

THE HIGH COURT

[2023] IEHC 441

2021 No. 1137P

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 July 2023

Introduction

1. This judgment relates to a three-day trial before this court which ran from 23-25 May 2023. Some days before the trial commenced, the solicitors on record for the defendants came off record, having issued a motion seeking to do so on the stated basis of non-payment of their fees. Counsel also ceased to act. On the first morning of the hearing new solicitors appeared (without counsel) seeking to represent the defendants. This

court refused an adjournment of the hearing and permitted the new solicitors to represent the defendants on the solicitors' undertaking to file a notice of change of solicitor, which they later did.

2. This is an unusual case where the plaintiffs (as borrowers) are suing the first named defendant (as lender) seeking to repay monies due and to have security released. The claim against the second named defendant is for an order restraining him from threatening the plaintiffs or otherwise attempting to coerce or compel them or their officers to act for or on behalf of the defendants or either of them. The plaintiffs also claim damages in respect of alleged breaches of duty by the defendants, which it is alleged have caused and are continuing to cause loss and damage to the plaintiffs – including a claim for loss of opportunity. One of the unusual aspects of this case is that although the first named defendant is a commercial lender, it has never produced a formal statement of account indicating the amount owed by the plaintiffs – indeed this position persisted right through the trial when this information was still not available to the court.
3. Only the second named defendant gave evidence on behalf of the defendants at the trial. A detailed witness statement was prepared by Pearse O'Donovan, who facilitated the introduction of the parties and who, through Moore (accountancy and advisory services provider), acted as loan monitor for the loan on behalf of the first named defendant. However, Mr O'Donovan did not give evidence at the trial. There was no agreement

that his witness statement would be admitted into evidence. While some account was taken of his witness statement by expert witnesses instructed on behalf of the plaintiffs, in particular by Mr Eoghan Linehan, there was no direct evidence from Mr O'Donovan available to the court.

4. The plaintiffs submit that there are two issues for determination in these proceedings as follows:

- (1) Is the first named defendant lender obliged to provide the plaintiffs as borrower with a redemption statement setting out the redemption figure and the calculation giving rise to that sum? If so, does any failure on the part of the lender to inform the borrower of the precise sum due amount to a clog or fetter on the borrower's equity of redemption?

- (2) Is the first named defendant liable to compensate the plaintiffs for damages arising out of any failure to release security? Is the first named defendant otherwise liable to compensate the plaintiffs for damages arising out of breaches of contract.

The parties and the background to this dispute

5. The plaintiffs, Dunboy Greener Homes Limited ("**Greener Homes**") and Dunboy Construction & Property Developers Limited ("**Dunboy Construction**") are Irish registered construction and property development companies, who specialise in the construction and development of smaller residential schemes. Greener Homes is a

wholly-owned subsidiary of Dunboy Construction. The principal and director of the plaintiffs is Mr Barth O'Neill, who gave evidence at the trial.

6. The first named defendant (“**Golden Door**”) is an Irish registered company which has been trading as a commercial lender in Ireland since in or about 2018. There was no evidence before the court regarding Golden Door’s status as an entity regulated by the Central Bank of Ireland. The principal of Golden Door at all times material to these proceedings was Mr Cheng Bi whose shareholding in Golden Door was held through a third-party company known as Founders Base (Ireland) Ltd.
7. The second named defendant (“**Dylan Bi**”) is a son of Mr Cheng Bi. There is a dispute as to whether or not Dylan Bi holds any formal position within Golden Door or is an agent of Golden Door. He stated in evidence that he is not a servant or agent of Golden Door but that he simply operates as a translator for his father. Dylan Bi was the only witness who gave evidence on behalf of the defendants at the trial of this action, having been subpoenaed to attend by the plaintiffs.
8. Dunboy Construction owns lands at Ard Aoibhinn, Inishannon, Co Cork (the “**Lands**”). On 6 July 2018 Greener Homes entered into a commercial lending agreement with Golden Door (the “**Loan Agreement**”) for a €1 million facility to fund the development of five detached houses (numbers 40-44 inclusive) on the Lands (the “**Development**”). The terms of the Loan Agreement will be considered in some detail in this judgment. In general terms, however, in return for the monies advanced by

Golden Door, Dunboy Construction granted certain security to Golden Door including a charge over land, a share charge and a guarantee and indemnity. Greener Homes also granted Golden Door a debenture. All of this security is referred to collectively as the “**Security**” in this judgment and is described in detail below. The Loan Agreement was subsequently amended by letter dated 18 September 2019 (the “**Amendment Letter**”).

Key terms of the Loan Agreement and the Amendment Letter

9. The Loan Agreement is a detailed agreement between Golden Door as lender and Greener Homes as borrower. Pursuant to its terms Golden Door granted Greener Homes the following facilities:
 - (a) a secured term loan facility of €900,000 (described as the “Working Capital Facility”); and
 - (b) an interest roll-up facility of €100,000 (described as the (the “Interest Roll-Up Facility”)together comprising the “**Loan**” (*clause 3.1*).
10. Clause 4.1 provides that Greener Homes “*shall use all money borrowed under the Working Capital Facility towards the cost of the Development.*”
11. Clause 4.2 requires Greener Homes to use all monies borrowed under the Interest Roll-Up Facility towards interest repayments, subject to clause 7 of the Loan Agreement. Clause 7 provides that interest shall accrue on the Loan from the date of the Loan

Agreement at a rate of 8.5% per annum whilst no Event of Default is continuing, and at the default rate of 12% whilst an Event of Default is continuing. “*Loan*” is defined as “*the drawings made or to be made hereunder and for the time being outstanding*”. The plaintiffs submit that interest is accordingly payable only on monies outstanding. They also say that the 12% rate is a penalty rate and unenforceable.

12. Clause 6.2 (a) provides that the Interest Roll-Up Facility will be capitalised monthly in equal instalments up until the Repayment Date. Clause 6.2 (c) provides that without prejudice to clause 11 (which deals with voluntary pre-payment) “*there is a minimum interest repayment of €85,000*”.
13. The Repayment Date is defined as the date which is 15 months after the date of the Loan Agreement – the Repayment Date thus appears to be 6 October 2019. Clause 10.1 (and 10.5) required Greener Homes to repay the Loan in full (as well as all other sums accrued and owing) on the Repayment Date, by way of cleared funds to the nominated account of Golden Door. In fact that nominated account was an account in the name of Founders Base (Ireland) Limited. Without prejudice to clause 10.1, the Loan was to be reduced by payment of the Net Disposals Proceeds of four of the houses in the Development, with those disposals commencing no later than ten months from the first drawdown. “Net Disposals Proceeds” means the proceeds of sale of each house at a gross amount of €250,000.

14. As part of the security arrangements for the Loan, clause 10.3 required Golden Door to arrange for the execution of five deeds of partial release of the Transaction Security in respect of each of the houses numbers 40, 41, 42, 43 and 44 in the Development.

Clause 10.3 states that Golden Door “*will arrange for same to be furnished forthwith to [Greener Homes’] Solicitor*”. It was stated that the deeds of partial release

“shall be held by [Greener Homes’] Solicitor on the understanding that each one shall be handed over to solicitors for the purchasers of each unit in exchange for the receipt of Net Disposals Proceeds by way of clear funds by [Greener Homes’] Solicitor. On completion of the sale of each Unit [Greener Homes’] Solicitor will remit to the account of [Golden Door] the Net Disposals Proceeds on a Unit by Unit basis in accordance with the Completion Statement received by [Greener Homes’] Solicitor.”

Despite the clear terms of clause 10.3, Golden Door did not provide these executed deeds of partial release to the solicitor for Greener Homes. Instead, Greener Homes has been required to request and secure these deeds on an *ad hoc* and piecemeal basis, often with delays incurred. This is a significant point of dispute between the parties and a driver of some losses claimed by the plaintiffs against Golden Door.

15. Clause 17.5 of the Loan Agreement provides that “*a certificate signed by any officer of [Golden Door] as to any amounts due hereunder shall be final and binding upon [Greener Homes] save for any manifest error on the face thereof*”.

