Unapproved **No Redactions Needed**

THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 56

Court of Appeal Record Number: 2018/457

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

SUPPLEMENTAL JUDGMENT of Mr. Justice Haughton delivered on the 25th day of February 2021

Introduction

1. This judgment is supplemental to the judgment which I delivered herein on 8 April 2020 ("the Principal Judgment"), with which Murray and Collins JJ. agreed. That judgment left over for further consideration, an issue of the interest (if any) to which the respondents might be entitled, and all questions of costs in the High Court (other than costs of the counterclaim which was dismissed with no order as to costs), and in this court. This supplemental judgment addresses those issues and should be read in conjunction with the Principal Judgment.

2. It will be recalled that these are specific performance proceedings in which the appellant ("Mr. Kenny") entered into an Agreement for Sale dated 20 May 2016 for the purchase of Block 20A Beckett Way, Parkwest Business Park, Gallanstown, Dublin 12 ("Block 20A") at a price of €1,450,000. Mr. Kenny failed to complete the purchase, and the property was resold by the respondents for €1,300,000, and that sale closed on 13 September 2017. As a result of Mr. Kenny's default he forfeited a deposit of €74,000 under the terms of the Agreement for Sale.

3. In the High Court the respondents were awarded –

(a) A Declaration that they were entitled to forfeit the deposit;

(b) €76,000, calculated as the shortfall between the agreed sale price (€1.45M) and the resale price (€1.3M), being €150,000 less credit for the forfeited deposit of €74,000;

(c) interest at 10% (being the contractual rate) on the said sum of €76,000; and

(d) by way of damages, interest at 10% on the amount of the agreed sale price *not* received by the respondents on the closing date (17 June 2016) – in the sum of €1.376M – for a period of 454 days until completion of the resale on 13 September 2017: a figure calculated to be €171,151.40.

4. Further claims did not succeed in the High Court: additional costs allegedly incurred by the respondents as a result of the delay arising before resale under the headings of Rates, Insurance, and External Service Charges in respect of Block 20A, totalling €14,415.22, were disallowed by the trial judge.

5. In the Principal Judgment this court found that there was no basis in law or in fact for the trial judge to apply a rate of 10% per annum on the amount of the agreed sales price not received by the respondents on the agreed closing date for the period of 454 days up to the date of completion of the resale. However, at paragraph 43 this court agreed with the trial judge to this extent, that "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"

6. As to how these damages should be assessed, this is addressed at paragraph 50 – 51:

> "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."

7. On this basis, and for pragmatic reasons given in paragraph 57 of the principal judgment, this court sought to address the damages, and for that purpose gave the following direction: -

"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, [which referred to AIB advising of interest from 28 August 2017 amounting to €119.65 per day] 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."

8. As is clear from what follows, there was considerable delay on the part of the respondents in complying with these and subsequent directions, and this has some relevance to my decision on the residual issues.

The Affidavit Evidence

9. Although the Principal Judgment was delivered on 8 April 2020, the first affidavit on behalf of the respondent was not filed until 15 July 2020, some two months late. This affidavit was sworn by Mr. Des Donegan, the first named respondent, on 9 July 2020. No leave of this court for late filing was sought, and the affidavit contains no explanation as to why it was sworn and filed so late, but the lockdown due to the Covid-19 pandemic was perhaps a factor.

10. In his affidavit Mr. Donegan describes himself as a businessman (it later transpires that he is a working accountant), and says he makes the affidavit on behalf of the respondents, collectively known as the "Killeen Partnership". He deposes that the Killeen

Partnership originally obtained a loan on 1 December 1999 ("the First Facility") from AIB in the sum of IR£1,772,000 to finance the purchase of Block 20A, an office building. The First Facility was pre-secured by a legal mortgage in favour of AIB, and one of the special conditions requires "rental income to be mandated to current account at AIB, 219 Crumlin Road." The First Facility was to be reduced to IR£860,000 over 13 years by way of quarterly repayments of IR£39,000, and the interest rate for the first three years was fixed at a compound rate of 6.4%.

11. The First Facility was restructured by a replacement facility dated 28 November 2016 ("the Second Facility"), reference 10540455-2, which was drawn down on 1 February 2017, at which time the bank's reference changed to BBIBB 01170320004. The Second Facility is for €1,390,624. Its purpose was to restructure the original funding for the purchase of Block 20A pending resale. The rate of interest is –

> "The Bank's Market Relative rate of interest (defined in clause 5.3.2 of the General Terms and Conditions) plus a margin of 3.5% per annum (the "Margin") and each Interest Period (defined below) will be one month(s), (unless otherwise agreed between you and the Bank in writing)."

The Second Facility is repayable on demand, but without prejudice to that provision is interest only for a period of 12 months from the "Effective Date", which appears to have been 1 February 2017, and payable in arrears on the last day of each month. The Second Facility was made in contemplation of the disposal of Block 20A, and further provided under "Repayment" that during the 12 month period "you will make repayments against the amounts due under this Facility from the sales proceeds of the Property". It set an "Asset Disposal Target" of €1,450,000. It was supported by the existing security, i.e., the legal mortgage of Block 20A as well as fixed charges from the respondents over funds held in two

other identified accounts. In Financial Covenant 5.2.2 it was provided that "all Rental income will be applied to AIB account number 931020-15881057".

