

McCULLOUGH SALES LIMITED


Plaintiffs

and

CHETHAM TIMBER COMPANY (IRELAND)
LIMITED

Defendants

Judgment of Mr. Justice Doyle delivered the 1st day of February 1983.



The claim is for the price or the balance of the price of certain goods sold and delivered by the plaintiffs to the defendants. The plaintiffs are Builders Providers carrying on business in Northern Ireland; they supply, in particular, a special type of building material called "Celuform". The defendants Chetham Timber Company (Ireland) Limited hereinafter for brevity called "Chethams" are timber importers, who, inter alia, supply some specialised products to the building industry in the Republic. The endorsement on the plaintiffs Summary Summons and the grounding affidavit accompanying a motion for judgment against the defendants Chetham were deemed sufficiently to demonstrate the details of the plaintiffs' claim in this Action. Accordingly no statement of claim was required, but a defence was delivered on behalf of the defendants which also contained a counterclaim alleging that the goods supplied by the plaintiffs were in breach of contract, defective, unusable for the purpose for which they were required, and not of merchantable quality.

The goods, known as "Celuform", consisted of skirtings and architraves which could be fixed to concrete walls by using nails of a special design which nails were included, in the Order. Broadly speaking it was a plastic substitute for timber or other materials from which skirtings and architraves are commonly made. When the trial date was reached the substantial matter as issue remaining between the parties were the terms of the counterclaim and the rights of the defendants on foot of this counterclaim. For this reason Counsel for the defendants was allowed to begin. He commenced by briefly detailing the facts and circumstances which would be adduced in support of the counterclaim and stated that the amount claimed on this heading was a sum of £209. He indicated that there would also be a claim for interest. When evidence had commenced Mr. Michael McGrath the Managing Director of the defendant company "Chethams" stated that the true amount due on foot of the counterclaim without taking into account the matter of interest was a sum of £219. The plaintiffs in their defence to the counterclaim, after denying that the goods were not of merchantable quality or fit for the purposes for which they were required, or defective in the other manners alleged in the defendants'

defence, went on to aver that the goods were sold by the plaintiffs to the defendants under their patent or other trade name and that accordingly there was no condition implied as to their fitness for any particular purpose. They also alleged that the defendants had duly examined the goods or were afforded by the plaintiffs the opportunity to do so when any of the alleged defects ought to have been revealed.

The transaction between the parties commenced early in the month of August, 1973 when Mr. Ian McCullough a Director of McCullough Sales Limited the plaintiffs met Mr. Michael McGrath who is the Managing Director of Chetham Timber Company (Ireland) Limited. Messrs. McCullough Sales Limited carry on business at Muckamore, County Antrim, Northern Ireland and Messrs Chetham Timber Limited operate from offices in Dublin at Grand Canal Street where the first meeting took place between Mr. Ian McCullough a Director of McCullough Sales Limited and Mr. Michael McGrath the Managing Director of Chethams. Chethams are timber importers and builders providers and the discussion concerned the product known as "Celuform" which McCullough Sales were anxious that Chethams should take up and distribute to their customers and also use in their building operations. "Celuform" is a man-made material, and is, as previously stated, a substitute for timber intended to be used for architraves and skirtings. It was more expensive than the soft timbers commonly used for

such fittings but it was claimed to incorporate the advantages such as to outweigh the price difference. This claim was based upon the circumstance that "Celuform", being an inert man-made product was more stable than timber; it was produced to a high finish so that painting could be dispensed with, but the most novel feature claimed for it was the system of fixing by hidden or "secret" nails which obviated the necessity to fill and paint over the apertures which remained after the more conventional nailing methods had been used. One of Chethams directors had seen this product in use in Northern Ireland and was impressed by it and interested in learning more. After a considerable discussion a deal was arrived at and Chethams Timber were allocated territories covering counties in the Republic to have in those territories what appeared to be exclusive rights to sell or fit the product "Celuform". Subsequent correspondence between the parties appears to indicate that Chethams placed a firm order in the course of this first meeting for the product and a letter of the 10th August, 1973 from McCulloughs to Chethams confirms this order and enclosed certain brochures for the enlightenment of customers in Galway and Cork. This last mentioned transaction was agreed by Chethams in a letter of the 22nd August, 1973, the delay having been caused by the fact that the Directors of Chethams at this stage, presumably during the building holidays, had themselves taken a vacation in another part of Ireland. Some

later letters from Chethams indicate that they were sufficiently impressed by "Celuform" to recommend it to other customers of their own.

