

## THE HIGH COURT

[2016 No. 1346 P]

BETWEEN

WILLIAM O'RIORDAN

PLAINTIFF

AND

KEVIN DUNNE AND BERNARD DUNNE

DEFENDANTS

**JUDGMENT of Ms. Justice Pilkington delivered on the 31st day of May, 2019.**

1. This matter is in essence a dispute over the claim by the plaintiff, as receiver, for possession of the premises known as No. 1 Cherryvalley Green, Rathmolyon in the county of Meath ("1 Cherryvalley") being part of the lands comprised in folio 53955F in the register of freeholders and county of Meath.
2. The defendants are father and son respectively; the second named defendant joined as a person whom the plaintiff believes to be in possession of 1 Cherryvalley but the dispute is largely between the receiver appointed over M.&M. Construction Company Limited ("M.&M.") and the first named defendant.
3. Folio 53955F is registered in the name of M.&M. in respect of which 1 Cherryvalley was, together with other lands, subject to an Indenture of Mortgage dated 17 December, 2004 between Anglo Irish Bank Corporation Limited of the one part and M.&M. of the other part. Cherryvalley is a development of some 73 units.
4. By Deed of Appointment dated 3 March, 2010, the plaintiff was appointed receiver by Anglo Irish Bank Corporation Limited of all the properties, undertakings and assets of M.&M. and a company known as Lark Construction Limited ("Lark"), which included Cherryvalley. Both companies were involved in the construction business; M.&M. would acquire this and other developments with Lark being responsible for the development/construction of the properties.
5. Eight persons gave evidence for the plaintiff; Mr. Comerford and Mr. Murray on behalf of Lark and M.&M., Ms. Lynham then an accountant with Lark, Mr. Brooks solicitor, who acted for M.&M., then of the firm Brooks and Lee, Mr. McGarry of K-Tech Security, the plaintiff and Messrs. O'Reilly and Lynch, both of PWC on behalf of the plaintiff receiver. Both defendants gave evidence and a valuer Mr. Liam O'Reilly.
6. The first and in my view most important document of note is that entitled "Combined Building Agreement and Contract for Sale" dated 24 June, 2008 between Kevin Dunne called "the employer" and M.&M. Construction described as "the contractor" – it appears that those descriptions should be reversed. In any event the contract states a contract price of €450,000, the closing date to be fourteen days after the completion date which is in turn described as the earlier of: -
 

"the date upon which the employer shall agree in writing that the works have been completed; or

the date upon which the employer shall receive from the contractor a notice in writing that the works have been completed."
7. Under the heading of method of payment, the following appears:
 

"the contract price shall be paid by the employer to the contractor in the following manner; deposit paid: €51,285.

On the closing day the balance of the contract price and payment for any extras or variations agreed between the contractor and employer."
8. The contract is duly executed with the first named defendant Mr. Dunne signing as employer and the directors of M.&M. signing as contractor, in my view it is quite clear that M.&M. is the employer and Mr. Dunne the contractor.
9. The wording with regard to the deposit within the body of the contract can be construed as having been discharged as opposed to requiring payment in the future.
10. By way of background the first named defendant's carpentry company was the sole firm employed by Lark for the construction work on the Cherryvalley Development.
11. It is contended by Mr. Comerford and Mr. Murray on behalf of M.&M. and Lark that an agreement was entered into with the first named defendant, whereby in lieu of monies outstanding to the first named defendant's company (not it appears the first named defendant personally) he would be entitled to purchase one of the properties in the development. Apparently it was not unusual in or about 2006 for contractors to enter into such an arrangement in the hope that there would be a significant uplift in the value of those properties when the development was ultimately completed and also that the contractor's funder (in this case Anglo Irish Bank Corporation) could see that there were initial sales in respect of the development.
12. Mr. Comerford, Mr. Murray and M.&M.'s solicitor Mr. Brooks gave clear evidence that the deposit in respect of 1 Cherryvalley was in lieu of payment to the first named defendant Mr. Dunne in respect of monies owed to his company KBC Carpentry. Just as Mr. Dunne appears to intermingle his role with that of his company there appeared to also be some mingling between M.&M. and Lark.
13. The first named defendant alleges that he mortgaged his own unencumbered family home to purchase 1 Cherryvalley (primarily for his son, the second named defendant) and that from the drawdown of the monies he paid the deposit sum of €51,285 to M.&M. As a stand-alone deposit it is an unusual figure; in such circumstances deposits are usually a rounded percentage of the overall price.
14. Mr. Declan Brooks solicitor, then of Brooks and Lee Solicitors, was the solicitor for M.&M. and Lark. It was he who issued the contract in respect of 1 Cherryvalley. The entire conveyancing file had initially been transferred to Messrs. McCann Fitzgerald (the

then solicitors for the receiver) and thereafter it appeared that it could no longer be located. He had retained the files for the requisite period but thereafter the files had been destroyed. In any event in respect of the file and the documentation generally surrounding this matter, as examined by Mr. Brooks, it appears that the following can be discerned;

(a) In a letter headed subject to contract/contract denied – dated 26 March, 2008, Mr. Brooks forward the relevant documentation for execution by the purchaser Mr. Kevin Dunne.

