Maryani Sadeli *v* Arjun Permanand Samtani and another and other appeals [2014] SGCA 55

Case Number	: Civil Appeals Nos 152, 153 and 154 of 2013
Decision Date	: 20 November 2014
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s)	: Kannan Ramesh SC, Eddee Ng Ka Luan, Ho Xin Ling, Ian Ho and Ooi Huey Hien (Tan Kok Quan Partnership) for the appellants in Civil Appeals Nos 152, 153 and 154 of 2013; N Sreenivasan SC and Shankar s/o Angammah (Straits Law Practice LLC) for the first respondent in Civil Appeals Nos 152, 153 and 154 of 2013; Anparasan s/o Kamachi and Tan Wei Ming (KhattarWong LLP) for the second respondent in Civil Appeals Nos 152, 153 and 154 of 2013.
Parties	: Maryani Sadeli — Arjun Permanand Samtani and another

Equity – Remedies – Equitable Compensation

Damages – Recovery of Legal Costs

20 November 2014

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 The present proceedings comprise appeals against the decision of the judge ("the Judge") in *Then Khek Koon and another v Arjun Permanand Samtani and another and other suits* [2014] 1 SLR 245 ("the Judgment"). These appeals stem from a long and chequered history of litigation surrounding the unsuccessful collective sale of the development known as Horizon Towers and find their origin in three consolidated suits brought by the five plaintiffs ("the Appellants") against the two defendants ("the Respondents").

2 The Appellants in the present proceedings founded their claim against the Respondents in equitable compensation for breach of fiduciary duties, seeking as damages the *shortfall* in the *costs* of the previous proceedings which they did not manage to recover, *notwithstanding the earlier costs orders awarded in their favour* (in *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 4 SLR(R) 155 ("*Ng Eng Ghee (Costs)*"). This last-mentioned award of costs in favour of the Appellants was made as a result of the decision of this court in *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109 ("*Ng Eng Ghee (CA)*").

3 After hearing detailed arguments by the Appellants, we decided that the Appellants could not have obtained in the present proceedings damages comprising the unrecovered costs of the previous proceedings, and therefore dismissed the appeals. Having arrived at this conclusion, it was not necessary for us to consider the anterior question of whether the Appellants' claim based on equitable compensation could be established in the first place. We now give the detailed grounds for our decision.

Background to the appeals

Background to the appeals

4 The facts of the previous proceedings and the background to the appeals before us have been set out in meticulous detail in the Judgment, as well as in *Ng Eng Ghee (CA)* and *Ng Eng Ghee (Costs)*, and it is unnecessary to canvass them again at length here. It suffices to note for the purposes of the present appeals that this court in *Ng Eng Ghee (CA)* set aside the collective sale and in so doing found, *inter alia*, that the Respondents, as members of a sales committee in a collective sale owed fiduciary duties to the subsidiary proprietors of the development which included the Appellants, and had in fact breached those fiduciary duties. This was the basis for the Appellants' claim in equitable compensation which they submitted was a cause of action independent of the earlier proceedings in *Ng Eng Ghee (CA)*.

5 As a result of this court's decision in *Ng Eng Ghee (CA)*, the Appellants were awarded costs for the proceedings leading up to their successful appeal (in *Ng Eng Ghee (Costs)*). However, the Appellants were not satisfied with those costs orders. As in most cases, the costs recovered by the Appellants did not amount to the actual sum of legal fees incurred. The Appellants were also involved in some earlier applications which were not part of the procedural history of *Ng Eng Ghee (CA)*, where no orders were made as to costs. The Appellants were therefore left out of pocket to some extent; hence their claim against the Respondents in equitable compensation in the present proceedings for the *difference or shortfall* between the amount of costs awarded in *Ng Eng Ghee (Costs)* and the costs they had actually incurred. It bears noting that, if the Appellants were successful in the present proceedings, they would in effect have received *a full indemnity for their costs – a position which would not have been attainable under a normal costs order*.

6 Three further points bear setting out in order to provide the necessary background to the present appeals. First, costs were awarded to *all* the Appellants notwithstanding the fact that two of the Appellants were *not* parties to the appeal in *Ng Eng Ghee (CA)*. Whilst these two were parties in the High Court proceedings (in *Lo Pui Sang and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and other appeals* [2008] 4 SLR(R) 754 ("*Ng Eng Ghee (HC)*")), where the court held *against* the subsidiary proprietors (including the Appellants), they chose *not* to appeal. Nevertheless, a number of other subsidiary proprietors (including the other three Appellants) did in fact appeal against the decision in *Ng Eng Ghee (HC)* and this court in *Ng Eng Ghee (CA)* allowed the appeal. After the appeal was allowed, the Court of Appeal received submissions on costs from the parties to *Ng Eng Ghee (CA)*, and also from the two Appellants who did not appeal and were technically non-parties to the appeal. The two Appellants were not invited to submit on costs, but they nevertheless did so by way of a letter tendered to the court where they asked for an award of costs. The Court of Appeal made clear that it had the power to award costs in favour of *all* the Appellants, including those who did not appeal against the decision in *Ng Eng Ghee (HC)*, and did in fact award costs for the proceedings leading up to the successful appeal.

7 Secondly, the Respondents were parties to the *previous* proceedings as members of the collective sales committee *as a whole*, whereas the claim in the *present* proceedings was brought by the Appellants against the Respondents in their *individual capacities*. This was significant inasmuch as the Appellants sought to rely on this distinction to persuade the court that their present claim was valid.

8 Thirdly, the Appellants did consider seeking costs as against the Respondents in their individual capacities in *those* proceedings, but eventually decided not to (see Judgment at [284]). This was significant because the Respondents sought to rely on this fact to say that the Appellants should not be allowed to bring a claim to recover those costs now.

