Neutral Citation Number: [2006] IEHC 51

THE HIGH COURT

2003 No. 5972 P

BETWEEN

LEO LARKIN, TRAVELOWEN LIMITED (IN VOLUNTARY LIQUIDATION) AND MARGARET LARKIN

PLAINTIFFS

AND

IQBAL JOOSUB AND DUBLIN CITY COUNCIL AND BY ORDER CIARAN CALLAN

DEFENDANTS

Judgment of Ms. Justice Finlay Geoghegan delivered 23rd February, 2006.

1. The plaintiffs are the owners of No. 17 Upper Leeson Street in the city of Dublin. It is held as an investment property and let in units. The first named defendant and his late uncle, Ismail Joosub, were the owners of No. 16 Upper Leeson Street until it was vested in the second named defendant, the Dublin City Council, on the 22nd September, 2000, following procedures taken by the City Council pursuant to the provisions of the Derelict Sites Act, 1990. The third named defendant is joined as representative of the estate of the late Mr. Ismail Joosub. In this judgment I will refer, as necessary, to the first named defendant and the interest represented by the third named defendant collectively as "The Joosub Defendants". Nos. 16 and 17 Upper Leeson Street are adjoining terraced houses. In August, 1998 a fire occurred in No. 16 Upper Leeson Street, which left what was initially a small hole in its roof. It is undisputed that the hole in the roof got bigger with time and was not repaired until February, 2001.

2. The plaintiffs' claim is for loss and damage which they suffered by reason of damage alleged to have occurred to No. 17 as a result of water falling through the hole in the roof of No. 16 and its percolation along and through the party wall between Nos. 16 and 17 with resultant damage to No. 17. The losses claimed are the costs of repair of the damage to No. 17 and loss of rent.

3. The plaintiffs' claim against the Joosub defendants and Dublin City Council was put forward on the following grounds:

> (i) A claim in negligence against each defendant for the respective periods for which they were the owners of No. 16 Upper Leeson Street.
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> (ii) A claim in nuisance against each of the defendants for the respective period in which they were the owners and occupiers of No. 16.
>
> (iii) A claim pursuant to the rule in *Rylands v. Fletcher* against each of the defendants for the same respective periods.
>
> (iv) A claim against the City Council for negligence and breach of duty in the exercise of its statutory powers and duties under the Derelict Sites Act, 1990.

4. In the course of the hearing it became apparent that many of the issues relating to the quantum of damages depended on whether or not active dry rot was present in Nos. 16 and 17 Upper Leeson Street. Further, it appeared that there was substantial agreement that Dr. Brian Ridout was an appropriate expert to carry out an inspection on both properties and report. Accordingly, on the 12th July, 2005, the Court made orders pursuant to O. 50, r. 4 of the Rules of the Superior Courts for the entry of the persons named therein to Nos. 16 and 17 Upper Leeson Street and, for the carrying out of an inspection, the taking of samples and the furnishing of a written report to all the parties including recommendations as to the necessary treatment and works to be carried out to affected areas (if any). The Court also made on the same day orders that the plaintiffs, following Dr. Ridout's report, furnish details of the remedial works required having regard to the contents of the report and the cost of same and ordered a response from the defendants.

5. Following the provision of the report by Dr. Ridout and the further exchanges directed between the parties, the Court was informed that agreement had been reached, without admission of liability by the defendants, that the cost of the remedial works to No. 17 resulting from the penetration of water is €275,000 (inclusive of VAT) and that further agreement had been reached (again without admission of liability) that the loss of rental income of the plaintiffs for the periods (both past and future) during which the plaintiffs were or will be unable to let all or part of No. 17 Upper Leeson Street by reason of water percolation and repair works was agreed at €255,000.

6. The report of Dr. Ridout of August, 2005 and subsequent reports from the relevant architects, structural engineer, quantity surveyor and comments of a consultant timber technologist were handed in to court to form part of the evidence in the case by agreement of the parties. Having regard to the agreement reached on quantum, nothing turns on the detailed content of those reports and no oral evidence was called from the persons preparing same.

