



08TACD2022



Appellant

v

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. On 16 December 2014, the Respondent raised amended notices of assessments to income tax on the Appellant for the years 2009, 2010, 2011 and 2012 disallowing the Appellant's entitlement to claim the following trading losses that arose in the ABC Partnership:

| Period | Losses Claimed |
|--------|------------------|
| | € |
| 2009 | 458,464 |
| 2010 | 257,098 |
| 2011 | 257,098 |
| 2012 | <u>225,280</u> |
| Total | <u>1,197,940</u> |

2. It was agreed between the parties that included in the amount of loss relief for 2009 of €458,464 is an amount of €172,645 which relates to tourist trading losses governed by section 48 Finance Act 1995 and therefore the ABC Partnership losses to be considered in this appeal are to be reduced to €1,025,295. The Appellant also conceded that the ABC Partnership losses should be further reduced to €761,757 being the amount of the Appellant's actual loss.



Issue

3. The issue in this appeal is to determine whether the Appellant can satisfy the burden of proof to support his assertion that he invested in ABC Partnership and as a consequence is entitled to avail of loss relief of €761,757 pursuant to Taxes Consolidation Act 1997 (TCA) section 381. The parties have agreed that a consideration of the restrictions to loss relief by virtue of the limited partnership provisions pursuant to TCA, section 1013 is not required.

Material facts that were admitted or proved in the evidence

4. The Appellant formed a friendship with DD in the mid 1990s. In or around 2003, the Appellant and DD together with a group of others individuals commenced in property investment.
5. The Appellant engaged FF in YY Solicitors to act on his behalf in relation to all of his property investments.

Project 1

6. The Appellant and a group of investors acquired a site in location 1 and built a block of apartments and a number of townhouses. The project completed in 2005 and the Appellant retained 4 apartments. This was his first investment with DD.

Project 2

7. The Appellant invested €100,000 in a project 2 partnership in 2005 for the purpose of acquiring a listed property and to build student accommodation with 9 other investors including DD. He also paid legal fees, stamp duty and interest bringing his total investment to approximately €150,000 to €170,000. However there were planning difficulties associated with the listed property and the property was sold or assumed into XYZ in 2007. As a pension investor in XYZ, he could not invest in that company as an ordinary investor and did not receive any return from that project.

Project 3

8. In 2006, a group of 46 individuals acquired a site in location 3 with the intention of building 82 apartments. The Appellant invested €100,000 together with providing a guarantee for a further €107,000. While the apartments were completed, there were issues with the building contractor which concluded towards the end of 2008. The property was subsequently repossessed by [REDACTED] and sold on. The guarantee



of €107,000 was called in and later settled. At the hearing on 8th October Counsel for the Appellant mentioned a settlement figure of €50,000.

Project 4

9. An amount of €121,000 was given by the Appellant to YY Solicitors in May 2006 for the purposes of developing a site in location 4 with a group of other investors including DD. However no development took place and the site was bought by XYZ or one of its subsidiary companies. While the Appellant had understood that the monies were transferred by YY Solicitors into the Project 4 account they were instead transferred to DD. It was not known what DD did with the money nor did the Appellant ask DD notwithstanding their contact continued up until 2017.

Project ABC

10. On 30th May 2007, an entity described as the XYZ Group, controlled by DD, successfully tendered to purchase site at location ABC from Vendors for €20 million.
11. DD signed an agreement to purchase property ABC Partnership but was unable to pay the €2 million deposit prompting the vendors' solicitors, ██████████, to issue proceedings in the Commercial Court. As a consequence DD diverted funds from another development project in ██████████ to fund the deposit. The unlawful use of such funds was subject of litigation ██████████ v YY Solicitors.
12. ABC Partnership was managed and controlled by DD and YY Solicitors were responsible for processing and accounting for the funds through their Solicitors' client accounts.
13. By Co-Ownership Agreement dated 18th October 2007 (the Agreement), the Appellant entered into an agreement to acquire an interest of 7.04% in ABC Partnership with 6 individuals and XYZ subsidiary.
14. ABC obtained loan finance of €15 million, from HH Bank on 2 October 2007 on a joint and several basis. The agreed initial purchase price was €20 million, financed 75% by HH Bank Loan with the balance, €5 million, made up of partner equity. There were late closing penalty fees together with a fee for a licence agreement which had unexpectedly increased the cost of the purchase. As such, the costs associated with the acquiring the property ABC Partnership were as follows:

€ €



| | | |
|------------------------------|-------------------|------------------|
| Cost of property | 20,000,000 | |
| Bank loan | <u>15,000,000</u> | |
| Initial Equity Requirement | | 5,000,000 |
| <u>Additional Costs</u> | | |
| Late Closing Penalty Fine | 700,000 | |
| Bank arrangement fee | 150,000 | |
| Interest payments – Jan 2008 | 250,000 | |
| Interest payments – Apr 2008 | 250,000 | |
| Licensing agreement | <u>1,100,000</u> | <u>2,450,000</u> |
| Total Private Equity | | <u>7,450,000</u> |

15. In initial correspondence, the Appellant explained that €5 million was invested by the equity partners and that his contribution was €352,000 and relied on a schedule to the Agreement which supported his assertion that he held an equity stake of 7.04% in the project. He also claimed to have paid interest in the amount of €257,439 which was to be refunded once the additional funds were released by the bank.
16. However, following a change of tax agent and after the matter was part-heard, the Appellant claimed that he made 3 payments towards the purchase price, in the amounts of €121,000, €50,000, and €333,318, and an interest payment of €257,439.
17. As such, the Appellant asserted that he invested a total sum of €761,757 in ABC Partnership, comprising of his initial investment of €504,318 and interest payments of €257,439 paid on the HH Bank loan, in the following tranches:

| | |
|-------------------------------------|----------------|
| | € |
| Equity release - May 2006 | 121,000 |
| Bank of Scotland deposit – Jan 2007 | 50,000 |
| Bank of Scotland, Jul 2008 | <u>333,318</u> |
| | 504,318 |
| HH Bank loan interest – Jul 2008 | <u>257,439</u> |



Appellant's Total Equity Investment €761,757

€121,000

18. The amount of €121,000, which went through YY Solicitors in May 2006 from a remortgage of a property, went towards the Appellant's contribution to Project 4, a development site in location 4. As noted above, the initial intention was to develop the site with a group of other individuals, however, that never came to pass. The site was subsequently acquired by XYZ or one of its subsidiary companies. The Appellant's evidence was that he gave instructions to DD that his €121,000 investment be used for the ABC Partnership project. However, as outlined above, while he had understood that the monies were transferred by YY Solicitors into the Project 4 account, those funds were instead transferred to an account in the name of DD. The Appellant also accepted that the documentary evidence in relation to the €121,000 stopped when it was transferred to DD in 2006.

€50,000

19. BOSI, in providing mortgages for two apartments in [REDACTED], insisted that an amount of €50,000 be placed on deposit under its control for a period of time. At the end of that period, he could use the funds. A letter from that BOSI recorded that the funds went to DD and EE capital account in 2007 which was a surprise to the Appellant as he understood that the funds were transferred to the YY Solicitors client account.
20. He was unable to explain why the funds were transferred to DD and EE but only became aware of that transfer when he received the letter from BOSI on 14th June 2021. The Appellant also agreed that the documentary evidence in relation to the €50,000 stopped when it was transferred to the account of DD and EE.

€333,318

21. BOSI provided an equity release in respect of 2 apartments in [REDACTED] of €333,318.33 and lodged with YY Solicitors on 27th July 2008. Thereafter those funds transferred to EE.
22. LL, a partner in YY Solicitors and a witness called by the Appellant, confirmed that a sum of €333,318.30 was received by his firm from the Appellant on 29th July 2008 and the client ledger reflected that that amount was transferred to an account in the name of EE. There was no evidence of what EE did with that money.



€257,000

23. There were difficulties in financing the cost of the ABC Partnership project so in order to keep the project alive, the Appellant, in evidence, said that he paid the interest for 3rd quarter as the previous interest payments had been paid. The initial funds that the partners had introduced was intended to be sufficient to pay the interest in each quarter but the additional costs were not factored in and were partially attributable to the delay in closing the transaction resulting in significant penalties. There was evidence of an AIB statement recording a cheque no.503730 for an amount of €257,439.34 debited to the Appellant's account on 5 June 2008 and the supporting AIB cheque advice regarding the payment to HH Bank of this amount. There was also a document from HH Bank showing an amount of €257,439 lodged to the ABC Partnership account on 5th June 2008.
24. The Appellant claimed that he made the payment to HH Bank on the basis that he would be repaid out of the subsequent development financing but he could not explain why he would provide such funds when he only owned 7.04% of the development. He was unable to explain why he described the €257,439 interest payment as a "*pension payment*" in his documentation. It is also remarkable that he did not discuss the interest payment with the other investors before taking the decision to make such a contribution specifically in the absence of any agreement from the other investors of how he would be compensated.
25. He produced a bank statement recording a transfer of €250,000 into his business bank account 3 days before making the interest payment of the €257,439 and gave evidence that he transferred those funds from a deposit account held jointly with his wife. When questioned by Counsel for the Respondent as to the source of those funds, the Appellant responded:

"I don't ---- even if I had provided evidence, Commissioner, that that account is my account, and it is a joint account between my wife and I, it is a deposit account of ours, but even if I had provided that surely if you, you follow the line of questioning the next thing would be well where did the money come from that was in that account, and I don't see how that process ends? These were my funds that I've, with my wife's consent, invested in paying the interest on the ABC Partnership."
26. He was a founding director and secretary of XYZ, as well as a shareholder, a director and secretary of UVW from 2014 to 2017 and continued to work with DD during that period. Notwithstanding that relationship, the Appellant never received documentation from DD despite being aware that the losses had been challenged.



