Record NO.244/85
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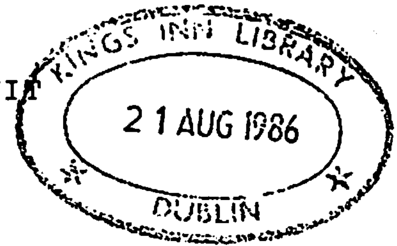
THE CIRCUIT COURT
EASTERN CIRCUIT COUNTY OF LOUTH
APPEAL TO THE HIGH COURT ON CIRCUIT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BETWEEN:-

JOHN MAGUIRE

Plaintiff

AND

DANIEL ROWAN

Defendant

Judgment of Mr. Justice Blayney delivered the 5th day of May 1986.

This is an Appeal by the Defendant, together with a cross-appeal by the Plaintiff, against a Judgment of His Hon. Judge John G. Esmond S.C given at Trim on the 31st day of July 1985. The learned Circuit Court Judge awarded the Plaintiff damages on his claim in the sum of £16,010, and awarded the Defendant damages on his counterclaim in the sum of £7,150, and having set one decree off against the other gave judgment for the Plaintiff for the sum of £8,860. The Plaintiff was awarded his costs of the proceedings and the Defendant was awarded costs of injunction proceedings which he had brought in the High Court.

The Plaintiff's claim and the Defendant's counterclaim involve separate issues, so I will deal with them separately starting with the Plaintiff's claim and I will deal at the end with the question of the costs of the injunction proceedings.

The Plaintiff claims a sum of £16,851.41 as the balance due to him for work done and services rendered in building a house for the Defendant at Bellewstown in the County of Meath. The case is different from the ordinary building contract case in

that there was no formal contract and there is a dispute both as to the price which the Plaintiff was to receive and as to what work was included in the price. Because of there not being clear agreement as to what work was included in the price, there is the further problem as to what work constitutes an extra and as to how much the Plaintiff is to be paid for any such work. There is also the question of what credits the Defendant is entitled to in regard to work omitted from the contract, whether by agreement or otherwise, and in regard to materials provided by the Defendant. So in order to come to a conclusion on the Plaintiff's claim the following issues have to be determined:

1. What was the agreed price for the work?
2. What work was included in the agreed price?
3. What work done by the Plaintiff comes within the category of "extras"?
4. What is the Plaintiff entitled to be paid for such work as constitutes an "extra"?
5. To what credits is the Defendant entitled?

I propose to deal with each of these issues separately.

1. The Plaintiff claims that the agreed price was £45,648. This is the price set out in writing on the Plaintiff's billhead dated the 18th April 1983 and it is agreed that this billhead was given to the Defendant on that date. What was stated on the billhead was very brief and was as follows:

"Price for the erection of dwelling at Bellewstown County Meath £45,648.

P.C. sums included in above price:-

Painting £2,300.

Kitchen units £2,500.

Sanitary fittings £1,000

Wall,floor tiling £700

This estimate is subject to variations of labour and material over time of contract".

While the Defendant in his evidence admitted receiving this billhead, he said it was the subject of a discussion and that the Plaintiff agreed to knock off the £648, leaving the price at £45,000. He also said it was agreed that he could do the painting himself, which would reduce the figure by a further £2,300 and that it was agreed that the type of brick to be used would be Tyrone brick instead of Butterly brick and that this would further reduce the price by £1,500. So he claims that the actual price agreed on the 18th April 1983 was £41,200.

I do not accept that any such figure was ever agreed between the parties. The Defendant may have considered that this is what the price would work out as. That such a price was actually agreed would be inconsistant with what the Defendant stated in his affidavit sworn on the 28th January 1985 and also in his defence filed in the Circuit Court. In paragraph 3 of his affidavit he stated that he "agreed with the Plaintiff to pay him a sum of £45,000, £648 less than appears on his quotation of said date, if he would build for me a dwelling house on a site owned by me at Hilltown Great Bellewstown in the County of Meath". He then goes on to say that the price agreed was subject to a condition that he could do the painting himself and so not have to pay the P.C. sum of £2,300 for this, and also that he would be entitled to have the price reduced by £1,500 if the Plaintiff used Tyrone bricks instead of Butterly bricks. But he does not aver that the price agreed was

£41,200. And the agreement is pleaded in similar terms in paragraph 1 of the Defendant's defence. So I find that a price of £41,200 was never agreed though the Plaintiff may have believed that the ultimate cost to him could be reduced to this figure.