(b) By letter dated 2 May, 2008 headed in the same manner as above the letter, referencing earlier correspondence and telephone messages asks that if Mr. Dunne is proceeding then contracts be returned. A letter almost in identical terms is then sent by Brooks and Lee on 23 May, 2008.

(c) The contract duly executed is returned by Oliver Shanley & Co. (the then solicitors for Mr. Kevin Dunne) on 29 May, 2008 with the usual subject to contract/contract denied on the letter.

(d) Following the execution of the contract on 28 April, 2008 Brooks and Lee return one part duly executed.

(e) By letter dated 30 June, 2008 from Brooks and Lee to Oliver Shanley & Co. (an open letter) formal notice is given that the works are completed and assert that the closing date for the transaction would be fourteen days from that completion date. A closing statement is attached to that document which clearly shows a contract price of €450,000 a deposit of €51,285, service charge of €190 and therefore an amount due on closing of €398,905.

(f) On 30 June, 2008 the file discloses a letter from Oliver Shanley & Co. to the first named defendant informing him that the solicitors for the vendor have written saying that the property is near completion and ask that if "you would kindly arrange loan approval with your lending institution as soon as possible." The figures required before completion are then set out within the documentation in terms of professional fees and outlay payable to third parties.

(g) On 2 July, 2008 there was a letter from Oliver Shanley & Co. to Kevin Dunne the penultimate paragraph of which reads: -

"please also arrange to have your loan approval issued to us without delay as it would take at least five working days for the loan cheque to issue from the time we receive our request."

There is then a handwritten notation at the end of the letter to the following effect: -

"I rang Kevin on Thursday 3/7/08. He is meeting bank manager next Tuesday. He will ring on Wednesday to let me know how soon I have money."

(h) In chronological order there is then a letter dated 9 January, 2008 from Oliver Shanley & Co. to Homeloans which states the following:

"We have spoken with our client and it would appear that the following figures have been given as follows: -

(1) In or around April, 2008 €70,000 paid to the vendor.

(2) In or around May, 2008 €51,285 was paid to the vendor.

(3) The vendor agreed with our client that due to money owed by them to our client that €100,000 would be deducted from the asking price."

(i) There is then a letter dated 27 October, 2009 from Oliver Shanley & Co. to Brooks and Lee which in part recites the following: -

"We refer to the above matter and confirm that our client is no longer in a position to proceed with the above purchase. We would be obliged if you could confirm if you require a return of all contract documentation furnished."

(j) There are then two memoranda apparently within the firm Oliver Shanley & Co.; one is from Michael Shanley to Oliver Shanley asking whether or not Declan Brooks is going to rescind the contract and thereafter a memo from Michael Shanley of 25 June, 2013 in respect of fees due to the firm.

(k) Finally there is a memorandum on the second named defendant Bernard Dunne when he attended at the office on 26 June, 2013 seeking his father's file in respect of 1 Cherryvalley property from Oliver Shanley & Co. Apparently there was potential difficulty with regard to outstanding fees due to the firm of Oliver Shanley & Co., the final two paragraphs of that memo state the following:-

"I told him (a reference to Bernard Dunne) the original purchase price was €450,000 and that his dad was supposed to have paid €51,258 to the vendor and €70,000 to the vendor as per letter of 29th January, as per instruction. While told that we were not aware that €70,000 was paid, we weren't aware that the client says he is owed €100,000 by the vendor he said that he was happy that he didn't need anything else and brought with him a copy of the letter of 27th October, 2009 which I gave him."

15. In his evidence Mr. Brooks agreed that the deposit was reflected in an unusual manner on the building agreement/contract for sale because it had already been paid and he confirmed that his client had instructed him that this deposit was to be reflected in that amount on the face of the contract/building agreement as it was payment in lieu of services of monies owed to the first named defendant. Mr. Brooks confirmed that he was aware in general terms of the practice where certain sub-contractors were owed money that they would agree terms to acquire a property or an apartment instead of monies owed to them.

16. He questioned in any event whether the Home-Bond policy would be open to the first named defendant but had no knowledge of whether it had been sought on the facts of this case.

17. He confirmed (in response to a query as to why no steps had been taken after the service of the completion notice on 30 June, 2008) that no further instructions were received seeking a forfeit of the deposit or serving a notice of rescission. He also confirmed that his clients were aware throughout 2008/2009 that their position was precarious and were essentially awaiting a receiver to be appointed and that throughout that period there was also some degree of accommodation afforded to any purchaser

18. He further confirmed in response to a question from the plaintiff's counsel that a ledger card had been opened in respect of 1 Cherryvalley, but no transaction was entered.

19. There matters rest. Counsel for the plaintiff has fairly confirmed that no notice or letter of rescission was ever served in respect of this contract and nor it appears was any letter sent in respect of the return of the deposit. Given the evidence advanced on behalf of the vendor regarding the circumstances of this deposit this is understandable.