Individual LL

27. Individual LL, a partner in YY Solicitors, gave evidence and explained that he was not involved in the transaction in 2007 but had reviewed the firm's financial records and said:

"The difficulty is that that money came from DD but we don't know how that money, from what individuals that money came, how DD calculated that and what individuals he was putting in to the mix in relation to that. That is the difficulty that we have. Yes, there was money over and above, over and above what was wrongfully diverted from ██████████ and over and above the 15 million which came from HH Bank. There was money that came from the investors but I suppose the point I am making is that I am not clear. I have asked DD, we have a reply from him and I don't know whether that is accurate or inaccurate. I can only reply it is not clear from our records where those monies came from but money did come"

28. Individual LL also gave evidence that ██████████ Bank had sued his firm with regard to the unlawful transfer of funds from the ██████████ project into the ABC project. LL concluded that the unlawful diversion of funds *"seems to be something that happened constantly throughout DD's investment in these various projects"*.
29. Published on the website of the Institute of Chartered Accountants in Ireland is the *'Outcome of Appeal by DD against findings and orders of Disciplinary Tribunal regarding complaints against DD* in which it reported:
██████████
30. The Disciplinary Tribunal of the Institute of Chartered Accountants found that DD had failed to provide timely and adequate information to investors and that his actions amounted to professional misconduct. As a consequence, DD had his membership from the Institute of Chartered Accountants revoked ██████████.

Appellant's submission

Oral Arrangements

31. It is a constant facet of the arrangements pertaining to the ABC Partnership project that such arrangements were not reduced to writing, but were oral arrangements in line with previous practice regarding property structures involving DD and YY Solicitors, and were in essence "creatures of the time". However, it is submitted that the lack of



documentation in certain aspects does not render such arrangements any less certain or enforceable than had they been reduced in their entirety to writing.

32. It is also a facet of these arrangements that the funding of each of the projects, including the ABC Partnership project, was not formalised in a structured manner, rather funds were processed through YY Solicitors and also through accounts held by DD and EE, DD being the promoter and driving force behind the projects. However, it is submitted that the lack of a formalised and fully documented process does not render such funding arrangements any less certain or enforceable than had the funding process been carried out in a fully documented manner.
33. In response to being asked to comment on an observation that his relationships and investments seem to be predicated by a lack of any or a scarcity of written documentation and that much seems to have been done on oral instructions between DD, YY Solicitors and other parties, the Appellant responded to the Commission on this aspect of his arrangements with the benefit of hindsight in the following terms:

“In, in retrospect, Commissioner, these things appear totally crazy to have done precisely that; depended on oral agreements as opposed to written ones, not to have asked, for example when you mentioned earlier on, what is the projected outcome from a particular project? That's unfortunately what I did and what the other people who were involved did. There was not ever a document that showed the potential outcome from a profitability point of view. I was asked earlier about would the bank loan document not have stipulated? The bank loan document didn't stipulate that particular part of the funds was to go to an investment in project A or project B. Lots of things were done we would wish were done differently. Was documentation as good as it should be? I think clearly not but that's how it was done.”

34. In line with this theme, the ABC Partnership was not subject to a freestanding partnership agreement. Rather, there was an oral agreement between the parties to develop the ABC Partnership property as a business with a view to a profit with the risks and rewards being shared in accordance with the partnership share interests as outlined in the Second Schedule of the ABC Partnership Co-Ownership Agreement. The Appellant provided the Commission with his understanding of the arrangement in the following terms:

“My understanding was that the, we were the owners. I think I understand what was, the point that was being put to me earlier on that in, in one legal sense because the title didn't transfer we were not the owners but, as I mentioned earlier on, the bank was prepared to provide the funding to us to purchase this. In those circumstances it



was the, it was up to us to develop the site and sell it on and we would gain financially from doing that.”

35. The Appellant in distinguishing his role in the ABC Partnership project from his role in previous projects, went on to elaborate about his involvement in the ABC Partnership project in the following terms:

“... The ABC Partnership development was the only one in which I had intended to have an active role.”

36. It was submitted that there were many facets to the agreement between the members of the partnership and that the partnership arrangement between the parties and was supported by the following documentation, namely:

- (a) The ABC Partnership Co-Ownership Agreement dated 1 October 2007.
- (b) The HH Bank loan facility dated 2 October 2007 where each of the parties were jointly and severally liable for loan and interest therein.
- (c) The Registry of Deeds records the interests that the Appellant and the ABC Partnership CoOwnership have in the lands at location ABC Partnership and also the Mortgage and Charge granted by the Appellant and the other members of the ABC partnership to HH Bank on 16 October 2007.
- (d) The ABC partnership was registered for tax purposes and the Appellant was named as the preceding acting partner.

37. The Appellant referred to the role of HH Bank in the matter and his intention regarding the development in response to questioning from ██████████ in the following terms:

“The HH Bank were prepared to finance this to the tune of €15,000,000. If the bank solicitors and the legal team at ██████████ were prepared to do that I presume there was some value. Again I can't say that I understand all of the legal niceties. My intention was clear; I put my 500,000 in on the assumption that I was getting a portion of the ABC Partnership. The intention was to develop it and dispose of some of the property afterwards.”

38. The Appellant in further questioning from the Commissioner regarding his ownership of the ABC Partnership property and simply giving money to DD, stated that he understood the difference between the two propositions and that the reason that he is claiming



trading losses is not because he made a failed investment, but because of his interest in the ABC Partnership property, wherein he stated in response to questioning from the Commissioner the following:

“Commissioner Kennedy

Q. So can you see the difference between you going and giving money to DD and saying I want to invest in a project and you personally buying a property and saying I now own that? Is that distinction clear to you?

The Appellant

A. Yes

Commissioner

Q. And you understand that this case is here because if you invest with DD and you lose your money?

The Appellant A.

Yes.

Commissioner

Q. There are certain things you can do about that but you cannot claim that as a trading loss against your income tax, you understand that?

The Appellant

A. I think I'm quite clear on that, I only claimed the trading losses.

Commissioner

Q. And the reason you're claiming them as trading losses is not because you made a failed investment, you understand that?

The Appellant A.

Yes.

Commissioner

Q. It's because you are saying you purchased, you personally purchased the property?

The Appellant

A. Yes, along with the six others and with the company.”



39. Further regarding the Appellant's interest in the ABC Partnership property, it was submitted that evidence regarding his interest in the property was confirmed by the following:

- (a) Information on public record held in the Registry of Deeds wherein the Registry of Deeds records the interests that the Appellant and the ABC Partnership Co-Ownership have in the lands at location ABC Partnership and also the Mortgage and Charge granted by the Appellant and the other members of the ABC Partnership to HH Bank on 16 October 2007; and
- (b) The involvement of the Appellant in the suit taken by the previous vendors of the ABC Partnership property against the various parties to the transaction, including the Appellant, entitled: *Vendors -v- ABC Partnership*

RELEVANT FACTS AND EVIDENCE

- 40. The Appellant was a participant in the ABC Partnership Co-Ownership which comprised of seven private individuals, including the Appellant, and a company, XYZ subsidiary. The partnership entered into an agreement with HH Bank on 2 October 2007 to borrow €15 million to purchase a 1.45 acre site with full planning permission for 24 residential units at [REDACTED].
- 41. The Appellant held a 7.04% interest in the ABC Partnership Co-Ownership and he was a party to The ABC Partnership Co-Ownership Agreement, 1 October 2007.
- 42. The Appellant signed the bank loan document for €15 million from HH Bank together with the other members of the ABC Partnership Co-Ownership and all partners were jointly and severally liable for the loan.
- 43. The agreed initial purchase price of the properties was €20 million, financed 75% by HH Bank Loan with the balance, €5 million, made up of equity. There were some late closing penalty clauses invoked subsequently, plus licence agreement fees pertaining to the purchase which increased the cost of the purchase.
- 44. The Appellant outlined to the tribunal to the best of his knowledge the various components of the ABC project investment, namely:

| | € | € |
|------------------|------------|---|
| Cost of property | 20,000,000 | |



| | | |
|------------------------------|-------------------|------------------|
| Bank loan | <u>15,000,000</u> | |
| Net purchase cost | | 5,000,000 |
| <u>Additional Costs</u> | | |
| Late Closing Penalty Fine | 700,000 | |
| Bank arrangement fee | 150,000 | |
| Interest payments – Jan 2008 | 250,000 | |
| Interest payments – Apr | 250,000 | |
| Licensing agreement | <u>1,100,000</u> | <u>2,450,000</u> |
| Total Private Equity | | <u>7,450,000</u> |

