THE HIGH COURT

[2023] IEHC 723
[2021 No. 1137 P]

BETWEEN

DUNBOY GREENER HOMES LIMITED and DUNBOY CONSTRUCTION & PROPERTY DEVELOPERS LIMITED

PLAINTIFFS

AND

GOLDEN DOOR LENDING DESIGNATED ACTIVITY COMPANY and DYLAN BI

DEFENDANTS

JUDGMENT of Ms. Justice Eileen Roberts delivered on 20 December 2023

Introduction

1. This judgment deals with the costs arising from the judgment delivered by this court on 20 July 2023 following a three day trial of the above proceedings (the "**Judgment**"). I heard submissions from counsel on costs on 12 December 2023.
2. The background to these proceedings is set out in detail in the Judgment and I do not propose to repeat that detailed background here. In summary, the plaintiffs are borrowers who sued the first named defendant lender seeking to repay monies due and to have the security held by the first named defendant released. They also sued for damages for breach of contract and for loss of opportunity related to the first named defendant's failure to release the security it held, as set out in detail in the Judgment. A separate claim was advanced against the second named defendant for an order restraining him from threatening or otherwise attempting to coerce or compel the plaintiffs or their officers to act for or on behalf of the defendants.

3. An unusual aspect of these proceedings is that it was the borrower who initiated proceedings against the lender to achieve repayment of the loan facility the parties had entered into. This scenario arose in circumstances where the plaintiffs defaulted on their loan by failing to repay it on the expiry of the loan repayment date. The parties were then left in a position where the loan agreement did not provide certainty on how the indebtedness was to be treated after the expiry of the loan repayment date. That, in turn, created an uncertainty regarding the calculation of the outstanding indebtedness. This issue was exacerbated by the lender's failure to provide a redemption figure for the plaintiffs leading to the plaintiffs instructing PWC, as an independent party, to calculate the amounts properly due to be repaid by the plaintiffs by way of principal and interest.

The outcome of the Judgment against the claims by the parties.

4. The following table summarises the reliefs sought in the plenary summons and the orders made by this court as set out in the Judgment:

Reliefs sought	**Remedy obtained**
Release of Deeds of Partial release for 40 and 43 Ard Aoibhinn.	Deeds released and properties were sold before trial. No order made or required from court at trial other than to award damages to plaintiffs in respect of interest charged to them arising from the delayed handover of deeds.
Declaration that first named plaintiff is entitled to repay monies due and redeem loan.	Court fixed the amount due to redeem loan at €9745.23, in line with plaintiffs' calculations.

Order restraining first defendant from interfering with plaintiff's equity of redemption including delaying the right to redeem, applying penalties or interest contrary to law. Alternative claim for estoppel on interest charges.	Court fixed the amount due to redeem loan – declared that no further interest was chargeable due to the first defendant's default in providing redemption statement.
Order restraining first defendant from making any demand for monies or declaring the event of default or taking steps to enforce security.	The court did not have to address these reliefs at trial – undertakings were given at interlocutory stage by the defendants.
Order restraining second defendant from threatening the plaintiffs or compelling them to act for or on behalf of the defendants.	Order made against second defendant.
Order directing that any charges be recorded as satisfied or otherwise to be vacated.	Court directed the satisfaction of registered charges by defendant at defendants' cost following the set-off of damages against the amount outstanding totalling €9745.23, resulting in nil balance payable by either side.
Interest pursuant to statute.	Not awarded.
Damages (to include aggravated or punitive damages). Subsequently the plaintiffs particularised damages on a continuing basis estimated	Damages awarded for excess interest incurred due to defendants' delay in providing partial deeds of release. Damages also awarded for costs of

at €55,000 per month until the releases are perfected. Specific loss of opportunity claimed in relation to Kinsale Site claimed as a loss estimated by PwC to be between €800,000-€2 million (for more general loss of opportunity)	procuring PwC calculation of indebtedness. No damages awarded in respect of substantial claim for loss of opportunity. No aggravated or punitive damages awarded.

5. The defence filed denied all claims and counterclaimed for a declaration that the plaintiffs were in breach of the facility agreement. The Court fixed the amount due to be repaid, made no other finding of breach by the plaintiffs, and no damages for breach were ordered against them. Insofar as the defendants had advanced an unparticularised counterclaim for loan repayments outstanding, the court determined the amount due, and no other order was made on the first defendant's counterclaim.

