[2017] IEHC 554

THE HIGH COURT

Record No. 2011/ 7987P

SHANE AND ANTOINETTE O'REILLY

PLAINTIFFS

AND

SEAMUS NEVILLE, LIAM NEVILLE, COLM NEVILLE, ANTHONY NEVILLE, BRENDAN NEVILLE, and WILLIAM NEVILLE AND SONS CONSTRUCTION trading as THE NEVILLE DEVELOPMENT PARTNERSHIP

DEFENDANTS

JUDGMENT of Mr. Justice Binchy delivered on the 31st day of July, 2017.

Introduction

1. This is an action for damages for breach of contract, negligence and breach of duty arising out of the purchase by the plaintiffs, from the defendants of a dwelling house known as 19 Millrace Crescent, Saggart, Co. Dublin (the "dwellinghouse"), pursuant to a building contract entered into between the parties on 30th March, 2005 and which contact was completed on 22nd September, 2005 (the "Building Agreement"), meaning that the transaction closed on that date. The Building Agreement was in the form of an agreement combining the standard Law Society Contract for sale, 2001 Edition and the standard form Building Agreement issued jointly by the Law Society of Ireland and Construction Industry Federation, also stated to be a 2001 Edition. At the conclusion of the transaction the defendants also furnished to the plaintiffs the standard form of home bond documentation as security against defects in the construction of the dwellinghouse. In these proceedings, the defendants in particular placed some reliance on the terms of the Building Agreement, to which I will return later. In the proceedings as originally issued, the plaintiffs sought an order rescinding the Building Agreement. However, at the conclusion of the trial, the plaintiffs abandoned that claim and confined their claim to one for damages, quantified in the total amount of €97,000.00.

2. Mrs. O'Reilly, the second named plaintiff, gave evidence on behalf of both plaintiffs. She stated that very soon after they took possession of the dwelling house the plaintiffs started to experience problems. They were not unduly concerned and indeed expected to have some "teething" problems in a newly constructed house. Any time a problem would manifest itself, they would make contact with the site foreman of the defendants (the plaintiffs' house was in Phase 1 of a much larger development, and so the defendants' representatives were always readily accessible) and the problem would be addressed, although according to Mrs. O'Reilly, not necessary fully resolved. Eventually, on 3rd March, 2009 frustrated by the continuing problems, the plaintiffs sent an email to Mr. Shane Clancy of the defendants summarising the various problems they had experienced and were continuing to experience since moving into the dwelling house. These can be summarised as follows:-

(i) **the front door**: the plaintiff complained of issues with a draft coming from the door and issues with the front door locking; every time the plaintiff left the house the alarm would go off; she maintained that the door was faulty and the defendant accepted that there was a problem with the door. The plaintiffs replaced the front door at a the cost of €1700 of which they were reimbursed €800 by the defendant;

(ii) **the attic**: Items were water damaged in the attic, including baby items and clothes due to mould and damp. The plaintiffs were told this was due to condensation and it was a common problem. Remedial work was undertaken by he defendant, but the problem persisted;

(iii) **sewage smell**: the plaintiffs noticed a smell in the bathroom, following remedial works in the attic, but this was subsequently rectified by the defendants;

(iv) **main bathroom**: the plaintiffs complained of a smell remaining in the bathroom, as well as a leak in the roof over the window; the sink was dripping and had to be repaired on a number of occasions. The plaintiffs stated that the sink was tilted, resulting in an overflow of water. In her evidence, Mrs. O'Reilly also stated that upon moving into the house, the bath came away from the wall, by "a couple of inches" when she took a bath and she expressed concern that this occurred over an electricity box;

(v) **en suite**: there were leakages in the en suite bathroom on four occasions, over a period of 2 years, resulting in damage to the sitting room walls and ceiling; the shower was not properly sealed. The plaintiffs also complained of mould growing in the en suite bathroom; Mrs O'Reilly said that she would have to clean the windows and the shower following the use of the shower to avoid the growth of black mould; the extractor fan did not extract air;

(vi) **box room**: the plaintiffs moved their eldest son into this room when he was 7 or 8 weeks old. Mrs. O'Reilly gave evidence that the rear wall of the room was very cold and the room took a long time to heat up. The plaintiffs had to manually manage the temperature of the room and remove the child if the room became too cold.

(vii) **back bedroom**: there was a draft resulting from a gap between the wall and the window resulting in a draft and noise;

(viii) **main bedroom**: mould would form due to condensation when the shower was in use; Mrs. O'Reilly gave evidence she was told by the defendants that this was due to the plaintiffs breathing; the plaintiffs have to clean this on a regular basis;

(ix) **landing**: there was a gap in the steps and the banisters were wobbly;

(x) **kitchen**: full length crack and split in the floor tiles; plaster falling from the ceiling; water was coming through the wall and across the roof, this issue is still occurring; the bathroom balcony has leaked into the kitchen three times;

(xi) **Windows**: handles falling off the window, handles are since discontinued;

(xii) **Settling cracks**: settling cracks in house were never repaired;

(xiii) **Noise issue**: neighbours on both sides could be heard through the walls and

(xiv) **Heating system**: the hot water function does not work; the heating system had to be operated from the hot press through the movement of a handle.

3. Following upon this email, Mrs. O'Reilly met with the fifth named defendant, Mr. Brendan Neville and subsequently received an email of 1st April, 2009 from Mr. Clancy, in which he promised, on behalf of the defendants, to carry out remedial works on 21st April, 2009. There appears to have been some confusion between the parties about precisely what was agreed at around this time and remedial works were not in fact undertaken. There was then a lull in activity until the plaintiffs wrote to the first named defendant on 15th June 2010. Mrs. O'Reilly explained that the plaintiffs have two sons, Zac born on 29th September, 2007 and Leon born in November 2009. She said that it was in part measure owing to the arrival of Leon that the plaintiffs did not have time to deal with the problems in the dwelling house at this time as they were extremely busy with two infant children during this period. They did not find time to address the problems with the house again until June 2010. However, and significantly, in the intervening period, the plaintiffs had become concerned about the health of their sons, who they constantly had to bring to the doctor on account of respiratory problems. The plaintiffs' general practitioner, a Dr. James Clarke, gave evidence as to his attendance upon the plaintiffs' children. Between 19th November 2009 and 27th April 2010, Mrs. O'Reilly brought Zac on eight occasions to see Dr. Clarke. His records indicated that Zac was suffering from some kind of viral infections which manifested itself in coughing and respiratory difficulties. Between 16th December 2009 and 31st May 2010, Dr. Clarke attended Leon on nine occasions, for similar symptoms. On a number of occasions, he referred each of Leon and Zac to A&E in Tallaght Hospital. Dr. Clarke said the overall picture that he had of the children at this time was they were attending with him very frequently with chest infections, and at some stage the plaintiffs informed Dr. Clarke that they had been advised by a person in Tallaght Hospital that they should consider if the environment in which they were living might be responsible for the childrens' ongoing problems. Dr. Clarke said he had himself independently formed the conclusion that the children should be moved from their home in order to establish whether or not their environment might be the cause of their ailments.

4. Mrs. O'Reilly said that as a result of these discussions, the family moved out of the home on 18th May 2010, on an experimental basis, to see if the boys' health would improve. They remained out of the house for twelve days and had Dr. Clarke examine the children both immediately before they left the house, and immediately upon their return. During this period of twelve days the plaintiffs and their children stayed with Mrs. O'Reilly's mother. Mrs. O'Reilly said that during their period out of the dwelling house at this time the childrens' health did improve, but upon return to the dwelling house the same complaints began to recur again. In August 2010, the plaintiffs left the dwelling house altogether and have not returned since. Dr. Clarke's evidence was that there was a dramatic improvement in their health from this time onwards and that he has seen very little of the children ever since, although his records did indicate that he saw Zac on five occasions between 25th February 2011 and 7th November 2011.

5. In their letter of 15th June 2010, to Mr. Seamus Neville, the plaintiffs referred to the health of their sons and informed Mr. Neville that they had been advised by both a consultant and their GP to move out of the house for a period of time because there was a concern that the house was to blame for the illnesses being experienced by the children. Mrs. O'Reilly referred to the fact that they had moved out of the house on the 19th of May for twelve days and that their sons' health improved during that period, but regressed again when they moved back into the house.

6. As a result of the ongoing problems, the plaintiffs had obtained at this time a report from a consulting engineer, Mr. Desmond Kirwan-Browne and the plaintiffs sent this to Mr. Seamus Neville with their letter of 15th June 2010. This report identified a list of items noted by Mr. Kirwan-Browne on what he described as "a preliminary walk around inspection". The items identified by Mr. Kirwan-Browne are identified below. By way of letter dated 13th July 2010, Mr. Seamus Neville on behalf of the respondents replied to each item in Mr. Kirwan-Browne's report. The responses provided to each item are italicised below.

1. The external stairs requires maintenance and securing of some of the steps.

Where remedial work is required to the external stairs that is deemed other than normal maintenance (the responsibility of the management company), we will attend to this item.

2. It was noted there is efflorescence on the brick work.

Efflorescence on brickwork is not uncommon but is somewhat unusual after a period of five years. We will have this matter checked with the brick manufacturer.

3. There is extensive cracking on the front elevation at upper-floor window head and parapet.

Cracking to the front elevation is not of a structural nature and as advised is a matter for filling and making good with first decoration which we assume is on the programme for the management company given that you are in your property almost five years.

4. I do not know how the roof is ventilated above the parapet or how the guttering is formed, or if the parapet has a DPC under.

We will check the ventilation in the attic space to establish if there is adequate cross ventilation and should additional vents be required, we will have those installed to ensure that the ventilation is in accordance with building regulations.

5. There is cracking under the parapet of the balcony. I suspect there may be no DPC under the coping.

As 3 above.

6. I would have concerns about the security and adequacy of the fixing of the balcony screens.

We will check the fixings on the balcony screen, but we do wish to point out that those were fixed in accordance with our architect's and engineers design and was certified by them and by the Department of Environment.

7. The weathering of the sill of the door onto the balcony from the bedroom is inadequate (I was advised that various efforts were made to improve it). As a result, there is damp penetrating within.

We will have the weathering to the sill of the balcony door checked and while accepting that efforts were made to address this matter in the past, having re-examined the detail, we are satisfied that the remedial work we have in mind will address the matter satisfactorily.

