# THE HIGH COURT

**COMMERCIAL**

**[2025] IEHC 55**

**Record No. 2016/5037 P**

**BETWEEN**

**VICTORIA HALL MANAGEMENT LIMITED,**

**PALM TREE LIMITED,**

**GREY WILLOW LIMITED,**

**ALBERT PROJECT MANAGEMENT LIMITED,**

**O'FLYNN CAPITAL PARTNERS**

**AND**

**O'FLYNN CONSTRUCTION (CORK)**

**PLAINTIFFS**

**AND**

**PATRICK COX,**

**ROCKFORD ADVISORS LIMITED,**

**LIAM FOLEY,**

**FOLEY PROJECT MANAGEMENT LIMITED,**

**EOGHAN KEARNEY,**

**CARROWMORE PROPERTY LIMITED,**

**CARROWMORE PROPERTY GARDINER LIMITED**

**AND**

**CARROWMORE PROPERTY GLOUCESTER LIMITED**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Michael Quinn delivered on the 5th day of February 2025**

**(Form of Order and Costs)**

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## Introduction

**1.** This Court delivered judgment in these proceedings on 26 November 2024; [2024] IEHC 674, the "Principal Judgment".

**2.** In the Principal Judgment, the court held as follows:-

(a) That the first named defendant was a fiduciary of the plaintiffs;

(b) That the first named defendant acted in breach of fiduciary duties when he concealed from the plaintiffs the opportunity to develop a student accommodation scheme at Gardiner Street, Dublin and diverted its profits to himself and his co-defendants;

(c) That no cause of action was made out against the third to eighth named defendants.

**3.** At the hearing of the action, limited submissions were made by the parties in relation to the remedy or form of order which would be made were the plaintiffs to succeed. Following delivery of the Principal Judgment, the court has now heard submissions as to the form of the order and costs. It emerges from the submissions, and certain extracts cited by the parties from the Principal Judgment, that there are two aspects of the judgment on which the parties have opposing views as to the remedy and orders to be made, in addition to their opposing positions on costs. Firstly, the position of the sixth named plaintiff O'Flynn Construction (Cork). Secondly, the meaning and substantive effect of an "account" of the profits of the Gardiner Street Scheme. This judgment relates to those questions and costs.

**4.** I have also been informed that the defendants intend to apply for a stay pending an appeal from the Principal Judgment. The matter will therefore be listed before me again one week after delivery of this judgment.

**The sixth named plaintiff**

**5.** In paragraph 377 of the Principal Judgment, I found that the sixth plaintiff was not a party to the employment contract with Mr. Cox and that it lacked privity of contract with him, an obstacle not overcome by the Assignment to the plaintiffs of the Tiger Developments contract with Mr. Cox which I found to be unenforceable. I also found that there was no evidence that the sixth plaintiff had any history of developing student accommodation schemes or was party to the plans and ambitions of the first five plaintiffs to develop such projects. It follows from those findings that the findings of breach of fiduciary duty which underpin the Principal Judgment do not apply in favour of the sixth named plaintiff. The claim of the sixth named plaintiff will be dismissed.

**6.** At paragraph 1737 I stated that *"the remedy which flows from my conclusion that the first defendant acted in breach of fiduciary duties to the first to fifth named plaintiffs is that he will be ordered to account to <u>those</u> plaintiffs for all the profits earned in the Gardiner Street*

*scheme together with interest"* (emphasis added). I stated also that if and to the extent that the first defendant is not entitled to or does not receive distributions of such profits, the remedy for his breach of duty in diverting the scheme from the plaintiffs will be an order for the payment of damages. These orders will be made in favour only of the first to fifth named plaintiffs.

**Accounting for profits**

**7.** There is a distinction between an order to account for profits and an order for 'disgorgement'. The order to account is an order that a defendant fiduciary furnish a narrative description of the profits earned, if necessary with appropriate verification of receipts and disbursements. An order for disgorgement is sometimes referred to as an account 'of' profits and means an order that a defendant give up and pay over the profits to the plaintiff. The authors of McGregor on Damages (Sweet & Maxwell, 22nd edn.) explain that "the process of accounting is distinct from the disgorgement order stripping the profits".

**8.** The plaintiffs now submit that the effect of my finding in paragraph 1737, quoted at paragraph 6 above, is that before they should be required to elect between the equitable remedy of disgorgement and damages for breach of duty, they should first receive the narrative and verified account of the profits earned and held by the defendants.

**9.** The defendants do not object to the making of orders that the first, second, sixth, seventh and eighth defendants furnish an account to the plaintiffs of profits "held" by them. However, they submit that the obligation of the sixth, seventh and eighth defendants (the 'Carrowmore' defendants), should be limited to accounting for Mr. Cox's proportion of any profits held by them.

**10.** In *Island Records Limited v Tring International plc.* [1996] 1 WLR 1256, Lightman J stated:

> *"A party should in general not be required to elect or to be found to have elected between remedies unless and until he is able to make an informed choice. A right of*

*election, if it is to be meaningful and not a mere gamble, must embrace the right to readily available information as to his likely entitlement in case of both the two alternative remedies. It is quite unreasonable to require the plaintiff to speculate totally in the dark as to whether or not the sum recoverable by way of damages will exceed that recoverable under an account of profits."*