The costs orders contended for by the parties.

<u>The plaintiffs</u>

6. The plaintiffs seek their costs as against the defendants in respect of the proceedings and the trial together with the costs of interlocutory motions (as set out below) brought by the plaintiffs during the course of the proceedings.

7. Dealing firstly with the interlocutory motions, the following summarises the motions issued in these proceedings and the orders made in relation to them. All bar one of these motions were issued by the plaintiffs with the final motion issued by the defendants' then solicitors to come off record.

Motion type	Judge	Date of issue	Date and Order made	Costs Order
Ex parte motion to restrain appointment of receiver	Reynolds J	23 Feb 2021	24 Feb 2021 – undertaking by first defendant not to appoint receiver pending interlocutory hearing.	Reserved.
Interlocutory motion to restrain appointment of receiver	Reynolds J	23 Feb 2021	11 Mar 2021 – motion adjourned generally on consent. Appears that the first defendant's undertaking was to continue although this is not reflected in the Order. Directions agreed for pleadings.	Reserved to trial of action
Judgment in default of defence	Barr J	1 July 2021	11 Oct 2021 – motion struck out on consent.	Defendants to pay costs of motion with stay on execution pending trial.

Discovery	O'Moore J	22 Feb 2022	16 May 2022 – Defendants to make discovery of agreed 5 categories within 7 weeks.	Defendants to pay costs of motion with stay on execution.
Default of discovery	O'Moore J	23 Aug 2022	7 Nov 2022 – time extended to file affidavit to 24/11/22.	
Default of discovery	O'Moore J	23 Aug 2022	28 Nov 2022 -time for making discovery extended by 2 weeks. Adjourned to 19 Dec 2022.	
Default of discovery	O'Moore J	23 Aug 2022	18 Jan 2023 – time for compliance further extended for 3 weeks. Motion adjourned generally with directions made and expedited hearing date set for 23 May 2023.	Liberty to re-enter including in respect of the costs of the motion.
Defendant's solicitors seek to come off record	O'Moore J	17 May 2023	18 May 2023 – solicitors permitted to come off record for defendants.	None made.

8. In summary, it is apparent that the plaintiffs have already been awarded their costs against the defendants (on the usual party and party basis) for their default judgment motion and their discovery motion. What remains outstanding are the costs of the injunction motion which were reserved to the trial and a suggestion now by the plaintiffs that they should be awarded costs of the discovery motions on a solicitor and client basis in circumstances where the discovery made by the defendants was so inadequate. They say that this possibility was envisaged by O'Moore J when he granted liberty to re-enter in respect of the costs of the default of discovery motion. The plaintiffs say that the inadequacy of the discovery made by the defendants was what prompted the court to make this order and to fix an expedited hearing date for the trial.

9. The injunction motion was filed by the plaintiffs on 23 February 2021 seeking to restrain the appointment of a receiver by the first named defendant. That motion arose following confirmation in writing from the first named defendant's solicitors in October and November 2020 that the first named defendant intended to appoint receivers and/or have certain residential properties sold through BidX1 if the loan was not redeemed on 31 October 2020 or agreement reached to extend the term of the loan to 31 December 2020.That motion was resolved when counsel for the first named defendant provided an undertaking that no receiver would be appointed. That undertaking continued at the interlocutory stage and, with the cooperation of the parties, the relevant properties were consensually sold to third parties in the ordinary course prior to trial. This court did not have to make orders on this injunctive aspect. The plaintiffs say that they succeeded on this interlocutory motion and should be awarded their costs.

10. In relation to the motion filed by the plaintiffs on 23 August 2022 seeking to strike out the defendant's defence for failure to comply with the agreed discovery order or in the alternative seeking further and better discovery, the plaintiffs say that they should be awarded their costs on a full indemnity basis. They argue for this in light of the critical comments made by the presiding judge on the adequacy of the discovery made by the defendants and they say that this question of costs was to be left over until after discovery was made by the defendants. It does not appear that O'Moore J was ever asked to finally determine this issue once discovery was made by the defendants.

11. It is also worth noting that post the Judgment, a further motion was issued by the plaintiffs seeking to join Mr Cheng Bi as a party for the purposes of holding him personally liable for the plaintiffs' costs as against the first named defendant. This motion has not been progressed by the plaintiffs in circumstances where the court has yet to determine whether the plaintiffs are entitled to legal costs for these proceedings.