8. In the living-room, beneath the door overhead to the balcony, there are signs of water ingress.

This was as a result of no.7 above and therefore once no.7 has been dealt with this should leave this matter satisfactory and we will redecorate.

9. The laminate is peeling off the doors to kitchen cupboards.

We will have the kitchen manufacturer's deal with this matter.

10. Extract over the kitchen cooker is inefficient. It would appear to have approximately an 8m length of ducting to inappropriately partially-blocked vent to the rear of the premises. A Service Engineer should be asked to look at the design with regard to extraction from the kitchen and the en-suite.

We will have this matter fully checked out and satisfy ourselves that it is functioning fully in accordance with building regulations. Until such time as we have it checked out we are not clear as to what remedial action may be needed.

11. There is staining on the ceiling of the en-suite and associated mould growth. Directly above that can be seen extensive staining of the dry-lining of the attic space (without vapour barrier). It is most probably associated with fault/incompleted extract duct from the apartment beneath. This may be the primary source of condensation in the attic space.

We will have this matter investigated.

12. The extract from the en-suite would originally appear to have gone through the front roof pitch. There is also a tear in the felt.

It was noted on the day of the inspection that the extractor fan was not working in the then en-suite. This we will deal with whether by means of correcting the electrical fault or should the fan be defective, have it replaced. Also the tear in the roofing felt will be made good.

13. The bedroom extractor would now appear to come through a newly-installed vent on the soffit to the rear of premises adjacent the vent from the bedroom. This is considered to be totally ineffective and unsatisfactory.

We will reposition the extractor vent not to have it extracting adjacent to the air vent for the room.

14. The roof tank does not have a lid and is not insulated.

We will insulate and place a plywood lid to the water tank.

15. There is no vapour barrier to ceiling in the attic.

This item we will look into and investigate.

16. There are concerns with regard to the ventilation of the attic void, most particularly with regard to venting to the front of the dwelling.

This matter we have referred to earlier and how we intend addressing it.

17. Further investigation is required with regard to adequacy of fire stop in the attic area.

We are not aware of any deficiency in the fire-stopping in the attic space as those attics were fully inspected by the Department of the Environment and our architect at the time of completion.

18. The design of the stairs is such that there is winders on the top. It is recommended that if a stairs has to have winders it is preferable with regard to safety that they be on the bottom of the flight.

The stairs construction is in accordance with building regulations at the time of construction.

At the end of his report, Mr. Kirwan-Browne stated that:

> "From my initial inspection, I have concerns with regard to the external fabric of the building. A failure of flashing leading to water ingress, the lack of provision of proper extraction from kitchen and en suite bathroom, lack of ventilation and vapour barrier in attic area. Further investigation is recommended."

As a result of their letter of 15th June 2010, the plaintiffs met with Mr. Séamus Neville at the dwelling house on 8th July 2010 to discuss the matter. Mr. Neville's reply of 13th July followed upon this letter. It is fair to observe that while Mr. Neville makes proposals for works in this letter, in his response to eight items, he considered that the matters raised required further inspection before he would commit to any works. It can also be seen that in the case of some issues, he considered that they should be addressed by the management company However, in relation to those items in which they agreed that works were necessary, the defendants proposed undertaking the same sometime after the builders' holidays in August 2010 – they suggested a start date of some time after 3rd August 2010.

7. At this point, the plaintiffs decided to instruct another consulting engineer, Mr. Declan Gibbons. This was because Mr. Kirwan-Browne had said that further investigations were required, but he was not available to undertake the same on their behalf. Mr. Gibbons was instructed by the plaintiffs on 3rd August 2010. He in turn advised the plaintiffs to retain the firm of Allergy Standards Consulting Ltd. to assess indoor air quality in the dwelling house and to advise and make recommendations. They prepared two reports, one dated 1st September 2010, and a second dated 24th September 2010, to advise specifically on the impact of the operation of the shower in the en suite bathroom on humidity levels in the attic space. Mr. Gibbon's report was then finalised on 29th October 2010. In his report, Mr. Gibbons summarised the defects that he identified at the dwelling house as follows:

(i) The Attic

(a) A lack of adequate ventilation leading to condensation and the

growth of mould in the attic;

(b) Mould on the bitumen felt, rafters and insulation. This he said was very obvious to observe on inspection;

(c) Efflorescence on the block work of the chimney breast in the attic, suggesting water ingress;

(d) Water staining to the valley boards and a missing valley board;

(e) A defective vent tile allowing condensation to flow into the pipe serving the vent, above the bedroom of one of the children;

(f) Master bedroom en suite shower vent discharging into the attic, contributing to condensation;

(g) Master bedroom en suite vent going through roof eaves too close to a bedroom vent;

(h) Plasterboard not foil backed and therefore not providing a proper vapour barrier; and

(i) Defective flexible piping connecting soil stack to vent pipe which leaked and allowed condensation into the attic.

(ii) Bedrooms

(a) Both children's bedrooms inappropriately venting into the attic, exposing children to moulds and fibreglass;

(b) Fan vent from master bedroom en suite carrying moulds into one of the children's bedrooms;

(c) The other child's bedroom has no proper vent and as a result is venting inadequately through a gap between the pebble dash and facia.

(iii) Balconies

(a) water ingress from the three balconies in the dwelling house is

affecting both the plaintiff's dwelling house and the apartment

below;

(b) poor flashing details;

(c) cracking of the bell-cast on the bedroom balcony;

(d) cracking of the parapet copings as a result either of a problem with the damp proof course membrane or alternatively as a result of there being no DPC membrane;

(e) inappropriate dressing of the lead flashing – lead flashing not folded as required;

(f) staining on the wall below the balcony, steps under balcony unusable due to damp;

(g) poor quality steps.

(iv) Insulation

(a) Incorrectly installed insulation in the kitchen; and

(b) One bedroom is so cold as to suggest that there is no insulation in the wall. However, this was not verified by Mr. Gibbons' inspection.

(v) Other Defects

(a) Extensive cracking in the building and evidence of water ingress to the building;

(b) Laminate peeling from kitchen cabinets;

(c) Inefficient extractor fans (fan over cooker not working) and insufficient ventilation throughout dwelling house;

(d) Defects in concrete floors;

(e) Fire safety defects in doors, walls and fire hydrant.

8. While Mr. Gibbons report is dated 29th October 2010, it was not sent to the defendants until Mr. Gibbons sent it to them by letter of 10th December 2010. He sent this letter by way of email, to which he attached his report, the reports of Allergy Standards

Consultants, as well as letters from Dr. Clarke and an email from a Dr. Ronnie Russell of Trinity College Dublin, in relation to mould remediation. Not having received any reply to this email, he sent hard copies of all of these documents to Mr. Seamus Neville by post on 21st January, 2011 together with additional documentation comprising:

> (i) A document entitled "national guidelines for the prevention of nonsocomial invasive aspergillosis during construction/renovation activities"; and
>
> (ii) Indoor mould, toxigenic fungus and stachybotrys chartarum; infectious disease perspective; and
>
> (iii) Mould remediation in schools and commercial buildings.

9. There followed a meeting between Mr. Gibbons and Mr. Brendan Neville at the dwelling house, following upon which Mr. Seamus Neville wrote, on 24th February 2011, to Mr. Gibbons to say that the defendants' experts were considering Mr. Gibbons' report, and stating that the defendants expected to be in a position to commence any necessary remedial work on the 3rd/4th March. However, Mr. Gibbons was not agreeable to the defendants commencing any works until such time as they proposed specifications. Mr. Gibbons himself did not propose specifications for remedial works. In his evidence he said that it was not his practice to do so in such circumstances as in his view it is a matter for the builder to propose remedial works for defective works.

10. On 3rd March 2011, Mr. Gibbons wrote to Mr. Seamus Neville in the following terms:

> "Could you please advise in writing that your experts agree with the reports sent to you and outline in writing the schedule of works from removal of roof through to the asphalting of all balconies down to the replacement of all fixtures, fittings, furniture, linen and clothing. I also request a programme for these works clearly indicating commencement and completion dates for each item. I also request detailed drawings of all works proposed, especially the three balconies, roof and vents. I am also concerned with the damp in the basement below and how it may be affecting my clients' home. In view of the poor work of the block layers in relation to the vents, I cannot accept, until physically proven to me, that there is clear separation of the dwelling units.
>
> In relation to the children's' health, I was verbally informed last Friday that an x-ray of Zac's chest showed it now to be clear of the mass that was formally present. I am not in possession of the doctor's report on this matter."

11. This was the first occasion on which there was any reference to removal of the roof of the dwelling house. Since Mr. Gibbons did not propose any remedial works in the report that he sent to the defendants, it would not have been apparent to the defendants why he considered such action necessary. Nor was the removal of the roof suggested in the reports of Allergy Standards which Mr. Gibbons sent to the defendants. So at this point the defendants could have had no way of knowing why works of such dramatic nature would be necessary to address the problems in the premises that were identified by Mr. Gibbons.

12. The defendants then instructed their own consulting engineer to report on the premises. This was a Mr. Paul Forde of the firm DBFL, consulting engineers. He prepared a report dated 26th April 2011. This was quite a short report in which Mr. Ford stated:

> "I have also reviewed the engineering reports prepared by Mr. J. Desmond Kirwan-Browne, consulting engineer, and Mr. Declan Gibbons, consulting engineer, both acting on behalf of the home owners. The principal concern that each of these consulting engineers have with this house is the issue of ventilation provisions and related matters.

Following my inspection, my discussion with Mr. Gibbons, and my review of both consulting engineers reports I would recommend that the following works be carried out:-

> 1. Defects in the existing ventilation provisions need to be remedied as follows:-
>
> - All vents need to be checked, and remedied as necessary, to ensure that they connect directly to the outside face of walls.
>
> - The external discharge position for the vent from the en suite bathroom needs to be relocated so that it is remote from the bedroom vents in the rear of the house.
>
> - The external grille which is partially blocked by pebble dash needs to be fully cleared.
>
> - The ventilation of the attic space needs to be checked for compliance with building regulations and remedied if necessary.
>
> 2. The first floor ceiling plasterboard does not appear to be foil-backed. This should be checked and if this is the case the plasterboard will need to be replaced with foil-backed plasterboard throughout the full extent of the first floor ceiling.
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> All penetrations of the first floor ceiling will need to be fully sealed.
>
> 3. The support to the water tank needs to be confirmed to be in accordance with the Irish building regulations/home bond requirements i.e. it must be supported over four trusses. If this is not the case the installation of additional support will be required.
>
> 4. The top of the water tank should be provided with a cover and this should then be insulated to the same standard as the ceiling below.
>
> 5. Any cracking in render should be repaired and sealed."