12. Mr. Donegan sets out the interest which he avers was charged on foot of the First Facility from 17 June 2016 to 1 February 2017, and on foot of the Second Facility from 2 February 2017 to 14 September 2017 in paras 8 and 9 of his affidavit: -

> "8. I say that the loan balance of the First Loan Facility with AIB Bank Plc on 17th June 2016 was €1,395,916.96. The interest charged from 17th June 2016 to 1st February 2017 was charged quarterly in arrears in accordance with the First Loan Facility and calculated as follows: -
>
> **Interest Charged**
>
> Interest accrued for period 16.06.2016 – 16.09.2016
>
> was €4,826.01 (92 days) or €52.4566304 per day
>
> Interest accrued for period 17.06.2016 – 16.09.2016
>
> | | |
> |---|---|
> | 91 days x €52.4566304 per day | €4,773.55 |
> | Interest accrued for period 17.09.2016 – 16.12.2016 | €4,768.44 |
> | Interest accrued for period 17.12.2016 – 01.02.2017 | €2,523.17 |
> | **Total** | **€12,065.16** |
>
> 9. The closing balance of the First Loan Facility on 1st February 2017 was €1,397,916.36 which was refinanced in the Second Loan Facility for the same amount with the same lending institution. The interest charged on the restructured

loan was charged monthly in arrears from 2nd February 2017 to 14th September 2017 amounted to €26,908.46 and is set out as follows:-

Interest Charged

01.03.2017	€3,349.02
03.04.2017	€3,948.33
02.05.2017	€3,467.52
02.06.2017	€3,706.66
03.07.2017	€3,705.47
01.08.2017	€3,467.52
01.09.2017	€3,709.04
14.09.2017	€1,554.90
Total	**€26,908.46**"

13. Mr. Donegan avers that the loan facility was redeemed in full on 14 September 2017 following completion of the sale to Trinitymount. He exhibits at "DD3" AIB Bank Loan Account Statements for account no. 015881131 showing the following interest charges: -

16 September 2016	€4,826.01
16 December 2016	€4,768.44

1 February 2017	€2,523.17
Total:	€12,117.62

It will be seen that the first of these interest charges is greater than the figure mentioned in the later part of para. 8 of the affidavit, and results in an overall total that is some €52 greater.

14. Also in exhibit "DD3" is a copy letter dated 21 May 2020 from AIB Bank Centre to the respondents, in relation to account reference BBIBB 01170320004, effective from 1st February 2017. This document does not have the appearance of a regular statement, and the timing of its issue shows that it was obtained *after* the Principal Judgment, presumably for the purpose of establishing interest actually charged to that account for the purposes of the respondents' interest claim. This shows an opening debit of €1,397,916.36 DR, and some eight interest debits totalling €26,908.46 (as referred to in para. 9 of Mr. Donegan's affidavit). This statement shows that a principal repayment of €659,957.26 was made on 5 September 2017, and a further principal repayment of €737,959.10 was made on 18 September 2017, leaving a zero balance.

15. At para. 11 of his affidavit Mr. Donegan avers that the Killeen Partnership only paid interest on the loans during the relevant 454 day period, and that the total interest accrued, when the two figures are added together, is €38,973.62. He then avers: -

> "12. I say that the Killeen Partnership paid AIB Bank Plc €1,401,146.81 in discharge of their loan facility, which the Plaintiff's/Respondent's cleared in full from the net sales proceeds of the sale of the property €1,269,131.00 (€1,300,000.00) (less the Plaintiff's/Respondent's legal costs of €16,109.00 and sale agent's costs of €14,760.00) together with €132,015.81 made up of the Plaintiff's/Respondent's own

contribution of €82,015.81 and the forfeited deposit of €50,000.00 under the original contract for sale of the premises."

16. Given that the onus of proof is on the respondents, it is of note that no affidavit from any AIB bank official was sworn to verify the figures set out in Mr. Donegan's affidavit, or in exhibit "DD3".

17. The matter was next listed for hearing before this court on 2 November 2020. On 5 October 2020 the Court of Appeal Office wrote by email to both parties indicating that if outstanding matters had not been agreed they should be identified and notified to that office. Adams Law, solicitors for the respondents, sent an email to Mr. Kenny on 6 October referring to Mr. Donegan's affidavit and seeking his response in light of the remote hearing listed for 2 November 2020. Mr. Kenny responded on 8 October 2020 indicating that he did want to put in a replying affidavit, and would furnish it by 15 October 2020.

18. Mr. Kenny swore a short replying affidavit on 15 October 2020, and it is worth setting out the operative paragraphs in full: -

"3. I say that the redemption figures set out in paragraph 12 of Mr. Donegan's affidavit are incorrect and the forfeited deposit was €74,000.00 and not €50,000.00. Further, he confirms that the balance of €82,015.81 was made up from the Plaintiffs themselves, however, he does not account for the rent the partnership received for Block 20A, Beckett Way, Parkwest Business park, Gallanstown, Dublin [12] for the 15 months from the 17th June 2016 to the 14th of September 2017 which should be in excess of €100,000.00.

