THE HIGH COURT

[2003 No. 1798 P.]

BETWEEN

MARGARET BRENNAN

PLAINTIFF

AND

THOMAS FLANNERY AND CATHERINE FLANNERY, T. & C. DEVELOPMENTS LIMITED,

THE NATIONAL HOUSE BUILDING GUARANTEE COMPANY LIMITED, SEAMUS QUINN AND

MIDLAND DESIGN SERVICES LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Dunne delivered the 20 day of March 2013

The plaintiff in these proceedings purchased a house at 10 Mockmoyne Heights, Boyle, Co. Roscommon. The house was a newly built house and was part of a small development of houses in Boyle, Co. Roscommon.

It appears that a contract for sale was entered into by Thomas Flannery and Catherine Flannery with the plaintiff on the 9th November, 1999, and in evidence, the plaintiff said that she took possession of the house around the 17th March, 2000. As is not unusual in the case of newly built houses, in addition to the contract between the purchaser and the vendors of the land for the purchase of the lands on which the house was built, there was a separate building agreement in respect of which the contractor was T & C. Developments Limited (hereinafter referred to as "the company"). The consideration for the purchase of the property was stated in the pleadings to be £85,000 or €107,927.74. This was made up as to £5,000 being the consideration for the purchase of the lands and £80,000 being the amount of the contract price set out in the building agreement. That agreement was also signed on the 9th November, 1999. In the course of the transaction, the plaintiff was represented by Kilrane O'Callaghan and Company, solicitors.

The plaintiff has had serious issues about the manner in which the house was constructed by the company and accordingly proceedings were issued by her by plenary summons dated the 10th February, 2003.

It is not necessary for me to describe the long procedural history of this action, but it is relevant to mention one or two matters. When the proceedings came on for hearing before me, the plaintiff no longer had legal representation. On the first day of the hearing the only defendant who appeared and was represented before the court was the National House Building Guarantee Company Limited, (hereinafter referred to as "Homebond"). Subsequently one of the defendants, Seamus Quinn, who had been a director of another defendant, Midland Design Services Limited, appeared and took part briefly in the proceedings. He left then to attend a funeral and took no further part in the proceedings. To a large extent therefore, the action proceeded as a case against Homebond, although I was satisfied that the other defendants had been notified of the trial date and with the exception of Mr. Quinn, they chose not to participate.

It should be said at the outset that the plaintiff herein has raised serious issues about a number of alleged defects in the house purchased by her from the Flannerys and the Company. They include a complaint as to stability of the foundations of the house, the construction of the footpath surrounding the house, a significant problem with damp, issues in relation to insulation and the fact that the site is waterlogged, to name but a few. Much of the hearing before me concerned the extent of the defects and the nature of the defects in the house. There was a significant argument as to the full extent of the defects.

A further issue concerned the liability of Homebond on foot of its guarantee with the plaintiff in respect of defects in the house. The latter issue is of central importance to the plaintiffs claim in these proceedings as the plaintiff contends that Homebond, by providing a guarantee are responsible to her for all defects found in the construction of the dwelling house. Homebond on the other hand contend that the plaintiff entered into a written guarantee and that she, the plaintiff, is subject to the terms of the guarantee and the limits contained therein.

It is not in dispute that the plaintiff signed the Homebond guarantee on the 91h November, 1999, at the same time as she signed the contract for sale and the building agreement.

Given that the extent of the liability of Homebond is central to these proceedings, I propose to deal with that issue first.

The Homebond guarantee provides inter alia for limits on liability in the following terms:-

> "4(a) In particular neither the member nor the company shall be liable under this agreement or the guarantee certificate for:
>
> (i) any defect which arises consequent upon negligence other than that of the member or his subcontractor;
>
> (ii) any defect for which compensation is provided by legislation or which is covered by insurance;
>
> (iii) any defect in consequence of drawings, materials, designs or specification provided by, or on behalf of the purchaser;
>
> (iv) any defect caused by, or damage to anything not built into the dwelling pursuant to the contract of sale or building agreement entered into by the member and the purchaser;

(v) hair cracks, shrinkage, expansion, dampness due to normal drying out of the dwelling or condensation;

(vi) wear and tear or gradual deterioration;

(vii) consequential loss whatsoever and howsoever arising;

(viii) any defects in central heating; or

(ix) any defect consequent upon the installation in or about the dwelling by the member or otherwise of a lift or swimming pool.