- 16.** On the same date as the Loan Agreement was executed, a number of security documents (the “**Security**”) were also executed in favour of Golden Door as follows: –
- (1) A deed of charge over land by way of first fixed charge was executed by Dunboy Construction over each of the five houses in the Development;
- (2) A deed of debenture by way of first fixed charge was executed by Greener Homes over the undertaking, property and assets, both present and future, of Greener Homes;
- (3) A deed of share charge by way of first fixed charge was executed by Dunboy Construction over all its shares, whether present or future, in Greener Homes; and
- (4) A deed of guarantee and indemnity was executed by both Greener Homes (as Principal) and Dunboy Construction (as Guarantor), regarding monies due in respect of the Loan, limited to the interests of Dunboy Construction in the Development.
- 17.** Certificates of the registration of the charges issued on 16 and 17 July 2018 pursuant to section 409 of the Companies Act 2014.
- 18.** Funds (totalling €777,710) were drawn down by Greener Homes pursuant to the Loan Agreement in nine tranches as follows:
- 25/07/2018 €199,310
 - 31/08/2018 €129,682

- 16/10/2018 €122,458
- 09/11/2018 €68,613
- 05/12/2018 €59,147
- 20/12/2018 €23,736
- 05/02 2019 €40,809
- 18/04/2019 €70,908
- 05/07/2019 €63,047

- 19.** The house at number 44 was the first property to be sold in the Development. On 22 March 2019 a repayment was made by Greener Homes of €250,000 from the sale proceeds of that property.
- 20.** On 22 July 2019 the Property Registration Authority (“**PRA**”) raised a query with Golden Door regarding the suitability of the map attached to the land charge. A replacement map was required. On 7 October 2019 the PRA again contacted Golden Door noting that no reply had been received to their earlier query and threatening to treat the registration application as abandoned.
- 21.** The Loan Agreement was amended by the Amendment Letter on 18 September 2019 (which was before the Repayment Date). The material terms of the amendment were that the loan repayment term was extended from 6 October 2019 (though stated to be 29 September 2019) until 30 April 2020 with a grace period of 30 days to 31 May 2020 if

there were contracted sales waiting to close. Clause 7 of the Loan Agreement was amended to provide for a higher interest rate from 8.5% to 9.5%. An amendment fee was also payable. Because that amendment fee is provided for at a rate of 1% it is not clear whether this was a percentage of the total loan drawdown or the total outstanding as at the date of the Amendment Letter.

Events post the Amendment Letter

22. Largely due to the onset of the covid pandemic in early 2020, Greener Homes was unable to repay the Loan on the extended Repayment Date of either 30 April 2020 or 31 May 2020. Discussions took place between Mr Barth O'Neill for the plaintiffs and Golden Door. There is a dispute as to whether Dylan Bi attended those discussions. The plaintiffs' position is that he did. This is denied by Dylan Bi.
23. It is specifically alleged by Mr O'Neill that on 16 June 2020 he was asked by Dylan Bi to organise a protest outside the property of an unrelated third party who owed money to Golden Door. The stated purpose of this protest was to assist Golden Door in its dispute with that third-party borrower. Mr O'Neill was unwilling to accede to this request and he recorded his concerns in writing to Mr O'Donovan of Moore. Mr O'Donovan advised Dylan Bi by email dated 17 July 2020 to be cautious as "*this muddies the waters somewhat and it may be presented as coercion down the line if we don't see this out the way I have planned*". Mr O'Neill gave evidence of this request to

the court. Dylan Bi gave evidence denying that he had ever made such a request. When Dylan Bi was questioned on cross-examination regarding this correspondence, he had received from Mr O'Donovan he did not provide a clear or credible answer – seeking to deflect the question or saying that he could not remember.

24. On 1 July 2020 Dylan Bi wrote to Mr O'Neill in the following terms:

“Founders Base would kindly ask you to repay the loan within 15 days after the objective environment allows you. This would typically depend on the reopening date of CRO and PRAI offices, they are expected to be reopened on 20th July. Mr Bi has discussed your proposed repayment plan and taken into account the objective economic environment with the company. We are willing to offer you another loan extension in this regard. The repayment date can be deferred to October 2020, the processing fee is €50,000”.

25. On 3 July 2020 Mr O'Neill wrote to Golden Door (with the assistance of Mr O'Donovan) pushing back on the proposed “*processing fee*” and suggesting

“we agree to continue as the market allows the sales to close in this regard. For the avoidance of doubt, I need an assurance that a receiver will not be appointed over the property and for you to understand that the facility agreement does not allow for charging a “processing fee” as you have suggested.... I will pay all the interest that will be incurred until the loan is repaid. I will behave with honour

and integrity from here to the end of the loan repayment and I am sure that you will too”.

26. On 17 July 2020 a meeting took place between Mr O’Neill and Mr O’Donovan, after which, on 23 July 2020, Mr O’ Donovan wrote to Greener Homes in the following terms: -

“1. The limit on the loan of €657,860 has expired since 30.04.20. A month was permitted per the terms of the facility letter to repay the loan and all accrued interest and fee.

2. The current balance is €679,179.75

3. Interest of €5,208.06 per month continues to be due and has not been paid since January (previously rolled up).

Despite the loan being in default the lender has been satisfied to forbear the position given recent circumstances. It is positive to hear that there is activity in terms of potential sales.

I am confirming from the discussion with Mr O’Neill what the lender will permit:

(a) The limit plus interest can be restated to October 31st 2020 at the current rate subject to an arrangement fee of 1%.

(b) The limit plus interest can be restated to December 31st 2020 subject to the arrangement fee. However the interest rate will be at 12.5%.

(c) Repay all principal, interest and exit fee owing.

We have not heard back from you regarding these options. In the event you wish to extend please confirm so and which option you will avail of and the position will be formally documented. Please reply by 31.07.20 at the latest. Should we not receive any further response we will expect repayment in full by 07.08.20.”

27. It appears that no agreement was ultimately reached on the terms of any further extended payment date.
28. On 7 August 2020 the then solicitors for the plaintiffs wrote to Moore noting that sales of numbers 42 and 43 of the Development would be closing in the coming days. A request was made for the deeds of partial discharge and letters of non-crystallisation of the floating charges in respect of these properties. This was to ensure that the purchasers could take clear title on closing. Under the terms of the Amendment letter, Golden Door was entitled to receive the full net sales proceeds of these properties which, on the plaintiffs’ evidence, would have cleared the Loan balance. However Golden Door delayed in providing the requested documentation. Their delay appears to be linked to the ongoing mapping query which had been raised with Golden Door by the PRA in July 2019. The plaintiff’s evidence is that, as a consequence of this delay, the sale of no. 41 was lost (although a new purchaser was later found). The other sale (no. 42) closed later than anticipated resulting in the accrual of unnecessary interest. A

payment of €450,000 was remitted by the plaintiffs to Golden Door on the closing of the sale of number 42 on 14 September 2020.

- 29.** On 29 October 2020 solicitors for Golden Door wrote to the plaintiff's then solicitors stating

“the facility was originally due to expire on or before 29 September 2019, and that this was extended from 29 September 2019 to 30 April 2020. We further note that a further agreement was reached to extend this further on account of the current pandemic to 31 October 2020. The matter has rested with your clients since Pearce O’Donovan’s email of 17 July 2020. Our clients have asked us to now write to you in light of the impending expiry date. Please advise that you are in funds to redeem the loan on the 31 October 2020 or in the alternative, please confirm that you wish to extend the term of the loan to 31 December 2020 at default rate with houses to go on Bid XI/receivership. You might also note that the extension agreement reached from April to October has 1% of the outstanding amount as the amendment fee, which is €6741.”

- 30.** The plaintiffs say that this letter was factually incorrect in that they never agreed to extend the repayment to 31 October 2020. It is the case however that the Loan was still outstanding at that date.

- 31.** On 5 November 2020 the solicitors for Golden Door wrote again to the plaintiffs’ solicitors noting that they had not received a response and “*are under instructions to*

prepare a formal demand for the discharge/repayment of the loan, and for the appointment of a Receiver over the properties in question should the demand not be satisfied". A response was requested by 6 November.