4. I further say that at paragraph 12 of the Affidavit of Des Donegan, Mr. Donegan confirms that the facility to AIB Bank was discharged in or about the 14th of September 2017 in the amount of €1,401,146.81 as follows: -

(a) €1,269,131.00 from the proceeds of sale; he has furnished two exhibits namely, the bank account of the partnership and the loan account and I enclose copy of the two statements from loan account, however, the one thing that the statements for the loan account do not take into account is the rent which the Killeen Partnership received on Block 20A, Beckett Way, Parkwest Business Park, Gallanstown, Dublin [12] from the 17th of June 2016 to the 14th of September 2017 and I note that under the loan offers that all rent was to be lodged to AIB Bank, sort code 931020 account number 15881057. I note that this statement from this account has not been included in Mr. Donegan's Affidavit.

5. I further say that given Mr. Donegan's indebtedness to the Bank and given that he was a large developer, I consider an Affidavit should be furnished from a representative from AIB Bank and the provision for this was made in the Judgment of Mr. Justice Robert Haughton. The reason I am pointing this out is I am not sure what arrangement Mr. Donegan gave to the Bank on the portion of interest of his other loans. He could have levied a higher interest rate on the property as he could pay it. I consider that the Bank will have to clarify the interest charged on this loan and also clarify the interest charged in conjunction with the rent in the account as set out in paragraph 4(a) above.

6. I further say that Mr. Donegan was to deliver his Affidavit within two months from the time the Judgement of Mr. Justice Haughton was delivered which was the

8th of April 2020 and Mr. Donegan furnished his Affidavit in or about the 15th of July 2020.

7. I asked that this Court accordingly make an Order that a representative of AIB Bank furnish an Affidavit setting out the interest and also the position with the rent fully sent out."

19. Mr. Kenny was correct in his averment that the forfeited deposit was €74,000 and not €50,000. He also raised a valid issue in relation to the respondent's accounting for the rent from Block 20A during the 454 day period in question. This was in my view an appropriate reminder that the object of the exercise was not simply to ascertain what interest the respondents paid to AIB during the relevant period, but rather to establish whether the respondents had in fact suffered *any actual loss* that should be compensated in damages for breach of contract. As Mr. Kenny correctly observed, neither the exhibited AIB statements in respect of the First Facility, nor the AIB document of 21 May 2020 in relation to the restructured account, record any inward payment of rent notwithstanding the special condition in the First Facility to mandate the payment of rental income "to current account at AIB, 219 Crumlin Road", and the covenant at clause 5.2.2 in the Second Facility to apply all rental income to account no. 15881057. No statements at all in respect of account no. 15881057 were exhibited by Mr. Donegan.

20. Mr. Kenny's comments in paras 5 and 7 in relation to the absence of any affidavit from a representative of AIB Bank, and the absence of any evidence as to Mr. Donegan's other accounts or other arrangements he may have had with AIB Bank which may have impacted on the two accounts featuring in exhibit "DD3", were also apposite, as was his observation about the late delivery of Mr. Donegan's affidavit.

Events pre-hearing

21. It appears that the respondent's solicitors did not receive a copy of Mr. Kenny's affidavit until 23 October 2020 and in light of that and the expectation that the respondents would wish to reply to Mr. Kenny's affidavit, the court decided to vacate the hearing date fixed for 2 November 2020. Accordingly, on 30 October 2020 the Court of Appeal Office informed the parties that the listing on 2 November 2020 was vacated, and the case adjourned in order to allow the respondents to prepare and file one or more supplemental affidavits. The parties were notified that the matter would be listed for remote hearing instead on Thursday 26 November 2020 at 2pm, and the court directed that any supplemental affidavits of the respondents be filed and delivered by close of business on Monday 16 November 2020.

22. No supplemental affidavit on behalf of the respondents was filed or delivered by close of business on Monday 16 November 2020. Nor was there any notification from the respondent's solicitors intimating an application for an extension of time.

23. On 24 November 2020 at 16:33 the respondents' solicitors sent an email to the Court of Appeal Office stating –

> "Our client, Mr. Donegan, has just reverted with some details as regards the supplemental Affidavit. Mr. Donegan is an accountant and is in the middle of the annual tax returns at the moment which are due on the 10th December 2020. In the circumstances, we would like to kindly ask if the Court could perhaps consider providing a further period of time to finalise the said supplemental Affidavit of the Plaintiffs and adjourn the matter for a further period of two weeks?"

It was implicit in this that the respondents were seeking an extension of time within which to file a supplemental affidavit. The court was conscious that even if a supplemental affidavit was filed before the scheduled hearing on 26 November, Mr. Kenny, who is a litigant in person, would not have any or any adequate opportunity to consider that affidavit, let alone respond.

The court therefore felt obliged to vacate the hearing on the 26 November 2020, and issued new directions on 25 November 2020: that the respondents, supplemental affidavit be filed by close of business on 18 December 2020, that Mr. Kenny have an opportunity to reply to that by 11 January 2021; and that the hearing now be re-fixed for 21 January 2021 at 2pm.

24. No supplemental affidavit was filed or delivered by the respondents on or before 18 December 2020 and accordingly there was nothing to which Mr. Kenny could reply. Nor was there any application made by or on behalf of the respondents for an extension of the new deadline for delivery of a supplemental affidavit.