13. Mr. Gibbons was given a copy of this report by the defendants, by letter of 3rd May 2011. He did not consider the proposals in Mr. Ford's report to be an adequate response to the problem, because it did not address the issue as to how to remove mould from the attic space, although it did deal with resolving the problems that created the environment for mould to thrive in the first place i.e. ventilation issues.

14. Mr. Gibbons did not respond in writing to this report. He was asked in cross-examination if he made any attempt to discuss the report with Mr. Ford, and at first he said that he did not do so; subsequently however, he said that having reflected on the matter,

he believed he did speak with Mr. Ford. He then checked his telephone records and identified a phone call to Mr. Ford on 26th May 2011. Although his recollection of that phone call was somewhat vague, he said that he believed that Mr. Ford told him that he would not be dealing with this issue any further on behalf of the defendants. However, Mr. Gibbons said that he did not enquire as to who would now be dealing with this issue or with whom he might correspond about the issue. Mr. Gibbons confirmed that throughout this period, he was the sole adviser to the plaintiffs about the matter and that the plaintiffs were relying upon his advice and expertise to achieve a resolution. There matters rested until solicitors acting on behalf of the plaintiffs wrote to the defendants on 14th October 2011. The solicitors concerned, Messrs. Fabian Cadden and Co. were recommended by Mr. Gibbons.

15. In her evidence, Mrs. O'Reilly confirmed that she recalled seeing the report of Mr. Ford, but said that the plaintiffs were not satisfied to proceed on the basis of that report for the same reason that the plaintiffs had been unwilling to proceed on the basis of the earlier proposal of the defendants to carry out works i.e. the works proposed by Mr. Ford did not address the elimination of the fungus and mould from the premises. Mrs. O'Reilly confirmed that following upon the recommendation of Mr. Gibbons, she instructed her solicitors in the matter in July 2011. The plenary summons in these proceedings issued on 6th September 2011, just sixteen days less than six years from the date upon which the contract was completed and the dwelling house was delivered to the plaintiffs. No reference was made to the issue of the summons in the first letter of the plaintiff's solicitors of 14th October 2011, to the defendants, but in any case, following some initial correspondence with the solicitors for the defendants, Messrs. Miley and Miley, the plenary summons and statement of claim were served by the solicitors for the plaintiffs on Messrs. Miley and Miley on 16th February 2012. By this time the plaintiffs had been out of their dwellinghouse approximately eighteen months, the first eleven months of which they stayed at no cost with Mrs. O'Reilly's mother, but from which point onwards they were residing and continue to reside in rented accommodation.

16. The Court heard that there were settlement discussions in or about March 2012, but that these did not result in any agreement. On 5th April 2012, Messrs. Miley and Miley wrote on behalf of the defendants to Fabian Cadden and Co. an open letter which stated, *inter alia,* the following:

> "…we confirm that our clients are prepared without admission of liability to carry out all of the works recommended to be carried out in the report of DBFL Consulting Engineers together with such other works which your clients may reasonably require to have carried out. Our clients have made many attempts to carry out repair works over the last few years but your clients have failed, refused or neglected to make facilities available for this purpose. Should your clients again refuse facilities to our clients to carry out the works, this letter will be used during the course of the hearing of the proceedings as part of our clients' defence and with a view to fixing your clients' with the costs of proceedings….
>
> We will be obliged if you will be kind enough to confirm that facilities will now be made available to our clients to carry out the recommended works. Following this your clients will be fully entitled, if they consider it necessary, to pursue their proceedings with our clients in relation to any other issues in respect of which they consider our clients have a liability."

17. An open response was not delivered to this letter on behalf of the plaintiffs until 23rd March 2015, and this response rejected the proposal because:

> "the defendant's proposed works do not properly or at all address the serious defects in their dwellinghouse and the substantial works that are required to be carried out thereto to render it habitable."

The defendants delivered their defence to the proceedings on 25th October 2012. On 21st January 2013, the plaintiffs' solicitors suggested that a Scott schedule be prepared with a view to identifying the issues in dispute as well as the costs of agreed works and works in dispute. The defendant's solicitors confirmed agreement to preparation of a Scott schedule by letter of 23rd January 2013. However, the Scott schedule was not prepared by Mr. Gibbons on behalf of the plaintiffs until towards the end of 2013. Mr. Gibbons explained that he could not prepare the Scott schedule until he had obtained drawings from a technician, following upon which it was necessary for him to prepare a schedule of the works that he considered necessary to be undertaken, and thereafter to have the cost of those estimated by a quantity surveyor. Mr. Gibbons then prepared an updated report on 3rd February 2014. This report was very similar to his original report of October 2011, but also reported on a leak which he had investigated in May 2013 (following a complaint from the neighbours occupying the apartment beneath the plaintiffs' dwellinghouse) as well as an estimated cost of carrying out works of repair and consequent upon a report from a fire expert retained by Mr. Gibbons on behalf of the plaintiffs, namely Mr.Martin Lawless. The Scott schedule was not furnished by the solicitors for the plaintiff to the solicitor for the defendant until 21st May 2015.

18. As matters continued towards trial, which had by now been listed for November 2016, on 18th February, 2016 the solicitors for the defendants sent a letter proposing a resolution to the impasse. They proposed as follows:-

> "As a perfectly reasonable manner in which to progress the case between now and November, 2016, our clients hereby offer the following:-
>
> > (1) Our clients' architect (Mr. Pat Halley) will liaise with your clients' engineer (Mr. Declan Gibbons) to discuss and, if possible, agree on the condition in which the plaintiffs' house should be (to include position of vents, damp proofing, fire proofing etc).
> >
> > (2) If no agreement can be reached, both Mr. Halley and Mr. Gibbons will provide their respective views as to an independent expert, acting as expert and not arbitrator or adjudicator, who will decide on what the condition should be, and whose decision will be final.
> >
> > (3) When there is agreement or determination on the final condition, Mr. Halley and Mr. Gibbons will liaise and if possible, agree a specification for the works required to meet the agreed or determined condition.
> >
> > (4) If no agreement can be reached, both Mr. Halley and Mr. Gibbons will provide their respective views to an independent expert, acting as expert and not arbitrator or adjudicator, who will decide on what the specification should be, and whose decision will be final.
> >
> > (5) Our clients will carry out the required works, according to the agreed or determined specification.
> >
> > (6) Mr. Halley and Mr. Gibbons will have equal rights to supervise and inspect work as it is ongoing and, in the event of an issue arising, the person who believes there to be an issue will liaise with the other and discuss, and if possible agree, a solution.

(7) If no agreed solution to a perceived problem arising during the course of the works can be found or reached, both Mr. Halley and Mr. Gibbons will provide their respective views to an independent expert, acting as expert and not as arbitrator or adjudicator, who will decide on what the solution should be, and whose decision will be final.

(8) When the works are claimed to be complete, Mr. Halley and Mr. Gibbons will be invited to inspect the works, and when both are satisfied that it is appropriate, the independent expert will be invited to inspect and certify the works as complete and satisfying the specification, and his certificate shall be final.

(9) If at completion stage there is a difference of opinion between Mr. Halley and Mr. Gibbons, the subject matter of such difference will be referred to the independent expert for his expert opinion, which shall be final.

By agreeing to this proposal, your clients can be assured that all works will be independently approved and their house restored to the condition in which it should be.

When the works are complete, there may be other issues remaining in the case which can be litigated over a much shorter timeframe."

19. The solicitors for the plaintiffs replied to this proposal by letter of 2nd March, 2016. Their response was to say that they had not yet received a response to the Scott schedule and they said that upon receipt of the Scott schedule with the defendants' comments, the plaintiffs would then be in a position to assess whether or not there was any point in proceeding further to instruct Mr. Gibbons to liaise with Mr. Halley (the engineer now retained on behalf of the defendants) and "to discuss the question of the condition in which our clients' family home should be in".

The Evidence

Mr. Gibbons

20. The evidence of both Mrs. O'Reilly and Mr. Gibbons is summarised in the summary of the background above. However, Mr. Gibbons was subjected to rigorous cross-examination and it is desirable to set out a summary of the salient parts of his evidence as given under cross-examination.

21. Mr. Gibbons was asked if he was the plaintiffs' sole professional advisor until they retained their solicitors in October 2011, and he confirmed that this was so. He also confirmed that they were therefore relying upon him exclusively for professional advice during this period. He confirmed that he had no objection to the defendants undertaking whatever works of remediation may be agreed, provided that there is appropriate supervision of the carrying out of the works. However, the plaintiffs have lost faith in the defendants and it was for this reason that he wanted the defendants to engage, through their experts, with a view to agreeing specifications for works before the defendants would be given access to the dwellinghouse to undertake the necessary remediation works. He was asked if he ever explained to the plaintiffs that there could be no objection to the defendants carrying out works of remediation, if they were appropriately supervised, and he said that he could not recall advising the plaintiffs to this effect, and in any case this did not arise because at no time did the defendants propose works to Mr. Gibbons' satisfaction in relation to the eradication of mould from the attic space.

22. He said that once a scope of works was agreed, it would be possible to prepare an estimate of the costs of the same within a period of three to four weeks. He was asked why he did not do this when he was first engaged, and why he did not advise the plaintiffs at that time to undertake the works themselves (by borrowing funds if necessary) with a view to mitigating their losses. It was pointed out to him that had he done this, the plaintiffs could have avoided incurring the cost of rented accommodation. In answer to this he said that initially he was anxious to avoid running up unnecessary costs by drawing up a specification for works and preparing an estimate of the cost of the same. He saw it as the defendants' responsibility to propose a satisfactory specification for remediation works, and had they done this it would have been unnecessary for him to prepare any estimate as to the costs of the same. Ultimately, he only prepared such an estimate in preparation for the trial of the action.

