161 (172)

THE HIGH COURT

1980 No.6902 P

BETWEEN:-

MARY COLEMAN AND JAMES COLEMAN

Plaintiffs

-and-

DUNDALK URBAN DISTRICT COUNCIL

Defendants

Judgment of Mr. Justice Murphy delivered the 3rd day of November 1983.

John J. Coleman and his wife Mary Coleman (the Plaintiffs) reside at number 100 Oaklands Park in the town of Dundalk and County of Louth. These premises were formerly known as 100 Cox's Demesne.

In the early 1950's the Defendant Council, displaying what would appear to have been a commendable degree of foresight and responsibility, drew up plans for the provision of some 1,500 houses by the construction of a series of building estates. The overall plan was designed by Mr. Desmond Fitzgerald. In addition he acted as architect in connection with the construction of the first of these estates, namely, Marian Park which was completed some time about 1958. The next stage in implementing the Council's plans was the development of the area known

as "Cox's Demesne." For the purposes of development this was divided into four stages involving the sub-division of the demesne into four sections known as A, B, C, and D. These four sections as well as the other building estates are clearly identified on a plan which was put in evidence and dated as of May 1983. Before building work commenced on Cox's Demesne preliminary work had been carried out between 1955 and 1956 by the installation by Hastings and Company under the direction of the Defendant's engineers of a water and sewage system and by the construction in 1961 of part of the road system providing access to the estate.

Sometime in 1964 Mr. Oliver McCarron was appointed consultant architect in connection with the development of Section A of Cox's Demesne. He prepared the site plans and drew up the specifiction of the work to be done. The work was put to tender and the contract awarded ultimately to Messrs McCaughey Brothers, who apparently entered into a form of contract to execute the works on the 16th of May 1965 having previously taken possession of the site and commenced the preliminary site work at the end of 1964 or the beginning of 1965. Mr. McCarron retired from private practice as an architect in 1965 to take up an appointment with the Department of Local Government. He

was replaced as consultant architect by Mr. Uinsean McKeown who was appointed to that position in January 1965. The resident engineer in connection with the development was Mr. Patrick Deavy. He was employed by the Dundalk Urban District Council as an engineer as of the 1st November 1964. It was in the spring of 1965 - indeed about the 17th of March 1965 - that he took up his duties as resident engineer. The 150 or so sites in section A were completed between the years 1965 and 1967. In February 1967 the Defendants made a letting to Mr. John Coleman of the premises in question on a weekly tenancy at a basic weekly rent of 81 shillings. Subsequently the premises were vested in the Plaintiffs on and from the 1st day of October 1974 for the term of 99 years from that date by virtue of a transfer order made on the 15th day of May 1978 pursuant to Section 90 of the Housing Act, 1966. The vesting of the premises in the Plaintiffs was subject to the payment of the purchase price of £2,370.00 (together with interest) by weekly instalments of £5.13 over a period of 20 years from the 1st day of October 1974 and subject to the payment of the nominal rent of 5p per annum if demanded.

In 1976 serious cracks were observed in the premises. Whilst these proceedings are concerned only with damage to the premises occupied by

the Plaintiffs evidence was also given of the fact that similar damage occurred in a number of other houses comprised in the estate. Evidence of this nature was relevant and material in considering the cause of the damage. Each of the Plaintiffs and some of their neighbours gave evidence as to the nature and extent of these cracks. In the case of the Plaintiffs the position may be summarised by saying that there were a great number of cracks on the ceiling and elsewhere inside the premises but more significantly there were four major cracks on the outside of the front wall of the premises. These particular cracks had corresponding cracks on the interior of the front wall. The inescapable inference is that the fissures extended through the depth of the wall. Photographs of the adjoining houses indicate the nature of the cracking involved. In the case of the Plaintiffs' house the cracking is at present disguised by the recent decoration of the premises. It is not disputed by the Defendants that these substantial cracks have appeared and indeed that they have grown worse over the years. As a result of representations made by the Plaintiffs and other residents the Defendants treated the cracking by inserting mastic in the cracks. This treatment was ineffective as the cracks re-opened or extended. Perhaps more alarming is the manner in which the Plaintiffs'

house has become distorted. Again it is not disputed but that the doorways and window opes in the house have become deformed so much so that Mr. Coleman removed a number of the doors and windows and re-shaped them with a view to fitting them in the distorted frames. As illustrated by the photographs put in evidence this remedial work has achieved only a limited measure of success and the uncontradicted expert evidence was to the effect that the distortion will continue so that the exercise would require to be repeated in the future.