The decision below

9 We observe that the Judgment was a lengthy one, but in fairness to the Judge, this was because he felt that he had to deal with all the issues which were presented to him (including the one upon which the present appeal turns, but which was dealt with by the Judge only in the last part of the Judgment (and whose decision in this particular regard we have, for the reasons set out below, generally affirmed)). In particular, the Judge considered the controversy surrounding, *inter alia*, the issue of *causation* in the context of the award of equitable compensation for breach of fiduciary duties (here, by the Respondents, as found in *Ng Eng Ghee (CA)* but which the Respondents nevertheless sought to controvert in the present proceedings). The Judge characterised this issue of causation as a question of whether the Appellants' claim against the Respondents fell within the class of cases stemming from the Canadian Privy Council decision of *Brickenden v London Loan & Savings Company of Canada* [1934] 3 DLR 465 (in which but-for causation is *not* essential for liability) *or* the class of cases stemming from the House of Lords decision of *Target Holdings Ltd v Redferns (a firm)* [1996] 1 AC 421 (in which but-for causation *is* essential for liability) (see Judgment at [109]). Counsel for the Appellants, Mr Kannan Ramesh SC, submitted during the appeal that this was an unsettled area of law within the Commonwealth and was the subject of much academic debate (although this submission must now be considered in light of the very recent UK Supreme Court decision of *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58 ("*AIB*"), which in fairness to the parties was not yet decided when the present appeals were heard).

10 As astutely pointed out by Lord Toulson in *AIB* (at [47]), "the debate which has followed *Target Holdings* is part of a wider debate, or series of debates, about equitable doctrines and remedies and their inter-relationship with common law principles and remedies, particularly in a commercial context". Coincidentally, that was our view on the issue when the appeals were heard, which was also borne out by the various opinions and views on the subject put forward by many learned writers (see, for example, Charles Mitchell, "Equitable Compensation for Breach of Fiduciary Duty" (2013) 66 Current Legal Problems 307; Michael O'Meara, "Causation, Remoteness and Equitable Compensation" (2005) 26 Aust Bar Rev 51; Matthew Conaglen, "Remedial Ramifications of Conflicts between A Fiduciary's Duties" (2010) 126 LQR 72; Matthew Conaglen, "Equitable Compensation for Breach of Fiduciary Dealing Rules" (2003) 119 LQR 246; Jamie Glister, "Breach of Fiduciary Duty: Brickenden Lives On (*Premium Real Estate v Stevens*)" (2011) 5 J Eq 59; Charles Rickett, "Equitable Compensation: Towards a Blueprint?" (2003) 25 Sydney L Rev 31; as well as James Edelman and Steven Elliot, "Money Remedies against Trustees" (2004) 3 TL 116).

11 However, given that we did *not* think the Appellants were entitled to claim the aforementioned *difference* in the amount of *costs* recovered, assuming they could mount an independent cause of action for breach of fiduciary duties against the Respondents, it was strictly unnecessary for us to consider this particular issue any further. If the Appellants were not entitled to recover the aforesaid amount claimed in the first place, then that is the end of the matter. There would consequently be no need to discuss, *inter alia*, the complex as well as thorny issues relating to the test of causation for equitable compensation which we have referred to briefly in the preceding paragraph. A definitive ruling on this difficult area of the law can be made when it next comes for decision before this court. It should also be noted that, in light of the analysis adopted by this court in the present appeal, there is no need to address (as the Judge did) the doctrine of *novus actus interveniens vis-à-vis* the issue of causation.

12 Instead, we focus our attention on the issue that was dispositive of the appeals before us, *ie*, whether the Appellants were entitled to recover as damages the unrecovered legal costs of the previous proceedings.

13 On this issue, the Judge held that the Appellants were barred from doing so, both as a matter of law and on the facts of the case. The Judge held that the Appellants were seeking to recover an

indemnity for their costs in *Ng Eng Ghee (Costs)*, and that they made submissions to the Court of Appeal for costs to be awarded on an indemnity basis. The Judge noted that the Court of Appeal in *Ng Eng Ghee (Costs)* rejected the Appellants' submissions in that regard, and awarded them the default standard basis costs instead. It is important at this juncture for us to make clear that an award of *costs on an indemnity basis*, which although a higher measure of costs than the default standard basis, is a misnomer as it does *not* entail a *full (or literal) indemnity* as such, which was what the Appellants were effectively claiming in the present proceedings.

14 The Judge then set out the holdings of the Court of Appeal in *Ng Eng Ghee (Costs)* (at [266] of the Judgment), which we reproduce here for convenience:

> In *Ng Eng Ghee (Costs)*, the Court of Appeal made the following holdings of principle:
>
> > (a) The Court of Appeal declined to award indemnity costs to any of the objecting subsidiary proprietors because the matters they had raised did not make a sufficiently compelling case for a departure from the usual award of costs on the standard basis (at [31]).
> >
> > (b) The Court of Appeal held that it had the power to award costs in favour of Mr Then and Ms Tan even though they did not appeal against [the High Court decision] and were therefore not parties to [the appeal].
> >
> > (c) In so far as the plaintiffs were entitled to the costs of any particular set of proceedings, those costs would be discounted by 20% to account for the duplication of work with the objecting subsidiary proprietors represented by [Harry Elias Partnership], the legal relevance of the points taken and the cogency of the contentions advanced (at [28]).
> >
> > …

It was on the basis of those principles that the Court of Appeal made the cost orders it did (see *Ng Eng Ghee (Costs)* at [43] and the Judgment at [267]), which, as we have said, resulted in the Appellants having a shortfall in their legal costs recovered.

15 The Judge established that the Appellants could have brought their claim for costs in the subsequent proceedings only if the Court of Appeal did not apply what is known as the indemnity principle (see below at [30]) in making the costs orders, or if the Appellants did not have the opportunity to seek costs against the Respondents (in their individual capacities). The Judge found that the Court of Appeal did apply the indemnity principle, and also that the Appellants had the opportunity to seek costs against the Respondents (in their individual capacities) in the earlier proceedings but failed to do so. In fact, the Appellants contemplated seeking costs against the Respondents (in their individual capacities) in the earlier proceedings but eventually decided not to. In addition, the Judge found that even if he was wrong on that issue, the amount of compensation recoverable would be limited to costs on the standard basis. Since that was already awarded by the Court of Appeal, the Appellants could recover nothing further. In arriving at this conclusion, the Judge held as a matter of law that there was no difference in the measure of damages in situations where the defendant in the later proceedings was a party to the earlier proceedings (henceforth referred to as a "same-party case"), and in situations where the defendant in the later proceedings was not a party to the earlier proceedings (henceforth referred to as a "third-party case").

Our decision

16 With the above background in mind, let us now turn to the detailed reasons as to why we decided that the claim for unrecovered costs in the previous proceedings as damages *failed* on the *facts of the present case* such that the present appeals should be dismissed. As already explained above, the appeals before us could be (and were) decided on this one issue.