32. On that same day (5 November 2020) the current solicitors came on record for the plaintiffs. They wrote to Golden Door's then solicitors pointing out that the proposed appointment of a receiver would be an abuse of process given that no up-to-date redemption notice had been served. They confirmed that the plaintiffs were "*on the cusp of completing a sale*" and that if any action was taken, they would hold Golden Door wholly accountable for all loss and damage arising, including reputational damage. It was further pointed out that, because Golden Door had failed to provide particulars of the redemption figures due, Greener Homes "*has gone to considerable costs and appointed PwC to prepare details of the exact redemption figures, including accrued interest due under the Loan Agreement*". The plaintiffs' solicitors also confirmed that they would provide details of "*very significant losses*" incurred by Greener Homes as a result of Golden Door's "*unlawful action and/or inactions to date*". They sought confirmation that no steps would be taken to appoint a receiver and confirmation as to whether the solicitors had authority to accept service of proceedings.
33. On 6 November 2020 the plaintiffs' solicitors sent a detailed letter to the then solicitors for Golden Door. Confirmation was sought that there would be no further delays in arranging the required release of the charges and that sales of houses in the

Development would be facilitated without any issue. The letter enclosed correspondence from PwC addressed to Greener Homes which provided their calculation of the loan balance figure due and owing. The amount calculated by PwC (who had been instructed directly by Greener Homes in circumstances where no redemption figure had been provided by Golden Door) was €184,745.23 (of which €107,035.23 comprised interest). The letter went on to state the following:

“Kindly note that our client is in funds and can discharge the loan balance of €184,745.23 immediately. However, no such transfer of funds will take place until your client can confirm that all charges relating to the properties will be released forthwith and we have a satisfactory response to the issues detailed below”

- 34.** The letter then outlined the “*issues*”. It was alleged that the plaintiff was unable to close the sale of no. 42 on 11 August 2020 due to the failure of Golden Door to follow up on the PRA mapping query. This delay increased interest for the late closing of no. 42 in the amount of €3513.70. A loss was also claimed with regard to house no. 41 for failure to release the charge held in respect of that property. This was alleged to have resulted in a loss of that sale. It was also alleged that the sale of houses no. 40 and 41 had to be put on hold for the same reason. Finally, and most significantly, it was alleged that because the sales were not closing in a timely manner, the plaintiff suffered a loss of a significant financial opportunity as it was unable to participate in the tender for the purchase of lands in Kinsale for circa €1.2 million. This was said to be because of not

having access to the funds from the sales due to the inaction of Golden Door. However, the court notes that later on (and at the trial) this loss was alleged to be related to the failure of Golden Door to release the Security. A proposal for compensation was sought from Golden Door in circumstances where it was alleged Greener Homes had calculated the loss and damage suffered by them in the sum of €100,000. An “*exchange of reciprocal bank drafts*” was suggested. The solicitors for Greener Homes confirmed that “*our client is prepared to pay the balance of the loan of 184,745.23 Euro **but does require** your client to make adequate proposals and payments to compensate our client for the loss of €100,000*”.

35. On 18 November 2020 a response was received from Golden Door’s then solicitors. It is worth setting this response out in full as it is very unclear what it was in fact intended to convey. It is in the following terms:

“Our clients have noted that the PwC calculation does not relate to any legal documents, and on account of this qualification their calculations appear correct. However you might note that the Facility Agreement states (prior to the extension agreement in September 2019) that the interest was calculated on the €1 million. PwC’s calculation is based on the interest on the funds actually draw (sic) down. We are advised that the interest due was to be calculated referencing the amount of €657,860, only after the execution of the loan extension agreement in September 2019. In accordance with the Facility Agreement, your clients are in

default whereby the loan term expired on 30 April 2020. Accordingly, our clients contend that pursuant to clause 7.3 of the said Facility Agreement, the default interest is 13%. Should your clients wish to execute the extension agreement (which we understand was agreed with Pearce O'Donovan of Moore) there is a fee of 1% of the loan balance due. As of 30th of April 2020 the outstanding balance was €668,763.63. You might be good enough to take your client's instructions and revert".

36. This response is difficult to understand in a number of respects. It states that the PwC calculation is "*correct*". However, the context of that sentence and the following sentences convey the impression that Golden Door believed the PwC calculation was incorrect. There is a suggestion that the interest should, at least prior to the Amendment Letter, have been calculated on the entire amount of the facility rather than the amount drawn down. What is clear is that this response does not provide a redemption figure for the plaintiffs. Neither did it engage at all on the "issues" raised in the earlier letter from the plaintiffs' solicitors. A further formal request for "*a clear statement of the redemption figures as calculated by your client*" was requested by the solicitors for Greener Homes in their email dated 23 November 2020.
37. On 15 December 2020 Golden Door's solicitors issued correspondence to the solicitors for Greener Homes attaching the term sheet from Founders Base for the Loan, calculations from Moore as of May 2018 and July 2019, a schedule of payments

received and a compromise interest schedule prepared by Moore. The letter advised that interest was to be paid on the entire Loan amount rather than on the amounts drawn down (although internal correspondence later discovered between Moore and the defendants expressed some doubt on that). The schedule of amounts due as at 9 December 2020 was stated to be €208,440.28 which included the Exit Fee of €10,000. The PwC calculation did not include the Exit Fee.

- 38.** Thereafter an interim payment of €85,000 was made by the plaintiffs and the sale of house no. 41 closed in early January 2021. The parties were not agreed on the redemption figures or the manner in which interest was to be calculated. The plaintiffs continued to request proposals for compensation and provided updated particulars of their alleged loss by letter from their solicitors dated 20 January 2021. In particular, the opportunity to purchase lands in Kinsale for commercial development was highlighted by reference to the loss of this opportunity as a result of cash flow issues created by the non-release of deeds of discharge to facilitate the sales of properties in the Development which had been agreed by the plaintiffs. The letter notes anticipated profit on that Kinsale development, had it proceeded, would have been in excess of €1 million. Given what was described as the defendant's "*intransigence and refusal to engage*" the plaintiffs' solicitors confirmed they were proceeding to instruct counsel and were considering seeking injunctive relief. They advised that the two remaining properties were anticipated to be ready for completion in early February 2021 and that

if Golden Door did not accept the PwC redemption figures and provide reasonable proposals for compensation, steps would be taken to advance legal proceedings.

- 39.** On 29 January 2021 the defendants were put on notice that sales of the final two properties in the Development, namely house numbers 43 and 40, were nearing completion and calling on Golden Door to provide the required deeds of partial release and letters of non-crystallisation for these units as required under clause 10.3 of the Loan Agreement.
- 40.** By letter dated 4 February 2021 the solicitors for Golden Door reiterated their instructions that Golden Door stood over the calculations prepared by Moore. The suggestion was made that a deed of partial release would be furnished for house no. 43 subject to an undertaking to hold €150,000 in trust for Golden Door until the matter was resolved. As house no. 40 did not have contracts yet exchanged it was suggested that property could be dealt with later as part of a resolution process. Golden Door denied that any losses arose for the plaintiffs.
- 41.** The plaintiffs' solicitors responded on 5 February 2021 stating that the defendants' position was unacceptable and that the defendants could not impose preconditions on the release of deeds of partial discharge. The plaintiffs maintained their position that, following the interim payment of €85,000, a loan balance redemption sum of €123,440 would remain due based on figures presented by the defendants (i.e. €208,440 less €85,000 paid). It was noted however that the defendants were now seeking an

undertaking in respect of an increased figure of €150,000. It was also noted that no commitment had been given in respect of provision of a deed of partial release for house number 40. Demand was made for the release of the two remaining deeds of discharge. An offer was made to pay Golden Door €109,745 by way of redemption of the loan without prejudice to the parties' respective legal rights. It appears that figure comprised the PwC calculation of €184,745.23 plus the contractual Exit Fee of €10,000 less the €85,000 already paid by the plaintiffs. In addition, the plaintiffs agreed to lodge to their solicitors account €13,695 (being the difference between the redemption figures provided by the defendants on 15 December 2020 and the PwC calculations), such sum to be held pending the outcome of legal proceedings and resolution of the matters in dispute relating to the redemption figures on the Loan. While the letter indicated that the plaintiffs would be pursuing a claim for damages previously articulated, the payment proposal suggested in this letter was a stand-alone proposal.

42. The request for completed deeds of partial release for houses no. 40 and 43 was repeated on 9 February 2021 with an indication that purchasers had been lined up for both properties. Golden Door's solicitors confirmed that they were holding a signed deed for no. 43 but were awaiting an undertaking to hold €150,000 in trust for Golden Door before same would be forthcoming. This was effectively a restatement by the defendants of their previous position.

43. Draft proceedings were sent by the plaintiffs to the defendant's then solicitors on 12 February 2021 as matters were not resolving. A detailed letter issued by the plaintiffs' solicitors. The proceedings were taken not only against Golden Door but also Dylan Bi relating to his previous engagement with Mr Barth O'Neill when it was alleged that Dylan Bi had exerted duress on Mr O'Neill at a time when Golden Door was threatening to appoint a receiver, and requested "*wholly inappropriate*" actions be taken by Mr O'Neill regarding a third-party creditor. It was noted in that letter that the gap between the last stated redemption figure claimed by Golden Door and the admitted redemption sum calculated by PwC (including the Exit Fee of €10,000) was a sum of only €13,695.05. Notwithstanding that agreed difference in amount, Golden Door demanded a sum of €150,000 be held upon closing of the sale pending resolution of all issues in dispute with the agreement that the deed would be released for house no. 43 (but no commitment in relation to house no. 40). The letter repeated the offer to hold the sum of €109,745.23 plus the balance of €13,695.05 in solicitors accounts failing the acceptance of which the plaintiffs indicated they would advise the court that the defendants had deliberately impeded the completions of houses no. 40 and 43 to improve their position over and above that admitted as being its best case for redemption.
44. The defendants then solicitors confirmed on 15 February 2021 their authority to accept service of proceedings and that the defendants would be "*vehemently defending all*

matters". The correspondence enclosed a letter from Moore addressed to Mr Bi dated 11 February 2021. That letter noted that the figures furnished in December had not been intended for circulation and were incorrect. The letter outlined that the sum of €157,832.59 was due to Golden Door (including a set off of €6345.72 to remediate for the losses suffered owing to the lenders delays to that point). This was followed by a short letter dated 19 February from the defendant solicitors noting "*we are instructed to write to you to remind your clients that the loan is in default and to request your clients' proposals in this regard by 5 PM on next Monday*".