In these circumstances it is the Plaintiffs' contention that there was an implied term of the 1967 agreement under which they became tenants and the 1974 agreement in pursuance of which they became tenant purchasers that the premises were of "a substantial construction and free from material latent defects and were in all respects suitable for habitation as a dwellinghouse and would have a normal lifespan of a dwellinghouse of its type and construction" and that the premises did not conform to that standard. In addition, or alternatively, it was contended that the defects in the premises were due to the negligence and breach of statutory duty of the Defendants their servants or agents.

As I say it is not in fact disputed that the Plaintiffs' premises and those of some of the adjoining residents on the estate are defective

in the manner described above. Furthermore the reason for these defects emerging has now been clearly established and accepted by all parties. As appears from the report of the Institute of Industrial Research and Standards, dated tho 16th of February 1978, which was put in evidence, the foundations of the houses in this part of the estate were located in what is described in that report as, "a mottled, grey/brown clayey silt with fine roots and fine sand which was generally stiff in situ." Having so described the soil the Report then went on to conclude:-

> "The result of the site and laboratory tests carried out to date indicate that the clayey silt, or silty clay, sub-soil on which the footings are predominantly located has more than adequate bearing capacity for the applied loading in the main."

Indeed that report went on to express a view that the cracking which had appeared at that stage was not due to soil conditions. That view was expressed at paragraph 5.3 of the Report in the following terms:-

> "We have discovered no substantive evidence, as yet, that the problems with these structures are indeed due to foundation conditions since the sub-soil has been found to be of good strength in the main and does not appear to possess sufficient shrinkage potential to lead to damage such as that as has occurred."

However, detailed though the Report was, the I.I.R.S. whilst re-affirming their view proposed further tests as follows:-

"While the evidence to date tends to suggest that foundation movement or failure is not the probable cause of the damage incurred it is our intention to open a further number of trial holes and to examine the foundations and sub-soil more extensively."

As a result of further searches conducted by the I.I.R.S. with the assistance of specialist advisers - Geotechnical Consulting Services Limited - it was established by a further Report dated the 16th October 1979 and likewise put in evidence - that the firm crust of silt on which the foundations were located was underlaid by a layer of soft clay having a depth between 1.2 and 8.3 metres. This soft clay consisted of an alluvial deposit of organic nature and the settlement calculations showed that primary settlement could occur over a period in the order of 20 to 40 years duration. It was agreed that it was this settlement which caused and continues to cause damage to the Plaintiffs' house.

It must be recognised, however, that these conclusions were not reached until 12 years after the houses had been erected, 3 years after the cracking had appeared, and indeed twelve months after the first

Report of the I.I.R.S. had exculpated the soil conditions as a probable cause of the damage. Again it is proper to add that the I.I.R.S. and specialist advisers were engaged and their Reports obtained and provided by the Defendants and not the Plaintiffs.

The law as it applies to the circumstances of the present case has been authoritatively settled by the decision of the Supreme Court in Siney .v. Corporation of Dublin, 1980 I.R. 400. That case is authority for the proposition that where a letting is made of a dwellinghouse provided by a local authority under the Housing Act, 1966 that a condition or warranty is to be implied in such letting that the accommodation will be reasonably fit or suitable for habitation by the tenants at the commencement of the letting. In addition the Supreme Court expressly decided that the failure of the local authority to observe the statutory duty was in that case a particular source of negligence. I may also add that the Supreme Court rejected the contention that the existence of a liability in contract excluded liability in negligence.