17 That the claim was for the *unrecovered* costs in the previous proceedings was of the first importance because that was in *substance* what the Appellants were truly concerned about, and that was also what was *controversial* about the claim. We note at the outset that the Appellants' contentions brought to the fore difficult issues of law, because (as we shall see) unrecovered legal costs of previous proceedings *cannot* be recovered in a subsequent claim for damages as a general rule, but the Appellants nonetheless sought to show why their claim should succeed in any event because that general rule applied only with regard to a same-party case and not to a third-party case (which they alleged was the case at present).

18 The nature of the Appellants' claim and the *precise facts and context* of the appeals gave rise to two inextricably related issues:

(a) First, did the general rule that unrecovered costs in relation to previous legal proceedings cannot be recovered in a subsequent claim for damages apply only to the same-party case or did it also apply to a third-party case as well ("Issue 1")?

(b) Secondly, if the general rule referred to at (a) above did not apply to a third-party case, could the Appellants nevertheless be precluded from claiming unrecovered costs as such a claim was, on the *facts* of *this* case, *an abuse of process* ("Issue 2")?

19 Let us turn to consider each of the above issues *seriatim*.

Issue 1

The general rule: unrecovered costs in relation to previous legal proceedings cannot be recovered in a subsequent claim for damages in the same-party case

20 The *general* rule on the recovery of costs of previous legal proceedings as damages in subsequent proceedings is clear: such costs which were unrecovered previously *cannot* be recovered in a subsequent claim for damages, at least in so far as it involves a *same-party* case.

21 Whatever costs that a party seeks to recover should be dealt with in those same proceedings for which the costs were incurred, and the incidence of unrecovered costs cannot thereafter be the subject of subsequent legal action. As Bowen LJ observed in the English Court of Appeal decision of *The Quartz Hill Consolidated Gold Mining Company v Eyre* (1883) 11 QBD 674 ("*Quartz Hill*") (at 690):

> … The bringing of an ordinary action does not as a natural or necessary consequence involve any injury to a man's property, for this reason, that the only costs which the law recognises, and for which it will compensate him, are the costs properly incurred in the action itself. For those the successful defendant will have been already compensated, so far as the law chooses to compensate him. If the judge refuses to give him costs, it is because he does not deserve them: if he deserves them, he will get them in the original action: if he does not deserve them, he ought not to get them in a subsequent action. …

22 The legal basis for this rule was later considered in detail in the English Court of Appeal decision of *Berry v British Transport Commission* [1962] 1 QB 306 ("*Berry*"), where Devlin LJ traced the origins

of this rule to the case of *Hathaway v Barrow* (1807) 1 Camp 151 (at 320–321):

> … The rule appears to have been first laid down by Mansfield C.J. in *Hathaway v. Barrow* where he put it on the ground that "it would be incongruous to allow a person one sum" as costs in one court, and a different sum for the same costs in "another court". If in the earlier case there has been no adjudication upon costs (as distinct from an adjudication that there shall be no order as to costs), a party may recover all his costs assessed on the reasonable, and not on the necessary, basis. If a party has failed to apply for costs which he would have got if he had asked for them, a subsequent claim for damages may be defeated; but that would be because in such a case his loss would be held to be due to his own fault or omission. In any case in which the legal process does not permit an adjudication, the rule does not apply. This appears from a number of cases such as *Pritchet v. Boevey*, *Doe v. Filliter* and *Walshaw v. Brighouse Corporation*. …

23 Devlin LJ recognised that this line of reasoning was based on the idea of *res judicata*, in the sense that the "law cannot permit a double adjudication upon the same point" (at 322). Where a court has or could have adjudicated on a question of costs, this question cannot be the subject of a further action. However, the learned judge then raised a query as to whether there was a true *res judicata* as such in relation to a subsequent claim in damages for the costs of previous proceedings. This was because taxed costs (at that time in England and Wales) was on the basis of necessity (as opposed to reasonableness as is the position at present in Singapore), whereas any subsequent claim in damages for the costs of previous proceedings would be quantified subject to reasonableness under the principles governing assessment of damages. Leaving aside the fact that the latter basis of quantification would give rise to a larger amount of costs recoverable than the former, what was apparent was that a question of damages and a question of costs concerned different legal principles and a court was not really dealing with the same issues twice.

24 Instead, Devlin LJ appeared to suggest that the rule was really justified on the grounds of public policy, *viz*, bringing down the costs of litigation, and encouraging finality of litigation. As we elaborate shortly below, the latter justification arises only because of the former.

25 Devlin LJ made the uncontroversial point that there was a public interest in only allowing a successful party to recover less than the actual legal costs incurred, because this would encourage parties to keep legal costs low (see *Berry* at 322–323):

> … The stringent standards that prevail in a taxation of party and party costs can be justified on the same sort of ground; see, for example, *Smith v. Buller*, per Malins V.-C. It helps to keep down extravagance in litigation and that is a benefit to all those who have to resort to the law. …
>
> If the matter were res integra, I should for myself prefer to see the abandonment of the fiction that taxed costs are the same as costs reasonably incurred and its replacement by a statement of principle that the law for reasons which it considers to be in the public interest requires a litigant to exercise a greater austerity than it exacts in the ordinary way, and which it will not relax unless the litigant can show some additional ground for reimbursement over and above the bare fact that he has been successful.

26 However, because there is a difference between legal costs recoverable and actual legal costs incurred, this could possibly lead to parasitic litigation whenever the successful party was not satisfied with any cost order obtained. The rule that costs in previous proceedings could not be recovered in a subsequent action as damages was therefore additionally justified as it promoted finality in litigation (see *Berry* at 323):

> … there is undoubtedly a practical need for the rule in civil cases. Otherwise, every successful plaintiff might bring a second action against the same defendant in order to recover from him as damages resulting from his original wrongdoing the costs he had failed to obtain on taxation; this was unsuccessfully attempted by the plaintiff in *Cockburn.* v. *Edwards*. Or as Lord Tenterden C.J. said in *Loton* v. *Devereux*: "actions would frequently be brought for costs after the court had refused to allow them." The rule is thus essential to the administration of justice in civil suits and will continue to be so until the time comes, if it ever does, when the law either allows to a successful litigant all the costs he has reasonably incurred or recognises openly that an assessment of damage and a taxation of costs as between party and party are two different things.

