**HUTCHINSON**

**V.**

**HARRIS**

COURT OF APPEAL

9TH DAY OF JUNE, 1978

**LEX (1978) – 10 BLR 19**

# OTHER CITATIONS

# 2PLR/1988/39 (CA)

(1978) 10 BLR 19

**BEFORE THEIR LORDSHIPS**

STEPHENSON, WALLER AND CUMMING-BRUCE, LJJ

**BETWEEN**

HUTCHINSON – Appellant

AND

HARRIS – Respondent

**REPRESENTATION**

BRIAN KNIGHT appeared for the Appellant/Plaintiff, instructed by T. LJ. MOOD

RONALD WALKER appeared for the Respondent/Defendant, instructed by HERBERT SMITH & CO.

**ISSUES FROM THE CAUSE(S) OF ACTION**

COMMERCIAL LAW – BUILDING CONTRACT:- Doctrine of entire contract - Damages for breach of contract – Settled law that losses which are reasonably avoidable are irrecoverable - How assessed

TORT AND PERSONAL INJURIES LAW:- Professional negligence – Building services - Quantum of damages for established negligence – Relevant considerations

CHILDREN AND WOMEN LAW: Women in business - Claim of damages for architect’s professional negligence

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The plaintiff, Mrs Dinah Hutchinson, owned 113 Richmond Avenue, Islington. About February 1972 she engaged the defendant, Mrs Rosemary Harris, as her architect, on the terms of the RIBA Conditions of Engagement, for the purposes of converting the house into two maisonettes and a flat. Mrs Harris duly prepared plans and obtained the necessary permissions, consents and grants and in January 1973 Mrs Hutchinson entered into a contract with a builder. The building contract was in the form for minor building works. The contract price was £14,394

By October 1973 the work had been nearly completed. On 16 November 1973 the defendant issued the penultimate certificate for £13,700 gross. On 12 April 1974 she made a final inspection and on 19 April 1974 she issued a final certificate for £13,950

In 1974 Mrs Hutchinson moved to Regents Park Road, NW1. On 4 October 1974 the defendant submitted a fee account for £800 (representing the balance of the fee of 12 per cent on £139,50 and £25 60 for certain additional work). In November 1974 the plaintiff fell out with the builder whom she was then employing on her new house. In 1975, having refused to pay the defendant’s account, Mrs Hutchinson commenced proceedings against her claiming damages for professional negligence. The defendant counterclaimed for her fees.

The action was referred to Judge Fay QC, sitting as an Official Referee. Before the judge, the plaintiff’s allegations against the defendant were classified as follows: failure to obtain an acceptable local authority grant; failure to get a competitive tender; negligent supervision of the work, leading to the passing and certification of defective work; inaccuracies in certification; design faults. The plaintiff included amongst her claims, a claim for damages for distress and frustration and for loss of rental income on the Islington premises.

DECISION APPEALED AGAINST

On the plaintiff’s claim, Judge Fay held that the defendant had been negligent in:

(a) failing to obtain competitive tenders, but he assessed only nominal damages of £10;

(b) supervising the works and certifying defective work for payment, for which he awarded £1365 as damages.

He further held that the defendant succeeded on her counterclaim and, having set-off the counterclaim against the sums awarded on the claim, gave judgment in favour of the plaintiff for £575 with interest of £200 19 (being 12 per cent per annum from 19 April 1974). He did not award any damages for distress or frustration or for rental or for loss of rental income.

ISSUES FOR DETERMINATION OF APPEAL

The plaintiff appealed to the Court of Appeal on the following grounds:

1. That the defendant’s fee should be abated by reason of her negligence;

2. That the plaintiff was entitled to damages for distress and frustration;

3. That she was entitled as damages to the costs of two reports prepared by surveyors;

4. That she was entitled to interest payments made in respect of financing the premises as part of her damages;

5. That she was entitled to loss of rental income from the premises as part of her damages.

DECISION OF THE COURT OF APPEAL

*HELD: dismissing the appeal*

1. That the defendant was entitled to the whole of her fee; it was not to be abated or reduced on the grounds of her negligence since:

(a) no evidence had been called to show that the architect had not performed a high proportion of her work;

(b) even if the principle of *Mondel v Steel* (1841) 8 M & LJ 858; applied to a claim for fees, it did not apply on the facts of this case;

(c) to do so would be to pay the plaintiff twice over - a reduction in the fee and also damages for negligence.

2. That general damages for distress and frustration might be awarded for professional negligence but in this instance since the plaintiff was converting a house in order to let it for profit such damages were not recoverable.

3. That the cost of surveyors’ reports commissioned by the plaintiff were not recoverable as part of her damages as they were items of taxable cost.

4. That a claim for interest payments was an item of special damage which ought to have been pleaded and proved and was not recoverable.

5. That the loss of rental income was not recoverable since the plaintiff could reasonably have avoided it by completing the decorative and other work required to make the premises lettable and by taking steps to let them, all of which she had not done; she had therefore failed to mitigate her damage.

*Commentary*

The first point considered by the Court of Appeal is of general interest: the application of the principle of set-off to a severable contract for services. The plaintiff in this case had justified complaints about the quality of the services rendered by the defendant, her architect. It was argued on behalf of the plaintiff that these complaints by themselves demonstrated that the defendant had not performed all the work required of her and that therefore she ought not to be paid all the fees to which she would otherwise have been entitled.

The judgments of the Court of Appeal show that this argument requires to be considered carefully. The problem may be analysed the following way. If the contention is that the relevant services were not performed at all, or perhaps that their performance was so bad as to be tantamount to non-performance, then a further question has then to be considered: is the contract (or the applicable part of it) to be regarded as an entire contract (or as if it were an entire contract) or not?

An entire contract is one in which complete performance by one party is a condition precedent to the liability of the other. If the contract or stage in question is to be regarded as an entire contract, then no part of the price or fee will be payable in a case of non-performance for the price or fee will not have been earned. The court has no power to order payment commensurate to such work or services as were carried out. In certain cases, the party who has not performed his part of the contract will not only not get paid anything, but may have to pay damages for his breach *(of* the decision of the Court of Appeal in *Ibmac Ltd v Marshall Homes Ltd* (1968) 208 EG 851). Accordingly an architect who does only a quarter of the services required under stage H of the RIBA conditions may never earn the last instalment of his fee for normal services. Because the doctrine of the ‘entire contract’ has rather extreme consequences such contracts are examined carefully to see whether they are not ones in which ‘substantial performance’ will be sufficient to enable the ‘performer’ to obtain payment of the contract price - although it may then be abated or reduced by the extent to which full performance has not been achieved: see *Hoenig v Isaacs* [1952] 2 All ER 176. The reduction in the price may be measured by the damages suffered by the innocent party by reason of the breach.. This approach seems to us to underly and justify the decision of the Court of Appeal although not expressed in so many words. It is clearly reflected in the judgment of Stephenson LJ when he said (at page 32):

‘To award [the plaintiff] £1,365 damages, less the balance of the counterclaim, then to knock something off the balance of the defendant’s fees would, as far as I understand the position, be to duplicate damages and to give the plaintiff something twice over. I think that any abatement would be included in the cost of the remedial work, for which the judge has already compensated the plaintiff.’

