

**THE HIGH COURT  
COMMERCIAL**

[RECORD NO. 2016/7487 P]

**BETWEEN****DES DONEGAN, ALAN O'CONNELL AND JAMES DORAN****PLAINTIFFS****-AND-****O'REGAN T/A TOM O'REGAN AND COMPANY SOLICITORS,  
DENIS KENNY AND BARRY COGAN****DEFENDANTS****JUDGMENT of Mr. Justice Twomey delivered on the 31st day of October, 2018****Summary**

1. It is standard under the Law Society's General Conditions of Sale in contracts for the sale of land for there to be an interest rate applicable to any delays in the purchaser complying with the agreed closing date, so that he will pay interest on the purchase price for the period between the closing date agreed by him and the date on which the actual closing takes place.

2. The issue that arises in this case, is what happens when the original purchaser breaches the contract and fails to complete the sale and the property is sold to an unrelated third party at a later date. Does the rate of interest, in this case 10%, for the delayed completion by an intended purchaser under his contract for the sale of property apply when that intended purchaser is sued for damages by the vendor?

3. Under the terms of Condition 25 of the Law Society's Conditions, the interest rate applies to delayed completion by the intended purchaser. However, the completion which occurs in this case is with a third party and it is 'delayed' (not under the contract with the third party) but in the sense that it is later than the date in the contract with the intended purchaser. The plaintiffs in this case say they are entitled to the contractual rate of interest of 10% from the intended purchaser as damages for his failure to complete the contract which led to a delayed sale of the property, *albeit* with a third-party purchaser. For the reasons set out below, this Court finds that the terms of the contract, and therefore the contractual rate of interest of 10%, do not apply to the intended purchaser, since there was no delayed completion with him under the terms of his contract, the rate of 10% as the interest rate agreed between the parties where there is a delayed completion of the sale (*albeit* if the sale had completed late with the intended purchaser and not with a third party), is nonetheless the appropriate metric for this Court to use in the assessment of the amount of damages due to the vendor for the failure of the intended purchaser to complete the sale, which failure led to a later sale to a third party and thus the delayed sale of the property.

4. This case also considers the fact that Condition 41(a) of the Law Society's General Conditions for Sale expressly provides that if, as a result of an intended purchaser's failure to complete the purchase of a property that he had contracted to buy, the property is subsequently re-sold to someone other than the intended purchaser, then the vendor is entitled to recover the deficiency from the intended purchaser on the re-sale, if the re-sale takes place within a year of the closing date agreed by the intended purchaser. In this case the re-sale is alleged to have taken place outside that one-year period and so it is argued that there is no entitlement on the part of the vendors to recover the deficiency. For the reasons set out below, this Court finds that, despite the language of Condition 41(a), which refers only to the right of the vendors to recover the deficiency where a re-sale takes place within one year, the right to recover the deficiency also applies if the sale takes place outside that period under the general law applicable to damages for breach of contract.

**Background**

5. This case concerns a claim for damages by the plaintiffs, Messrs Donegan, O'Connell and Doran, arising from an alleged breach of contract by the defendant ("Mr. Kenny") as a result of his failure to complete the purchase of a property (the "Property") known as Block 20a, Beckett Way, Parkwest Business Park, Gallanstown, Dublin 12 at a purchase price of €1,450,000 ("Agreed Sale Price"). The contract for sale (the "Contract") was dated 20th May, 2016 and was signed by Mr. Kenny, albeit that it listed Mr. Barry Cogan as the purchaser. The closing date under the Contract was 17th June, 2016, (the "Agreed Closing Date.")

6. As Mr. Kenny failed to complete the purchase of the Property on the Agreed Closing Date, a Completion Notice was issued on 20th June, 2016 by the plaintiffs' solicitors. The sale was never completed by Mr. Kenny and the deposit of €74,000, which had been paid in respect of the Property, was forfeited by the plaintiffs. Since the deposit was €74,000, the plaintiffs were due to receive €1,376,000 on the Agreed Closing Date (i.e. €1,450,000 less €74,000.)

7. As a result of the failure of Mr. Kenny to purchase the property, the property was subsequently sold by the plaintiffs to an unrelated third party, Trinitymount Limited, for the sum of €1,300,000 ("Actual Sale Price") on the 13th September, 2017 the ("Actual Closing Date.")