27 We respectfully agree with Devlin LJ in that regard, and add further that, apart from bringing down the costs of litigation, the general rule is also *necessary* in order to promote the objective of our legal regime on costs to *enhance access to justice*. This requires some elaboration, but doing so is crucial in order to appreciate the context within which the general rule operates.

28 The objectives of and the principles underpinning our legal regime on costs have been discussed in admirable detail by the Judge (at [153]–[183] of the Judgment), and we do not propose to rehearse his analysis, except to emphasise and reinforce some aspects of it which are material for present purposes.

29 The starting point must be to appreciate that in all manner of litigation, legal costs are an inevitable expense to both the party bringing the action and the party defending it. It is therefore impossible, at least from a practical standpoint, for an individual's general right of access to the law to be divorced from the rules and principles governing the costs of litigation. In this regard, a legal system's rules on costs (which include how legal costs should be recovered in litigation) are necessarily a matter of social policy. This is underscored by the numerous reports commissioned by governments around the world which studied the rules and principles governing the costs of litigation as part of a wider review of civil justice (see, for example, *Review of Civil Litigation Costs: Final Report* (2009) by the Right Honourable Lord Justice Jackson ("the Jackson Report"); *Alternatives to Activity Based Costing – the New Zealand Approach* (2006) by the Honourable Justice Venning; Victoria, Victorian Law Reform Commission, *Civil Justice Review* Report 14 (2008); and Hong Kong, Chief Justice's Working Party on Civil Justice Reform, *Civil Justice Reform: Final Report* (2004)).

30 One fundamental aspect of our scheme of costs recovery is a cost-shifting rule which dictates that the successful litigant is ordinarily indemnified by the losing party for the legal costs incurred as between the successful party and his solicitor. This is commonly referred to as the principle that costs should generally follow the event, and is also known as the indemnity principle (although it should be noted that the term "indemnity principle" is also confusingly used to refer to the principle that prevents a party from recovering more by way of costs from an opponent than he is obliged to pay to his own lawyers (see the Jackson Report at p 53)).

31 The indemnity principle, however, does *not* result in an indemnity in the full or literal sense. The legal costs recoverable by the successful party from the losing party are more often than not *less* than the actual legal fees incurred as between the successful party and his solicitor. This is because the indemnity principle is also subject to a series of rules governing how recovery of costs is quantified, and those rules operate such that a *full* indemnity for legal costs is only recoverable by parties to litigation in exceptional circumstances (for example, where there is a contractual agreement between the parties to this effect).

32 The Judge explained that this was a result of the policy considerations which inform the

indemnity principle. As the Judge aptly observed, "while compensation is the immediate effect of applying the indemnity principle, the ultimate policy of the indemnity principle is rooted not in compensation but in enhancing access to justice" (see the Judgment at [156]). The exact way our rules on costs operate and the reasons why these rules enhance access to justice were set out comprehensively by the Judge at [153]–[176] of the Judgment, and we endorse his views on them entirely. We also agree with the Judge's elaboration on two further (albeit "subordinate") policies of our law on costs which centre on *the need to achieve finality in litigation as well as the need to suppress parasitic litigation* (at [179]–[182] and [183] of the Judgment, respectively).

33 We nonetheless underscore the Judge's views by reiterating that any legal system's scheme for costs recovery in litigation is driven by social policy. There are jurisdictions, such as the United States of America, where the successful litigant is *not* ordinarily entitled to recover even reasonable legal costs incurred from the losing party (see, for example, the United States Supreme Court decision of *Alyeska Pipeline Service Co v Wilderness Society*, 421 US 240, 247 (1975)). However, the scheme in the United States of America is calibrated by providing for "a significant number of statutory and common law exceptions that allow for a court … to order costs against a losing party" (see *Review of Civil Litigation Costs: Preliminary Report* (2009) by the Right Honourable Lord Justice Jackson at p 610). Equally, it would be possible to have a legal system where the norm is for the successful party to obtain a full indemnity from the losing party for the legal costs incurred. *However*, this might lead to problems such as the deterrence of risk-averse litigants with meritorious claims from instituting legal proceedings (see the Judgment at [159]–[161]).

34 Ultimately, *our* legal regime on costs recovery is calibrated in a manner such that full recovery of legal costs by the successful party is the exception rather than the norm. What we need to bear in mind is that this state of affairs is not something which exists to prejudice the winning party in litigation, but is a manifestation of the law's policy of *enhancing access to justice for all*. Put another way, unrecovered legal costs is something which is part and parcel of resolving disputes by seeking recourse to *our* legal system and all parties who come before our courts must accept this to be a *necessary incidence* of using the litigation process. It is in this light that the general rule must be understood.

Is there nevertheless an exception to the general rule in a third-party case?

35 Whilst the Appellants accepted that there was good reason for the general rule to the effect that unrecovered legal costs of previous legal proceedings cannot be recovered in a subsequent claim for damages, they nevertheless submitted that this rule should apply only to same-party cases and that a *different* rule ought to apply in relation to *third-party cases* ("the third-party rule"). In this regard, the Appellants relied on the following passage from a leading text on the law of damages (see Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 18th ed, 2009) ("*McGregor*") at para 17-039):

> Where the costs that are now being claimed as damages have been incurred in previous proceedings between the now claimant and some third parties, it was for long the rule that all costs incurred in such actions by the now claimant were recoverable, subject only to the costs having been reasonably incurred and to all other aspects of remoteness of damage.

36 The reasons for the position adopted by the Appellants were succinctly set out by the Judge (at [212] of the Judgment), and we summarise them as follows:

(a) In most third-party cases, the plaintiff's action against the defendant will be based on a cause of action independent of the earlier litigation. The plaintiff therefore has a right to

compensation for his losses.

(b) This right to compensation is not affected by other policy reasons which apply to same-party cases.

(c) First, an award of compensation will not undermine finality because the defendant was not before the earlier court. The plaintiff had no opportunity to invite the earlier court to consider the defendant's liability to pay for the costs of the earlier litigation.

(d) Secondly, the legal costs claimed as against the defendant by the plaintiff will not be extravagant since principles of causation, foreseeability, remoteness and mitigation apply when assessing compensation, and the plaintiff would limit his expenditure in the earlier proceedings because he would have no assurance of securing subsequent reimbursement from the defendant.