It is not entirely clear why Stephenson LJ had doubts about the application of *Mondel v Steel* to a contract with an architect, particularly since he accepted that a claim for professional services was ‘in a sense a claim for work and labour done’. (page 31). Suppose the client has had to rectify, at his own expense, work done badly by the builder (and in breach of the building contract) and had proper supervision been given by the architect then that bad work would not have occurred or would have been put right by the builder: it would indeed be curious if, in such circumstances, the client could not recover his expense by way of set-off against a claim by the architect for fees, whereas he could, of course, set-off his expenses against a claim by the builder for the contract price or for part of it - assuming that there was no express provision of the building contract that excluded the client’s right so to do *(Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689;1BLR 73; *Mottram Consultants Ltd v Bernard Sunley & Sons Ltd* [1975] 2 Lloyds Rep 197).

It is common to think that in such circumstances the client’s remedy is only against the builder on the basis that the builder was the immediate perpetrator of the bad work. That point was dealt with expressly by Judge Fay OC in the court below when he gave what Stephenson LJ described as a ‘characteristically careful, full and clear judgment’ and from which there was no appeal by the defendant. Judge Fay had said:

‘But as to the factor of Mr Bishop’s work [the builder’s work], Mr Walker submits that if the defendant was negligent in supervision or certifying, no damage is recoverable because the fault is Mr Bishop’s and the plaintiff has not shown that Mr Bishop is unable to pay them. He elicited the fact that Mr Bishop is suing the plaintiff in the County Court for the balance of his account and that the plaintiff is counterclaiming against him in respect of this defective work. He points out that in *Sutcliffe v Thackrah* [1974] AC 727; which I have mentioned, where the architect was responsible for the builders’ negligence, the builders were insolvent. This is an interesting argument but not I think a valid one. It seems to be bereft of authority. But where the duty of a contracting party is to supervise the work of another contracting party, it seems to me that there is a direct casual connexion between the supervisor’s negligent failure to prevent negligent work, and the damage represented by that negligent work. No doubt the builder is also liable. It is a case of concurrent breaches of contract producing the same damage. In my judgment the plaintiff has an action against both, although she cannot obtain damages twice over.’

The client would therefore have a double remedy and would no doubt in an appropriate case sue both the builder and the architect. Where both are liable to the plaintiff the court had prior 101 January 1979 power under section 6(1)(c) of the Law Reform (Married Women and Joint Tortfeasors) Act 1934 to apportion responsibility for the damage payable to the plaintiff by one or other of the parties held liable. That section was repealed by the Civil Liability (Contribution) Act 1978 which came into force on 1 January 1979. Under that Act it is now also possible for the court to apportion liability between co-defendants, or between a defendant and another party brought in, even though one or other br both of the defendants or parties brought in is liable only in contract. The court’s power however only applies in respect of breaches of obligation and/or damage incurred or suffered after the Act came into force (see section 7 of this Act). The commentary on *Batty v Metropolitan Property Realisations Ltd* (7 BLR 1 at 4) now needs to be read in the light of that Act.

Paradoxically, the second finding of the Court of Appeal brings cases of professional negligence into line with actions against builders where general damages may be recovered in suitable cases (see Batty *v Metropolitan Property Realisations* Ltd [1978] QB 554; 7 BLR 1 at 7).

Thirdly, the court dealt with the cost of experts’ reports used in litigation. The cost of such reports frequently causes problems, particularly where the expert has been employed not only in connection with remedial work but also to give evidence (see on this *Manakee v Brattle* [1970] 1 WLR 1607n and the Court of Appeal’s observations on it at page 39 of this report). The decision of the Court of Appeal suggests that, in such circumstances, a distinction should be made between that part of the fee which might properly be recovered as damages, and that part which can only be recovered (if at all) as costs. Additional and more difficult problems arise where a consultant is not called or could not be called to give evidence or where he was engaged only to do what his client or his client’s solicitor, could or should have done himself (for example where a contractor obtains outside assistance in the compilation of the claim). It may be doubted whether such fees are recoverable as costs.

The fourth point determined by the Court of Appeal underlines the difficulties attaching to the recovery of interest or financing charges. In a case of this kind the court held that they might only be recoverable if they had been specifically claimed and proved and if they would otherwise have been recoverable in law under the second limb of *Hadley v Baxendale* (1854) 9 Exch 341.

The Court of Appeal’s finding that the plaintiff had failed to mitigate her damage does not call for particular comment as it merely illustrates the application of the well-known rule that losses which are reasonably avoidable are irrecoverable

**MAIN JUDGMENT**

The plaintiff was not satisfied with that, and appeals to this court by a notice of appeal dated 31 May 1977. The defendant sought leave of this court, at an earlier stage, to cross-appeal out of time; but that application was refused by this court on 27 October 1977, and the only matter with which we are concerned, therefore, is the plaintiff’s appeal.

The history and background of the matter are set out clearly and comprehensively by the learned judge in his judgment. The plaintiff employed the defendant - and I am not setting out the history as fully as the learned judge set it out - in about February 1972, and she employed her, it is admitted, orally but on the terms of the RIBA Conditions of Engagement which are before us, terms which became effective from 12 July 1971. In March of that year the defendant made drawings, made applications for planning permission and for various grants. On 7 June she estimated the cost of the work of converting 113 Richmond Avenue, Islington, into two maisonettes and a flat at £13,200 including £1,600 for the work of decoration.

About 17 January 1973 the defendant invited a builder called Bishop to tender. It may be that that was the date of his tender, but at any rate at about that time he was invited to tender, and did tender, and his tender was somewhat higher than her estimate: it was for £14,394 She admittedly invited tenders from nobody else, for reasons which the defendant cannot now remember but which may well have been understandable reasons and not reasons contrary in any way to the interests of the plaintiff, although the learned judge has found her negligent in not putting the work out to competitive tenders. On 29 January the plaintiff, the defendant and Mr Bishop entered into a RIBA form of contract for minor building works. It is not necessary to refer in any detail to the provisions of that contract, but there are a few of the almost common form clauses to which I will refer. It was an agreement, of course, between Mrs Hutchinson, the plaintiff and Mr Bishop, the builder, for the conversion of this property, the work to be carried out under the direction of the defendant. Clause I provided:

‘I. The Contractor shall with due diligence and in a good and workmanlike manner carry out and complete the Works to the reasonable satisfaction of the Architect’ -that is, the defendant. Clause 2 dealt with the architect’s supervision and instructions. Clause 6 provided that the work should be commenced immediately, but did not give a date for completion: that is left blank. Clause 9 provided for practical completion, and for the architect, the defendant, certifying the date of that, for a defects liability period and for the architect certifying the date when, in her opinion, the contractor’s obligation for remedying any defects arising during that liability period had been discharged. Clause 10 was the usual sort of clause providing for interim payments to be certified by the architect, for a penultimate certificate and for a final certificate ‘certifying the amount remaining due to the Contractor or due to the Employer as the case may be’, and providing for payment 14 days from the final certificate. Those are all the matters to which I need refer in the contract.