20. The first named defendant Mr. Kevin Dunne says that he paid the deposit and in that regard evidences documentation showing that, in respect of his family home (which he contends was previously unencumbered) that he then had taken out a loan from Permanent TSB to fund the purchase at 1 Cherryvalley.

21. In support of the first named defendant's contention a letter of approval from Irish Life and Permanent Plc. to Mr. Kevin Dunne describing the mortgage of his family home sets out a loan amount of €400,000. Thereafter a current account of K. & B. Dunne and Conor O'Rourke trading as KBC Carpentry is set out showing 6 June, 2008, six payments into that account from Shanley & Co. solicitors which appear to total €347,534.90. It is the first named defendant's contention that the remainder of that money, (that is subtracting €400,000 from the figure above of €52,465.10) was the deposit which are valued together with fees of €950 costs, VAT and outlay. The amount set aside for fees and outlay is at variance with the documentation set out by Oliver Shanley & Co. but in any event Mr. Kevin Dunne asserts that those monies were held by Brooks and Lee for the deposit monies. No explanation was proffered as to the unusual figure of €51,285.

22. Whilst I understand the arguments regarding the deposit, I do not entirely understand how and in what circumstances it is alleged by the first named defendant that a further €70,000 was agreed to be "knocked off" the purchase price of this property. Moreover, the first named defendant alleges that at a meeting in January 2009 with the Murrays (senior and junior) and Mr. Comerford, it was agreed that if the first named defendant took 1 Cherryvalley "as is" they would not pursue him for the balance of the entirety of the purchase price.

23. All other parties who gave evidence concerning this January 2009 meeting (namely Mr. Murray junior and Mr. Comerford) emphatically denied that this meeting ever took place and/or that there was any such agreement. There is no documentary evidence of it and nor, perhaps more surprisingly given that the first named defendant claims to be entitled to the entirety of 1 Cherryvalley arising from a handshake between certain parties in 2009, it was never disclosed to the plaintiff receiver. It is also clear from the correspondence that his own solicitor never received instructions to this effect. No proceedings were ever issued by way of specific performance or otherwise.

24. It is agreed by all that the contract price was €450,000. If we accept the first named defendant's evidence that the correct deductions should comprise a deposit of €51,285 and an additional €70,000 totalling €121,285 that would mean that M.&M. Construction had agreed to waive an amount of €328,715 on the purchase price of this property.

25. That agreement allegedly took place in January, 2009. Evidence was also adduced that by 2009 M.&M. Construction and indeed the Cherryvalley project was in severe financial difficulties owing to the economic climate; the phrase that M.&M. was "waiting for the receiver" was used on more than one occasion. I therefore find it inherently implausible that such an arrangement would have been arrived at in the terms advanced by the first named defendant. It is also entirely at variance with the correspondence and memoranda from his own solicitor Mr. Michael Shanley of Oliver Shanley & Co.

26. I also note that the evidence advanced on behalf of M.&M. (Comerford and Murray) that by 2009 and perhaps earlier, funds were only being released by their funder (the Bank) upon notification by them that sales had been effected. One cannot easily imagine a scenario where a funder would sanction an oral agreement enabling the first named defendant to complete the (non-specified) works, forgive a substantial outstanding debt and thereafter simply move into the property.

27. Following the events in January 2009, the first named defendant claims he moved into the property and that he was in possession from that time onwards.

28. Post receivership Mr. Comerford and Mr. Murray had formed a company and (upon the instructions of PWC for the plaintiff) were dealing with outstanding issues on the Cherryvalley site including fortnightly inspections. Both gave evidence confirming that at that time there was some thirteen unsold premises within the Cherryvalley Development and that the property at 1 Cherryvalley was unoccupied. Their evidence was to the effect that the first named defendant or possibly the second named defendant took possession in 2012, but no-one was in possession in 2009/2010.

#### **Evidence of Mr. Comerford**

29. Mr. Comerford described himself as a director of M.&M. and a contracts manager for Lark Developments Ltd. which involved him visiting a number of sites – he would visit the site at Cherryvalley approximately once a week. M.&M. was involved in a number of residential developments and that it in turn would subcontract the development works to Lark.

30. The first named defendant did all of the carpentry work for Cherryvalley and had himself expressed an interest in buying a property. He denied there was ever any obligation upon any individual sub-contractor to purchase a property but if a sub-contractor expressed an interest then such interest would be welcomed.

31. He was clear that no deposit was ever paid by the first named defendant but rather that it was an offset between M.&M. and Lark in respect of monies owing by Lark to Mr. Kevin Dunne and that the deposit was inserted in the amount that it was in order to reflect this.

32. He confirmed that the deposit was offset between the companies on an inter-balance company balance sheet, there was no paperwork in this regard to the best of his knowledge nor in respect of the amount of work accrued and not paid over to KBC (the first named defendant's company).

33. He confirmed that the property was completed when the letter of practical completion issued and it was at that point ready to move into at that time.

34. With regard to the 2009 deal, he confirmed that no meeting took place on site or anywhere else and there was never any agreement of the type contended for by the first named defendant.