45. A response issued on 19 February in which the plaintiffs' solicitors confirmed:

"Proposals have been made to pay the redemption sum as calculated and presented by PwC through my client and an offer to hold additional monies pending resolution of the amount actually remaining due on the redemption has been made but ignored and increased sums have been demanded without any legal justification."

The deeds of partial release for houses no. 40 and 43 were demanded, failing which injunctive proceedings were threatened.

46. As the requested deeds were not released within the time stipulated, a plenary summons was issued on 23 February 2021 and a motion seeking interlocutory relief was also issued, returnable to 14 June 2021. Undertakings not to appoint a receiver were given by counsel for Golden Door at the interim application and a timetable for pleadings was

agreed. The interlocutory motion sought to restrain Golden Door from taking any steps to enforce the Loan; requiring Golden Door to comply with its obligation to release deeds of release for houses no. 40 and 43 in the Development and otherwise restraining Golden Door from interfering with the plaintiffs' equity of redemption whether by way of seeking collateral advantages, postponing or delaying the right to redeem or otherwise seeking to apply penalties or other charges contrary to law. The grounding affidavit of Barth O'Neill at paragraph 8 confirms his view that "*the lender is effectively holding the plaintiffs to ransom to accept an inflated loan redemption figure by withholding the deeds and threatening to enforce the security*". A compromise was agreed between the parties at interlocutory stage whereby the plaintiffs agreed to pay €100,000 out of sale proceeds of houses no. 40 and 43 and that the plaintiffs' solicitors would hold the sum of €57,832.59 on account pending the outcome of this litigation. The deeds of partial release were furnished in respect of houses no. 40 and 43 and both properties were sold.

47. By letter dated 7 May 2021 the plaintiffs' solicitors confirmed their instructions to pay over the sum of €9745.23 to the solicitors for Golden Door which, on the plaintiffs' calculation was the full balance then due and owing, reflecting the capital drawdown, the interest calculated by PwC and the Exit Fee less the repayments made by the plaintiffs to that date. Of some significance, however, that payment was never made.

Counsel for the plaintiffs confirmed at the hearing of this action that the plaintiffs' solicitors continue to hold the sum of €57,000 in accordance with their undertaking.

48. Thereafter the parties engaged in a full exchange of pleadings, with various motions issuing on behalf of the plaintiffs in respect of the defendants' defence and discovery. Discovery was obtained from the defendants supported by an affidavit of discovery sworn by Dylan Bi.
49. Golden Door did not release the Security. This remains the most significant ongoing dispute between the parties and was the position which remained at trial. As a consequence of Golden Door's refusal or failure to release the Security, the plaintiffs claim to have suffered loss both in terms of the payment of excess interest but also in terms of the fettering of their business activities by what they say is the consequence to them of being unable to provide appropriate security to another lender. The loss of a business opportunity in Kinsale, Co Cork is identified as a specific loss to the plaintiffs in that regard.

The evidence at the trial

The Plaintiffs' evidence

Barth O'Neill

50. Mr O'Neill had, on 10 February 2023, delivered a detailed 16-page witness statement which he adopted as his evidence in chief. He confirmed that he had made contact with

Mr O'Donovan of Moore in April 2018 seeking to discuss funding for the Development. He outlined the execution of the Loan Agreement and the various security documents and confirmed that the lending relationship between the parties had generally operated "*fine*" up until the outbreak of covid. The Loan was due for repayment on 1 June 2020 but the plaintiffs were unable to repay it at that time, in large part due to the pandemic. At that time, in summer 2020, the plaintiffs had two lenders, including Golden Door. One lender offered to extend the repayment date of its loan to reflect the impact of the Covid 19 pandemic on the construction sector. Golden Door took a different approach by seeking to increase the interest rate and demanding a €50,000 processing fee in exchange for an extension of the Loan. Ultimately, Golden Door agreed to forbear on seeking repayment on terms up to August or October 2020 subject to payment of an arrangement fee. He gave evidence that he had been asked by Dylan Bi on a call to help him organise a protest outside the premises of another party who owed money to Golden Door. Mr O'Neill said he refused to do so but was so concerned by the request that he made contact with Mr O'Donovan regarding it. The request was not advanced any further. Mr O'Neill believed however that what he perceived to be his subsequent harsh treatment by Golden Door was part of an effort on their part to coerce him to engage in this protest.

51. Mr O'Neill said that in July 2020 he had four houses left to close in the Development and he had booking deposits secured in relation to them. The accumulated sales value

for those houses would have been approximately €1.3 million. Golden Door had taken security over those sites under the terms of the Loan. Mr O'Neill said that Golden Door consistently failed to furnish deeds of partial release for houses, as they were required to do, and as a result there were delays and multiple problems caused for the plaintiffs in relation to closing contracted sales. He confirmed that instead of furnishing the deeds of partial release to the plaintiffs' solicitors, as agreed, Golden Door delivered up these deeds and the accompanying letters of non-crystallisation on an *ad hoc* basis and not in a timely manner and that this caused the plaintiffs to suffer significant delays in completing sales and indeed to lose some sales.

52. Mr O'Neill said that the sale of no. 42 was delayed for approximately five weeks over August and September 2020 due to mapping issues caused by Golden Door. This delay caused Mr O'Neill considerable embarrassment as the purchasers had flown to Ireland from abroad and were unable to close the sale at the original closing due to the absence of the deed of partial discharge. In the hope that this issue would not be repeated, Mr O'Neill had paid Golden Door the full sales proceeds of €450,000 to reduce the outstanding indebtedness although he was strictly obliged to remit only €384,355 to them from the sales proceeds.

53. Mr O'Neill denied that he had ever reached agreement with Golden Door on a further extension of the Loan following the Amendment Letter. He said that he took the threat to sell the remaining properties through BidX1 or by way of receivership, very

seriously indeed. It was clear at that point that his goodwill gesture to discharge €450,000 in September 2020 was not going to improve relations with Golden Door.

54. Mr O’Neill stated that he was unable to obtain a redemption figure for the Loan and although a formal demand letter was threatened, it was never received. He said he could not get this information and he therefore briefed PwC to do a calculation on an independent basis of the then balance, including interest, due by Greener Homes to Golden Door. He received PwC’s report on 5 November 2020. He arranged for that report to be sent via his solicitors to the solicitors for Golden Door in the hope that this would be accepted by Golden Door and he could get agreement on a redemption figure to repay the Loan and have the Security discharged. He said that at that point he had his eye on land in Kinsale which he wanted to buy and which would be ideal for his business.
55. In November 2020 Mr O’Neill said that there were three houses left to sell. However Golden Door would not provide the deeds of partial release. He said there was a delay of 50 days in obtaining this documentation for no. 41 – the relevant deed not being provided until January 2021. He said this delay was stressful and difficult for him and that in a local market this situation was very damaging from a reputational perspective for the plaintiffs. He said the plaintiffs had previously lost two sales (of houses no. 40 and 41) as a result of Golden Door’s delay in providing the deeds of release for those properties.

56. Mr O'Neill said that he did not bid for the Kinsale lands because he could not extricate himself from Golden Door and could not borrow elsewhere without Golden Door clearing off the Security. He estimated that Greener Homes had lost €1.4 million in profit that they could reasonably have expected to earn had they been able to develop the lands in Kinsale. He said that at the height of the market, Greener Homes employed 40 people. By 2021, they employed four staff. Now he has two office staff but no construction projects as he is unable to raise additional finance without the Security being released by Golden Door. He said this dispute has gone on for three years and has caused him considerable grief and hassle. He believes the plaintiffs have missed a good part of the positive up cycle in the property market. Mr O'Neill said that since incorporation, both of the plaintiffs have constructed on average 20 residential properties *per annum*. Since what he described as the effective sterilisation of the plaintiff companies by the failure of the defendants to release the Security over those companies, only two residential properties have been constructed by the plaintiffs. These have been funded by Mr O'Neill from his own personal resources.