45. The Appellant indicated that his initial investment was just over €500,000.
46. It was submitted that the original investment by the Appellant of €504,318 was in line with a 7.04% interest in the ABC Partnership project investment outlined by him to be in the order of circa €7,450,000.
47. The Appellant indicated that the ABC Partnership project was managed and controlled by DD, a Chartered Accountant and that the Solicitors responsible for the project were YY Solicitors. The Appellant had been a client of YY Solicitors since 2003. This firm provided legal services in respect of the ABC project and other projects managed by DD. YY Solicitors were responsible for processing and accounting for such funds through their Solicitors client accounts and they liaised with DD in this regard. The Appellant indicated that he dealt with FF, a solicitor in YY Solicitors in respect of all his transactions through that firm.
48. The Appellant invested a total sum of €761,757 in the ABC Partnership project, comprising of (1) €504,318 re his initial investment in the ABC Partnership project involving site purchase and associated costs, and (2) €257,439 re interest on the HH Bank loan, in the following tranches:

| Source | € |
|-----------------------------|---------|
| Equity release, 31 May 2006 | 121,000 |



| | |
|---|-----------------|
| Bank of Scotland deposit, January 2007 | 50,000 |
| Bank of Scotland, 25 July 2008 | 333,318 |
| | <hr/> |
| | 504,318 |
| HH Bank loan - interest – qtr. ended 16 July 2008 | 257,439 |
| | <hr/> |
| Total | <u>€761,757</u> |

49. Regarding the Appellant’s investment in the ABC Partnership project, it was submitted that the Appellant has been very clear and forthright in his evidence to the Commission and in cross-examination regarding the investment of €500,000, and the percentage expected, the Appellant stated:

“That depends on what the cost would be. So the intent, the purchase price of the site was to be €20,000,000. The, the amount contributed by the individuals involved was to be €5,000,000, however, the bank loan stipulated that interest had to be paid on a quarterly basis. There were late penalty for failing to close in the appropriate time period. There was a further agreement that lead to the actual amount being of the order of €7,000,000.”

50. And he further reiterated in cross-examination regarding the percentage, 7.04% and his contact with other parties in the project the following:

“... I decided to get involved in the project. I was aware that I was making an investment using my €500,000 to become part of the project. I could not honestly say that I was aware at that time that it was 7.04%. I was aware that other people were getting involved and that they were putting in different, differing amounts of money.”

51. The Appellant contributed his initial investment of €504,318 in the ABC Partnership project share of the purchase costs to YY Solicitors in three tranches and he provided further evidence as outlined in the following paragraphs.



€121,000.00

52. The sum of €121,000.00 arose from an equity release, on 31 May 2006. The original intent of this money was to invest Project 4 in location 4 and it was held in YY Solicitors client account, who were responsible for handling the purchase of the Project 4 site. However, the Appellant never became involved in Project 4 and instead, his instructions were that the sum of €121,000 be earmarked for the ABC project and that the funds be utilised in the purchase of the ABC site in location ABC. The Appellant also outlined in his evidence the circumstances surrounding the sum of €121,000 contained within the YY Solicitors Client Account ledger card re The Appellant – purchase of [REDACTED] Street. The funds were raised through a Bank of Scotland loan on 20 April 2006 (€832,628.20 + €52,371.80). The funds were originally transferred from the YY Solicitor’s client account ([REDACTED] Street) to the Project 4 account.
53. The Appellant provided the Commission with the circumstances involving his investment of €121,000 in the ABC project in the following terms:

“So initially the amount of 121,000, which went through YY Solicitors from a remortgage of a property, sorry, from a mortgage on a property which had been arranged through Bank of Scotland, initially that 121,000 was to go towards the Iceland project, which was a site for development in location 4. The initial intent was that the Iceland site would be bought and developed by a group of individuals, however, that never came to pass. The site was in fact bought by XYZ or one of its subsidiary companies. My money that I had introduced to that project was then to go towards the ABC site, that we are talking about.”

54. It should be emphasised that the Appellant had no involvement in Project 4 as this project was bought by XYZ or one of its subsidiary companies. The Appellant was never an ordinary investor in XYZ being a pension investor in XYZ and therefore precluded from becoming an ordinary investor in XYZ.

€50,000

55. The sum of €50,000 was originally a deposit with Bank of Scotland which Bank of Scotland insisted be made and held on deposit for a period of time as a condition for providing mortgages for two apartments in [REDACTED]. At the end of that period of time, the deposit of €50,000 could be used as the Appellant wished and the €50,000.00 was transferred from Bank of Scotland to DD and EE capital account in 2007 as part contribution of the purchase cost of the ABC Partnership project.



56. The Appellant provided the Commission with the circumstances involving his investment of €50,000 in the ABC Partnership project in the following terms:

“The €50,000 was a deposit with Bank of Scotland. Bank of Scotland in providing mortgages for two apartments in [REDACTED] insisted that an amount of €50,000 had, of the borrowing had to be placed on deposit with themselves for a period of time. At the end of that period of time I could then use the €50,000. I got a letter from Bank of Scotland, which I believe we have exhibited as well, in which shows that the funds then went from Bank of Scotland to DD.”

57. The Bank of Scotland letter dated 14 June 2021 was produced regarding the deposit of €50,000 and this letter indicated that the funds had been transferred to DD and EE capital account in 2007 and the Appellant confirmed that the funds were earmarked for the ABC Partnership project in the following terms:

“At the time that the funds were transferred I understood that they were being transferred to YY Solicitors. This was on foot of a conversation with DD. So it was a surprise to me that the funds went to DD and EE’s capital account. I didn’t know that until I received that letter. It was my understanding that those funds were part of my investment with DD, sorry, through DD in a property project. The -- I can only surmise, I do not know this for a fact, that some direct dealings with Bank of Scotland while they were still present allowed the money to be transferred directly to DD and EE rather than YY Solicitors, which is why I asked specifically for the instruction.”

58. The Appellant did specifically confirm to the Commissioner his direction in the matter:

Commissioner

Q. Did you allocate, did you direct that the money be transferred to the ABC Partnership, instead the money was transferred to DD and EE?

The Appellant

A. “... yes, my instruction was that the money was to go to YY Solicitors but clearly that-

Commissioner

Q. For the ABC Partnership?

The Appellant

A. Yes.



Commissioner

Q. And not to DD and EE?

The Appellant

A. No.

In answer to a question from his own Counsel regarding why would funds necessarily go to DD or DD and EE, the Appellant did note that EE was a partner in the ABC Partnership project.

€333,318.33

59. The sum of €333,318.33 also came from Bank of Scotland, being part of the remortgage of two apartments in [REDACTED] and the €333,318.33 was transferred to [REDACTED] on 25 July 2008 from Bank of Scotland for investment in the ABC Partnership project.
60. The Appellant provided the Commission with the circumstances involving his investment of €333,318.33 in the ABC Partnership project in the following terms:

“So this, this, these funds came once again via Bank of Scotland. It was for a remortgage of two apartments in [REDACTED] and of the amount of the, I don't know what the right word is, surplus, if that's the, the equity release was 333,318.33 and that amount of money was with YY Solicitors for the purposes of my investment in ABC Partnership project.”

61. The Appellant went on to outline the entirety of the circumstances surrounding his investment in the ABC Partnership project:

“So at the time of the purchase of the ABC site there were a number of people who had expressed an interest in it, I think there were nine or ten people altogether, of whom I was one, but I had decided not to proceed with this investment. Later on in the process as it came closer to completing it I was persuaded to be involved in the project principally because of the €121,000 that had not been used for Project 4, that I could get some value out of it by investing in the ABC Partnership project. I didn't have the balance of the funds at that time but again with DD said he would, DD, I beg your pardon, said he would help me with arranging this refinance or remortgage, but it took time to accomplish that, and the purpose of this refinance specifically was to



generate the balance of the funds that I needed to complete my investment in the ABC Partnership project.

The whole transaction was, my legal representatives were YY Solicitors so the bank loan was released to YY Solicitors on condition he paid off the previous mortgage and all of the other things that a solicitor needs to do for -- and again the person I dealt with for this was FF in YY Solicitors."

62. The Appellant's testimony has been corroborated by JJ's testimony in this matter.

Interest: €257,439

63. In addition to his original investment of €504,318, the Appellant paid the HH Bank loan quarterly interest of €257,439 on 5 June 2008 out of personal funds and he explained that he made the interest payment on behalf of the ABC Co- Ownership partnership. This AIB statement includes cheque no.503730 of €257,439.34 debited to the Appellant's account on 5 June 2008 and the supporting AIB cheque advice re payment to HH Bank of this amount. The Appellant explained that this amount was the third quarterly interest instalment – the first and second instalments having been paid by the partners in the project and formed part of the investment.