**11.** Later the court continued: -

*"In my view the court can at the split trial or on any other application for judgment be invited to defer entry of judgment for damages or profits. At this stage the court may either make no order as to the remedy for infringement (as in the Minnesota case) or (as I would prefer) may grant a declaration that the plaintiff is entitled at his election to judgment for either. The court may at the same time or thereafter give directions which secure that such information as is available and is reasonably required to enable the plaintiff to make an informed election (and accordingly is necessary for fairly disposing of the cause of a matter: (see O.24, rr. 8 and 13.1) is made available to him and that the election is made within a reasonable time thereafter. To secure that the plaintiff has the required information the court may direct discovery, but if the information may be made available by some other satisfactory means (e.g in an affidavit by the defendant or by way of audited accounts or reports) the court may hold that the alternative means be adopted. The court should not be deterred from this course by the fact that the information required may likewise be required on the taking of an account or an assessment. There should be no over-lengthy or unnecessarily sophisticated exercise. The plaintiff is not entitled to know exactly the amount of any damages or profits to which he is entitled, but only to such information as the court considers to be a fair basis in the circumstances in the particular case for an election."*

**12.** The court's attention was drawn also to its power under of the Rules of the Superior Courts which provide at O.33(2): -

*"The Court may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries to be made or accounts taken, notwithstanding that it may appear that there is some special or further relief sought or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner".*

**13.** The effect of my decision (see para. 1737) is that the plaintiffs are entitled to invoke the remedy of damages for breach of duty *"if and to the extent that the first named defendant is not entitled to or does not receive distributions of such profits".* It is clear therefore that, even leaving aside the plaintiffs' right of election as they have described it, it is necessary to first establish the extent of the profits received by the first defendant or which he is entitled to receive. This can only be achieved by the provision of an account of the profits of the Gardiner Street Scheme, substantial portions of which were earned in the Carrowmore defendants.

**14.** The defendants submit that because the court has found, by reference to agreement reached between the experts and announced to the court at the trial, that the net profits of the scheme were €11.33m, such an account is not necessary. That finding does not obviate the necessity, in the context of para. 1737 quoted above to establish precisely what profits have been received and distributed in each company, and the process described in Island Records (op cit) is appropriate in this case.

**15.** I shall therefore make an order in the form proposed by the plaintiffs, namely:

(i) An order that Mr Cox and Rockford Advisers Limited account to the plaintiffs in respect of the profits made on the Gardiner Street Scheme, such account to be given on affidavit by Mr Cox with appropriate verification provided and in respect of Rockford by way of affidavit of each of the directors of Rockford with appropriate verification provided.

(ii) An order that the sixth, seventh and eighth defendants ('the Carrowmore defendants') each account to the plaintiffs in respect of the profits respectively made on the Gardiner Street Scheme, such account to be given on affidavit by each of the directors of the Carrowmore defendants with appropriate verification provided.

**16.** The form of order proposed by the plaintiffs required the account to be provided within seven days of the making of the order. That may be sufficient, having regard to the fact that evidence on the subject was given at the trial by forensic accountants on behalf of all the parties. However, no submissions were made by the parties as to the time required to make and furnish the account. If the defendants consider seven days to be impracticable and wish to apply for a longer period, I shall hear that submission when the matter is listed again next week.

**Disgorgement**

**17.** On the more substantive question of disgorgement, the parties are in dispute as to the scope of application of such an order insofar as it would apply to the Carrowmore defendants. The plaintiffs rely on paragraph 1626 of the Principal Judgment where I stated: *"The remedy for such findings would in the ordinary course be a declaration that Mr. Cox acted in breach of fiduciary duty, a declaration that the profits earned in the Gardiner Street Scheme are held on trust for the plaintiffs, and an order directing the defendants* (emphasis added) *to account to the plaintiffs for the profits so earned."* They submit that all those defendants hold all their profits on trust for the plaintiffs. The defendants submit that this only applies to the extent of Mr. Cox's shareholding interest in those companies, namely 80% in the case of the seventh defendant Carrowmore Property Gardiner Limited, and one third in each of the sixth and eighth defendants Carrowmore Property Limited and Carrowmore Property Gloucester Limited. No submissions on this important question were made at the trial.

**18.** The plaintiffs' claim that all profits earned and held in the sixth, seventh and eighth defendants are held on trust for the plaintiffs rests on two propositions.

**19.** Firstly, the statement in paragraph 1626 of the Principal Judgment that the remedy for my findings of breach of fiduciary duties "would in the ordinary course be a declaration that the profits earned in the Gardiner Street scheme are held on trust for the plaintiffs, and an order directing the defendants to account to the plaintiffs for the profits so earned".

**20.** Secondly, a submission that those defendants are constructive trustees of all the profits for the plaintiffs.

**21.** Paragraph 1626 refers to the "defendants" without stating which defendants hold the profits on trust. When one reads the judgment in its entirety, and in particular the paragraphs quoted below, the consequence now contended for by the plaintiffs does not follow. I add emphasis where appropriate.

**22.** Para. 25.8:-

> *"The court will declare that the first and second named defendants have at all times held the profits of the Gardiner Street scheme on trust for the plaintiffs and will order that those defendants account to and pay the said profits to the plaintiffs together with interest."*

**23.** Para. 25.9:-

> *"Insofar as the first or second named defendants are not entitled to or have not received profits of the Gardiner Street scheme the remedy will be an order against them for damages for breach of fiduciary duty equivalent to the full profits of the scheme."*

**24.** Para. 1161:-

> *"When Mr. Cox took the Gardiner Street opportunity and diverted it for his own profit and that of his co-defendants he acted in breach of the fiduciary duties described above. The remedy for this breach is that he must account to the plaintiffs for the profits earned."*

**25.** Para. 1737:-

*"The remedy which flows from my conclusion that the first defendant acted in breach of fiduciary duties to the first to fifth named plaintiffs inclusive is that he will be ordered to account to those plaintiffs for all the profits earned in the Gardiner Street scheme together with interest. If and to the extent that the first named defendant is not entitled to or does not receive distributions of such profits, the remedy for his breach of fiduciary duty in diverting the scheme from the plaintiffs will be an order for the payment of damages for breach of duty."*

