

## THE HIGH COURT

1980 No. 680P

BETWEEN/

JAMES BROHAN AND CHRISTINA BROHAN

PLAINTIFFS

-and

CROSSPAN DEVELOPMENTS LIMITED

DEFENDANT

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Judgment delivered by O'Hanlon J., the 26th February, 1985.

This is an action for damages for breach of contract and negligence brought by house-purchasers against the builders. The matter, at first sight, is complicated by the fact that the parties entered into an agreement in writing dated the 18th day of October, 1977, appropriate to a situation where the builder was undertaking to erect a new house for the purchasers, and to carry out the work in a particular manner, whereas what happened in reality was that the purchasers bought the show house on a building estate at Kilcoole, Co. Wicklow, which was already completed when they first saw it.

For the purchasers it was contended that a good deal remained to be done to make the house fit for habitation, and that in addition to the express terms of the contract the builder was bound by the implied conditions referred to by Davitt P. in Brown v. Norton (1954) IR 34, in relation to the work already executed and remaining to be executed. It was held by the learned President in that case that the question whether a house should be regarded as "a completed house" or "a house in course of erection" at the time the parties made their agreement was a question of fact. Having

considered the evidence given on both sides in the present case I am satisfied that the house which was sold to the Plaintiffs was a completed house, as the work - if any - which remained to be done was of a trivial nature on a par with that which was disregarded by Mr. Justice Davitt in the last of the series of cases considered by him in Brown .v. Norton, and therefore the Plaintiffs' claim must rest on the duty owed to them by the builder under the express terms of the agreement which was concluded between the parties.

This conclusion, however, does not make any major inroad on the Plaintiffs' cause of action. Their entire case, virtually, is concerned with the incursion of damp into their home, and this, in turn is attributed to structural defects of various kinds. Clause 9 of the agreement provides that the builder shall be responsible for all structural defects which appear in the premises and of which notice in writing is given to the builder within 18 months from the date of closing. A long series of complaints by the Plaintiffs about damp affecting the premises commenced with a letter of the 6th March, 1978, from the first-named Plaintiff to the builder, well within the 18-months period, and accordingly I am prepared to hold that the Plaintiffs have a good cause of action for breach of contract in respect of all structural defects which have appeared in the premises and which can be shown to have contributed to the damp conditions of which the Plaintiffs complain.

While the house was in the very lowest cost-bracket for new housing, even by 1977 standards, and provided minimum accommodation of 700 square feet, it was conceded by the Defendant's witnesses that the least a purchaser was entitled to expect under his agreement was a house that would be wind and water-tight, and dry and fit for human habitation. The Plaintiffs say that the house they purchased fell far short of their requirements in these respects.

The house in question was one of a large number of houses erected by the Defendant on a housing estate at Beachdale, Kilcoole, Co. Wicklow. It is a bungalow, comprising a living-room, kitchen-cum-diningroom, 3 bedrooms and bathroom. The basic materials used were 9" hollow concrete blocks, rendered outside and plastered inside, with concrete tiled roof, and concrete floors throughout the building. The bungalows are detached, and quite attractive-looking in the photographs put in evidence. There is a single fire-place with back boiler in the living-room, and this is intended to provide heat for the whole house by means of radiators located in the bedrooms and the kitchen, with a small water pump to maintain the circulation of hot water.

The Plaintiffs complain that at all times since they took up occupation the house has been cold and very damp; they say the central heating never worked properly and merely succeeded in heating the radiators over a small section at the top (which became very hot) leaving the rest of the radiators cold.

There is no doubt that the house has been badly affected by damp, and the Plaintiffs' witnesses attributed the incursion of damp to three different sources - (1) rain penetrating the walls, particularly in the region of the bay-window in the living-room; (2) rising damp from ground level, affecting the floors and walls, and (3) very severe condensation throughout the whole interior of the premises.

Having carefully considered the expert evidence given on both sides I have come to the following conclusions about the cold and damp which have undoubtedly made living conditions for the Plaintiffs very unpleasant for much of the time since they first took up occupation in their new home:-

1. I think their bungalow, although an attractive-looking house from the exterior, was destined at all times to be a rather

cold and damp house, unless compensating measures were taken by the occupiers. The method of construction, using 9" hollow-block walls, was very common at the time, and was acceptable to local authorities and building societies, but it has since come to be recognised that for comfortable living conditions some additional insulation measures are needed, and these would now be demanded if a house is to qualify for a housing grant, or possibly to satisfy the requirements of building societies or other housing agencies. However, the provision of such additional insulation costs money, and adds significantly to the cost of the house. The Defendant says that it was giving good value for money, and should not now be asked to provide a more expensive type of house for a purchaser who was coming in at the bottom end of the market and accepting what could be provided for the amount of money he was willing to expend.

2. I find as a fact that the bay window in the living-room was badly constructed and allowed penetration of damp into that part of the house; that some structural cracks appeared in the outer fabric of the house which also let in the damp, but which were subsequently made good by the Defendant; that the central heating did not work properly and the pipe-work has been found to be defective; that water probably leaked from fractured pipe-work and that there are areas of the damp-proof course and damp-proof membrane which are at least suspect, and require to be opened up and examined and have remedial work carried out so far as necessary.