At first it appears that the business relationships between the parties proceeded smoothly but soon there was an indication from Messrs. Chethams that they were having difficulty in getting supplies of the special nails which were suitable for fixing "Celuform" as required in the building industry. McCulloughs explained the delay by saying that the manufacturers, a British firm known as G.K.N., were holding up the supply to McCulloughs who could not accordingly transmit a sufficient quantity of the nails with the supplies of "Celuform". Supplies apparently continued to present some difficulties and Messrs. Chethams complained on this score; on the other side McCulloughs were pressing for payment of goods as invoiced and the business relations between the parties appear to have begun to deteriorate towards the end of 1973 although a good deal of business had been transacted up to that date. This "state of play" is to some extent demonstrated by a letter from Chethams on the 3rd December, 1973, to McCullough Sales a paragraph of which is as follows:

"The latest news that comes to me is that two important items from our order have not been manufactured yet. We of course were expecting to get these with the nails instead of which we are sent further quantities of goods which we have already received and which are in excess of what was ordered. Your earlier acknowledgment of the 10th August, 1973 clearly

"confirms what was ordered".

The last paragraph of the letter reads:-

"I shall be glad to hear from you as to who is to blame for all the messing and when it is likely to be sorted out.

With kinds regards".

In reply Messrs McCullough Sales endeavour to explain their complaints about the charges and about the demands for payment by indicating the practice in the accounts department of their firm which they regard as regular in the particular circumstances. Chethams repeat their application for prompt delivery of the goods ordered. It seems clear that there was some undue delay in the delivery of the materials which had been ordered and there was also at this time complaints from Chethams about the efficacy or effectiveness of special nails for dealing with the "Celuform".

On the 25th January, 1974, Chethams wrote enclosing a cheque for £2,500 on account and I quote:

"which please receive only on the understanding that the balance of our order of August last will be dispatched to us within the next seven days".

Between the date of the last recited letter and the 4th February, 1974 business relations appear to have been restored upon a more regular basis between the

parties but by letter of the 4th February McCulloughs whilst making arrangements for further transactions between the parties in the way of special discounts to be allowed to Chethams did apparently concede that the masonry nails were not to satisfaction. It seems that by February the question of delivery of the "Celuform" had been put on a more satisfactory basis but the nails were still giving trouble. On the 18th February, 1974 Chethams wrote to McCulloughs a letter in the course of which they stated

"Now that Peter (a member of McCulloughs firm) has visited Dublin he is only too well aware of the problems we have in regard to the fixing of "Celuform". We are delighted with the product, provided that we can get over this fixing problem. Until that time all we can do is to sit and look at the stock, for if we attempt to make sales with the present nails we shall no doubt all find ourselves in serious difficulties. I do hope that Peter comes up with something soon so that we can commence selling what we have in stock instead of looking at it".

The defective condition of the nails continued to be the subject of discussion between the parties. The matter can be summarised by an extract from a letter from Chethams to McCulloughs on the 13th May, 1974 :-

"We are very concerned indeed about this whole product. It is absolutely out of the question for us to sell the architraves and skirlings with

"the fixing that we have available, with the knowledge that it just won't work. In our opinion the product is first class but the company did not look in to the fixing sufficiently well".

And almost a month later in a letter to McCulloughs on the 4th June, 1974, after some further experimentation had taken place Messrs Chethams conclude:

"Quite honestly at this moment I do not think that we are one step nearer a solution which is mighty disappointing as the material is first-class but the fixing arrangement is quite useless".

These extracts from a long and detailed correspondence are sufficient to illustrate reasonably clearly the matters in dispute between the parties and I turn now to such supplemental illustrations of the dispute as transpired when the oral evidence was given.

The first witness was Mr. Michael McGrath the Managing Director of the defendant company who stated that he had first met Mr. McCullough at Chethams Offices in Dublin on the 9th August, 1973. He described the product which Messrs McCullough were endeavouring to market. Its applications and advantages were demonstrated and he was told about the special method of fixing. He was given a card with 3 sample nails (Exh. 1) and a yellow brochure showing the method of fixing (Exh. 2). After this initial interview holidays intervened and an order was placed by Chethams at the conclusion of the holiday but at an

early stage Chethams were complaining about delay in obtaining deliveries.

In late October or early November they obtained small sections of architraves and skirtings but these could not be used because the necessary nails and punches to insert the nails were missing. The nails turned up in December, 1973 but according to Mr. McGrath they were unsatisfactory and they had difficulty in operating them from the very first time they tried them.

The balance of Mr. McGrath's evidence in chief substantially followed the development of the transaction as outlined in the extracts from the correspondence which I have read. He summarised the situation by stating

"We were never in a position to mark this product because there was never an effective method of fixing it. Mr. McGrath stated that the counterclaim mention of £209 ought to be of a sum of £219."

He added:

"We still have all the architraves and skirtings except about £50 worth which we sold to various people as samples".

Cross-examined by Mr. Mills for the plaintiffs he stated:

"We are timber importers. We sell to merchants and we also sell direct to Builders. He stated that hardwood was obtainable at three months delay. He agreed that between 1972 and 1973 there was "a scramble for timber" because of an anticipated shortage that never materialised.