57. On cross-examination it was put to Mr O'Neill that the reason this dispute ended up before this court was that the plaintiffs had not paid Golden Door what they contracted to pay them under the Loan Agreement in June 2020. It was also put to him that interest payments were not made every month to Golden Door in accordance with the terms of the Loan Agreement. Mr O'Neill admitted that he did not know how interest payments

were being made and said that Moore allocated those payments out of sales proceeds.

Mr O'Neill was asked why he had not paid over to Golden Door the full amount calculated as due by PwC. Mr O'Neill said that money would only be exchanged for the release of the Security and that Golden Door would not engage on this. It was put to Mr O'Neill that Golden Door could not engage as they had not received the monies due to them. Mr O'Neill said that the Security was never released despite monies being offered and put on deposit with solicitors.

58. Mr O'Neill accepted that by April 2021 all deeds of discharge for the Development had been provided. He confirmed that all five houses in the Development had been sold.

59. It was put to Mr O'Neill that he had no ability in fact to purchase the Kinsale property. Mr O'Neill said that it was clear from bank statements that the plaintiffs would have had sufficient funds to do so – they would have needed finance however to develop houses on it.

Tom Barry

60. Mr Barry is the CEO of Capri Asset Management Ltd (trading as Capri Capital), a firm involved in arranging finance for SME businesses, including property development companies. He worked for 29 years with AIB managing business loans. He has not worked with the plaintiff companies or been involved in raising finance for them. It was his evidence that a commercial property lender would not consider a potential loan

where the borrower had its shares secured by its parent company to another lender and where a legal dispute is ongoing. He said that the existence of a legal dispute would result in any new lender being uncertain that its new security would be permitted to take priority over the previous lender's security. He said that in his experience lenders would not engage in an examination of the merits of any ongoing litigation. It's existence alone would be enough to prevent them offering new funding given the potential complications regarding the security which the borrower could provide. In those circumstances he believed on the facts of the present case that there was no realistic possibility of the plaintiffs being approved for a new loan for any purpose until these proceedings were resolved and the charges over their respective shares were released by Golden Door.

- 61.** Mr Barry also confirmed that, in general terms, in the case of property lending, lenders would require a first priority charge over the property security so that the lender could gain full control of the property in the event of default. I did not believe his evidence to suggest that security over the property to be acquired could not be offered by a borrower whose shares were charged to another lender.

Eoghan Linehan

- 62.** Mr Linehan was called as an expert witness and his expert report dated 6 March 2023 was appended to his witness statement and formally adopted by him as his evidence in

chief. He is a director in forensic services at PwC. The independent calculation of the loan balance due to Golden Door under the Loan Agreement was prepared by his colleague Deirdre McGrath. However, Mr Linehan confirmed that he was familiar with this calculation dated 5 November 2020 and that he was involved in its preparation, and he adopted it as his evidence.

- 63.** In relation to the PwC redemption calculations, Mr Linehan confirmed that PwC had prepared these calculations on the basis of the amount drawn down rather than the full amount of the facility. The view was taken by PwC that this was the correct approach in light of the definition of “Loan” which referred to the amount outstanding rather than to the committed facility. He confirmed their calculation that €184,745.23 represented the amount due to Golden Door as at 5 November 2020. He confirmed that the total interest payable on the facility amounted to approximately €107,000 and this exceeded the minimum interest repayment of €85,000 specified in the Loan Agreement.
- 64.** Mr Linehan confirmed that the Exit Fee of €10,000 had not been included in the original PwC calculations as the purpose of those calculations was to confirm how much was due and repayable in respect of principal and interest. The Exit Fee figure arises as an additional fixed sum payable only on full redemption.
- 65.** Mr Linehan’s evidence of loss (being the second aspect of his evidence) was premised on the representations made to him by the plaintiffs that they offered to redeem the Loan in November 2020 on the basis of the figures detailed in PwC’s letter dated 5

November 2020 and that had Golden Door accepted, the Loan would have been redeemed in full and the Security released. Mr Linehan's report assumes that redemption would have taken place on 1 January 2021 but for the alleged actions of the defendants in failing to redeem the Loan.

- 66.** The headline summary of Mr Linehan's evidence was that he believes losses in the range from €0.86 million to €2.007 million have been incurred by the plaintiffs as a result of the non-release of the charges held by Golden Door. The lowest point of that range represents the loss of the Kinsale opportunity only. The higher level of that range represents the loss of the Kinsale opportunity and using it as a substantive representation of the opportunity generally lost by the plaintiffs.
- 67.** Mr Linehan gave evidence that there was always a practical difficulty when calculating loss of opportunity. In relation to his valuation of the Kinsale opportunity he started with the development site guide price of €1.4 million with planning permission for 18 units. He said that in fact 25 units were actually built on these lands and so he used that figure. The sales prices based on an opinion from Sherry FitzGerald as at 1 March 2023 were then applied although he conceded that these were not actual sales prices. He assumed a delay of 18 months to dispose of all properties and included various costs inputs and debt and equity finance requirements. A 40% probability of achieving this opportunity was assumed.

68. In relation to loss of opportunity more generally, this was assessed on the basis that Kinsale may not be a full picture of the plaintiffs' losses. Mr Linehan's view was that the loss of opportunity for the plaintiffs is likely to continue for so long as this matter remains unresolved between the parties and the Security continues to be held by Golden Door. He estimated the loss of opportunity as equating to €53,000 per month since 1 January 2021 and stated that this may be a reasonable representation of the continuing losses until resolution.
69. On cross-examination Mr Linehan conceded that his estimates were largely based on assumptions rather than facts. He also confirmed that PwC had not made any contact with Golden Door prior to producing their redemption calculations.

Fergal Smith

70. Fergal Smith is the Manager of Galligan Financial, a company who previously provided funding to Greener Homes. He said that his firm only provided finance to developers with a track record and who passed the relevant due diligence requirements. He confirmed that Greener Homes was one such developer. Mr Smith adopted the witness statement of Tadgh Galligan as Mr Galligan was unavailable to give evidence. However, this arrangement presented obvious evidential difficulties given that Mr Smith had not spoken directly to Mr O'Neill of Greener Homes regarding any specific funding for the Kinsale project. Mr Smith's general evidence was that Galligan

Financial would not provide funding facilities to Greener Homes for so long as their shares were charged to another entity. Mr Smith emphasised the requirement for a first legal charge over the lands being acquired by any funding, but of course that is a separate matter to the issue of the borrower's shares being charged. Mr Smith confirmed that litigation was also seen by Galligan Financial as an adverse risk factor for their investors and that this would also dissuade Galligan Financial from providing any additional funding to Greener Homes while that situation persisted.

71. On cross-examination Mr Smith was asked why the plaintiffs did not raise their finance through banks. He responded that post-2009 it was very difficult for developers to obtain the levels of finance they required from mainstream banking institutions and that was why finance was sought from elsewhere.

The Defendants' evidence

Dylan Bi

72. Mr Dylan Bi was the only witness to give oral evidence on behalf of the defendants. He was subpoenaed by the plaintiffs. He confirmed that he uses various names, namely his Chinese name, Shenghaimin Bi, which he confirmed was the name on his passport, as well as the name Dylan Bi, which he described as his English name. He also occasionally uses the name Dylan Haimin. He operated with an email address associated with @foundersbase.ie.

73. He had delivered a very short witness statement dated 28 March 2023 in which he confirmed that “...*at no time I am a servant, agent, employee or received any benefit from Golden Door Lending DAC*”. He continued in his oral testimony to deny any formal position or relationship with Golden Door. He said that his sole role was to act as a translator for his father, Cheng Bi who was previously a director of Golden Door and its main shareholder. In his role as translator he had to read documents and deal with emails. He said that he did not prepare or update any interest schedule. He said that he knew that Golden Door had given a loan to the plaintiffs and that Mr O’Donovan of Moore was the loan agent. His evidence however was that otherwise “*I’m not really sure what happened*”. He recalled that he saw the Loan Agreement in 2018 and confirmed that he had sworn the affidavit of discovery on behalf of Golden Door in these proceedings. When asked as to how much remained due on foot of the Loan, Mr Bi said the original loan was for €1 million but that he could not be more specific than that. He admitted that he had sent emails to Mr O’Donovan to chase payment from the plaintiffs as he did not believe Golden Door had received full payment. He could not, however, give any evidence regarding the amount due.
74. Dylan Bi said that he could not remember if he had ever met Mr O’Neill. He denied that he had ever asked him to participate in a protest. He also said that he did not believe there had been any delays in providing deeds of partial release for house sales.

He confirmed that the Security was still held because the full amount due had not been received by Golden Door.