**26.** Para. 1739:-

*"The second defendant Rockford Advisors Limited was the vehicle used by the first defendant both as a recipient of payments from the plaintiffs, and as part of the structure for the construction and development of Gardiner Street. The orders I intend to make against the first defendant will extend to this company."*

**27.** Para. 1740:-

*"The sixth, seventh and eighth named defendants were owned and controlled by Mr. Cox, Mr. Foley and Mr. Kearney who were directors of each of them. The shareholding was held equally between them, except for Carrowmore Properties Gardiner Limited, in which the first defendant held 80% of the shares. I have not found any contractual, fiduciary or other relationship between these defendants and the plaintiffs. I have also rejected the claim of conspiracy and the claim that they wrongfully procured or induced breaches of contract or other duties. Although Mr. Foley and Mr. Kearney had knowledge that Mr. Cox was sourcing information whilst still employed by the O'Flynn Group, there is no evidence that they were aware of the facts which have grounded my finding that he was a fiduciary of the plaintiffs. I cannot therefore attribute the wrongful actions of Mr. Cox alone to these companies. There will be no order against these*

*defendants, save insofar as may be required to give effect to orders against the first and second defendants. If required, I shall hear submissions on this question."*

**28.** In para. 1745:

*"It is my intention to make an order that the first and second defendants hold the profits of the Gardiner Street Scheme, totalling €11,333,00 on trust for the first five plaintiffs and an order that those defendants account and pay the plaintiffs such amounts together with interest."*

**29.** The reliance placed by the plaintiffs on the use of the word "defendants" in paragraph 1626, read in isolation, is misplaced. It is regrettable that this clarification is required, but it is clear from the judgment as a whole, including the paragraphs quoted above, that I have found no cause of action made out against any of the defendants except the first and second defendants.

**Constructive Trust**

**30.** In support of the claim of constructive trust over the entire profits in the Carrowmore defendants, the plaintiffs cite two academic works, both of which correctly describe the principles informing my decision on this question. In Ahern on Directors Duties: Law and Practice (Roundhall, 2009) the authors state:-

*"A director is liable in respect of profits made personally. However, so as to counteract avoidance schemes, a corporate vehicle used by a director may be held liable in respect of the profits made. This is a sensible approach to take as otherwise it would be relatively easy for a director to neatly evade the spirit of the account of profits remedy. Consequently, the courts have been keen to avoid directors seeking to avoid the consequences of breach of duty, in particular, the accounts of profit remedy, by incorporating another company to take advantage of the opportunity presented."*

**31.** In Lewin on Trusts (Vol. 2) (20th Ed. Sweet & Maxwell 2020) the authors state:-

*"But the trustee cannot avoid the rules concerning accountability for profits by arranging for the profit to be taken by his company (or a company in which he has a substantial interest) which is a mere cloak for the trustee, or which is formed by the trustee for the purpose of taking the profit, or which could have been taken by the trustee but which is arranged by him to be taken by a company. We do not consider that this principle is affected by Petrodel Resources Ltd. v Prest, which tightened up and restated the law on piercing the corporate veil. No piercing of the corporate veil is involved. Rather the principle is that in the circumstances stated above the trustee continues to have a liability of his own which is not eliminated by the interposition of the company. In such a case the trustee will be personally liable for the full amount of the profit, not merely a part proportionate to his interest in the company. The company will be personally accountable for the full amount of the profit obtained by it and will hold the profit on constructive trust for the beneficiaries. The liability is for the full amount of the net not gross profit. But in a case where a third party has a real and independent interest in the company, the profit to be accounted for will be limited to that attributable to the trustee's breach of duty. The position as to rights of contribution as between the trustee and his company is not clear."* (Emphasis added).

**32.** The plaintiffs cite two cases where defendants found to have acted in breach of fiduciary duty earned and took the profits of their breach in companies formed or controlled by them. In each case the court extended the obligation to account and disgorge to the relevant corporate entities.

**33.** In *Green v Bertobell Industries Pty Limited* [1983] WASC 144, the Supreme Court of Western Australia upheld a trial judge finding that the appellant had acted in breach of fiduciary duty and was held liable to account to the respondents to whom the duty was owed. The order extended to a company through which he pursued his new contracts in breach of duty. The

court described it as Mr. Green's company, and it was wholly owned and controlled by him. In that case the court found that the second appellant, the first appellant's company had "through the agency of the first appellant, participated in a breach of duty".

**34.** In *Quarter Master UK Limited (In Liquidation) v Pyke and Others* [2004] EWHC 1815 Ch. the first two defendants formed the third defendant, Affinity Limited. They were its sole shareholders and directors. It was claimed that Affinity had participated in the matters which led to the first two defendants being in breach of fiduciary duty. The court found that the knowledge of the first two defendants was to be imputed to Affinity, and they each knew all the facts which gave rise to their breaches of fiduciary. In those circumstances it would be unconscionable for Affinity not to be liable to pay over to the plaintiff the sums it received, and the court held Affinity liable to account for the profits received by it as a result of the breaches of fiduciary duty.

**35.** In neither of these cases was there a third party, not being one of the fiduciaries, holding an independent interest in the company concerned.

**36.** I have found (in paragraph 1740) that although Mr. Foley and Mr. Cox had knowledge that Mr. Cox was sourcing information whilst still employed by the O'Flynn Group, there was no evidence that they were aware of the facts which grounded my finding that he, and he alone, was a fiduciary of the plaintiffs. I did not therefore attribute his wrongful actions to the Carrowmore defendants.

**37.** The authors of Lewin refer to a trustee avoiding the rules of accountability for profits by arranging for the profit to be taken by *"a company which is a mere cloak for the trustee, or which is formed by the trustee for the purpose of taking the profit, or which could have been taken by the trustee but which is arranged by him to be taken by a company"*.

**38.** It is not disputed that the second defendant Rockford was a vehicle for Mr. Cox's personal interests, and it was the entity through which he entered into option agreements with Mr. Mullins, and incurred expenditure on the scheme.