7. The parties each prepared outline closing submissions in writing and closing oral submissions were made in November, 2005 by counsel on behalf of all the parties. Whilst the defendants each deny liability for the losses claimed in the agreed amounts no submission was made that any defendant was not liable for any specified portion of the losses.

8. The plaintiffs, in opening the case and in their closing submissions, claimed damages also by reason of the alleged state of dereliction of No. 16 Upper Leeson Street as a consequence of which it became occupied by squatters and allegedly infested with rats. As the two heads of damages in respect of which the quantum has been agreed (without prejudice to the issue of liability) are agreed as the quantum caused by water penetration, it is unnecessary for the Court to consider this additional claim. There is no separate amount of damages claimed to have resulted from the alleged state of general dereliction of No. 16 Upper Leeson Street.

9. The defendants each contend that the plaintiffs failed to mitigate their loss.

10. The City Council also contends that, on the authority of the decision of the Supreme Court in *Shelly-Morris v. Bus Átha Clíath* [2003] 1 I.R. 232 and an alleged exaggeration by the plaintiffs of their claim and an alleged intention to deceive the court, to which I will refer in more detail below, that the plaintiffs are not entitled to recover damages from the defendants.

Claim in negligence against first and third defendants

11. The plaintiffs' claim in negligence against the first and third named defendants is that as owners of the adjoining property they owe a duty of care to the plaintiffs to take reasonable care of the premises of which they are owners so as to prevent it from becoming dangerous and a nuisance and causing damage to the property of the plaintiffs. The plaintiffs rely upon the judgment of Davitt P. in *Victor Weston (Éire) Limited v. Kenny* [1954] I.R. 191 in relation to the nature of the duty of care owed by an owner of property to adjoining owners. In that case the plaintiff was a tenant of a ground floor and basement premises in Middle Abbey Street, Dublin. The defendant was the owner of the premises and the landlord. The defendant had let the remaining three floors of the premises and had retained the hall, staircases and landing on which there were lavatories which were not included in any of the leases or lettings of the premises. Flooding occurred by reason of a tap having been left on in a top floor lavatory which damaged the plaintiff's stock in the ground floor and basement. The evidence was that, prior to the incident in question, complaints had been made to the defendant that the tap in the lavatory was defective. Davitt P. held the defendant liable for the damage to the plaintiff's stock. In relation to the duty of care he stated at p. 197:

> "The maxim, *sic utere tuo ut alienum non laedas*, expresses in the broadest way the duty which a person, being the owner or occupier as the case may be of lands or buildings, owes to his neighbour, whether that neighbour be an adjoining owner or occupier, a person lawfully upon adjoining premises, or a member of the public using the adjoining highway. The extent of the duty varies from an absolute obligation to prevent dangerous matter from escaping, as in the case of *Fletcher v. Rylands* L.R. 1 Ex. 265 to an obligation to take reasonable care to prevent the premises from becoming dangerous and a nuisance, as in *Cunard and Wife v. Antifyre, Ltd.* [1933] 1 K.B. 551, *Taylor v. Liverpool Corporation* [1939] All E.R. 329 (as regards persons on adjoining premises) and *Kearney v. London and Brighton Railway Co*. L.R. 6 Q.B. 759, *Tarry v. Ashton* 1 Q.B.D. 314, *Palmer v. Bateman* [1908] 2 I.R. 393 (as regards persons on the highway)."

12. In the decision at p. 198 Davitt P. expanded further on the duty of care where he stated:

> "I can see no difference in principle between the position of the defendant in this case and that of the landlords in *Hargroves, Aronson and Co. v. Hartopp* [1905] 1 K.B. 472 and *Cockburn v. Smith* [1924] 2 K.B. 119. It seems to me that the same principle applies to each, and that the defendant in this case was under a legal obligation to take reasonable care to prevent any part of the premises which he retained from becoming a source of danger or damage to the adjoining occupiers, his tenants, and so to prevent the water from escaping from his top lavatory and doing damage. The next point to be decided, therefore, is whether the defendant was negligent."