75. On cross-examination he said that he was not permitted to work in Ireland under the terms of his visa. He was asked why the affidavit of discovery he swore described him as an employee of Golden Door. Dylan Bi said he was unable at the time to read the affidavit of discovery comprehensively as he was in China. It was then put to him that the jurat on the affidavit reflected that he had sworn the document in Dublin. Dylan Bi then said he was not aware of the sentence regarding his employment with Golden Door. He then said he did not understand what the word “deponent” meant. He was asked how he had satisfied himself that all relevant documentation had been made available on discovery. He confirmed that he had sent a Google Drive folder of documents to his former solicitors. He conceded however that he “*can't be sure*” whether there are other relevant documents which might exist.
76. Dylan Bi was asked who had instructed the current solicitors on behalf of Golden Door. He responded that Golden Door has been sold to another Chinese entity who had asked Cheng Bi to help in the meantime. He could not state clearly when the Golden Door business was sold but confirmed that his own involvement with Golden Door ceased in June 2021. It was put to him that his suggestion that he had no involvement with Golden Door since 2021 was not borne out by the evidence.

77. Counsel then explored with Dylan Bi a number of Companies Registration Office (“CRO”) documentation filed in relation to Golden Door. Dylan Bi confirmed he had seen these documents before they were filed although he said someone else presented them and used his email address. He later however confirmed that he presented this information to the CRO. It was also noted that he had a LinkedIn profile reflecting a connection with Founders Base (Ireland) Ltd. It was put to him that the first named defendant was held through Founders Base (Ireland) Ltd by Cheng Bi. Dylan Bi responded that he was not sure of this share structure. Dylan Bi said that he was finishing a Masters degree in the UK and not doing anything employment-wise at the moment. When asked as to who had instructed their previous solicitors Dylan Bi said it was not him.
78. It was put to him that his evidence in relation to the protest was false and that the correspondence exchanged between him and Mr O’Donovan clearly demonstrated that this conversation as testified to by Mr O’Neill, had taken place. Dylan Bi said he could not remember.
79. On re-examination, Dylan Bi confirmed that he was 18 years old in July 2020.

Analysis of the evidence at the trial

80. Starting first with the defendants’ evidence, it is fair to say that there was no evidence whatsoever advanced on their behalf regarding the amounts due to Golden Door. When

questioned directly by the court, Dylan Bi was unable to provide any information regarding the amount due to Golden Door. He could not point to any statement of account or redemption statement or letter of demand that had ever issued to the plaintiffs. His evidence was entirely unreliable and wholly inadequate for the purposes of establishing any counterclaim by Golden Door, as indeed are the pleadings.

81. I believe Mr O'Neill to have been a credible witness and that he made significant efforts to engage with Golden Door to establish a redemption figure. He did not however pay over the amount he understood, by his own independent calculations, to be due to Golden Door. I accept his evidence that there were delays in releasing the deeds of partial discharge and that Golden Door did not comply with their obligations to pre-deliver executed partial deeds of release as envisaged by the Loan Agreement. I accept his evidence and that of Mr Smith and Mr Barry that it would be very difficult if not impossible to successfully secure development funding when a company's shares are charged to a third-party lender. It would have been possible, however, for the plaintiffs to give security to a lender over any asset in respect of which that funding was obtained. There was no evidence before the court of an actual rejection of a funding application by the plaintiffs – Mr Smith's evidence on this was not his own.

82. I accept that the independent valuation produced by PwC recorded the amount due based on their own calculations and understanding of the terms of the Loan Agreement and the drawdown amounts and repayments made. That figure is €184,745.23. In the

absence of any contrary information before this court regarding these calculations, I accept this figure as representing the amounts actually due as at the date of PwC's calculation. Mr Linehan proffered a slightly lower number at the hearing based on assumptions in Mr Moore's witness statement but as that witness statement was not before the court, I believe the correct figure should remain at €184,745.23. I note that the figure provided by PwC did not include the Exit Fee of €10,000 which was payable by the plaintiffs on the redemption of the Loan. Assuming no further accrual of interest after that date (for reasons which I set out below), the evidence establishes that the full amount actually due by the plaintiffs to redeem the Loan as at 1 January 2021 was €109,745.23 – reflecting a repayment of €85,000 made on 31 December 2021. A further repayment of €100,000 made on 9 March 2021 reduced that outstanding figure to €9,745.23.

- 83.** I accept the evidence that there was a potential commercial opportunity of interest to Mr O'Neill regarding the lands at Kinsale. There was however no certainty that this opportunity could be secured by him or as to the profit levels he would obtain if it were secured. I accept that Mr Linehan brought as much science as he could to his potential calculation bearing in mind that he was working with multiple assumptions. I analyse the claim for damages later in this judgment.

The submissions of the parties

84. At the hearing of this action counsel for the plaintiffs sought a number of reliefs as follows: –

- (1) that the Security held by Golden Door be released ;
- (2) that the solicitors for the plaintiffs be released from their undertaking in relation to the sum of €57,000 held by them;
- (3) that the entire defence and counterclaim of the defendants be struck out for failure to make proper discovery;
- (4) alternatively, a declaration that there is no evidence to stand up the defence and counterclaim of the defendants;
- (5) a declaration that the proper redemption figure has been proved in evidence by Mr Linehan and that the court should direct that no payment is required to be made by the plaintiffs by way of set-off or otherwise; and
- (6) a finding in favour of the plaintiff for damages.

85. Counsel for the plaintiffs says that Golden Door has never sent a demand letter to Greener Homes and has never produced a certificate of the amounts due under the Loan. Instead, they provided a series of what he described as confused and confusing figures and calculations including those based on a manifest error of interpretation of the Loan Agreement. He argued that the defendants had utterly failed to engage with

the plaintiffs and that this issue resulted in the matter taking the course it did. He also suggested that the court had jurisdiction to join Mr Cheng Bi to the proceedings.

- 86.** Solicitors for the defendants asked this court to dismiss the plaintiffs' claim. They argued that the plaintiffs did not meet the conditions of the Loan Agreement. By September 2019 Greener Homes was in default. They received an extension to reflect the Covid 19 pandemic. However Greener Homes didn't pay what was due and Golden Door was entitled to demand payment, as it did. They say that Greener Homes could have paid everything off but chose not to and instead raised excuses, went to PwC to calculate interest, and then decided how much they would repay to Golden Door. They argued that even as at the date of the trial the full amount which the plaintiffs' solicitors had set out as due in correspondence had not been paid over. Specifically, they say lodging money with one's own solicitors is not the same as paying it over to the party entitled to it. They point to the very young age of Dylan Bi and say that all discussions which are alleged to have taken place must be viewed in that light. They disagree that the share charges held would have prevented the plaintiffs from securing further finance and they point out that first fixed charges could have been provided over any assets that were to be acquired with additional finance. They say that the remaining Security can only be released when full repayment is made and that the plaintiffs have never done this. They say that the plaintiffs' difficulties are entirely self-inflicted and that no damages should be awarded against the defendants. They say the damages claim

made by the plaintiffs is speculative and based entirely on assumptions. They say that the plaintiffs have already been compensated (by way of foregoing interest) regarding the initial delays in providing partial deeds of release due to mapping issues.

Discussion

87. One of the extraordinary features of this case is that Golden Door as lender never sent a statement of account or a formal demand to Greener Homes. Indeed even the counterclaim which is advanced by Golden Door merely seeks damages for breach of the Loan Agreement but fails to set out any particulars of the amount alleged to be due under the Loan Agreement. When further particulars of the amounts due were sought by the plaintiffs' solicitors, the replies somewhat extraordinarily stated "*This request makes no sense*" (*replies to particulars numbers 15-18 dated 30 November 2021*).
- Golden Door had all the information and should have provided this detail to Greener Homes. Instead, Golden Door seemed unwilling or unable to provide a redemption figure. While figures were provided at various times these were based on additional terms being introduced and on particular interpretations of the Loan Agreement, for example, whether interest was to be calculated only on the amount drawn down or on the entire facility or what interest rate would apply to any extended period. Once Greener Homes missed the Repayment Date this introduced an additional layer of complexity to the relationship as neither the Loan Agreement nor the Amendment Letter set out what was to happen in those circumstances. I accept that Golden Door

engaged in some correspondence to try to secure agreement on figures. However, the manner in which this engagement took place was highly unsatisfactory. It cannot be that difficult for a lender to provide clear particulars of the sum it alleges is due from a borrower. If Golden Door were the plaintiff in these proceedings seeking to recover monies due (as indeed they do in their counterclaim), case law clearly confirms their obligation to set out the amounts due with a high level of particularity. In *Bank of Ireland Mortgage Bank v O'Malley* [2019] IESC 84, [2020] 2 ILRM 423 at p 434 Clarke J observed at para 6.7 that

“...it does not seem to me to be too much to ask that a financial institution, availing of the benefit, of a summary judgment procedure, should specify, both in the special indorsement of claim and in the evidence presented, at least some straightforward account of how the amount said to be due is calculated and whether it includes surcharges and/or penalties as well as interest...”