"He agreed that "Celuform" was a very good substitute for timber. He did not know whether in fact it would take paint or not. He reiterated that his whole complaint was in the defective nails or method of securing the "Celuform". He stated:

"I was buying a system; "Celuform" supported by nails." He agreed with Mr. Mills that a test had been taken by them in their premises in Dock Road and the test bed was a normal concrete wall. McCulloughs representatives had agreed that two of the consignments of nails were faulty. Mr. McGrath pointed out that his firm were buying the product for reselling. He stated that before they could go to builders they wanted to be sure of it themselves. A builder was not the best person to make the first test. Mr. McGrath agreed that the fixing problem would not have arisen if wood were the material being used. The advantage of the system was that it was so to speak a secret fixing. No nail head would show. However he stated that it was from their point of view most important to have a nail that would go into masonry. The "Celuform" material was more expensive than wood. Later Mr. McGrath referred to the fact that the traditional building method in Ireland at present is the use of concrete blocks and he stated that "a nail that would not go into concrete blocks wouldn't be any use." He stated that "masonry nails had been in use for fifteen years".

Early in June, 1974 the defendants employed an Engineer, a Mr. Gunter Kanis, to carry out tests of the "Celuform" nails. Some of these tests were carried out with Mr. McGrath, at others Mr. McCullough was present. On the latter occasion Mr. McCullough drove the nails with a punch and also with a claw hammer with a steel head. The nails were being driven into a concrete block part of the office building. The first nail bent, the nail curved between the concrete and the punch when it was about one eighth of an inch into the concrete. The second reacted similarly. The third went off line and was driven in at an angle. The fourth went only half way in and would not go as far as the collar a projection some two thirds along the shaft of the nail. When this nail was removed it was found to be embedded in the punch. When the fifth nail was driven it was not possible to remove the punch in the normal way. When it was forced out of the wall the nail was still in the punch. The sixth and seventh performed similarly, that is to say three punches were withdrawn with nails still embedded in them. The eighth nail driven was bent the same way as number three and the performance of number nine Mr. Kanis could not precisely recollect. Number ten was inserted properly and effectively. Likewise nail number eleven. The foregoing nails were described as "black" nails.

Mr. Kanis then went on to test a second type of nail known as "bright"

nails. He did not know whether they differed in dimension or were longer or shorter than the black nails. The first of these was inserted satisfactorily. The second broke while being driven in. This second category of nails were part remaining from an earlier delivery. Mr. Kanis stated that the successful results were achieved with selected nails and only those which fitted into the punching tool easily were used. At the conclusion of the experiment Mr. Kanis said the top of the tool had become flattened out with driving home only these few nails. In answer to me Mr. Kanis stated that Mr. McCullough during these experiments had not requested that the nails or any of them should be tested on plaster board or timber which of course would have been a less rigorous test.

The next witness was Mr. Michael McArdle a member of the firm of Corbett and Sons of Galway who are timber merchants. He stated that his firm had bought about £8,000 worth of "Celuforn" architraves and skirtings. They gave samples of the product to their travellers who succeeded in selling them to small merchants and Building Contractors. This firm found that the main problem was in fixing the skirtings or architraves. They were impressed by the "secret" nails which the firm considered to be a good idea. Mr. McArdle said that he was present when certain tests were carried out but that it had taken some months to get delivery of the nails. With Mr. McCullough he had tested the nails and the punch in a concrete block wall. In general the

system gave trouble. Mr. McCullough explained to him that in the Republic we were accustomed to use a different density of concrete to that used in Northern Ireland. "If we had been using a sandstone block we would have had a better result," he said. Mr. McCullough stated that what he wanted was a nail suitable for the type of block used in the Republic. The nails were a problem all the way.

Messrs Corbett and Sons total purchase was £8,213-93 worth of the "Celufom" product as deposed to by Mr. McArdle. Their stock in hands was still £4,964. His firm had tried to sell what stocks were left without success. Later he said he had attended meetings in the Burlington Hotel in January, 1975. Others present were Mr. Peter Cooper and Mr. Ian McCullough and Mr. P. Higgins. At a second meeting on the afternoon of the same day Mr. Michael McGrath, Mr. Desmond McGrath, Mr. P. Williamson and Mr. McLoane of Messrs Williamsons were also present. The purpose of these meetings he said was to attempt to iron out the problems but no finality was reached. Very definite complaints were expressed about the disappointment of the customers with the product and their inability to market what they had been told was likely to be a very good sell. At the conclusion Mr. McArdle and other Builders Suppliers enquired if a return of the goods would be considered. No decision seems to have been arrived at on this proposition at either meeting nor does it appear that such

action was taken at any later date.