64. The Appellant in his testimony explained the rationale for his paying one quarter bank interest on behalf of the partnership, in essence, to keep the project alive, in the following terms:

Commissioner

Q. And why did you do that?

The Appellant

A. "I was saying we, we had at that stage had several meetings with HH Bank in an effort to drawdown the development finance. In addition to drawing down the development finance part of the negotiation was about refinancing the purchase cost through the development finance. We were still unsuccessful at that stage and in order to provide some more time to try and complete those transactions we had also begun discussion with another bank at that stage, but none of whichever came to fruition sadly, but in order to keep the possibility alive I agreed to pay the interest for that quarter. The, the funds that each of us had introduced at the beginning was intended to be sufficient to pay the interest in each quarter but we hadn't factored in the extra costs that we ended up having to pay, which principally was about delay in closing the transaction that lead to a significant penalty."



Commissioner

Q. What discussions did you have with your partners to say okay guys I'm ponying up the 257,000?

The Appellant

A. I can't say that I had discussions with my partners on this but because I was involved in trying to develop the site I had been at meetings with the banks and with [REDACTED] Council with regard to changes in the planning, so I felt I was keeping the possibility of completing the development alive.

Commissioner

Q. So how was the 257,000 to level out? Like you've, you've contributed far in excess of your 7%.

The Appellant

A. Yeah. So there was, there was a vague promise that once we got, I won't say "vague", there was a promise that once we got the development funds that I would be repaid for my [payment of the interest].

Commissioner

Q. Who gave you the promise? You said earlier on that you didn't discuss this with anybody, you decided on your own to make this –

The Appellant

A. I didn't discuss it with the other six individuals.

Commissioner Okay.

The Appellant

A. DD is the –

Commissioner

Q. Okay. So then, then you said there was a "vague promise", a vague promise from whom?

The Appellant

A. DD. In other words I didn't have something in writing.

Commissioner



That you'd be compensated for this?

The Appellant A.

Yes.

Commissioner Okay.

The Appellant

A. It was a verbal promise, maybe is a better way of putting it. It is easy to say now it was vague.

Commissioner

Yes, yes, yes, yes. Hindsight is a great thing."

65. The Appellant reiterated his rationale for making the interest payment in cross-examination:

"Yes. I believe, Commissioner, I explained earlier on that that was the agreement, only a verbal agreement but an agreement that I would be recompensed for that money out of the development funds, which unfortunately for me we never succeeded in getting.

Yeah. I made that payment of quarterly interest. Clearly other people benefited from the, people apart from myself but the reason that I did it was to try and get to the point where we would have development finance for the project and I would recoup that cost out of the development finance. I believed, and I think it's safe to say naively, that that was the best thing to do."

66. The Appellant's testimony in respect of the HH Bank quarterly interest payment of €257,439.34 has been corroborated by Ms. Céire Moynihan's testimony.

Funding of Investment in the ABC Partnership project – Overview

67. In light of the manner in which the ABC Partnership project was managed and controlled by DD with the involvement of YY Solicitors, and how previous projects were processed by DD/ YY Solicitors, it was submitted that the Appellant has provided clear and consistent evidence to the Commission regarding his funding of the ABC Partnership project.



68. It was submitted that the Appellant has provided sufficient evidence of his investment in the ABC Partnership project in circumstances where funds were directed to the project, the Appellant signed the Co-Ownership Agreement and HH Bank facility letter, his interest in the ABC Partnership property has been registered in the Registry of Deeds and where he subsequently paid the HH Bank loan quarterly interest of €257,439 on 5 June 2008 out of personal funds.

Involvement in the ABC Partnership project

69. The Appellant spent a considerable amount of time on the ABC Partnership project involving planning applications, liaising with neighbours, organising ground clearance, financial negotiations with HH Bank and financial projections and he outlined such at the hearing.

70. The Appellant stated that the partners actively involved in the development of the project were Individual II (initial stages in particular), Individual JJ (an architect and director of the corporate partner, XYZ), Individual KK (to a lesser extent) and himself, whilst confirming that DD was “the principal behind the thing”.

71. The project collapsed due to the property crash and the €15 million loan from HH Bank was called in by the Bank at the beginning of 2009. The Appellant explained that a judgement of about €16.5 million was obtained by HH Bank against him and the other ABC Partnership partners for which they were all jointly and severally liable.

72. The Appellant confirmed his investment in the ABC Partnership project and his disappointment on a number of occasions in his evidence in the following terms:

“Yes, Commissioner, there's no doubt that my funds were invested, at least there's no doubt in my mind that my funds were invested in the ABC Partnership project and in the amount of €500,000. That was my intention. I have mentioned already that I feel let down by those professionals I should have been able to depend on. I further paid a quarter of interest that in retrospect was very foolish of me but I did it at the time because I believed we could make a go of it. It has been a huge disappointment to me to learn that things happened to my funds that were not what I had asked. I can't say other than my disappointment to have discovered that.”

73. The Appellant in commenting on the YY Solicitors Client Account regarding the purchase of ABC Partnership property noted that the HH Bank loan of €15 million was not dealt with through the account and that “... the most important thing about it is that we can't identify any funds, as in I can't say which funds are mine or anybody else's.”



74. It is submitted that the chaotic state of the YY Solicitors Client Account in respect of the purchase of ABC Partnership property illustrates the difficulties that the Appellant had in obtaining information from his Solicitors, YY Solicitors and from DD.
75. Nevertheless, it was submitted that the Appellant has clearly demonstrated that he made an investment of €761,757 in the ABC Partnership project.
76. The Appellant has not received a refund at any time from YY Solicitors or from any other individual or company for the funds he invested in the ABC Partnership project and in confirming his position regarding his investment in the ABC Partnership project, he stated:

“This, this was my intention to become involved. This is how I paid for my part of the ABC Partnership project. As I mentioned earlier on I had not received anything by way of refund or whatever, whatever form financially for the money that I invested in this. I claimed the tax allowances in the belief that I was entitled to those tax allowances and I don't know what else to say, Commissioner, other than this is what I did.”

Litigation arising from the ABC Partnership project

77. The Appellant has been sued in two High Court actions on the basis of his membership of the ABC Co-Ownership, namely:
- (1) Vendors -v- ABC Partnership Partners and DD
 - (2) HH Bank -v- ABC Partnership Partners

These cases are a matter of public record.

78. The Appellant further confirmed the outcome of the case taken by HH Bank against the members of the ABC Partnership in the following terms:

“So following the, the negotiations, which I mentioned earlier on, to arrive at a settlement for each of us individually, the amount that HH Bank were looking for or demanding by way of a settlement was just not possible to achieve. They were prepared to give a period of time. There was an upfront payment and then a number of payments over two years but it, it was unobtainable for me. I had a meeting with, I think the man's name was ██████████ in HH Bank but we failed to reach a compromise. Subsequently HH Bank took court action against each of us on a joint



and several basis and that resulted in a judgment against each of us in the amount of approximately 16.5 million.”

Other investments

79. The Appellant has stated that he was a pension investor in XYZ and therefore he was precluded from becoming an ordinary investor in XYZ. The Appellant confirmed that he had made a series of other investment as follows.

Project 1

- (a) Commissioner Kennedy questioned the Appellant about OCM Construction which was referred to in the Bank of Scotland letter dated 20 June 2019. The Appellant stated that OCM Construction were the builders of the Project 1 apartments and that this was the first investment that he made with DD, YY Solicitors were also involved and it was completed in December 2005.

Project 2

- (b) He referred to the Project 2 partnership and stated that he had initially invested €100,000 in that project and he also paid further costs in respect of the project comprising legal fees, stamp duty, and interest on two occasions bring his total investment to approximately €150,000 to €170,000. He confirmed that he never received any return on the project and that the Project 2 property was subsequently transferred to XYZ or one of its subsidiaries. He confirmed that as a pension investor in XYZ, he could not invest in XYZ as an ordinary investor and therefore he was not one of the ordinary investors in the company and he confirmed that he never received a return from the Project 2 partnership project.

Project 3

- (c) The Appellant spoke about another project in which he was involved – Project 3. He stated that he had invested €100,000 in the project together with the provision of a bank guarantee of €107,000. The Appellant stated that there were fire safety problems and Court issues which delayed the project so that by the end of 2008 ██████████ repossessed the site and sold it on, and there was no return on the project to the original investors including the Appellant.



Pension property investments

80. The Appellant then stated that he had other investments through his pension fund – a one third owner in a building in [REDACTED] and a half share in property in [REDACTED] with his business partner [REDACTED], and his home [REDACTED].

Evidence – LL

81. LL, a partner in the law practice, YY Solicitors, who handled the legal aspects of the ABC project transaction including the drawing up of the ABC Co-Ownership Agreement, the HH Bank loan and the operation of the Solicitor’s Client Account in respect of the transaction, provided evidence to the Commission on Day 1 of the hearing of the matter, 16 December 2020.
82. Due to the lack of information, the passage of time, absence of individuals (FF who dealt with the ABC project transaction) and the state of YY Solicitors records, it was submitted that LL was in the unfortunate position that his testimony to the Commission is replete with speculation, rather than clear and sustainable evidence in the matter.
83. However, LL did confirm that the Appellant was one of the purchasers of property ABC.
84. He also confirmed that the sum of €333,318.33 was sent from Bank of Scotland on 27 July 2008 to YY Solicitors by the Appellant and lodged on 29 July 2008 to YY Solicitors accounts. He further indicated that the funds were subsequently transferred to an account in the name of EE, who was an investor in the ABC transaction. [REDACTED]
85. It was submitted that this evidence provided by LL corroborates the Appellant’s evidence regarding the ABC Partnership project and that such funds referred to in LL’s evidence (€333,318.33) were used by the ABC Co-Ownership partnership to fund development costs and HH Bank loan interest payments in 2008.
86. Further, it is noteworthy that Ms. Céire Moynihan’s on behalf of Revenue confirmed the following in respect of the €257,439.34 paid by the Appellant to HH Bank:

“... Revenue are satisfied that they have received evidence of an amount of 257,439.34, a bank statement in relation to one payment amounting to that from the Appellant’s bank account. We have also received evidence from HH Bank bank



account that monies were received into the ABC Partnership co ownership account in the amount of 257,439.34.”