- 88.** I have no doubt that the same obligation arises on any lender from whom a redemption figure is requested, even in the absence of legal proceedings. As noted by Haughton J in *Sheehan v Breccia* [2016] IEHC 67 at para 208, “[a]s an incident of his equity of redemption the plaintiff is entitled to know (or be in a position to calculate on a daily basis) without undue delay what he must pay to redeem the Facility Letter”. The inability or unwillingness of Golden Door to clearly set out the amount due to it by reference to agreed documentation persisted right through the trial resulting in the

extraordinary situation for this court that the lender gave no evidence whatsoever as to the amounts due to it. All of the evidence in that regard came from witnesses produced by the plaintiffs and this court must accept their uncontradicted evidence. In all the circumstances, I believe that the plaintiffs had no option but to engage an independent party to assist them to calculate the redemption figure in the hope that this would provide a basis for engagement with Golden Door. Unfortunately, that engagement was not forthcoming, as a result of which the parties found themselves embroiled in lengthy and expensive litigation including a three-day hearing before this court in circumstances where the legal costs will be significant and entirely disproportionate to the redemption amounts in dispute.

- 89.** Having secured an independent assessment of the redemption figure, it is instructive to consider what approach the plaintiffs took with that information. The PwC report concluded that the outstanding balance on the loan as at 5 November 2020 was €184,745.23. The plaintiffs' solicitors wrote to Golden Doors' then solicitors on 6 November 2020 providing a copy of the PwC report. The letter confirmed that Greener Homes was in funds to discharge the loan balance in that amount immediately but they required confirmation that all charges would be released forthwith together with a satisfactory response and compensation proposals regarding a claim of €100,000 on behalf of Greener Homes. That letter did not make a clear and unconditional promise to pay the sum calculated by PwC. Instead, it linked this amount with a request for

proposals to compensate for losses which were unvouched, but claimed, in the amount of €100,000. It also did not factor in the Exit Fee. It is unsurprising that this correspondence did not result in a resolution of matters.

- 90.** In what is perhaps the only reasonable effort by Golden Door to provide some particulars of what was alleged to be due to them, their solicitors sent a schedule to the plaintiffs' solicitors on 15 December 2020 in which the total due as at that date was stated to be €208,440.28. That amount included the Exit Fee of €10,000. The Exit Fee does not appear in the Loan Agreement itself. However, it does feature in the Founders Base Term Sheet which provides that "*1% is payable on redemption of the loan which will cover monitoring costs*". This 1% of the loan facility equates to €10,000. It was accepted by the plaintiffs at trial that this Exit Fee was payable on redemption. The PwC calculation did not include it as this calculation referred only to the interest and capital outstanding for redemption.
- 91.** As at 15 December 2020 there was therefore very little between the parties in terms of quantum. Allowing for the Exit Fee, the difference in fact appears to be only €13,695.05. Of course, there was also now a claim for loss and damage by the plaintiffs in the sum of €100,000 which was at that time linked to their expressed willingness to pay the PwC calculation.
- 92.** At the same time there was an ongoing row regarding the release of deeds of partial discharge for two remaining properties and relations between the parties were

deteriorating even further. On 5 February 2021, the plaintiffs' solicitors wrote to Golden Door's then solicitors in the following terms (which reflect a payment of €85,000 which had been discharged by Greener Homes in the interim period):

“Although my client has no obligation to do so, they will pay to your client the sum of €109,745 by way of redemption of the loan. It is accepted that this sum will be paid without prejudice to our respective client’s legal rights and positions and that either party may seek to pursue the enforcement of their rights through the Courts. In addition, my client will lodge in our office €13,695 being the difference between your stated position on the 15 December 2020, and my client’s position pending the outcome of legal proceedings, same to be held by my firm pending the resolution of the matters in dispute relating to the redemption figures on the loan”.

- 93.** This letter is significant. It is the first time that the plaintiffs decouple their claim for loss and damage from the redemption payment - essentially, they agree to pay the PwC calculation plus the Exit Fee of €10,000 and to lodge the disputed balance with their solicitors to be held pending resolution of the matters in dispute. This position was reiterated by the plaintiffs' solicitor in their letter dated 12 February 2021, although that letter refers to the entire amount being held pending the resolution of all issues. The plaintiffs' solicitors confirmed in their letter dated 12 February 2021 that:

“Finally, our offer to hold the sum of €109,745.23, plus the delta of €13,695.05 stands. Should this not be acceptable, the Court will be informed of the offer and that your client, as lender, impeded deliberately the completions to improve its position over and above that admitted as being its best case for redemption”.

94. Golden Door were, however, by then demanding a payment of €150,000 to be held which was a figure of €40,254.77 above the PwC redemption figure and indeed a figure which also exceeded the figure which they themselves had claimed was due on 15 December 2020. Unfortunately, the opportunity for resolution at that point was missed. Ultimately the matter took a different course with the solicitors for Golden Door responding on 19 February 2021 *“to remind your clients that the loan is in default and to request your clients’ proposals in this regard by 5 pm on next Monday”*. The plaintiff’s solicitors replied that Golden Door had ignored proposals to pay the redemption sum as calculated by PwC and to hold additional monies pending resolution of the amount actually remaining due on the redemption. Instead, they said that *“increased sums have been demanded without any legal justification”*. Proceedings issued thereafter including a motion for injunctive relief to restrain the appointment of a receiver.

95. The amounts offered were not paid by the plaintiffs at that time. However, on the closing of the final unit, no. 43, an additional sum of €100,000 was paid to Golden Door from the sales proceeds in March 2021. On 7 May 2021 the plaintiff’s solicitors

wrote to Golden Door's then solicitors confirming their instructions that the balance due on the Loan was €9745.23. This reflected the amount drawn down, PwC's interest calculation and the Exit Fee less the repayments made by Greener Homes between March 2019 and March 2021. The solicitors for Greener Homes indicated that notwithstanding their view that Greener Homes was entitled to set off this sum against its own losses, they had "*instructions to remit the sum of €9745.23*" to Golden Door's solicitors. Their letter noted that:

"[B]y remitting this sum to you on behalf of your client, this will demonstrably show that the full loan balance has been discharged and that our clients' liabilities are settled in full with respect to the loan balance. Please provide us with details of your client's account by return".

It was confirmed that the remittal of this amount would be in reduction of the sum of €57,000 which continued to be held by Greener Homes' solicitors (reflecting the increased amount sought by Golden Door post its 15 December 2020 figure). Golden Door does not appear to have provided the relevant account details and the admitted redemption balance of €9745.23 was not in fact ever paid over. The sum of €57,000 continued to be held by the solicitors for Greener Homes at the date of the trial.

96. Clause 10.1 of the Loan Agreement confirms that the Loan was to be repaid "*by way of payment of cleared funds to the account of the Lender, details of which are set out at Schedule 2 to this Agreement*". The admitted outstanding balance identified by Greener

Homes could simply have been paid by them to that account at any time, but it was not.

The Loan Agreement defines “*Unpaid Sum*” to mean “*any sum due and payable but unpaid by an Obligor under the Finance Documents*”. An “*Event of Default*” includes where Greener Homes “*fails to pay any sum payable by it under any Finance Document, unless its failure to pay is caused solely by an administrative error or technical problem and payment is made within 21 Business Days of its due date*”

(Clause 15.1 of the Loan Agreement.)

97. Clause 17.1 of the Greener Homes’ debenture dated 6 July 2018 confirms that “[*t*]he *Security is a continuing security and will extend to the ultimate balance of the Secured Liabilities, regardless of any intermediate payment or settlement of the Secured Liabilities*”. Under clause 17.11 the plaintiffs waived any right to “*interpose any defence based on any...claim of set-off or other counterclaim whatsoever*”.

98. Clause 18 deals with the release of that debenture. It provides as follows: –

“Subject to the other provisions of this Deed and of the Facility Agreement, following the date on which all the Secured Liabilities have been unconditionally and irrevocably paid, performed and discharged in full, [Golden Door] will, at [Greener Homes’] request and cost, release, discharge and re-assign the Security to [Greener Homes]”. Similar wording is set out at clause 22 of the share charge dated 6 July 2018 over all the shares in Greener Homes.