The plaintiff paid the defendant £899 60 on account on 31 January 1973. Mr Bishop got on with the work, and by October it was nearly completed, though no certificate of practical completion was ever issued. On 16 November the defendant issued the penultimate certificate under the contract for£13,700. On 12 April 1974 she made her final inspection, and on 19 April 1974 she issued the final certificate for £13,950

In the autumn of 1974 the plaintiff left Islington, where she was living, for Regents Park Road; and the defendant submitted her account on 4 October for 12 per cent on the £13,950 which she had finally certified as due to the builder. That came out at a figure of £1,674 which, giving credit for the amount of £899 60 that she had already been paid, left a balance of £774 40. To that she added a figure of £25 60, to round it up for certain services, and so comes her claim for £800. It is to be noted that in the account which she submitted for that fee then due she included an item:

‘Measuring and drawing existing house, prints of drawings, engineers’ services, grant applications - No charge’.

The £25 60 was expressed to be for:

‘supervision of electrician and drawing and getting estimates for area steps railings’, the electrician and the electrical work having been separately contracted for by the plaintiff directly.

Now the plaintiff had not been long in her new home in Regents Park Road, and getting Mr Bishop to work on those premises, when she fell out with him. She employed him there - she must have, had confidence in him - on his own, without the supervision of the defendant, but she early came to the conclusion that the prices he was charging were too high; and on 25 November 1974 she wrote a letter complaining, for the first time, of Mr Bishop’s work in converting Richmond Avenue. She complained of his work in reference to Regents Park Road, but she did also make some complaints - not very serious complaints - in connection mainly with the plumbing at Richmond Avenue, and she sent a copy of that letter to the defendant. The learned judge referred to that letter, and to the defendant’s letter in reply to it. The letter of 25 November ended with the postscript:

‘Judging by my latest estimate Fred Bishop’s prices are too high’.

The defendant’s reply contained this sentence:

‘I am at a loss to understand what happened as I have found Mr Bishop so competent and co-operative’.

But she went on to say:

- ‘he gets dispirited when difficulties arise to prevent him carrying out a first-class job, and... he needs a lot of supervision and organisation in the background to leave him free to do his best work’.

She added:

‘I do urge you to make peace with Mr Bishop, who has an excellent reputation he will naturally be anxious to preserve, certainly to the extent of carrying out corrections for which he is liable at Richmond Avenue’.

On 27 January 1975 the plaintiff wrote again to the defendant, her principal complaint of Mr Bishop being that his prices were too high. She referred to the fact that she had spent far too high -an amount of hard-earned money:

‘not to mention overdraft interest and worry - solely because I had an architect and relied on that architect’s sole recommendation of a high priced builder’.

So that by now she has not merely fallen out with Mr Bishop but she had fallen out with the defendant. Then she made the complaint that another builder should have been asked to estimate and tender.

The defendant wrote, in answer to that, what the judge called a full and conciliatory reply. She was hurt at the suggestion in the plaintiff’s letter that she had co-operated with Mr Bishop against the interests of the plaintiff, which she said was entirely untrue, and she offered to meet the plaintiff and sort it all out:

‘as I do not want to resort to more drastic action to recover my fee, which, however, I badly need’.

The judge said that that did not mollify the plaintiff, the correspondence became more formal, and the plaintiff, on 5 March, wrote a letter before action saying that she was going to sue the defendant.

That is the sad history of this matter in outline. We are concerned with a number of grounds on which the plaintiff seeks to say that the learned judge went wrong in awarding her too little on her claim and the defendant too much on her counterclaim. Rather, I think, to the surprise of every member of the court the first ground of appeal which we were asked to consider, and which we have considered at length, because it has been argued at length, relates to the counterclaim.

I would like, at this stage, to pay tribute to the way in which Mr Knight, on behalf of the plaintiff, has presented this appeal. The difficulties in his way were no doubt as obvious to him as they have been to the court. Undeterred by a certain lack of receptivity evinced by I think, every member of the court he has persisted in making plain every point which could be taken on the plaintiff’s behalf, and it may be some points which, in other circumstances, he would not have been permitted to take in this court. For my part I would like Mrs Hutchinson to understand that no criticisms that in the course of this judgment I feel bound to make of the submissions which he has put forward are in any way criticisms of his advocacy. Mrs Hutchinson was, indeed, well advised to cease to represent herself at the hearing of this appeal and, if I may say so, to brief Mr Knight.

The first ground of appeal is a surprising one, because it has to be extracted from the fourth ground in her notice of appeal without any hint of it in the judgment of the learned judge. That fourth ground is:

‘that the learned Official Referee was wrong in law and misdirected himself in holding that the Defendant was entitled to recover the whole of her fee despite the negligent performance of her duties and the learned Official Referee ought to have abated the said fee either by way of damages or on the ground that the Conditions of Engagement on their true construction do not allow the recovery of a fee for negligent work’.

Mr Knight, as I have already indicated, did not appear for -the plaintiff below, because she conducted her own case; but Mr Walker did appear below for the defendant, and he has told us and Mr Knight is not, of course, in any position to contradict him - that this point, as it has been developed on appeal, was never pleaded, adumbrated or argued in the court below at all. The case on-the counterclaim was conducted in the court below on an all or nothing basis. The case below was that Mrs Harris had been so negligent in the performance of her duties as an architect that she was not entitled to a penny, and certainly not a penny more than she had already been paid. That was the way in which the matter was pleaded in paragraph 13 of the reply to the defence and counterclaim:

‘The Defendant is not entitled to £1,674 or any sum because of the defendant’s negligence as instanced in the plaintiffs Statement of Claim’.

It is true that in the particulars given, there was a reference to partial services under the conditions of engagement, to which I shall have to refer; but after that reference comes the statement:

‘The Plaintiff maintains that the Defendant is not entitled to any fees at all and should therefore not be claiming any’.

The plaintiff did not claim repayment of what she had already paid the defendant, but her defence to the £800 counterclaim was that the defendant was not entitled to be paid any fees; so that it is not surprising that the learned judge did not deal with the point which Mr Knight has been permitted to take upon the counterclaim in this court.

The point may briefly be described as the *Mondel v Steel* point 8 M & LJ 858; 10 LJ Ex426; 151 ER 1288; 1 BLR 108. As is well known - and it would be particularly well known to the learned judge who tried this case since it was his judgment in *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689 which was restored by the House of Lords after it had been reversed by this court - *Mondel v Steel* provides for a defence to a claim for the price of goods sold and delivered, or a claim for the price of work and labour done. It is one of three procedures open to a defendant. As it was put by Morris LJ in giving the leading judgment of this court in *Hanak v Green* [1958] 2 QB 9 at 23:

‘The position is, therefore, that since the Judicature Acts there may be (1) a set-off of mutual debts; (2) in certain cases a setting up of matters of complaint which, if established, reduce or even extinguish the claim, and (3) reliance upon equitable set-off and reliance as a matter of defence upon matters of equity which formerly might have called for injunction or prohibition’.

The authority for that setting up of matters of complaint which, if established, reduce or even extinguish such a claim is the decision of the Court of Exchequer, in the judgment of that court given by Parke B in *Mondel v Steel* in 1841. That was a claim by a shipbuilder for the balance of the price of the ship. In giving the judgment of the court in that case Parke B said:

‘It must however be considered, that in all these cases of goods sold and delivered with a warranty, and work and labour, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and that it is competent for the defendant, in all of those, not to set-off, by a proceeding in the nature of a cross action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by shewing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent; but no more’.

That rule has been embodied in that section of the Sale of Goods Act 1893, section 53, which empowers a defendant to set up a breach of warranty in diminution or extinction of the purchase price of goods, but preserves, in subsection (4), his right to claim or cross-claim for any further damage which he may have suffered as a result of the breach.