But this does not dispose of this issue. There is still the question of whether the Plaintiff agreed to a discount of £648, and also agreed that there would be a reduction of £1,500 if he used Tyrone bricks instead of Butterly bricks. There is no real dispute as to the P.C. sum for painting so the only issue in regard to that is the extent of the credit to which the Defendant is entitled having regard to the fact that the Plaintiff did some of the painting.

In coming to a conclusion on the other two items, I have been considerably influenced by the account dated the 1st November 1984 prepared by the Defendant's Quantity Surveyor. The Defendant said in evidence that this account was prepared with his authority The account starts with the Plaintiff's quotation (excluding VAT) - £43,474.89. This is the equivalent of £45,648, including VAT, which the Plaintiff claims was the agreed price. The account makes no reference to any agreed discount of £648, or to the Defendant being entitled to any credit of £1,500 because Tyrone bricks were used instead of Butterly bricks. If there had been a clear agreement on both these items, I do not see how the Defendant could have authorised his Quantity Surveyor to prepare an account which made no reference to them, which account, leaving out the question of extras, showed a sum of £1,617.30 due to the Plaintiff. Furthermore, this account was sent in reply to an account received from the Plaintiff the first entry in which was

"Original price of house £45,648".

If that was not correct, one would have expected that at this time, when the parties were already in dispute, issue would have been taken with the Plaintiff on the price that had been agreed. This was not done and in these circumstances it seems to me that the Defendant has not discharged the onus of proving that the price stated on the Plaintiff's billhead of the 18th April 1983 had been varied by agreement. Accordingly, I hold that the agreed price was £45,648.

2. What work was included in the agreed price?

There are two main items in dispute. Firstly, the front porch, and secondly, the driveway. The Defendant claims that both were included in the work to be done, and the Plaintiff claims that they were not.

Insofar as the front porch is concerned, ~~that~~ on the evening of the 18th April 1983, when the final agreement was come to, the Defendant claims that it was part of the agreement that the porch or lobby at the back of the house, which was shown on the plans, should be omitted, and that in its place the Plaintiff should build a small front porch at no extra cost. In other words, the cost of the front porch, which was an addition, since it was not on the plans, should be met by omitting the back porch or lobby, which was on the plans. The Plaintiff's answer to this is that his price did not include anything for the back porch or lobby as it had been agreed sometime previously between himself and the Defendant that this would be omitted. In view of this there ~~can~~ could be no question of his having agreed to erect the front porch as part of the work covered by the agreed price.

I accept the evidence of the Defendant and his wife on this issue. Having regard to the funds available to them for the building of the house, I do not believe that they would have had a front porch built if it meant increasing the price. They had already got sanction for a loan of £35,000 from their Building Society, and they had been told that the most they could get on top of this was a further £3,000. That left them with £38,000 plus £5,000 which they had on deposit with the Building Society. Being so limited in funds, I do not believe that they would have had the front porch built as an extra, and even if they had agreed to this, I certainly do not believe that they would have agreed to it without getting a fixed price for it beforehand. If the Plaintiff's evidence is correct, it means that the Defendant was agreeing to the front porch being built without knowing what it was going to cost. him. To my mind it is totally against the balance of probabilities that the Defendant would have agreed to this. I find accordingly that the front porch was to be built instead of the back porch, and so at no extra expense to the Defendant.

The next question is whether the driveway was included. In my opinion it was because it is one of the items included in the schedule which the Defendant says he handed to the Plaintiff on the evening of 18th April 1983. I accept the evidence of the Defendant and his wife on this point. One of the items was:

> "Construct stone paved driveway and apron from available stone on site."

Apart from this, I do not accept the Plaintiff's evidence that the first time he saw the site plan, on which the driveway was marked,

was in the Boyne Valley Hotel in November 1984. He said that at that meeting a site plan was produced which showed a driveway on it 165 ft. in length. But the evidence of Mr. Cooney, which I accept, was that he produced the site plan at that meeting and that the site plan was the revised plan which showed the driveway being 60 ft. long. So the Plaintiff's knowledge that there was a site plan which showed the driveway as being 165 ft long must have been acquired from having that site plan at some time. And the site plan showed clearly the driveway leading up to the house. I find, accordingly, that the driveway also was included in the agreed price.