Mr. McGrath was cross-examined by Mr. Mills S.C. Counsel for the plaintiffs. He stated that his customers had complained about the nails. The masonry nail was well known in the building trade. A timber nail could not be driven into concrete. He said that his firm felt that they were buying a new system with the "secret" nails. These nails they found would go into timber but they would not go into concrete or even into timber if the thickness was less than the length of the nail from its point to its collar. It would go into 3/8 inch plaster board backed by one inch timber battens but not into concrete. His customers were complaining about the skirtings and I so told Mr. McCullough. I did understand that the customers were complaining in respect of the use of the nails with a concrete backing. I didn't expect that there would be any trouble with timber. The nails were bending, sticking in punches and there was difficulty in restricted working close to a floor when a man had to hold the punch in his left hand. When skirting is being fixed the height of the nail from the floor is approximately thirty six millimetres or one and three eight inches. When working with a hard wall plaster you would have to go through 5/8 inches skin before reaching the concrete backing. The plaster board is mounted on wooden frames part of which would be near the floor. The nail used in that situation is never tested as it would be a masonry nail. With the "Celuform" nails I saw Mr. McCullough working at the test and I tried to

drive them myself in Mr. McCullough's presence, they failed. The merchants to whom we had sold the product wanted to send it back to us not because of any stocking problems but because they couldn't sell it. The Builders were having problems and we had to take it back.

In re-examination the witness stated that Mr. McCullough and he had tested them jointly on an occasion in mid 1974. Mr. McCullough had succeeded in putting nails into concrete blocks but one head flew off almost thirty feet and hit an employee's car. Mr. McCullough at that time had suggested using an adhesive to affix the "Celuform" but this was an impractical suggestion in the witness's opinion. Their customers for the most part had been small Builders Merchants and some Building Contractors. The product was intended by them to be used in domestic housing.

The next witness was Mr. Robert Loane or McLoane. He is a member of the firm of Thomas Williamson Limited of Dundalk who are Builders Providers and Timber Merchants in a substantial way of business. Mr. Loane manages the timber side of that business. His first contract with Mr. McCullough was in 1973 when Mr. McCullough visited Williamsons office. He discussed the matter with Mr. Thomas Williamson. "We were given a brochure and we examined the product. We thought it was a good one and we were shown the nails and the punch. We bought a considerable quantity of the product. There were no discussions

about fixing in any other way except by the special nails. We gave samples of the product to our three representatives. Initially when the first container arrived there were no nails included. It was on our premises for a few months before the nails arrived. Eventually we got nails from Mr. McGrath of Chethams. Our first order was for approximately £6,000 worth of the product; later we placed some small orders for quadrant mouldings or beadings for use at the side of a bath. In the first six or seven months of the campaign we sold about £1,000 worth of the product, mostly to Builders Merchants. We got no repeat orders. We learned of difficulties in fixing skirtings. There were complaints relating to difficulties in fixing the skirting boards. We felt that more market research was necessary in the Republic and better advertising to help sales." He stated that Mr. McCullough had come into the premises frequently. He discussed the fixing problems and stated that he was aware of this problem but that they were getting stronger nails to deal with it. He also explained that the concrete in use in the Republic was denser than elsewhere. I think that we also talked to Mr. McGrath of Chethams who weren't happy with the general set up. "I felt that McCulloughs could have taken the stuff back." This witness was amongst those who attended the meeting in the Burlington Hotel earlier referred to in which he was named, I think incorrectly, by an earlier witness as "Mr. McLoane". He gave a graphic summary of this consultation and

he stated:

"All felt it should be taken back. We bared our hearts to them but Mr. Cooper couldn't answer then".

In cross-examination by Mr. Mills he stated that "it was mentioned to me through our Reps that the nail wasn't strong enough. The problem was fixing skirting to weight bearing walls". "The wooden wall plugs; he explained, "as used in the old conventional method to secure skirtings are not in use any more; the masonry nail has been used instead for the last fifteen years". He went on to say:

"Most of our customers are fair minded people, prepared to give a product a trial. This didn't succeed from the start".

The meeting in the Burlington Hotel was set up by Mr. McCullough so that we could all air our grievances.

Mr. Francis Quigley a Bachelor of Engineering next gave evidence. He was asked the density of a brick wall and he said the density was approximately 110 lbs. to 128 lbs. per cubic foot but he went on to say that brick was more homogeneous than a concrete block so that a nail driven into a brick is less likely to meet a stone. In a breeze block the density would be much less but breeze blocks are not now in use. When cross-examined by Mr. Mills he stated that he was employed in his professional capacity by a firm called Clondalkin

Concrete and he was concerned with the mix that went into concrete blocks. He stated that concrete hardens continuously for a hundred years and it could be 30% harder after four years. He stated that it was common to drive masonry nails into concrete.