The plaintiff, in my judgment, is in great difficulty in putting that argument before this court and submitting that the learned judge ought to have abated the claim for fees, the balance of the price of her services, for which the defendant was counterclaiming. It is not a matter of law on which no evidence could have been adduced, if the matter had been properly pleaded; and in spite of the argument that no more was necessary to alert the defendant to this point being taken than was contained in the statement of claim and the particulars I think it ought to have been specifically pleaded. No evidence was adduced relating to this matter at all, and it was a matter which required evidence. The defendant’s duties are the general duties of an architect, but they are expressed in the conditions of engagement. It is plain, from those conditions of engagement that her professional work and labour (if that is the right description of her services) were to be done, given, rendered, in stages, and those stages are set out in paragraph 2 of the conditions, which provide for minimum charges on a percentage basis. Stage C are outline proposals; Stage D is scheme design; Stages E, F, G, detail design, production information, bills of quantities, and so on; Stage H, tender action to completion. I read stage H in full:

‘Obtaining and advising on tenders and preparing and advising on the contract and the appointment of the contractor. Supplying information to the contractor, arranging for him to take possession of the site and examining his programme. Making periodic visits to the site as described in clause 1.33; issuing certificates and other administrative duties under the contract. Accepting the building on behalf of the client, providing scale drawings showing the main lines of drainage and obtaining drawings of other services as executed, and giving initial guidance on maintenance’.

Then there is a series of clauses relating to partial services at 3.5, 3.50 providing:

‘Where for any reason the architect provides only part of the Normal Services described in Part 2 of these Conditions he shall be entitled to commensurate remuneration, and his fees and charges shall be calculated as follows’.

Then there are percentage fees for the normal services, the first table for new works, the second table for works to existing buildings (which is this case), and a third table for apportionment of fees between stages of service. The second table, works to existing buildings, relates the minimum percentage rate to the total construction cost, and where the total construction cost is, as here, between £8,000 and £14,000 the minimum percentage rate is 12 per cent, stage H, £1,000. The third table, apportioning fees between the stages of service, gives 15 per cent for stage C, another 20 per cent for stage D, the remaining 40 per cent for stages E, F, G, and leaves over the final 25 per cent to be paid on stage H. So that there is here, as is rightly conceded by Mr Walker, a contract - not an entire contract but a contract in which the payment for the work is severable into stages, those stages which I have indicated. But stage H, of course, includes a very miscellaneous collection of important duties, important work which the architect contracts to supply. Before the judge could consider abating this architect’s counterclaim for fees it seems to me that he would have had to hear her evidence as to how far she had fulfilled those duties. It is said, and said with truth, that the judge’s own findings indicate that she had failed in her duty in passing work and certifying work which was defective, and that was failure in supervision and in certification at stage H. But if the judge had been satisfied that she had done a high proportion of the work which that clause required her to do, and, notwithstanding the fact that there was £1,365 worth of defective work, that amount was in no way commensurate with any failure of duty on her part, he might or might not have found that her counterclaim for fees ought to be abated, and he would have had to consider carefully by how much, if at all.

That leads to another point, and that is how far this head of defence which can be set up in abatement of price can be applied to a claim for professional services. That is, of course, in a sense a claim for work and labour done, but it is clear, from the language of the learned Baron which I have read, that what he had in mind was a specific chattel like a ship, which might be bought or upon which work and labour might be done. I find the greatest difficulty in applying this defence of abatement to a claim for professional services, certainly to such a claim for professional services as we have here. And it is not without interest that neither counsel has been able to call our attention to any case, reported or unreported, with one possible exception, in which such a claim for professional services has been reduced or abated by the application of *Mondel v Steel.* The nearest, perhaps, we get to it is the case of *Hoenig v Isaacs* [1952] 2 All ER176, where the plaintiff claiming the cost of work and labour was an interior decorator or a craftsman and not a professional person like a surgeon or a solicitor. It is also not without interest that in *Mondel v Steel* the court did refer to a case of an attorney, *Templer v M’Lachlan(2* Bos & Pul 936; 127 ER 576), of which Parke B said:

‘The same practice has not, however, extended to all cases of work and labour, as, for instance, that of an attorney, *Templer v M’Lachlan*, unless no benefit whatever has been derived from it’.

I do not refer in detail to that case. It was decided by reference to reasons, some of which might no longer hold good today. But there is no case, which has been cited to us, in which somebody in the position of an architect has had his or her claim for fees abated under this doctrine, except possibly the case to which I must now refer; and, as I say, I see the gravest difficulty in applying the doctrine to such a claim as is made by way of counterclaim here.

That case is *Sincock v Bangs (Reading)*, shortly reported in [1952] JPL 562 in which it appears that Barry J disallowed three guineas for a negligently performed initial survey, which he was able to distinguish from the later work of the same architect, for the price of which he gave judgment. If that is the right interpretation of his judgment I would doubt its correctness; but I can see the force of Mr Knight’s submission that if work has not been done by an architect at all - if, for instance, no initial survey has been carried out - he or she ought not to be able to claim any fees for it, and the cost of that work, if it can be ascertained, should be knocked off the total amount of his or her fees. What I cannot agree with is that the fact that certain work which she has certified has not been done by the builder necessarily means that she has not done the equivalent amount of her own work. It has to be borne in mind that what the court was dealing with in *Mondel v Steel* was the subject matter of the action, and the reduction of the worth of that subject matter by negligence or breach of duty. Here the subject matter of the builder’s contract is, of course, the work which he did in converting this property. But that is not the subject matter of the contract of employment between the plaintiff and the defendant: that is the services which she rendered in assisting to produce what Mr Knight calls the finished product, namely, the converted house at 113, ~ichmond Avenue. Those two subject matters are two different things, and it is only by confusing the two that it becomes possible to regard Mrs Harris’s counterclaim in this case as subject to any sort of abatement on the *Mondel v Steel* principle.

On the material before us I am by no means satisfied that the services Mrs Harris rendered are to any extent worthless and ought to be abated; and there is, in my judgment, a further objection to Mr Knight’s argument, and that is that anything which could be allowed by way of abatement is included in, and covered by, the damages which the plaintiff has been awarded by the learned judge. To award her £1365 damages, less the balance of the counterclaim, and then to knock something off the balance of the defendant’s fees would, as far as I can understand the position, be to duplicate damages and to give the plaintiff something twice over. I think that any abatement would be included in the cost of the remedial work, for which the judge has already compensated the plaintiff Finally Mr Walker, for the defendant, makes another objection to this argument on the counterclaim. I have already referred to the free services itemised in the account which the defendant submitted. If there were any small amount of the defendant’s fees to which it could be said that she was not entitled, it seems to me that the small amount would be amply covered by the cost of the services for which she has not charged, and that if this matter had been pleaded and argued in the court below that fact alone might well have led the learned judge to reject, as I would, the submission that the counterclaim for the balance of her fees should be reduced.

I pass next to the second submission which Mr Knight put forward on behalf of the plaintiff, and that is the submission raised in the first ground of appeal:

‘1. that the Official Referee was wrong in law and/or misdirected himself in failing to award to the Plaintiff damages for distress and frustration’.

This was claimed, not in so many words - it did not have to be, I think - in the claim for general damages in the statement of claim. It was pleaded thus in the reply, paragraph 5:

‘Further if the Defendant had not been negligent the Plaintiff would not now have the time consuming trouble of being involved in County Court proceedings’.