In the present case the Defendants necessarily accepted that it was an implied term of the tenancy agreement that the premises let to Mr. Coleman would be reasonably fit for habitation by him. The Defendants

did correctly assert that the implied condition or warranty required that the premises should be fit for habitation at the commencement of the tenancy rather than at a later date and that the criteria to be applied in determining fitness for habitation was that which would have been appropriate at the commencement of the letting.

Were these premises fit for habitation by Mr. Coleman in February 1967? As appears from the judgment of the Chief Justice in Siney .v. Corporation of Dublin (above) it was successfully argued on behalf of the Plaintiff in that case that the meaning to be attached to the words "fit for habitation" could be gleaned from the provisions of the Housing Act, 1966 itself. The argument was adumbrated in the judgment of the Chief Justice at page 409 in the following terms:-

> "In considering whether a house was or was not fit for human habitation, the Defendant corporation (and every other housing authority) was obliged to have regard to the extent to which the house was deficient as respects each of the matters set out in the second schedule to the Act of 1966: see sub-section (2) of Section 66. Among the matters mentioned in the second schedule are "resistant to moisture" and "air space and ventilation."

In the present case the Plaintiffs' adopting the same approach referred to the second schedule of the 1966 Act and pointed out that the first matter to which regard should be had as specified in that schedule was "stability." In my view this is a proper approach to the question. It seems to me that the 1966 Act clearly recognises - and I would be surprised if the position were otherwise - that a house lacking the requisite degree of stability would not be fit for human habitation. Whilst it was not suggested that there is any danger of the premises collapsing and the Plaintiffs have not - unlike the Plaintiff in the Siney case - vacated the premises it is common case that the damage to the Plaintiffs' premises is serious and betokens a very significant degree of settlement or subsidence which has continued and will continue for a number of years to come with the result that the existing cracking and distortion cannot be repaired effectively unless and until radical changes are made in the support available to the foundations. In these circumstances it seems to me that the proper inference is that the premises are not at the present time at any rate reasonably fit for habitation.

The other question then is whether the premises were likewise unfit for habitation at the commencement of the letting. The significant fact

in that context is that no cracking appeared for some ten years after the commencement of the letting. The Plaintiffs made no complaint and would have no reason to suspect that anything was amiss during that period. On the other hand the defective sub-soil conditions existed; the subsidence was inevitable and the damage which did occur was bound to occur sooner or later. It seems to me, therefore, that the premises were in fact defective in 1967 and that the fact that the occupiers were unaware of the problem and that it did not manifest itself for a considerable period thereafter does not alter the position. The instability existed in 1967 and that of itself rendered the house unfit for habitation so as to comply with the implied term of the letting agreement.

In relation to the claim in so far as it is grounded in negligence, which was the issue to which the greater part of the evidence was directed, the matter resolves itself to the question of whether or not the Defendants or the experts whom they engaged should have explored the site by digging trial or bore holes for the purpose of investigating the nature and condition of the sub-soil which we now know, with the benefit of hindsight, was the cause of the settlement. In fact the

specification prepared by Mr. Oliver McCarron contains an express provision (paragraph 31) in relation to trial holes which is in the following terms:-

"The contractor shall provisionally include for digging no. 15 trial holes in positions as directed by the architect, in order to ascertain the nature of the sub-soil for foundations."

No trial holes were in fact dug. On behalf of the Plaintiffs it was suggested that this represented a departure from the scheme which Mr. McCarron had envisaged. This Mr. McCarron vehemently denied. He explained that paragraph 31 was included in the specifications solely for the purpose of ascertaining the cost of these excavations if it should be decided at a later stage to carry them out. In this - and I may say in all other matters - I accept in full the integrity of this witness. However the inclusion of the paragraph aforesaid in the specifications is helpful to some extent. Its existence shows that in 1964 architects recognised that in certain circumstances it might be necessary or desirable to examine the nature of the sub-soil. This is important as the evidence established that this is a branch of the art in which considerable evolution has taken place over the past 30 years or so. The evidence showed that the science of soil mechanics had not

been studied or understood as fully in the late 1950's as it is now. Again the methods of excavation and the availability of heavy earth moving equipment have changed significantly since the late 1950's. Indeed evidence was given to the effect that it was 1968 before the JCB earth moving equipment was available for hire in the Dundalk area which was helpful in putting the problem in its proper perspective.

