UNAPPROVED

THE COURT OF APPEAL
CIVIL

Neutral Citation Number: [2020] IECA 90
Record Number: 2018/000457
High Court Record Number: 2016/7487P

Haughton J.
Murray J.
Collins J.

BETWEEN/

DES DONEGAN, ALAN O'CONNELL

AND JAMES DORAN

PLAINTIFFS/RESPONDENTS

- AND -

DENIS KENNY

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Robert Haughton delivered on the 8th day of April 2020

Introduction

1. This is an appeal from the judgment of Twomey J. delivered on 31 October 2018, and his order dated 7 November 2018 (perfected 8 November 2018) in specific performance proceedings where the appellant failed to complete a purchase and ultimately the subject property was resold by the respondent vendors at a lower price. The High Court ordered recovery by the respondents against the appellant of a sum of €248,871 by way of damages and interest. Although a number of issues are raised in the appeal, of central importance are two issues: (1) whether the respondents took reasonable steps to minimise their losses in the resale of the property, and (2) whether the trial judge was correct in his use of the interest rate of 10% stipulated in the contract of sale as the "metric" for assessing damages arising from the delay in receiving the proceeds of sale occasioned by the necessity to resale.

Background

2. By Agreement for Sale dated 20 May 2016 (the "Contract") the respondents agreed to sell, and the appellant agreed to purchase Block 20A, Beckett Way, Park West Business Park, Gallanstown, Dublin 12 ("the Property") at a price of €1,450,000 ("agreed sale price"). The Contract was signed by the appellant, albeit that it listed a Mr. Barry Cogan as the purchaser. The Closing Date was to be "four weeks from the date hereof" i.e., 17 June 2016. The Interest Rate stipulated under the Contract on page 2 was 10% per annum. The deposit, originally intended to be €145,000, was reduced to €74,000. The Law Society General Conditions of Sale (2009 Edition) applied to the sale.

3. Special condition 8 provided –

> "8. Mortgage
>
> The property in sale is charged to AIB bank Plc. On or prior to completion the Vendors' solicitor shall furnish the Purchaser's solicitor a letter from AIB bank confirming the proceeds that they require in order to release the property in sale from

its security. The Vendors' solicitor shall undertake to discharge the charges over the said property out of the proceeds of sale and to furnish the Purchaser's solicitor with evidence of eDischarges or alternatively a vacates or vacated charges as soon as same comes to hand after completion."

4. The appellant failed to complete the purchase on the agreed closing date, and a Completion Notice was issued on 20 June 2016 by the respondents' solicitors. The time for completion was further extended by agreement beyond this date, and ultimately on 31 August 2016, the respondents extended the closing date for an additional two-week period which expired on 14 September 2016.

The proceedings and resale

5. These proceedings were initiated by Plenary Summons issued on 17 August 2016, seeking specific performance of the Contract, and/or damages in lieu of specific performance. The case was entered into the Commercial Court on 5 December 2016.

6. Subsequently, as the sale was never completed, the deposit of €74,000 was forfeited by the respondents under General Condition 41(a), and the Property was subsequently resold by them to an unrelated third party, Trinitymount Limited ("Trinitymount") for a sum of €1,300,000. That sale was agreed on 30 August 2017 and closed on 13 September 2017.

7. These proceedings thereafter were amended and continued as a claim for damages for breach of contract and a declaration that the respondents were entitled to retain the deposit for their own use. In addition to retention of the deposit the respondents claimed: -

(A) €76,000 calculated as the shortfall between the agreed sale price (€1.45M) and the resale price (€1.3M), being €150,000 less the forfeited deposit of €74,000 giving a net figure of €76,000.

(B) Interest of 10% on the said sum of €76,000.

(C) By way of damages, interest at 10% on the amount of the agreed sale price *not* received by the plaintiffs on the closing date – in the sum of €1.376M – for the period of delay from the closing date of 20 June 2016 up to completion of the resale on 13 September 2017 (a figure calculated to be €171,151.40).

(D) Additional costs allegedly incurred by the respondents as a result of the delay in closing between June 2016 and September 2017 made up of rates (€4,267.24), insurance (€2,131.51) and a service charge (€8,016.47), making a total of €14,415.22

This last head of claim was not allowed by the trial judge on the basis that during the period of delay, the vendor had the benefit of rent from the property and to award such sums would be to put the vendors in a better position, than if the appellant had performed the Contract and amount to double compensation. This element of the decision is not the subject matter of any cross-appeal.

8. The matter was heard in the High Court on 16 October 2018 and 26 October 2018. The appellant appeared in person.. Three witnesses were called for the plaintiffs – the first named respondent Mr. Donegan, Mr. Milan Schuster, a solicitor in Adams Law the firm representing the respondents, and Mr. Pat Riney, a valuer in Orchard Real Estate Alliance, retained by the respondents both in respect of the original sale and on the resale. While this court did not have the benefit of Transcripts, it did have copies of the Witness Statements of these three witnesses, and counsel for the respondent confirmed that these witness statements were adopted as part of their evidence by each of these witnesses. The appellant did not disagree with that statement.

9. The High Court had to deal with a number of defences that do not arise on this appeal. The defences raised by the appellant that are germane to the appeal are succinctly set out in para. 10 of the judgment: -

"10. … He also claims that for the plaintiffs to recover the difference between the Actual Sale Price and the Agreed Sale Price, the Property should have been sold within 12 months of the Agreed Closing Date of 17th June, 2016, as required by Condition 41(a) of the Contract, which he says did not occur. He also claims that the interest rate of 10% under the Contract, which the plaintiffs are seeking on the sum of €1.45 million (but this Court calculates should be €1,376,000 once account is taken of the deposit) for the one year and the three month delay between the Agreed Closing Date and the Actual Closing Date (and the same rate of 10% on the shortfall of €76,000 thereafter) is not enforceable as he says it is an unconscionable rate of interest."