**39.** The Carrowmore defendants are different. They are the companies through which the first, third and fifth defendants pursued the Gardiner Street project. The only evidence before the court as to how they were structured in terms of ownership is the very limited evidence that whatever shareholding proportions were initially proposed by Mr. Cox, Mr. Foley pushed back against. In his email to Mr. Cox of 16 December 2015 he said that having regard to his 'history' with Mr. Cox he was "finding it hard to reconcile why Eoghan [Kearney] and I are being treated on an equal footing". It is clear that the shareholding allocations finally settled on in the Carrowmore defendants were the result of a negotiated agreement between the three persons. This is evidenced also by earlier emails in which Mr. Cox invites the others to turn their attention to the "key activities of the new business". And "what do you think are the main roles you, me and Eoghan would play in the company" and "lastly, what would a new company with the three of us be lacking". (See paragraph 910 of the Judgment).

**40.** I have no doubt that the Gardiner Street scheme was uppermost in Mr. Cox's mind at this time, and he was building a team around him. And it would of course be common and entirely appropriate that limited liability company structures would be used for such a development. But there is no evidence that Mr. Foley and Mr. Cox were mere nominees, such that those three companies can be characterised as a "mere cloak". The only evidence is to the contrary. The case is therefore different to *Green* and *Quarter Master*, where there was a total identity between the fiduciaries found to be in breach of duty and the ownership and control of the companies in which they took the profits to be accounted for.

**41.** In the footnote to the quote from Lewin the authors discuss the question of third party interests in any such company. They state:-

> *"A company in which the defendant's interest is less than 100% can (but not necessarily will) be one which is a cloak or alter ego, as for example where some shares in the company are owned by persons connected with the defendant so as to give and (incorrect) appearance of autonomy".*

Undoubtedly Messrs. Foley and Kearney were "connected" to Mr. Cox, in that they had all at various times in the past been employees in the O'Flynn Group, they entered business together and shared, in agreed proportions, the companies which took the profits of Gardiner Street. But, for all the reasons described in this judgment, there is no evidence that they became shareholders in the Carrowmore defendants for the purpose of creating a "cloak or alter ego" or an "appearance of autonomy".

**42.** I have held that Mr. Cox, in breach of fiduciary duty, concealed from the plaintiffs the Gardiner Street scheme and diverted it and its profits to himself and his co-defendants. For this breach the remedy, as I made clear, is that for profits received by him or to which he is entitled, he must account as a trustee to the plaintiffs. And I held that to the extent he does not or is not entitled to receive those profits, the remedy will be damages. The consequence of my statement that orders will be made against the Carrowmore defendants insofar as may be required to give effect to orders against the first and second defendants, is that they must account, as they have now acknowledged in their submission, for so much of the profits as represent the profits of the first and second defendants. To the extent that the full amount of €11.33m is not recovered by this remedy, Mr. Cox's liability for the balance of the diverted profits will be in damages.

**43.** The reliefs claimed in the plenary summons include the following:

> *"(3) A declaration that the proceeds and/or profits of the commercial opportunity so concealed are diverted from the plaintiffs to the defendants or any of them or held in trust for the plaintiffs.*

*(4) An order directing the defendants to account to the plaintiffs for the proceeds and/or profits of the commercial opportunities which have been so concealed from the plaintiff and/or diverted to the defendants or any of them.*

*(5) An order in favour of the plaintiffs against the defendants for the taking of any accounts and inquiries as to damages."*

**44.** The high point of the basis for this claim is:

a) that the acts, omissions, knowledge, concerns and beliefs of Mr. Cox, Mr. Kearney and Mr. Foley are attributable to Carrowmore, which is defined in the Statement of Claim as the sixth named defendant only (paragraph 12 of the Statement of Claim) and,

b) that Carrowmore (meaning the sixth defendant only) wrongfully induced and procured the various breaches of contract and/ or other obligations of Mr. Cox, Mr. Kearney and Mr. Foley (paragraph 38 of the Statement of Claim).

**45.** In the Principal Judgment I rejected both of these propositions. The submissions now made based on constructive trust were not advanced at the trial. Having regard to (a) my conclusions as regards the Carrowmore defendants and (b) the principles considered in *Ahern* and *Lewin* and applied in *Green* and *Quarter Master*, I shall make a declaration that the Carrowmore defendants hold the profits of the Gardiner Street scheme as trustees for the first, second, third, fourth and fifth plaintiffs, as to eighty percent in the case of the seventh defendant and as to one third each in the case of the sixth and eighth defendants.

**Costs**

**46.** The first and second named defendants do not oppose the making of an order for costs against them. They submit that there are grounds on which they could argue that the plaintiffs were not entirely successful against them under a number of headings, notably claims for breach of contract and conspiracy, or that the length of the trial was extended by what the defendants characterise as errors, at best, in the plaintiffs' evidence. But these defendants

accept that the effect of the judgment is that the plaintiffs have succeeded as against them and therefore that the general rule applies that costs should follow the event, consistent with s. 169(1) of the Legal Services Regulation Act, 2015. There will be an order that the first and second defendants pay the costs of the first five plaintiffs.