37 *However*, the Judge then proceeded to hold that a distinction between same-party cases and third-party cases was conceptually flawed, relying on the English High Court decision of *British Racing Drivers' Club Ltd and another v Hextall Erskine & Co (a firm)* [1996] 3 All ER 667 ("*British Racing*"). In that case, the plaintiffs brought proceedings against their solicitors for providing negligent advice in relation to a joint venture agreement. This was after the plaintiffs had already brought prior proceedings against other parties involved in the joint venture agreement and arrived at a settlement. Part of the plaintiffs' claim against the defendants was for the professional fees incurred in the prior proceedings. The defendants admitted that they were negligent but disputed, *inter alia*, the extent of their liability with regard to the professional fees. They argued that any claim for professional fees expended by the plaintiffs should be subject to some form of inquiry or taxation to ensure that they were reasonable, *ie*, that the professional fees should be taxed on a standard basis. The plaintiffs, on the other hand, maintained that the professional fees had been incurred and they were therefore recoverable in full unless the defendants could demonstrate that they were unreasonable. Alternatively, they argued that any taxation should be done on an indemnity basis.

38 Carnwath J took the view that the professional fees incurred in bringing the prior proceedings was a reasonable mitigation of the plaintiffs' loss, but held that the quantification of liability should be subject to taxation on the standard basis, and that the mere fact that it was a third-party case should not otherwise affect the basis of quantification. He observed thus (at 691):

> The expenditure on the professional fees of solicitors and accountants was as I have held, expenditure incurred by the plaintiffs in reasonably mitigating their loss. Prima facie therefore, it is claimable under the ordinary rules relating to mitigation. However, litigation costs have traditionally been subject to special rules for policy reasons. Prior to the change in the taxation rules [in England in 1986], there was an established distinction between such costs incurred in proceedings between the same parties, and those incurred in proceedings against third parties. This was anomalous, given that similar policy considerations applied in each case. The most recent cases show that the position must be re-considered in the light of the changes to the taxation rules. This enables the anomaly to be resolved. Under the new dispensation, taxation on the standard basis is to be regarded as the equivalent to the solicitor and client basis referred to by *McGregor*.

39 Carnwath J took the view that the policy considerations which applied to same-party cases applied equally to third-party cases. The Judge agreed with this view to the effect that there was no distinction of principle between same-party cases and third-party cases. This was supported, in the Judge's view, by the fact that (see [222] of the Judgment):

> … [t]he procedural rules on joinder of causes of action and joinder of parties in O 15 and on joinder of third parties in O 16 are now drawn extremely widely. They advance the policy of suppressing multiplicity of proceedings and avoiding inconsistent findings of fact. The result is that virtually every third-party case could be litigated as a same-party case.

40 The Appellants challenged this finding by the Judge, and, in doing so, relied heavily on an extract from *McGregor* (at para 17-019) in support of their case. This particular extract referred, in particular, to two English decisions, *viz*, *Collen v Wright* (1858) 8 E & B 647 ("*Collen*") and *Hammond v Bussey* (1888) 20 QBD 79 ("*Hammond*"), which were said to have "established the law on costs as damages", with the facts of the cases showing "how sensible the courts have been" (see *McGregor* at para 17-019). Looked at in this light, it would be apposite to examine these two cases more closely.

41 In *Collen*, the plaintiff brought a claim against an agent who had purportedly entered, on behalf of his principal, into a lease agreement with the plaintiff. The plaintiff had, in previous proceedings, brought an action against the principal but failed because of the lack of actual authority as between the principal and the agent. The plaintiff then brought a subsequent action against the agent, claiming, *inter alia*, the costs incurred in his failed action against the principal. He succeeded in this claim.

42 In *Hammond*, the plaintiff was a buyer of coal who later on-sold the coal to a sub-buyer. The terms of both these sales included the same warranties as to the quality of the coal. The sub-buyer was dissatisfied with the quality of the coal and brought proceedings against the plaintiff. The plaintiff wrote to the seller proposing that he should co-operate in the defence and agree to be bound by the verdict and any award of damages, but the seller declined to interfere in the matter. It was later found by the court that the coal was of deficient quality, and the sub-buyer therefore prevailed in his action against the plaintiff. The plaintiff then brought proceedings against the seller for damages which included the costs of defending itself in the previous proceedings. The plaintiff's claim for costs incurred in the previous proceedings as damages in the subsequent proceedings was allowed by the court.

43 Returning to *McGregor*, the learned author, after having analysed the two cases just mentioned, criticised *British Racing* in the following terms (see *McGregor* at para 17-019):

> … Why should the now claimant in these cases be under-compensated in respect of two sets of costs when it is the now defendant's wrong which has involved him in two actions rather than one? There is nothing anomalous in allowing the now claimant, provided he has acted reasonably, to be made whole in relation to the action into which he has been forced by the now defendant's breach of contract or tort. In the one action his loss in costs has to be looked at through the glass of costs but in the other it can be, and should be, looked at through the glass of damages.

We also note the recent English High Court decision of *Herrmann v Withers LLP* [2012] PNLR 28, where Newey J was of the view (at [115]) that the approach that Carnwath J adopted in *British Racing* was "no longer appropriate" (a decision which, not surprisingly, was warmly welcomed in the latest edition of *McGregor* (see Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 19th ed, 2014) at p vii and para 20-011), although the learned author did also observe thus (*ibid* at para 20-011):

> … It is true that Newey J. did not go so far as awarding a full indemnity equivalent to the costs that would have been awarded under the former solicitor and client basis, but I am told that indemnity basis costs were all the claimants had asked him for. Perhaps the neatest solution

would be for the courts to ensure, whenever in these types of case costs reasonably incurred earlier are claimed as damages, that a full indemnity is awarded with no percentage shortfall, however small. We await the Court of Appeal's solution.

44 Both *Colleen* and *Hammond* indeed put forward a compelling case for allowing the plaintiff to claim the full costs of legal fees incurred in the first set of proceedings, since but for the defendant's misconduct in both those cases, the plaintiffs would not have been involved in two sets of legal proceedings so as to be put out of pocket twice for legal costs incurred that are not fully recoverable. Therefore, looked at from the point of view of compensation, the full extent of the losses incurred by the plaintiffs (which includes costs) in the first set of proceedings should be fully recoverable from the defendants in a third-party case.