(b) The company, its servants or agents, shall have no liability whatsoever or howsoever arising to the purchaser in respect of any claims for damages, expenses or other compensation relating to any act or omission in or about any proceedings relating to the dwelling and, without prejudice to the generality of the foregoing, shall have no liability in respect of any negligence or default in inspecting or failing to inspect the dwelling or in respect of the rendering operative, or the contents of, a guarantee certificate or in the investigation of a complaint made by the purchaser. Provided however that the provisions of this subclause shall not in any way limit the purchaser's entitlement to pursue its rights and remedies under the guarantee certificate."

Particular reliance was placed by Homebond on Clause 4(b).

In addition, the guarantee agreement places a limit on liability in the sum of £30,000 (€38,000) in relation to any major defect or any number of major defects.

The Homebond guarantee goes on to define major defect as:

"1. Any major defect in the foundation of the dwelling; or in the load bearing parts of its floors, walls and roof; or in any retaining wall necessary for the dwelling support; which effects the structural stability of the dwelling or

2. Smoke penetration from the chimney breast to the habitable areas of the dwelling

3. Water penetration through the main structural elements, roof flashings or roof valleys of the dwelling."

It is further provided in the Homebond guarantee that upon the issue of the final notice in respect of the dwelling by Homebond, it shall become bound to the purchaser in the terms of the guarantee certificate attached in the first schedule to the guarantee, subject to the terms as set out in that guarantee certificate and the terms of the Homebond guarantee. Both the guarantee agreement and the guarantee certificate make reference to the rules ofHomebond.

It appears that if Homebond is correct in its contentions as to the terms of the guarantee, then it could only be liable to the plaintiff in respect of any or any number of major defects up to a limit of €38,000. I note, however, that in the course of the evidence it was conceded that, on occasion, Homebond has assumed a liability in respect of sums greater than €38,000.

It would also be helpful to set out a number of Homebond's rules which were referred to in the course of the hearing. Before referring to specific rules, the general observation might be made that the rules provide for applications for membership of Homebond by builders/developers, conditions that may be attached to members and provisions in relation to the termination of membership. Rule 19 deals with applications for registration of a dwelling with Homebond and inspections in the following terms:-

"(a) A member who is obliged to enter into or has entered into a guarantee agreement in respect of a dwelling under rule 16 or rule 17 shall send to the company an application in the prescribed form for registration and for initial inspection of the dwelling not less than 21 days before commencement of work on site; such application shall be accompanied by any prescribed documents, plans, specifications and fees. Provided however, that the company shall be entitled, in its absolute discretion, to refuse an application for registration and inspection of a dwelling if the member or his associate is at the relevant time in serious breach of any of its obligations under the rules (including but not limited to the failure to make good defects in the dwellings and/or to discharge payments due to the company).

(b) If a dwelling is to be constructed on a site which is deemed to be a high risk site by the company, the member shall comply not only with its obligations under subrule (a) of this rule, but shall also notify the company in writing not later that two months before commencement of work on that site. (c) A member who is obliged to enter into or has entered into a guarantee agreement in respect of a dwelling under rule 16 or rule 17 shall send to the company 14 days before the dwelling is structurally complete an application in the prescribed form for final inspection of the dwelling. The member shall fully indemnify the company against any costs, losses or other damage howsoever arising by reason of any failure by the member to fulfil his obligations under this subrule.

(d) The company shall be entitled to require the member to carry out any opening up works which are necessary, in the company's opinion, to facilitate any inspection of the dwelling by the company. The member shall fully indemnify the company against any costs, losses or other damage howsoever arising by reason of any failure by the member to fulfil his obligations under this subrule."

It is also relevant to note that under rule 17:-

"Every builder member is required to enter into the current prescribed form of guarantee agreement at the same time as any contract which he makes to sell, build or complete a dwelling for occupation by the other party to that contract. This rule shall apply whether the building is to be built or completed on land owned by either party to the contract."