3. With regard to the problem of condensation, which seems to have been a major source of damp conditions within the house, I tend to accept the expert evidence given on behalf of the Defendant rather than that given on behalf of the Plaintiffs. The Plaintiffs purchased a house which could not be made warm and comfortable except by providing further and more costly methods of

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insulation, or by keeping the central heating going more constantly and at a higher level than would be required in a better-insulated house. The area required to be heated was small and I believe that if the fire in the living-room had been kept going for most of the day during the periods of the year when the weather outside was not temperate, and if the central heating system had been kept in good working order, then much if not all of the problems stemming from condensation on the walls and windows would have been eliminated. While the Defendant must be faulted as regards the defects which have appeared in the central heating system it should be noted that the Defendant was never put on notice that the system was not working properly until the hearing of the action was about to commence. I think the Plaintiffs were very remiss in letting several years go by without tackling the problem at its source, and ensuring that they themselves did everything possible to keep up a reasonable level of internal heating in the house. In this respect I have to hold that they contributed significantly to the hardships they have had to endure, and to the loss and damage to clothing and house furnishings of which they complain.

4. I do not find that there was any penetration of damp through the walls of the house, save in relation to the wall of the living-room and I find that the Plaintiffs' claims for remedial work to combat such penetration of damp, or to combat the problem of condensation is largely unsustainable, (save in relation to the bay-window area already referred to).

These findings lead on to a consideration of the measure of damages appropriate to the case. I am satisfied that there have been breaches of contract on the part of the Defendant

resulting in loss and damage to the Plaintiffs, and in the course of the hearing of the proceedings this was effectively conceded by the Defendant - the main argument being as to the nature and extent of the remedial work required to bring the premises into line with the Defendant's obligations under the agreement for sale.

With regard to the remedial work which the Plaintiffs are entitled to have carried out at the cost and expense of the Defendant, I have regard to the most recent written report furnished by the Plaintiffs' architects, Messrs. McCabe, Delaney and Associates, dated the 21st November, 1984, and I am prepared to allow for the recommendations contained in Paragraph 6.2 of that report, but not for the recommendations contained in Paragraph 6.1 thereof, for the reasons already stated.

With regard to the recommendations in Paragraph 6.2, I am not convinced that the Plaintiffs are entitled to have their hall-door replaced for the second time, as there was a good deal of evidence to suggest that the present hall-door is reasonable and adequate, having regard to the specifications which were applicable when the house was built, but I have decided to allow this item along with the others in Paragraph 6.2 as a concession to the Plaintiffs.

As to the pricing of the work referred to in Paragraph 6.2 of the said report, I am prepared to act on the assurance of Mr. Lyons, the Quantity Surveyor called on behalf of the Defendant that he is confident that competent small contractors could be readily located during the present period of recession for the building trade, who would carry out the entire work satisfactorily for a sum in the region of £3,400.

I have no difficulty in deciding that it was reasonable for the Plaintiffs to delay the execution of these works up to the

present time (apart from their failure to tackle the heating problem within the house at an early stage, and this is not a major part of the claim).

The correspondence discloses that the Plaintiffs were calling upon the Defendant from a very early stage to make good defects which appeared in the house, and that the Defendants were very dilatory in their response to these requests for action. Promises were made at regular intervals, but I have the impression from reading the correspondence that the effort put into compliance with these promises was sporadic and largely ineffectual. I can readily envisage how difficult it was for the Defendant to mobilise a labour force to make good defects to this house and many others which were the subject-matter of complaints at the same time, but I believe they could have cut their losses very considerably had they taken the complaints seriously and embarked on a major campaign of repair and reconstruction insofar as this was necessary. As it was, the Plaintiffs were being led along by promises of action right down to the trial of the action, and in these circumstances I would hold that they cannot be accused of failure to mitigate their damage by carrying out remedial works themselves at their own cost at any time prior to the hearing.

On this basis, I propose to allow the present day cost of making good the defects for which I have found the Defendant liable, and I start by adopting Mr. Lyons's figure of £3,400 for the works prescribed by the Plaintiffs' architects, and adding to that the sum of £340, being VAT at 10% which would now be involved in the building costs. This gives a figure of £3,740, to which I propose to add a further sum of £1,260 in respect of the Plaintiffs' claims for damage to clothing, curtains and carpets. This is in the nature of a compromise figure, as my finding that the trouble from condensation could have been largely avoided by prompt

action on the Plaintiffs' own part means that a proportion, at least, of the damage to their belongings caused by damp must be laid at their own door; and in relation to carpeting I am not prepared to act on the Plaintiffs' own estimate of the area involved or of the price per square yard which should be allowed.

By this means I have arrived at a figure of £5,000, to which I propose to add a further sum of £1,000 by way of general damages to compensate the Plaintiffs for the unpleasant living conditions they have had to endure by reason of defects in their house for which the Defendant is answerable, and which they will have to continue to endure during the execution of further remedial works, on the assumption that they embark on same.

Accordingly, there will be a decree for the all-in figure of £6,000 in favour of the Plaintiffs against the Defendant on foot of the Plaintiffs' claims herein.

*R. J. O'Hanlon,*

R. J. O'Hanlon.  
26th February, 1985.

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Counsel for the Plaintiffs:- Feargus Flood, SC  
Peter Kelly, BL

Counsel for the Defendant:- Colm Allen, BL.

Cases and Materials cited:-

Brown v. Norton, (1954) IR 34.

Stewart Ltd. v. Callaghan, (Supreme Court, 28th July, 1982).

Quinn v. Quality Homes, (Finlay P., High Court, 21 Nov. 1977).