The next witness was Mr. Desmond McGrath a son of Mr. Michael McGrath the first witness who stated that he had joined his father's company in 1969. He was present when Mr. McCullough explained the "Celuform" system for architraves and skirtings and there were other applications also such as fencing posts which Mr. McCullough would demonstrate at a later stage. There was no suggestion then that the nail should be put through plaster or plaster board. He had attended a building exhibition at Belfast in October or November, 1974 where he had met Mr. McCullough and was shown one length of "Celuform" attached to a mock wall made from hard board. He was not present when any subsequent tests were conducted. Cross-examined he stated that the firm had two offices, one in Grand Canal Street and the other at Bond Road. It was the Grand Canal Street premises to which Mr. McCullough had called when he was demanding payment. He stated then that new products were in process of development and he was wishing to introduce more products to us. Mr. Desmond McGrath was involved on the sales side of the family business. He had his own distributors. He stated that the nail, that is the "Celuform" nail wouldn't work because we

couldn't get into the wall in the manner we were told about. The nail should be driven into the collar into a concrete block if you are going to put skirting on to the concrete. We told Mr. McCullough about failure in operating and we got a second batch of nails but we had the same trouble. In January 1974 a longer nail, silver in appearance was supplied. It was supposed to go into concrete like the first one. Next we got a short silver one and thirdly a black one. None of them was satisfactory. In June 1974 the tests earlier referred to were carried out at Grand Canal Street in the presence of Mr. McCullough who said he would carry them out. We asked him if he would go to our Bond Road premises and see Mr. Kanis who had far more experience of nails and the problems associated with them. We were not going to use the 'Celuform' ourselves but we required to be able to recommend it to our customers to satisfy them so that they would give repeat orders. Our complaint was that an excessive quantity of nails had failed. Mr. Desmond McGrath said that the beauty of the product was that it required no finishing; therefore the "secret" nail was necessary in applying the "Celuform". There was no question of adhesives. "You won't get an adequate bond by gluing "Celuform" on to plaster". In the course of the tests we pointed out that "Celuform" was dearer than timber. McCullough said it would cut out labour on buildings. By March 1974 supplies of nails had been made on a reasonable scale. In the previous January he had

paid a sum on account because he was afraid of a threatened Bank strike. He had not then completed the order.

We were getting unfavourable reports from our travellers and I knew that the "Celuforn" was not acceptable to Builders. They wouldn't use it at all unless it was capable of being used by the "secret" nail. I doubt if they would be satisfied with a masonry nail and filling. He went on to say that plaster board applied to battens is not a method nowadays used. He also stated that only a marginal number of walls in private houses are stud partitions. Most of the walls are weight bearing. We had been told that the Northern Ireland Housing Executive had made use of the "Celuforn" process in building undertakings of theirs. We enquired at this meeting where the houses were which had had "Celuforn" incorporated but we could get no information on this head. This concluded the evidence for the defendant and counter-claimant.

The evidence of the first witness in resisting the defence and counterclaim, Mr. Adrian Moody, an Architect and Bachelor of Science, required careful assessment. He stated that he had been in private practice in the town of Larne in Northern Ireland but he was now in the Government Service. He knew Mr. McCullough, Chairman of the plaintiff company and was familiar with the product "Celuforn" and had himself made use of it. In the year 1974 he considered it a good product. He continued "I first specified its use for

a Health Centre for handicapped people. I had also been associated with its use in a sports centre for a firm known as British Eukalon operating in Northern Ireland and I also used it in my own private house". The base to which Mr. Adrian Moody had applied the "Celuforn" was by using it with fairface brick, fixing with masonry nails and a special filler. He said:

"I thought the "secret" nail, that is the black not the shiny one, was too long".

He stated that he had been asked to test the three different nails by Mr. McCullough. The first he attempted to drive into a concrete block in his own house. I may mention what had been stated earlier in the evidence for the counterclaimants, that the concrete commonly in use in Northern Ireland is not of as high a density or hardness as that in use in the Republic. Mr. Moody adverted to the tests earlier referred to in this judgment by Mr. Kanis and stated that "if the nails are driven through plaster first they are long enough to go through the plaster and not to have to go too far into concrete". He was shown a diagram which had been put in evidence as exhibit 4 and stated his professional opinion that it would be impossible to drive the nail up to its collar; he adverted to the fact that here we have a concrete block extremely hard and impossible to put the nail in. From his own knowledge he was able to state that "Celuforn" continued to be in use in Northern Ireland

but he did not go on to detail the particular methods of fixing in areas where it is still being operated. In cross-examination he agreed that the barb on the nails below the collar was in order to give a better grip. He continued:

"I have used "Celuform" quadrants e.g. at the side of a bath to fill a joint, by using an adhesive to fix it. The nail on the job which I did was too long for masonry so I used masonry nails through the "Celuform" skirting and got a painter to fill in."

(I intervene to say that it would be recollected from the evidence on behalf of the counterclaimants that one of the main advantages pointed out for the "Celuform" process was that the "secret" nails required no filling or painting since their head could not be perceived when they had been properly driven into the "Celuform".)

Having stated that he had used masonry nails and got a painter to fill in he added:

"I looked for shorter "secret" nails but I couldn't get them. I haven't seen "Celuform" used with the "secret" nail for the skirting of private housing".