For completeness it may be useful to refer also to rule 24(a) which provides: "That where the company is satisfied that the member has complied with the rules and that the dwelling is structurally completed to the satisfaction of the company, the company shall issue the final notice."

Having set out the relevant terms and rules of the Homebond guarantee, I now propose to consider this evidence and the submissions made in respect of the extent of the liability of Homebond. It appears from the evidence in this case that the company became a

member of Homebond after the commencement of the building of the development in which the plaintiff's house is located. Mr. Thomas Crotty, formally employed by Homebond as an assessor, was called as a witness by the plaintiff and gave evidence that he carried out the assessment of the company on foot of which the company became a member of Homebond. The purpose of such assessment was to examine the technical competence of the company on its application to become a member of the Homebond scheme. When Mr. Crotty carried out the assessment he looked at a number of houses in the development. He required to see a house at the construction stage and then he would have filed a report on the technical assessment of the builder. Obviously that report was favourable as the company became a member of the Homebond scheme. He explained that the company would have had to apply to have existing houses being built covered under the scheme and for that purpose appropriate engineer's certificates would be required and obtained. It was his recollection that there was an inspection of the property of the plaintiff on the 5th February, 1999, prior to the issue of the final notice HP11.

Conor Taaffe, the managing director of Homebond, described the process involved in becoming a member of Homebond. On application there is a technical examination of houses under construction or recently constructed. If already constructed, the house, provided it is unsold may be registered under the scheme. He explained that originally the Department of the Environment acted as agents for Homebond in carrying out inspections. In this context, he referred to a screen grab from the computer records of Homebond in respect of the plaintiff's property. It indicated that there was an engineer's report in respect of the property. This was required because there had been no inspection of the foundations of the house as the house was built when the company became a member of the Homebond scheme. He also explained that the final notice HB11 does not issue until the house is completed.

He went on to explain that HB10, the Homebond guarantee, issues at the time of registration of a building. It was not necessary to have an engineer's report before the guarantee was issued. He explained that when an application for membership is first made, dwellings are usually under construction and there would not have been an opportunity to inspect the foundations. In those circumstances an engineer's report will be obtained. He could not say when the engineer's report in this case was obtained.

Normally, once a member is registered, Homebond would carry out two inspections, one at the stage of the foundations being put in and one before the final notice was issued. In this case, Homebond did not have the opportunity to inspect the foundations as the house was already constructed when the application for membership was made and the dwelling was registered with Homebond.

He confirmed that the main structural inspection was carried out by the Department of the Environment on behalf of Homebond. It appears that the house was completed in March 1998 and that Homebond relied on the engineer's report. He reiterated that it was not necessary to have an engineer's report before issuing a Homebond guarantee. There was an engineer's report obtained in respect of the foundations and that was the report of Michael Archer dated the 10th October, 1997.

The Plaintiff referred to the certificate given by Michael Archer and commented that he was offsite by the 24th June, 1997. She stated this on the basis that two commencement notices were sent to Roscommon County Council, under the provisions of Part 2 of the Building Control Regulations 1991, one of which was signed on the 11th June, 1997, by Mr. Archer and the second of which was signed on the 24th June, 1997, by Mr. Flannery. In relation to this point, both of which are in respect of the development of eleven house at Mockmoyne, I do not know the basis upon which it was contended by the Plaintiff that the conclusion to be drawn from the signatures on the commencement notices being that of Michael Archer in the first instance and Thomas J. Flannery in the second instance means that Mr. Archer was offsite by the date of the second commencement notice. The relevance of this issue from the Plaintiffs point of view was that if Mr. Archer was "offsite" by the 24th June 1997, how could he have given a certificate in relation to the foundations on the 101h October 1997.The Plaintiff has reached that conclusion but there was no evidence from Mr. Archer before the court as to his involvement with the site, and having regard to the evidence I did have, I cannot say as a matter of fact that he left the site at any particular stage.

In the course of her evidence, the plaintiff described her understanding or notion of a guarantee as being something that guaranteed credibility and quality. She relied very much on the fact that the final notice, HB11, was issued by Homebond which allowed the house to be sold and, in those circumstances, she stated in evidence that Homebond was responsible for the wrongs of others. She argued, and her evidence was to the same effect, that she wanted Homebond to compensate her for all the defects which she described in the house.