Quantum of ABC Partnership Losses

87. The respondent’s estimation of the Appellant’s tax liabilities as a result of disallowing the entitlement to loss relief giving rise to the following liabilities were drawn to the attention of the Commission, namely:

| Period | Losses claimed | Losses used | Tax under appeal |
|---------------|-------------------------|-----------------------|-------------------------|
| | € | € | € |
| 2009 | 458,464 | 373,794 | 113,492 |
| 2010 | 257,098 | 180,257 | 35,935 |
| 2011 | 257,098 | 146,127 | 39,123 |
| 2012 | 225,280 | 138,552 | 27,297 |
| Total | <u>1,197,940</u> | <u>838,730</u> | <u>215,847</u> |

88. The Appellant explained that the losses claimed in 2009 comprise of two elements:

| | |
|------------------------------------|----------------|
| | € |
| Tourist trade – Section 48 FA 1995 | 172,645 |
| relief ABC development | <u>285,819</u> |
| | <u>458,464</u> |

89. In the circumstances, the ABC Partnership construction losses being claimed by the Appellant are as follows:

| Period | ABC Losses claimed |
|---------------|---------------------------|
| | € |
| 2009 | 285,819 |
| 2010 | 257,098 |
| 2011 | 257,098 |
| 2012 | <u>225,280</u> |
| Total | <u>€1,025,295</u> |



90. There has been no issue taken by Revenue in respect of the Section 48 Finance Act 1995 losses and therefore, it is submitted that the ABC Partnership construction losses of €1,025,295 are the appropriate losses in question for the purposes of this appeal and that the Section 48 loss relief of €172,645 incurred in 2009 is not in dispute.
91. The Section 48 loss relief of €172,645 claimed in 2009 was the last year of a 10 year scheme regarding property rentals. The sum of €172,645 reflects a double rent allowance claimed in each year.
92. In the circumstances, having regard to the Section 48 loss relief, the losses utilised in respect of the ABC Partnership development amount to €660,085 (€838,730 less €172,645), which is less than the actual monetary losses incurred by the Appellant of €761,757.
93. It is submitted that the Appellant is entitled to avail of losses incurred in the write-down of the valuation of the ABC Partnership property and the interest accrued in respect of the Zurich Bank loan in accordance with general accounting principles and pursuant to Section 381(4) TCA 1997.
94. Further, it is submitted that the provisions of Sections 381A to 381C, TCA 1997 have no application. In particular, it was submitted that the restrictions pertaining to valuation write-downs and interest (Section 381A (2)) TCA 1997 do not apply in this instance.
95. It was submitted that the Appellant has provided credible evidence that the total investment in the ABC Partnership project was in the order of €22,450,000, being the original cost of the property together with additional costs.
96. In the succeeding years, the ABC Co-Ownership partnership suffered a catastrophic loss on the investment comprising of loss of the entirety of the original investment, together with development and professional costs, and interest costs (approximately €1 million per annum).
97. In the circumstances, it was submitted that the original investment was written down in the years following the financial crash and that the Appellant's share of such losses has been reflected in his income tax returns for the tax years, 2009 to 2012.

Conclusion

98. It was noted that there was a lack of documentation in certain aspects of the arrangements pertaining to the ABC Partnership project. Notwithstanding, it was



submitted that such arrangements in place, oral and/or written, regarding the ABC Partnership project, do not render the arrangements any less certain or enforceable than had they been reduced in their entirety to writing.

99. Further, it is noted that the funding arrangements in respect of the ABC Partnership project, were not formalised in a structured manner, rather funds were processed through YY Solicitors and also through accounts held by DD and EE, DD being the promoter and driving force behind the project. Notwithstanding, it was submitted that the lack of a formalised and fully documented process does not render such funding arrangements any less certain or enforceable than had the funding process been carried out in a formalised and fully documented manner.
100. It was submitted that the issues before this Commission have been narrowed to whether or not the Appellant invested monies in the ABC Co-Ownership partnership, and as a consequence, the Appellant seeks to avail of loss relief pursuant to Section 381 TCA 1997, and this point has been accepted by the Respondent.
101. It was submitted that the Appellant has clearly demonstrated that he invested €761,757 from his own resources in the ABC Co-Ownership partnership and the property therein in the following circumstances:
- (a) The Appellant held a 7.04% interest in the ABC Co-Ownership partnership demonstrated by his participation in the ABC Co-Ownership Agreement dated 1 October 2007.
 - (a) The arrangement between the co-owners had all the indicia of a partnership in that it was established as a business with a view to a profit.
 - (b) The Appellant together with the other members of the ABC Partnership Co-Ownership entered into a loan agreement with HH Bank to purchase the ABC property with all partners jointly and severally liable for the loan.
 - (c) The Registry of Deeds records the interests that the Appellant and the ABC Partnership CoOwnership have in the ABC property and also the Mortgage and Charge granted by the Appellant and the other members of the ABC Partnership to HH Bank on 16 October 2007 in respect of the ABC property.
 - (d) The Appellant paid for his 7.04% interest in the ABC Partnership in three tranches amounting to €504,318.



- (e) The Appellant provided detailed and consistent information and supporting documentation regarding the three elements of the total investment, namely:
 - (i) €121,000
 - (ii) €50,000
 - (iii) €333,318.33
- (f) The Appellant paid a further €257,439.34 in respect of the HH Bank quarterly on the €15 million loan and he provided supporting documentation.
- (g) The Appellant has provided clear and credible evidence of his involvement in the ABC Partnership project.
- (h) The Appellant has incurred trading losses arising from losses incurred in the holding and development of the ABC Partnership property, €1,025,295 and the losses utilised in respect of the ABC Partnership development amount to €660,085.
- (i) The Appellant confirmed in his testimony to the Commission that he never received any return from his investment in the ABC Partnership project.
- (j) The Appellant has been sued in [REDACTED] on the basis of his membership of the ABC Partnership.
- (k) LL corroborated a number of aspects of the evidence of the Appellant.
- (l) The Appellant has provided a set of documentation supporting his evidence.

102. It was submitted that the Appellant has clearly demonstrated that he invested €761,757 in the ABC Partnership and the property therein, so as to underpin his entitlement to tax losses of €1,025,295 arising on the project pertaining to his investment and in particular to the tax losses of €660,085 actually claimed in respect of the losses incurred in the ABC Partnership, such losses being less than the actual monetary losses incurred by the Appellant of €761,757.

Respondent's submissions

103. The purported trading losses were alleged to have arisen in the course of property development. The Appellant claimed to have invested sums by purchasing, as a partner, lands at location ABC in 2007. He claimed that he, along with other named partners, had



purchased the property, with their own funds supplemented by a loan from HH Bank, and that he thereby suffered a loss when the bank subsequently appointed a receiver over the property because of their failure to repay the loan from the bank.

104. The Respondent was, and remains, willing to concede that in so far as any payments made towards the purchase price of the property were made from the Appellant's own resources, were actually utilised to purchase the property by being paid to the vendors (as opposed to just being paid to the principal behind the investment proposal or to the solicitor acting for the partners), and were not repaid by either the vendors or any other person involved in the project, then loss relief pursuant to Section 381 Taxes Consolidation Act 1997 should be available to him. At issue, from the outset, was the lack of any documentary or other evidence in relation to the extent of his contribution to the purchase price.

105. The evidence was heard over 2 days. On the first, 16 December 2020, Individual LL, from the firm of solicitors who represented the Appellant throughout the transaction, appeared as the Appellant's witness, and gave evidence on the movements of money in and out of the Appellant's solicitor's accounts. On 12 July 2021, the Appellant himself gave his evidence. In between the two days, on the eve of the second day, the Appellant's agent provided a booklet of documentation to be relied on in his evidence.

106. In the course of the hearing, it was pointed out that €172,645 of the 2009 losses claimed were unrelated to the within matter, and related instead to loss relief for tourism losses. The Respondent is not taking issue with those losses, and in so far as they form part of the appeal, the Respondent has no objection to those losses being allowed. The Respondent therefore accepts that losses in the amount of €172,645 should be allowed. At issue, therefore, are the balance of the losses, in the amount of €1,025,295.

The various versions of the Appellant's case

107. In his original returns as filed, the appellant had claimed losses in the total amount of €1,197,940. After allowing €172,645, the losses claimed in relation to the ABC Partnership project claimed in those returns by the Appellant were €1,025,295, being €285,819 for 2009, €257,098 for 2010, €257,098 for 2011 and €225,280 for 2012. No trading accounts were ever produced for 2009, 2010, 2011 or 2012 to support these figures.