35. From 2009 to 2012 he confirmed that none of the unsold houses were occupied.

36. Mr. Comerford (and Mr. Murray) had been retained by PWC after the appointment of the receiver to do various works on the Cherryvalley site including fortnightly inspection, particularly with regard to the thirteen unsold houses. His evidence was that in 2012 he received a phone call from the QS (acting for the receiver) who said that he had noticed activity at 1 Cherryvalley. That evening he sent an email to Messrs. Murphy and Lynch at PWC. Thereafter it was a matter for them.

37. It was his evidence that the property was occupied in August 2012 and not before. He was shown a series of photos taken by Kevin Dunne in or about February/March 2010 (showing what he asserted was the poor state of the property at that time). In his view the house was ready to move into on 24 June, 2009.

38. In respect of an alleged meeting at 2009 he also denied that he or any other person within M.&M./Lark had agreed that the first named defendant Kevin Dunne could acquire the property with any outstanding sums forgiven in consideration for he (Mr. Dunne) not making any claim from Home-Bond. His evidence that Mr. Dunne was entitled to do so if he wished.

#### **Evidence of Mr. Michael Murray**

39. Michael Murray stated he was a director of M.&M. and a contracts manager of Lark. He confirmed that the directors of M.&M. comprised of himself, his father Anthony Murray and his sister (she at some point in 2008 resigned her directorship in favour of her husband Mr. Comerford). He also confirmed that he was on site two to three times a week and that in the period 2006/2008 there were four developments on the go at the time.

40. His evidence was that the first named defendant began working for them in 2004/2005 and that his company was the only carpentry sub-contractor for the Cherryvalley Development. He states that whilst none of the sub-contractors were obliged to purchase property they were more than welcome to do so.

41. In the case of the first named defendant he confirmed that in lieu of payment for works done the deposit reflected the unpaid sums and was inserted into the contract for that reason. He did not accept that Mr. Dunne paid the deposit from his own resources. He confirmed that the sale did not complete, that there was no meeting or agreement in January 2009 or at any time that, subject to not making a claim on the Home-Bond policy or for any reason, that Mr. Kevin Dunne was to be "forgiven" the balance of the monies for the purchase of the Cherryvalley site in order that he would move in and do such completion works as were necessary.

42. He also confirmed that in his view the first named defendant never took possession of 1 Cherryvalley, in 2009 he had inspected the property on many occasions and it was not occupied. There was testing on the property (for pyrite) from 2009 onwards and Mr. Kevin Dunne was not in the property at that time. In this view the first named defendant moved in in 2012.

43. Mr. Murray confirmed that from late 2008 to March, 2010 the first named defendant was still working for Lark but his involvement was minimal as they were not effectively doing any new building work they were simply trying to close out the existing properties.

44. Mr. Murray had a clear recollection that prior to the bank holiday weekend in 2012 there had been some form of break-in approximately ten days earlier and some windows had been broken. He understood that PWC sent out security arising from that incident.

45. Mr. Murray confirmed that he didn't see Mr. Dunne from mid-2009 onwards but saw his son after August, 2012. Since the appointment of the receiver he had no dealings with Mr. Dunne at all.

#### **Evidence of Mr. Kevin McGarry**

46. Mr. Kevin McGarry, director of K-Tech Security, stated he had been informed by PWC that they thought there were squatters on the land, that he had called down to 1 Cherryvalley and had changed the locks as requested. He had turned the water off, he said there was no electricity as such but there was lead out of an ESB box which he disconnected.

47. Mr. McGarry inspected the premises gave evidence that he had turned off the water and electricity and reported to PWC that it was indeed occupied and the documentation within it showed that it appeared to be by a Mr. Bernard Dunne the second named defendant and a woman within the property. He confirmed that the water had been turned off and the locks had been changed.

48. Following a complaint from the first named defendant who had contacted PWC, Mr. McGarry again, at their request, went down and met the first named defendant outside the property. The first named defendant explained his situation to Mr. McGarry who then telephoned PWC who in such circumstances asked him to leave the property

49. With regard to the defendants contention that K-Tech caused serious damage to the premise, to the extent that there is a conflict of evidence I prefer the evidence of Mr. McGarry.

#### **Evidence of Ms. Suzanne Lynham**

50. Ms. Lynham was called to confirm that she had never sent an email purporting to come from Lark to the first named defendant which sought to confirm that he was obliged to purchase a property if he or his company wished to be employed/retained as a site contractor.

51. In my view, very little turns upon this matter, the first named defendant executed the contract and was independently advised by his own solicitor throughout.

#### **Evidence on behalf of the Receiver**

52. Before dealing with the evidence on behalf of the plaintiff it is necessary to set out the position disclosed within the documentation.

53. Pursuant to the appointment of the plaintiff as receiver, a letter was sent addressed to the first named defendant Kevin Dunne at KBC Carpentry. It confirmed that the receivership of Lark Developments Limited took place on 3 March, 2010 and sought details of any claims and other related matters. It is clear at this stage that the receiver had no knowledge of any contract executed on behalf of M.&M. Construction Limited and the first named defendant.

