mr. Morrissey to cooperate to ensure the performance of the agreement and not to prevent fulfilment of the relevant conditions: see, for example, *Mackay v. Dick* (1881) 6 App Cas 251 and *Chitty on Contracts Vol. 1: General Principles* (34th edn, Sweet & Maxwell 2021) paras. 16-026 and 16-027, pp. 1197 – 1198 and the cases cited therein.

155. The essential question here is: can a party who has agreed to give a consent to orders and who has issued a Consent Letter consenting to those orders (as Mr. Morrissey has done here) change his mind and seek to withdraw that consent before the court gets to make those orders? The answer to this question must unequivocally be "no". That answer is supported not only by the express term referred to in clause 21.1 of the Settlement Agreement but, even in the absence of that express term, the authorities cited to the court by AIB and Everyday and by Plazamont clearly establish that the court will imply a term into the relevant agreement to ensure that the agreement is not frustrated by a non-cooperating party or that one of the parties may not prevent the fulfilment of a condition in the agreement.

156. In *Foskett on Compromise* (8th edn, Sweet & Maxwell 2015) the author considers the position where a compromise agreement contains an express term to the effect that an appropriate consent order or judgment will be made in due course and whether the court will use an implied term to *"bridge the gap between the time when the*

compromise is concluded and the making of the order". The possibility or entitlement of one of the parties changing his or her mind before judgment is entered thereby preventing the consent order or judgment being made is described as being *"an unmeritorious position to take"* (para. 5-49, p. 79). The author describes the situation as being *"readily met"* by an implied term to the effect that both parties will cooperate in securing the consent order or, conversely, that neither party will prevent its realisation, with each party being protected from the consequences of an attempted withdrawal from the agreement by the other (para. 5-50, pp. 79 – 80). The author cites a number of cases including *Smallman v. Smallman, McCallum v. Country Residences Limited* [1965] 1 WLR 657 and *Howard & Wyndham Plc. v. Healthworks UK Ltd*, and *Chitty* in support of that approach. In the *Howard & Wyndham* case, O'Connor L.J. observed that if parties reach an agreement which involves a consent order being made, it is not open to a party when the other seeks to get the consent order made *"to go back on his consent"*. I completely agree.

157. The author of *Foskett* cites *Chitty* in support of his position. I have referred above to the relevant passages in the most up to date version of *Chitty: Vol. 1*, paras. 16-026 and 16-027. *Chitty* states that *"where a binding contract is subject to a condition precedent, a term may be implied that a party will not do an act which, if done, would prevent fulfilment of the condition"* (*Chitty: Vol. 1*, paras. 16 – 027, p. 1198 and the cases cited there). *Chitty* makes the point that such an implication is not inevitable and may in circumstances be unreasonably wide or be displaced by an express term.

158. McDermott and McDermott in *Contract Law* (2nd ed, Bloomsbury Professional 2017) explain that the Irish courts have been prepared to imply a term into a contract requiring a duty to cooperate or not to frustrate a contract or not to prevent performance of a contract (see paras. 8.145 – 8.147, pp. 442 – 443). The cases cited

are *Royal Trust Company of Canada (Ireland) Limited v. Kelly* [1989] IEHC 33 (Barron J.), *Meridian Communications Limited v. Eircell Limited* [2002] 1 I.R. 17 (O'Higgins J.) and *Airscape Limited v. Heaslon Properties Limited* [2008] IEHC 82 (Edwards J.).

159. Later, at para. 22-03, the authors observe that the ability of one party to perform its side of the contract will often depend on the cooperation of the other party. They continue:

> *"As we have seen, there may be express or implied terms as regards cooperating so as to allow the performance of a contract. In general, each party to a contract agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract. Even where a contract does not involve active cooperation between the parties, the ability of one party to perform may depend on the other party not preventing that performance. In such cases the court will usually imply a term into the contract to protect against this. Thus in Stirling v. Maitland* [(1864) 5 B&S 840] *Cockburn C.J. stated that:*
>
> > *'If a party enters into an agreement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which a loan the arrangement can be operative.'"* (para. 22-03, p. 1328)

160. I accept that the principles set out in these sources represent the correct legal position in Ireland. Even if there were not an express term such as clause 21.1 in the Settlement Agreement and even if I am wrong as to the interpretation of that express term, I would be prepared to hold that the agreement contained an implied term

requiring Mr. Morrissey to cooperate in ensuring that the conditions set out in clause 3.1, are fulfilled, including by granting the *"additional security"* referred to in the agreement and consenting to the orders, and not to do anything to prevent the fulfilment of those conditions, such as by purporting to withdraw his consent to the orders. The implication of such a term would, in my view, be consistent with the principles on the implication of terms in Irish law (recently discussed and applied in *Clarion Quay Management Company Limited v. Dublin City Council & Ors* [2021] IEHC 811 (Barniville J.)).

161. The existence and application of these legal principles strongly supports the conclusion which common sense and fairness would dictate, namely, that Mr. Morrissey should not be permitted to withdraw his consent as set out in the Consent Letter and as communicated to the court. I completely agree with the point made by Peart J. in *Geaney* that "*parties who settle their claims are entitled to finality"* (at para. 12). A change of mind or regret that a case was settled does not afford a basis for reneging on a Settlement or for withdrawing a consent to agreed orders. I am not satisfied that Mr. Morrisey has put forward any valid basis for withdrawing his consent and I agree that his discovery of further "limited financial information" (to use his own words) in July 2020 does not provide such a valid basis.