12. The plaintiffs also seek their costs of the three-day hearing and the proceedings generally. They argue that they obtained declarations in relation to the proper sums due to the first defendant and that damages were awarded to the plaintiffs such that no further sums were found due to the first defendant whose counterclaim was then struck out with no order. The plaintiffs say that they obtained an order for the release of security held by the first named defendant and the discharge and return of monies held by their solicitors on foot of an undertaking. They also secured a permanent injunction against the second named defendant in the terms sought.

13. In those circumstances the plaintiffs submit that by these proceedings they have substantially secured the reliefs they sought, although they acknowledge they were not awarded damages for loss of opportunity as they had claimed. They argue

nevertheless that they have been *entirely successful* in this action such that the ordinary rule should apply- namely that costs follow the event.

14. The plaintiffs say that this is not one of those exceptional cases where this court should engage in the type of analysis undertaken by the Court of Appeal in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183 to parse a relatively condensed hearing to determine whether the defendants ought to be awarded costs on any discrete issue.

15. Furthermore, the plaintiffs reject any suggestion that this court should make a differential costs order pursuant to section 17 (2) of the Courts Act 1981 (as amended by section 14 of the Courts Act 1991) (the "**1981 Act**") albeit that the damages awarded by this court were significantly less than the jurisdiction of the Circuit Court. They say the Circuit Court would not have had jurisdiction to make the orders sought in this case, in particular the injunctive relief sought against the second named defendant (which did not relate to property) or the redemption of mortgages charged on the plaintiff's shares (rather than on their properties). They also argue that the value to the plaintiffs of the orders and declarations made by this court exceeds the monetary jurisdiction of the Circuit Court. Given what they say is the exceptional nature of these proceedings, where a borrower was required to sue a lender in order to effect repayment and release. The plaintiffs say it would in any event be appropriate for this court to grant a special certificate under section 17 (5) of the 1981 Act that it was reasonable in the interests of justice generally and owing to the exceptional nature of these proceedings that these proceedings should have been commenced and determined in the High Court. They argue that the value of the release of undertakings by their solicitors who were holding €57,000 would bring them within the range of

damages permitting such a certificate to issue, if it was required (which they say it is not).

16. The plaintiffs reject any suggestion that they unreasonably refused to engage in mediation prior to the trial. They say that the attitude of the defendants to this litigation varied between apathy and belligerence and that the defendants in fact led no evidence at all at the trial despite confirming they would do so and putting the plaintiffs to the expense of meeting this expected evidence. They argue that the plaintiffs had to issue motions on every conceivable ground in order to keep the litigation progressing. They say that the conduct of the defendants both before and throughout the course of these proceedings are matters that ought to persuade this court to make the costs orders sought by the plaintiffs. They also point out that the defendants at no stage until this costs hearing, ever suggested that this litigation should be advanced in a lower court.

<u>The defendants</u>

17. In summary, it is the defendants' position that both parties were partially successful in these proceedings, but that the defendants were more successful. They argue that previous motions have been fully addressed by the presiding judge at the time and that the sum awarded by this court is well below the High Court jurisdiction and is at District Court level. The defendants therefore seek an order for 50% of their costs, or in the alternative no order for costs, or in the alternative a costs differential order.

18. The defendants deny that the plaintiffs were *entirely successful* in the proceedings. Instead, they say that the plaintiffs were the least successful party in the proceedings in circumstances where the damages awarded against the first named defendant were a minute fraction of what was claimed by the plaintiffs and no damages at all were awarded for loss of opportunity.

19. The defendants submit that the court has three options in relation to costs:

a) First, the court could make no order for costs because both parties have been partially successful in the proceedings.

b) Second, the court could assess who was the more successful party and, if so, the defendants say the court should then award costs to the first named defendant who successfully defended the significant damages claim of the plaintiff and succeeded in its argument that it did not have any legal obligation to release the security until the loan balance outstanding was actually paid.

c) Third, if the court determines that costs should be awarded to the plaintiff, then the defendants seek a differential costs order under section 17 (5) of the 1981 Act.

20. Counsel for the defendants submits that as a consequence of the Judgment, the loan is deemed repaid now, but at the time of issuing and hearing these proceedings the plaintiffs remained in default of repayment. He says that in those circumstances the relief sought by the plaintiffs seeking release of security was not only unsuccessful but was misconceived from the start. He says that the plaintiffs were unsuccessful in obtaining any damages for loss of opportunity and were unsuccessful in their claim for the release of the security (save for *after* the repayment of the debt, which was not an issue in the proceedings as the debt was not repaid at that time).