54. It would appear that letter was not responded to until 21 August, 2010 when the first named defendant confirmed he was not a creditor of M.&M. and had an agreement to purchase 1 Cherryvalley.

55. The first file note (created by PWC) is dated 10 September, 2012 and records it as a telephone conversation on that date between Mr. Lynch of PWC and the first named defendant. Amongst other matters the following is recorded within that note: -

"KD stated that he thought the agreed price of the house per the contract was €395,000. Given that he paid a deposit of €61,000 and that he was also due €79,000 for work he had done for the company; the net balance he would be due to pay on the house was €255,000."

It is further recorded: -

"KD stated that he moved into the house 10/12 weeks ago, roughly around 25th June, 2012."

Within the record of that telephone conversation he was told not to do any more works and that there were structural problems with the house primarily to do with pyrite. A copy of the contract that Mr. Dunne states he entered into with M.&M. was sought at that point. The following was also recorded: -

"KD stated that he had originally requested for the deposit to be returned to him. BL (a reference to Mr. Lynch) stated that Kevin's claim was unsecured and that he would not get his deposit back. KD also stated that he had gone to Home-Bond to receive his deposit back, but that they had also refused him."

56. In a face to face meeting between the parties on the 30 May, 2013; the following matters are recorded: -

"KD said he had paid a deposit on the house and is still owed over €70,000 from the company, which he accepts is a bad debt that is unlikely to be repaid as he is an unsecured creditor in a receivership."

57. He was informed that the receiver accepted that there was a signed contract that a deposit had been paid but the contract had not been completed and that "he will not have title over the property until various issues have been resolved."

58. The note continues: -

"KD accepted all of this and asked if he could submit a proposal to the bank through the receiver, BL said this is only possible if it came through his solicitor. KD agreed to submit the proposal to BL by 30th June through his solicitor. KD noted that he had some funds available and he may have to find the balance by way of mortgage for his 23 year-old son."

He was again advised to undertake no further works in respect of 1 Cherryvalley.

59. On 28 June, 2013 two matters occurred:

(a) On his own behalf the first named defendant submitted a proposal to acquire the property at 1 Cherryvalley based upon the various considerations set out and proposing a payment of €25,000 for the release of the charge over that property.

(b) By email of the same date Con O'Leary and Company who then and now act for the first named defendant Mr. Kevin Dunne write, in a less than conciliatory fashion, making various claims on his behalf. Thereafter Messrs. McCann Fitzgerald reply on behalf of the receiver and there does not appear to have been any direct engagement between the parties thereafter.

#### **Evidence of Mr. Emmet O'Reilly**

60. Mr. Emmet O'Reilly of PWC gave evidence in respect of a telephone conversation between the parties on 10 September 2012. In essence his evidence was to confirm his recollection of that meeting as reflected within the contemporaneous file note. He further confirmed that after that telephone conversation they were trying to ascertain the position with regard to Mr. Brendan Lynch. Upon a thorough perusal of the file he could find no record of the letter sent by Mr. Kevin Dunne in August, 2010.

61. With regard to the subsequent face to face meeting in 2013 and the request that any offer be put through Mr. Kevin Dunne's solicitors – again Mr. O'Reilly from his perusal of the papers stated that a personal letter from Mr. Kevin Dunne was not received by or on behalf of the receiver.

#### **Evidence of the plaintiff**

62. The plaintiff, aside from confirming his appointment and other matters relating to the mortgage debentures and the folio lands, stated that the day to day running of this receivership was very much managed by the senior management dealing of his team and that any questions with regard to the day to day matters in respect of this receivership should be directed to them.

#### **Evidence of Mr. Brendan Lynch**

63. Mr. Brendan Lynch assists the plaintiff receiver throughout this receivership. He confirmed the two interactions with Kevin Dunne being the telephone call in September 2012 and a meeting in May 2013. He further confirmed that at the time of the receivership, of the properties in the development at Cherryvalley fifty-two were sold, thirteen remained unsold and that 1 Cherryvalley is now the only outstanding unsold property.

64. He further confirmed that with regard to the receivership of M.&M. there was a significant property portfolio above and beyond the properties at Cherryvalley (the overall indebtedness was in the order of €35m).

65. He confirmed that KBC Carpentry was an unsecured creditor of Lark Developments and was not a creditor of M.&M.

66. In or around August/September 2012 he recollected that a QS retained by PWC who was working on the uncompleted houses, particularly those with pyrite, and that he had reported a potential occupation which thereafter was investigated.

67. He confirmed that he had once accompanied Mr. Comerford to view the unsold units and that he went into each. He believed that 1 Cherryvalley was on the list of houses to be completed but that the work required was at the minimal end of that scale. He

confirmed that to the best of his knowledge the first named defendant took possession of 1 Cherryvalley in August.