25. At 09:55 on 21 January 2021 the respondents' solicitors sent by email to the Court of Appeal Office and to Mr. Kenny the Second Affidavit of Mr. Donegan, sworn on 20 January 2021, together with exhibits. The email presented a request to attend the office for filing before the hearing at 2pm. No request was made for leave for late filing (although this was perhaps implicit), nor was there any explanation as to why it was being produced so late in the day.

26. At para. 3 of his Second Affidavit Mr. Donegan says –

> "I apologise to this Honourable Court for the delay in filing same."

This apology is not extended to Mr. Kenny. No explanation is given for the delay, nor was there any formal request for leave to file the affidavit late. It is a three page affidavit running to 14 paragraphs, with some 17 pages of exhibits consisting of bank statements and detailed accounts.

27. The court gives directions for good reason, and while it will afford some latitude, and frequently does extend time, there was a regrettably casual approach taken by the respondents to the courts' directions in this appeal. Even without taking into account the respondents' earlier failures to comply with timelines, the failure to comply with the direction of 25 November 2020 was egregious, and disrespectful of Mr. Kenny and the court. Counsel for the respondents was left with the unenviable task of trying to explain how this happened. He accepted that there was very significant delay, and all he could say was that this arose from difficulty in obtaining instructions which were only received the previous day.

28. When the court enquired of Mr. Kenny as to what he wished to do, making it clear that if he sought an adjournment it would be granted, he indicated to the court that he did not want a further adjournment, and he preferred that the matter would proceed and be finalised.

29. In deference to Mr. Kenny's wishes the court proceeded with the hearing. The members of the court had had an opportunity to read the Second Affidavit of Mr. Donegan and the exhibits, and the court decided to consider that affidavit *de bene esse*.

The Second Affidavit of Mr. Donegan

30. By way of overview, the Second Affidavit of Mr. Donegan addresses the rent received into the Killeen Partnership Rent Account, AIB account number 15881057, and seeks to make the case that there was a net deficit of €41,866 between rental/service charge receipts

on the one hand, and the costs of managing/maintaining Block 20A (including the interest paid to AIB) on the other hand, during the relevant 454 day period.

31. While it was initially unclear whether this asserted deficit was the amount of damages now claimed by the respondents, or whether it was a sum of €39,026.08 which Mr. Donegan avers at para. 5 was the interest that AIB extracted from the rent account during the relevant period, Counsel clarified at hearing that the respondents were confining their claim to the interest.

However, Counsel accepted, quite correctly in my view, that if there was no deficit then there could be no loss and no damages claim, and it followed that if the deficit was in fact less than the interest paid, then that lesser sum was the most that could be claimed as damages for losses arising from the operation of Block 20A over the relevant period.

32. Mr. Donegan exhibits at "2DD1" a table which he prepared, setting out the interest payments made. As Mr. Donegan avers in para. 6 there is a slight disparity between the total interest set out in this table of €39,026.08, and the interest set out in his first affidavit which totalled €38,973.62. Mr. Donegan accounts for this in para. 6 –

> "6. There is a slight disparity between the above figure and the figure set out in paragraph 8 of your Deponent's first Affidavit in that the interest charged on 16.09.2016 was €4,826.01, whereas the figure in your Deponent's first Affidavit is for the slightly reduced period of time and is calculated at €4,775.55."

Mr. Donegan exhibits at "2DD2" copy AIB statements in respect of loan account no. 15881-131, as previously exhibited, which support his averment as to the interest charged.

33. At paragraph 4 Mr. Donegan avers that the Killeen Partnership Rent Account being AIB account no. 15881057 received rent (from Block 20A), and from this AIB "controlled

the extraction of interest for the partnership loan account" and he avers at paragraph 8 that the partnership received rent *and* service charges from the tenants, but also discharged ongoing costs including interest on the loans from this account. In para. 9 he gives a summary of activity on the Rent Account for the relevant period in a Table: -

	€
Rental Receipts	174,623
Service Charges Receipts	58,945

Total	233,568

Discharged	
Expenses	240,362
Interest	35,072

Total	275,434

(Deficit) in the period	(41,866)

What is immediately striking from this Table is the healthy level of receipts but the even greater level of expenses.

34. The remainder of Mr. Donegan's Second Affidavit reads as follows: -

> "10. I say, in the hope that it is of assistance to this Honourable Court, that I prepared a document headed *'Block 20A Parkwest Rent/Service Charges Received from 17th June 2016 to 13th September 2017'* which sets out the rent/service charges received during the relevant period. In this regard, I beg to refer to a true copy of the said document upon which pinned together and marked with the letters '**2DD3**' I have signed my name prior to the swearing hereof.
>
> 11. I say that I further prepared a summary of the rental income and expenditure associated with Block 20A entitled *'Killeen Partnership Rental Income Account*

Period 17.06.2016 to 13.09.2017'. Further, again in the hope that it is off (sic) assistance to this Honourable Court, backup spreadsheets providing itemised figures for the expenditure whether by way of cheque payments or direct debits have been prepared. In this regard, I beg to refer to true copies of the said documents upon which pinned together and marked with the letters **"2DD4"** I have signed my name prior to the swearing hereof.