3. What work should be included in the extras.

All the extras claimed by the Plaintiff are set out in Mr.Cooney's report on the final account and I will deal with the extras by reference to this report as it was by reference to this report that all the evidence in regard to extras was given. I do not propose to refer to every item in the report but merely to those which I consider should not be allowed.

On page 1 I disallow Item F as this is work in respect of the front porch.

On page 2 I disallow the following items:

(b) Hire of saw for cutting steel on site. If steel reinforcement had to be used in the construction, the cost of any equipment needed to deal with it could not be an extra.

(c) Collect and fix special twist steel reinforcement for beam. I accept that it should have been envisaged that steel reinforcement would be necessary. And accordingly, this is not an extra either.

D. Hire of scaffold for extra month. This could be claimed only if the delay which necessitated the scaffolding being required for an additional month was caused by some default on the part of the Defendant. I am not satisfied that it was.

E. New secondary door and screen to hall. These were materials required for the front porch and are disallowed on this ground

On page 3 I disallow the following Items:

A. Extra fitting to doors. I am not satisfied that any additional charge is justified for fitting the doors in the house.

G. Maple flooring and skirting to enlarged hall. These are materials in connection with the construction of the new front porch.

K. Doubleglazing to diamond window. The schedule of items provided for "doubleglazed hardwood windows throughout except where otherwise specified". Accordingly, the doubleglazing to the diamond window could not be an extra.

On page 4 I disallow the following Items:

B. Ironmongery to secondary door screen. This Item also relates to the front porch.

H. Paving. This was shown on the drawings and so could not be an extra.

On page 5 I disallow the following Items:

C. Include for new front door and screen.

D. Include for mahogany diamond window

E. Include for rear door and screen.

All these items were included in the drawings and so were part of the agreement.

4. What is the value of the extras which I have allowed?

I have considered each of the items separately, and allotted a figure to each on the basis of the evidence given and attempting to be as fair as possible to both parties, ~~and~~ the aggregate figure at which I have arrived is £8,080.33. Accordingly, this is the figure which I propose to allow in respect of the extras.

5. The credits to which the Defendant is entitled.

The Defendant is entitled to credits in respect of the kitchen fittings, the windows, the painting, and the windowsills. It is only in respect of the painting that the amount of the credit is really in dispute. The Defendant claimed credit of £1,140 whereas the Plaintiff claims that it should only be £650. I propose to allow a credit of £800 in respect of this so the total credits will be £8,000 made up as follows:

Kitchen fittings	£2,500
Windows	£4,400
Painting	£ 800
Windowsills	£ 300.

On the basis of these findings I calculate that the Plaintiff is entitled to the sum of £9,132.98 on his claim. This sum is made up as follows:

The Plaintiff's original quotation (excluding VAT)	£43,474.89.
Extras	£ 8,080.33
Total	£51,555.22
Credits	£ 8,000.00
Balance	£43,555.22
VAT @ 5%	£ 2,177.76
Total	£45,732.98
Credit amounts paid by the Defendant on account	£36,600.00
Balance	£ 9,132.98

I now come to the Defendant's counterclaim. He claimed damages under three separate headings:-

1. Defective work.
2. Loss incurred through delay in the completion of the house and in obtaining possession.
3. General damages for inconvenience.

The first of these is the most serious. The Defendant's architect, Mr. Duncan Stewart, gave evidence in regard to a considerable number of defects, and his Quantity Surveyor, Mr. Tony Cooney, estimates that the cost of rectifying them could exceed £18,000. It will be necessary to refer to these defects in detail at a later stage.

The principal issue is whether the Plaintiff is liable for the cost of rectifying them. For the most part it is not contested that the defects exist. What is contested is the Plaintiff's liability for them. There is also an issue in regard to some of them as to the nature of the work required to put them right.