68. With regard to the contents of the memo of 10 September, 2012 he had been surprised to hear that a contract had been executed in respect of one of those houses. He had asked for it but had never received a copy of it. He confirmed that if any offer had been made that it such a proposal that would have to go through certain procedural steps to ultimately be put to the bank for its approval. In the telephone conversation of September 2012, Mr. Lynch learnt the second named defendant was living in the property.

69. He is quite clear that he informed Mr. Dunne that on no circumstances should any further works be done on the property and also informed him of the difficulties with pyrite as it affected 1 Cherryvalley

70. Mr. Lynch confirmed that he never received a copy of the contract had been procured through his then solicitors not the first named defendant.

71. A meeting with the first named defendant took place on 30 May, 2013 and the memorandum was stated to accurately record the events of that day. Mr. Lynch said that at no point was the agreement of 2009 brought up either in the previous telephone call in 2012 or in the May 2013 meeting.

72. Mr. Lynch explained then in the context of a receivership it was for Mr. Kevin Dunne to put any proposals that was not for this receiver or indeed any receiver to put such an offer. In such circumstances where the first named defendant wished to put a proposal Mr. Lynch asked that he put through his solicitor. He further confirmed that, whilst PWC never received a personal letter from Mr. Dunne offering €25,000, in any event that that would be a wholly unacceptable figure. Upon re-reading the file he confirmed that there had been a letter from where the first named defendant's solicitors of the same date.

73. Mr. Lynch confirmed that two of the houses had been sold by private treaty that the works to fix the pyrite issue had been put out to tender and the houses affected were now been pyrite free. Nine houses had been sold to Cluid the Housing Association and that a property of 1 Cherryvalley was the final asset outstanding. Mr. Lynch pointed out that it would have been much more cost effective to do all of the remedial and remediate works at once but the occupation of 1 Cherryvalley made that impossible and it was decided that, whilst it inhibited the conduct of the receivership, it was best to realise the other assets and to then deal with the position of the defendants thereafter.

74. Mr. Lynch confirmed there was little other remedial work needed to be done in respect of the completion of No. 1 Cherryvalley from his memory of figure of some €10,000 had been put on the value of such remedial works. Dealing with pyrite issue would increase that figure, again from memory Mr. Lynch thought to something approximating €40,000 per house.

75. In response to a question as to why no steps were taken to recover possession between August 2012 and 2016, again Mr. Lynch emphasised that it was not clear he could get vacant possession. In his view it had been preferable to deal with the other matters in receivership; at present 1 Cherryvalley is the only outstanding issue with regard to the Cherryvalley Development.

#### **Evidence of Mr. Kevin Dunne**

76. The first named defendant gave evidence of his company having quoted for the carpentry work to Lark for the Cherryvalley Development. He confirmed that he had a gentlemen's agreement with Tony and Michael Murray that he would be entitled to purchase one of the houses and it was for him to choose the specific property.

77. He confirmed that he borrowed €400,000 and that this money was drawn down and was with Oliver Shanley Solicitors, his son Michael Shanley did all his legal work at that time. Michael Shanley was instructed as his solicitor to draw down the money including the deposit money.

78. He emphatically denied that the deposit sum of €51,285 was in lieu or set off of monies he was owed by Lark. He stated that the agreed price for the property was €450,000 that he himself worked out the deposit sum to be paid and told his solicitor that that sum was to be paid in respect of the premises. He was told he could only borrow €400,000 and that he calculated his total costs of the purchase of the property as being in the order of €470,000.

79. He then stated that he was also told that he would be credited €70,000 in respect of other works that his company (in his mind M.&M. and Lark were interchangeable) that instead of paying him they would give him another €70,000 off the purchase price. By his calculation he had a balance after the deposit and the €70,000 was credited together with his costs and expenses that he would have to pay in the order of €350,000 thereafter for the property.

80. In essence, he states that when it appeared that the property was not completed that he gave instructions to his solicitor that the monies be remitted back to his account and the shortfall (which he says in part was the payment of the deposit of €51,285) remains as the shortfall mortgage on his property.

81. He confirmed that he executed the contract of June 2008 and that he received a letter on 24 June, 2008 stating that the property was ready. Mr. Dunne was emphatic that the property was not remotely finished at that point that he found the suggestion laughable and told his solicitor not to close on that basis.

82. He informed Tony and Michael Murray that the property was not ready and he was not closing until it was. He was aware that M.&M. and Lark were cash strapped at that point and that they were having difficulties with their bank. He said that the next six months were a lot of pressure upon him and he believed also upon M.&M. and Lark. However, he remained emphatic that the property never reached the stage of practical completion and he was not going to close until it did. By October 2008, after the clocks went back there was very little activity on the site and very little activity in respect of the works that he anticipated would be effected on his house to bring it to completion.

83. In respect of the meeting in January 2019, it was a cordial meeting and on the basis of a handshake, following his complaints that the property was very far from complete, it was agreed that he could take the house as is and that he would be given the deeds. He confirmed that whilst he took possession nobody spent any nights there in 2009 and 2010 as the property was not habitable.

84. He was aware that in 2010 a receiver had been appointed and that all contractors including himself would be unsecured creditors with very little prospect of receiving the monies owed to them.