Notwithstanding the case made by Counsel for the Plaintiffs in the course of cross-examination, it seems to me that the clay in which the foundations for the development were immediately located was suitable and adequate. Perhaps it would be more correct to say for the purposes of this judgment that there was no want of care in laying the foundations of the type selected, that is to say, the strip foundations in the outer crust which existed on the site. All of the engineers who had an opportunity of seeing the soil from which the trenches had been taken out and who gave evidence before me, that is to say, Messrs Oliver McCarron, Mr. Uinsean McKeown and Mr. Patrick Deavy gave evidence to that effect. Indeed their evidence was effectively confirmed by the Report of the I.I.R.S. The real issue is whether the trial holes should have been taken out with a view to ascertaining the nature of the soil <u>below</u> the foundation level.

There was a considerable conflict of evidence as to what the practice was in the mid 1960's with regard to the digging of trial holes in connection with the construction of various types of buildings. Doctor Bunni - a distinguished consulting engineer - gave evidence to the effect that as far back as 1965 it would have been his practice to take out trial holes and to do soil tests before laying the foundations even for a two storey house. He explained that he would have taken out trial holes before the drawing stage and failing that he would certainly have tested the sub-soil before the work commenced. He explained that one would ordinarily hire a JCB for something like £25.00 an hour which would quickly excavate one or more holes to a depth of 10 feet from which a competent engineer could readily assess the quality of the sub-soil. However Doctor Bunni did recognise that he had not practised his profession in this country before 1969 so that he was not in a position to give positive evidence as to the practice here before that date or indeed evidence as to the availability of excavation equipment. Furthermore he himself expressed the view that there might be a difference between the practice adopted by consultant engineers and the standard applied by local authorities.

Mr. John Osborne, a civil engineer, confirmed that soil testing was

firmly established by the late 1950's or early 1960's in this country but he did differ with Doctor Bunni to the extent that he himself would not have dug a trial hole for a single dwellinghouse and would only have done so for a building scheme. Furthermore he attached the utmost significance to the ground conditions prevailing in the area of the intended structure. The effect of the evidence given by Mr. Timothy Sullivan - another civil engineer who gave evidence on behalf of the Plaintiffs - was that, having heard the evidence in which Cox's Demesne was described prior to the development, he would on that basis have opened trial holes had he been the engineer responsible for the job. Mr. McCarron's approach to the digging of foundations was explained in the following terms:-

> "You would start in the foundation trenches and go down to something you are satisfied with: you do not dig trial holes. If the foundations are set in suitable soil I would be happy with that."

This was supported by another engineer, Mr. Pierce McKenna, who indicated that this was the correct practice in the period 1963/'64. As he recalled it, the procedure was to take out trenches for foundations until a firm bottom was reached. At that stage the owner, here the Local Authority, was notified of the condition of the bottom of the

trench and given an opportunity to inspect and to pass it. If on the other hand there was any indication of weakness or inconsistency in the bottom of the trench it became a case for re-inforcement. He confirmed that the crow-bar test, which it was said had been used in the present case to test the firmness of the bottom of the foundation trench, was correct and appropriate.