8. It is relevant to note that, initially, the plaintiffs sought specific performance of the Contract against Mr. Kenny and it is for this reason that this case was entered into the Commercial Court on 23rd November, 2016 as a case involving specific performance of a contract worth €1.45 million. However, as a result of the subsequent sale of the Property to Trinitymount Limited, it is no longer a specific performance case, but is now a case involving a claim for damages by the plaintiffs against Mr. Kenny for the loss occasioned to them by Mr. Kenny's alleged breach of the Contract.

9. The plaintiffs claim damages from Mr. Kenny, in the sum of €76,000, plus interest and costs. This is because €76,000 is the difference between the Agreed Sale Price with Mr. Kenny (€1.45 million), and the Actual Sale Price of the Property (€1.3 million), being the sum of €150,000 less the forfeited deposit of €74,000, giving a net figure of €76,000.

10. The key defences put forward to these proceedings by Mr. Kenny, who was unrepresented, was that the Contract, although signed by him, was in the name of Mr. Cogan. 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 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.

11. For their part, the plaintiffs claim that the interest rate under the Contract is 10% and, as such, they claim that this is the rate applicable to the period of one year and three months during which the plaintiffs did not receive the €1.376 million they expected to receive, as agreed under the Contract. Thus, during this period they say they are entitled to interest at 10% on the sum of €1.376 million.

12. They also claim that they are entitled to the €76,000 shortfall between the price Mr. Kenny contracted to pay and the amount they received when they sold the Property to Trinitymount Limited, since they say this is clearly a loss incurred by them as a result of Mr. Kenny's failure to complete the Contract.

13. The plaintiffs also claim that this interest rate of 10% should be applied to the shortfall of €76,000 for the period after the Actual Closing Date, since on that date it became clear that there was going to be a shortfall of that amount, and therefore it should have been paid to them by Mr. Kenny then. This interest period they say runs until the date that judgment is granted by this Court for that amount.

14. In addition to the shortfall and the foregoing two tranches of interest which the plaintiffs say they are entitled to as damages for Mr. Kenny's alleged breach of contract, the plaintiffs are also claiming additional costs as damages for the alleged breach of contract by Mr. Kenny. In this regard, they state that the Property was let out to tenants under the terms of commercial leases, however one floor was vacant. Accordingly, the plaintiffs are seeking the additional costs they incurred as a result of the sale not closing until one year and three months after the Agreed Closing Date under the Contract. These costs are made up of rates of €4,267.24, insurance of €2,131.51 and a service charge of €8,016.47 (a total of €14,415.22), all in relation to that portion of the building which was not leased out and therefore had to be paid by the owners, being the plaintiffs, rather than tenants during this period of one year and three months. Once the sale completed in September 2017, these costs then became the responsibility of the actual purchaser. Thus, the plaintiffs are claiming that the only reason they had to pay these additional costs during this period of one year and three months was because Mr. Kenny failed to complete the purchase of the Property on the Agreed Closing Date.

15. The plaintiffs' damages claim therefore is for the shortfall in the purchase price of €76,000, interest on €1.376m for one year and three months at 10%, plus interest on the shortfall of €76,000 for the period from the Actual Closing Date to the date of this hearing and the Property expenses for the one year and three months.

16. Mr. Kenny does not dispute that he was the purchaser of the property under the Contract. He also does not dispute that he did not complete the sale of the Property. However, he disputes that the plaintiffs were entitled to forfeit the deposit and that the plaintiffs are entitled to foregoing damages claim on a number of grounds, which this Court will consider in turn.

#### **Was the Completion Notice validly served on Mr. Kenny?**

17. A 28-day Completion Notice was sent by the solicitors for the plaintiffs to the solicitor acting for the purchaser of the Property, Mr. Tom O'Regan, Solicitor, pursuant to Conditions 40 and 41 of the Law Society General Conditions of Sale, 2009 Edition, which conditions applied to the Contract in this case. These conditions entitle the vendor of the Property to forfeit the deposit if the purchaser fails to complete the purchase within that 28-day period.

18. However, Mr. Kenny alleges that the Completion Notice was not properly served on him and so the deposit should not have been forfeited and the plaintiffs are not entitled to the damages which they seek.