108. The Appellant's original case on appeal was that €5,000,000 had been invested by the equity partners in the project and used towards the purchase price of €20,000,000, that the balance was funded by a loan in the amount of €15,000,000 from HH Bank. He



claimed that he had made one payment towards the purchase price in the amount of €352,000 and had made a payment towards the interest on the loan in the amount of €257,439, and that his total financial contribution to the project was €609,000. He relied very heavily in this regard on a schedule to a development agreement, which seemed to show him having an equity stake of 7.04% in the project (as 7.04% of €5,000,000 is €352,000).

109. Following a change of agent, after the matter was part-heard, the Appellant changed his case. He now claims that he made 3 payments towards the purchase price, in the amounts of €121,000, €50,000, and €333,318, and that he had made a payment towards the interest on the loan in the amount of €257,439, and that his total financial contribution to the project was therefore €761,318.

The failure to provide documentation

110. By Direction of the Tax Appeals Commission dated 7 March 2018, all evidence should be sent to Céire Moynihan, Revenue by Friday 23 March 2018 in order to avoid dismissal of the appeal. No evidence was sent.

111. On 30 October 2020 the Tax Appeals Commission directed that that Appellant must file submissions and witness statement. No written submissions were filed. Four documents were provided. A witness statement was not provided.

The burden of proof

112. In appeals before the Tax Appeals Commission, the burden of proof rests on the Appellant. In an appeal against the disallowance of a loss claimed for the purposes of income tax, therefore, the Appellant must prove on the balance of probabilities that an allowable loss occurred. In the High Court decision in *Menolly Homes Ltd -v- Appeal Commissioners and another*, [2010] IEHC 49, at paragraph 22, Charleton J. summarised the position as follows:

“The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.”

113. It is well-established that the onus of proof resting on the taxpayer flows from the proposition that knowledge of the relevant facts and custody of the documentary evidence in relation to one’s tax affairs are in the sole possession of the taxpayer.



114. The onus of proof in this appeal, of establishing that an allowable loss for the purposes of the income tax regime occurred, rested on the Appellant. A loss presupposes an investment by the Appellant, not just in [REDACTED] or in DD or in a project, but an investment in land by way of purchase of that land with his own funds.

The law - Loss Relief

115. At issue before the Appeal Commissioner is whether allowable trading losses had been incurred by the Appellant. Section 381(1) of the Taxes Consolidation Act 1997 ("TCA") addresses allowable losses from a trade. It provides:

"Subject to this section, where in any year of assessment any person has sustained a loss in any trade, profession or employment carried on by that person either solely or in partnership, that person shall be entitled, on making a claim in that behalf, to such repayment of income tax as is necessary to secure that the aggregate amount of income tax for the year ultimately borne by that person will not exceed the amount which would have been borne by that person if the income of that person had been reduced by the amount of the loss."

116. In order to satisfy section 381, the Appellant must establish that he invested his own monies in the property in the course of trade, and subsequently incurred a trading loss.

117. At a series of case management hearings, and through *inter-partes* correspondence, the matters at issue have been narrowed down. It is accepted by the Revenue Commissioners that investment as a partner through a partnership in a property development could give rise to a trading loss, so that the sole matter to be decided at the hearing was a matter of fact, namely whether the Appellant had in fact invested monies in the property as alleged, and therefore subsequently incurred the alleged losses as a partner. It was clear to both parties that what would be required at the full hearing was evidence that the Appellant, in his capacity as a partner, invested his own monies in the purchase or subsequent development of the ABC lands, did not recoup the monies in any way from DD or from the other partners, and therefore incurred trading losses.

118. The Respondent's position throughout has been that evidence that the Appellant paid over monies to DD or [REDACTED], or to his solicitor, would not, in and of itself, be sufficient to discharge the evidential burden on him, as he had to establish that he invested his own monies in purchasing or developing the lands, that the purchase was made by him, via the ABC partnership or otherwise, that the funds were not returned or



reinvested elsewhere, and that the loss was incurred by him, as a member of the partnership.

LL's evidence

119. LL of YY Solicitors gave evidence on behalf of the Appellant by remote hearing on 16 December 2020.

120. In evidence in chief, he stated as follows:

- YY Solicitors acted for the ABC Partnership Co-ownership, with a solicitor named FF dealing with the transaction. FF left the firm in 2009
- The records within the firm are limited, but the firm has a purchase file for the ABC property.
- It is unclear in what format the Appellant gave instructions to the firm
- On 27 July 2008 a sum of €333,318.33 was sent from Bank of Scotland to the firm by the Appellant
- These funds were transferred to a bank account in the name of EE.
- The records also show that moneys were diverted by DD and FF from another project, being moneys that [REDACTED] [REDACTED] had loaned for another project
- This is well-documented, it is the matter of [REDACTED] v YY Solicitors. The record shows these moneys coming in and being used for the ABC project.
- It also shows other moneys coming in from DD.
- LL was of the view that the answer as to what moneys went where and were applied by whom rests with DD;
- LL is unclear why the money was sent to EE;
- He confirmed that the Appellant advanced moneys to the firm, and that no one can confirm where they went or, if they were sent to EE and why;
- He confirmed that DD directed where the Appellant's money was to be used, and that the Appellant and DD had quite a lot of contact;
- He had significant communication with the Appellant over the years, and was surprised it was not before the Commission;
- There is also a record of a sum of €121,000;

121. In cross-examination, he stated as follows:

- There were at least 3 other projects involving the Appellant and DD that the firm was involved in;
- He confirmed that there were four others, Projects 1, 2, 3 and 4;



- DD put the groups together, money was paid by individuals, but only DD knows what was what, in terms of what moneys went where;
- DD was involved in relation to a development in ██████████ named ██████████, financed by ██████████. ██████████ agreed to refinance the project, and lent money on foot of it. That money was paid to the firm. And FF and DD used that money to finance part of project ABC. That became ██████████ v YY Solicitors. It seemed that the Appellant was not ██████████ ;

122. When asked by the Commissioner if the Appellant's money could have been involuntarily transferred to a project that he had no interest in, LL replied that if you look at the report from the Chartered Accountants, that seems to be something that happened constantly throughout DD's investment in these various projects. He confirmed that certainly in relation to this Project ABC matter there were moneys unlawfully and wrongly directed from the ██████████ project in ██████████ into this. He then set this out in some detail:

“DD signed an option agreement to purchase property ABC. He wasn't able to pay the deposit. The vendors issued proceedings in the Commercial Court. At that point, the moneys from ██████████ project, which were meant to discharge the previous loan to ██████████ for that project, were diverted in to Project ABC. That was about €2,500,000.”

123. LL confirmed that he believed that funds from other projects may have been directed or diverted to *Project ABC*, but that from the records and from what he had heard from other people, he had no reason to believe that funds intended for *Project ABC* were diverted elsewhere.

124. In summary, he stated that there were further moneys besides the €15m loan and the €2.5m from ██████████, but it couldn't be said from whom that money came.

The Appellant's own evidence

125. The Appellant gave evidence on 12 July 2021. In evidence in chief, he stated as follows:

- He formed a friendship with DD in the 1990s. They started investing in property together in the early 2000s, and then invested in others until the crash in 2008;
- He used YY Solicitors for that first investment in 2003, and since then the firm has been his solicitor for many property-related transactions. He dealt exclusively with FF;



-
- He stated that he signed the ABC co-ownership agreement, which states that he is one of the partners and that he had a 7.04% interest.
 - The ABC Partnership project involved purchasing a site for Development at location ABC at the end of 2007, with a view to changing the planning on the site. They were unable to get planning changed, or to get development funding to develop the site;
 - The purchase cost was €20m, with the bank providing €15m on condition the individuals provided the remainder of the finance, which was to be €5,000,000.
 - Further funding was eventually required, due to a delay in completing the purchase, penalty clauses on foot of a tender document (in the amount of between €500,000 and €900,000), a licensing agreement entered into with the vendors (for €1m, half of which was paid, the remainder the subject of a High Court judgment), and quarterly interest payments.
 - He found the evidence of his own witness, LL, to be unsatisfactory;
 - DD has been uncooperative in relation to evidence;
 - He claimed that he invested €50,000, plus €121,000, plus €333,318, plus a quarterly interest payment in the amount of €257,439;
 - The €121,000 was initially to go into Project 4, and was transferred to the “Project 4 Account” but XYZ or one of its subsidiaries bought that site, so it was put into the ABC project on his instructions to DD;
 - The €121,000 was funded by a bank loan granted for the purchase of [REDACTED];
 - The €50,000 was held in a deposit account of 6 months and then transferred to a current account of DD and EE;
 - He was surprised that it had not been transferred to YY Solicitors, as he had instructed that it should, but could not explain this;
 - He first invested the €121,000 and DD helped him re-mortgage to release the €333,318 as the balance of funds due for ABC; The €333,318 was funded by way of re-mortgage of the Project 1 apartments (being the balance after paying off the previous mortgage on the properties), and was sent to YY Solicitors.
 - He had previously been involved in Project 2, in which he invested €100,000 and other costs, such as legal fees, a portion of the stamp duty, interest on two occasions and a loan to UVW to contribute to a further interest payment, being €150,000 to €170,000 in total;
 - That project was taken over by XYZ, the other investors were given proportionate shares in XYZ in 2007 but since he was a pension investor in XYZ he could not;
 - He cannot account for that money, but he presumes it should have come back to him;
 - He also invested €100,000 in Project 3, a development which was repossessed by the bank;