**47.** Four contentious issues remain in relation to costs:

1. The plaintiffs submit that the court should order the third, fourth and fifth defendants to pay their costs, notwithstanding the court's decision that no cause of action was made out against them and that the claims against them will be dismissed. This claim is grounded principally on the fact that those defendants joined with the first and second defendants in advancing the 'NAMA' Defence and the multiple unpleaded allegations of fraud, theft and lying which took so much of the time at trial and which were rejected by the court. The plaintiffs submit that this was conduct which the court should take into account in determining liability for costs and should mark its disapproval of the conduct of the defence by awarding costs against all the defendants. The converse of this claim is that the third, fourth and fifth defendants submit that they were entirely successful and are presumptively entitled to their costs (Section 169(1) of the Act). A 'subset' of this question arises from the statement made in submissions that these defendants did not incur any costs.
2. The plaintiffs submit that the court should order the sixth seventh and eighth defendants to pay their costs, again notwithstanding that the court found no contractual, fiduciary or any other relationship between them and the plaintiffs and rejected the claim of conspiracy and wrongful procurement or inducement of breach of contract or other duties, and concluded that there will be no order as against them, save insofar as may be required to give effect to orders against the first and second defendants (paragraph 1740).

This claim is grounded principally on two bases. Firstly, the same basis as the costs claims against the third, fourth and fifth defendants, namely that they joined in and conducted a unified defence of the proceedings, extending to unpleaded allegations of fraud, theft and lying, which were rejected in the Principal Judgment.

Secondly, it is submitted that it was necessary to join those defendants, as orders are necessary against them to give effect to the orders against the first and second defendants. As appears earlier in this judgment, orders are now being made that those defendants furnish accounts of the profits earned on the Gardiner Street scheme.

Again, the converse submissions are that in light of the Principal Judgment those defendants were entirely successful in their defence of the allegations made against them and are presumptively entitled to their costs.

3. The defendants submit that since the claim of the sixth named plaintiff O'Flynn Construction (Cork) will be dismissed all the defendants are entitled to an order for their costs against it.
4. The plaintiffs claim that orders for costs in their favour should be made on a legal practitioner and client basis, the elevated level of costs which a court has discretion to order pursuant to Order 99 Rule 10(3) of the Rules of the Superior Courts.

**Legal Services Regulation Act 2015**

**48.** Section 168 confers on the court the power to award legal costs and provides as follows:

*"168(1) Subject to the provisions of this part, a court may on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings –*

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

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

*(a) a portion of another party's costs,*

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

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

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

**49.** Section 169 provides as follows: -

*"169(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including -*

*(a) conduct before and during the proceedings,*

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

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

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

[(e) to (g) not relevant]

*169(2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order."*

**Order 99 of the Rules of the Superior Courts**

**50.** Order 99 provides: -

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

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

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

**51.** Order 99.10(3) provides:

*"The court in awarding costs to which this rule applies may in any case in which it thinks fit to do so, order or direct that the costs shall be taxed on a legal practitioner and client basis"* (formerly known as solicitor and client costs).

**Chubb European Group SE v. Health Insurance Authority**

**52.** The principles which apply to costs having regard to ss. 168 and 169 of the Act and O.99 of the Rules were summarised by Murray J. in *Chubb European Group SE v. Health Insurance Authority* [2022] I.R. 734 as follows.

*"(a) The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and 0.99, r.2(1) RSC).*

*(b) In considering the awarding of costs of any action, the Court should 'have regard to' the provisions of s.169(1) (0.9, r.3(1) RSC).*

*(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 (0.99, 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)).''*

**53.** Murray J. by identified a number of changes in the law arising from the 2015 Act.

"whereas under the pre-existing law, costs presumptively followed the event the *prima facie* entitlement to costs is now limited to the party who is *'entirely successful'.* Given that the law was that the term *'event'* fell to be construed distributively so that there could be a number of events in a single case *( Kennedy v. Healy),* winning the *'event'* and being *'entirely successful'* may well not mean the same thing (although it will be observed that the phrase *'costs to follow the event'* appears in the marginal note to, but not the text of, s. 169 of the 2015 Act)."

**Costs considerations in this case**

**54.** Before I turn to the four separate issues on costs, it is necessary to make certain observations about the findings in the Principal Judgment as far as they inform the exercise of the court's discretion on costs. The parties have, understandably, each selected extracts from the judgment in support of their respective submissions on costs. I do not propose to repeat those selected extracts. My observations below are not a substitute for the Principal Judgment and are made in the specific context of determining where costs fall as between the numerous parties. They are not to be read as taking further any of the findings in that judgment. The key factors informing costs are the following.

**55.** Firstly, the core finding is that the first defendant owed fiduciary duties to the first five plaintiffs and that he breached them by concealing and diverting the Gardiner Street opportunity. The defendants have, fairly, accepted that the plaintiffs have been entirely successful and have not sought to persuade the court to depart from the presumptive order of full costs against the first and second defendants.

**56.** Secondly, I rejected the NAMA Defence, and the unpleaded allegations of fraud, theft and lying. In doing so I stated that it was inappropriate for the defendants to introduce unpleaded allegations of fraud and then to broaden those allegations during the trial and repeat them, and allegations of lying on the part of the plaintiff's witnesses. This aspect was aggravated by the decision of the defendants to never apply for leave to amend their Defence. Understandably such an application would have faced serious challenges, but no attempt was made to apply, and instead the defendants relied on Particulars delivered on 21 March 2021, during the long interruption of the trial.

**57.** Thirdly, the duration of the trial was elongated significantly by these allegations against the plaintiffs and their witnesses.

**58.** Fourthly, the plaintiffs applied for, and I have refused, aggravated damages, on a number of grounds considered in Part 23 of the Judgment. This application was grounded partly

on the claim that the defendants had made unpleaded allegations of fraud and had, during the trial, expanded its allegations of fraud, theft, fabrication of evidence and criminal offences. In rejecting the claim for aggravated damages, I commented, in paragraph 1735, that the case was never as straightforward as the plaintiffs contended, that the evidence required to reply to the NAMA Defence was complex and that a number of the allegations warranted a hearing.