The next witness was Mr. Michael Donnelly, the Managing Director of a firm known as Ulster Industrialised Units who make school buildings from timber materials. He knew Mr. Ian McCullough and had used "Celuform" about four years

ago in a small way; he found a faster way of fixing it (one assumed a method other than the use of the "secret" nails) and then used it extensively for architraves and skirtings. "In a hotel on the Antrim Road I fixed "Celuform" to plastered concrete block walls with masonry nails and I filled and painted because I had a colour scheme to adhere to and I didn't like a white finish". Mr. Donnelly went on to say that "with masonry nails in concrete you have got to discharge one in six" that is, I suppose, to extract it from the gun which is intended to drive them into position. The "secret" nail system he said is good but it's not fast enough for my operation. In his view a builder would require $\frac{1}{2}$ inch to $\frac{5}{8}$ inches of plaster on concrete walls as a basis for the use of "Celuform". In cross-examination he explained that the quicker method to which he had referred was by using a gun to drive in longer lengths, in schools and buildings of that character.

The next witness was Mr. Ian McCullough the Managing Director of the plaintiff company which had been formed in 1973 but had been connected with the construction industry since 1969. He stated that he had become acquainted with "Celuform" through reading about it in a trade magazine. He went to the premises of "Celuform" to conduct an inspection of the method where he met Mr. Peter Cooper who explained to him the product and the method of its fixing. Some two or three months after that demonstration he commenced to

deal in "Celuform". The relevant brochures and instructions, known as "literature", were sent to McCulloughs by a firm called "Key Terrain" who were apparently in association with the makers of "Celuform". Mr. McCullough said:-

"We use direct mail shots and so we got our own brochures printed.

We became aware that the McGraths were interested, the McGraths being the directors of Chethams. We went to see them. We brought samples

and our brochure but we had no fixing materials at that time. A

discussion took place with the McGraths about methods of fixing the

"Celuform". We went through the procedure recommended in the brochures and explained the method of secret fixing, face fixing and drilling.

This discussion and demonstration took place at Chethams premises at Grand Canal Street, Dublin. Mr. McCullough said:

"I never stated that secret fixing was the only method; they never

said that the order was dependent on secret fixing being available."

At the conclusion of this discussion and demonstration Chethams placed an order for 2" architraves, 3" skirting, 4" skirting, some punches and an excess quantity of nails above those supplied free of charge. This order was confirmed by letter on the 10th August, 1973. Also discussed at this time was the question of granting a franchise to Chethams and the area of any such

franchise. I quote:

"We gave Chethams Leinster except Louth and Longford. Mr. McGrath also mentioned Corbetts of Galway whom we later supplied and Hickeys of Cork. Corbetts gave me an order for £6,000 worth but only one order. We supplied Williamsons of Dundalk and Bertie Loane of that firm who was a witness here was a friend of mine".

A quantity of correspondence which had been put in evidence was directed to the attention of this witness and he was taken through the complaints. He then came on to deal with the test of the nails and he agreed that they were bending. This was in early 1974, he thought in January. Next he was asked to discuss the meeting between the parties in 1975. "Mr. Cooper was present, the two McGraths and myself and we were concerned about the "secret" nail and its tendency to bend. We pointed out that this was only one method of fixing "Celuform" to the walls". "I agree" he said "that the concrete blocks commonly in use in the Republic are of higher density than those in Great Britain or Northern Ireland. The short shiny nail was first provided with a single collar. The long wire nails also had a single collar but the black nail has a reinforced collar". The wire nail, he agreed, is unsuitable for use in concrete for architraves and skirtings on stud partitions. Eventually he was able to obtain a supply of the black nails and he sent these to Chethams in

March 1974. Chethams telephoned him and he offered to come to Dublin for a further meeting in June of that year. He saw both the Messrs McGrath at Grand Canal Street on that occasion and there was a considerable discussion about "firstly, the bending of the black nails and secondly the payment of our account". "They asked me to go to their timber yard and test with their engineer. I went to their premises at Bond Road and met Mr. Kanis. We were in a small office building, Mr. McCullough said, when Kanis brought some nails we had supplied." He said that a wall which he indicated was their test wall. "It was a bare concrete wall very tough and mature in years it seemed to me, with a very hard skin on it of a gravel consistency. We carried out three or four tests and some of the nails did bend. The nails that did go in went in satisfactorily up to the collar. We tried some more on a path outside the office building and a nail went in to that substance. I was sent a report prepared by Mr. Kanis in which he claims that the punch jammed on the nail on two or three occasions. The test wall I thought was unusually hard. I felt that if we could go on a building site we would probably have a 100% success rate." When questioned about Mr. Kanis's detailed report which had been sent to him enclosed in a letter of the 4th June, 1974 he said:

"I didn't make notes myself at the time of these tests. I think we went through three punches. I remember driving one nail into the

"concrete path outside the office".