12. As can be seen from the calculation set out above, the deficit on the account for the period 17th June 2016 to 13th September 2017 was €41,866.00. The deficit would not have arisen had Mr. Kenny closed the sale as per the contract.

13. For the avoidance of doubt, the Killeen Partnership property loan was an absolute standalone facility and treated as such by the bank. I reject the suggestion made by Mr. Kenny that the Plaintiffs could have somehow influenced the bank to levy a higher interest charge on the Killeen Partnership facility to the betterment of other facilities with the same bank. The interest rate charged was in any event relatively low and only increased on restructure of the facility on 01.02.2017 to act as an incentive to obtain a disposal and loan redemption. The rate increased from 1.375% (December 2016) to 3.123% (01.02.2017).

14. I say that Mr. Kenny is correct in saying that the sum of €74,000.00 was paid by way of deposit and the reference to €50,000.00 in your Deponent's first Affidavit was an error, however the amount paid to AIB including the net proceeds of sale are correct. I apologise to this Honourable Court for the above error."

35. Exhibit "2DD3" is a one page document prepared by Mr. Donegan setting out in respect of Block 20A the "Rent/Service Charges Received from 17th June, 2016 to 13th

September 2017". Rental receipts total €174,623.40. Service Charges Total €58,945.06. The combined total for rent and service charges is €233,568.46. These are the figures transposed by Mr. Donegan to the first part of his Table.

36. No vouching documentation is exhibited in relation to the receipts of rent and service charges. In particular Mr. Donegan does not exhibit bank statements in respect of AIB account no. 15881057 into which he avers that all rents were received. The absence of bank statements and vouching documentation excludes any possibility of the court verifying or reconciling rent and service charges actually received with the list prepared by Mr. Donegan in exhibit "2DD3".

37. The first page of exhibit "2DD4" is the Killeen Partnership Rental Income Account prepared by Mr. Donegan for the period. This sets out an opening balance of €54,107.70, and then records the gross rental income receipts (€174,623.40) and gross service charge receipts (€58,945.06). The account then sets out 'Withdrawals', totalling €275,434.17, and when these are deducted from the opening balance, rental income and service charges, there is a Closing Bank Balance of €12,241.99, which, when the Opening Balance of €54,107.70 is deducted, gives rise to the claimed deficit of €41,866.

38. The 'Withdrawals' are detailed as follows: -

"Withdrawals:

Utilities	17,558.57
Insurance	7,249.69
Lift Maintenance	1,135.00
External Service Charges	30,037.57
Rates	14,363.22

Repairs	2,686.99
Cleaner	1,376.00
Accounting	11,070.00
Professional Fees	117,941.00
Administration & Management	23,985.00
Revenue Commissioners	12,878.00
Bank Fees & Charges	81.35
Loan Interest Paid	35,071.78
Total Withdrawals:	**275,434.17"**

39. The Rent Account is followed by four pages of "backup spreadsheets" prepared by Mr. Donegan purporting to show itemised figures for expenditure whether by way of cheque payments or direct debits. The spreadsheets detail the date and the payee, and the amount is given under one of several columns giving the head of expenditure.

Issues with the expenditure figures

40. The Rent Account and spread sheets raise serious issues in relation to the claimed deficit, some of which were explored with counsel at the hearing. The receipts for the relevant period were significant, amounting in total to a figure many multiples of the bank interest payable. The level of withdrawals appears to be very high, particularly the figures given in the Rent Account for 'Professional Fees' of €117,941. In general, it can be said that the spread sheets do not give any greater explanation for any particular payment other than the name of the payee and the head of expenditure and no vouching documentation has been furnished from which any further information might be extracted.

41. Counsel for the respondents explained at the outset that of this €117,941 that some €85,405 was paid to Donegan & Associates, the first named respondent's accountancy firm. The spreadsheets disclose that Donegan & Associates were paid €79,255.00 by way of direct debit and a further €6,150 by cheque, making in total €85,405, between 1 July 2016 and 1 September 2017. Of this €23,985 is attributed to a column headed 'Admin & Management' thus tallying with the figure given under that heading in the Rental Account. All the other payments to Donegan & Associates are simply listed in the column 'Prof fees'.

42. I would observe the following:

(1) Counsel for the respondents explained that of the Professional Fees of €117,941, a sum of €14,885 was attributable to fees paid to Counsel and solicitors in connection with these proceedings, and he identified on the spreadsheets four payments adding to this amount. As such this is an item of costs that is not an appropriate deduction from the rental/service charge income for the purposes of this exercise, and this was conceded by counsel at the outset. Accordingly, the claimed deficit of €41,866 must be reduced by €14,885, thus reducing the maximum possible claim to €26,981 (and that is so notwithstanding the fact that interest of circa €39,000 was paid to AIB).

(2) (i) Counsel then informed the court that Donegan & Associates received €16,605 for Administration and Management of the Killeen Partnership, and additionally €11,070 for Accounts and Taxation.

(ii) The spread sheets do record that 'Des Donegan' received €11,070 for 'Donegan Accounting'.