45 However, notwithstanding the arguments proffered in the preceding paragraph, it is important to bear in mind that the plaintiffs were claiming *unrecovered legal costs* in the previous proceedings. As mentioned above, if the law relating to the recovery of legal costs was such that the successful party would obtain a *full* indemnity for his or her legal costs, the plaintiffs would not suffer any loss for which they could make a claim against the defendants. Indeed, the plaintiffs would be satisfied that their losses have been compensated for. But our law on costs (informed by our policy considerations of enhancing social justice) is simply such that the successful party to litigation will *not* generally get full recovery for his legal expenses.

46 If we take that as the starting point, there is no reason why a third-party case should be treated any differently from a same-party case simply because the plaintiffs can point to another party who was ultimately responsible for the state of affairs which resulted in litigation. The indemnity principle's objective of enhancing access to justice does not differentiate between litigation in that manner. Indeed, there is *no logical basis for making such a differentiation*. *Everyone* who is subject to the law simply takes the risk of becoming embroiled in legal proceedings, and that involves incurring legal costs which are unrecoverable in full. Take, for example, a defendant who is wrongly sued for breach of contract. The defendant will ordinarily be put out of pocket as regards the recovery of legal costs, even though but for the plaintiff who wrongly alleged the breach of contract, the defendant would not have had to incur those legal expenses in the first place. Another example would be the plaintiff who is successful in bringing a claim in tort. Notwithstanding the fact that it was the wrongful act of the tortfeasor in the first place that led to the litigation (and the consequent incurring of legal costs), the plaintiff will be left out of pocket for unrecovered legal costs. Yet, we accept these outcomes as a necessary incidence of using our litigation system as a method of dispute resolution *only* because we recognise at the same time that this shortfall in the recovery of legal costs incurred by the successful litigant is part of the wider policy objective of enhancing access to justice. Looked at in this light, the policy considerations regarding the recovery of costs *must apply in equal measure* to a third-party case as to a same-party case.

47 The Judge was also correct, in our view, in observing that virtually every third-party case could be litigated as a same-party case owing to our broad rules as to joinder of causes of action, joinder of parties, and joinder of third parties (see O 15 and O 16 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed)) ("the rules on joinder"), and to treat a third-party case differently from a same-party case would be *unprincipled*. The Judge's point was that in a same-party case, the plaintiff would only obtain costs on a *standard* basis against the defendant, and, hence, unless the view that costs on a standard basis for a same-party case is challenged, the criticism raised in *McGregor* (see above at [43]) can be *turned on its head* – why should the defendant in the later proceedings have to pay additional damages just because the plaintiff chose not to join him as a party to the earlier proceedings? In addition, we would add that allowing a difference in the outcome depending on whether or not the rules of joinder were employed would be an undesirable policy. The rules on joinder

are meant to encourage all parties to have all related disputes litigated under one set of proceedings in order to save costs and judicial resources. If the *full* measure of costs incurred in previous proceedings were allowed to be recovered *as damages* in subsequent proceedings for *a third-party case*, this might encourage plaintiffs *not* to bring an action against all possible defendants at the outset, thereby *undermining* the joinder procedure. This reasoning is of course premised on the assumption that where all parties are joined in a single action comprising different claims, it is treated as a same-party case and the third-party rule does not apply.

48 In the circumstances, the Judge's view that any distinction between same-party cases and third-party cases was too "fragile and unprincipled" to justify the third-party rule (see Judgment at [228]) was, in our view, persuasive, and reflected the fundamental position that unrecovered legal costs is a *necessary incidence* of litigation under our legal regime costs which is informed by the policy of enhancing access to justice. In this regard, let us elaborate further.

49 Although this was not raised by the Appellants, there is, in fact, a line of first instance English decisions which held that the third-party rule applied to cases involving a single action comprising claims between different parties (see, in particular, *Kasler and Cohen v Slavouski* [1928] 1 KB 78; *Butterworth v Kingsway Motors Ltd* [1954] 1 WLR 1286; and *Bowmaker (Commercial) Ltd v Day* [1965] 1 WLR 1396). This appeared to undermine the very premise of the Judge's (and indeed our) argument relating to joinder, since that simply meant that joinder cases were not treated as same-party cases but as third-party cases instead.

5 0 *However*, these earlier cases were (in turn) contradicted in the more recent English Court of Appeal decision of *Penn v Bristol & West Building Society* [1997] 1 WLR 1356 ("*Penn*"), and a careful analysis of that case is instructive. *Penn* involved a situation where a husband forged his wife's signature in order to commit a mortgage fraud on a house jointly owned by both of them. The wife claimed against the mortgagor building society, and the building society in turn counterclaimed against the husband's solicitor who mistakenly believed that he was also instructed to act for the wife in dealing with the house. The building society's counterclaim was for damages for breach of warranty of authority as well as for the building society's costs of defending the wife's action against them on an indemnity basis. The court held that because there was only one set of proceedings, this did not suffice to allow for costs to be recovered on more than the standard basis. This was notwithstanding the fact that the court appeared to have accepted that greater costs could have been recoverable as damages had a separate action been brought. What is interesting was that Waller LJ (with whom Waite and Staughton LJJ agreed) turned the argument on joinder raised earlier on its head in arriving at his decision; he observed thus (at 1366):

> The other side of the coin, I accept, is that it could be said that if the court does not order indemnity costs where such costs would have been recoverable as damages if a separate action had been brought, that will discourage the bringing of third party and other claims in the one action. That, however, I do not think is a serious risk having regard to the many other benefits of proceeding in one action and having all issues tried at the same time.

51 Therefore, it was apparent that any arguments based on joinder had to be premised on a more fundamental position, which was foreshadowed by Waller LJ in *Penn* as follows (at 1365):

> The problem as it seems to me is that there are competing considerations which do not necessarily lie easily together. The first consideration is that a wrongdoer should indemnify in damages for the wrong done. The second is that when it comes to costs a wrongdoer is only liable to pay on a standard basis unless "it appears to the court to be appropriate to order costs to be taxed on the indemnity basis:" see R.S.C., Ord. 62, r. 3(4). In other words, a wrongdoer is

normally thought to be compensating the person wronged so far as costs are concerned by paying costs on a standard basis, and it takes something out of the norm for there to be an order for indemnity costs.