10. General Condition 41(a) is relied upon by the respondents and states –

"If the purchaser shall fail in any material respect to comply with any of the Conditions, the Vendor (without prejudice to any rights or remedies available to him at law or in equity) shall be entitled to forfeit the deposit and to such purpose unilaterally to direct his Solicitor or other stakeholder to release same to him AND the Vendor shall be at liberty (without being obliged to tender an Assurance) to resell the Subject Property, with or without notice to the Purchaser, either by public auction or private treaty. In the event of the Vendor reselling the Subject Property within one year after the Closing Date (or within one year computed from the expiration of any period by which the closing may have been extended pursuant to Condition 40) the deficiency (if any) arising on such re-sale and all costs and expenses attending the same or on any attempted re-sale shall (without prejudice to such damages to which the Vendor shall otherwise be entitled) be made good to the Vendor by the Purchaser, who shall be allowed to credit against same for the deposit so forfeited. Any increase

in the price obtained by the Vendor on any re-sale, whenever effected, shall belong to the Vendor."

11. It was the appellant's contention at trial that the resale had not taken place within the one year provided within General Condition 41(a) and therefore there was no entitlement to claim the shortfall.

12. As to the respondents' contention at trial that the rate of interest of 10%, being the stipulated interest rate in the Contract, should apply to the calculation of interest on the outstanding purchase monies up to the date that those monies were received on completion of the resale, the respondents relied in the High Court on General Condition 25(a), either directly or indirectly, as setting the appropriate rate. That condition provides: -

"25(a)If by reason of any default on the part of the Purchaser, the purchase shall not have been completed on or before the later of (a) the Closing Date or (b) such subsequent date whereafter delay in completing shall not be attributable to default on the part of the Vendor. (i)the Purchaser shall pay interest to the Vendor on the balance of the Purchase Price remaining unpaid at the Stipulated Interest Rate for the period between the Closing Date (or as the case may be such subsequent date as aforesaid) and the date of actual completion of the Sale. Such interest shall accrue from day to day and shall be payable before and after any judgment

and

(ii) the Vendor shall in addition to being entitled to receive such interest, have the right to take the rents and profits less the outgoings of the Subject Property up to the date of the actual completion of the Sale."

13. The appellant had contested that that rate was applicable, or alternatively argued that it was unconscionable.

Decision in the High Court

14. Having found that the Completion Notice was validly served on the appellant, the trial judge made the following findings in relation to the key issues: -

A. The issue of sale outside the one-year period mentioned in General Condition 41(a) is covered in paragraphs 26-28 of his judgment where he rejects the defence based on a failure to resell the property within the one-year period, finding –

> "27… This is because the reference in the condition, to a particular right on the part of the vendor if the property is re-sold within the twelve-month period, does not mean that the normal rules for damages arising from a breach of contract do not apply if the property is sold outside of that twelve-month period. Indeed, this is expressly recognised in the condition, since it states that the reference to the vendor's entitlement to recover the deficiency on a sale within 12 months is stated to be '*without prejudice to such damages to which the Vendor shall otherwise be entitled*'. The damages to which a vendor is otherwise entitled is a reference to the normal rules for the calculation of damages for breach of contract. The principal feature of these rules was noted by Clarke J. (as he then was) in *Kelleher v O'Connor* [2010] IEHC 313 at para. 9.1, as; -
>
> 'It is important to start with the fundamental proposition that, in almost all cases, the principal function of the award of damages is to seek to put the party concerned back into the position in which they would have been had the relevant wrongdoing not occurred.'"

This conclusion was reached based on "the fact that the Property might have been re-sold to Trinitymount Limited outside the period of twelve months". However

the trial judge made no specific finding as to whether or not the property was in fact resold outside the twelve-month period.

B. As part of the loss occasioned by the appellant's breach of contract, the respondents were entitled to an award of the sum of €76,000 being the net difference, after forfeiture of the deposit of €74,000, between the agreed sale price and the resale price of €1.3M.

C. The trial judge rejected the contention that the respondents had failed to mitigate their loss by, as was alleged by the appellant, selling the Property at an undervalue i.e., at a price of €150,000 less than the agreed sale price. The trial judge took into account that the respondents were under pressure from their lender AIB to sell the property, that no expert valuation evidence had been provided by the appellant, that €1.3M was an undervalue in September 2017, and that after the appellant failed to complete the respondents' auctioneer it did seek buyers for the property at the price of €1.45M but was unsuccessful, leading ultimately to the negotiated sale to Trinitymount for €1.3M. In reaching this conclusion, the trial judge in his judgment cited and applied the approach noted by the Court of Appeal in *Hyland v Dundalk Racing* [2017] IECA 172, at paragraph 78 (joint judgment of Finlay Geoghegan J. and Irvine J.) when seeking to find another purchaser that –

> "the standard by which they are to be judged is not an unduly harsh one because […] it is the defendant, as wrongdoer, who has put the claimant into that difficult position".

D. As to the 10% interest claim the trial judge made a number of relevant findings. Firstly, on the authority of *O'Donnell v Truck and Machinery Sales Limited* [1998] 4 IR 191 (the judgment of Barron J. in the Supreme Court, at p. 2018) he

found that penalty interest rates are permissible in contracts for the sale of land. Secondly he found that General Condition 25(a) has the effect of applying interest at the stipulated contractual rate (10%) from the Closing Date until "the date of the actual completion of the Sale", which he found to be "a reference to the sale of the property to the Purchaser under *that* Contract, not to some purchaser under a subsequent Contract". Accordingly it had no application to the appellant who did not complete the sale under the Contract. This was not a finding that was appealed by either party.

E. Notwithstanding this, the trial judge went on to conclude that the rate of 10% interest was the appropriate rate for the court to apply between the Agreed Closing Date, and the date on which the resale was completed, in calculating the loss to the respondents arising from the appellant's failure to complete the sale. His reasoning for this will be referred to later in this judgment.

F. As to interest on the shortfall of €76,000 that the High Court awarded as part of the damages claimed, he found that the 10% rate did not apply because Clause 25(a) dealt only with interest for the period up until completion of the sale of the property, and that there was no agreed interest rate in respect of damages that might be assessed. Accordingly he applied the Courts Act interest rate of 2% for a 413 day period from 13 September 2017 to the date of judgment, being a sum of €1,719.87. This finding was not the subject of any Ground of Appeal.

G. As to the claim by the respondents for additional costs arising because of a part vacancy of the property – the insurance, service charges and rates amounting to €14,415.22 - the trial judge rejected this claim on the basis that during the period in respect of these expenses were incurred, the respondents were in possession

and entitled to receipt of the rent. As mentioned earlier there was no cross-appeal in respect of this finding.