The Plaintiff's liability depends on the nature of the duty imposed on him by law arising out of his contract with the Defendant, and it seems reasonably clear what this was. The Plaintiff Counsel in his written submission in the Circuit Court submitted that the Plaintiff's obligation at Common Law was "to build the house in a good and workmanlike manner". The obligation is stated in very similar terms in Hudson on Building Contracts (10th Edition) at page 274:-

"It is submitted that a contractor undertaking to do work and supply materials impliedly undertakes:

(a) to do the work undertaken with care and skill or, as sometimes expressed, in a workmanlike manner;

(b) to use materials of good quality.

(c) that both the work and materials will be reasonably fit for the purpose for which they are required, unless the circumstances of the contract are such as to exclude any such obligation...."

The question in regard to each of the defects is whether the Defendant can establish that it resulted from a breach by the Plaintiff of this implied undertaking.

Before I go on to apply this test, there is a submission made on behalf of the Plaintiff with which I should deal. It is submitted that the fundamental cause of the difficulties in the case is that the Defendant employed no architect to supervise the Plaintiff and that the drawings supplied were inadequate. As regards supervision, I think it is clear that the Plaintiff was aware that there would be no architect supervising him. So he took on the contract on that basis. Having done so, he cannot in my view complain about the absence of an architect. The Defendant was not at fault in not employing one since he had not at any time undertaken to do so. And as regards the plans, the Plaintiff had been supplied with these long before he gave the Defendant the final price; they had been discussed in detail with him: and he was aware that they were the only drawings he would be furnished with except perhaps for some matters of detail, so once again it seems to me that having entered into the contract on this basis he cannot subsequently be heard to complain that the drawings were inadequate. He agreed to build the house described in the drawings and if he did not have the skill to do so he ought not to have taken on the contract.

For these reasons I must reject the submission that the difficulties in the case arose from the absence of an architect and the inadequacy of the drawings.

I propose to deal with the defects in the order in which they are set out in Mr. Stewart's report which formed part of the evidence.

1. The chimneys.

Mr. Stewart said that there is evidence of extensive dampness in the lounge and family room resulting from the absence of damp-proof courses (DPCs) in the three chimney-stacks. This was not contested by the Plaintiff's architect, Mr. Turlough Lynch. It appears that there ought to have been a lead tray DPC through each chimney-stack. In failing to provide such a DPC, was the Plaintiff in breach of his implied undertaking? It seems to me that he was. Mr. Stewart said that it is normal good practice to supply them; Mr. Lynch thought that the Plaintiff had probably never heard of them. Whether he had or not, it is clear that he was aware that there ought to have been a DPC as he said in his evidence that there was in fact one. So he cannot escape liability on the ground that he could not be expected to know that a DPC was required. In my opinion the failure to have an effective DPC in the chimney-stacks constituted a failure to exercise due skill and care in their construction, and was also a failure to ensure that the work and materials would be reasonably fit for the purpose for which the chimney stacks were required, i.e., as part of a residence, which obviously meant that they had to be so constructed that they did not enable dampness to penetrate into the house.

What is required to rectify this defect? There is a conflict between the experts on this. Mr. Lynch said that a silicone treatment of the exterior of the brick work should be tried and should be effective. Both Mr. Stewart and Mr. John Donnelly, a structural engineer called on behalf of the Defendant, were of the opinion that the application of a silicone sealer would not work.

Mr. Stewart said that he had researched this particular problem and he was satisfied that a square chimney, having four walls, could not be protected from dampness by such a sealer, and Mr. Donnelly said that he would not accept painting on the brick work as any cracking in the mortar joints would break the film. I accept their evidence on this. It follows that the Defendant is entitled to have the chimney-stacks taken down to roof level; a proper lead tray DPC inserted, and then rebuilt. The cost of this, as estimated by Mr. Cooney, whose figures were accepted by Mr. Carroll as not being unreasonable, is £2,800, and I allow this sum in respect of the chimneys.

2. The Parapets and roof flashings.

This defect is described by Mr. Stewart in his report as follows:

"All the gable walls of the monopitched roofs are provided with an upstand parapet coping, capped "in situ concrete". These have not been provided with a stepped DPC underneath at junction with cavity brick walls and cover flashings of roof. This is resulting in damp penetration to interior of dwelling in various locations such as lounge, family room, entrance hall and porch."