21. The defendants accept that the plaintiffs were "*partially successful*" and acknowledge that a central issue on which the plaintiffs prevailed (i.e. the redemption figure) was held by this court to be the sum claimed in the PwC report commissioned by the plaintiffs.

22. The defendants point out that the total of the damages awarded in this matter was less than €10,000. They say section 17 (5) of the 1981 Act allows a trial judge who has awarded damages which are within a lower monetary jurisdiction to measure a sum

which the judge considers to be the difference between the costs actually incurred and those which would have been incurred had proceedings been brought in the correct jurisdiction. Counsel for the defendants say that breach of contract claims can be brought in any jurisdiction and this cause of action was the only relief that the plaintiffs were successful in against the first named defendant. Counsel argues that in reliance on the Court of Appeal decision in related cases of *Moin v Sicika* and *O'Malley v McEvoy* [2018] IECA 240, it is incumbent on courts to make a costs differential order unless there are good reasons for not doing so, where an award is significantly within the monetary jurisdiction of a lower court. Counsel argues that the true purpose of these proceedings was to secure a redemption of the mortgages held by the first named defendant and to secure the release of security and damages. He says these orders could have been made by the Circuit Court and should have been sought there.

23. In relation to the previous interlocutory motions, the defendants submit that there is no basis to depart from the usual position that costs will be awarded on a party and party basis. They say that the plaintiffs did not in fact obtain a final order in the terms of the injunction they sought in their motion of 23 February 2021 as the properties were sold prior to trial and that in any event it is now clear that the plaintiffs were indebted to the first named defendant at that time. They say that these reserved costs should "follow the event" and be awarded to the successful defendants.

24. The defendants say it is uncertain whether the costs of the further discovery motion in this case were in fact reserved, or if any costs order was made in relation to that motion. They say that the presiding judge over those motions was best placed to determine costs and it is inappropriate for the plaintiffs to now refer to obiter comments that judge made which are not reflected in the court order. They say that

Mr Justice O'Moore was in the best position to determine the costs of those motions and he chose not to make an order for costs on an indemnity basis.

25. In relation to the post discovery motion seeking to join Mr Cheng Bi, the defendants say that this motion should be dismissed. They argue that it is inappropriate for the plaintiffs to place this motion in abeyance and say that this again shows the plaintiffs "over litigating" this dispute.

Analysis

26. The relevant legal provisions which apply to the determination of costs in this case are sections 168 and 169 of the Legal Services and Regulation Act 2015 (the "**2015 Act'**) and the recast O. 99 introduced by the Rules of the Superior Courts (Costs) Order 2019 SI 584/2019. The relevant sections of the 2015 Act came into force on 7 October 2019 and the new provisions of O.99 took effect from 3 December 2019. The proceedings in this case issued on 23 February 2021.

27. As outlined by Murray J in *Chubb*, the general principles now applicable to the costs of proceedings as a whole (as opposed to the costs of interlocutory applications) can be summarised as follows:

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

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

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

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

(e) Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings, and

whether it was reasonable for a party to raise, pursue or contest one or more issues (s. 169(1)(a) and (b)).

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

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

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

28. I am of the view that in this case the plaintiffs were partially successful. It cannot be said that they were entirely successful in light of their failure to obtain any damages for the significant loss of opportunity claim they had advanced. Furthermore, while they did secure an order directing the first defendant to release the security it held, that order was only made in circumstances where the court found that the plaintiffs remained indebted to the first defendant up until the court awarded damages to the plaintiffs which could be offset against the indebtedness due, thereby creating an obligation on the first defendant to release the security. The plaintiffs undoubtedly secured a real benefit from the Judgment but they were not entirely successful in their claim. Similarly, the defendants (or at least the first named defendant) were also partially successful in their defence of the proceedings.