85. He confirmed in emphatic terms that he sent the letter of August 2010 to the receiver that he typed it and sent it himself – his own view was that his claim and concerns were "so far down the food chain" that he had simply been overlooked. He confirmed that

2010 was a bad year for him and his business and he had significant debts and other difficulties. There was no one living full time at 1 Cherryvalley at that time.

86. The first named defendant produced photographs which he said had been taken after the vendors served the completion notice. With regard to the photographs he said he had taken apparently certain units / fixtures had been installed but had later been removed at some point.

87. He is emphatic that he had a short impromptu meeting with Mr. Lynch in or about May 2010 in that he simply walked into the offices and met Mr. Lynch in the foyer and asked to see him. By his account it was a very brief cordial meeting. Mr. Lynch has no recollection of it and in my view, nothing turns on it.

88. With regard to 1 Cherryvalley he had done minimal works to the property in 2009 and 2010 as he himself had financial issues. He had tidied and commenced work on the attic conversion of the property. He said that on occasion he saw Mr. Comerford and Mr. Murray and there was no malice between them and he was unaware of anyone coming into the property at 1 Cherryvalley, he hadn't changed the locks and he again confirmed he had master keys for the entire site.

89. He said that his son the second named defendant had been in the house more permanently from 2011 when his college course finished and he had taken the power off a generator and thereafter, they had both (with independent contractors) done more significant works to the premises to make it habitable for his son. Sometime later his son's partner moved into the property and they had a son together in or about August 2012. The three then lived in the property. He stated that the documents that he had put into his discovery were some of the receipts for the monies that he had spent doing up the property he also confirmed that these prices included a cost for his own labour.

90. He confirmed that whilst the works had seriously begun in earnest in 2011, that they were in effect almost complete when he met with Mr. Lynch in 2013 when he informed him that he had done all the works and was effectively only waiting for an ESB connection. He further confirmed that he was clearly told not to do any further works.

91. He confirmed the telephone call with Mr. Lynch in September 2012, he believed that the figures set out in the memo of that conversation are incorrect. Mr. Lynch particularly took issue with the claim of the agreed price he said that €450,000 always was the price of the house. He believed that he was told there were structural problems but it was only at the face to face meeting in PWC that he first heard of the pyrite issue.

92. With regard to his procuring the contract he said that he had no means of getting it and that he did what he possibly could to try and get it. He agreed that Mr. Lynch asked that he put the offer through his solicitor and that he was and remains willing to purchase the property.

93. The offer in the letter of 28 June, 2013 was prepared by his son but signed by him. From late 2011 he employed a new solicitor (he and Mr. Shanley had had issues in respect of a different matter) and that solicitor had sent the letter on his instructions on 28 June, 2013.

94. The second named defendant and his family left the property in mid-2016 as he was aware of the legal proceedings and thought it preferable that they should not reside there. Thereafter he rented the property to Kildare County Council under their local authority H.A.P. Scheme. He rented the property initially for €950 per calendar month. Apparently it is currently tenanted for the period September 2018 to September 2019 being paid the sum of €1,200 per calendar month on a yearly contract. This information had not previously been disclosed to the plaintiff.

95. The first named defendant confirmed that his case was that in addition to the deposit of €51,285 that at some point thereafter between May 2008 and January 2009, a further €70,000 was agreed to be subtracted from the contract price by agreement of the parties. There was nothing in writing to confirm this.

96. He further confirmed that he had keys to the entirety of the development but had only changed the locks in or about August 2012. With regard to the entries on the ledger on the solicitor's conveyancing file showing no payments, the first named defendant believed that that could well be a fabrication but did not know anything about it.

97. The first named defendant was also at a loss as to explain why in his telephone contact and meeting with PWC that he did not mention that he had done a deal with M.&M. in 2009 that the entirety of the property was his. He confirmed that at no point in any of these conversations with PWC personnel had he informed them that he had acquired the entirety of the property in January 2009.

#### **Evidence of the second named defendant - Mr. Bernard Dunne**

98. The second named defendant and son of the first named defendant gave evidence. Following completion of a law degree at NUI Galway, he entered 1 Cherryvalley he believed in or around June/July 2011. He confirmed that at that point the Cherryvalley property was not finished, there was no running water or electricity in the property. In his view, the works were done prior to the arrival of K-Tech in or around summer 2012.

99. By summer 2012, he said that the property was doing well, it needed a little more to be done and also there was an urgency to completing the works because his son was born in August 2013, and he, his partner and son lived in the property. That remained the position until mid-2016 when he, his partner and son moved out of the property. He stated that he had therefore lived for some three and a half to four years in the property.

100. It had been the first and second named defendants' evidence that he (the second named defendant) had obtained a settlement in a personal injury action – he gave evidence he borrowed monies on the strength of it as it was an assessment only claim in which the firm of Oliver Shanley & Co. had acted for him. He had paid some of those monies for the ongoing repairs to his property but there was no documentary evidence in support of this contention.