19. Mr. Kenny bases this claim on the fact that the Completion Notice was not served on him personally, but rather was served by the plaintiffs on Mr. Tom O'Regan, who was the solicitor acting for the purchaser. In this regard, he relies on the fact that the covering letter sent by the plaintiffs' solicitors to Mr. O'Regan is dated 20th June, 2016 and is headed, "Your Client – Barry Cogan". For his part, Mr. O'Regan, the solicitor advising the purchaser witnessed the execution of the Contract which stated that Mr. Barry Cogan was the purchaser. However, the Contract was executed by Mr. Kenny as the purchaser. Furthermore, Mr. O'Regan's correspondence prior to the execution of the Contract referred to his client as being "Mr. Tom O'Regan In Trust" (e.g. his letter of 6th May, 2016 to the plaintiffs' solicitors).

20. Mr. Kenny relies on this lack of clarity, regarding the identity of the purchaser at the time the Completion Notice was served, to claim that the Completion Notice which was served on Mr. O'Regan was not properly served on Mr. Kenny, since it was not personally served on him, but rather was served on Mr. O'Regan and contained no mention of Mr. Kenny.

21. However, it is clear that Mr. O'Regan was the solicitor for the purchaser of the Property under the Contract. It is also clear that Mr. Kenny, who signed the Contract is, and was at that time, the purchaser of the Property under the Contract, despite Mr. Cogan being listed as the purchaser. This is evident from Mr. Kenny's own affidavit sworn on 3rd November, 2017, in which he avers that he was the purchaser of the Property under the Contract and that Mr. O'Regan was his solicitor for the transaction. It should be noted that until Mr. Kenny swore this affidavit, there was no acknowledgement by him or his solicitor of the identity of the true purchaser of the Property despite numerous attempts by the plaintiffs to discover this fact (as well as the fact that the plaintiffs had to seek court orders for substituted service to effect service of these proceedings on Mr. Kenny).

22. Therefore, when the Completion Notice was served by the plaintiffs on Mr. O'Regan, Mr. Kenny had not acknowledged that he was the purchaser of the Property and all that the plaintiffs had to go on was the fact that the Contract was signed in Mr. Cogan's name and the solicitor for the purchaser stated in correspondence that the property was being purchased in trust.

23. Against this background, the plaintiffs served the Completion Notice on Mr. O'Regan, solicitor. Under Condition 49 of the Contract, it is expressly stated that any notice served under the Contract, and thus it includes a Completion Notice, can be properly served by sending same to the; -

"office of the Solicitor representing the intended recipient in relation to the Sale."

24. Since there is no doubt that Mr. O'Regan was the solicitor for Mr. Kenny in relation to the sale of the Property, it is clear that the service of the Completion Notice on Mr. O'Regan, even though it did not refer to Mr. Kenny, constitutes proper service of the Completion Notice on Mr. Kenny.

25. Thus, this defence, to the forfeiture of the deposit and the claim for damages for Mr. Kenny's failure to complete the sale, is without substance.

#### **Does fact that property not sold within a year disentitle plaintiffs to damages?**

26. Mr. Kenny relies on Condition 41(a) of the Contract to claim that, as the Property was not sold to the third party (Trinitymount

Limited) within 12 months of the Agreed Closing Date, the plaintiffs are not entitled to the interest and costs arising from Mr. Kenny's failure to complete the purchase of the Property, a failure which Mr. Kenny does not dispute and which he has not disputed amounts to a breach of the Contract he signed.

Condition 41(a) 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 price obtained by the Vendor on any re-sale, whenever effected, shall belong to the Vendor."

27. It could be argued that this condition is curiously drafted since in the second sentence it deals only with a situation where the Property is sold within a year of the closing date agreed under the Contract and therefore it could be argued that if a property is re-sold outside the 12-month period, the vendor is not entitled to recover the deficiency arising on the re-sale. However, this Court does not believe that this argument is correct. 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 12-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 12-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."

28. For the foregoing reasons, this Court concludes that the fact that the Property might have been re-sold to Trinitymount Limited outside the period of 12 months does not provide Mr. Kenny with a defence to the plaintiffs' claim to recover the deficiency on the sale to Trinitymount Limited vis-à-vis the proposed sale to Mr. Kenny.