23. Asked about the defendants' proposals, he said that the principal difficultly in the various proposals put forward by the defendants was that they did not propose, in his opinion, a satisfactory methodology for the elimination of mould in the attic space. In fact, it was not until he had discussions with the defendants' architect, Mr. Halley in November 2015, that he knew what the defendants were proposing to eliminate the mould problem. In Mr. Gibbons' estimation these proposals were inadequate. Insofar as those proposals involved either "fogging" or "fumigation" of the attic space, Mr. Gibbons was concerned that such treatments were unlikely to reach all areas of the attic affected by mould, because of the overlapping of materials in the attic. Insofar as it was proposed to clean down surfaces in the attic and thereafter treat them with antifungal paint, Mr. Gibbons was concerned that much of the surface area in the attic, especially the roof felt, would not be amenable to such treatment because its surface is too rough in texture. He also considered that chemical treatment of surfaces in the attic might pose a health hazard to the plaintiffs and he made the remark that the plaintiffs did not "contract to buy a chemically treated house."

24. Mr. Gibbons did not accept that the letter sent by the solicitors for the defendants dated the 5th April, 2012, put forward a fair proposal to resolve matters, because the letter did not put forward a specific proposal in relation to the eradication of mould in the attic space. He did agree however that the letter of the defendants' solicitors of 18th February, 2016, represented a reasonable proposal to overcome the impasse. He said that from an engineering perspective, there was no reason to refuse this proposal, involving as it did dispute resolution mechanisms through an independent engineer, acting as an expert. He said he did not know why this proposal was not accepted by the plaintiffs, although he did say that the defendants had not at that point in time replied to the Scott schedule which had been furnished to the defendants in May 2015. It was put to him however that a response to the Scott schedule would have been immaterial to the proposal put forward on behalf of the defendants in the letter of their solicitors of 18th February, 2016, and he did not appear to demur from this proposition.

25. Mr. Gibbons said that in his opinion, in order to eradicate the mould from the attic space, it is necessary to remove all contaminated materials, which effectively involves the removal of the roof. He said that he had previously been involved in two other projects where this issue had arisen, and this was the chosen solution, and one that had been accepted by loss adjustors acting on behalf of insurers in those projects.

26. Finally, Mr. Gibbons was also cross-examined at some length in relation to a range of other issues which he identified as defects in the dwellinghouse, but which were not accepted as such by the defendants. However, for reasons that are apparent in the conclusion of this decision, it is not necessary to address those matters here.

Ms. Pauline Gallagher
27. Ms. Pauline Gallagher of Allergy Standards Consulting Ltd. gave evidence on behalf of the plaintiffs. Ms. Gallagher is a scientist with a Batchelors Degree in Science and a Higher Diploma in Applied Science. She has been an occupational hygienist for approximately ten years. At the request of Mr. Gibbons, she conducted a survey of the dwellinghouse on 13th August, 2010, the purpose of which was to assess the quality of air in the dwellinghouse. She returned to conduct a further survey on 16th September, 2010, the purpose of which was to assess the impact of the operation of the hot shower in the en suite bathroom on relative humidity levels in the attic of the dwellinghouse.

28. The samples taken in her survey on 13th August, 2010 demonstrated the presence of the following species of mould in the dwellinghouse: aspergillus/penicillium, stachybotrys, ulocladium and acremonium. Her report states:-

> "Of the mould species found perhaps the most significant is stachybotrys which was found in medium amounts in the bulk sample taken from the insulation at the base of a vent pipe in the attic. Additionally, this sample contained hyphal fragments. The presence of fungal hyphae, suggests fungal colonisation and growth. This mould is recognised as a mycotoxin producer that can cause animal and human mycotoxicosis and should not be present in indoor environments. Ulcocladium is a major allergen and along with stachybotrys species can cause Type 1 allergies such as hay fever or even trigger asthma attacks. Acremonium is known to cause opportunistic infections mainly among the immunocompromised patients."

Air samples taken in the small box room which was occupied by the plainitffs' eldest son, Zac and double back bedroom demonstrated the presence of stachybotrys, and Ms. Gallagher said that this suggested infiltration from the attic area.

29. Ms. Gallagher prepared a table identifying the levels of each of the species identified as being present in the dwelling house, and the locations within the dwellinghouse where they were present. She also took samples of the ambient environment outside the dwelling house for comparison purposes. Her principal findings are illustrated in the table below. It should be noted that the recommended guidelines for indoor environments prepared by the Indoor Air Quality Association states that a presence of less than <1,000 spores/m3 of air represents low levels of fungal contamination, whereas >2,000 spores/m3 of air represents elevated levels of fungal contamination.

SPORE TYPE OUTSIDE
COUNT/M3 ATTIC
COUNT/M3 SMALL BOXROOM
COUNT/M3 DOUBLE
BACK BEDROOM
COUNT/M3
Aspergillus/penicillium 21 112,000 15,200 2510
Epicoccum 13 21 21 0
Stachybotrys 0 14,200 148 42
Ulcocladium 0 3230 0 0
30. In general terms Ms. Gallagher said that there should be higher levels of mould spores outside than indoors. The levels of stachybotrys were of particular concern. While she agreed that the levels in the bedrooms where just a fraction of those in the attic, in her opinion the indoor levels should be no more than those outside and in this case samples taken outside indicated no presence at all of stachybotrys. She said that the levels found in the dwellinghouse would present concerns for the health of the occupants of the dwellinghouse.

31. Ms. Gallagher said that her second survey of the dwellinghouse indicated that the relative humidity levels in the attic were being influenced by the running of a hot shower in the en suite master bedroom, suggesting that the venting of the en suite bathroom through the attic space is contributing to the problem of moisture in the attic space and therefore the presence of mould.

32. She recommended that the source of moisture in the attic space should be investigated and remediated, and proper effective levels of ventilation should be introduced into the attic space and dwelling house generally. She said that ensuring effective ventilation should reduce the total suspended particulate and volatile organic compounds in the dwelling house. In other words, these steps should eliminate the environment within which the mould species identified thrive.

33. Ms. Gallagher also recommended that the dwelling house should be effectively cleaned and in her report she referred to the guidelines for managing mould growth in State buildings. She agreed that she did not contemplate the removal of the roof from the dwellinghouse for the purpose of removing the presence of mould, but at the same time she said that if she lived in the dwellinghouse she would like all materials affected or contaminated by the mould to be removed. However, she considered that it might be acceptable to have the mould treated by an appropriately qualified specialist contractor who should also subsequently inspect the dwelling house and certify the same as being mould free.

Dr. Brian Crook
34. Dr. Crook is a research microbiologist and team leader at the Health and Safety Laboratory in Buxton, United Kingdom, with over thirty years experience in investigating exposure of people to microorganisms and the health consequences of the same. Dr. Crook had been given a copy of the Allergy Standards Report. He considered their methodology in taking samples to be reasonable and he also agreed with Ms. Gallagher's conclusions. In his report he said that:-

> "It is medically recognised that exposure by inhalation to mould spores significantly in excess of normal background levels can trigger an allergic response in individuals who are either sensitised to such exposure or who are immunocompromised. The conclusion, based on similar mould species being present in samples taken by Ms. Gallagher and also in samples taken by a Mr. Creighton on behalf of the defendants, was that there was potential transfer of contamination from the loft area into a bedroom which would justifiably raise health concerns."

Dr. Crook considered that it was reasonable for the plaintiffs to seek alternative accommodation pending remediation of the problems.

35. Dr. Crook addressed a series of questions put to him by the plaintiffs' solicitors as regards the possible remediation of the mould problem. He was specifically asked about "fogging" which is the generation of fine droplets of a disinfectant chemical to fill an enclosed space, as distinct from fumigation in which a disinfectant gas or vapour is generated. The purpose of either of these methods of treatment is to treat contaminated areas that cannot be readily accessed by hand.

36. In his report, Dr. Crook said that fogging is likely to have limitations in terms of penetration, because while it will deliver

disinfectant to a surface, it may not penetrate deeply, nor will it necessarily access between timbers butted together or within joints. Where timbers overlap, it may deliver disinfectant to the facing surface only, but not to the surface masked by the overlap.

37. Dr. Crook confirmed that any works of remediation would have to deal with the cause of the problem i.e. dampness and ventilation issues, apart from treating contaminated surfaces. He also made the point that any disinfectant treatment will introduce hazardous chemicals into the building which would require a risk assessment from the point of view of the occupants, as well as plans to remove potentially harmful residues before reoccupation.

38. In his evidence he expressly said that he did not think that fogging would be adequate to decontaminate the affected surfaces in the dwellinghouse. He said that while fumigation might penetrate more effectively, he was of the view that if there is an alternative to these methods of treatment, they should be considered. The only alternative that he suggested was the removal of all contaminated materials, including contaminated timbers and the roof felt. Otherwise, he felt that there was a risk of the problem recurring.

39. In cross-examination it was put to him that the treatment of affected surfaces through fogging or fumigation, coupled with measures to address ventilation and dampness may be adequate to deal with the problem. He agreed that that might be so if the treatment is done thoroughly and effectively, without exposing the occupants to risk. However, he also said that if the steps taken are not effective, it would take some time, quite probably several months, for recolonization of spores to occur. For this reason, further air quality surveys would be required at a later time, which he suggested should be twelve months after the treatment of contaminated surfaces.

Dr. Peter Greally
40. Dr. Greally is a Consultant Paediatrician specialising in respiratory paediatrics since 1994. The plaintiffs' children were referred to Dr. Greally by Dr. Clarke. He saw the two children in September 2012, when Zack was four and half years of age and Leon was two and half years.

41. Dr. Greally confirmed he was familiar with the Allergies Standards' reports. He said the matter of most concern to him in the report was the high level of spores found in the attic and box room. He said that the presence of stachybotrys is not indicative of a healthy environment and the presence of these spores in the levels identified was abnormal, and in all probability a factor in the ill health of the children. He said that aspergillus/penicillium is a known cause of fungal bronchitis and a known pathogen. He said that the moulds identified have the capacity to produce unhealthy compounds that get into the body through the nose and eyes, and they have been documented as having the capacity to impair the immune system. He said that in general terms children are more vulnerable, having a lower body mass. He considered the level of stachybotrys found in the box room to be significant. His concluding remark was that the dwellinghouse was not a healthy environment and he would not like his family living in it, in its current condition.