The existence of this defect does not appear to be challenged by Mr. Lynch. His evidence was simply to the effect that it would be difficult to put a damp-proof course under the flashings. But it seems clear that this has to be done to prevent dampness penetrating. Mr. Cooney estimates the cost at £2,270 and I will allow this sum under this head.

3. Ridge tiles.

This is a relatively minor item but clearly requires attention. I allow the amount estimated by Mr. Cooney - £260.

4. Opes in external cavity walls.

Mr. Stewart states that many of the window and door opes show signs of dampness at heads and reveals which is caused by defective stepped DPC (cavity trays) or the absence thereof, over window and door lintels. Mr. Lynch agrees that there is a problem and that a proper sealing job should be done. Mr. Cooney estimates the cost at £1,630 and I allow this sum.

5. Sub-floor DPC (housing water pump).

There is extensive dampness in the walls, timber wall plates, joists and overhead maple flooring of this small cellar by reason of there being no ground level DPC fitted in three of the rising wa[lls]. The Plaintiff said it was too late to put in the DPC when he was asked to construct the cellar, which had not formed part of the original plan, and he claims to be excused on this ground. In my opinion he is not entitled to be. He must have known that what has happened would happen if he laid a wooden floor ~~and~~ on rising walls which had no DPC. When he was asked by the Defendant to form this cellar he ought to have told him that this would involve removing a number of courses of blocks in order to put in the DPC at ground level, and it would have been for the Defendant to decide in the circumstances if it was worth going to this expense. As it is, the Defendant has made, and been paid for as part of the extras, a cellar which is so affected by damp that all the timber in it will have to be replaced, and in order to prevent dampness in the future the walls will have to be injected with a chemical DPC. Mr. Cooney has estimated the cost of this work at £630 and £296, making in all £926 and I allow the Defendant this sum.

6. Lounge ceiling.

Mr. Stewart found the ceiling in a poor state of repair. The cause was that no vapour barrier was provided on the inside surface

of the insulation behind the sheeting and there was no ventilation in the cavity space. Mr. Lynch said he would not expect the Plaintiff to have known about the damp-proof membrane which constituted the vapour barrier; that it ought to have been specified, and I accept his evidence on this. Accordingly, I hold that the Plaintiff is not liable for this defect.

7. Eaves detail over lounge.

As a result of defective work, rain-water is driven through and drips down on the chipboard flooring at both corners of the front wall over the baywindow. Mr. Lynch says that there should have been careful detailing around the eaves. It appears there was not. I allow Mr. Cooney's estimate of the cost of repairing this defect - £300.

8. Sub-floor of cellar housing water pump.

It seems clear from Mr. Stewart's evidence, and also from Mr. Donnelly's that this floor was not constructed in workmanlike manner. It consists of only two inches of lean mix concrete and there is no hard core under it. Mr. Lynch said that if no defect has appeared by now he sees no risk in the future. But the Defendant is entitled to have the kind of floor that would be put in by a competent builder exercising skill and care. Mr. Cooney's estimate for this work is £400 and I allow this sum also.

9. Rear monopitched roof (over bedrooms)

Mr. Lynch agrees that it is desirable to anchor this roof down with strap iron. Mr. Carroll's estimate of the cost is £200. Mr. Stewart and Mr. Donnelly consider that much more substantial works are required - tying of the flank walls to the first floor timbers and rafters; strapping down the roof at the eaves and apex; and diagonal bracing. As Mr. Donnelly is a structural engineer

I consider that his view, which is supported by Mr. Stewart, should prevail. Accordingly I allow the sum of £700 which is the cost estimated by Mr. Cooney.

I am not allowing any figure for counterbattens as I accept Mr. Lynch's evidence that they are not necessary.

10. Spar cantilever at lounge gable walls.

It is not disputed that there is a crack on both spar cantilevers and that it is due to the Plaintiff's failure to follow the detailed design provided by the Defendant. The only question is as to the nature and cost of the remedial work. Mr. Lynch suggests that all that is required is that expanded metal should be put over the beam extending onto the block work and replastered, and that this would cost £30. Mr. Stewart says that both sides of the lounge should be opened up, packed under with grout and tied down with stainless steel straps one metre long welded to angle linte and chased into and rawl bolted to block work, for which the estimated cost is £480. This seems to me to be more likely to produce the result which would have been achieved if the Plaintiff had carried out the work in accordance with the design provided, and accordingly I allow the sum of £480.