#### **Mr Kenny is liable for the loss suffered by the plaintiffs**

29. Mr. Kenny has not denied his failure to complete the Contract for the purchase of the Property and it is clear to this Court that he is liable for the loss occasioned to the plaintiffs by this breach of contract (subject to the plaintiffs' obligation to mitigate their loss.) To put the plaintiffs into the position they would have been in if the Contract had been performed by Mr. Kenny requires them to receive the difference between the price actually obtained on the sale to Trinitymount Limited and the price Mr. Kenny agreed to pay, but failed to pay, under the Contract. There can be little doubt therefore that, subject to any issues regarding mitigation of loss and interest (which will be dealt with next), the plaintiffs are entitled to the €76,000, being the net difference (after forfeiture of the deposit) between the Agreed Sale Price and the Actual Sale Price.

#### **Did the plaintiffs fail to mitigate their loss?**

30. Mr. Kenny claims in his defence that the plaintiffs did not fully mitigate their loss caused by his breach of the Contract, since they sold the Property at an undervalue to Trinitymount Limited, being €1.3 million, the Property having originally been subject to an agreed sale price with Mr. Kenny of €1.45 million. It is relevant to note that 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 €2.76m purchase price and the sale price, whether €1.3m or €1.45m, when the property was sold. As previously noted, when the sale to Mr. Kenny did not complete in June 2016, the plaintiffs agreed to sell it to Trinitymount Limited for some €150,000 less in September 2017.

31. It is relevant to note that no expert valuation evidence was provided by Mr. Kenny to the effect that the price of €1.3 million in September 2017 was undervalue and so his claim that it was undervalue amounts to a mere assertion.

32. Furthermore, the plaintiffs provided evidence from their auctioneer that he sought buyers of the Property, after the sale to Mr. Kenny did not complete, at the price of €1.45 million but was unsuccessful and this led to the sale of the Property to Trinitymount Limited for €1.3 million as they were not willing to pay €1.45 million.

33. Finally, of course, as is noted by the Court of Appeal in *Hyland v. Dundalk Racing* [2017] IECA 172 at para. 78 (joint judgment of Finlay Geoghegan J. and Irvine J.) it must be remembered that it was Mr. Kenny who put the plaintiffs in this unenviable position of having to find another purchaser, because Mr. Kenny was in breach of contract, and in assessing whether they have mitigated their loss:

"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"

34. Applying this standard to the evidence before this Court, the plaintiffs could not be said to have failed to mitigate their loss by selling the Property for €1.3 million to Trinitymount Limited one year and three months after Mr. Kenny had failed to complete the Contract.

#### **Is the contractual interest rate of 10% applicable to delay in receipt of money?**

35. The next defence to these proceedings raised by Mr. Kenny is that the interest rate of 10% under the Contract is unconscionable and therefore unenforceable. The plaintiffs rely on the terms of the Contract which Mr. Kenny signed upon receiving independent legal advice as terms which they say should be enforceable against him and justify the application of the 10% interest rate to the delay on their receiving the purchase price between the Agreed Closing Date and the Actual Closing Date.

#### **Are penalty interest rates permissible in contracts for the sale of land?**

36. The plaintiffs claim that the principles applicable to assessing whether rates of interest amount to penalty clauses and thus are

unenforceable has no application to contracts for the sale of land. They placed reliance on the *obiter* statement of Barron J. (since the case concerned a sale of vehicles and not land) in the Supreme Court case of *O'Donnell v. Truck and Machinery Sales Ltd* [1998] 4 I.R. 191 at 218; -

"In contracts for the sale of land the normal rule is that on the date fixed for completion the character of the parties changes and the purchaser becomes entitled to the rents and profits of the property but must at the same time pay interest on the balance of the purchase money for the time being outstanding. It is customary in such cases for the parties to agree the rate of interest so payable. There is a vast body of law as to the circumstances in which such interest will become payable depending upon whether there has been default or wilful default or some other circumstance set out in the contract. If the parties do not agree a rate equity will provide the rate, normally five %. However it is significant that in all the precedent books the rate is left blank and there is no note in any of them to indicate that too high a rate might not be enforced, though '*Williams on Vendor and Purchaser*' does advise purchasers not to agree too high a rate. In any event the principles relating to penalties would not apply since the payment of interest is being paid in the course of the performance of the contract and before the mutual obligations of the parties had been finally discharged. Another obvious example of where an agreed rate of interest will not be interfered with by the court is seen in the use of credit cards. The borrower does not have to pay off the entire debt on a fixed date, but may pay interest at an agreed rate thereafter on the amount for the time being remaining unpaid. Here again the test which I have indicated is fulfilled. By accepting the option not to pay the whole sum, the debtor is performing the contract in the manner intended by the parties."