Mr. Martin Lawless
42. Mr. Lawless has a primary degree in structural engineering but also holds a Masters degree in fire safety and lectures in fire safety. He has 35 years' experience in the area.

43. Mr. Lawless gave evidence as to the applicable regulatory background specifically, the Building Control Regulations 1997, Part B, and the various British standards referred therein, as well as the Health, Safety and Welfare at Work Regulations 1989.

44. Mr. Lawless gave evidence that the doors within the dwellinghouse are required to be a minimum of FD20, meaning that they are fire resistant for at least 20 minutes. The door in questions are actually FD30, meaning that they are fire resistant for 30 minutes, but they are deficient for two reasons:

1. the number of hinges are inadequate – each door should have three hinges as opposed to the two hinges fitted; and

2. There are no intumescent strips fitted to the doors. In the case of FD30 door sets, intumescent strips are required to be fitted to the doors.

45. While the above deficiencies can be addressed through retro-fitting, the difficulty is that it will be almost impossible to obtain certification for the doors without having them taken off site and certified at great expense. So while the doors may, after retro-fitting, be compliant with Regulations, it will not be possible to obtain a fire safety certificate in respect of the same.

46. Mr. Lawless also gave evidence that he drilled holes in the cavities around the windows and the doors and there was no evidence of fire safety cavity barriers in these areas. This can be remedied by taking out the windows and doors and retro-fitting the cavity barriers.

47. Having regard to these deficiencies, Mr. Lawless is of the opinion that it would be appropriate to check whether the party walls have the benefit of the protection of cavity barriers. These are essential to prevent the spread of fire from one building to the next. In order to undertake this exercise, it is necessary to remove roof tiles, and if there are no cavity barriers at these points, these too would have to be retro-fitted.

Mr. James Vesey
48. Mr. James Vesey is a chartered quantity surveyor, practising as such since 1966. He has worked in his own private practice since 1989. He describes his practice as being the standard kind of practice in quantity surveying involving as it does preparation of bills of quantities. He was retained by the solicitors for the plaintiff and was put in touch with them by Mr. Gibbons. He was given a copy of Mr. Gibbons' report, a copy of Mr. Lawless' report and a copy of the pleadings in the case. Mr. Vesey was asked to prepare an estimate of the costs of carrying out remedial works, and in order to do so he said that he would require a specification of works, which Mr. Gibbons subsequently provided to him.

49. Mr. Vesey prepared a report which estimated the cost of carrying out remedial works, to include the removal of the roof. The estimated costs came to a total of €72,241.02, to which VAT (at different rates) is applicable. His estimated provision for VAT is €10,702.54. He also estimates the sum of €600 for the provision of a performance band in connection with the carrying out of the works and an additional €13,328 in respect of the cost of design, drawings and other related professional costs, together with VAT thereon at the rate of 13%. Accordingly, his total estimate of the cost of carrying out the works specified by Mr. Gibbons comes to almost €97,000.

50. Mr. Vesey's estimate was subjected to rigorous cross-examination, and he did not demur from his estimate. However, what is apparent from the answers given under cross-examination and indeed from the estimate itself is the extent to which the estimated

cost of remediation works is influenced by the removal of the roof. While at one level this is unsurprising, at another level it seems inconsistent with the provision in the estimate for the sum of €14,731 in respect of the "main roof work amount". But there are other knock on effects to the cost of remediation works that are influenced by the removal or non-removal of the roof. In round figures, Mr. Vesey agreed that if the roof was not to be removed, and instead the attic space is treated in accordance with an estimate furnished by the defendants in the sum €2,895, the cost of the remaining works would not exceed €30,000.

The defendants' evidence

Professor Thomas C. Buckley
51. Professor Buckley has been head of Microbiology at the Irish Equine Centre for 33 years. He is a faculty associate of the Veterinary School in University College, Dublin. Professor Buckley gave evidence on behalf of the defendants. He said that his work includes identification and treatment of mould in racing stables, because of the effect that moulds can have on the performance of race horses.

52. Professor Buckley confirmed that there was no substantive difference in the air quality survey conducted by one of his colleagues, Mr. Creighton, and the survey conducted by Ms. Gallagher. He recommended that in order to deal with the problem, everything should be removed from the attic, including stored goods and insulation. He said that the attic should then be dehumidified and if there was mould on the trusses these should be washed down, and if necessary, air blasted. He said he would recommend that the attic is treated with mould specific disinfectant, using a fogging machine. He said that these disinfectants work quickly and all moulds would be eliminated, including those about which Dr. Greally expressed concern. He said that the drying out could be checked soon afterwards, although he recommended that ongoing checks should be conducted, for up to twelve months, to ensure there is no reoccurrence of the moulds. He said that if issues relating to dampness and ventilation are properly dealt with, there should be no reoccurrence of the moulds. He said that it is unnecessary to remove the roof of the dwelling house. He said that it is common practice to sterilise rooms affected by mould and moulds can be kept at harmless levels.

53. In cross-examination he was asked if disinfectants would only deal with the surface treated i.e. was there not a risk that it would not penetrate sufficiently. Dr. Buckley said that in his view it should do so. Dr. Buckley said that removing contaminated materials, including parts of the structure would be disproportionate – he described such an approach as using "a blunderbuss to kill a flee." He said that he has been doing work of this kind in stables in Ireland, the United Kingdom and France for the past fifteen years and he has never heard it suggested that a roof should be removed. He said that no area is 100% sterile and there is always likely to be some mould present, to some degree. In his opinion, the house can be restored to the position that it should have been in at the time of purchase by the plaintiffs, and this can be proven by sampling and testing after treatment.

Mr. Patrick Halley
54. Mr. Halley is an architect retained by the defendants for these proceedings. He qualified as an architect in 1978 and has extensive experience in commercial and residential developments. While Mr. Halley disputed most of the items identified by Mr. Gibbons as defects in the dwellinghouse, in the Scott schedule completed by the parties, the defendants agreed that works having a value of the order of €20,000.00 require to be carried out at the dwellinghouse. Almost all of these works are directly or indirectly related to the works which the defendants accept need to be undertaken to deal with the mould problem. Mr. Halley does not accept that any works are necessary to be undertaken to the chimney, the gutters and valley, the front elevation of the dwelling house (save for cracks in the plaster and the concrete stairs), the front balcony and the various parts of the premises which Mr. Gibbons alleged require damp-proof coursing, but which Mr. Halley believes is already in situ.

55. As far as the attic is concerned, Mr. Halley accepts that some of the works proposed by Mr. Gibbons are necessary, but rejects others. He rejects that any works are required to be undertaken to the chimney, to the trusses or to the valley boards. Although not accepting that fire stopping cavity barriers have not been installed, Mr. Halley agrees that if investigation demonstrates that these have not been installed, then they should be installed – this requires the areas concerned to be opened up, but the retrofitting of such cavity barriers is a relatively minor item involving no more than a half days work.

56. While it is accepted that the doors in the dwellinghouse are not compliant with fire safety regulations, Mr. Halley says that this can easily be addressed by the fitting of intumescent strips in the doors which will actually give them a greater level of protection from fire than that required by Regulations (30 minutes rather than twenty). While Mr. Halley accepts that it will not be possible from a practical point of view to obtain a fire certificate for the doors, after the fitting of the intumescent strips – because this would necessitate the removal of the doors to a specialist for certification – he is quite satisfied that such retrofitting is perfectly adequate to address this issue.

57. In his report, Mr. Halley addresses some fifty-nine items identified in the report of Mr. Gibbons. Of these, Mr. Halley considers that forty of them present no problem requiring remediation, save that of those forty, six items are matters of maintenance for the attention for the plaintiffs or the management company. Four items require further investigation to determine if any action is necessary. One of these relates to fire stopping at the party walls, two of them relate to the front balcony (one to ensure the adequacy of the lead work, and another to determine if DPC is in situ) and the fourth concerns cavity insulation board in the front wall at a vent pipe.

58. Of the remaining works which Mr. Halley agreed were necessary, he considered that none of the works involved were especially difficult. He said that he considered the response given by Mr. Neville on 13th July, 2010 to the plaintiffs (in response to the report of Mr. Kirwan-Browne) to be a reasonable response although some of the items were not specific pending further investigation. He also said that in his opinion the report of Mr. Forde of DBFL was a reasonable response to the report of Mr. Gibbons. He said that if he was advising the plaintiffs he would have advised them that the offer made by the defendants by letter of 5th April, 2012 was a reasonable letter. He said that the further offer of 18th February, 2016 made on behalf of the defendants in his opinion was an obvious solution to the impasse with provisions for resolution by an independent expert.

59. Mr. Halley said he did not think it was necessary to remove the roof in order to address the agreed defects – in his opinion all problems could be addressed without removing the roof. He said the source of the mould should first be eliminated through the elimination of condensation problems in the attic and the provision of proper ventilation, and thereafter through appropriate cleansing and sterilisation works.

60. Mr. Seamus Neville gave evidence on behalf of the defendants. He gave evidence as to the various efforts that he made to try and address the plaintiffs' grievances. These included his own response of 13th July, 2010 (which he said he felt addressed all the plaintiffs' concerns), his letter of 3rd May, 2011 enclosing the report of Mr. Forde (and proposing to do the works suggested by Mr. Forde), the letter of the defendants' solicitors of 5th April, 2012 and the letter of 18th February, 2016. Mr. Neville made it clear that at all times he has been willing to do whatever is necessary to address the defects on the premises, as may be agreed between the

parties' advisors. Moreover, he said that that offer was still open. He said that the defendants were always willing to address the mould problem, within the context of the professional advice. He said that remedial works could be undertaken and completed within two or three weeks, if they did not include the requirement to remove and replace the roof structure.

61. Under cross-examination Mr. Halley agreed that the first time the defendants specifically addressed the mould problem was when they instructed Prof. Buckley and the Irish Equine Centre to investigate and report in 2015. It was also put to Mr. Halley that the first time that there was a detailed response to the report of Mr. Gibbons was when Mr. Halley reported in November 2015. It was put to Mr. Halley that these reports would have been the appropriate response to Mr. Gibbons report of October 2010. Mr. Halley in reply said that he thought the responses that they gave at different times were adequate. However, he said that at no time did they consider that it was necessary to remove the roof. He accepted that the report of Mr. Forde did not address proposed remediation works in any detail.