11. The chipboard flooring.

This is clearly not of flooring grade and the Plaintiff is entitled to have it replaced, but not by tongued and grooved boarding as Mr. Stewart suggests, and which would cost £1,050. Mr. Lynch's figure is £80, but this would seem to be for the landing floor only, whereas it is the chipboard flooring of the entire first floor that has to be replaced. I will allow a sum of £400 for this.

12. Timber treatment.

I am not satisfied on the evidence that any of the timber was properly treated and accordingly I allow the sum of £300 which Mr. Cooney estimates as a cost of treating all wall plates and end bearing, and the timber in the ceiling of the lounge.

13. External works.

Mr. Stewart makes a number of criticisms of the drainage work. Mr. Lynch agrees that the surface water should be diverted from the foul drain, but does not agree that the foul drain needs to be relaid completely. He says that the foul drain is obviously working an only needs some repairs which would not come to much. His evidence was also that the percolation from the septic tank was adequate. It seems to me that Mr. Stewart is insisting here on a higher standard than could be required of the Plaintiff, and on the basis of Mr. Lynch's evidence I allow a sum of £300.

14. Large landing baywindow.

It is agreed that this window is too short and needs to be replaced but it seems to me that this is not the Plaintiff's responsibility. While initially he was to have supplied the windows, they were in fact supplied by the Defendant, and in dealing with the Plaintiff's claim, I allowed the Defendant a credit of £4,400 in respect of windows. I am accordingly not allowing the Defendant anything under this head.

15. Window boards.

I think Mr. Stewart is again insisting on too high a standard in requiring the window boards to be replaced. Mr. Lynch says they appear to be in order. So I make no allowance under this head.

16. Solid fuel central heating circuit.

Mr. Stewart gave evidence of defects in the system but I have no evidence of the nature of the remedial work required, which Mr. Cooney simply describes as "alterations to system as installed". As the onus of proof is on the Defendant to prove his loss, and as he has not done so in respect of this item, I cannot allow it.

17. Fireplaces.

The cost of two fireplaces at £500 is claimed on the basis that these were shown on the drawings. What is stated on the drawings in respect of one is "fireplace and hearth to detail", and in respect of the other "fireplace and hearth to later detail". No evidence was given of any details having ever been supplied to the Plaintiff so it seems to me that he is not in default and accordingly I disallow this item also.

18. Floor tiling.

The tiling in the family room is uneven and off level. Mr. Stewart said it showed a deviation of half an inch over four fee Mr. Donnelly said it was four times over the level of tolerance. Mr. Lynch says it looks alright; that it is not a serious defect and you would have to put up with it. I don't think the Defendant should have to put up with it. It seems to me that it could not be said that a floor having such obvious defects was laid in a workmanlike manner. So the Defendant is entitled to the cost of the remedial work estimated by Mr. Cooney at £410. In addition plumbing pipes crossing the floor are not laid at an adequate depth and the Defendant is entitled to a further £180 for laying these at the correct depth after they have first being lagged.

19. Balusters.

I am not satisfied that the Plaintiff was under an obligation

to provide balusters on the staircase and accordingly I disallow this item.

20. Facing brick tiles.

Mr. Stewart says that water will run in behind these bricks and lift them, but I am not satisfied that this defect was due to any failure on the part of the Plaintiff to lay the bricks in a workmanlike manner. Accordingly I disallow this item.

21. Sundry internal and external works.

£500 is claimed for these. That seems to me to be excessive and I allow a sum of £150.

That completes the first part of the Defendant's counterclaim, and I calculate that the aggregate of the sums I have allowed is £11,500.

The next head of claim is loss incurred through delay in the completion of the house and in obtaining possession.

The Plaintiff started on the construction of the house in June 1983. The Plaintiff said it was on the 17th of June and the Defendant put it a week earlier. According to the Defendant, the Plaintiff had agreed to finish the house in seven months. The Plaintiff says that that would be the time for a normal house, and that in view of the unusual design of this house, he had said it would take nine months. I accept the Plaintiff's evidence on this.