There was some discussion in the course of her evidence as to whether or not she was aware of the documents that she signed in November, 2009. She said that she got the documents at different stages and that in relation to the Homebond guarantee she thought that she only received one page of the document. It was pointed out to her that the form of guarantee was one where there was writing on both sides of a single sheet of paper and her signature appeared on the second page of the document. It was pointed out that the Homebond guarantee was operative from the date of the final notice and that Homebond indicated their willingness to provide cover notwithstanding that the terms of the guarantee provided that it should be for a period of two years from that date. Homebond accepted liability for the defects covered by the guarantee because a complaint had been made within the time concerned to the member of Homebond.

I should note that Mr. Quinn cross examined the plaintiff and explained that he was on site once and that he signed off on a number of the houses when he was there including that of the plaintiff. There was some discussion between the plaintiff and Mr. Quinn as to his qualification as at an earlier stage of the proceedings, the plaintiff had suggested that Mr. Quinn was not a *bona fide* member of Engineers Ireland. I should say for clarification at this point, that Mr. Quinn became involved in this matter when he was asked by the company to furnish a certificate of compliance in relation to the development and in particular in respect of the dwelling house at No. 10 Mockmoyne Heights. That certificate of compliance was to the effect that the construction of the works complied substantially with the grant of permission and substantially with the building regulations applicable thereto. The certificate was dated the 291h July, 1999, and noted that Mr. Quinn did not supervise the construction of the relevant works and his inspection which was made on the 22nd July, 1999, was visual only. He added that the inspection did not entail the opening up of works, which had been fully/substantially completed on that date. To the extent that such inspection allowed and not taking into account matters which were inaccessible to him, he was of the opinion that the relevant works had been constructed in substantial compliance with the building regulations aforesaid. I will address the role of Mr. Quinn at a later stage.

I now want to consider the submissions of the parties in the light of the evidence on this issue.

The plaintiff's submissions are quite straightforward. It is her case that in purchasing the property, she relied on the fact that it had a Homebond structural guarantee. She said that her reliance on the guarantee was based on Homebond literature which says that if a new dwelling house is not inspected, final certificate HB11 may not issue. It is the case that there is no doubt that the foundations were not inspected by Homebond and further, that Homebond relied on the certificate provided by Michael Archer in respect of the foundations.

I do not doubt for a moment that the existence of a Homebond guarantee is something that would be of influence in the consideration of a person purchasing a newly built dwelling. I accept that it was the case that as far as the plaintiff was concerned, it was a matter that she relied on in considering the purchase of this property. Her main argument centred on the contention that Homebond should not have provided a guarantee in circumstances where they had not inspected the foundations of the property. Further if they had not provided a guarantee, she would not have bought the property. The point was made by her that it was not appropriate for Homebond to have registered the dwelling under the Homebond scheme retrospectively.

In the course of submissions on behalf of Homebond, reference was made to the question of whether or not Homebond owed a duty of care to the plaintiff. Reliance was placed on the decision in *Ward v. McMaster* [1988] 1 I.R. 337, which was described as the high water mark in terms of the extent of a duty of care giving rise to a claim in negligence. That was a case which concerned the provisions of the Housing Act 1966, which enabled a housing authority to lend money to allow persons to purchase homes. The housing authority by virtue of regulations made pursuant to the Act was under an express statutory duty to ensure that the value of the property to be acquired was sufficient to be good security for the loan. The scheme set up by Louth County Council expressly provided that no advance would be made until the Council had satisfied itself that the value of the property to be acquired was sufficient security for the loan. Further the scheme was limited to persons whose means were below a certain level. The plaintiff sought to borrow money from the Council and the Council carried out a valuation of the property and advanced the money. The property turned out to be unfit for human habitation and the plaintiff sued, *inter alia*, Louth County Council.