After this, he said, I submitted to them some samples of "Celuform" which could be stuck with an adhesive called "Gripfill" which had been used by a client of ours to affix "Celuform" to exceptionally hard brick. Mr. Cooper and I offered to go out to do site applications to give the "secret" nail a fair chance. That offer was never made by letter but it was made when we were in Grand Canal Street.

In July, 1974 I was present and personally carried out some tests in Galway with Mr. McArdle. On this test we penetrated with the black nail up to the half shank. My conclusion was that the test was satisfactory. We had further meetings in the Burlington Hotel in January 1975. First in the morning with Messrs. Williamson and Loane. Their main complaint was not the nails but the pure difficulty of marketing "Celuform". Secondly they wanted some help in advertising. We felt it was their responsibility as distributors. We had had it on display at the time when it was seen by Messrs Williamson at the Belfast Building Exhibition. Williamson's said they had large stocks of timber and asked us to take back the "Celuform". Corbetts also and Messrs Higgins and McArdle were present at discussions about the nail. Mr. McGrath of Chethams stated his experience about his attempts at application of the nail. We replied that their, that is, Chethams contract was not on the basis that we

were selling the product on secret nail fixing alone. When cross-examined the witness said there is now a firm called "Celuform Limited". Formerly it was known as Key Terrain. He stated that you could combine "Celuform" architraves and timber skirting but the timber skirting of course would not have the advantage of the "secret" nail fixing. He said he was not prepared to accept Mr. Kanis's report "as I was present at that particular series of tests. If I hadn't been there" he stated, "I would have regarded his report as showing that the nails were unsuitable". His attention was drawn to a letter which he had written on the 4th October, 1973 and he agreed that he had there described the process of trying to sell "Celuform" without the "secret" nails as "bad marketing". He was unable to point to any other suggestions in the course of the correspondence relating to other methods of fixing until one came up to July, 1974.

The last witness was Mr. Peter Cooper. In 1973 he had been appointed Product Sales Manager of Key Terrain which the previous witness had stated is now called "Celuform Limited". Mr. Cooper at the date when he was giving evidence had become General Manager of "Celuform Limited". He stated:

"In 1973 we produced a chamfered profile. We felt there was a better market if we had a mechanical means of secret fixing. We had previously sold it with adhesive fixings. We approached G.K.N. and also the British

Shoe Machine Company who were able to produce the nails which we required for the mechanical method of secret fixing. This was an entirely new development. They are basically wire nails and they start as a continuous strip. Later in 1973 he said, Mr. McCullough and myself instituted a harder nail to meet the special requirements of the Irish market and it was also fitted with the reinforcement of a collar. It was recommended that we limit the nail's hardness to eliminate danger in operating it (presumably because fragments might fly if the nail was of a particular hardness). Referring to Mr. Kanis's test, he described it as not scientific although he thought that Mr. Kanis had done his best. He stated that the hardened nail was 30 mm. from point to collar and 12 mm. from collar to the end. He attended the meeting in January 1975 in Dublin, having been asked to assist at the tests, which were carried out in his presence. He describes the morning meeting but stated "in the afternoon practically everybody wanted their money back. I couldn't bow to that". In cross-examination he stated "before marketing we have feasibility studies. We did experiments on the secret nails with special reference to the United Kingdom market. The results were satisfactory, but in August of 1973 we found that they were unsuitable for the Irish market and so we developed a special masonry nail. The product, that is, I suppose "Celuform", was suitable when it was used with the black nail, code number 9970 shown on

a brochure which was exhibit number 5. According to Mr. Cooper it was open to use three methods (1) using a masonry nail and subsequently filling, (2) using the secret nail as shown in the brochure and (3) fitting plugs to receive the secret nail. This concluded the evidence.

I have come to the following conclusions of fact. "Celuform", to the extent that it comprised sections or lengths of an inert plastic substance, could in particular circumstances be an acceptable or even superior alternative to timber in certain building operations. The nails produced by McCullough's to Chethams as the proper method for affixing the plastic lengths of material I find to have been defective and in many cases completely inefficient. Moreover, these nails together with the punches with which they were intended to be applied were in short supply and not delivered with the lengths of plastic, sometimes a considerable time afterwards. I find that the initial transactions between the parties amounted to this: Chethams were offered "Celuform" by McCullough's as an improved and more efficient method of constructing architraves skirtings and such like fittings associated with the building industry. "Celuform" as offered, in my view, comprised not only the man made inert substance produced to a high finish, enabling painting to be dispensed with, but also the accompanying distinctive feature that it was supplied with special nails and a nailing system which would obviate the necessity to "fill" and "paint over" after the material had been affixed by