The nine months would have expired in March 1984. But the house was not finished until September of that year and it was only May 1985 that the Defendant got possession as the Plaintiff refused to hand over the keys of the house until he was paid what he claimed was the balance due to him. In my opinion there was no justification

whatsoever for the Plaintiff refusing to hand over possession and his Counsel has quite correctly not tried to justify it. So the position is that between March 1984 and May 1985 - a period of fourteen months - the Plaintiff was in default, firstly for not having finished the house within the agreed time, and secondly, for not having handed over possession.

The Plaintiff claims damages under three heads which I will consider separately:-

1. £1,800 - being the difference between the interest paid on the bridging loan obtained by the Defendant and the interest which the Defendant would have been paying on the Building Society loan which he could only get after the house had been completed.

   In my opinion this is not within the first branch of the rule in <u>Hadley .v. Baxendale</u>, i.e. it is not a loss which may fairly and reasonably be considered as arising naturally, i.e., according to the usual course of things, from the breach of contract itself. So if the Defendant is to recover this loss, he must show that it comes within the second branch of the rule, that is to say, that it is such a loss as might reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable loss resulting from the breach of it. But in my opinion the Defendant cannot show this. In order to do so he would have had to prove that at the time he entered into the contract with the Plaintiff on the 28th April 1983 the Plaintiff was aware that the Defendant would not get the Building Society loan until the house was completed; that in order to finance the construction of the house he would in the meantime have to get a bridging loan; and that the interest payable under the

bridging loan would be substantially higher than the interest payable under the Building Society loan. And the Defendant has not proved that the Plaintiff was aware of all of these things.

In November 1984, however, when the Plaintiff was refusing to give up possession, the Defendant's solicitor, in a letter of the 5th November 1984, put the Plaintiff on notice that the Defendant, as a result of not getting possession, was suffering a loss through still being on a bridging loan, and I consider that as from that date the Defendant is entitled to recover this loss as damages for trespass. This means that the Defendant is entitled to recover in respect of two months - the proportionate sum being £300.

2. £1,500 for renting a house in Drogheda for fourteen months.

In my opinion this is recoverable but the figure should be £1,400, i.e., fourteen months at £100 per month. In Hudson on Building Contracts (10th Edition) page 595, in dealing with delay and consequential loss, the following passage occurs:-

> "In the case of an apparently ordinary dwelling-house required for personal occupation, damages recoverable within the first branch of the rule would include, it is submitted, the reasonable cost of living accommodation or living elsewhere and storing furniture etc. if in fact expenses of this kind were incurred,..."

Here there is evidence that the rent was incurred over the period in question and so it is recoverable.

3. £1,000 claimed in respect of travelling expenses to and from the house twice daily.

I am not prepared to allow anything under this head. The Defendant works in Dublin and could have called to the house each day on his way to and from work, and I see no reason for charging this to the Plaintiff. Apart from this, there was no necessity for the Defendant to visit the house twice daily.

Finally, the Defendant claimed general damages for inconvenience. I am not satisfied that this is a case in which such damages can be recovered. In Hobbs .v. London and S.W. Railway Company (1875) L.R. 10 Q.B. 111 Mellor J. said in his judgment at page 122

> "I quite agree with my brother Parry, that for the mere inconvenience, such as annoyance and loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages."

The only evidence that I have before me is very sparse. The Defendant simply said that he and his wife were caused terrible inconvenience. I cannot tell from that if the Defendant suffered physical inconvenience, which means that he has not discharged the onus of proof which he must discharge if he is to be entitled to an award of damages. So there will be no award of damages for inconvenience.

The special damages for delay come to £1,700, and when this is added to the £11,500 to which the Defendant is entitled as damages for defective work, it gives the final amount to which the Defendant is entitled on his counterclaim, namely, £13,200, and the Defendant is entitled to judgment for this amount.

Finally, there is the question of the Defendant's costs of the Injunction proceedings in the High Court. The Learned Circuit Cou[illegible] Judge awarded these to the Defendant. I am in entire agreement with his decision on this point. The Defendant had to institute the proceedings in order to get possession of his house, and I see no reason why he should not be entitled to his costs of those proceedings