(iii) As to the €16,605 for Administration and Management, counsel informed the court that this was received in two direct debits: the first on 23.08.16 for €12,300, and the second on 29.3.17 for €4,305. Counsel did not know whether these were part of 'Professional Fees' or 'Admin & Management', but on looking at the spread sheets only the second payment is

recorded under 'Admin & Management', and the first payment of €12,300 is recorded under 'Prof Fees'.

(iv) In fact under the column headed 'Admin & Management' the spread sheets record four direct debits to Donegan & Associates in the remarkably short period 01.03.17 to 25.04.17, totalling €23,985, and these do not include the payment of €12,300.

(v) Thus the Spread Sheets indicate that Donegan & Associates received €23,985 plus €11,070, a total of €35,055, between 'Admin & Management' and 'Accounting' over the period. This also appears in the Killeen Partnership Rent Account.

(4) It is noteworthy that during the relevant period there were only two tenants – Certification Europe, and Clonmel Healthcare – as rent and service charges were received only from those two entities. This meant that the administration and management should have been straightforward.

(5) The foregoing figures – which appear to reflect a very generous level of payments to Mr. Donegan and/or his firm - do not account for the following seven further payments totalling €50,350 made to Donegan & Associates, and recorded in the spread sheets as 'Prof Fees':

01.07.16	Debit	€ 9,840
23.08.16	Debit	12,300
29.08.16	Debit	4,840
16.12.16	Cheque	6,150
24.01.17	Debit	7,380
07.06.17	Debit	3,690
01.08.17	Debit	6,150
Total		€ 50,350

When added to the €23,985 ('Admin & Management') and €11,070 ('Accounting') it means that Donegan & Associates received, as Counsel stated, altogether some €85,405 in the relevant period.

(6) There is no explanation or analysis of these seven payments in the spread sheets – they are merely listed as 'Prof Fees' payments to Donegan & Associates, without any detail as to purpose, work done or services rendered.

(7) In the absence of any explanation on affidavit – and, of course, it was properly a matter to be addressed on affidavit – and in response to queries raised by the court, Counsel on instructions informed the court that the entire balance in respect of 'Professional Fees' paid to Donegan & Associates related to work and services carried out on securing the resale of Block 20A to Trinitymount. It was said that Mr. Donegan "engaged with" Trinitymount.

(8) I do not find this explanation acceptable. These payments cannot have related to professional agency work, as there is no suggestion that Donegan & Associates, or Mr. Donegan, were professional auctioneers, estate agents or valuers. These payments are, therefore, effectively unexplained.

(9) Moreover the explanation offered does not in any event justify the level of these payments, or their spread over a period of in excess of 12 months. Further they cannot have related to maintenance of Block 20A as this is covered under other Rent Account headings such as 'External Service Charges' €30,037.57 (paid to Airscape Ltd), Lift Maintenance €1,135, and Repairs €2,686.99.

(10) There is also recorded in the spread sheets a cheque payment of €50,000 on 24 August 2017 to Adams Solicitors, the solicitors on record for the respondents in these proceedings, listed under 'Prof Fees'. In the absence of further evidence, including relevant bank statements, it remains entirely unclear whether this is for fees related to the costs of these proceedings, or other legal work, or relates to costs of sale, or represents payment out of part of the forfeited deposit or the deposit in respect of the second sale. This may have significance for the respondents' claim, but absent further evidence the court is left to speculate. That is, once again, wholly unsatisfactory.

Decision

43. The onus of proving that the respondents suffered further loss arising from the resale rests with them. The affidavits of Mr. Donegan which were proffered to provide such proof raise more questions than they answer. Leaving aside the absence of admissible evidence from AIB verifying the interest payments, Mr. Donegan does not exhibit the bank statements in respect of AIB account no. 15881057 which received the rent, and into which the court is left to presume the service charges were also paid. Nor are the same bank statements exhibited to support the "Expenses"/"Withdrawals" payments of €240,362 which feature in the spread sheets, and which Mr. Donegan averred were discharged from account no. 15881057. Most unsatisfactory of all is the absence of vouching and explanation in relation to the 'Professional Fees' paid to Donegan & Associates, and in particular there is no satisfactory evidence to explain or justify the seven payments totalling €50,350.

44. Even if the second Affidavit of Mr. Donegan is taken into account, I cannot be satisfied on the evidence that the Killeen Partnership incurred *any* deficit arising from its Block 20A letting operation over the relevant period, even after payment of interest AIB is taken into account at the higher figure of €39,026.08. It was accepted that the legal fees of €14,885 must be discounted, reducing the deficit in Mr. Donegan's Table to €26,981. If the unexplained payments of €50,350 which I have just queried were not justified – and the evidence made available by Mr. Donegan in my view provides no justification - then the Killeen Partnership would have made a profit; even if only half of that figure was justified there would still have been a break-even/no deficit outcome.

45. Accordingly the respondents have failed to adduce evidence from which I could be satisfied that they have any entitlement to interest in respect of the relevant borrowing from AIB, or any further damages, arising from the delay in receiving the balance of the purchase

monies from 17 June 2016 (when the Contract for Sale to Mr. Kenny should have closed) to completion of the resale on 13 September 2017.