Grounds of appeal

15. The appellant appealed the entirety of the High Court decision on Grounds of Appeal (a) – (g) as follows: -

"(a) The learned trial judge erred in determining that the respondents were entitled to recover the deficiency in the resale price paid for the property the subject matter of these proceedings.

(b) The learned trial judge erred in failing to correctly interpret and apply the provisions of the Law Society General Condition of Sale, Condition 41(a) which limited the right to recover the deficiency in the resale price to a one year period.

(c) The learned trial judge erred in concluding that there had been no failure to mitigate losses on the part of the respondents.

(d) The learned trial judge erred in conducting the interest rate the respondents were entitled to recover under the contract of 10% was not penal in the circumstances.

(e) The learned trial judge erred in failing to apply the relevant principles on breach of contract. In particular, the learned trial judge erred in awarding an sum of damages (including interest) which put the respondents in a better position then they would have been if the contract had been performed.

(f) The learned trial judge erred in awarding a total sum of €172,871.27 in respect of interest in circumstances where the respondents had put forward evidence of

the costs incurred as a result of the appellant failing to close the sale which amounted to €14,415.22.

(g) The learned trial judge erred in failing to apply the appropriate metric to assess damages in the circumstances."

16. The respondents' Grounds of Opposition traverse the Grounds of Appeal and plead that the trial judge made his decisions based on uncontroverted evidence given on behalf of the respondents. It was also noted that the appellant failed to challenge the issue of calculation of the figures in respect of the damages award prior to the trial judge making the final order on 7 November 2018 as the appellant did not attend court on 31 October 2018 (or, as the Order notes, on the adjourned date of 7 November 2018).

17. I have also considered the written legal submissions of the appellant and the replying submissions from the respondents. The appellant attended this court in person but made limited oral submissions. The respondents were represented by counsel. I propose to address the Grounds of Appeal in turn.

Grounds (a) and (b) – *Shortfall claim/Resale after one year period*

18. These can be addressed together as they largely cover the same point relating to the alleged failure to resell the Property within the one-year period, and the consequences of such a failure having regard to the terms of Condition 41(a).

19. The first issue that arises is whether, as a matter of fact, the resale took place within the one-year period – a matter on which the trial judge made no specific finding. This period commences "after the Closing Date (or within one year computed from the expiration of any period by which the closing may have been extended pursuant to Condition 40)". Condition 40 allows the parties, where a Completion Notice has been served, to extend the term of the Notice for one or more specified periods of time whereupon the notice is deemed to expire on

the last day of such extended period or periods, and time is of the essence in relation to such extended period(s).

20. The undisputed evidence was that the Completion Notice was served on 20 June 2016 and allowed 28 days for completion, which expired on 17 July 2016. It was extended by agreement on successive occasions, and the last such extension was for a two-week period commencing on 31 August 2016 and ending on 14 September 2016.

21. Accordingly, the one-year period under Condition 41(a) commenced on 15 September 2016 and ended on 14 September 2017.

22. The respondents' agreement to resell the Property to Trinitymount was entered into on 30 August 2017 and that sale closed on 13 September 2017. Although the trial judge made no finding, in my view this undisputed evidence compels a finding that the property was in fact resold within one year after the extended Closing Date. It follows that the second limb of General Condition 41(a) came into play and the respondents were entitled to have the deficiency arising on the resale, and all costs and expenses attending same to "be made good to the Vendor by the Purchaser, who shall be allowed credit against same for the deposit so forfeited".

23. Even if this were not the case I would have agreed with the trial judge's analysis at paras. 26 – 28 of his judgment. The second and third sentences of General Condition 41(a) deal expressly with the position that is to prevail in the event that the property is resold within the one-year period, and do so "without prejudice to such damages to which the Vendor shall otherwise be entitled", which can only be a reference to the damages that a vendor is entitled to at common law for breach of contract in the event that a purchaser fails to complete in accordance with their contractual obligations. Absent this express clause, which governs the matter in the event of a sale within the one-year period, there would be an entitlement to damages designed to put the vendors back into the position in which they would have been

but for the relevant wrongdoing, and those damages would generally include the deficiency arising on resale, but subject to other general principles, including the requirement that a claimant mitigate their losses. It is also notable that the last sentence in General Condition 41(a) – which entitles the vendor on any resale to retain any "increase in price", applies "whenever [the resale is] effected". Thus the Condition makes it expressly clear that the vendor is entitled to forfeit the deposit, and to retain any increase in price on resale. General Condition 41(a), when read as a whole, is clearly drafted to benefit the vendor in the event that the sale falls through due to the purchaser's failure to comply with a contract.

Ground (c) – *Failure to mitigate loss*

24. Undoubtedly the respondents had a duty to mitigate their losses following on the appellant's failure to complete the Contract. In *Contract Law* (McDermott P.A and McDermott J., 2nd Edition, (2017) Bloomsbury) the authors introduce the topic of mitigation in the following terms: -

> "**[23.250]** Mitigation of damages is the principle that a plaintiff may not recover losses that could have been avoided by taking reasonable steps after the breach. In other words, the plaintiff cannot recover avoidable losses. The rule is based on notions of fairness and the idea that damages for breach of contract are not generally intended to be punitive. It is also socially desirable to minimise the costs of a civil wrong. The duty to mitigate can also be said to allocate risks fairly, since the plaintiff is usually in the best position to deal with the consequences of a breach of contract. The plaintiff should therefore be prevented from recovering losses that could reasonably have been avoided. These factors have recently been described by Finlay Geoghegan J in the Court of Appeal as 'the public policy considerations core to the concept of mitigation'.

> What is reasonable is a question of fact. The burden of proof is on the defendant to show that the plaintiff could reasonably have avoided a loss or was unreasonable in his conduct. A pragmatic approach is often evident in the case law and the measures that the plaintiff should have taken to mitigate will not be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty."