13. Counsel for the first and third defendants sought to distinguish the above decision by reason of the fact that the defendant was a landlord. It does not appear to me that it is capable of being so distinguished. The principles as stated appear to me to relate to the defendant as an owner of adjoining property and I would respectfully agree with them as such. Accordingly, I conclude that the first and third named defendants were under a legal obligation to take reasonable care to prevent any part of their premises at No. 16 Upper Leeson Street from becoming a source of danger or damage to the adjoining occupiers or owners including the plaintiffs.

14. In *Victor Weston (Éire) Limited v. Kenny* the defendant was found to be negligent. That finding was primarily based upon the neglect by the defendant of the retained portion of the premises. The defendant was considered by the judge to have been under an obligation to carry out a periodic inspection of the retained portions and in particular the lavatories and water supply.

15. On the facts of this case the plaintiffs' claim is that the Joosub defendants were in breach of the duty of care owed to them as the owners of the adjoining property in failing to repair the hole in the roof caused by the fire in August, 1998. It is submitted that those defendants knew, or ought to have known, of the hole in the roof; that as the hole in the roof was located close to the party wall with No. 17 it was foreseeable that if rain was permitted to enter through the hole in the roof that it would flow down the party wall, penetrate into No. 17 and cause damage to No. 17.

16. It is not disputed that the hole in the roof was close to the party wall. As a matter of common sense it is foreseeable that a hole in a roof close to a party wall in a terraced house, which permits rain to fall down along the party wall, may cause damage by penetration of the water through the party wall into the adjoining premises. The only real issue is whether the Joosub defendants on the facts herein knew, or ought to have known, of the hole in the roof caused by the fire.

17. The Joosub defendants had been resident in South Africa for many years prior to the fire. The first named defendant did not give evidence. The evidence of Mr. Larkin, the first named plaintiff, was that the property was looked after on behalf of the owners (then unknown to him) by a Mr. Con Ryan, an estate agent. Mr. Ryan did not give evidence.

18. On the evidence, I find that No. 16 was already in a derelict state prior to the fire in August, 1998. Prior to that date the property had been occupied by squatters and the subject of many complaints from Mr. Larkin to Mr. Ryan, the City Council and others. In 1997 Mr. McLoughlin of the Derelict Sites Section of the City Council wrote directly to the first named defendant in South Africa. In response to that letter Mr. McLoughlin was contacted by BCM Hanby Wallace, solicitors, on behalf of the first and third named defendant. In September, 1997 Mr. McLoughlin wrote to BCM Hanby Wallace stating that the property was in a derelict condition and understood to be occupied by squatters and threatening proceedings under the Derelict Sites Act.

19. In accordance with the principles set out by Davitt P., an owner of property owes a duty of care to the owners and occupiers of adjoining property to take reasonable care to prevent his property becoming dangerous or a nuisance. Such a duty of care must include an obligation to inspect the property from time to time and to carry out such repairs as appear necessary. A person who is a non-resident owner must be under a duty of care to arrange for someone to carry out such inspections and repairs on his behalf.

20. The fire occurred in August, 1998. The evidence is that initially the hole in the roof was small and increased in size over the following months. On the evidence given I am satisfied that the hole was such that it must have been evident upon any reasonable inspection of the property carried out in the months following the fire. I find, as a matter of probability, that Mr. Ryan, agent for the Joosub defendants, was aware of the hole in the roof of No. 16 following the fire. The evidence was that the hole was initially covered with polythene which was then blown off and the hole in time worsened.

21. Accordingly I am satisfied that the Joosub defendants were aware of the hole in the roof of No. 16 and failed to take any steps to repair it or, if they were not aware, such lack of knowledge was caused by their own breach of duty in failing to arrange for regular inspections of the property to be carried out on their behalf in this jurisdiction.