52 Whilst we note that Waller LJ's reasoning for his refusal to allow costs to be recovered on more than the standard basis appeared to be based on his interpretation of the Rules of the Supreme Court (1965) (UK) (which *McGregor* at para 17-044 criticises as being a "dubious" interpretation), his observations cited in the preceding paragraph that in so far as compensation for wrongdoing is for the recovery of costs, any indemnity for losses suffered *must be subject to the law on costs* was in our view what was material to the issue before us. In this regard, we endorse Waller LJ's point. It is not in doubt that both these aforementioned legal principles are important. However, in such a situation, both principles do not *appear* (at least) to be capable of being reconciled in their entirety. It seems to us that since it is a matter of policy that the actual amount of legal costs incurred will not ordinarily be recoverable by the successful party in litigation, where compensation for legal costs incurred is the subject of a claim in *damages*, such compensation *must be subject to* the law on the recovery of costs (albeit in the manner explained in the following paragraph). It does *not* – and should *not* – matter whether the situation is a same-party case or a third-party case. At the risk of repetition, *any recourse to litigation* comes with the inherent consequence that some legal costs will be unrecovered by the successful party as a result of the indemnity principle's objective of enhancing access to justice.

53 In any event, our view is that what appears (in the preceding paragraph) to be a *conflict* between the law of damages on the one hand and the law on the recovery of costs on the other is more *apparent* than real. Put simply, the claim concerned *is* (as *McGregor* emphasises) one in *damages*. *However*, the *measure* of damages ought, in our view, to be *subject to* the policy considerations embodied within the law on the recovery of *costs*. This is *not* a preference of one *substantive* doctrine over the other. Instead, the law on costs or, more accurately, the policy considerations underlying the law on costs, *informs* the law on damages in the following manner. Where the plaintiff would *only* have been able to claim *costs* based on *the indemnity principle in the previous proceedings, it appears to us to be correct in principle that the plaintiff ought not, in subsequent proceedings, to be able to claim for the unrecovered costs of the previous proceedings – albeit with at least one possible caveat.* Given the myriad of possible fact circumstances, we would not rule out the possibility of situations where the measure of damages awarded by the court might consist of the full costs (*ie*, costs that go beyond the measure awardable pursuant to the indemnity principle). In the nature of things (and given the need to give effect to the policy considerations underlying the law on costs), we would think that such instances *would be exceptionally rare (if they in fact exist at all)*. However, as this issue does not arise in the context of the present appeals, we will render a definitive pronouncement when it arises directly for decision. We would simply clarify, in the context of the present proceedings, that, to the extent that the law laid down in *British* Racing is taken to wholly preclude recovery of the costs of previous proceedings in a subsequent claim in damages, this may be too categorical an approach to adopt when we consider that we are dealing with an area of law where judicial discretion is critical in achieving a fair and just outcome on each particular set of facts.

54 For clarity, we should point out at this juncture that there is also a *further constraint* on *even mounting a subsequent action in the first place* for recovery of costs – where to permit the subsequent proceedings would be to sanction what is in effect *an abuse of process*. It is important to note, in this regard, that much will depend on *the precise facts* concerned. Indeed, the *facts* of *this* case were such as *to result in an abuse of process* for the reasons which we elaborate upon in more detail below in our analysis of Issue 2 (at [62]–[68]).

55 It remains for us to clarify further that the approach we have proposed in the present case (see above at [53] and below at [59]) is an apparent departure from the earlier decision of this court in *Ganesan Carlose & Partners v Lee Siew Chun* [1995] 1 SLR(R) 358 ("*Ganesan Carlose*"). That case was similar to *Penn* inasmuch as it involved a single action comprising claims between different parties and also involved a mortgage fraud. The plaintiff was a mother who was tricked by her son into mortgaging her home to a bank so that credit facilities could be extended by the bank to her son's company. The plaintiff was supposed to sign the mortgage documents before a legal assistant of a law firm but this was not done owing to the negligence of the legal assistant. Instead, the son simply took the mortgage document away from the legal assistant and returned with it signed. The plaintiff sued, in a single action, her son's company, the bank, as well as the law firm. The plaintiff's claim against the bank to set aside the mortgage was dismissed, but her claim against the law firm was allowed in part. At the assessment of damages stage, the plaintiff claimed, *inter alia*, the legal costs and expenses incurred by her in suing the company and the bank.

56 The court in *Ganesan Carlose* did not allow the plaintiff's claim for reasons premised on abuse of process. The court held that an order for costs was made for the law firm to pay costs to the plaintiff which included all costs payable by the plaintiff to the bank (*ie*, a *Bullock* order (see the English Court of Appeal decision of *Bullock v The London General Omnibus Company* [1907] 1 KB 264)), but there was *no order for the law firm to pay the plaintiff's own costs of suing the bank*. Therefore, the issue of the plaintiff's costs in suing the company and the bank could not be reopened, and the recourse for the plaintiff if she thought that there was something amiss in the cost orders made was to have resorted to the liberty to apply clause in the order of court. The plaintiff should not "be entitled to a second bite under the guise of damages" (see *Ganesan Carlose* at [20]).

57 However, in arriving at that conclusion, the court in *Ganesan Carlose* (like the court in *Penn*) assumed, without much discussion, the validity of the third-party rule. In this regard, it should be noted that there were two earlier English Court of Appeal decisions (*viz*, *The Tiburon* [1992] 2 Lloyd's Rep 26 and *Lonrho plc v Fayed (No 5)* [1993] 1 WLR 1489) where it was held (albeit by way of *obiter dicta*) that claims as damages for the costs of previous proceedings would be limited only to costs on a standard basis even for third-party cases (see also *McGregor* at para 17-044). These decisions and *British Racing* were not cited in *Ganesan Carlose*.

58 With respect, we therefore do not think that the statement made by this court in *Ganesan Carlose* citing *Hammond* (at [12]) that, "[i]t is settled law that where as a result of the defendant's wrong the plaintiff has incurred costs in other proceedings the plaintiff may, subject to the rules of remoteness, recover those costs from the defendant as damages", was meant to be a firm endorsement of the third-party rule, and we decline to adopt the third-party rule as stated in *Ganesan Carlose* for the reasons stated above.