Report of Dr. Raymond Connolly
62. Dr. Raymond Connolly is the principal in a company called Fire and Risk Solutions Limited. While he did not give evidence, his report was shown to the Court.

63. As regards the doors in the dwellinghouse, his report states that the retrospective fitting of seal hinges and intumescent strips will deliver an arrangement superior to the minimum standards required by the Building Regulations. His report states that the absence of such upgrading does not necessarily mean that the doors are not fit for purpose, but rather that upgrading will remove any ambiguities.

64. As regard the alleged absence of cavity barriers, his report states that the construction of the external wall as a twin leaf of concrete blocks permits a relaxation in the requirement to provide cavity barriers, subject to compliance with a technical guidance document referred to in the Regulations. If need be, the windows may be removed and suitable perimeter fire stopping retro-fitted. His conclusions are that the retrospective installation of intumescent strips and hinges in the doors, as well as the installation of fire stopping around the windows and the front door will remove any uncertainty regarding compliance with the Fire Regulations.

Mr. Seamus Neville
65. Mr. Neville is the first named defendant and the last witness to give evidence (save for a resumed cross-examination of Mr. Halley).

66. Mr. Neville said that he has been in the construction business for 40 years and estimates that he has built thousands of houses during that period. In this particular development, there were 325 houses. Mr. Neville explained that a finishing foreman would typically be on site for about 18 months after completion of works. That person would be available to purchasers who had problems that they wanted to have addressed by the building contractor. In this case however, because the plaintiff's dwelling was one of the first constructed, and because the development came to completion as a whole in the middle of 2016, there was at all times available to the plaintiffs a foreman on site to address their various complaints.

67. In Mr. Neville's view, the dwellinghouse was completed in a good and workman like manner in accordance with contractual requirements. He said that the defendants would have attended to any snags drawn to their attention and that they did not refuse to attend to anything which the plaintiff's requested them to attend.

68. Mr. Neville said that the Department of Environment inspected the development after completion of works and raised no issues. All appropriate certificates of compliance were issued in relation to the dwellinghouse. He was asked if the plaintiffs permitted the defendants to carry out remediation works, and he said that after the report of Mr. Kirwan-Brown, the defendants were not permitted to undertake works.

69. Following receipt of the report of Mr. Kirwan-Brown, Mr. Neville said that he made contact with the plaintiffs to establish what was required to address their complaints. He met with them on 8th July, 2010 and he thought that meeting went well. The defendants never refused to undertake any works suggested by Mr. Kirwan-Brown and it was always their intention to investigate any matters highlighted in the investigation in his letter to the plaintiff's on 13th July, 2010. He thought that they addressed all items raised by Mr. Kirwan-Brown.

70. Following the receipt of Mr. Gibbons' report, and the documentation accompanying the same, Mr. Neville says that he and the other defendants remained concerned to deal with the issues raised. However, when they received Mr. Gibbons' letter of 3rd March, 2011, they were not in agreement that the roof required removal, and they sought the advice of Mr. Forde. But they heard nothing further from anybody on behalf of the plaintiffs until the plaintiffs' solicitors moved on 14th October, 2011.

71. Following unsuccessful settlement discretions in March, 2012, the defendants instructed their solicitors to write to the solicitors for the plaintiff setting out proposals for settlement, and these were set out in the letter of the defendants' solicitors dated 5th April, 2012. This letter was intended to convey a willingness to undertake all necessary works, but no response was received (until 2015).

72. Mr. Neville said that the defendants remained prepared to undertake all necessary works, as may be agreed between the consultants, to resolve the matters. He said that the defendants had always been willing to deal with the mould issue, but subject to appropriate advice. And, subject to such advice, there are no limits on what the defendants are prepared to do to resolve the matter. Mr. Neville said that if the works required to remediate the premises did not include the removal of the roof, he estimated that they could be completed in about two or three weeks.

73. Under cross-examination, it was put to Mr. Neville that the defendants could not have been supervising their sub-contractors properly. For example, the failure to install foil backed plasterboard in the attic is indicative of a lack of supervision. Mr. Neville accepted that this was an oversight of the part of the said supervisor.

74. Mr. Neville was asked whether the common areas within the building development have been taken over by the management company. He said that while the transfer of the site comprising the common areas had not taken place, as a matter of fact the management company has taken over the maintenance of common areas. Moreover, the roof structures in the development all form part of the common areas.

75. It was put to Mr. Neville that while on the one hand he said the defendants were always anxious to carry out such remediation works as were necessary, they refused to replace a faulty front door and perhaps made a contribution towards the same and the plaintiffs replaced the door. Mr. Neville said that that contribution (of €800 out of a total replacement cost of €1700) was a gesture of goodwill only. The defendants did not think that the front door was in any way defective.

76. Mr. Neville agreed that the plaintiffs made a series of complaints to the defendants between 2005 and 2009, but he said that that was not unusual. He accepted that Mrs. O'Reilly had said that two attempts had been made to fix a leak from a balcony to the kitchen below, and that these attempts had been unsuccessful.

77. Mr. Neville confirmed that following receipt of the report of Mr. Kirwan-Brown, he attended at the dwellinghouse to meet the plaintiff's on 8th July, 2010, but he did not inspect the attic on that occasion. He did, however, inspect the en suite bathroom and saw evidence of mould growth. He also inspected the back background and identified a problem with the vents.

78. Mr. Neville accepted that he initially disputed any deficiency in fire stopping because at the inspection carried out by the Department of the Environment and the Architect at the time of completion of the building of the dwellinghouse when pressed on this, however, he could not be certain as to the extent of such an inspection. The most that he could say that they would have looked in through the trap door in the attic. In any case he agreed that at this point some deficiencies had been established at fire stopping, but he also said that the remedial works were of a minor nature.

79. It was put to Mr. Neville that Mr. Forde in his report of April, 2011 failed to address the issue of mould, and that in fact this issue was not addressed by the defendants until the reports of the Irish Equine Centre and the reports of Mr. Halley in 2015. Mr. Neville responded by saying that he thought that the response to this issue was at all times adequate, and they did not consider it necessary to remove the roof. He rejected the suggestion that the response given by the defendants in 2011 was inadequate; he said it needed to be seen in the light of the site meeting that took place and the plaintiffs' request to remove the roof, with which the defendants never agreed.

The Pleadings

80. The plaintiffs issued their plenary summons on 6th September, 2011. As already mentioned, in their proceedings they claim recission of the Building Agreement, together with an order for payment to the plaintiffs of the contract price. In the alternative, they claim damages for breach of contract, negligence and breach of duty.

81. The plaintiffs did not deliver their statement of claim until 16th February, 2012. The statement of claim refers to the Building Agreement, the completion of the purchase of the dwellinghouse by the plaintiffs from the defendants and lists all of the defects already described above which the plaintiffs claim are present in the dwellinghouse. It also refers to the ill health which the plaintiffs claim their children have suffered by reason of living in the dwellinghouse.

82. The plaintiffs claim that the defendants have been guilty of negligence and breach of duty, including statutory duty, in:-

> (a) failing to build and completely finish the dwellinghouse in a good substantial and workmanlike manner;
>
> (b) failing to use materials of an appropriate and reasonable quality;
>
> (c) failing to make good the defects; and
>
> (d) failing to ensure the building was free from defects which would endanger the plaintiffs and/or their children and/or constitute a danger to health.

83. A defence was delivered on behalf of the defendants on 25th October, 2012. It is admitted that the parties entered into the Building Agreement. It is admitted that it was a term of the Agreement that the dwellinghouse would be built and completed in a good, substantial and workmanlike manner as referred to in the statement of claim. While it is not admitted that it was agreed generally that any defects would be made good, reference is made to Condition 8(a) of the Building Agreement which provides for the circumstances in which defects would be made good whereby the defendants agreed as follows:-

> (i) "to make good any major defects which arise within a period of eighteen months after the completion date or the date of payment of the balance of the contract price, whichever is the earlier",
>
> (ii) "make good any minor defects which arise within a period of six months after the same date."

84. The defendants deny the existence of the defects in the dwellinghouse as particularised in the statement of claim. They admit, however, that as a gesture of goodwill and not otherwise, the defendants directed their servants or agents to attend at the dwellinghouse at various times between 2005 and 2010 at the request of the plaintiffs to investigate complaints made by the plaintiffs and without admission that any works were required or that the defendants had any liability to carry out any works. It is pleaded that the defendants only undertook minor repairs and works at the dwellinghouse in an effort to appease the plaintiffs. It is expressly denied that the defendants are or were in breach of the Building Agreement or that they were otherwise in breach of duty (including statutory duty) in the construction of the dwellinghouse.

85. It is denied that the dwellinghouse is unfit for human habitation and it is further denied that the defendants had any responsibility for the decision taken by the plaintiffs to vacate their home.

86. The defendants plead that if the plaintiffs suffered any of the alleged loss, damage or inconvenience as pleaded by the plaintiffs, that same were caused solely or in the alternative contributed to by the plaintiffs themselves in failing to maintain the dwellinghouse properly and in failing to ventilate the dwellinghouse adequately and in failing to afford the defendants the necessary access to the dwellinghouse for the purpose of carrying out works. It is further pleaded that the plaintiffs have failed to mitigate their losses.

87. In the defence, the defendants refer to the various offers made by the plaintiffs to undertake remedial works at the dwellinghouse, on 13th July, 2010, 24th February, 2011, 3rd May, 2011 and 5th April, 2012. This latter plea is somewhat curious given that it is stated on the face of the statement of claim that it was delivered on 16th February, 2012, and so presumably therefore it was not in fact delivered until sometime after 5th April, 2012.

88. It is pleaded that if there are any defects in the dwellinghouse (which is denied) that they are of a minor nature and that the repairs necessary to remedy the same would be brief and relatively inexpensive and would not require the plaintiffs to move out of the property for a prolonged or any period.