22. Counsel for the first and third named defendants sought to rely upon the absence of any evidence from the plaintiffs that they had made those defendants aware of the damage allegedly being done to No. 17 Upper Leeson Street by the rainwater falling on the party wall through the hole in the roof of No. 16. The first and third named defendants' liability in negligence to the plaintiffs for the damage caused by their breach of duty in failing to repair the hole in the roof is not dependant upon the plaintiffs notifying them of

the alleged damage to No. 17. It may be relevant to the issue of mitigation which I will consider further below.

23. Accordingly, I have concluded that the first and third named defendants are liable in negligence to the plaintiffs for the damage caused to No. 17 by reason of the negligence and breach of duty owed by the first and third named defendants in permitting the hole in the roof to remain without being repaired and permitting rain water to fall down the party wall and percolate into No. 17.

24. The first and third named defendants remained the owners of the property until it vested in the second named defendant on the 22nd September, 2000. It is not disputed on behalf of the first and third named defendants that damage occurred to No. 17 by reason of the water percolation prior to that date.

Claim in negligence against the second named defendant as owner and occupier.
25. The duty of care owed by Dublin City Council as the owner and occupier of No. 16 Upper Leeson Street is no different from that of the first and third named defendants. In *Glencar Explorations Plc v. Mayo County Council (No. 2)* [2002] 1 I.R. 84, Keane C.J. at p. 139, in considering the liability of the defendant in that case for the alleged negligence in the performance of a statutory function, distinguished other situations in the following terms:

> "There are, of course, many instances in which a public authority will be liable in negligence because the duty of care imposed by the law on them is no different from that arising in private law generally. Obvious examples are the duties owed by local and other public authorities arising out of their occupation of premises or their role as employers. In such cases, the plaintiff does not have to call in aid the fact that the defendants may have been exercising a statutory function: their duty of care as occupiers, employers, *etc*., is no greater, but also no less, than that of their counterparts in the private sector."

26. The second named defendant became the owner of the property on the 22nd September, 2000, when there had been a hole in the roof for approximately two years.

27. It was not disputed that it was then under a duty of care to repair the hole in the roof. The roof was not repaired until February, 2001. It is alleged on behalf of the plaintiff that the second named defendant was negligent and in breach of duty in taking approximately five months to repair the roof. There is a separate and discrete allegation of negligence in relation to events which occurred during the repair work on the roof in February, 2001.

28. The duty of care owed by the second named defendant to the plaintiffs in September, 2000 must be considered in the context of communications which had taken place between the parties prior to that date and the second named defendant's knowledge of the damage being caused to the plaintiffs' property by the state of dereliction and, in particular, the hole in the roof of No. 16 Upper Leeson Street.

29. The evidence given on behalf of the second named defendant was that Mr. Larkin had been in contact with the Derelict Sites Section since approximately July, 1997. Mr. Larkin had met with representatives of that section prior to the fire in August, 1998. At that stage the complaints related to the general state of dereliction of the property, occupation by squatters and rats etc., in the building. The evidence given by Mr. McLoughlin on behalf of the second named defendant is that he had been inspecting the premises at least since October, 1999 and had been aware of the hole in the roof. In January, 2000 an express complaint was made by Mr. Larkin, in writing and orally, that, by reason of the hole in the roof of No. 16, water was entering No. 17 and damaging same. In February, 2000 an inspection was carried out on behalf of the second named defendant and the hole in the roof of No. 16 photographed from the roof of No. 17.

30. The second named defendant was, and had been for some time prior to the vesting order, aware of the damage being caused to the plaintiffs' property by reason of the water entering through the hole in the roof of No. 16 Upper Leeson Street.

31. Following the vesting order in September, 2000, the responsibility for the building appears to have rested with the Development Department. By agreement, there was admitted into evidence a copy of a report prepared by Susan Roundtree who is described as an architect in the City Architect's Department, following an inspection carried out by her at the request of the principal officer in the Development Department on the 26th October, 2000. In that report Ms. Roundtree stated:

> "While the building appears reasonably sound when viewed from the street it must be stated that this structure is seriously at risk. This is because fire damage at the upper level has destroyed the roof leaving the building open to the weather, causing water damage to the property and probably also damaging adjoining houses in the terrace."