25. In approaching this issue the trial judge at paragraph 33 of his judgment referred to the decision of this court in *Highland v Dundalk Racing* [2017] IECA 172. There Dundalk Racing brought appeals against three orders of the High Court in favour of bookmakers concerning the operation of the "Pitched Rules" at the newly developed Dundalk Racecourse with the first all-weather racetrack in Ireland. The dispute concerned Dundalk Racing seeking a capital contribution of €8,000 for the allocation of bookmaker's pitches at the racecourse. The bookmaker plaintiffs claimed, successfully, that the Pitch Rules were contractually binding on Dundalk Racing and governed the allocation of pitches, and that Dundalk Racing was in breach of contract, as a result of which the bookmakers were entitled to damages. These were assessed in the High Court and the subject matter of appeals and cross-appeals in the Court of Appeal. The main argument made by Dundalk Racing was that the bookmakers had failed to mitigate their losses. While the facts of that case were different to the instant case, the joint judgment of Finlay Geoghegan and Irvine JJ undertakes an analysis of the duty to mitigate loss which in my view is of general application to claims for damages for breach of contract.

26. The court adopted and applied the principles established in *Waterford Harbour Commissioners v British Rail* [1979] 1 ILRM 296 and *Banco de Portugal v Waterlow & Sons Limited* [1932] AC 452 (*per* Lord McMillan at p. 506), which authorities along with the court's judgment in *Hyland* are footnoted as the basis for the passage from *Contract Law* quoted above. The court also quoted with approval from *Rosbeg Partners Limited v. L.K.*

Shields (a Firm) [2016] IECA 161, where MacMenamin J. sitting as a member of this court stated: -

> "51. Turning then to the question of mitigation, it is true to say that the quantum of recoverable damages may be reduced, if a plaintiff fails to take reasonable steps to mitigate its loss. the duty is '*to take all reasonable steps*', having regard to the circumstances of the case (see the judgment of Hamilton C.J., and Denham J. in *Kelly v. Hennessy* [1995] 3 I.R. 253).
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> 52. Here, again, the trial judge's assessment of the reasonableness of efforts to mitigate is highly relevant. The second principle in *Hay v. O'Grady* is engaged. Where a plaintiff has provided an explanation for a failure to take certain steps to mitigate loss, and the trial judge has accepted that explanation, an appellate court should be slow to overturn that assessment, unless there was no credible evidence to support it. (See judgments of Hamilton C.J. and Denham J. in *Kelly v. Hennessy*). In that authority, the Supreme Court declined to engage in any substantive assessment of the reasonableness of mitigation. The trial judge's findings were based on an acceptance of the plaintiff's evidence, which was sufficient to dispose of that ground of the appeal. It has not been suggested that *Kelly* was erroneously decided, or can be distinguished on the facts.
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> 53. It is well established, that reasonableness of a plaintiff's effort to mitigate is a question of fact, not a question of law (*Payuz v. Saunders* [1919] 2 KB 581; *The Soholt* [1983] 1 Lloyds Rep 605) and *McCord v. Electricity Supply Board* [1980] ILRM p. 153. In general, courts, both here and elsewhere, rarely find it appropriate to interfere with conclusions of a trial judge either based on evidence, or the lack of satisfactory evidence. The onus lies on a defendant (here the appellant) to establish, on the basis of satisfactory evidence, that there was a failure to mitigate."

27. Of particular relevance to the present appeal is firstly that what was reasonable was a question of fact for the trial judge, and secondly that the burden of proof to show that the respondents could have avoided (or reduced) the loss of €150,000 on a resale rested with the appellant. Clearly a trial judge is entitled to take into account all of the evidence that might be relevant, and a party seeking to minimise their losses is entitled to take a pragmatic approach.

28. Finlay Geoghegan and Irvine JJ. In *Hyland*, at paragraph 78 also observed: -

> "While a plaintiff is bound to mitigate his or her loss 'the standard by which they are to be judged is not an unduly harsh one' because, as was stated by Jackson J. in *Shepherd Holmes v Encia Remediation Limited* [2007] EWHC 1710 (TCC), it is the defendant, as wrongdoer who has put the claimant into that difficult position."

This passage was referenced by the trial judge in the instant case at paragraph 33 of his judgment, and establishes the standard by which the respondents' conduct was to be judged.

29. In my view the trial judge correctly identified the obligation on the respondents to mitigate their loss, and he made findings of fact relevant to the issue at paragraphs. 30-33. This court should be slow to overturn those findings of fact. The appellant in his written submissions is critical of the valuation relied on by the purchaser to negotiate down the price and argues that the respondents "failed/refused to re-market the property" and that the shortfall of €150,000 "could have been avoided".

30. Of particular relevance is that the onus was on the appellant but, as the trial judge notes at paragraph 31, he did not call any expert valuation evidence to suggest that, at the time the resale was entered into on 31 August 2017, €1.3M was an undervalue. The appellant did, as he was entitled to, rely on certain valuations that were referred to in evidence called by the respondents, although not all of these were relied on by them. His starting point was the agreed sale price in the Contract (€1.45M), and that was a price that initially Trinitymount

appeared willing to pay. The first of the relevant valuations was a report obtained by Trinitymount from Cushman Wakefield dated 10 April 2017, valuing the property at €1.3M, in respect of which Mr. Schuster, solicitor, in his Witness Statement on behalf of the respondents, stated the following: -

> "36. We wrote to Mr. Tom O'Regan's office [acting for the appellant in the original purchase] on 28th April 2017, advising that the Valuation Report of Cushman Wakefield was seriously flawed in that the valuer failed to take into account that the lease for the second floor, to Clonmel Healthcare, had a rent review that is upward only in nature and not as it is set out in the report as being upwards or downwards. As a result, the rental income value was reduced by €30,000 which impacted on the valuation of the overall building.
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> 37. Following from this, our clients had a Valuation Report carried out by CBRE who valued the premises at the price it was originally on the market for €1,450,000."

31. The appellant relied secondly on the CBRE valuation for €1.45M. Thirdly the appellant was able to point to paragraph 14 of the Witness Statement of Mr. Riney, the valuer who gave evidence on behalf of the respondents. Mr. Riney at paragraphs 12 and 13 of his Witness Statement makes similar comments to those of Mr. Schuster, and then at paragraph 14 states: -

> "In my opinion, a more accurate valuation of the premises would have been in the region of €1.5M".