59 Let us *summarise* the analysis thus far. Where the plaintiff brings a claim in damages against the defendant for the costs of previous proceedings, the general rule is that the *measure* of the plaintiff's claim would be subject to the policy considerations embodied within the law on costs. This limit is (in accordance with the indemnity principle) costs on the standard basis (or costs on the indemnity basis where appropriate) and applies *both* to the plaintiff in a same-party case and a third-party case – subject (possibly) to the exceptionally rare (and indeed, almost hypothetical) instance where the plaintiff is able to persuade the court that the facts of the case are such that an award of the *full* measure of costs beyond that awardable pursuant to the indemnity principle might be justified (a possible situation which did not arise in the context of the present proceedings and which will be dealt with definitively when it arises directly for decision). In this connection, the effect of *British Racing* (as also recognised by the Judge) should not be taken to constitute *an inflexible bar* to a plaintiff in a third-party case inasmuch as it would proscribe him from recovering any of the costs

incurred in the earlier litigation as damages.

Application to the facts

60 Turning to the facts of *the present case*, we were of the view that the Appellants' claims must fail. That this was so is confirmed by the fact that had the Appellants not made any request to this court in *Ng Eng Ghee (Costs)* and (hence) received no award of costs, they would (on the principles of law set out above) have been in a similar situation to the plaintiff in *Hammond* (*ie*, a third-party case). On the basis of the relevant decisions discussed above, had the Appellants *then* mounted a claim based on an *independent cause of action* (here, premised on an alleged breach of fiduciary duties on the part of the Respondents), it is clear, in our view, that the Appellants (assuming that they could establish a breach of fiduciary duties and could surmount any difficulties with regard to causation) should not have found themselves better off than they found themselves after their request had been considered by this court in *Ng Eng Ghee (Costs)*. Put simply, it is *unlikely* that this court would have awarded the Appellants damages in the quantum that went *beyond costs on the standard basis* (for example, indemnity costs, or a full and literal indemnity) given the facts of the present case. In order for the policy objective of our costs regime (*ie*, enhancing access to justice) not to be undermined, the quantum awarded would have had to reflect accurately the nature of the damage which the Appellants had in fact suffered, and this cannot be different from the recovery of legal costs which they *ought to have received had they been raised before the court in the original proceedings*, *ie*, an amount comprising *what would have amounted to the costs awarded on the standard basis*.

61 Furthermore, the Appellants had, in point of fact, *already* been awarded *costs on a standard basis* in *Ng Eng Ghee (Costs). A fortiori*, no further recovery was possible in light of our analysis above. Their claim in damages for the unrecovered costs of the previous proceedings therefore could not succeed.

Issue 2

62 There was, in fact, a *further* reason as to why this appeal ought to fail *in any event, even assuming that Issue 1 was decided in the Appellants' favour* (which was not the case in light of our decision above). Having *had the opportunity to seek costs* from this court in *Ng Eng Ghee (Costs) and having decided not to avail themselves of that opportunity*, it was, in our view, *an abuse of process* for the Appellants to now raise the issue of costs against the Respondents in the present proceedings (in accordance with the legal principles set out in the Singapore High Court decision of *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 at [51]–[53]). Indeed, as we have already noted, the Appellants made a deliberate choice *not* to seek costs as against the Respondents in their individual capacities before this court in *Ng Eng Ghee (Costs)*. This was notwithstanding the fact that all the Appellants (including the two Appellants who were *non*-parties to *Ng Eng Ghee (CA)*) were allowed to recover costs for the proceedings leading up to *Ng Eng Ghee (CA)*, and were, in fact, awarded costs on a standard basis in *Ng Eng Ghee (Costs)*.

63 We note that the *Appellants* also sought to argue that it was not, in any event, *possible* for them to have been awarded costs against the Respondents as they were *non*-parties. In particular, they relied on the decision of this court in *DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd and another appeal* [2010] 3 SLR 542 ("*DB Trustees*") which they submitted stood for the proposition that two factors ought to be present before the Court will award costs against a non-party which are derived from [30] and [35] of that case:

(a) There must be a close connection between the non-party and the proceedings, such as

where the non-party either funds or controls legal proceedings with the intention of ultimately deriving a benefit from the same.

(b) The non-party must have caused the incurring of costs in the legal proceedings, which may be established by the very same facts which go toward the establishment of the first factor.

64 The Appellants argued that there was no such connection between the Respondents and the previous proceedings as the Respondents had neither funded nor controlled the relevant legal proceedings, and that the Respondents did not cause the incurring of costs.

65 We were *not* persuaded by the Appellants' arguments in this regard for a number of reasons.

66 First, the two factors in *DB Trustees* are by no means conclusive. As pointed out by the Respondents, the award of costs whether as against parties to the proceedings or non-parties is ultimately a matter of the court's discretion. This much was clear from a careful reading of *DB Trustees*, which explained (at [29]) that:

> From [*Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Associated Industrial Finance Pty Ltd, Third Party)* [2004] 1 WLR 2807] and [*Globe Equities Limited v Globe Legal Services Limited* [1999] BLR 232], as well as [*Chin Yoke Choong Bobby v Hong Lam Marine Pte Ltd* [1999] 3 SLR(R) 907], it is clear that *the overarching rule with regard to ordering costs against a non-party in court proceedings is that it must, in the circumstances of the case, be just to do so*. That said, it appears to us that two particular factors, among the myriad of possibly relevant considerations, ought to almost always be present to make it just to award costs against a non-party. *This does not, however, mean that they are indispensable prerequisites that have to be met before a costs order against a non-party can be made*. [emphasis added]

It was clear to us that it was *possible* for costs to have been awarded against the Respondents even if the two factors had not been met so long as it was in the interest of justice to do so. This was especially so in the particular situation of collective sale application disputes where the nature of such applications is that the parties to the dispute might not be as intimately involved in the proceedings as some non-parties who might not fall within the ambit of the two factors. The Respondents in the present appeals are a case in point.

67 Secondly, it was also difficult to accept that the Appellants could on the one hand maintain that the Respondents, as non-parties in the earlier proceedings, caused their loss in the form of legal costs incurred for the purposes of establishing their claim in equitable compensation, whilst on the other hand take the contradictory position that the Respondents did not cause such loss for the purposes of asking the court to award costs against the Respondents as non-parties.

68 The Appellants could have and, indeed, should have sought costs against the Respondents when they had the opportunity to do so in *Ng Eng Ghee (Costs)*. Having not taken this opportunity, we found that it was an abuse of process for them to now claim as damages the costs of those previous proceedings.

Conclusion

69 For the reasons set out above, we dismissed the appeals, with costs awarded to each of the Respondents in the amount of $30,000 (inclusive of disbursements). The usual consequential orders also applied.