101. He confirmed that he attended the offices of Oliver Shanley & Co. but was informed that there were legal fees outstanding and he would not be entitled to the file until those were discharged. He confirmed that it was he who drafted the letter to the receivers putting the proposal forward.

102. The second named defendant further confirmed that he had not been in receipt of rents and profits and nor had his father until the property had been rented post-February 2016. He did not pay any rent himself in respect of the property.

### **Evidence of Mr. Liam O'Reilly**

103. A valuer Mr. O'Reilly gave evidence giving a present valuation of the property (assuming the pyrite problem had been dealt with) in the order of €200,000. With regard to any comparators Mr. O'Reilly was largely of the view that this property was now some 12 years old and its energy rating could not readily be brought up to the standard of the other properties on sale. If the pyrite problem was rectified, he thought that it might bring the property up to €240,000 and he felt that the rental potential for such a property would be between €1,100 to €1,200 per month. He pointed out that the property would be difficult to sell in its current condition owing to the pyrite issue.

104. At the conclusion of this three-day action (there was no transcript), neither counsel offered oral nor written submissions and no authorities were furnished.

105. Accordingly, in my view the position is as follows: -

(a) Given that the April 2008, contract was entered into prior to the enactment of the Land and Conveyancing Law Reform Act 2009, the law prior to that enactment was that a purchaser obtains only a beneficial interest commensurate with the proportion of the purchase price paid (see *Tempamy v. Hynes* [1976] IR 101).

(b) In no documentation that I have seen in respect of 1 Cherryvalley has any contract been expressed to be "time of the essence." Accordingly, the contract remains in existence until it is rescinded, usually by way of a notice of rescission. In this instance it was fairly acknowledged that no notice of rescission had been served. In such circumstances, a letter could also be written deeming the deposit forfeit, however under the unusual circumstances of how the deposit arose in this case that would not have appeared possible for this vendor to send such a notice.

(c) I am satisfied that the vendor upon the evidence advanced on behalf of M.&M. and in particular from its solicitor Mr. Brooks that a deposit be shown on this contract of €51,285 in lieu of payment to the first named defendant's company. I can find no satisfactory evidence that this sum was in fact paid in money by the first named defendant as he suggests and it was never explained as to what turned upon that assertion. I favour the evidence of Mr. Brooks who gave evidence as a solicitor as to the insertion of the deposit amount and the instructions of his client in that regard. No other solicitor gave evidence.

(d) Given that no steps were ever taken in respect of this deposit (which appears clearly on the face of a duly executed contract between the parties as "deposit paid" as confirmed by Mr. Brooks), in my view the plaintiff cannot now seek to resile from the position adopted by M.&M. in that regard; that is that on the face of the document (which must of course be construed against them) that a deposit was paid and I accept that in the contract of April 2008, the payment of that deposit remains.

(e) Accordingly, the first named defendant Mr. Kevin Dunne has acquired a beneficial interest in 1 Cherryvalley, being whatever percentage €51,285 is to the overall purchase price of €450,000. He is thereafter entitled to have that interest noted on the register.

(f) I can find no evidence that persuades me of any additional agreement between the parties that entitles the first named defendant to the deduction of a further €70,000 or any other figure.

(g) The least satisfactory aspect of the first named defendant's evidence was his insistence that in January 2009, on a handshake agreement, he was entitled to the entirety of the property provided he would do whatever works remained to be done in respect of it. On the balance of probabilities particularly arising from his failure to raise this matter in any manner with the plaintiff, I find no further alleged or other agreement as contended for by the defendants (and none was satisfactorily evidenced before the Court) to be binding upon the plaintiff. No written agreement exists and I reject any suggestion that the first named defendant is entitled to a 100% beneficial interest in 1 Cherryvalley.

(h) To the extent that any other figures were put forward by the first and possibly the second named defendant as to monies they claim by virtue of them having expended monies on 1 Cherryvalley, then in my view he has no contractual or other basis for seeking to claim these monies from the plaintiff. The claim is rejected.

(i) Counsel for the plaintiff appeared to suggest that to the extent that Mr. Kevin Dunne might have an equity in the property that those equities could in some way be "cancelled out" or considered in light of the overall facts of this case. In my view, the entitlement of Mr. Kevin Dunne to a beneficial interest in this property by virtue of the deposit stands alone. I do not understand the concept of equitable set off in that regard and no submissions were advanced to me other than a generalised assertion.

(j) There may be other outstanding issues, as counsel for the plaintiff informed the Court that until the first named defendant gave evidence his client was unaware as to the status of 1 Cherryvalley and the receipt of rental monies. This is a significant matter that the first named defendant only disclosed in his evidence before this Court. That will now be a matter for the plaintiff to deal with.

(k) Accordingly, the plaintiff is entitled to its order for possession subject to the entitlement of the first named defendant to his beneficial interest solely arising from the deposit paid as reflected with the terms of the April 2008 contract. To the extent that is necessary the first relief sought by the defendants within their counterclaim can be amended to reflect the terms of this order.

106. I will hear the parties as to any further orders including any order for costs as required.