Whilst there was, therefore, a considerable amount of discussion as to the appropriate measures to be taken before laying the foundations I do not think that the apparently conflicting views were as far apart as at one stage appeared. At one end of the spectrum I would be unwilling to accept that there was an established practice that trial holes were dug or that it was appropriate or necessary that they should be dug in connection with the construction of every dwellinghouse or indeed every building estate. At the other extreme I would be equally unwilling to accept that the excavation of suitable trenches for foundations would necessarily exclude the need to dig trial holes. The common body of the evidence given by all the distinguished experts was to the effect that there were a variety of factors to be considered in relation to the soil conditions and that a proper consideration of those factors would determine whether or not the excavation of trial pits was an appropriate

procedure. That this is the correct conclusion is entirely supported by the fact that by a happy coincidence the Department of Local Government, as it then was, in a circular letter dated the 24th May 1965 regarding housing advised - among other things - as follows:-

"A careful examination should be made for evidence of the existence of undesirable sub-soil conditions, such as rock, bog, running sand and soils affording poor drainage. Adjoining lands - where there may be cuttings of one kind or another or rock outcrop - should also be surveyed if there is no direct evidence of the conditions mentioned on the site itself. If any of these conditions are suspected, trial pits should be opened in order to ascertain either that satisfactory sub-soil conditions exist or that the conditions present can be dealt with at reasonable cost and will not affect the health, comfort or amenity of future residents. Trial pits or borings may not give an accurate picture of sub-soil conditions unless their locations are well chosen and they are of sufficient number and depth to cover all contingencies."

As all of the experts accepted that the foregoing statement represented the standard applied by prudent, competent architects and engineers in 1965 the issue in this case in so far as it is grounded in negligence

reduced itself further effectively to the question whether a reasonable examination of the site by a competent expert would have disclosed the existence of features such as those mentioned in the circular from the Department of Local Government as would put such an expert on enquiry as to the nature of the sub-soil and accordingly dictate the excavation of trial pits or borings.

Again there was considerable controversy as to the condition of section A of Cox's Demesne. Mr. John Carroll, who had been familiar with the land in his youth described all of Cox's Demesne in the 1940's, said there were lakes on the land at that time. Mr. Kevin Hayes, who is also a native of Dundalk and had known the site for some time described it as "swampy". He in fact worked on the site as an employee of the builders and subsequently went to live there. He described the condition of the site during the development work as being a "quagmire" but I think it must be accepted that the state of the site would depend very much upon the nature of the operations being carried on and the stage at which the roads were installed on the estate. However Mr. Hayes did say that prior to the top-soil being removed the ground was all bulrushes and indeed that there was still a bulrush presently growing in his own back garden on the site. Mr. Brown who was a labourer employed by the builders and

subsequently a resident on the estate said that part of section A - about one third of it - was boggy and marshy. It had, he said, large ditches or shucks through it and he recalled two large types of lake south-east and south-west of section A. Mr. O'Mahoney, who had been employed as an engineer by the Defendants between 1960 and 1966 was in a position to say that he had been on the site before the development took place and whilst he accepted that there were rushes growing on Cox's Demesne he placed those more in sections C and D rather than section A. On all of the sections, other than section A, special provision was made to cope with the problems of the site by constructing the buildings on a raft type foundation. That procedure was adopted even without trial holes being dug.

Mr. McCarron was placed in a particular difficulty in giving his evidence. It was nearly 20 years since the events occurred in respect of which he was asked to give evidence. Perhaps surprisingly he had not been asked to recall the matter until 3 weeks before the hearing of the Action. Moreover, he explained, in the circumstances he felt that it was undesirable for him to review such documentation as was available because he felt there was a danger that he would re-construct rather than recall his evidence of the material events. It was not surprising,

therefore, that Mr. McCarron found himself in the position that frequently he had to restrict his evidence to statements as to what he would have done rather than statements as to what in fact he did. Mr. McCarron was clear that he had gone to the site before embarking on the drawings. Unfortunately, he had no clear recollection of the site itself at that stage. All he could say with certainty was that he had no recollection of "any indicators that would alert me to problems existing on the site." The fact that he had provided in the specification for trial holes was not an indication that he would necessarily dig such holes or that he had any particular reason to anticipate that they would be necessary. Indeed Mr. McCarron prescribed a paricularly strong type of foundation - it was described as an inverted T foundation - but this was prescribed simply to secure a better structure and was not dictated by any shortcomings on the site itself. The evidence given by Mr. McCarron on this topic may be summarised as follows:-

> "I would have walked the lands and I would have paid attention to what I saw. If there was a house in the vicinity I would be interested if it had any cracks in it. If there were excavations I would have been interested in them. If there were reeds I would have been alerted. I would have spoken

to the borough engineer. A great deal of nebulous information would have been available. The land did not produce any suspicious circumstance. I have a definite recollection that my suspicions were not aroused. I have no recollection of water on the site. There were definitely drainage ditches there. No trial holes were dug. There was no reason for doing so."