**59.** Fifthly, there were aspects of the defence in which I found that the evidence of the plaintiffs and Mr. Nesbitt was unsatisfactory. I do not repeat those here, but a clear example was the subject of Mr. Nesbitt's communications with NAMA in relation to the sale of the Birmingham site, where I found that he placed himself in a position where his fiduciary duties as a director of VHL and his personal interests were in conflict and he breached his fiduciary duties when he failed to disclose certain aspects of the Coral scheme, notably his personal interest through VHML and the proprietary interest taken by the third named plaintiff in the Coral partnership. My conclusion was that these matters were not a good defence to the plaintiffs' claims. Nonetheless, it is clear that the plaintiffs, whilst succeeding in the fundamentals of the case, were not without blemish.

**60.** Sixthly, one of the issues on which the plaintiffs were found to have given inconsistent evidence was the description of the original incorporation of VHML, its shareholding and the dates when it first became operational. This was characterised by the defendants as the 'Foundation Lie', a description which I rejected, finding that the plaintiffs witnesses did not lie or set out to mislead the court. This issue did not arise from the NAMA Defence or from unpleaded fraud and other allegations made at the trial. In the original Defence the plaintiffs were put on proof as to the fundamentals of the ownership and control of VHML (paragraph 2 of the Defence) and as to its business activity (paragraph 11 of the Defence). Therefore, they ought to have come to court with a clearer description of those matters. (See paragraphs 287-289 of the Judgment).

**61.** The tests relevant to the exercise of discretion as to costs conferred by s.169(1) of the Act, and relevant to a decision as to whether or not to award aggravated damages are not necessarily identical. On the facts of this case, however, it seems to me that many of the features of the conduct of the parties are relevant to both questions, and therefore inform the decisions as to costs.

**COSTS ISSUE ONE: THE THIRD, FOURTH AND FIFTH DEFENDANTS**

**62.** I have concluded that no cause of action has been made out against any of these defendants and therefore that no order will be made against them.

**63.** These defendants are therefore presumptively entitled to their costs "unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including -" [the matters identified in s.169(1) quoted at paragraph 48 above].

**64.** The plaintiffs submit that the court should mark its disapproval of the conduct of these defendants by awarding costs against them or at least by disallowing these defendants their costs or part thereof.

**65.** This submission is based almost entirely on the role of the third and fifth named defendants in associating themselves with the NAMA defence and related allegations which I found were not a defence to the plaintiffs' case.

**66.** These defendants clearly associated themselves with all the allegations made by the first and second defendants, both pleaded and unpleaded. Only one defence was delivered on behalf of all defendants and the third and fifth named defendants gave evidence in support of Mr. Cox. In doing so their role was limited. Mr. Foley was a project management consultant on the Birmingham project. It does not appear that Mr. Kearney had any role in relation to those assets. These defendants succeeded, not because of matters pleaded in the NAMA

Defence or the unpleaded allegations, but because the basic cause of action pleaded against them was not made out.

**67.** Nor can it be said that those defendants caused any elongation of the duration of the trial. If anything, the plaintiffs' decision to join them had that effect, however marginal it was. The question therefore is whether they should be penalised in costs for the fact that through common representation they associated themselves with these defences and with unpleaded and unapproved allegations.

**68.** The plaintiffs' claims against Mr. Foley and Mr. Kearney were that they acted in breach of contract, breach of fiduciary duty and breach of duty of confidentiality. I found definitively that no such duties were owed by Mr. Foley or Mr. Kearney to the plaintiffs. I also found that the allegation of conspiracy was not made out against them. They came to court facing serious allegations, with potentially serious monetary and reputational consequences. In all the circumstances I am not persuaded that by joining in the defence as they did, it would be just that they suffer an award of costs against them. Therefore, no order for costs will be made against them.

**69.** That is not the end of the matter as far as concerns these defendants. In the written submissions presented to this court on 20 January, 2025 it was stated as follows:

> "(a) They are therefore entitled to an order of costs, even where they have not incurred costs, because the costs have been paid by Carrowmore Properties Gardiner Limited. The costs that they can successfully adjudicate, if any, is a matter for the Legal Costs Adjudicator".
>
> (b) "… the bulk of the costs of the proceedings – in excess of €2 million – were paid by Carrowmore Properties Gardiner Limited, the profits of which Mr. Foley and Mr. Kearney had a 20% right to participate in. Mr. Cox paid approximately €750,000 personally."

**70.** As a general rule, the question of quantum and the question of whether costs have actually been paid or incurred is not a matter on which this court would hold an inquiry, those being matters for the Legal Costs Adjudicator, as the defendants have pointed out. However, I am faced with a remarkably stark and clear statement that these defendants have not incurred costs.

**71.** It is a fundamental principle of the jurisdiction to award costs that the court is doing so on the basis of the "indemnity principle", namely that a party which is successful should, subject to the factors now provided for in s.169(1) of the Act of 2015, recover the costs which it has discharged or incurred.

**72.** The factors to which a court is required to have regard by s.169(1) are stated to include those described in subparagraphs (a) to (g) of that subsection. They are not exhaustive, and it is clear from ss. 168 and 169, and from Order 99.2(1) that orders for costs are discretionary. Where a party, as here, has informed the court unequivocally that it has not incurred costs, the indemnity principle has no application and an award of costs to such party would be inappropriate. I shall make no order for costs as between the first five plaintiffs and the third, fourth and fifth defendants.

**COSTS ISSUE TWO: SIXTH, SEVENTH AND EIGHTH NAMED DEFENDANTS**

**73.** The Principal Judgment (para. 1740) found that there was no contractual, fiduciary or other relationship between these defendants and the plaintiffs. I also rejected the claim of conspiracy and the claim that these defendants wrongfully procured or induced breaches of contract or other duties. I concluded by stating that there will no order against these defendants, *"save insofar as may be required to give effect to orders against the first and second named defendants."*

**74.** The plaintiffs submit that although they have been unsuccessful in their claim against these defendants, these defendants will be required to account for profits earned on the Gardiner

Street scheme and accordingly that it was necessary and appropriate that they be joined as defendants.