89. Finally, the defendants repeat the open offer made to the plaintiffs in their letter of 5th April, 2012.

Building Agreement – Remedy of Defects

90. The defendants rely upon Clause 8 of the Building Agreement, referred to above, which requires them to make good any major defects within a period of eighteen months after the completion date, and to make good any minor defects within a period of six months after the same date. The defendants do not rely upon the time limits referred to in that clause, but instead argue that insofar as the plaintiffs requested the remedying of defects long after the periods referred to in Clause 8, and the defendants volunteered to carry out works in response to that request, that the period for remedying defects has been extended, implicitly, by agreement between the parties. The defendant does not rely on Condition 8 (c) of the Building Agreement which states that it is a condition precedent to the operation of Clause 8 that the plaintiffs shall furnish to the defendants' particulars in writing of any alleged defects before the expiration of the relevant periods.

Submissions

Submissions of the plaintiffs
91. Counsel for the plaintiffs submit that it is well established that damages for breach of contract should be such as to place the person who has sustained a loss in the same situation, with respect to damages, as if the contract had been performed. Counsel refers to the old authorities of Robinson v. Harman 154 E.R. 363 (1848) and *Hadley v. Baxendale* (1854) 9 Ex 341.

92. Counsel also refers to the judgment of Asquith L.J. in the case of Victoria Laundry (Winsor) Limited v. Newman Industries Limited [1949] 2 K.B. 528 in which he stated as follows:-

> *"Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the 'first rule' in Hadley v. Baxendale. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses of special circumstance outside the 'ordinary course of things' of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss recoverable."*

93. Counsel for the plaintiffs also rely on *Hudson's Building and Engineering Contracts* (12th Ed.) which states that:-

> *"The measure of damages recoverable by the building owner for the breach of a building contract is…the difference between the contract price of the work or building contracted for and the cost of making the work or the building conform to the contract, with the addition, in most cases, of the amount of profits or earnings lost by the breach."*

94. It is submitted that the plaintiffs have not failed to mitigate their losses, as suggested by the defendants. The plaintiffs had to rent alternative accommodation, and also continue servicing their existing mortgage, and accordingly, could not raise funds to carry out remedial works themselves.

95. Moreover, the plaintiffs submit that it would be inappropriate to permit the defendants to carry out remedial works in circumstances where the defendants failed to put forward an acceptable resolution as regards the problem of mould in the attic, and against the background that the plaintiffs' childrens' health had suffered as a consequence of that problem. The plaintiffs also reject any suggestion that they were guilty of inordinate and inexcusable delay in the prosecution of these proceedings as alleged by the defendants.

96. In all of the circumstances, therefore, the plaintiffs argue that damages are an appropriate remedy and further argue that the Court should award general damages in view of the impact upon the plaintiffs on their quality of life and enjoyment of life by reason of the defendants' breach of contract. The plaintiffs rely on the decisions of Hogan J. in *Mitchell & Anor v. Mulvey Developments Limited & Ors* [2014] IEHC 37 and O'Sullivan J. in *Leahy v. Rawson* [2004] 3 I.R. 1.

Defendants' submissions
97. For their part, the defendants submit that they have at all times sought to address the plaintiffs' complaints in a reasonable manner. They point to the various attempts by them, outlined above, to address the plaintiffs' complaints and in particular the offer set out in the letter of 5th April, 2012, from the defendants' solicitors to the plaintiffs' solicitors, the terms of the defence itself, which contained an open offer and the letter from the defendants' solicitors to the plaintiffs' solicitors of 18th February, 2016.

98. The defendants point to the fact that the Building Agreement places an obligation on the defendants to remedy major defects that arise within a period of eighteen months after the completion date, and minor defects that arise within a period of six months after the same date. However, notwithstanding the limitation periods contained in the Building Agreement, the defendants, at all times, agreed to make good any defects and that each of the parties continued to operate on the basis that the period within which repairs, major and minor, could be carried out had been extended. That this is so was clear from the request that Mr. Gibbons made of the defendants in December 2010 to make proposals for remediation on the clear understanding that it was the defendants would carry out whatever works might be agreed.

99. The defendants rely upon the decision of Lord Diplock in the House of Lords in the case of *Kaye Limited v. Hosier & Dickinson* [1972] 1 W.L.R. 146 at p. 166, wherein he stated, regarding a clause in a building contract used in the United Kingdom, which required the contractor to make good defects, that the clause:-

> *"imposes upon the contractor a liability to mitigate the damage caused by his breach by making good defects of construction at his own expense. It confers on him a corresponding right to do so. It is a necessary implication from this that the employer cannot, as he otherwise could, recover as damages from the contractor the difference between the value of the works if they had been constructed in conformity with the contract and their value in their defective condition, without first giving the contractor the opportunity of making good the defects. The obverse of this coin is that the contractor is under an obligation to remedy the defects in accordance with the architect's instructions."*

100. The defendants also rely upon clauses in the home bond agreement which clearly envisage that the contractor will attend to any major defect in the dwelling, either by remedying the major defect or, with the agreement of home bond, paying the cost of the remedial works to the purchaser. The home bond documentation requires also the purchaser to allow the contractor to inspect, investigate and carry out works to make good defects.

101. For their part, the plaintiffs submit that any such rule is not unqualified and they rely upon the authority of *Mul v. Hutton Construction Limited* [2014] EWHC 1797, wherein Akenhead J. stated that:-

> *"What triggers the Contractor's obligation to make good defects under the Contract is the appearance and then*

notification to the Contractor of such defects by the CA within or up to 14 days after the end of the Rectification Period. That obligation must carry with it the concomitant right on the part of the Contractor to do such making good and, by way probably of an implied obligation on the part of the Employer to co-operate reasonably, the Employer must facilitate this making good process, most commonly by way of providing access to the Property (in this case)…."

102. But Akenhead J. then goes on to consider what might happen if there was no rectification period in the contract, he states:-

"The usual rules about damages would apply such as causation, remoteness, foreseeability and, of course mitigation of damage. It will often be the case that the Employer can be said to have failed to mitigate his or her damage if he or she fails to give the contractor to opportunity to put right the breaches of contract, namely the culpable defects in question. However, it is not invariably the case that the Employer would have failed to mitigate damage in failing to give the Contractor this opportunity; examples might be where there were such wholescale defects that no reasonable employer could be expected to have that Contractor back on site, where there had been fraudulent behaviour on the part of the Contractor relating to the Works or where the Contractor had made it clear that it was not prepared to return to put right alleged defects; it all depends on the facts and the circumstances. Assuming that remedial works were the proper basis of an award of damages, the appropriate damages would be related to the reasonable cost to the Employer of the remedial works and employing other parties to do them, unless he or she had failed to mitigate by not offering the opportunity to the Contractor to put right the defects in question; in this latter case, the Employer would be limited to what it would have cost the Contractor to put them right (this cost often being significantly less than that of bringing in new contractors or tradesmen to do so).

103. The defendants submit that in his evidence, Mr. Gibbons agreed that the defendants would be perfectly competent to undertake the remediation works, subject to proper supervision. Mrs. O'Reilly in her evidence said that she had confidence in Mr. Gibbons and would be guided by his advice. If, therefore, matters got to the point where a programme of works was agreed, there is no reason why the works should not be undertaken by the defendants, subject to whatever supervision is appropriate. While it is submitted for the defendants therefore that at no time was it reasonable for the plaintiffs to take the view that the defendants were incapable of carrying out the necessary remedial works. Indeed, up to the time that Mr. Gibbons had been retained, the plaintiffs themselves had been pressurising the defendants to do remedial works and since Mr. Gibbons confirmed that the defendants were capable of doing the works (subject to his supervision), it follows that they should be permitted to do so.

104. It is further submitted on behalf of the defendants that the very considerable delay in progressing this claim was entirely due to the plaintiffs, as well as their advisors. On the evidence of the plaintiffs' own witnesses, it is submitted that the resolution of the defects should have been achieved over the period of approximately ten weeks made up as follows:-

(a) three weeks from Mr. Gibbons to investigate, specify and report;

(b) three weeks for allergy standards to report and for Mr. Vesey to cost remedial works;

(c) three weeks to carry out remedial works; and

(d) one week for retesting for mould.

105. If matters had progressed on that basis, remedial works would have been completed by the end of October 2010, at no cost to the plaintiffs with no legal costs, and without the expense of renting alternative accommodation. This is based on the assumption that the roof is not removed, but Mr. Vesey suggested that if it were required to remove the roof, the works would have taken no more than an additional two weeks.

106. The defendants contend that the evidence does not support the proposition that the roof requires to be removed in order to remediate the house and that Mr. Vesey acknowledged that if the removal of the roof was not required, the remaining works would cost of the order of €30,000 (at most), if an independent contractor was employed, to include contingency works and supervision. It is also submitted that, given the timescale referred to above, the plaintiffs had no need to rent alternative accommodation if matters were progressed sufficiently by their advisers. The defendants submit that the following would be a fair outcome to the proceedings:-

(a) an order for specific performance of the Building Agreement, to the effect, that the premises be completed in a good and substantial workmanlike manner in accordance with the specification and plans therefore, and in compliance with the appropriate building regulations, to the reasonable satisfaction of an architect or engineers of the plaintiffs' choice within two months from the date of the court order;

(b) compensation for inconvenience and disturbance measured by reference to the duration of the same which in the defendants' submission is for the period between August 2010 to November 2010;

(c) costs on the Circuit Court scale and to the point of the delivery of the statement of claim only, in view of the open offer of the defendants' of 5th April, 2012.

Discussion and Decision

107. As noted at the outset, the principal relief sought by the plaintiffs in these proceedings was the equitable remedy of rescission. It is probably on account of their desire to secure that relief (at that point in time) that they did not elect to invoke the arbitration clause at Clause 11 of the Building Agreement. At the conclusion of the trial, counsel for the plaintiffs informed the Court that the plaintiffs were no longer seeking the remedy of rescission and instead were seeking an award of damages for breach of contract (also claimed in the proceedings, in the alternative, from the outset).

108. The defendants acknowledge that there are defects requiring remediation in the dwellinghouse. In the Scott schedule furnished by the parties to the Court, the defendants indicate agreement to the carrying out of works having a value of approximately €19,444.07. This is out of a total claimed in the sum of €72,241.02 (the balance of the plaintiffs' claim of €97,000 is made up of VAT, the cost of a performance bond and an estimate for the costs of design and related expenses).