32. However, both Mr. Schuster and Mr. Riney go on to explain why the resale was ultimately concluded with Trinitymount for €1.3M. Mr. Schuster explains: -

> "38. However, after a considerable amount of time spent trying to sell the property and facilitating the numerous proposed sub-purchasers/purchasers, the Plaintiffs

decided that they had no alternative but to mitigate their losses, and agreed to the sale of the property for the reduced purchase price of €1,300,000.00.

39. We wrote to Amoss solicitors on the 28th July 2017 advising that our client was prepared to sell the property for €1,300,000.00 to their clients, however may only do so with the consent of their lending institution. We had received confirmation that Amoss solicitors were in funds of €535,000.00 and a facility in the sum of €780,000.00 was obtained.

40. We wrote to AIB Bank Plc on the 28th July 2017 advising that the original sale was no longer proceeding and that an offer from an independent third party was received. We advised that the proposed purchaser was a Mr Timothy McSweeney, through an SPV called Trinitymount Limited for the sum of €1,300,000.00, and requested their consent to sell the property at the new purchase price.

41…..

42. I say that AIB Bank Plc wrote to us on the 24th August 2017 and confirmed that the bank would release its charge over the property provided that they received €1,401,146.81 by 28th August 2017. I say that we were advised that interest as and from 28th August 2017 amounted to €119.65 per day."

33. This court did not have the benefit of transcripts of the evidence in the High Court, but were advised by counsel, without demur by the appellant, that he did not undertake any cross-examination as to the time spent and efforts made by or on behalf of the respondents and their professional advisers to sell the property for a figure at or nearer to €1.45M. The trial judge notes at paragraph 32 of his judgment that the respondents –

"…provided evidence from their auctioneer that he sought buyers [for] the property, after the sale to Mr. Kenny did not complete, at the price of €1.45M but was

> unsuccessful and this led to the sale of the property to Trinitymount Limited for €1.3M as they were not willing to pay €1.45M."

He also notes at paragraph 4 of his judgment that the resale on 31 August 2017 occurred "following protracted negotiations". It is also clear from reading Mr. Schuster's Witness Statement that, after the appellant had failed to complete the sale, he and/or his solicitor Mr. Tom O'Regan made efforts to find a substitute purchaser, and indeed on 2 December 2016 Mr. Tom O'Regan wrote to the respondents' solicitors advising him of "a new person who wished to 'step into the purchase' of the Property", and that initially they introduced an offer from Profunder dated 25 November 2016 (this potential purchaser only had a facility for €1M), and later a Mr. Tim McSweeney, with whom there were pre-contract discussions over a period of some months on the basis that there would be a sub-sale rather than a resale. It was that interested party that appeared initially willing to purchase for €1.45M, but later, following receipt of the Cushman Wakefield Report of 10 April 2017, reduced the offer to €1.3M. That ultimately resulted in the second sale – but not by way of a sub-sale as the new purchaser required a new contract - and also on the advice of Mr. McSweeney the ultimate purchaser was a SPV namely Trinitymount Limited.

34. The trial judge was also entitled to take into account "[t]hat the plaintiffs were under pressure from AIB to sell the property, which they had purchased for €2.76 million, with funding from AIB, and they were obliged to make up the shortfall to AIB between the €2.76 million purchase price and the sale price, whether €1.3M or €1.45M, when the property was sold." (paragraph 30).

35. In my view it was open to the trial judge, in applying a standard that was not too exacting or "unduly harsh", to find on the facts that the respondents had taken reasonable steps in all the circumstances to mitigate the loss on resale of the property bearing in mind the difficult position in which they found themselves. Although re-marketing to the public at

large and/or a sale by public auction, would have been options, the law did not require that the respondents follow either of those paths – rather their duty was to take reasonable steps in all the circumstances. It is clear that the trial judge did not consider that the appellant had discharged the onus that was on him to show failure to mitigate loss, characterising his claims as "mere assertion". This was a question of fact for the trial judge to decide. It may well be that it would not have taken much evidence for him to have taken a more critical view of the resale process and price achieved, but the appellant's failure to adduce any valuation evidence or cross-examination on the issue arguably left the trial judge with no scope to reach a different conclusion. In my view the trial judge correctly applied the law, and this ground of appeal must fail.

Grounds of Appeal (d)(e) (f) and (g) – *Award of 10% interest on balance of purchase monies*

36. It is convenient to address these issues together. It will be recalled that the Contract stipulated an interest rate of 10% per annum which applied for the purposes of General Condition 25(a). It was not disputed (or appealed) that the trial judge was correct in determining that this rate was not, as a matter of contract, "*directly* applicable to the situation that transpired" because Condition 25(a) only applied to late completion of the Contract by the appellant (paragraphs 39-40 of the judgment). However the appellant argued that the 10% rate should not have been applied indirectly or otherwise as the "appropriate metric" to assess damages arising between the Agreed Closing Date and the date on which the resale to Trinitymount closed, particularly where the respondents put forward evidence of the costs incurred as a result of the appellants failure to close which amounted to €14,415.22; and he argued that it was penal and put the respondents in a better position than they would have been had the Contract been completed.

37. The respondents submitted that the trial judge was correct in his reasoning in determining that the respondents should be put in the same position as if the Contract was completed by the appellant. This reasoning is set out below and examined in more detail later. It was further submitted that the principles applicable to assessing whether rates of interest amount to penalty clauses and are thus unenforceable have no application to contracts for the sale of land, and that the trial judge was correct in his reliance on the *obiter* statement of Barron J. in *O'Donnell v. Truck and Machinery Sales Ltd* [1998] 4 IR. 191 which indicated that a different approach was to be taken in relation to contracts for the sale of land compared to other contracts. Counsel also relied on a recent review of the law on 'penalty clauses' undertaken by McKechnie J in *Launceston Property Finance Limited v. Burke* [2017] IESC 62 in the context of the recent UK Supreme Court decision in *Cavendish Square Holding BV v. Makdesse* [2015] UKSC 67, where that court gave primacy to freedom to contract and favoured an approach of whether a contractual decision "is penal, not whether it is a pre-estimate of loss". McKechnie J at paragraph 43 expressed the view *obiter* that he was "not immediately convinced that any change to the test [genuine pre-estimate of loss] is necessary, nor that the route taken by the UK Supreme Court in necessarily a superior one. I stress that the live debate must be left over…". Thus the respondents appeared to submit that insofar as the 10% rate was that chosen by the parties it was a genuine attempt to pre-estimate loss.