To that extent it was pleaded there. And it figured as item 240 in the Scott schedule:

‘General damages claim for nuisance, time spent on litigation with builder, *etc.’.*

That was simply denied by the defendant; and in the further comments of the plaintiff she said this;

‘Particulars under item 240 should instead read "General damages claim for nuisance, anxiety, loss of time *etc.".*

The Plaintiff has had considerable nuisance, anxiety and loss of time, *etc*, over this contract between the Defendant and the Plaintiff as a result of the Defendant’s negligence. At the end, the Plaintiff does not have a building converted and rehabilitated to the high standard agreed, or to the Grant standard as agreed. She has all the attendant nuisance and expense of a building that is not up to this standard. This is after paying out £13,558 to the Defendant’s builder or his nominees on the Defendant’s certificates, in addition to £899 60 to the Defendant herself. The Plaintiff would have been better off if she had not engaged the Defendant, a professional expert, to look after her interests.

Litigation with the builder (who is suing for an extra £392 in addition to the £13,558 paid already by the Plaintiff as above) is a small part of the nuisance and loss of time. But there would not have been that litigation with the builder if the Defendant had not certified his defective and undone work. Further there would not have been this litigation with the builder if the Defendant had not put forward an incompetent builder, whom she highly recommended, and then advised the Plaintiff to sign up with him before he went off to another long job... The Plaintiff would have fared better if she had not engaged the Defendant, a professional, at all.’

The learned judge dealt with this head of claim in this way at the bottom of page 23 of his judgment, on item 240:

‘Until recently damages for breach of contract did not include any sum for vexation and the like and were in practice confined to pecuniary loss. Then came the case of *Jarvis v Swans Tours Ltd* [1973] QB 233. Holiday contracts might be thought to be a special case, but in *Cox v Phillips Industries Ltd* [1976] 1 LJ LR 638 Lawson J held that general damages for mental distress could be awarded in a case of breach of service contract by demotion. There has also been a professional negligence case of a similar kind in *Heywood v Wellers* [1976] QB 446. 1 think it would be reasonably within the contemplation of the parties to an architect’s contract that negligence by the architect might cause distress or vexation if the work is to a client’s home, but, whereas here, the building is not for the owner’s occupation but for her profit I see no room for this class of damage. What I do award her is the total of the pecuniary loss she has in my judgment proved to have flowed from the errors of certification and the negligent passing of bad work as specified in the paper setting out my findings upon the items. The total of this loss amounts to £1,365’

Mr Knight submits that damages for frustration, vexation and distress which are likely to result, or reasonably foreseeable by the parties to the contract as likely to result, from a breach of contract, or must be in their contemplation when they make the contract if the contract is broken, are, in principle, universally recoverable; and whether these damages are put as damages which flow from the failure to put the matter out to competitive tender and to take on an incompetent sole builder, Mr Bishop, or whether they flow from the failure to supervise and take care over certifying, the frustration, the vexation, the distress which Mrs Hutchinson has suffered is something which must have been contemplated as likely to result from those failures in duty leading to this defective conversion work. And he puts the distress which he says must have been contemplated by both parties under three heads: the litigation with the builder which is now going on in the County Court but has, we are told, been adjourned or left in abeyance pending the hearing of this appeal; the inconvenience of having to organise remedial work; and the aggravation which the tenants will suffer when they go into these premises, or have suffered while in the premises - an aggravation which will rebound upon the plaintiff. There is not a word of the last head in the pleadings, including the Scott schedule, the tenant’s aggravation rebounding on the plaintiff as landlord. It is difficult to spell out the second head, the inconvenience of having to organise the remedial work from anything, and I have read, I think, everything relevant that there is in the pleadings, including the Scott schedule. The only thing really clearly relied upon in the pleadings and the Scott schedule is this litigation with the builder.

Mr Walker, on the other hand, has submitted that it is not yet the law that wherever any form of mental distress, frustration,-vexation, or annoyance is suffered by a victim of a breach of contract and that might have been reasonably contemplated by the contract-breaker, it is recoverable as part of the damages for breach of contract. He says that only applies to two kinds of cases: First, where the contract is to provide somebody with something satisfying like a holiday, it is obviously contemplated that if the holiday goes wrong a main part of your damage will be, not only the financial loss that you have suffered by spending money on the holiday, which turns out to be a poor holiday instead of a good one, but your disappointment and frustration at not having a proper holiday. That is one class of case, illustrated by *Jarvis v Swans Tours Ltd* [1973] QB 233 and *Jackson v Horizon Holidays Ltd* [1975] I WLR 1468*.* The other class is the *Heywood v Wellers* type of case, and that was a case in which the contract provided for the protection of one party to a contract from a particular evil. Where the breach of the contract has resulted in that protection being denied and that evil affecting adversely the innocent party’s health, clearly that again is a case in which such damages are recoverable.

In *Heywood v Wellers* [1976] QB 446 this court had before it a lady in person who had suffered much at the hands of solicitors, and it is quite plain, from the full report of the argument, that her main complaint, for which she had not been given damages, was all the time, anxiety, trouble and difficulty she had had, not knowing about the law, and seeking to bring a complaint against a firm of solicitors. She had had three years of stress and litigation, including suing a solicitor for damages for, in effect, taking the wrong proceedings against a man who was molesting her to stop him from molesting her. This court struggled hard, thinking that that head of damage was no good, to find a head of damage that was some good, and they found that the lady was entitled to be protected from molestation by this man, and if proper proceedings had been taken by a competent and careful solicitor she would have been protected from that molestation. As the solicitor had broken his duty and taken unsuccessful proceedings, instead of successful proceedings, she was still molested, and for that continued molestation she was entitled to be paid £150 less the £25 which would have been the costs of the proper proceedings had they been taken. It is made plain by, I think, every member of the court that it was the latter, the distress caused by the continued molestation, and nothing else, for which they felt able to give her damages.

That is plain from what Lord Denning MR said in the course of the argument, at the bottom of page 452; it is plain from his judgment at page 459E, where he said:

‘So the remaining question is: What damages should be awarded to Mrs Heywood for the molestation she suffered on three or four occasions, and the mental distress and upset she suffered?’

It is plainer still from the judgments of James and Bridge LJJ in that case. James LJ said at page 461 B/C:

“I fully understand the plaintiff’s sense of grievance on the first point. I accept that she is genuine in her statement that she felt forced to act on her own behalf. But the position in law and in reality is that she could have instructed other solicitors... “

In my opinion the position is very different under her second heading. It is well known and settled law that an action by a client against a solicitor alleging negligence in the conduct of the client’s affairs is an action for breach of contract... It is also the law that where, at the time of making a contract, it is within the contemplation of the contracting parties that a foreseeable result of a breach of the contract will be to cause vexation, frustration or distress, then if a breach occurs which does bring about that result, damages are recoverable under that heading’, and he refers to *Jarvis v Swans Tours Ltd.-*

‘Not in every case of breach of contract on the part of a solicitor towards his client will damages be recoverable under this head’.