The Supreme Court found that even though the housing authority was under an express duty to ensure that the property was of a sufficient value to be security for the loan that did not create a private law duty of care to the plaintiff. However, the court found that having regard to the special relationship between the parties, it was reasonably foreseeable by the Council that those applying under the scheme would not have the means themselves to assess the property and would rely on the Council's agreement to make the loan as evidence of the value of the property. McCarthy J. commented that the Council could have excluded liability saying:-

> "In any event, I see no bar to the County Council expressly excluding any representation to be inferred from the fact that it sanctions a particular loan. (p. 346)

It was contended that the facts of this case could not be more different. There was no relationship, special or otherwise, between the plaintiff and Homebond prior to her acquisition of the house. There was no express statutory duty on Homebond of a type similar to that at issue in Ward v. McMaster nor was there any representation by them of the type made by Louth County Council under the terms of its scheme.

Thirdly, the liability of Homebond was expressly excluded in the guarantee agreement signed by the plaintiff, the guarantee certificate and the Homebond rules. (See in particular clause 4(b) of the guarantee agreement).

It was pointed out that no evidence had been adduced by the plaintiff of any representation made by Homebond prior to her acquisition of the property upon which she purported to rely. Her express evidence was that she relied on her solicitor and that she expected that her solicitor would rely on the certification given by Homebond. There is no evidence of any representation made by Homebond, nor a misrepresentation which was capable of giving rise to a cause of action.

It was further contended that even if there was a duty of care of the kind contended for owed by Homebond there was no evidence of any breach on the part of the Homebond of any such duty of care. The complaint that has been made by the plaintiff is of a failure by Homebond in and about its assessment of the application for membership of the company, but in that context, no evidence of want of care was adduced or established by the plaintiff in that regard.

As I have already said a major part of the complaint of the plaintiff is that Homebond should not have registered the house under the scheme in circumstances where they had not been in a position to inspect the foundations and where the house was completed prior to registration. She has described the provision of the Homebond guarantee as a misrepresentation on the part of Homebond, giving the impression that the guarantee was a guarantee of quality and credibility.

Mr. Taaffe explained in his evidence as did Mr. Crotty that when there is an application for membership and the same is approved, the member may apply to have existing houses covered by the scheme provided that the appropriate engineer's reports have been obtained.

I can see nothing in the Homebond literature, the Homebond rules, the guarantee or the final notice HB11 that precludes Homebond from registering a property which is either being built or has been built.

Homebond has expressly excluded liability in clause 4(b) of the agreement where it was provided:

> "That the company, its servants or agents shall have no liability arising to the purchaser in respect of any claim for damages relating to any act or omission in or about any proceedings relating to the dwelling and shall have no liability in respect of any negligence or default in inspecting or failing to inspect the dwelling ..."

There is simply no relationship of any kind between the plaintiff and Homebond prior to the signing of the Homebond guarantee and there is simply no evidence at all to the effect that any representation was made by Homebond to the plaintiff over and above the express terms of the Homebond Guarantee.

The plaintiff was somewhat vague in relation to the signing of documents prior to the completion of the purchase of the dwelling house, but I am satisfied that she signed the contract for the purchase of the lands, the building agreement and the guarantee agreement on the 9th November, 1999, at a time when she had the assistance of solicitors in relation to the purchase of the property. I accept as a fact that when she signed the guarantee agreement she had a single sheet on which there were two pages of writing incorporating its terms. Thus she had to have been aware of the limitations of the Homebond Guarantee.

I accept the submissions of counsel on behalf of Homebond as to the applicable law herein. In all the circumstances of this case, I cannot come to the conclusion that the plaintiff has established that Homebond owed a duty of care to the plaintiff giving rise to liability for all the defects in the dwelling house as contended for by the plaintiff.

It should be noted that Homebond has always accepted that it has a liability to the plaintiff on foot of the guarantee and I will come back to that issue later on in the judgment. However, I do want to refer briefly to a number of the other issues that have been raised by the plaintiff in relation to the defects in the house.

The plaintiff in these proceedings has stated in evidence that it is her view that the property should be demolished and that it should be rebuilt. I have to say that having reviewed all the evidence in this case I can see no basis upon which it would be appropriate to take such an extreme step. One of the concerns that the plaintiff has relates to the foundations of the property and the question of whether or not the foundations are in some way unstable. This relates in part to a crack which has been identified in the gable wall and which was stated to have arisen because of instability in the foundations. According to one of the plaintiff's witnesses, Mr. Cooney, the crack which was identified in a site visit by Mr. Cooney on the 9th January, 2013, was not present when another of the plaintiff's witnesses, Mr. Manning had visited the previous July. Having considered all of the evidence in relation to this aspect of the matter I have to say that I am not satisfied that that crack is due to any instability in the foundations. This is a property which has now been built for over thirteen years and if there was such a level of instability in the foundations, I think it would have manifested itself prior to this.