38. Turning to the reasoning of the trial judge for adopting the 10% rate, this commences at paragraph 42:

> "42. First, it is the purpose of this Court to assess what damages or compensation is due to the plaintiffs. In this regard, it is relevant to note that in the High Court case of *Mac A Bhaird v Commissioner of Public Works* [2016] IEHC 630 at para. 53, Baker J

concluded that the interest rate in the Law Society Conditions for a sale of property, amounted to compensation: -

> '53. The claim for interest is a claim for compensation for late closing to be assessed on an agreed formula, and although the general conditions make no reference to 'compensation' the intention of the interest provision is clear. It is to award compensation to the vendor on account of the failure by the purchaser to handover the monies.'

43. Secondly, the reason this Court concludes that it is appropriate to use the 10% rate of interest as the metric for assessing damages is because if the Contract had been performed by Mr. Kenny, albeit late, which he failed to do after the service of the Completion Notice, the plaintiffs would have been entitled to the 10% interest from him.

44. Thirdly, the plaintiffs are entitled to be put in the position they would be in if the Contract had been performed. If it was Mr. Kenny, rather than Trinitymount Limited, that completed the sale on the Actual Closing Date, then there can be no question, but that Mr. Kenny would have been contractually liable to pay the plaintiff's interest of 10% for the period of delay. To put the plaintiffs in the position that they would have been in, therefore, it is appropriate for this Court to assess the damages due to the plaintiffs on the basis of such an interest rate which was actually agreed between the parties to cover a similar eventuality (if Mr. Kenny himself had completed the sale late) but not an identical eventuality (a delayed sale of the property to Trinitymount Limited).

45. Furthermore, and to put the matter another way, 10% was the agreed estimate by both parties (after obtaining legal advice) of the amount of compensation, (to use Baker J's description of the interest provision in Law Society's General Conditions of

Sale) which would be incurred by the plaintiffs by a late completion of the Contract. It was agreed by parties as the rate which should be paid in the event that Mr. Kenny's default caused the delayed completion of the sale (*albeit* that under the terms of Condition 25(a) it is based on the sale proceeding late with Mr. Kenny and not some third party). Nonetheless, this Court believes that it should be reluctant to interfere in the parties' own assessment of the amount of damages which would be incurred by a delayed sale and therefore it should be reluctant to replace that rate with its own interest rate.

46. In this regard, it is also to be noted that in *Mac A Bhaird v Commissioner of Public Works* [2016] IEHC 630 at para.20, Baker J. comments on Condition 25 in the following manner:

> 'general condition 25 is designed and intended by the parties to be one mechanism by which the parties have agreed as a form of remedy in the event of default.'

47. On this basis the Court concludes that it should adopt the *'form of remedy'* negotiated by the parties to assess damages and this Court would therefore conclude that 10% is the appropriate metric to use to calculate the damages to be awarded to the plaintiffs rather than interposing its own interest rate. It does so in the particular circumstances of this case, including the fact that the Actual Closing Date took place within a reasonable period of time of the Agreed Closing Date. This is because it seems to this Court that the delayed completion interest rate of 10% is in all likelihood set at a relatively high rate so as to provide a disincentive to purchasers to delay completing purchases and accordingly it is likely that the parties negotiating that rate expected it to apply for a relatively short time. Although reluctant to interpose a different rate from the one agreed by parties (*albeit* for a similar, but not identical,

> eventuality) there may be situations where the Court might have to do so. For example, if a period of say five years' interest was being claimed, then bearing in mind that the overriding duty of this Court is to put the vendor in the position they would have been in, if the Contract had not been breached, this Court might conclude in those circumstances that five years interest at 10% would put the vendor in a better position than if the Contract had been performed and so conclude that in such a situation 10% was not the appropriate metric to use to assess damages incurred by the vendor in the delayed sale."

The trial judge accordingly awarded interest at 10% on €1.36M from the Agreed Closing Date to the date of completion of the resale, being 454 days – a sum of €171,151.40.

Discussion

39. The starting point in assessing damages for breach of contract is to see what has been agreed between the parties, and this applies equally to contracts for the sale of land, just as it would apply to other contracts.

40. The General Conditions (2009) provide expressly for two situations of breach of contract by the purchaser. The first arises when the purchaser fails to complete on time, and a completion notice is served making time of the essence, (and, as in the instant case, the parties may agree further time extension for closing time still being of the essence), but ultimately the purchaser does complete. Clause 25(a) covers this situation and expressly entitles the vendor to interest on the balance of the purchase monies at the stipulated interest rate – here 10% was stipulated – from the Closing date to the date of actual completion by the purchaser. In addition during this period the vendor is entitled to take the rents and profits, less the outgoings, from the property. Condition 25(a), unlike General Condition 41, does not make any reference to "such damages to which the Vendor shall otherwise be entitled", and

therefore in my view does not leave scope for a vendor to claim other losses e.g. the cost of putting in place bridging finance and any additional interest that that might attract.

41. It may be noted that generally the period to which such interest will apply will be relatively short, perhaps spanning days, or a few weeks if the sale is completed within the 28 days allowed by the Completion Notice. The stipulated interest rate is usually high compared to normal borrowing rates, and is an incentive for closing promptly.

42. It is important to note that this was the situation with which Baker J was concerned in *Mac A Bhaird.* Her comments on interest being "a claim for compensation for late closing" relate only to interest arising under Condition 25(a) which she regarded as the "mechanism by which the parties have agreed as a form of remedy in the event of default". In my view the trial judge erred in applying those comments to the instant case to formulate a 'form of remedy' in circumstances where General Condition 41(a) applies.