29. The plaintiffs, not having been '*entirely successful'* in these proceedings have no entitlement under s.169(1) of the 2015 Act to their costs. The Court has, however, the power under s.168(2)(a) to make an order in their favour to the extent that they were *'partially successful'* in the proceedings, just as it has the power to make an order on the same basis in favour of the defendants. That power extends to awarding '*costs relating to the successful element'* of the proceedings. As Murray J noted in *Chubb* at para 31:" The *difference between the two provisions is important: the party*

who prevails entirely has a right to costs unless there is a reason not to order them. A party who only succeeds partially may obtain an order for costs in respect of the successful aspect of its claim if, having regard inter alia to the criteria specified in s.169(2), it is appropriate to award them."

30. The plaintiffs claim for damages for loss of opportunity was, in my view, a separate and distinct heading of claim which added materially to the time and cost of the proceedings. It was necessary to particularise that claim and to brief experts in relation to it. At the hearing itself much of the time spent by Mr O'Neill both in evidence in chief and on cross examination related to the loss of opportunity claim. The evidence of Mr Barry and Mr Smith was entirely focused on that aspect of the plaintiffs' claim. At least half of the evidence proffered by Mr Linehan of PwC was also directed at this aspect albeit that he also gave evidence regarding the quantification of the balance outstanding, on which latter aspect the plaintiffs were successful. There was only one other witness at the hearing, namely the second named defendant whose evidence did not concern the loss of opportunity claim.

31. Part of the opening and closing submissions were also taken up by this loss of opportunity claim. Having rechecked the digital audio recording ("**DAR**") in the absence of any transcript of the hearing, it appears to me that I can fairly estimate that 35% of the total trial time was spent on or associated with this aspect. Account needs also to be taken not merely of the time spent in court but also on trial preparation, affidavits, expert reports, and legal submissions. As noted by Murray J in *Chubb* :"*The exercise falls to be conducted adopting 'a relatively broad brush approach'… It is not possible to achieve a mathematically perfect allocation of time, effort, and cost."*

32. I also have to consider that the plaintiffs did not prevail on their argument that the first defendant was obligated, *simpliciter,* to release the security it held. However, as this argument was so closely linked to the recovery of damages for loss of opportunity, I believe that the time and costs of arguing this point are covered by the lost opportunity estimate.

33. The defendants argue that these proceedings could have been avoided entirely had the plaintiff paid the debt they accepted was due and then simply sought the release of the security. Had the security not been released, the defendants say that proceedings could then have been brought immediately in a lower court. While this is on its face a stateable argument, it does not reflect the very significant and unjustified difficulties the plaintiffs had in obtaining a redemption figure from the first named defendant. It is equally valid to say that had the first named defendant provided a proper calculation of a redemption figure (as I held it should), that sum would in all likelihood have been paid by the plaintiffs who continued to express their willingness to redeem the loan. Even if the plaintiffs had paid the amount calculated by PwC I have no evidence that the first named defendant would have accepted it and indeed they did not agree to this figure when it was suggested in correspondence. Neither was there any evidence at the trial that the defendants accepted this was the outstanding balance – indeed there was no evidence at all from the defendants as to what they said the redemption figure was. I believe therefore that even if the PwC figure had been paid together with the Exit Fee, there is no certainty at all that the first named defendant would then simply have released the security it held. The plaintiffs would on the evidence most likely have had to issue proceedings to secure its release. This relief was the most important relief for the plaintiff to secure in terms of its future business operations.

34. In all the circumstances I have concluded that the plaintiffs should be awarded 65% of the costs of the proceedings and the defendants should be awarded 35% of the costs. Balancing out those percentages against each other results in a net payment due to the plaintiffs of 30% of the costs of these proceedings.

35. The question then arises as to whether these proceedings ought to have been advanced in the Circuit Court. To focus solely on the amount of damages actually awarded in this case is not, in my view, the correct basis to determine whether these proceedings could or should have been brought in a lower court. This is not a case where a plaintiff only seeks damages for breach of contract or tort resulting in a financial loss or a personal injury which is and always was valued within the monetary jurisdiction of a lower court. These proceedings were more complex with multiple reliefs sought including injunctive relief against the second named defendant which was not within the Circuit Court's jurisdiction. I am also not satisfied that the redemption of a loan which seeks the release of security over company shares (as opposed to real property) is one that falls within the jurisdiction of the Circuit Court[1]. It is arguable that the "cancellation" of a deed of charge over shares is within the Circuit Courts Jurisdiction,[2] but what was sought here was the release of the security in the context of redemption (rather than its cancellation, rectification, or setting aside). It is true that the plaintiffs recovered a low level of damages, indeed within the District Court's jurisdiction. However, the value to the plaintiffs of the release of the security was significant to them. The level of damages they recovered did not reflect any cap at that level but rather that on the evidence the obligation to release the security had not been triggered. In circumstances where I am not satisfied that these proceedings could

[1] Para 19 of Third Schedule to Courts (Supplemental Provisions) Act 1961.
[2] Para 21 of Third Schedule to Courts (Supplemental Provisions) Act 1961.

in all aspects have been dealt with by the Circuit Court or indeed by the District Court, I will not make a differential costs order despite the low level of damages awarded to the plaintiffs.