**75.** The plaintiffs discovered that the Gardiner Street opportunity had been diverted to Mr. Cox and his co-defendants, and that certain profits were earned in these defendants. I accept that as the recipients of profits it was appropriate to join these companies in the proceedings and orders are being made against them (paragraphs 15 and 45 of this judgment). However, I am not persuaded that the form of order which is necessary to give effect to orders made against the first and second defendants (paragraph 1740) is sufficient to outweigh, in the context of costs, my finding that there has been no actionable wrong doing, in contract, tort or equity on their part.

**76.** Therefore, to the extent that it has been necessary for the sixth, seventh and eighth defendants to defend the claims made against them in their own right, I see no reason to depart from the default position that they are entitled to an order for costs against the plaintiffs and I shall so order.

**77.** Finally, I have been told that the seventh named defendant has paid the "bulk" of the costs of the proceedings. It can of course only recover those costs occasioned and incurred by it in defending claims made against it. By contrast with the position of the third, fourth and fifth defendants, I have not been told that the sixth and eight defendants did not discharge or incur costs. The determination of the quantum of costs properly and validly incurred by each of these defendants will, as referenced earlier, be a matter for the Legal Costs Adjudicator.

**COSTS ISSUE THREE: THE SIXTH NAMED PLAINTIFF**

**78.** In paragraph 5 above of this judgment I have explained why the claim of this plaintiff will be dismissed. The defendants submit that they should all be granted costs against the sixth plaintiff. That is the consequence which would flow from s. 169 of the Act, unless I otherwise

order, having regard to the nature and circumstances of the case, and the conduct of the parties including the matters referred to at subparagraphs (a) to (g) of that section.

**79.** No submission was made as to any such factor in the case of the sixth plaintiff. The plaintiffs seek costs against the third to eighth defendants principally on the ground that they, although otherwise successful in their defences, had joined with the first and second defendants in their unsuccessful defences. I have rejected that as a ground to order costs against the third to eighth defendants. Those defendants succeeded not because the NAMA Defence and fraud allegations prevailed, which they did not, but because the causes of action pleaded against them were not made out in the first place. Similarly, the sixth plaintiff has failed to make out its case against any defendants. I see no reason why the first, second, sixth, seventh and eighth defendants should not be awarded their costs against the sixth plaintiff. The first and second defendants will recover only the quantum of costs occasioned by meeting the claim of the sixth plaintiff, again a matter for determination by the Legal Costs Adjudicator.

**80.** For the reasons stated in paragraphs 69-72 above, this question does not arise for the third, fourth and fifth defendants, which have incurred no costs.

**COSTS ISSUE FOUR: LEGAL PRACTITIONER AND CLIENT COSTS**

**81.** The plaintiffs submit that the award of costs in their favour should, as provided for under O.99 r.10(3) of the Rules of the Superior Courts be adjudicated on a "legal practitioner and client basis". Order 99 r.10 provides as follows:

> *"(2) Subject to sub-rule (3), costs to which this Part applies shall be adjudicated on a party and party basis in accordance with section 155 and Schedule 1 to the 2015 Act.*
>
> *(3) The Court in awarding costs to which this rule applies may in any case in which it thinks fit to do so, order or direct that the costs shall be adjudicated on a legal practitioner and client basis."*

**82.** The principles informing the discretion to order costs to be adjudicated on this elevated basis were summarised by Barniville J. (as he then was) in *Trafalgar Developments Ltd v. Mazepin* [2020] IEHC 13 where he summarised relevant principles as follows:

> *"(1) The normal position is that where costs are awarded against one party in favour of another, those costs will be taxed or adjudicated on the party and party basis.*
>
> *(2) The court has a discretion to depart from the normal position in the particular circumstances of the case, where the court thinks fit to do so, and to direct that the costs be taxed or adjudicated on the solicitor and client basis.*
>
> *(3) There has to be a good reason for the court to depart from the normal position and to make an order for costs on the solicitor and client basis (or on the even more severe basis, the solicitor and own client basis).*
>
> *(4) The court may exercise its discretion to order costs on the solicitor and client basis where it wishes to mark its disapproval of or displeasure at the conduct of the party against which the order for costs is being made.*
>
> *(5) The conduct in question can include: -*
>
> > *(a) A particularly serious breach of the party's discovery obligations;*
> >
> > *(b) An abuse of process by that party in commencing and maintaining proceedings for an improper purpose or for an ulterior motive, designed to seek a collateral and improper advantage;*
> >
> > *(c) The failure to exercise the requisite caution in commencing proceedings making claims of fraud or dishonesty or conspiracy without ensuring there exists clear evidence supporting a prima facie case in relation to such claims;*
> >
> > *(d) Any other conduct in relation to the commencement or conduct of the proceedings, or any aspect of the proceedings, which the court considers merits be marked by the court's displeasure or disapproval, such as particularly*

*serious or blatant breach of a court order, the directions of the court or the Rules of the Superior Courts.*

*(6) In considering whether the conduct of a party is such that the court should exercise its discretion to make an order for costs on the solicitor and client basis, the court should: -*

*(a) Clearly identify the particular conduct or behaviour of the party which is said to afford the basis for the court exercising its discretion to award costs on the solicitor and client basis;*

*(b) Carefully examine and consider the explanation (if any) offered by the party for the conduct or behaviour in question;*

*(c) Carefully consider and examine the consequences (if any) of the conduct or behaviour in question for the other party, whether in terms of delay or costs or any other form of prejudice to that party;*

*(d) in light of the above, determine whether, in all the circumstances, it would be appropriate and in the interests of justice to award costs on the solicitor and client basis under O. 99, r 10 (3).*