He then refers to Lord Denning’s, the Master of the Rolls’, judgment in *Cook v Swinfen* [1967] 1 WLR 457, distinguishing between a breakdown in health and injured feelings, damages being recoverable for the first and not for the second, and he holds:

‘Vexation, frustration and distress were therefore likely to result from a breach of contract in this case. Further, the feelings of the plaintiff are not merely the feelings of an unsuccessful litigant who is disappointed or annoyed at the outcome of the case which would not sound in damages. In my judgment the plaintiff brings herself within those circumstances in which damages under this head are recoverable’.

Bridge LJ says at the bottom of page 463:

‘There is, I think, a clear distinction to be drawn between mental distress which is an incidental consequence to the client of the misconduct of litigation by his solicitor, on the one hand, and mental distress on the other hand which is the direct and inevitable consequence of the solicitor’s negligent failure to obtain the very relief which it was the sole purpose of the litigation to secure. The first does not sound in damages: the second does’.

Now as I read those judgments this court was not sweeping away everything that has been thought for years to be the law about damages for breach of contract being usually limited to financial loss. There is still some force in the decision of the House of Lords in *Addis v Gramophone Co Ltd* [1909] AC 488. I am also clearly of the opinion that, in these days, we have reached a point where damages would have been properly awarded, as the judge thought, for any distress which had been caused to the plaintiff by her being kept out of her own house and home through having to do extensive repairs to it. But the learned judge took the view that, in this case, such damages were not recoverable. Here was a lady, no doubt wanting to do up these premises and convert them in order to obtain an income to support herself and her family, but nevertheless embarking upon a commercial enterprise, converting these premises as a property owner, premises in which she had no intention of living herself but into which she intended to put tenants in order to draw rents from them. In those circumstances in my judgment the learned judge was quite right to hold that damages for distress and annoyance, under whichever of the heads now put by the plaintiff in this court, were not recoverable. No doubt it has been put to us very differently from the way in which Mrs Hutchinson herself felt able to put it before the learned judge. As I say, the principal head of damages for distress argued before him, as I understand the position, was the strain of litigation with the builder in the County Court, and as to that Mr Walker has argued with force that the plaintiff could have paid the builder before the defects were discovered, and then there would not have been this litigation, although she might, I suppose, have then gone to court to try to get the money back from the builder. He points out, also, that the litigation in the County Court is not concerned only with these premises but the builder is also suing Mrs Hutchinson in the County Court for the work which he did to Regents Park Road, and that litigation could go on and worry her, no doubt, and distress her whether or not there had been any claim in respect of the £392 which she has still not paid him on his account for the work done to 113, Richmond Avenue. Finally Mr Walker says that the £392 as long as she ‘hangs on to’ it and has not paid it to the builder, has already been covered by the £1,365 or balance of it, which she has recovered by the judgment of the judge in these proceedings.

As I say, I think the learned judge, in the present state of the law, was quite right to hold that even if some part of the distress which she claims to have suffered was reasonably to be expected by the parties at the time they made this contract, if it was broken, the facts of this case do not entitle the plaintiff to any damages under that head. The case is quite different, for instance, from the case of *Batty v MetropolitanProperty Realisations* [1978] QB 554; 7 BLR 1, to which we were referred, where apparently there was an unappealed judgment for £250 in favour of a party who had suffered the sort of inconvenience in her own home which the plaintiff has not suffered here. To have given damages under this head in this case would have been to extend, without warrant, the cases in which such damages are recoverable. Perhaps the strongest case in support of such an extension is the case of *Cox v Philips Industries*, to which the judge referred, a decision referred to apparently with approval in *Heywood v Wellers*, but one the limits of which, at any rate, may one day call for further consideration.

I should add that Cox’s case was a very special case. There the demotion, which was the breach of contract for which Lawson J gave the plaintiff £500 had caused no financial loss. The only loss resulting from the breach of contract was depression, vexation, frustration and ill health. There can be few breaches of contract which result in financial loss which do not also result in distress and worry, and it cannot be that in every such case - or, indeed, in the majority of such cases - a plaintiff is entitled to extra damages for distress. I find nothing in Lawson J’s decision in Cox that would seem to warrant any such conclusion.

The remaining complaints of the plaintiff are three. First of all she claims, in her second ground of appeal, that the learned judge was wrong not to award her as damages the cost of surveyors’ reports. That is item 238 in the Scott schedule, and it is plain from the schedule that those are two reports by a quantity surveyor named Shelley, acting for two different firms, the first in June 1975, the second in July 1976. The first was exchanged after the usual order for directions, the second was exhibited to the particulars delivered by the plaintiff. The costs of those two reports are £216 and £576 respectively. They were not claimed as items of special damage, but they were resisted as items of cost and not damages, and the learned judge held that that is what they were. In my judgment he was right so to hold.

There was some evidence about them from Mr Shelley given on 18 January, and it may be that the two reports fall into slightly different categories. He was asked about the purpose of his original visit to make the first report, and he gave a rather confusing answer:

‘(A) ... the purpose was to do an approximate valuation of the work. The client didn’t tell us what purpose, *etc*, didn’t explain any of the contract problems, and we visited the site as such and pointed out we were going to do a survey of the various defects and the cost of rectifying that, those we found at that time, so we agreed upon an approximate valuation of the works if they had been carried out in accordance with the contract as such’.

There is therefore some ground for saying that the first report was made partly with the purpose of rectifying the defective work. But both reports were headed:

‘Financial analysis of building contract based on architect’s drawings, architect’s specification, architect’s instructions ‘and if one looks at the substance of them it seems pretty clear that the main purpose of both of them was to indicate over-pricing by the builder with a view to proving that matter in this action.

Mr Knight cited to us two decisions: one is a decision of Mocatta J, sitting with assessors, in *Manakee v Braille* [1970] 1 WLR 1607 where some costs of a surveyor’s report incidental to some work were allowed as costs although it appears to have been assumed that they could have been claimed as damages. I do not think that he gets support from that decision. It is neutral.

He also rightly called our attention to what Cairns LJ had to say in *Bolton v Mahadeva* [1972] 1 WLR, 1009 at 1014-G about a defendant’s claim in respect of fees for a report which he had obtained from his expert. That was in a case in which a heating engineer was suing for work done in installing a heating and domestic hot water system. There Cairns LJ, giving the first judgment of the court, said:

‘So far as the defendant’s claim in respect of fees for the report which he obtained from his expert is concerned, it seems to me quite clear that that report was obtained in view of a dispute which had arisen and with a view to being used in evidence if proceedings did become necessary, and in the hope that it would assist in the settlement of the dispute without proceedings being started. In those circumstances, I think that the judge was right in reaching the conclusion that the report was something the fees for which if recoverable at all, would be recoverable only under an order for costs’.

At least one other member of the court agreed with his judgment, and Mr Knight concedes it is against him. The question of the necessity for these two reports and the propriety of the amounts paid for them was not gone into at the trial. I would respectfully agree with the learned judge that both of those reports were properly items of costs, and not of damages, and that will have the advantage of those two questions being considered on taxation.

I would only add that I cannot accept Mr Knight’s proposition that because they resulted from the breach of contract they therefore are recoverable as damages, even if they could alternatively be recoverable as costs. All the costs of litigation which arise out of a breach of contract or a breach of duty are, in a sense, the result of that breach, but not all such costs are recoverable as damages.