32. The final paragraph of her report read:

> "Immediate action is required to safeguard the property and to prevent further deterioration of the structure and adjoining properties. Works are urgently required to make the building envelope watertight, to secure the property and to take action to contain outbreaks of rot within the building. Roof works will be the major part of this operation and should include the reinstatement of the roof structure to its original profile and all other works necessary works (*sic*) to properly weather the adjoining buildings. Other works urgently required are to secure window and door openings at the rear of the property and to address the immediate outbreaks of wet and dry rot in the building."

33. Notwithstanding this report and what was stated to be a decision of the principal officer (who did not give evidence) dated the 6th November, 2000 that the matter should proceed "as a matter of urgency" the repairs to the roof did not commence until February, 2001.

34. On the 17th October, 2000 Mr. Martin O'Malley, a quantity surveyor, on behalf of the plaintiff had written to the Development Department of the second named defendant and in the opening paragraph stated:

> "We are informed that you are now responsible for No. 16 Upper Leeson Street. As you are aware, it has and is continuing to allow rain water to penetrate and enter our Client's property, causing serious damage, loss and expense (past, present and future) to our Client."

35. The letter then called on the Corporation to take immediate steps to make No. 16 weather tight and offered facilities for access. It also expressly put the second named defendant on notice of an intended claim.

36. On the 16th November Mr. O'Malley wrote again, not having received any response to his letter of the 17th October. At this time

the plaintiff had been threatened with cancellation of his insurance policy as a result of the poor condition of the property.

37. Notwithstanding the foregoing the repairs to the roof did not take place until February, 2001. No real explanation has been offered on behalf of the second named defendant for the delay. The evidence given by Mr. Larkin was that there was further significant rain damage caused to No. 17 between October, 2000 and February, 2001.

38. Having regard to the history of the dealings between the plaintiffs and the second named defendant in relation to this property and the second named defendant's state of knowledge of both properties in September, 2000, I have concluded that the second named defendant was negligent and in breach of a duty of care owed to the plaintiffs in failing to repair the roof on No. 16 and make it weatherproof in the month of October, 2000. I am further satisfied that part of the cause of the damage suffered by the plaintiffs in relation to No. 17 was caused by the rainfall between November, 2000 and February, 2001.

39. The evidence called on behalf of the plaintiff from Mr. Larkin and Mr. O'Malley was that, when the works were carried out on the roof in February, 2001 by a contractor employed by the second named defendant, with the permission of the plaintiffs, such contractor removed certain flashing on the valley in the roof of the plaintiffs' premises. Further, that in the course of works the contractors left exposed and without protection an area of the plaintiffs' roof (No. 17) and the roof of No. 16 over a weekend period during which there was very heavy rain causing further and particular water damage to the plaintiffs' premises. The second named defendant did not dispute that the contractors employed by them in leaving the roofs exposed over the weekend in February, 2001, were negligent nor that the second named defendant was responsible for such negligence.

Defendants as concurrent wrongdoers

40. I have concluded that each of the defendants is liable in negligence to the plaintiffs for the damage caused to No. 17 Upper Leeson Street by reason of water ingress and penetration of water through the party wall with No. 16. I have also concluded that they are concurrent wrongdoers within the meaning of s. 11 of the Civil Liability Act, 1961 which provides:

> "11.—(1) For the purpose of this Part, two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person (in this Part called the injured person or the plaintiff) for the same damage, whether or not judgment has been recovered against some or all of them.
>
> (2) Without prejudice to the generality of subsection (1) of this section—
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> (a) persons may become concurrent wrongdoers as a result of vicarious liability of one for another, breach of joint duty, conspiracy, concerted action to a common end or independent acts causing the same damage;
>
> (b) the wrong on the part of one or both may be a tort, breach of contract or breach of trust, or any combination of them;
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> (c) it is immaterial whether the acts constituting concurrent wrongs are contemporaneous or successive.
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> (3) Where two or more persons are at fault and one or more of them is or are responsible for damage while the other or others is or are free from causal responsibility, but it is not possible to establish which is the case, such two or more persons shall be deemed to be concurrent wrongdoers in respect of the damage.
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> (4) Where there is a joint libel in circumstances normally protected by the defences of qualified privilege or fair comment upon a matter of public interest, the malice of one person shall not defeat the defence for the other, unless that other is vicariously liable for the malice of the first.
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> (5) Where the same or substantially the same libel or slander or injurious falsehood is published by different persons, the court shall take into consideration the extent to which it is probable that the statement in question was published directly or indirectly to the same persons, and to that extent may find the wrongdoers to be concurrent wrongdoers.
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> (6) For the purpose of any enactment referring to a specific tort, an action for a conspiracy to commit that tort shall be deemed to be an action for that tort."

41. Considering the different elements of the definition, all the defendants are wrongdoers by reason of the negligence found herein. To come within the definition they must be responsible to the plaintiffs for the same damage. Hamilton J. (as he then was) considered the meaning of "the same damage" in *Lynch v. Beale* (Unreported, High Court, 23rd November, 1974). In that case a building owner sued his architect, main contractor and nominated sub-contractor for loss sustained as a result of alleged negligence and breach of contract of the three defendants in the construction of hotel premises. The premises had collapsed due to two main factors, the subsidence of foundations and inadequate design in the building. The defendant submitted that there were two separate and distinct causes for the structural defects and that the defendants were not concurrent wrongdoers. Hamilton J., in considering this stated:

> "The damage claimed in this case against all the defendants is the same damage, viz.: the loss sustained by him as a result of the internal collapse of the hotel and the subsidence thereof and the court is satisfied that the defendants are 'concurrent wrongdoers' as defined in the Civil Liability Act, 1961."

42. I would respectfully agree with the former President of the High Court in his approach to s. 11(1) of the Act of 1961. The requirement of the definition is that the persons alleged to be concurrent wrongdoers are responsible to the plaintiff for the same damage. Hence it is the damage suffered by the plaintiff which is being referred to.

43. On the facts of this case, the damage suffered by the plaintiffs is the cost to the plaintiffs of now repairing No. 17 and the rental loss past and future. Further, the acts allegedly constituting concurrent wrongs as found in this judgment took place successively as envisaged by s. 11(2)(c). It is the cumulative effect of the water during the respective periods which has necessitated the repairs to the building, which in turn has caused the damage to the plaintiffs (in sense of cost of repairs) within the meaning of s. 11(1) of the Act of 1961. Accordingly, I have concluded that all the defendants are concurrent wrongdoers within the meaning of the section.

44. I was informed at the commencement of the oral submissions on the last day that a compromise figure for loss of rental had been agreed at €255,000 without prejudice to the liability of the defendants to the plaintiffs. No submission was made on behalf of the defendants that one or other was not liable for any portion of this amount in the event that they were to be found liable in negligence

or nuisance to the plaintiffs, nor that it should be treated in any different way to the cost of repairs in assessing the relevant contributions.

Claim in nuisance
45. There is significant overlap between the claims in negligence and in nuisance. In *Sedleigh-Denfield v. O'Callaghan* [1940] AC 880 Lord Wright referred to the succinct definition by Talbot J. in *Cunard v. Antifyre* [1933] 1 KB 551, 557 of private nuisances:

> "as interferences by owners or occupiers of property with the use or enjoyment of neighbouring property."

46. A hole in a roof in a terraced house close to a party wall which permits, over a period of time, rain to fall down the party wall and to percolate into the neighbouring property comes within such a definition. It is not alleged that any of the defendants caused the nuisance. Rather it is alleged that each of the defendants continued the nuisance. In *Sedleigh-Denfield v. O'Callaghan Viscount Maugham* at p. 894 stated:

> "In my opinion an occupier of land 'continues' a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so."