*(7) While a failure to comply with the provisions of the Rules of the Superior Courts or of a direction or order of the court will normally merit the award of costs against the party in default, such costs will normally be awarded on the party and party basis. It will generally only be if the breach or failure to comply is of a particularly blatant or serious nature, having serious consequences for the other party, that the court will be justified, in the exercise of its discretion, to award costs on the solicitor and client basis (or, exceptionally, on the solicitor and own client basis)."*

**83.** In his ruling in *Hand v. McGregor* (5 December 2024), Owens J. refused to make an award of costs on a solicitor (now legal practitioner) and client basis. The court observed that

the jurisdiction to make such an award *"must be exercised sparingly, as, for instance to express disapproval of a party who had pleaded fraud or dishonesty without any evidential basis, in other words whether you believe the evidence or not without any evidential basis or behave in an obstructive way in the conduct of proceedings."*

**84.** Owens J. continued:

> *"Mr. McGregor was entitled to put his case and in my view his case was put fairly and effectively by his legal team. His occasional sallies into theorising and advocacy while giving evidence did not, in my view, justify an award of solicitor and client costs. Nor would the somewhat extravagant allegation made on his behalf by counsel in paragraph 17 of the defence of dishonesty of the plaintiff. That was a piece of unnecessary advocacy which shouldn't have been put in the evidence and might have been struck out. However it is not really a basis, in my view, that sort of thing, for awarding costs on a solicitor and client basis. That would be a fair* (sic) *too extreme step to take in relation to something which perhaps on reflection shouldn't have appeared in the defence."*

**85.** In this case, the defendants persisted at trial with allegations which had not even been made in the Defence and never applied to amend their pleadings. The plaintiffs submit that the NAMA defence "morphed and expanded prior to and during the hearing to comprise multiple allegations of lying on the part of the plaintiffs and their witnesses, allegations of fraud, and allegations of theft "none of which the court has accepted".

**86.** The plaintiffs claim, as they did during the trial, that the defendants pursued the NAMA Defence for the sole purpose of intimidating the plaintiffs into withdrawing the proceedings. They say that this was an improper purpose constituting an abuse of process and "an affront to the administration of justice" for which they submit that the court should mark its displeasure.

**87.** I have held that the matters which were advanced by the defendants firstly in the NAMA defence and then in the unpleaded allegations of fraud, theft and lying were not made out and were not a defence to the plaintiff's case.

**88.** In doing so I was critical of the defendants for making and persisting at the trial with this range of unpleaded allegations. It was noteworthy that even when the defendants delivered the 'March 2021 Particulars' they did so without applying, even at such a late stage, for leave to amend the Defence to plead fraud.

**89.** At first pass, these features of the case are hallmarks of abuse of process, such as contemplated by Barniville J. in Trafalgar, and the jurisdiction to award legal practitioner and client costs is engaged. Nonetheless, the award of such costs is discretionary, and I respectfully agree with Owens J. that it should be used only sparingly. In this case there is another dimension to the matter. There are features of the plaintiffs' conduct in the presentation of the case which I believe should be weighed against the defendants' conduct. I expressed dissatisfaction at a number of aspects of their evidence in the case. Examples of this include the following: (a) evidence advanced by Mr. Nesbitt and Mr. O'Flynn as to the circumstances in which VHL had applied for planning permission on the Birmingham swap site (b) my finding that Mr. Nesbitt was selective in his disclosures to NAMA in the context of the sale of the Birmingham and Coventry sites amounting to a breach of fiduciary duties in his capacity as director of VHL. Under this heading I concluded that "the grime which was the breach of duty on the part of Mr. Nesbitt was not closely or directly connected to the claims made by the plaintiff such as would warrant refusal of the relief."

**90.** I found also that there were certain contradictions in evidence advanced by the defendants as to the existence and timing of a sharing agreement between VHL and VHML, although I found that the plaintiffs had not forged or fabricated evidence.

**91.** Finally, I found that there were certain contradictions and inconsistencies in the plaintiffs account of the incorporation, shareholding in and trading activities of the first plaintiff VHML. That did not arise from the NAMA Defence, but from the basic defence putting the plaintiffs on proof of those matters.

**92.** These matters were considered in the Principal Judgment in the different context of an application by the plaintiffs for an award of aggravated damages, which I refused for the reasons stated in Part 23 of the Judgment. It seems to me that they are relevant also to the exercise of discretion to award legal practitioner and client costs. Taking account of all these aspects of the conduct of the case, the balance of justice favours an order that the first and second defendants pay the costs of the first five plaintiffs on a party and party basis and not on the elevated basis of legal practitioner and own client costs.

**Conclusion on Costs**

**93.** The following orders will be made:-

(1) That the first and second named defendants pay the costs of the first, second, third, fourth and fifth named plaintiffs on a party and party basis in accordance with s. 155 and schedule 1 to the 2015 Act, such costs to be adjudicated by the Legal Costs Adjudicator in default of agreement.

(2) That the first to fifth named plaintiffs pay the costs of the sixth, seventh and eighth named defendants on a party and party basis in accordance with s. 155 and schedule 1 to the 2015 Act, such costs to be adjudicated by the Legal Costs Adjudicator in default of agreement.

(3) The sixth named plaintiff pay the costs of the first, second, sixth, seventh and eighth named defendants on a party and party basis in accordance with s.155 and schedule 1 to the 2015 Act, such costs to be adjudicated by the Legal Costs Adjudicator in default of agreement.

(4) No order will be made in respect of costs to the third, fourth or fifth named defendants.

**94.** At the hearing on 20 January 2025 for submissions on the Form of Order and Costs the court was informed that the defendants intend to apply for a stay pending an appeal from the Principal Judgment. The matter will be listed on Wednesday 12 February 2025 at 10:30am for that purpose and for any submissions regarding the time limited for making and furnishing the account of profits now being ordered, and any other necessary submissions as to the form of the order.