37. Although an *obiter* statement, it does indicate that a different approach is taken to the interest rate agreed between vendors and purchasers of land, than for other contracts. It is also relevant to note that Mr. Kenny agreed the 10% with the benefit of independent legal advice.

### **Interest on €1.376 million between Agreed Closing Date and Actual Closing Date**

38. In considering whether the contractual rate of interest of 10% applies to the first tranche of interest claimed (i.e. on €1.376 million between Agreed Closing Date and Actual Closing Date), it is important to bear in mind that the task of this Court is to put the plaintiffs in the position they would be in, if the Contract had been performed by Mr. Kenny.

39. However, it is this Court's view that the terms of the Contract regarding contractual interest are not *directly* applicable to the situation which transpired in this case. This is because Condition 25(a) of the Contract states; -

"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 judgement

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."

40. It seems clear to this Court that when reference is made in Condition 25(a)(ii) of the Contract to interest being payable between the agreed '*Closing Date*' and the '*date of the actual completion of the Sale*', that this is a reference to the sale of the Property to the purchaser under *that* Contract and not to some other purchaser under a subsequent contract. In this regard, it is relevant to note that the term '*Sale*' is defined in the Contract as '*the transaction evidenced by the Memorandum, the Particulars and the Conditions*', which must mean that Memorandum, those Particulars and those Conditions, and not some other Memorandum, some other Particulars and some other Conditions, agreed at a later date with another unrelated third-party purchaser. Thus, in the case of Mr. Kenny, the reference to the interest period in Condition 25(a)(i) is a reference to the period between the Agreed Closing Date and the date of the actual sale of the Property to Mr. Kenny, which never occurred, since the Property was sold to Trinitymount Limited. On this basis, it seems clear to this Court that the reference in Condition 25(a) to the *contractual rate* of 10% interest being payable for a particular period can have no application to Mr. Kenny, since there is no such period applicable to Mr. Kenny. However, that is not the end of the matter, since one must consider what damages and/or interest rate is applicable to the failure by Mr. Kenny to complete the purchase of the Property.

### **What rate is applicable for damages for delayed sale caused by Mr. Kenny?**

41. Even though the Contract is not directly applicable to the events which transpired in this case, in assessing damages for the breach of contract by Mr. Kenny, it is this Court's view that the rate of 10% interest is the appropriate rate for this Court to apply between the Agreed Closing Date and the Actual Closing Date, in calculating the loss to the plaintiffs arising from Mr. Kenny's failure to complete the sale of the Property on the Actual Closing Date. It reaches this conclusion for a number of reasons.

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 a property, amounted to compensation; -

"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 plaintiffs interest of 10% for the period of delay. To put the plaintiffs in the position 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 (i.e. if Mr. Kenny himself had completed the sale late) but not an identical eventuality (i.e. 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 the 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 this 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 the 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.

48. However, in the circumstances of this case, this Court concludes that it should apply the interest rate negotiated between the parties to calculate the damages suffered by the plaintiffs in having their sale of the Property delayed by one year and three months as a result of Mr. Kenny's breach of contract.

49. On this basis therefore, this Court will make an award of interest of 10% on the sum of €1.376 million for the period between the Agreed Closing Date and the Actual Closing Date, being 454 days, i.e. the sum of €171,151.40 in interest.

#### **Interest on €76,000 from Actual Closing Date to the present**

50. The next issue is whether that 10% rate is also applicable to the shortfall of €76,000. It seems to this Court that under the terms of the Contract, the parties agreed that 10% was the appropriate rate to apply for any delay in the completion of the Contract and for the foregoing reasons it is the appropriate metric to be used by this Court in assessing damages to be awarded to the plaintiffs arising from Mr. Kenny's breach of the Contract, which led to the delayed completion of the sale of Property, albeit not to Mr. Kenny, but to an unrelated third party.