The second issue relates to drainage on the site and part of the problem relates to the extent or level of water beneath the floor slab. There are two things I think I should say in relation to this. First of all, I accept as a matter of fact that the site on which the house is built is very poorly drained. The photographs produced by the plaintiff are clear evidence in support of this view. In my view it is a genuine and real issue with the property. There was a dispute in the evidence in relation to the level of dampness underneath the floor slab. To that extent it is necessary to explain that a number of bore holes were drilled within the house and Mr. Cooney and Mr. Manning's evidence in regard to the level of water under the building is disputed by the witnesses on behalf of Homebond. There was also an issue as to the question of a gap under the floor slab. I accept that the damp proof membrane under the floor slab has been damp on some occasions but I have to say that I am not convinced by the evidence on behalf of the plaintiff that there is standing water under the building or that the water level under the building is such that it is in contact with the damp proof membrane. I do, however, accept that there is a problem with the drainage of the site and in particular the drainage around the house. It seems to me that this is a matter which should be attended to as matter of urgency.

There has never been any dispute between the parties that there is a significant problem in relation to damp proofing in respect of the property. The difficulty that has been identified as a result of the investigations carried out on site is that the damp proof membrane under the floor slab does not lap over the damp proof course. It is necessary that the DPM and the DPC should be appropriately sealed in order to stop rising damp. This is not an issue in dispute between the parties, although there is a degree of dispute as to level of the problem. It may also be that this problem was contributed to by the conduit that has been described in the course of evidence which comes from a trap on the road outside the house and carried some wiring into the house under the floor.

There are a number of other issues that were referred to in the course of the evidence. They relate to matters such as the support for the water tank in the attic, the question of fire separation within the attic space between the garage and the rest of the house, diagonal bracing in relation to the roof as constructed and issues as to the lack of insulation.

Another significant issue identified by the plaintiff was the construction of the footpath which surrounded the house. That footpath has undoubtedly been constructed inadequately and the net effect of that is that the footpath has settled or subsided. There are bad cracks at different points in the footpath. This has created additional difficulties for the plaintiff in that her central heating boiler was placed on that footpath to the rear of the house. As a result of the settlement in the footpath, the central heating boiler has tilted and for that reason the pipework has been distorted and consequently the plaintiff has not used her central heating system since approximately 2004. Since then she has relied on a portable gas heater within the house. Clearly this has had an adverse effect on the plaintiff in terms of living in comfort in the house.

I have no doubt that the plaintiff is entitled to a remedy in respect of the problems that have been identified in the construction of the property in the course of the evidence. Many aspects of the development carried out by the company were unsatisfactory apart altogether from the problems with the plaintiff’s house. There were problems with the drainage of the estate as a whole and it was not for a number of years that an appropriate drainage system for the development was installed.

On the evidence before me, it is clear that the construction of the plaintiffs house was unsatisfactory and that the plaintiff must be entitled to a remedy against Thomas and Catherine Flannery and T. & C. Developments Limited. One of the difficulties in this case is that no evidence of any kind was led by the plaintiff in relation to the cost of rectifying the defects identified in the property. I indicated to the plaintiff in the course of the hearing that I would permit her to call appropriate evidence in this regard. I will hear further from the plaintiff in respect of this issue.

I also want to deal with the claim of the plaintiff against Seamus Quinn trading as Midland Design Services Limited. I have referred previously to the very limited involvement of Mr. Quinn in the course of these proceedings. Mr. Quinn became involved because as part of the conveyancing aspect of the matter, he provided a certificate of compliance to T. & C. Developments Limited. Having regard to the terms of that certificate and having regard to the evidence led by the plaintiff in respect of the liability of Mr. Quinn trading as Midland Design Services Limited, I cannot see any basis upon which liability could be imposed on either Mr. Quinn or Midland Design Services Limited, which I understand is now in liquidation. I should also observe that I could not see any reason for calling into question Mr. Quinn's professional qualifications.