36. There were allegations and cross allegations made by counsel in submissions regarding refusals to mediate this matter to avoid court. It is indeed regrettable that these proceedings were ever required to be litigated and I have no doubt that if both parties had been genuinely willing to engage in mediation there is every chance this dispute could have been resolved speedily and cost effectively. The Judgment points to instances where opportunities for resolution were lost. While both sides confirmed in general terms that they were amenable to mediation, this never occurred. I have no evidence that an appropriate costs letter regarding mediation was ever issued by either party. Had such correspondence issued I would have had no hesitation in exercising my discretion to penalise the party who had refused to engage with such a mediation request.

37. The Judgment confirms the basis on which this court made an order against Mr Dylan Bi. While the immediate risk which prompted the seeking of this injunctive relief has passed, I do not believe, as the defendants argue, that to make this order is now unnecessary and it should not be made. The order of this court should reflect the terms of the permanent injunctive relief which was granted against Mr Dylan Bi in the terms requested by the plaintiffs. I was satisfied on the evidence that the requests on which that injunction was sought had indeed been communicated by Mr Dylan Bi to Mr Barth O’Neill.

Decision

38. Dealing first with the interlocutory applications and motions:

a) This court will not interfere with the orders for costs already made in those applications in favour of the plaintiffs being the motion for judgment in default of defence and the motion for discovery. I believe that correctly understood, the costs of the motion for further discovery were also intended to be awarded to the plaintiffs as this motion was a direct follow on application from the initial discovery motion and it was necessitated entirely by the default of the defendants in complying with the earlier High Court discovery order. Insofar as there is any doubt on that point, I award the costs of that further discovery motion to the plaintiffs. I have however no evidence to justify awarding costs of the discovery motions on any basis other than the usual party and party basis, O'Moore J awarded costs on this basis although he was best placed to make an indemnity costs order had he seen fit. The party and party costs of those three motions therefore are awarded to the plaintiffs as against both defendants, same to be adjudicated in default of agreement.

b) In relation to the interlocutory application for injunctive relief in respect of which the costs were reserved, I award the plaintiffs their party and party costs of that motion as against the first named defendant only, such costs to be adjudicated in default of agreement. That injunction was not required to be pursued or confirmed at the trial. While it is true that the plaintiffs were indebted to the defendants at the time this motion issued, that of itself would not justify the appointment of a receiver - for example, no formal letter of demand had been sent to the plaintiffs nor had any notice of default issued. The factual matrix leading to that motion was the first defendant's unjustified and persistent refusal to provide a redemption

figure and its unjustified refusal and delay in handing over the partial deeds of release to enable the properties in question to be sold. The plaintiffs prevailed on both of these points at trial. The first defendant could have prevented this motion being issued. It was repeatedly asked to confirm that it would not appoint a receiver but it failed to do so until the matter came before the court by way of injunction.

c) Regarding the motion to join Mr Cheng Bi to the proceedings for the purposes of fixing him with costs on a personal basis, that is a separate application which would have to be advanced in the chancery list. In light of the decision of this court on the overall allocation of costs the plaintiffs may or may not decide to advance this motion and I express no view in relation to its possible success. If the motion was to be withdrawn at this point I direct that no order for costs should be made in relation to it. If it is advanced, then the plaintiff will remain at risk as to costs on it in the normal way.

39. In relation to the costs of these proceedings, including the trial costs, I find that having been partially successful in these proceedings, the plaintiff is entitled to recover 30% of its party and party trial costs as against the defendants for the reasons previously set out in this judgment. These costs are to be adjudicated in default of agreement between the parties.

40. In circumstances where I am not satisfied that these proceedings could in all aspects have been dealt with by a lower court and where the plaintiffs obtained relief on those aspects, I will not make a differential costs order despite the low level of damages awarded to the plaintiffs.