43. This leads to the second and very different situation where the purchaser fails to complete at all, even after time is made of the essence by a Completion Notice. This is covered by General Condition 41(a). This entitles the vendor in the first place to forfeit the deposit. This is a significant entitlement, with deposits usually ranging from 5% to 20%, and frequently being agreed at 10%. The amount of a deposit will in many, if not most, sales exceed the costs of sale, leaving the vendor to the good unless there has been a significant reduction in the value of property. It is perfectly possible that the vendor will make a profit from the purchaser's failure to complete, and the law permits this. There is no obligation thereafter for the vendor to resell – the vendor may choose to hold onto the deposit *and* the property. If the vendor does sell within one year then the further provisions in Condition 41(a) entitle recovery of shortfall (after giving credit for the retained deposit). As found by the trial judge, with whom I agree on this point, if the vendor does not sell within the year the vendor can still seek to recover the shortfall as damages to which they are entitled at common

law. Further if the vendor resells at an increased price, whether during the one year period or later, Condition 41(a) expressly allows the vendor to retain that increase. Thus Condition 41(a) is the mechanism that the parties have agreed addresses the failure to complete that occurred in the instant case.

44. Nowhere in Condition 41(a) is there any reference to interest, still less to the stipulated rate under the contract. This must be deliberate. Successive versions of the General Conditions have been developed over time by expert conveyancing committees of the Law Society, and adopted by the Law Society, and were it intended that the balance of purchase monies should attract interest at the stipulated contract rate or any stated rate it can safely be assumed that an express provision would have been built into Condition 41(a). It would also have been open to the parties to vary the contractual position by special condition. Accordingly the trial judge erred in principle in 'forming a remedy' based on the stipulated rate applicable under Condition 25(a) when this was never agreed between the parties and Condition 41(a) contains its own mechanism for compensating the vendor where a purchaser fails to complete.

45. In their written submissions Counsel for the respondents rely on what Clarke J (as he then was) said on the law of damages in *Kelleher v O'Connor* [2010] IEHC 313, in which he found that a solicitor who acted in the purchase of a restaurant was negligent in failing to carry out appropriate pre-contract enquiries with the health authority in relation to compliance with hygiene regulations. Paragraph 31 of the respondents submissions try to justify the adoption of the 10% rate by the trial judge in the instant case by quoting Clarke J:

> "[9.1] It is important to start with the fundamental proposition that, in almost all cases, the principal function of an award of damages is to seek to put the party concerned back into the position in which they would have been had the relevant wrongdoing not occurred. The differences which are identified in the authorities

> concerning the proper approach to the calculation of damages for a tort, on the one hand, or a breach of contract on the other hand, stem from that fundamental proposition. In the case of a tort, the court has to attempt to put the plaintiff back into the position in which that plaintiff would have been had the tort not occurred at all. It is the pre-incident position that the court must look at as a starting point. On the other hand, the wrongdoing which a party sued successfully for breach of contract is liable for, is the failure of that party to comply with its contractual obligations. The position that the court must look at as a starting point is, therefore, the position that should have obtained post-incident in the sense that the court is looking at what would have been the situation had the contract been complied with in accordance with its terms. The court is not, therefore, concerned directly with the position of the aggrieved party pre-contract, but rather what the position of that party post-contract would and should have been had the contract been complied with."

46. In my view this does not advance the respondents' case. Clarke J was concerned with a case in negligence, and his comments on the law of damages in contract should be read in that context. Where he refers to the 'starting point' in contract cases this does not mean that express contract terms that directly bear on the consequences of a breach of contract are to be ignored. Condition 41(a) is one such term. Moreover if the position of the respondents is considered on the basis that the appellant had completed the Contract in accordance with its terms, then it is clear that they would have received the balance of the purchase monies which would immediately have been paid over to AIB to discharge in whole or in part the bank debt charged on the property. No interest, whether at the rate of 10% per annum or otherwise, would have been payable to the respondent if the appellant had completed the Contract in accordance with its terms.

47. It follows that the trial judge's reasoning that 10% interest should apply because this is what the appellant would have paid if he had completed late does not stand up to scrutiny. It also cannot be said that adopting this *form of remedy* puts the respondents "in the position in which they would be in if the Contract had been performed", because this is to ignore the mechanism of Condition 41(a) that applies where the contract has not been performed. It provides for the recovery of damages for any loss, not of interest. For the same reason the trial judge erred in suggesting that applying the 10% rate reflects "the parties' own assessment of the amount of damages which would be incurred by a delayed sale".

48. The trial judge states in paragraph 45 that for the reasons he gave, the court was "reluctant to replace that rate [10%] with its own interest rate." He presumably had in mind the rate which the courts can apply pursuant to s.22 of the Courts Act, 1981, which currently stands at 2%. This indeed was the rate that he applied to the shortfall of €76,000, and in my view correctly. Section 22 provides:

> "22.(1) Where in any proceedings a court orders the payment by any person of a sum of money (which expression includes in this section damages), the judge concerned may, if he thinks fit, also order the payment by the person of interest at the rate per annum standing specified for the time being in section 26 of the Debtors (Ireland) Act, 1840, on the whole or any part of the sum in respect of the whole or any part of the period between the date when the cause of action accrued and the date of the judgment."

49. The subsection only empowers a court to add non-contractual interest when the court *orders a payment*. It was therefore open to the trial judge to add, as he did, interest at 2% to the €76,000 shortfall which he ordered be paid by the appellant to the respondents, covering the period from the date or closing of the resale on 13 September 2017 to the date of his judgment. However the subsection could not be utilised to order interest on the €1.3M

purchase monies which Trinitymount paid to the respondents on the resale, as these were not a payment ordered by the court but rather a payment made by Trinitymount pursuant to its contractual obligation.

Assessing the damages

50. How then should the damages have been assessed? The starting point was General Condition 41(a). As the trial judge observed, when deciding that the resale did not have to take place within the one year period, Condition 41(a) does not exclude the vendor pursuing damages by reference to the normal rules for the calculation of damages for breach of contract because of the bracketed words "(without prejudice to such damages to which the Vendor shall otherwise be entitled)". I cannot identify any reason why that should not apply to General Condition 41(a) in its entirety. Accordingly if the resale is at a price which is so reduced that the vendor is still at a loss even when credit is given for the forfeited deposit – as occurred here - then in my view the vendor in entitled to claim sufficient damages to put him/her "back into the position in which they would have been had the relevant wrongdoing not occurred" – per Clarke J (as he then was) in *Kelleher v O'Connor*. Accordingly the correct approach was to ascertain the respondents' *actual loss* arising from the appellant's failure to complete, viewed as of the date of completion of the resale. When this is ascertained and payment ordered it will put the respondents back into the position in which they would have been had the appellant not defaulted.