46. Furthermore the respondents have had more than adequate opportunity to prove their case for damages, and having regard to their successive breaches of directions, the adjournments of this hearing on two occasions, and the indulgence granted to them during the process since the Principal Judgment, it would not be appropriate to countenance any further adjournment to afford an opportunity to adduce further evidence and explanations. Moreover such a course of action would not be fair to Mr. Kenny who, at the start of the hearing at a time when it might have been seen to be in his interests, did not want any adjournment, preferring that the proceedings be brought to finality.

Orders

47. For the sake of clarity it is appropriate that I should set out in full the orders that I would now be disposed to make in accordance with the Principal Judgment and this Judgment:

(1) The court confirms the following Declarations made in the High Court (Twomey J) in the Order dated 7 November 2018, and in which the reference to the Second Named Defendant is now replaced with reference to "Denis Kenny" as the only remaining Defendant: -

> "THE COURT DOTH DECLARE that the completion notice served under a Contract for Sale dated the 20th May 2016 the subject matter of these proceedings validly served on Denis Kenny and the claim by Denis Kenny for the return of the deposit which had been forfeited by the Plaintiffs, and for damages, stand refused AND THE COURT DOTH FURTHER DECLARE: -
>
> (a) that even if the property, the subject matter of the Contract was sold to a third party outside the period of 12 months as set out in Condition 41(a) of

the general conditions of the Contract for Sale, that does not provide Denis Kenny with a defence to the Plaintiffs' claim to recover the deficiency on the sale to a third party *vis á viz* the sale to Denis Kenny; and

(b) that Denis Kenny is liable to the Plaintiffs for the loss suffered by the Plaintiffs, being the net difference (after forfeiture of the deposit) between the agreed sale price as set out in the Contract for Sale and the actual sale price as set out in the Contract for Sale to the third party; and

(c) that applying the evidence given to the Court, the plaintiffs could not be said to have failed to mitigate their loss by selling the property at a lower price to a third party, one year and three months after Denis Kenny failed to complete the Contract for Sale;"

(2) The court vacates the following Declaration made in the said High Court Order dated 7 November 2018:

"(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 date the Contract for Sale actually closed with the third party"

And in lieu therefore Declares –

"(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."

(4) The court confirms the following further Declarations made in the said Order dated 7 November 2018: -

> "(e) that the appropriate rate of interest to apply for the period from which Denis Kenny should have paid the shortfall (commencing from the date of the actual closing of the sale to the said third party), is the Courts Act interest of 2%; and
>
> (f) that the Plaintiffs are not entitled to have Denis Kenny cover the expenses of the property incurred by them as a result of the delayed completion of the sale of the Property arising from Denis Kenny's breach of contract [on] the basis that a claim for damages as well as interest is a claim for double compensation for a single loss."

(5) The court vacates the order of the High Court so far as it ordered that the plaintiffs do recover from Denis Kenny damages in the sum of €248,871.27.

(6) The court confirms the order that the Plaintiffs do recover from Denis Kenny the balance due of €76,000 being the shortfall between the price agreed of €1,450,000 and the price achieved of €1,300,000 less the deposit forfeited of €74,000.

(7) The court confirms that the Plaintiffs do recover from Denis Kenny interest in the amount of €1,719.87 being interest at the rate of 2% per annum on the shortfall of €76,000 for the period of delay from the date of actual completion being the 13th September 2017 to the date of judgment on the 31st October 2018 (a total of 413 days).

(8) The court, not being satisfied on the evidence adduced that the Plaintiffs/Respondents have suffered any loss of actual interest accruing in respect of the relevant borrowing by them 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, or any further loss or damage, the court refuses to award any damages under this heading.

(9) The court confirms the order dismissing Denis Kenny's counter claim with no order as to costs.

Costs

48. This leaves outstanding (1) the plaintiffs'/respondents' costs in the High Court which were ordered to be paid by Mr. Kenny (and are the subject of his appeal), and (2) the costs of this appeal. As this appeal was dealt with remotely, in the normal way I will set out what I propose should be the costs orders, but the parties will be afforded an opportunity to seek different orders. This requires that I address the history of the proceedings and orders to date, but I will first set out briefly the relevant legislative provisions.

49. Order 99 of the Rules of the Superior Courts, as amended by S.I. 584 of 2019, which came into operation on 3 December, 2019, governs costs. O. 99, r.2(1) now provides that "the costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively", reflecting similar wording in the old O.99 r.1(1) that applied when Twomey J awarded costs in the High Court.

50. O. 99, r. 3(1) now provides that the court when determining liability for costs of an appeal, shall have regard to the matters set out in section 169(1) of the Legal Services Regulation Act 2015, "where applicable". Section 169 of the Legal Services Regulation Act, 2015, which came into operation in 2019, and applied at the time this appeal was heard, provides in subsection (1) that –

"A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise…"

In my view this provision, which applies only to the costs of the appeal, has no application as neither party was "entirely successful".

51. Accordingly this court has a discretion in relation to the costs in both courts, which must of course be exercised judicially.

52. There were in fact a number of costs orders in the High Court: -

(1) An Order of Heneghan J. dated 14 November 2016 related to service of documents on Mr. Kenny, in which costs were reserved.