I come next, then, to the sixth and fifth grounds on which the plaintiff complains of the learned judge’s judgment, and take them in that order. The first is:

‘6. that the learned’ judge ‘was wrong... in failing to award to the Plaintiff as damages interest charges incurred by the Plaintiff on sums unnecessarily paid out due to the Defendant’s negligent certification and supervision’, and the second is:

‘5. that he ‘was wrong... in holding that with regard to the Plaintiff’s claim for loss of letting income she failed to mitigate her loss and his decision was against the weight of the-evidence’.

Both of those matters were pleaded in paragraph 22 of the statement of claim, and in the further and better particulars. The way those claims were put was first of all:

‘22(i) In addition to the nuisance and loss directly resulting to the Plaintiff from the negligence set out... above the Plaintiff has also lost rental income, bank loan interest’.

That was particularised:

‘ *"rental income":* the Plaintiff would prefer her loss of rental income to be assessed by the court bearing in mind that

(a) The top maisonette is let at £116 per month exclusive of rates. The Plaintiff will have to lose this rent while the roof is renewed and so on.

(b) The first floor flat is let at £21 67 per week exclusive of rates but the Plaintiff was unable to let it until 1 June 1975 because of defective work and so forth although the architect Defendant’s final certificate is dated 19 April 1975 - that is a mistype for "1974" - over a year earlier.

(c) The bottom flat is still empty but after considerable effort on trying to rectify defective work, damp, *etc*, it is capable of being let at £32 per week (exclusive of rates), a rent which the Plaintiff is and has been losing. The Plaintiff is unable to complete this flat and let is before experts’ inspections and a court inspection had taken place, because completing it and decorating it would have obliterated the evidence -just as part of the evidence of defective work has been obliterated in the first floor flat.

*"bank loan interest":* The Plaintiff finds it very difficult to assess her loss for interest not knowing the final figure that the court would hold to be the correct sum for her total loss over this contract. The Plaintiff would prefer a figure for interest to be assessed by the court bearing in mind:

(i) In 1974-75 the Plaintiff paid interest to Coutts & Co... totalling £551 in that financial year.

(ii) In "the same year" the Plaintiff paid in addition £621 to Hill Samuel. On this latter interest on at least £10,000 at 15 per cent for part of the year is attributable to the loss over the contract with the Defendant.

(iii) In 1973-74 the Plaintiff paid £415 interest to Coutts & Co. during the financial year on the money borrowed to finance 113 Richmond Avenue work.

(iv) Now, and since 30 October 1974, the Plaintiff has had a £10,000 mortgage on her present house at 11½per cent interest. It would not have been necessary for the Plaintiff to get this £10,000 mortgage at all if the Plaintiff had not been run into a loss which the Plaintiff assesses to be in excess of £ 10,000" ‘.

In the Scott schedule these two items both figure: ‘bank loan interest’ is item 236 and ‘loss of letting income while parts of premises unlet as a result of defective work’ is item 239. The first is denied. Of the second, the defendant said:

‘in any event, the Plaintiff had a duty to mitigate her loss by remedying any defective work forthwith. The premises were kept vacant not as a result of any alleged defects but because of the Plaintiff’s intention to sell the property and/or her desire not to enhance her income and financial position generally pending the conclusion of ancillary matrimonial proceedings’.

On item 236 the plaintiff commented that she had suffered:

‘loss on bank loan interest on the amount of losses caused to her through the defendant’s negligence... in issuing a final certificate for some £5057 more than the value of the work as done or not done at that date. The defendant was aware that much of the work was being financed through a bank loan’.

And as to 239:

‘The Defendant’s comments about the premises being vacant are incorrect’

Then she sets out:

(a) The top flat was let before the building work was even finished;

(b) The Defendant’s other observations are based on hearsay and are inaccurate’.

The learned judge dealt with the bank loan interest very shortly. He said simply: ‘No. 236 does not arise at this stage’. By that he meant that:

‘interest does not arise at the date of the breach of contract, it arises now at the date of my judgment, and I give the £200 19 interest on the amount of the judgment which I award to the Plaintiff’

I will have to deal at a little more length with what he said about the other matter, but before I do that I should say that the evidence on the interest topic was extremely sparse, it was confined to evidence given by the plaintiff in the course of her final speech. She had, up to that point, given no evidence in support of this allegation. Of course, it is not enough simply to set out in the particulars what you say you have lost, you have to prove it on oath in the witness box; and after the judge had invited her to interrupt her final speech and give him some evidence about it the following questions were asked and answered:

‘(Judge Fay)... First of all the bank loan interest - not getting the £3,600 grant, how did you raise the money?

(A) By overdraft from Coutts, and it is mentioned in the correspondence between me and the Defendant. There is mention of my going to the bank.

(Q) Do you remember what rate of interest you were charged?

(A) (after a pause): Normally 4 per cent above bank rate.

(Q) What about the rent of the top flat?

(A) Also, my Lord, I was borrowing other money. I did give some details of rent in the Further and Better Particulars... The top flat was originally let at £35 a week. That was reduced by the Rent Tribunal to £30 a week. They said that I could go back when things were more finished’, and that was the sum total of the evidence, as I understand it, on both these points, subject to a certain amount of evidence that was given as to the delay in letting these flats, to which I shall come.

As regards the interest charges, it appears that the plaintiff is saying: ‘Well, I had to raise the money from my bank, the defendant knew that I had to do that - I have had to pay interest on what I have raised from the bank - and therefore I am entitled to be paid that back’. That, I should have thought, ought to have been quantified and claimed very clearly as special damage if it was to be recoverable at all, and there ought to have been proper evidence about it. It is, of course, open to the very serious objection that a defendant, even a tortfeasor, is, broadly speaking, not to be penalised by the impecuniosity of the innocent party. It may be that there could have been - we have not been shown it - evidence that this was a special case in which the impecuniosity and the need for a bank loan, the fact that the plaintiff would have to borrow from the bank, was brought to the notice of the defendant when she agreed to act as the plaintiff’s architect; but on the material which we have I find myself quite unable to say that the learned judge was wrong in refusing to do more about interest than he did in his judgment. He would, on the material he had, as I understand it, have been wrong to have awarded the plaintiff any interest on the money that I will assume she had to raise by borrowing in order to pay as much to the builder on the defendant’s certificates as she did. I would not, therefore, find any support for this appeal in this ground or allow that item.

There remains only the question of loss of rental income. It is necessary to bear in mind a few further facts which are set out in the judgment of the learned judge before I come to the way in which he dealt with that. First of all, as the learned judge found, decoration had been excluded from the specification and the contract. £1,600 worth had figured in the defendant’s original estimate, but it was excluded at the instance of the plaintiff. Furthermore, although the electrical work was included in the contract, and remained included in the contract, the plaintiff elected to deal herself direct with the electrician, nominally a subcontractor to Mr Bishop. He was a Mr Stanger. That appears from the judge’s judgment. The learned judge held that it was her duty to mitigate her damage by going ahead with decorative work, which she had (as it were) reserved to herself, without waiting for the builder to finish the plasterwork. Finally, coming to this item, 239, ‘loss of letting income while parts of premises unlet as a result of defective work’, the learned judge said:

‘The short answer to this is that the Plaintiff should have mitigated her loss by completing the decoration and other necessary works. I am not concerned with her motive for so doing, although I understand her indignation at the suggestion that the premises were kept empty as a bargaining manoeuvre in her maintenance battle with her former husband. It was most unfortunate that the Defendant allowed herself to give information on the telephone to the husband, as she admitted she had done. I am sure it was done innocently, but I can understand that the incident heightened the Plaintiff’s suspicions about her former friend’.