these hidden or "secret" nails. Moreover, I consider that it was clearly known to McCullough's, as shown by their franchising arrangements with Chethams, that the system would be sold for use in the building conditions and practice customary in the Republic: it was stated by Mr. Ian McCullough that the density of concrete in use here was higher than that used in Northern Ireland. I find as a fact that Mr. McGrath on behalf of Chethams agreed with Mr. McCullough on behalf of the Plaintiffs to buy as he said "a system; "Celuform", or affixed by the special nails and nailing method". Unless it could be affixed to concrete blocks it would not be of any use in Mr. McGrath's stated view. I find therefore that, in the manner which I have indicated, the Plaintiffs Messrs. McCullough's were in breach of their Agreement to supply the "Celuform" system to the extent that I have mentioned, and that Chethams have thereby suffered damage to the extent of £2,280-61p being the £2,500 cheque on account sent by Chethams on the 25th January, 1974 and earlier referred to in this judgment, less the sum of £219-34p agreed to be owing at the time that the cheque was sent. I accept that Mr. McGrath was truthful when he stated "we were never in a position to market this product because there was never an effective method of fixing it". He also stated "we still have all the architraves and skirtings except about £50 worth which we sold to various people as samples". It seems at least likely that the £50 received for these samples was outweighed as a benefit to Chethams' business by the loss of

goodwill on the part of those who paid for the samples. Making a rough approach, I am disposed to ignore the evidence relating to these transactions in relation to the samples.

As previously indicated I am satisfied that what Chethams intended to buy was a system, which system was described to them by Mr. Ian McCullough at their first meeting in Dublin; a description, partly oral and partly demonstrated by the yellow brochure which he produced to Chethams, and also, I think, the sample nails which he also had at that time. The description centered around the provision of architraves, skirtings and comparable members for house building by the use of this new plastic type substitute for timber and the process also, apparently novel, of the fixing of the plasterboard with secret nails by means of the punch which has been described in the review of the evidence. I have no doubt that Mr. McCullough was a persuasive salesman and I am satisfied that Mr. McGrath was entitled to place reliance upon and did rely upon what was shown and spoken about and generally described orally and with reference to the brochure. Having regard to the business interests of both parties it goes without saying that McCullough's knew the purpose for which Chethams required the goods and it is not contested that it was an important part of McCullough's business and so regarded by them to supply the "Celuform" method of building construction.

The course of the evidence makes it clear that the goods in question were not reasonably fit for the said purpose, at least when adopted for use under Irish building conditions and when sought to be applied to Irish concrete walls, that is to say, concrete walls of the consistency common in building practice in the Republic of Ireland. For the same reason, it is clear that they were not of merchantable quality or capable of being readily sold by Messrs. Chethams to their building customers. Mr. McCullough, in the course of his persuasive and what proved to be successful initial sales talk, clearly represented that the "Celuform" system would be highly advantageous to Chethams customers for the building purposes for which it had been devised and also perhaps for Chethams themselves if they should use it in building operations on their own account. I accept Mr. McGrath's statement that he was persuaded and that he did rely upon these representations and bought on foot of them. Since the initial contract was entered into after this discussion which was accompanied only by the production of the brochure as well as the persuasive descriptions already referred to and, perhaps, the three sample nails, and that a firm order was thereafter placed, it seems clear that Chethams were not afforded an opportunity of examining the actual system itself and bought entirely upon Mr. McCullough's description. Mr. McGrath could not reasonably have anticipated the defects which subsequently appeared when the "Celuform"

scheme was delivered and put into operation in the various places described in the course of the evidence.

It seems to be the case that the provisions of section 14 of the Sale of Goods Act 1893 are intended to modify, restrict or otherwise eat into the legal implications covered by the phrase caveat emptor. The maxim has been in no sense abrogated by the provisions of the section, as has been explained by many learned judges; it has merely been modified in its application. In the famous Irish Authority of Wallis -v- Russell (1902) 2 IR 585, familiar to practitioners for many reasons, some not directly related to the scope of the law of contract, Lord Justice Fitzgibbon had this to say "the maxim, caveat emptor, applies to the purchase of specific things upon which the buyer can and usually does exercise his own judgment it applies also where, by usage or otherwise, it is a term of the contract express or implied that the buyer shall not rely on the skill or judgment of the seller but it has no application to any case in which the seller has undertaken and the buyer has left it to the seller to supply goods to be used for a purpose known to both parties at the time of the sale". In my view this last example given by Fitzgibbon L.J. is apposite and should be applied in the present circumstances. It may be that McCullough's are entitled to claim on behalf or in respect of any representation or warranty made or given to them by the manufacturers of Celuform if they,

McCullough's, were thereby induced to correspondingly represent or warrant to
 Chethams, following the principle laid down in the Shanklin Pier case reported
 at (1951) 2 K.B. 854 in which McNair J. restated and followed a venerable line
 of authority; but that is not a matter for present consideration.

Approved

Thomas A. Doyle

2. 27. '83

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For Plaintiff

N. McCARTHY S.C. and PAUL BUTLER

For Defendants

Hearing 24th January 1978 and following days

Sale of Goods Act 1893, S.14

Cases:

WALLIS .v. RUSSELL, (1902) 2 IR. 585

SHANKLIN PIER (1951) 2 K.B. 854