-
- It was a condition of the €15,000,000 loan that interest be paid quarterly. He paid the total third quarterly interest payment in the amount of approximately €257,439 on 5 June 2008;
 - He vaguely said that the first 2 quarters were paid by the partners and formed part of the investment;
 - He paid on behalf of everyone, in order to keep the development alive;
 - He didn't discuss the payment with the 6 other individuals, but he had a verbal promise from DD that he would be repaid from the development funds once released;
 - He himself noted that the payment of €257,439 was "re location ABC", "HH Bank" and "pension transfer" but he cannot explain that. The payment was preceded by a lodgement of €250,000 from an account which he states was his and his wife's joint deposit account;
 - HH Bank called in the loan in 2009.
 - He was absolutely certain he had invested €500,000 in the ABC project;
 - Things happened to his funds that he had not asked for;
 - For Project 3, he had put €100,000 in, taken it out to invest in something else, then re-invested;
 - In relation to the YY Solicitors ledger, he can't say which funds are his and which are other people's;
 - He doesn't think it is possible to identify anything of an individual character from the ledger;
 - Over €5m was paid to [REDACTED];
 - HH Bank got judgment in the amount of €16.5m against him, but this was subsequently written off;

126. In cross-examination, he stated as follows:

- He was a founding director and secretary of XYZ, as well as a shareholder;
- He was a director and secretary of UVW from 2014 to 2017;
- He was working with DD from 2013 to 2017;
- His investment in Project 1 resulted in him owning 4 apartments in location 1; that was done by way of a single conveyance from purchase of the site to title to the apartments;
- He understood that land purchases normally involve an agreement to purchase, and then a deed of transfer;
- In Project 2, he loaned the money for an interest repayment to UVW; but UVW had no interest in the property;
- In all the developments, the amount of equity was in proportion to the amount of funds introduced;



-
- In Project 3, the intention was to retain title with the vendors until they the developers were ready to transfer the title to the apartment owners;
 - He accepted that documentary evidence that he paid €121,000 to YY Solicitors which was then paid to DD for the Project 4 site was not evidence that he had owned a share in that site; in fact only XYZ purchased the site;
 - The withdrawal of the €121,00 was not active on his part, was only said by way of verbal instruction, and might only have been said to DD;
 - It is not possible to identify individual funds from the YY Solicitors ledger card;
 - It was the XYZ Group who tendered to purchase the ABC properties in May 2007;
 - There is no document that evidences that the Appellant would be a purchaser;
 - He wasn't sure if he "owned" the property; he was sure there was a deed of conveyance, as referred to in the co-ownership agreement; he had no recollection of signing a deed of conveyance and transfer; the co-ownership agreement related to construction and development;
 - The co-ownership agreement provided that the co-owners were to manage and fund the development in their relevant proportions, and his proportion was 7.04%;
 - The co-ownership agreement expressly states that it is not a partnership agreement;
 - It is signed by XYZ subsidiary;
 - He didn't know if XYZ subsidiary had given funds towards the purchase;
 - There was no other agreement entered into in relation to ABC Partnership;
 - At the time of signing the co-ownership agreement, the equity contribution was expected to be €5m;
 - He could not explain how the percentage allocations in the second schedule (14.085 etc) were arrived at;
 - He stated that in October 2007 he had agreed that his investment would be €500,000;
 - He agreed that 7.04% of €5,000,000 was €352,000;
 - He stated however that 7.04% of €7,000,00 was €500,000;



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- But he then accepted that he could not have known in October 2007 of the extra costs that would increase the equity contribution from €5m to €7m;
 - He then stated that when he was investing €500,000, his understanding was that he would have an equity that reflected this, and he can't say he understood it to be 7% or 10% or 20%;
 - He now says that we should not take from the co-ownership agreement that he would have a particular percentage (i.e. that the 7.04% figure cannot be relied upon);
 - He was to be compensated from the development financing for all the work he was doing in relation to the development;
 - He had nothing in writing to support this;
 - He disclosed that, contrary to everything stated to date, the transaction was structured so that the vendors would remain as legal owners, and title would be passed directly to potential purchasers of properties in the completed development. He was actively involved in the development, and he agreed to this as far as he understood it;
 - He was not aware of any connection between [REDACTED] and the development of ABC Partnership; He didn't pay particular attention to the [REDACTED] v YY Solicitors proceedings; He knew that YY Solicitors was meant to do something with €2.5m but did something else with it;
 - He eventually accepted under sustained cross-examination that this wasn't the first time he had heard that €2.5m of the money's loaned by [REDACTED] in relation to the [REDACTED] property, which were meant to be used to discharge a prior mortgage and loan, were used by DD to fund the purchase of the ABC Partnership property;
 - He agreed that the co-ownership agreement provided that he was only responsible for a 7.04% share of development costs;
 - He agreed that the loan agreement provided for an assignment over the contracts to purchase the site, an assignment and charge over any licence agreement with the ownership to transfer at practical completion stage, and a limited recourse guarantee and collateral mortgage for the vendors;
 - The Appellant conceded that this was consistent with ownership of the property being retained by the vendors;



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- The Appellant conceded that this could be clarified by way of a purchase agreement and the licence agreement, but he has not produced them;
 - Similarly, he has not produced a deed of transfer;
 - He agreed that the only “relevant” agreement he has produced, the tender document, shows XYZ Group as the purchaser;
 - In relation to the documentary evidence, he stated that he has not produced the facility letters as he didn’t think there was any relevance to them;
 - He agreed that the documentary evidence in relation to the €50,000 stopped when it was transferred to a current account of DD and EE;
 - He agreed that the documentary evidence in relation to the €121,000 stopped when it was transferred to DD labelled [REDACTED] in 2006;
 - LL had previously given evidence that on 27 July 2008 a sum of €333,318.33 was sent from [REDACTED] to the firm by the Appellant, and was subsequently transferred to a bank account in the name of EE;
 - In relation to the €257,439 payment, he claimed that he made the payment to HH Bank on the basis that he would be repaid out of the subsequent development financing – he could not properly explain why he would sink such substantial funds into this when he only owned 7.04% of the development;
 - He accepted that the YY Solicitors showed a credit in the amount of €2m on 8 June 2007 to DD’s personal account, and then a payment of that amount to [REDACTED], solicitors for the vendor;
 - He did not think any of his money was in that payment;
 - He agreed that the initial payment seems to be followed by a payment of €3.286m from unascrbed loan proceeds;
 - He stated that when he was putting in €500,000, he was not aware of what portion of the project he would be getting, and he was not aware that he would be getting 7.04%;
 - He confirmed that a revenue enquiry commenced in February 2012;
 - He confirmed that he has been aware since 2012 of the fact that the losses were contested;



- He confirmed that in 2018 his position in the appeal was that the equity was €5m, and he had contributed 7.04% of that equity;
- He confirmed that an email sent on his behalf in 2018 stated that “*he directly paid for stock €352,000, interest €257,439 ..*”;
- He confirmed that his case had been that he had paid in €352,000, but that now because there was further costs in relation to the site, he was contending that he paid in €500,000;
- He acknowledged that he had caused to send in to Revenue a letter from an architect who was another XYZ investor, without acknowledging that he was another XYZ investor, stating that the architect was involved in design and construction for 4 XYZ projects, and on each of them he was involved with the appellant “met with him frequently, both in our offices and on site”.
- He stated that the architect was incorrect. He confirmed that he, the Appellant, had sent the letter to Revenue in 2018, but he was now saying on evidence that it was incorrect; he contradicted and acknowledged as false the further contents of this letter which he had years previously been seeking to rely upon;
- He acknowledged that there was a payment of €250,000 into his account three days before the payment of the €257,439 but claimed that this was from his deposit account held jointly with his wife, and that he had never produced that account because the next thing Revenue would be asking where the money in that account came from, and he didn’t see where that process ends;
- He acknowledged that he was making personal loans of €50,000 for undisclosed purposes at this time;
- He confirmed that he worked with DD from 2012 to 2017, but never received relevant documentation from him despite being aware that the losses had been challenged;

The documentary evidence

127. The lack of documentary evidence is remarkable. Not only is the Appellant unable to vouch the amounts allegedly invested, the Appellant failed to produce trading accounts, failed to produce his bank account records, failed to produce any written correspondence with DD, failed to produce any written correspondence with any of the XYZ companies, failed to produce any written instructions to, or other correspondence with, his solicitor’s firm, failed to produce any notes of any of his dealings, contemporaneous or otherwise, failed to produce any partnership agreement, failed to produce a purchase agreement with his name on it, and failed to produce any deeds or other purchase or transfer documents.



128. He was essentially asking the Tax Appeals Commission to accept on the basis of his oral evidence that he lost over €750,000 in a property investment.