162. For completeness, therefore, I agree with the submissions advanced on this issue by AIB and Everyday and by Plazamont and I reject the submissions made by Mr. Morrissey and by the Malcomson Law Defendants.

163. It is unnecessary for me to consider the additional argument advanced by AIB and Everyday that Mr. Morrissey is estopped from withdrawing his consent for the reasons outlined in their submissions and summarised above. However, I do see considerable force in that argument and would, if necessary, have concluded that Mr.

Morrissey is estopped from withdrawing his consent for the reasons urged by AIB and Everyday.

164. Finally, if I am wrong in all of the above analysis and even if Mr. Morrissey were to be permitted to withdraw his consent to the orders sought in the AIB/Everyday application (contrary to what I have held), I would in any event to make the orders sought on the AIB/Everyday application, including an order substituting Everyday for AIB, making declarations in relation to the creation of the equitable mortgage and the well charging orders on foot of the judgment mortgages as well as the appointment of the Receivers with the powers sought in the notice of motion, as, in my view, AIB and Everyday have demonstrated an entitlement to those orders, even without the consent of Mr. Morrissey, for the reasons I have sought to demonstrate when addressing each of those issues earlier in this judgment.

8. Summary of Conclusions and Orders

165. In summary, for the reasons outlined in this judgment, I am satisfied that I should make the various orders sought in the notice of motion in respect of the AIB/Everyday application to which Mr. Morrissey consented in the Consent Letter signed by him on 31st January, 2020. I have carefully considered the objections advanced by the Malcomson Law Defendants to some of those orders and have explained why I do not accept that they afford any basis on which I should refuse to make them. I have made clear that nothing in this judgment is intended to affect in any way the validity or effectiveness of the alleged Malcomson Law Charge or the priority which should be attached to that alleged charge. Those are all issues now for the trial as between Everyday and the Malcomson Law Defendants.

166. I will, therefore, make an order noting Mr. Morrissey's consent to the orders set out in schedule 1 of the notice of motion.

167. I will also make the orders set out in schedule 2 of the notice of motion on consent of AIB, Everyday and Mr. Morrissey together with the orders sought at paras. 10 and 11 of the notice of motion. I will direct that the sum of €1.5m be withheld by the Receivers from the proceeds of sale of the relevant property. I will also require an undertaking from the Receivers that in the event that that sum is not sufficient to meet any sums properly secured by the alleged Malcomson Law Charge, they will ensure that the full amount found to be due and owing to the Malcomson Law Defendants is paid to them (the precise detail of this undertaking can be discussed with the parties once they have considered the judgment).

168. It will be seen, therefore, that in relation to the issues which have required most consideration in this judgment, I have concluded that I should make (a) an order substituting Everyday for AIB as plaintiff in the proceedings and not an order joining Everyday as a further plaintiff to the proceedings; (b) a declaration that the letter of 3rd May, 2011, constituted an equitable mortgage by Mr. Morrissey in favour of AIB over the lands described as the Clonmelsh Property, but excluding Mr. Morrissey's family home; (c) a declaration that the sum of €24,970,000 (together with costs and interest) (or such other sum as may be found due and owing on inquiry) stands well charged against Mr. Morrissey's interest in the Clonmelsh Property but excluding his family home and the lands described as the "retained lands" pursuant to the judgment mortgages registered by AIB in January 2016; and (d) an order appointing Mr. McCann and Mr. Tennant as Receivers over the interest of Mr. Morrissey in the Clonmelsh Property but excluding his family home and the lands described as the

"retained lands" and conferring on them, the powers referred to at para. 10(I) to (XII) of the notice of motion.

169. I am also making an order removing the PRA as a defendant to the proceedings and giving Everyday liberty to deliver an amended summons and statement of claim. I will, however, require the amended pleadings to be served on the Malcomson Law Defendants (and as a matter of courtesy on Mr. Morrissey notwithstanding the orders which I have made) within seven days of the perfection of the order.

170. I have given careful consideration to whether it is open to Mr. Morrissey to withdraw the consent to the orders set out in the Consent Letter signed by him on 31st January, 2020 and in the agreed to Settlement Agreement and as communicated to the court by Mr. Morrissey's counsel on at least two occasions, 31st January, 2020 and 10th February, 2020. I have concluded that it is not open to Mr. Morrissey to withdraw his consent for the detailed reasons set out earlier. The withdrawal of his consent would involve a breach of an express term of the Settlement Agreement or, alternatively, a breach of certain terms which would otherwise be implied into the agreement between the parties.

171. As this judgment is being delivered electronically, I will list the matter for the purpose of making orders and for any consequential applications at 10:15 a.m. on Wednesday, 26th April, 2023. The hearing will be conducted on a hybrid basis on that day so physical attendance will not be required. I would ask the solicitors for AIB and Everyday to prepare and circulate a draft order reflecting the terms of the judgment by 5 pm on Thursday the 20th April, 2023.

172. Finally, I wish to thank the parties for their extremely helpful written and oral submissions. I want to particularly thank Mr. Morrissey for the courtesy with which he participated and made his submissions. Unfortunately, I have not been persuaded

by those submissions. I must also apologise to the parties for the delay in the preparation of this judgment which, unfortunately, was caused by severe pressure of other work. The parties were entitled to receive this judgment much sooner than now and, for that, I sincerely apologise.