(2) An Order of McGovern J. dated 5 December 2016, admitting the proceedings to the Commercial List and giving certain directions, in which costs were ordered to be "costs in the cause".

(3) An Order of McGovern J. dated 18 December 2017 permitting the plaintiffs to deliver an amended plenary summons and amended statement of claim, and giving further directions – the costs of the motion and order were ordered to be "costs in the cause".

(4) An order of McGovern J. dated 9 April 2018 extending the time for issue and service of the amended plenary summons and amended statement of claim. The order does not contain any order addressing costs.

(5) The order of Twomey J. made on 7 November 2018 whereby it was ordered that "the Plaintiffs do recover as against [Denis Kenny] the costs of Action

when taxed and ascertained" and that there be no order as to the costs of the counter claim. There is no reference in this order to the costs reserved by Heneghan J. on 14 November 2016.

53. It is clear that the respondents amended their Plenary Summons and Statement of Claim following forfeiture of the deposit and resale of the property. They no longer sought specific performance, and confined their claim to confirming their entitlement to forfeit the deposit, and damages. In the Amended Statement of Claim delivered on 3 January 2018 the damages claim was now reformulated, having regard to the deficiency in sale price of the property of €150,000. Giving credit for the deposit retained of €74,000, the plaintiffs now claimed: -

(1) The shortfall of €76,000.

They were successful in this claim in the High Court, and before this court.

(2) A reformulated interest claim as follows: -

"22. Furthermore, pursuant to the said Contract for Sale dated the 20th May 2016 the Plaintiffs were entitled to contractual interest at the rate of 10% per annum. Negligently, in breach of duty and/or in breach of contract the Defendant, his servants or agents, has failed, refused or neglected to discharge the said interest."

The plaintiffs succeeded in that claim before the High Court, but in the Previous Judgment I set aside the High Court's finding and, for the reasons set out in this judgment the plaintiffs/respondents have now failed to prove any entitlement to damages by reference to for the actual interest on borrowings from AIB during the relevant period.

Accordingly the respondents lost this claim on appeal before this court, and this was a substantial win for Mr. Kenny.

(3) Legal Fees, Outlay and VAT in the sum of €18,714.18.

This head of damage does not appear to have been pursued at hearing – it does not feature in the judgment of Twomey J.

(4) Contractual Interest – This was a claim for interest on €76,000 from the closing date of 17 June 2016 to the actual closing date on resale of 13 September 2017. At hearing it was claimed at 10%, but the trial judge rejected this and awarded Courts Act interest at 2%, a sum of €1,719.87.

The respondents had pursued a 10% rate in the High Court, and the 2% applied by the trial judge and affirmed by this court in the Principal Judgment favoured Mr. Kenny.

(5) The plaintiffs claimed un-particularised but ongoing costs under the headings "External Service Charge for *Vacant Period* 17.06.2016 – 13.09.2017", and "Building & Engineering Insurance Period" and "Commercial Rates Period" over the same 15 month period. [Emphasis added]

At trial these costs were detailed and quantified at €14,415.22. As his Order indicates, the trial judge rejected this expenses claim on the "…basis that a claim for damages as well as interest is a claim for double compensation for a single loss". There was no cross-appeal in relation to that element, so the respondents failed on this issue.

In passing I would comment that I have some concerns about the pleading of a "vacant period". From what can now be gleaned from Mr. Donegan's exhibit "2DD3", far from Block 20A being vacant it was occupied by two tenants who paid substantial rent and service charges throughout the relevant period.

54. At the time the Plenary Summons was issued on 17 August 2016 the plaintiffs/respondents were entitled to seek specific performance. Following resale of the property they were entitled to pursue a damages claim, and to amend their pleadings accordingly. However the residual claim no longer warranted proceedings in the Commercial List as, at its height, the claim came nowhere near the usual threshold of €1 million for entry into that list of commercial claims.

55. The more obvious claims in the High Court for a declaration of entitlement to forfeit the deposit of €76,000, and the claim for €74,000 to make up the shortfall on resale, were successful. However the main claim for 10% interest amounting to €171,151.40, which succeeded in the High Court, has now failed entirely on appeal. It can indeed be said that Mr. Kenny, in the outcome before this court, has to a significant extent succeeded.

56. Having regard to the fact that the plaintiffs/respondents won certain issues in the High Court, but lost on others, and that Mr. Kenny was to a significant extent successful on this appeal, and further that the plaintiffs/respondents failed to satisfy this court as to their entitlement to any further interest/damages in the follow up hearing, in my view there should be no order as to costs in either court.

57. I would therefore propose the following costs orders:

(i) vacate the order of Twomey J. awarding costs to the plaintiffs against Mr. Kenny;

(ii) make no order in relation to the costs in the High Court, including all reserved costs and costs in the cause,

(iii) no order as to the costs of either party on the appeal, including the follow up hearing.

58. If either party wishes to seek some other order as to costs then they should then notify the Court of Appeal Office by email within 14 days of the electronic delivery of this supplemental judgment, and the court will then arrange a short costs hearing, but any party requesting such a hearing if unsuccessful will run the risk that they may be ordered to pay the costs of such hearing.

Murray J. and Collins J. have indicated that they are in agreement with this supplemental judgment.