But the learned judge’s answer to this claim was that it was not the defendant’s fault but the plaintiff’s. She could have got on with letting these premises, but she chose not to do so. She should have got the work completed by another builder, she should have got the decoration done, the electrical work completed and the fact is that it was not until June 1975 that she let the first floor flat, and the ground floor maisonette had not been let even at the date of the trial.

Now Mr Knight has submitted that the extent of the defects found by the learned judge and quantified at £1,365 indicates, as I understand his submissions, that if the plaintiff had got on with putting these premises right, repairing the defective work, as quickly as she could and let them at the earliest opportunity she must have lost some letting time. The evidence about that seems to be - and I do not refer to it in any detail, we have looked at it - that according to the evidence of Mr. Vincent, the defendant’s expert, it would have taken about a month to put the premises which were not let into lettable condition. It is fair, also, to bear in mind that there was evidence from a Mr Allin, called for the plaintiff, that in March 1974 the works were nowhere near complete. It is also right to bear in mind that Mr Vincent was apparently treating perhaps three or four weeks as the time it would take to do what he had listed as £447 worth of work, and it is not plain how closely that can be related to the £1,365 worth of work which the learned judge has found needed doing or redoing.

But there is no clear evidence that it would have taken longer than three or four weeks, and there is clear evidence from Mr Stanger himself, who was called for the defendant, that he did not get on with the electrical work because of instructions which he received to suspend the electrical work from the plaintiff herself. She had not let the first floor flat until June 1975, and she certainly required, according to Mr Stanger’s evidence, that the work on that should be left in abeyance until the end of 1974. She had not let the lower maisonette at all and, according to Mr Stanger’s evidence, she had work on that suspended until 1976.

There it is. There is a delay of 15 months or more in putting this flat and maisonettes into lettable condition, and why should the defendant pay for that? Mr Knight says:

‘Oh well, it may be that the Plaintiff’s not getting on with it as she should have was one cause, but another cause was the Defendant’s breach of contract, so she is liable’.

He relies on *Heskell v Continental Express Ltd* [1950] 1 All ER 1033, a decision of Devlin J in support of that proposition. I cannot, with all respect to him, see that anything that learned judge said in that case gives any support whatever to the view that it is not the plaintiff’s duty to mitigate her loss, or throws doubt on the judge’s view that if, by acting reasonably, she could have prevented all, or almost all, of the damage from not letting these premises which could otherwise be attributed to the defendant’s breach of contract she is not entitled to recover from the defendant loss of rent from not letting because that loss from not letting does not result from the defendant’s breach of contract but from her own failure to mitigate the damage which will result if she does not mitigate it. I cannot see that there is anything wrong with the learned judge’s conclusion, on the material which he had, that there is no real loss of letting income attributable to the negligence and breach of duty of which he found the defendant guilty.

The learned judge, I suspect, had a harder task than this court in arriving at a just result. He gave a characteristically careful, full and clear judgment. The plaintiff may have had good reasons for not being legally represented. It is unfortunate, in my view, that she was not represented before the learned judge, but I find it difficult to believe that, if she had been, she would have come off any better than she did. And in my judgment she did not come off at all badly. The learned judge himself inspected the premises, and he came to the clear conclusion that, whatever the merits of Mr Bishop as a builder, he was guilty of slipshod work, and slipshod work to the tune of roughly 10 per cent of the total cost of the work which he did in converting these premises. But Mr Knight, in spite of all his skill, has failed to satisfy me that the learned judge went wrong in giving the plaintiff too little or the defendant too much.

On the first point on the counterclaim I should have read what the learned judge said about it. He said:

‘This is not an entire contract, and if it were I should have held it to have been substantially performed. The defendant’s addition of £25 60 for ancillary services is a great deal less than she would have been entitled to if she had made a reasonable charge for all the work done beyond what the scale fee covers, and I find her case on the Counterclaim... to be proved’.

I repeat that in justice to the defendant. On the material which we have and on the submissions which have been put before us I see no reason to disagree with any of that. I bear in mind that the scales on which she charged were minimum scales; I bear in mind that she did a certain amount of work free; I bear in mind the remarkable candour of the letters which she wrote and the wise way in which she attempted both to be loyal to the builder whom she had recommended and to advance the interests of the friend who had given her this work. Her efforts were vain. I think she was entitled to the full balance of the fees which she claimed, and the learned judge was right to set those off against the substantial damages which he awarded to the plaintiff.

In my opinion there is, at the end of the day, nothing in any of the grounds on which it is sought to impugn his judgment, either on the claim or on the counterclaim, and for these reasons I would dismiss this appeal.

**WALLER LJ:**

I entirely agree with the judgment which my Lord has delivered and would only add a few words out of respect to Mr Knight’s attractive but, in the end, unsuccessful argument on his two main points.

Firstly, the question of damages for distress as a result of the negligence of the defendant. The basis of Mr Knight’s submissions were the cases of *Jarvis v Swans Tours* and *Heywood v Wellers*, which have already been mentioned by my Lord. I agree with the passage which my Lord has already cited from the case of *Heywood v Wellers*, the passage from James LJ’s judgment at page 462-C, and Bridge LJ’s judgment at page 463-H. In the case of *Jarvis* the plaintiff had lost a holiday because of the breach of contract of the defendant, a holiday for which the defendant was to be responsible. In *Heywood’s* case the defendant was a solicitor and the plaintiff went to the defendant in order to take action to prevent herself being pestered by a man. She wanted his pestering to be stopped. As a result of the negligence of the defendant the pestering continued. Those were cases substantially different from the present case. It is not, in my view, mere frustration or distress which any breach of contract may cause, or irritation at the contract being broken. One must bear in mind that the plaintiff in this case was not concerned with her own home, she was in the position of a landlord. She had decided, on probably very good grounds, to invest money in property, and in doing so, in my view, she has to concern herself with this sort of problem as an inevitable incident of being a landlord. In the nature of things they go wrong from time to time, and this is the sort of thing which happens. It is rather that which is foreseeable which may affect closely the comfort, pleasure or health which carrying out the contract would have achieved, such as a holiday or the prevention of pestering. The learned judge in this case said:

‘I think it would be reasonably within the contemplation of the parties to an architect’s contract that negligence by the architect might cause distress or vexation if the work is to a client’s home, but where, as here, the building is not for the owner’s occupation but for her profit I see no room for this class of damage’.

I agree with the learned judge in that conclusion.

The other main point raised by Mr Knight was that to which my Lord has already referred, abatement. Whereas damages for distress had been fully argued before the learned judge, abatement was not argued. Of the reasons given by my Lord I find the following most powerful. Firstly, the argument of abatement was not pleaded. Secondly, it was not argued in the court below. And thirdly, to allow such a claim would be giving the plaintiff damages twice over. The plaintiff was awarded £1365 as damages. This must cover the loss occasioned by the defendant’s negligence. If she achieved abatement in addition to that claim she would be being paid twice over. As between two owners - on the one hand the plaintiff, who had received damages of £1365 to put her house in order, and another owner who had, as a building owner, had it built in order - if her argument was correct she would pay less for her house than the building owner whose house had been completed properly at the first go, and in my judgment that cannot possibly be right.

I add those matters to the judgment of my Lord.

**CUMMING-BRUCE LJ:**

I agree.