51. However, the parties did not agree, on the rate of interest or the principles applicable to the assessment of damages, in the event of a delay in the payment of any shortfall, which should have been paid by Mr. Kenny to the plaintiffs after the Actual Closing Date. This is because Clause 25(a) deals only with interest for the period up until the completion of the sale of the Property. In these circumstances, this Court concludes that the appropriate rate of interest to apply for the period from when Mr. Kenny should have paid the shortfall, is Courts Act interest of 2%. Thus, it is 2% for the 413-day period between 13th September, 2017 to the date of this judgment, being the sum of €1,719.87.

#### **Additional costs incurred by the plaintiffs because of part vacancy of Property**

52. The final issue is whether the plaintiffs are also entitled to the costs which they say they incurred in insurance, service charges and rates of €14,415.22 (as previously detailed) which were incurred by the plaintiffs in owning the property for the additional period of one year and three months (which they say they would not have incurred if it had been sold on the Agreed Closing Date, rather than on the Actual Closing Date). While the other floors in the Property were rented out under commercial leases and thus these costs were the responsibility of the tenants, the first floor in the building was vacant and so these costs were the responsibility of the plaintiffs pending the sale by them of the Property. The plaintiffs claim that if the sale had proceeded on the Agreed Closing Date, they would not have had to pay these costs and so they are entitled to these costs as damages from Mr. Kenny for his breach of contract.

53. The principle of damage assessment in contractual cases is that the plaintiff is put in the position he would have been in, if the contract had been performed, not in a better position. If the Contract had been performed on the Agreed Closing Date, the plaintiffs would have ceased to be entitled to the use and benefits of the Property, including, but not limited to rent. On that date, they would also have ceased to be responsible for the 'burdens' or expenses attaching to the Property, including the payment of insurance, service charges and rates. However, in their damages claim, the plaintiffs are seeking to retain the benefits, but have Mr. Kenny take responsibility for the burdens.

54. For their part the plaintiffs argue that the rents which they received were paid directly to the bank and so there is no question of them retaining any benefit of the Property during the delayed completion, while having Mr. Kenny discharge the burdens attaching to the Property. However, receiving rent is a benefit, even if the vendor of the property chooses or is obliged to pay that rent to a bank, since by doing so the vendor reduces his borrowings. In addition, of course, this Court has found that the plaintiffs are entitled to damages for Mr. Kenny's breach, which has been calculated using the rate of 10% on €1.376 million for the one year and three months of the delay in completion, a total of €171,151.40 in interest. It seems clear that in today's interest rate environment that this level of interest not only operates as a disincentive to a purchaser from delaying the completion, but it does so by offering the vendor the benefit of receiving a very attractive rate of interest while he waits for the delayed purchase money.

55. Accordingly, if the plaintiffs are to get this amount in interest (which this Court has determined they will), plus the benefit of the rents but also have Mr. Kenny discharge the expenses of the Property, the plaintiffs would be placed in a better position than if the Contract had been performed by Mr. Kenny. This is because if the Contract had been performed on the Actual Closing Date, while the plaintiffs would not have had to pay the expenses of the Property, they also would not have received the interest of €171,151.40 as

well as the rent which they paid to their bank to reduce their borrowings. For this reason, this Court rejects the plaintiffs' claim that they are entitled to have Mr. Kenny pay the expenses of the Property.

56. In reaching its decision in this regard, this Court also relies on the decision in *Mac A Bhaird v. Commissioner of Public Works* [2016] IEHC 630, where Baker J. refused to award interest and damages to a plaintiff in a case in which the plaintiff got an order for specific performance, Baker J. noting at para. 53 et seq that the interest rate under the Law Society's Condition '*is intended to provide compensation to the vendor arising from the delay*' and at para. 58, that the '*claim for damages in addition to interest is a claim for double compensation for a single loss*'.

57. Thus, the plaintiffs are not entitled to have Mr. 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 Mr. Kenny's breach of contract.

### **Conclusion**

58. The total in damages due to the plaintiffs is made up of the shortfall of €76,000, plus interest at the rate of 10% on the amount of the Agreed Sale Price not received by the plaintiffs on the Agreed Closing Date (the sum of €1.376 million) for the period of delay in the completion of the sale (i.e. interest of €171,151.40), combined with interest of 2% on the shortfall of €76,000 for the period of delay in Mr. Kenny paying that shortfall (interest of €1,719.87), but not the sum of €14,415.22 (in claimed Property expenses). This leads to a total award of €248,871.27.