On balance I accept that the site was one which might properly be described as marshy or boggy and as such that it did warrant further investigation. Unquestionably the adjoining land - and it will be remembered that the circular from the Department of Local Government expressly refers to adjoining land - gave a very positive indication of the existence of some problems which should be investigated by sinking trial holes or borings. It does seem to me, however, to be fair to add that the failure to investigate the site more thoroughly was, I believe, due to some extent to a breakdown in communications between the Defendants and the various experts whom they engaged. I attach importance to the fact that Mr. McCarron placed great reliance on the evidence available to the Defendants. He recognised that they would have built up a body of technical data as a result of the construction of roadways and the installation of water mains in the area as well as the construction of

the Marian Park estate to the north-west of Cox's Demesne. Without in any way seeking to cast blame upon the Defendants or their permanent employees it was implicit in his evidence that he relied strongly upon the facts that such knowledge was available to the Defendants rather than the fact that it was transmitted to him. When asked why he had no suspicions regarding the site he replied:-

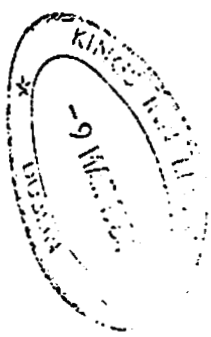
"You walk the land with the town surveyor who has a background knowledge of the site going back years."

In fact the town surveyor - Mr. Thomas Kenny - was not called to give evidence but I am inclined to infer that each of the experts may have been lulled into a false sense of security by the belief that the other of them had or would carry out any investigations that might be necessary. It is not necessary for me in this case to decide where the fault lies as between the two experts. In either event the Defendants would be liable. This was made clear in the decision of Henchy J., in Sinay .v. Corporation of Dublin (see above), in his judgment at page 418 where he explained the position as follows:-

"As the housing authority, the Defendants were expected by the legislature to ensure that the dwellings provided by them under

the Act would not have defects which would make them uninhabitable. While the Defendants may possibly have rights against third parties, the primary responsibility for the defective design falls on them. They cannot rid themselves of that responsibility by pleading that they delegated the observance of their statutory obligations to others."

Moreover, it must be recognised that the case itself can be and is resolved on the basis of the contractual responsibility of the Defendants to the Plaintiffs. It was originally argued on behalf of the Defendants that the full extent of their obligation was to exercise reasonable care to ensure that the premises were reasonably fit for habitation. In other words that the contractual obligation was co-extensive with the duty in tort. However, having re-considered the legal principles the Defendants did not pursue that line of argument. It was, as I understand it, accepted that there was an implied term that the premises would be reasonably fit for the particular purpose aforesaid and if it were not so fit at the relevant time - for whatever reason - that the Defendants were liable in contract for the damages thereby caused.



By agreement between the parties the issue in so far as it related to damages was postponed to a later date and the only evidence tendered

in relation to damages was such as was adduced for the purpose of indicating the nature of the damage and its probable cause. Attention was, however, drawn to the fact that the operative date for determining whether or not the premises were habitable was the commencement of the letting in the first instance. As there was a subsequent sale by way of lease of the premises by the Defendants to the Plaintiffs it would seem inescapable that a like term was implied in the sale agreement as to the fitness of the premises for habitation. In that case it would seem to me to follow that the implied covenant related back to the period when the premises were first provided for occupation and not the date of the agreement for sale or the date of the vesting of the premises in the Plaintiffs. However, that point was not the subject matter of argument and a final decision thereon must be postponed until the question of damages falls to be dealt with.