51. This was not addressed at all in evidence or argument in the High Court, or even before this court. The case seems to have proceeded, from written submissions to judgment to appeal, on an assumption that the damages should be addressed by an award of interest. Yet *prima facie* the actual loss suffered by the delay between the Agreed Closing Date of 17

June 2016 and the completion of the resale on 13 September 2017 (454 days) is clear from consideration of Special Condition 8 of the Contract. That contains the respondents' solicitor's undertaking to discharge the AIB charges over the property from the proceeds of sale. An identical undertaking is given in Special Condition 8 of the contract for sale to Trinitymount. Thus *prima facie* the actual loss was the additional interest in fact charged by AIB on the sums owed to the bank over that 454 day period.

52. In paragraph 42 of his Witness Statement Mr. Schuster states –

> "I say that AIB Bank Plc wrote to us on the 24th August 2017 and confirmed that the bank would release its charge over the property provided that they received €1,401.146.81 by the 28th August 2017. I say that we were advised that interest as and from 28th August 2017 amounted to €119.65 per day."

In paragraph 24 of his Witness Statement Mr. Donegan states that AIB agreed to release their charge over the property "upon receipt of the sum of €1,401,146.81 which was the total sum due and owing by the Plaintiffs to the bank…on the 30th September 2017, and the security was subsequently released on the 27th November, 2017".

53. This evidence falls short of identifying the principal due as of 17 June 2016 and the interest actually added during the 454 days ending on 13 September 2017: there may have been rate changes or payments against principal or interest (e.g. from rental income) over that period; interest may have been compounded; and there may have been a moratorium on interest. As a result the figure of €119.65 per day may not have been a constant. However assuming for illustrative purposes that it was a constant, then the actual interest accrued over the period would have been 454 x €119.65 which comes to €54,321.10. If there was a moratorium or concessionary rate agreed between the bank and the respondents then the appellant is entitled to the benefit of that because it represents the actual loss and the respondents had a duty to minimise their losses.

54. It will be noted that this illustrative figure is substantially less than sum of €171.151.40 awarded for interest in the High Court. On this basis I would accept the appellant's main argument that the adoption of the 10% interest rate by the trial judge put the respondents "in a better position than they would have been if the contract had been performed", and was, in principle, the wrong approach to assessing damages. As the appellant must succeed on this point it is not necessary to consider the question whether the rate applied by the trial judge should be struck down as penal which was ground (d) in the Notice of Appeal.

55. If the figure for actual loss of interest is awarded as damages, and added to the €76,000 shortfall, and taking into account the €74,000 forfeited deposit, the position is reached where the respondents are, at least theoretically, restored to the position in which they would have been if the Contract had been completed without any default or delay. This does not take into account that during the 454 days the respondents remained in receipt of the rents and profits, but would have had outgoings; this may have resulted in loss but is more likely to have resulted in profit. It also excludes interest arising after 13 September 2017. In principle the respondents should have been able to pay the monies received from Trinitymount to AIB to discharge the mortgage within a day or two of closing on 13 September 2017 (a Sunday), and in light of their duty to minimise losses this should have been done to stop the clock running on the interest.

Conclusion

56. On this basis and for the reasons given I would allow the appeal in part and, by reference to the Order of the High Court I would order as follows:

1) I would vacate the Declaration made "(d) that the rate of 10% interest is applicable to the Contract for Sale for the period between the date that the Contract for Sale

should have closed up until the Contract for Sale actually closed with the third party" and would substitute therefor the following Declaration:

> "(d) that in addition to the sums to which the Plaintiffs are entitled by virtue of Condition 41(a) the Plaintiffs are entitled to recover as actual loss the interest that accrued in respect of the relevant borrowing from AIB for the period of 454 days from 17 June 2016 when the Contract for Sale should have closed to 13 September 2017 when the Contract for Sale with the third party actually closed as damages for breach of contract".

2) In all other respects I would affirm the Declarations made in the High Court.

3) I would vacate the Order that the Plaintiffs do recover as part of the damages -

"(2) Interest in the amount of €171,151.40, being interest at the rate of 10% per annum on the amount of the agreed sales price not received by the Plaintiffs on the agreed closing date (the sum of €1.376 million) for the period prior to the completion of the sale (i.e. being the period from 17th June 2016 – 13th September 2017, a total of 454 days)"

and I would substitute therefor –

> "(2) The actual interest that accrued in respect of the relevant borrowing by the Plaintiffs from AIB for the period of 454 days from 17 June 2016 when the Contract for Sale should have closed to 13 September 2017 when the Contract for Sale with the third party actually closed, in such sum as maybe agreed or in default of agreement as be ascertained by the Court."

4) Consequently I would delete the words "in the sum of €248,871.27" from that part of the order that reads "IT IS HEREBY ORDERED that the Plaintiffs do recover from the Second Named Defendant damages in the sum of €248,871.27 made up as follows:",

5) I would affirm the orders at (1) and (3) for recovery by the Plaintiffs of the sums €76,000 and €1,719.87 respectively.

6) I would postpone making any orders in respect of costs in the High Court or this court pending hearing further argument.

57. It would be a singular waste of time and resources, both for the parties and the courts, if this court were at this point to remit the matter to the High Court simply to ascertain the actual interest that accrued on the AIB debt over the relevant 454 days. In the present appeal this should be resorted to only if there is a factual dispute that cannot be resolved by agreement in this court.

58. I would therefore direct that within 28 days the respondents should swear and deliver an affidavit setting out and vouching details of the relevant account(s) for the 454 day period of 17 June 2016 to 13 September 2017 which resulted in AIB's letter of 24 August 2017 to Adams Law with the figures identified in paragraph 42 of Mr. Schuster's Witness Statement, or alternatively file and deliver an affidavit from AIB with the same information. This affidavit should be furnished to the appellant with a net figure which he should be asked to agree in substitution for the interest figure of €171,151.40 awarded in the High Court at paragraph (2) of the order. The matter should then be relisted before this court not later than two months from the date of delivery of this judgment for final orders and to address any questions of costs.

As this judgment is being delivered electronically, Murray and Collins JJ. have indicated their agreement with it.