I now want to turn to the question of the extent of the liability on foot of the guarantee of Homebond to the plaintiff. It has always been accepted that Homebond has a liability to the plaintiff in respect of the problem with damp penetration. From the letter of the 2ih September, 2002, it was indicated by Homebond that they were prepared to carry out remedial works to remedy the water penetration/dampness defect in the dwelling by (i) installing adequate drainage at the front of the dwelling to collect surface run off, connect new drainage and existing water gully traps (if required) to the storm water drainage system (ii) identify walls where DPC and floor DPM do not overlap, remove timber skirtings and hack off plaster, paint proprietary waterproof product and block work, refix, (replace of necessary) timber skirtings or if that was not feasible to cut out sections of the concrete floor adjacent to walls where the DPC and floor DPM do not overlap and so on. It was confirmed that if ceramic floor tiles or timber floors have to be removed to facilitate the works that reinstatement would form part of the works. It was pointed out that alternative accommodation was not covered under the terms of the guarantee, but, if necessary, there was an offer to make a contribution as a gesture of good will. That was not acceptable to the plaintiff and she issued proceedings in February 2003.

Subsequently in June 2006, a further letter was written to the plaintiff on behalf of Homebond describing works that they were prepared to carry out. It was stated in that letter that those works represented clarification and confirmation of the works proposed in the letter of the 2ih September, 2002.

In the course of the hearing before me, evidence was adduced on behalf of Homebond as to the extent of works that could be carried out in relation to the remedying of the defects identified and two detailed bills of quantities were put before the court in relation to the scope of works identified by Homebond. Those were produced by Mr. Rothwell, a quantity surveyor. The first option proposed by Mr. Rothwell involved a total expenditure of €19,984.61 and involved opening up and carrying out repairs to a limited portion of the

house. The second option provided for a more extensive opening up and repair of the problem caused by the failure of the DPM to meet the DPC and that option involved a total expenditure of €50,952.99.

Much evidence was given in the course of the case in relation to the extent of the damage caused by the problem in respect of the damp proof course and DPC and in relation to remedying the problem of damp in the house. Having considered all of the evidence, and in particular that of Mr. Taaffe, Mr. Colm McKiernan who gave evidence on behalf of Homebond, as to damp meter readings in relation to the house and the evidence of Mr. Quigley, together with the evidence of Mr. Cooney on behalf of the plaintiff, I am satisfied that in order to eradicate this problem, what requires to be done is the works specified in the latter option described by Mr. Rothwell, in other words, the works totalling a sum of €50,000 approximately.

I note that the financial limit of the Homebond guarantee is stated to be €38,000, but as I mentioned previously, it was clear from the evidence of Mr. Taaffe and Mr. Crotty that Homebond does from to time to time carry out works to remedy major defects which cost more than the limit provided for in Homebond guarantee. It is clear that the guarantee envisages that in certain circumstances, the company Homebond, may make good any major defects in a property and may be entitled to enter on to the property for the purpose of carrying out such works. I have no doubt that it would be appropriate in the circumstances of this case for the works described in the second option to be carried out in order to remedy the major defect present in the plaintiffs house. In circumstances where it is clear that Homebond from time to time will carry out works to a greater extent than that provided for in the guarantee it seems to me that this is one of the rare cases where that should be done and accordingly I am directing that the works be carried out in accordance with option (b). I recognise that the relationship between the plaintiff and Homebond, at this stage is such that it is not realistic or feasible to expect that Homebond could at this stage have its contractors carry out the work in respect of this property. For that reason I think it would be appropriate to have Homebond discharge the sum provided for in the second option to the plaintiff for the purpose of having the works carried out.

I have the utmost sympathy for the plaintiff in the circumstances in which she has found herself but the fault for this rests not with Homebond but with the builder of the house. Homebond's liability is derived solely from the terms of its guarantee. Accordingly, I propose to give judgment to the plaintiff in the sum of €50,952.99 against Homebond.

I will hear further from the plaintiff in relation to whether or not she wishes to pursue the question of providing evidence to the court in relation to the liability of Thomas Flannery, Catherine Flannery and T. & C. Developments Limited.