129. The primary characteristic of the scant documentary evidence that was produced was the lack of support in it for the case as argued. Taken at its height, the documentary evidence showed as follows:

- (a) DD funded the ABC Partnership purchase with at least €2m from the [REDACTED] loan for [REDACTED] before the Appellant was involved in the purchase;
- (b) In relation to the €121,000, this was paid to DD as an investment in the Project 4 development; no further written record appears in relation to it;
- (c) In relation to the €50,000, this was transferred to the current account of DD and EE; no further written record appears in relation to it;
- (d) In relation to the payment of €333,318, these funds were transferred to a bank account in the name of EE; no further written record appears in relation to it;
- (e) HH Bank insisted that the vendors charge and assign their interest in the property;
- (f) In relation to the €257,439, he did pay this to HH Bank, but he failed to provide the bank account details that could allow confirmation if this was in its entirety his own funds, or was funded by way of contributions from the other investors, or was paid pursuant to a loan or indemnity agreement with the others, or was paid as a loan to DD or a XYZ company, as he had previously done;

130. Ironically, the strongest piece of documentary evidence available to the Appellant was the second schedule of the co-ownership agreement, which strongly suggested that he had a 7.04% share in the ABC Partnership development, which would support a €352,000 investment; the Appellant himself however stated expressly that this percentage could not be relied upon, and that the 7.04% figure in the second schedule does not represent evidence of his share of the contribution. He essentially disavowed the strongest (but in no way conclusive) evidence in his favour.

131. He had previously sought to rely on the 7.04% figure in his evidence in considerable detail by stating that the equity was actually €7m, and that he therefore had introduced 7.04% of €7m, but this is clearly a contrivance because the second schedule was prepared when the equity was believed to be €5m, and it was long after the document was prepared that the costs had increased.

132. To be fair to the Appellant, he does not seek to provide any credible explanation or excuse for the lack of documentary evidence other than that he was badly served by his



advisors. He does not credibly explain why he has never looked at the details of the [REDACTED] [REDACTED] proceedings, even though they were widely reported and concern the wrongful diversion by DD of €2.5m to the ABC Partnership project.

The lack of the credibility of the other evidence

133. The Appellant in giving his evidence seemed to have an incontestable certainty in regard to certain matters, where they might support his claim, but extreme vagueness in others, where they might not. It was only under sustained cross-examination on the wording in the co-ownership agreement that he disclosed that no formal transfer of the land ever took place, and that a purchase agreement was entered into in relation to the lands, but no formal transfer to the purchasers ever actually took place.

134. He cannot explain why the €257,439 payment is labelled a “pension payment”. He cannot adequately explain why he would, without any discussions with the other investors, unilaterally decide to pay €257,439 to the bank without at least first checking to see if they would co-fund the interest payment. It is incredible that he would pay it alone, when he had such a small share in the project, but it is doubly incredible that he would do so without first asking those who were jointly legally obliged to pay it to do so.

135. He cannot credibly explain why payments were made by his solicitors to DD and EE, and not to the vendors. He cannot credibly explain how his account can be reconciled with the misappropriation of the [REDACTED] moneys, which he claims to be virtually unaware of.

136. He asks the Commission to believe that as costs went up and further moneys were advanced, the respective shares of the Appellant and of the other investors, including the XYZ investor, were rebalanced and revised, but without any communication whatsoever between those investors.

137. He cannot credibly explain why he did not get documentation from his solicitors at the time, or from DD while they continued to work together in the period from 2012 to 2017.

The Appellant’s “new” “evidence”

138. The Appellant now seeks to admit new evidence. He should not be permitted to do so. The evidence is closed. Even if he were permitted to do so, the document in question is not a list of interests in the relevant lands - the document in question merely shows that a Land Registry search reveals that the Appellant purported to grant an interest in the



lands, but that is not evidence that the Appellant had an interest in that land. The search result itself is headed with a warning that it is not conclusive. It is remarkable that the same search does not reveal any interest being transferred to the Appellant.

Conclusion

139. The Appellant invested sums with DD, and may not have recouped them. But investing in a project is not the same as purchasing land. The Appellant has not provided any credible evidence to support the contention that he was a part-purchaser of the lands in question. The evidence he has provided falls far short of establishing that he himself personally paid approximately €504,000 to the vendors of the property and received a proportionate share in the property in return, and falls far short of establishing the source of the €257,439 funds that he paid to the bank in relation to interest, or the legal basis on which he made the payment. The documentation that he has provided also contradicts his own account.

140. It was submitted that the losses in question should therefore not be allowed.



Determination

141. As observed by the Respondent, the lack of documentary evidence is remarkable to the extent that the Appellant was unable to prove that he invested directly in the ABC Partnership project. The Appellant also failed to produce trading accounts, adequate bank account records, any written correspondence with DD or indeed correspondence with any of the XYZ companies. Furthermore, the Appellant was unable to produce any written instructions or other correspondence with his solicitor or provide any communications or notes of his dealings with the other members of ABC Partnership.
142. Therefore and after considering the evidence and submissions of the parties, my findings are as follows:
- (a) DD funded the €2 million deposit for the ABC property purchase with unlawfully diverted funds before the Appellant's involvement in ABC Partnership;
 - (b) there was no evidence that €121,000 transferred from the YY Solicitors' client account in the Appellant's name to DD in 2006 for the investment in Project 4 was subsequently used to acquire an interest in the ABC Partnership project;
 - (c) there was no evidence that the €50,000 transferred to the capital account of DD and EE in 2007 was transferred to the ABC Partnership project;
 - (d) there was no evidence that the payment of €333,318 transferred into a bank account in the name of EE in 2007 was allocated to the ABC Partnership project.
 - (e) the evidence of LL, the report from the Institute of Chartered Accountants in Ireland and the judgment in ██████████ v YY Solicitors, all confirm that DD was associated with diverting investor's funds into other projects;
 - (f) the Appellant's other investments in Project 4, Project 3 and Project 2 were unsuccessful and warranted additional capital contributions, certainly the latter 2. These additional contributions coincided with the Appellant's purported investments in ABC Partnership. Furthermore there was no evidence of how the Appellant funded the shortfalls in Project 3 and Project 2;
 - (g) there was a conflict in documentary evidence between the Appellant's current and former tax agents with regard to the amount of funds invested in ABC Partnership;

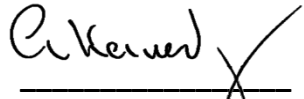


- (h) as highlighted by the Respondent, the Appellant sought to justify his equity stake of 7.04% in ABC Partnership by stating that his investment of €504,318 was approximately 7.04% of €7 million. However the equity requirement of the investors in 2007 was only €5 million. Furthermore the Appellant's previous tax agent informed the Respondent that the Appellant had invested €352,000 in ABC Partnership which works out to be 7.04% of €5 million.
- (i) while the Appellant was able to produce his business bank statements for the period May and June 2008 recording a transfer into that account of €250,000 on 3rd June 2008 and a subsequent payment out of that account on 5th June 2008 of €257,439 and a corresponding statement from HH Bank recording that payment, the Appellant failed to produce evidence of the source of the €250,000 transferred into his business account. Furthermore when pressed by Counsel for the Respondent as to the source of such funds, the Appellant provided the following unusual response:
- "I don't --- even if I had provided evidence, Commissioner, that that account is my account, and it is a joint account between my wife and I, it is a deposit account of ours, but even if I had provided that surely if you, you follow the line of questioning the next thing would be well where did the money come from that was in that account, and I don't see how that process ends? These were my funds that I've, with my wife's consent, invested in paying the interest on the ABC Partnership co ownership."*
- (j) while the Appellant was capably represented by Senior Counsel and was fully aware of his obligation to provide basic documentary evidence to support his assertion that he had incurred expenditure in acquiring the ABC property, I am not satisfied that the €250,000 came from a joint bank account held with his wife. Furthermore it should not have been too problematic to provide evidence of the source of those funds which presumably came from a declared income or other legitimate source.
- (k) it is difficult to understand why the Appellant, who held the smallest equity stake in ABC Partnership, decided to pay the interest payment of €257,439 to HH Bank without consulting with the other partners. Furthermore there was a conflict in the Appellant's evidence as he initially said that *"I can't say that I had discussions with my partners"* that he would pay the €257,439 interest payment to HH Bank but when pressed as to why he would make such a payment, he later said that he had discussed the matter with DD and had received a *"vague"* promise from DD that he would be repaid.



143. In light of the above and in accordance with the default position in tax litigation as espoused by Charleton J. stated in *Menolly Homes Ltd. v Appeal Commissioners & Revenue Commissioners* [2010] IEHC 49, the Appellant failed to provide the standard evidence to support his claim for the loss relief in the sum of €761,757. Therefore the entitlement to loss relief of €761,575 claimed on the ABC Partnership project is denied. However and as a matter agreed with the Respondent, the Appellant is entitled to the 'section 48' loss relief of €172,645 in respect of the tourist undertaking. Therefore the assessments should be amended accordingly to reflect that loss.

144. This appeal is therefore determined in accordance with Taxes Consolidation Act 1997, section 949AK.



Conor Kennedy
Appeal Commissioner
4th November 2021