47. A consideration of all the speeches in the House of Lords in *Sedleigh-Denfield v. O'Callaghan* make clear that an owner or occupier of a property will not be liable for the continuance of a nuisance unless he has knowledge of such nuisance. However such knowledge includes the knowledge of servants or agents for whom he is responsible and which must be attributed to him (see Lord Wright p. 906 approving the statement by Fletcher Moulton L.J. in the Court of Appeal).

48. There is no dispute that the second named defendant was aware of the nuisance at the time it became the owner and occupier of No.16 Upper Leeson Street. On the evidence, I have already found that as a matter of probability Mr. Ryan, estate agent for the first and third named defendants, was aware of the hole in the roof and ingress of water in the area of the party wall. This is knowledge which must be attributed to the first and third named defendants.

49. For the reasons set out above in relation to the claim in negligence I have also concluded that each of the defendants failed to take reasonable steps to bring the nuisance to an end during the respective periods when they were owners and occupiers of the property and in that sense continued the nuisance. No submission was made, in my view correctly, that the Joosub defendants were not occupiers in the period August, 1998 to September, 2000.

Claim under the Rule in *Rylands v. Fetcher*
50. Counsel for the plaintiffs made clear that he was pursuing, but in the alternative to the primary claims in negligence in nuisance, a claim under the rule in *Rylands v. Fletcher*. In the light of my decision on the claims in negligence and nuisance it is not necessary for me to determine this alternative claim.

Claim under the Derelict Sites Act, 1990
51. Similarly the claim against the second named defendants under the Derelict Sites Act is an alternative claim to the claim in negligence and nuisance. Accordingly it is unnecessary for me to determine this claim.

Plaintiffs' failure to mitigate their loss
52. The plaintiffs were under a duty to mitigate the loss and damage suffered by them by reason of the negligence of the defendants. Section 34(2)(b) of the Act of 1961 provides that:

> "A negligent or careless failure to mitigate damage shall be deemed to be contributory negligence in respect of the amount by which such damage exceeds the damage which would otherwise have occurred…".

53. The submissions made by counsel on behalf of the first and third named defendants in relation to the failure to mitigate may be summarised as follows:

> 1. The plaintiffs' failed to mitigate by not going out onto the roof of No. 16 and repairing same to make it weatherproof when the plaintiffs realised that damp was occurring in No. 17 from an opening in the roof of No. 16.
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> 2. Failing to contact the first named defendant in February, 2000 when his name and address was furnished to the plaintiffs' solicitors by the second named defendant.
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> 3. Failing to carry out the opening up works recommended in a report dated the 4th February, 2000, from Tom Brennan Building Preservation.
>
> 4. Failing to carry out remedial works at an earlier date.

54. Counsel for the second named defendant made submissions under headings 3 and 4 above.

55. In assessing the above submissions it must be recalled that, whilst the fire occurred in August, 1998, the evidence of Mr. Larkin, which was not disputed and which I accept, is that he first became aware of damp in No. 17 from the opening in the roof of No. 16 in the late autumn/early winter of 1999. Also, that following the fire he had carried out all necessary repairs to No. 17, including that resulting from water damage by the fire brigade, and recovered insurance monies in relation thereto. The further evidence which I accept is that in late 1999 Mr. Larkin went up and saw the hole in the roof of No. 16 facing towards the party wall with No. 17. It appears to have been in the winter of 1999/2000 that the position became worse and in the spring of 2000 blisters on the party wall in No. 17 started to weep whenever there was heavy rain and water started running down the party wall in No. 17 to the hall level and down to the basement.

56. The response of Mr. Larkin to a suggestion by counsel for the first and second named defendant in cross-examination that he ought to have gone onto the roof of No. 16 and carried out repairs in early 2000 was twofold. Firstly, Mr. Larkin stated he considered the roof dangerous and secondly, he did not think he was entitled to as he would be trespassing.

57. No. 16 Upper Leeson Street was in a derelict state by early 2000. Independently of Mr. Larkin's legal entitlement to go onto the roof of No. 16 and carry out repairs, it does not appear to me that his failure to do so on the facts of this case should be considered either a negligent or a careless failure to mitigate the damage claimed by reason of the water coming through to No. 17.