99. Clause 20 of the charge over land dated 6 July 2018 deals with release of that security in the following terms:

“Subject to the other provisions of this Deed, following the date on which all the Secured Liabilities have been unconditionally and irrevocably paid, performed and discharged in full, [Golden Door] will, at [Dunboy Construction’s] request and cost, release, discharge and re-assign the Security to [Dunboy Construction] PROVIDED ALWAYS THAT Deeds of Partial Release of individual units will be provided in accordance with the terms of the Facility Agreement”.

100. The guarantee and indemnity deed dated 6 July 2018 was offered by Greener Homes as Principal and Dunboy Construction as Guarantor. It provided that Dunboy Construction *“irrevocably and unconditionally”* guaranteed to Golden Door *“the due and punctual payment and discharge in full”* by Greener Homes of the Guaranteed Obligations and/or Cost Overruns when the same became due for payment or discharge (clause 2.1(a)).

101. I do not believe that an offer to pay a redemption sum (even if correctly calculated) which was coupled with or dependent upon Golden Door dealing with a claim for losses alleged by the plaintiffs, constituted a “payment” of the redemption sum such as to entitle the plaintiffs to demand release of the Security held by Golden Door. A more difficult question is whether a stated instruction to make such a redemption payment in open correspondence, not linked to proposals for compensation of the plaintiffs, can be

said to be sufficient to trigger the obligation on Golden Door to release the Security.

This is the situation which arose on 7 May 2021 when the plaintiffs' solicitors confirmed they were instructed to remit the sum of €9745.23 and sought account details for payment (although it was clear from the Loan Agreement what account was to be used and all previous repayments had been made without difficulty). In addition, the balance of the (increased) amount sought by Golden Door was offered to be held to their account. Counsel for the plaintiffs argued that there was no basis for Golden Door not to release the Security at that time as this proposal covered the full extent of any sums due and it was an open and unconditional offer. It is agreed however that the amount offered was not in fact ever paid over.

102. What has arisen in this case is a classic “chicken and egg” situation. The plaintiffs did not pay over the amount offered because they did not get confirmation that the Security would be released. Golden Door did not release the Security because it did not get paid. It is clear from the various deeds that the obligation to release Security does not arise until Golden Door is “*paid*”. In the normal course, the release of any security happens after repayment is made and not merely when it is promised to be paid. If the plaintiffs had actually paid over the money that they acknowledged to be due for redemption, they would then have been in a position to seek to compel Golden Door to release the Security. That did not happen. I do not believe that the plaintiffs’ offer to remit the admitted sum of €9,745.23 was itself enough to trigger an obligation on Golden Door to

release the Security. I understand that the plaintiffs were looking for comfort that the payment would be accepted as a full redemption. However, until the plaintiffs paid the amount that they themselves acknowledged to be due to redeem the Loan, the obligation to release the Security did not arise.

103. The plaintiffs can only pursue a claim in damages against Golden Door for their failure to release the Security if in fact Golden Door was under an obligation to release the Security and failed to do so. If Golden Door was not obliged to release the Security until full payment of the redemption amount was received by them (which I believe to be the case), then their failure to release the Security is not actionable in damages by the plaintiffs.

104. Because Golden Door did not engage with the PwC calculation or provide a clear redemption statement despite repeated requests to do so, I find that Golden Door is not entitled to charge further interest consequent upon its own delay post 6 November 2020. For that reason, and bearing in mind the only evidence on quantum available to this court at trial, I find that the redemption figure payable by the plaintiffs on the Loan was and remains €9745.23.

105. It is clear that Golden Door did not engage as one would expect a reasonable lender to do. There should have been no difficulty in them providing a redemption figure and regular statements of account to the plaintiffs. Golden Door singularly failed to do so. This required the plaintiffs to instruct PwC to calculate the figures that should easily

have been obtained from Golden Door. The cost to the plaintiffs associated with that exercise are recoverable by the plaintiffs from Golden Door by way of damages. The witness statements confirm those fees at €1,300 plus VAT.

106. Furthermore, I am satisfied on the evidence that Golden Door was in clear breach of clause 10.3 of the Loan Agreement in that they did not provide the pre-executed deeds of partial release for the five properties in the Development. Their failure to do that resulted in unnecessary delays, increased interest charges and in some cases the loss of sales. The plaintiffs are entitled to damages in respect of that breach. In terms of quantum, the sale of house no. 42 was delayed for 38 days from the 7 August 2022 to 14 September 2020. Using Mr Linehan's calculations but extending the period of delay from 30 to 38 days, the additional interest applied, for which the plaintiff should now be compensated under this heading, is €4,617.55. Mr O'Neill's witness statement notes that the sale of house no. 41 was also impacted by the failure to provide the deed of partial release for that property and that the sale was lost for this reason in the first week of September 2020. His witness statement advises that in addition to the capital loss incurred, the plaintiffs suffered an additional interest liability which has been calculated at €3,513.70. I have already determined that no additional interest should be payable by the plaintiffs post 6 November 2020 and this covers any increased interest arising from the delay in closing the sale of house no. 43 in March 2021. While counsel's submissions refer to "*unnecessary conveyancing costs*" arising from Golden

Door's intransigence in relation to producing the partial deeds of discharge (which ought never to have been necessary) there was no evidence to quantify those figures at the trial.

107. The net effect of these damages is to essentially cancel out the redemption figure I have determined to be due. In those circumstances the plaintiffs are entitled to set off their damages against the redemption figure. Accordingly, I will grant a declaration that the redemption figure properly payable by the plaintiffs is €9,745.23. That figure should be deducted from the damages I have awarded the plaintiffs against Golden Door, resulting in a situation where no party owes anything further to the other. On that basis, I direct that the Security held by Golden Door against the plaintiffs or either of them must be discharged at Golden Door's cost within 7 days of this judgment failing which I direct that all such Security will be deemed by this court to have been satisfied or otherwise vacated.

108. I further direct that in so far as there is any undertaking in place from the plaintiffs' solicitors with regard to the retention of funds under their control, those undertakings are released, and the plaintiffs' solicitors are discharged from them in full.

Conclusion

109. There was a failure on the part of Golden Door to provide the plaintiffs with a redemption statement setting out the sum due and how it was calculated. As Golden

Door did not properly engage with the redemption calculation provided by the plaintiffs, Golden Door cannot claim additional interest beyond that date arising from its own failure and delay. I find that the redemption figure now payable by the plaintiffs is €9,745.23, being the amount calculated by the plaintiffs.

- 110.** There was no obligation on Golden Door to release the Security unless and until they were paid the redemption amount in full. The plaintiffs did not pay the redemption figure they admitted was due to Golden Door. Lodging money with their own solicitor pending the outcome of litigation was not a discharge of the plaintiffs' obligations under the Loan Agreement such as would trigger the obligation on Golden Door to release the Security.
- 111.** Accordingly, the plaintiffs cannot recover damages from Golden Door for any loss of opportunity arising from the plaintiffs' inability to raise additional finance as a result of Golden Door's failure to release the Security.
- 112.** Golden Door was in clear breach of clause 10.3 of the Loan Agreement in that they did not provide the pre-executed deeds of partial release for the five properties in the Development and this resulted in delays in closing sales. Greener Homes is entitled to recover damages for the additional interest it incurred as a result of those delays.
- 113.** Golden Door failed to provide a redemption figure and regular statements of account to the plaintiffs. This required the plaintiffs to instruct PwC to calculate the redemption

figures due. The cost to the plaintiffs of instructing PwC for that exercise is properly recoverable by the plaintiffs from Golden Door by way of damages.

114. As the quantum of the damages roughly equates to the outstanding redemption figure, both amounts should be offset against the other resulting in a nil balance being payable by one party to the other.

115. Accordingly, the Loan is deemed to be now fully repaid with a requirement on the part of Golden Door to immediately release the Security. This should be done within 7 days by Golden Door at its cost, failing which this court deems all the Security to be satisfied and otherwise vacated. Should Golden Door fail to release the Security as directed by this court, any costs incurred by the plaintiffs regarding the release of the Security are recoverable by the plaintiffs from Golden Door.

116. The plaintiffs' solicitors are discharged from all and any undertakings they have given in this matter. The funds held by them on account are no longer subject to any further undertaking.

117. As the only order sought against Dylan Bi was an order restraining him from threatening the plaintiffs, their officers or agents, or otherwise attempting to coerce or compel them to act for or on behalf of the defendants, I will also make that Order although I believe that the situation giving rise to that request has now passed.

118. I will list this matter for mention on Friday 28 July at 10.30 am to ascertain if the Security has been released and to agree the final form of Order. Insofar as written submissions are likely to be required from the parties in respect of legal costs, that matter and any other issues arising can also be considered further at that time.