109. The single biggest issue of contention as between the parties (which accounts for the difference between €19,440.07 and €72,241.02) is whether or not there is a necessity to replace the roof structure of the dwelling house in its entirety. The value of these works, net of VAT is €14,731.89, and, of course, other costs increase if that is allowed in full such as VAT, preliminaries and

professional costs which are percentage based.

110. There are also a certain number of works which the defendants, while not agreeing that they need to be carried out, have agreed the value of in the event that the works prove to be necessary following investigation by opening up. Chief amongst these are the provision of vertical and horizontal cavity barriers for fire safety purposes, having a value of €4,290.98. A number of items claimed by the plaintiffs would only arise in the event of an award of damages in favour of the plaintiffs, as distinct of an order for specific performance, since, in the event of the latter, certain costs would probably not be incurred as the defendants would have the in-house capabilities to do certain things without incurring external costs e.g. provision of scaffolding (€5,500), provision of a safety supervisor (€1,500) and the amount claimed for preliminaries (€4,696.37).

111. There are a considerable number of smaller items claimed by the plaintiffs and denied by the defendants in respect of which it is almost impossible for a court to prefer the evidence of one consulting engineering over another. It is for this very reason that clause eleven of the Building Agreement contains the arbitration clause referred to above which, was not invoked by either of the parties to these proceedings. Arbitration would, in my view, have been a far more suitable form of dispute resolution to deploy in this case, because of the very technical nature of the matters in dispute. Be that as it may, it goes without saying that the parties are fully within their entitlements to have recourse to the courts instead.

Decision

112. From the very beginning of his retainer, Mr. Gibbons identified that there was a problem in the attic with mould. He knew this for certain as soon as he received the reports from Allergy Standards in September 2010, although he did not actually notify the defendants until December 2010. He followed up in January 2011, and after some delay on the part of the defendants, he received a response from their engineer, Mr. Forde, in April 2011. This response was not in Mr. Gibbons' view adequate, but it appears that he did take the issue up with Mr. Forde in any purposeful way. He says that he made a telephone call to Mr. Forde at around this time, but he took no further action other than to recommend to the plaintiffs that they should consult with Mr. Cadden, solicitor, about the matter. Mr. Gibbons did not put forward any suggestions for remediation of the mould problem, which was the single biggest problem he identified in his report. He said that he did not think it was his responsibility to do so – he felt it was the responsibility of the defendants to put forward proposals for remediation, for his consideration. In a reminder letter that he sent to the defendants by email on 3rd March, 2011, before he received the report from Mr. Forde, he mentioned, only in passing, that the defendants should put forward proposals to include the removal of the roof, but without any explanation as to why he considered this to be necessary.

113. There can be little doubt at all but that this was at all times the single most contentious issue between the parties and it is more than likely that it is that single issue that has prevented the parties from reaching agreement as to remediation works generally.

114. The defendants submit that, with the exception of Mr. Gibbons, not a single witness, including those of the plaintiff, supported the proposition that it is necessary to remove the roof to remediate the attic space and the mould problem. There was general agreement amongst the professional witnesses that, if the ventilation issues in the attic are resolved, then the conditions within which the mould thrives are removed. Accordingly, it is the defendants' contention that to remediate the mould issue, all that is required is to remove and replace the insulation and the roof felt in the attic, and to treat the timbers in the attic appropriately, through cleaning, and disinfecting and, in the case of areas that are difficult to reach, through to treat either fogging or fumigation.

115. However, Dr. Crook expressed significant reservations about fogging and fumigation. In his opinion those treatments are likely to have limitations in terms of penetration. They are unlikely to penetrate surfaces deeply, and nor will they certainly access contaminated areas between timbers butted together or within joints. He considered that such treatment measures will not ensure eradication of mould contamination because any mould problems are likely to have resulted in mycelia penetration, growing in small confined spaces, between joints and in cracks and fissures in timbers, because this is where increased moisture creates the microclimate conducive to growth. He is also concerned about the potential effect of treatment chemicals on human health and he expressed a preference that if there is a reasonable and practicable alternative to fumigation or fogging, that he would prefer to see that course followed.

116. There is of course an alternative and that is the removal of the entire roof structure. It may reasonably be asked whether that is a practical or proportionate option? However, in asking that question a number of things need to be born in mind. The first is that presence of mould in the attic space is entirely attributable to the extraordinarily poor workmanship in the ventilation of the attic space and in the failing to insulate a ventilation pipe leading from the en suite bathroom through the attic. These are entirely rudimentary matters of construction. Failure to attend to these matters properly has led to a build-up of unhealthy mould in the attic space which is likely to have infested parts of the attic that may not be amenable to treatment, according to Dr. Crook. While these organisms occur naturally in the environment and could well arrive, through no fault of anybody, into any given environment, the fact is that in this particular case the problem was caused by the poor workmanship of the defendants. Moreover, it is just one of many problems in the dwellinghouse that the defendants acknowledge and in the Scott schedule handed into Court they have agreed that the cost of repairing items not in dispute is of the order of €20,000.

117. The plaintiffs claim that the presence of mould in their household has had damaging effects upon the health of their children. Proceedings have been issued on behalf of their children, and it is not part of the role of the Court in these proceedings to arrive at any conclusions relation to those proceedings. However, it is fair to observe that having regard to the medical evidence in the case, the plaintiffs concerns in this regard are reasonably entertained. I have also had regard to the evidence of Dr. Greally, who gave evidence that the spores found in the attic can cause significant health problems and, *inter alia* have the capacity to impair the immune system. While I appreciate that this may depend upon the concentration levels at which the spores are present and that these levels would be reduced very significantly by the works proposed by the defendants, nonetheless in my view, the plaintiffs are entitled to re-enter their house, secure in the knowledge that these matters have been fully addressed without qualification, and that there are no residual spores present in the attic that might cause any health problems to themselves or their children in the future. Or at least that should such an event occur again, it will not be on account of the defective construction of their dwelling house.

118. It should also be observed that Dr. Crook made the point that in the event that the treatment option is taken, it will be necessary to follow up with further inspections six and twelve months after the works have been completed, to ensure that the problem has been eradicated and has not recurred. I pose the question: why should the plaintiffs have to put up with such concerns, or have any worries at all when they take back possession of their dwellinghouse after completion of remediation works having been obliged to leave the dwellinghouse in 2010? I appreciate that not all the delay in bringing matters to a conclusion in the intervening period is attributable to the defendants, but that does not mean that the plaintiffs should be placed in a position whereby they should have to have any continuing doubts about their environment upon completion of remediation works. For these reasons, I consider it reasonable that the roof structure should be replaced, to put the plaintiffs in the situation that they should have been in from the outset.

119. The plaintiffs have abandoned their claim for an order of recission of contract and instead seek an order for damages for breach of contract as well as general damages. Damages are of course, available as a remedy for breach of contract, but it is not the only remedy. Having sought the remedy of recission, the plaintiffs have brought themselves within the equitable jurisdiction of the Court. The defendants have submitted that in all of the circumstances the most appropriate remedy is an order for specific performance of the contract on certain terms. The defendants have submitted that they are contractually entitled to re-enter upon the premises to undertake works of remediation and I agree with their submission that this is a corollary of the obligation imposed upon them under Clause 8 of the Building Agreement. I draw support for this conclusion from the dicta of Lord Diplock in *Kaye Ltd. v. Hosier and Dickenson* referred to above and also from the provisions of the home bond agreement which require the purchaser i.e. the plaintiffs to permit a home bond member i.e. the defendant to enter the dwellinghouse for the purpose of the carrying out of works to make good defects. Accordingly, since I have come to the conclusion that the roof should be replaced I consider that this is the fairest order to make as it will enable the defendants to undertake these works at significantly less cost than would be incurred by a third party contractor. I also believe that the defendants are contractually entitled to re-enter the premises for such purposes. Any concerns that the plaintiffs may have about the defendants undertaking the works are adequately addressed through appropriate supervision as Mr. Gibbons acknowledged.

120. Removal of the roof will also have the added benefit of removing doubts about some of the other issues raised by Mr. Gibbons, such as fire stopping, and to address this issue as needs be, in the event that there are any shortcomings. Accordingly, although it is probably not quite what the defendants had in mind, I am persuaded that the most appropriate resolution to these proceedings is to make an order for specific performance of the Building Agreement, to be completed in a good and substantial and workmanlike manner in accordance with the specifications and plans therefore, and complying with all applicable building regulations, and to the satisfaction of an architect or engineer to be appointed by agreement between the parties, or failing such agreement, by the President for the time being of the Institute of Engineers of Ireland within two months of the date of this order, but subject to the specific direction that roof shall be removed and contaminated materials disposed of where remediation is not possible; conversely however where the engineer appointed is satisfied that remediation of materials is possible they may be reused in the reinstatement of the roof structure. This is consistent with the guidelines for managing mould growth in State buildings, to which I was also referred during the course of these proceedings, because Ms. Gallagher referred to the same in her report as a guideline to the remediation of the dwelling house. Any decision taken by the engineer appointed on any matter of remediation shall be binding on the parties and the defendants shall undertake such works as he/she shall direct in accordance with the foregoing provisions.

121. I turn now to the question of special damages and specifically the rental costs incurred by the plaintiffs in the rental of alternative accommodation since they left the dwellinghouse in August 2010. The first point to be made is that they kept their losses to a minimum in the first year in that they stayed with Mrs. O'Reilly's mother at no cost at all. Since then however, they have rented alternative premises at what appear to be reasonable levels of rent. It is fair to observe that the defendants made several significant efforts to resolve these proceedings through various offers, but the difficulty is that at all times the defendants were unwilling to agree to replace the roof structure, and therefore it was inevitable that these proceedings would have to be brought to a conclusion. While there were delays on the part of the plaintiffs in doing so, it may reasonably be pointed out that the defendants could have taken steps to bring the proceedings on earlier had they wished to do so, having delivered a defence in April 2012. Accordingly, since it was necessary for the plaintiffs to bring these proceedings to a conclusion in order to achieve the remedy now afforded to them, I do not think it would be fair to deprive them of any of the costs of renting alternative accommodation, and I will make an order for the full costs of the same upon the conclusion of the remediation works by the defendants.

122. Finally, while counsel for the plaintiffs have advanced submissions that the plaintiffs should also be awarded general damages, having regard to the very extensive other reliefs granted to the plaintiffs by this decision, I do not consider that an award of general damages is merited.