58. In relation to the second submission, Mr. Larkin gave no explanation for his failure to contact the first named defendant when he finally obtained his full name and address in February, 2000. His evidence was that he had been seeking to ascertain this and such evidence is corroborated by his correspondence with the second named defendant. A duty to mitigate loss on an owner of adjoining property which is allegedly being damaged by a nuisance or damage in the adjoining property, must be considered to include an obligation to notify the adjoining owner of the damage and call on him to carry out the necessary repairs. On the facts of this case, until the plaintiffs obtained the name and address of the first named defendant, I am satisfied that they could not reasonably carry out such a duty. However, the failure to make any contact with the first named defendant having obtained his named and address, albeit that he was in South Africa, must, it seems to me, be considered to be a negligent or careless failure to mitigate within the meaning of s. 34(2)(b). Accordingly, it is deemed to be contributory negligence "in respect of the amount by which such damage exceeds the damage that would otherwise have occurred".

59. The damage which would "otherwise have occurred" within the meaning of s. 34(2)(b) on the facts herein appears to be the damage which, as a matter of probability, would have occurred if the plaintiffs in February, 2000 had written to the first named defendant informing him of the water damage then occurring in No. 17 and calling on him to carry out the necessary repairs to the roof. As already stated, the first named defendant did not give evidence. No evidence was called on behalf of the first and third named defendants which suggests in any way that in February, 2000 the first named defendant would have reacted by carrying out repairs prior to September, 2000 when the property vested in the second named defendant. On the contrary, from the evidence before the Court I conclude that, as a matter of probability, nothing would have been done to No.16 Upper Leeson Street by the first named defendant in response to a letter from the plaintiffs in February, 2000. By that time the property had been derelict for several years. Acquisition proceedings had commenced and the notice of intention to acquire had been published in January, 1999. Objections had been made to this on behalf of the first and third named defendants and, in August, 1999 the first named defendant had written to Mr. McLoughlin of the second named defendant, indicating that work would be carried out on the premises. This did not happen. The Joosub defendants were already faced with the threat of losing ownership of the premises and had failed to carry out works in response to that threat. It therefore appears improbable that they would have carried out any works in response to a request from the plaintiffs even if such requests included a threat of a claim. Hence, the agreed amount of the damages herein do not, as a matter of probability, exceed the damage which "would otherwise have occurred" within the meaning of s. 34(2)(b) of the Act of 1961.

60. Accordingly, I have concluded that there is no amount by which the plaintiffs should be deemed to be contributorily negligent under s. 34(2)(b) of the Act of 1961 by reason of their failure to notify the first named defendant and request repair of the roof in February, 2000.

61. Turning to the third submission, in January, 2000 the plaintiffs had No. 17 inspected by Mr. Tom Brennan for the purpose of inspecting the party wall with No. 16 for evidence of damp and rot. No definite findings of rot were made but the risk of dry rot and wet rot developing was stated. Further, Mr. Brennan advised "to reduce the risk of dry rot developing" that certain steps should be taken. These were to open up and expose certain parts of the building particularly close to the party wall. This was not done.

62. The findings in Dr. Ridout's report are that there is no active dry rot. In summary he stated:

> "It has been argued that dry rot problems in No. 17 Upper Leeson Street had been caused by the poor waterproofing of No. 16 between the years 1998 and 2002. We were, however, unable to find any indications of dry rot in No. 16. The only significant decay located in No. 17 was some old cellar rot damage in an embedded wall plate at second floor level. This damage was dry and desiccated and may easily have been present for many decades. The building is generally dry and there is no risk that dry rot will develop as a consequence of water penetration following the fire in 1998. Comprehensive stripping out (or indeed any stripping out) of interiors cannot be justified on this basis."

63. The plaintiffs' claim (in the agreed amount) is not caused, even in part, by any dry rot in No. 17. Accordingly, it does not appear to me that any failure to take the steps advised by Mr. Brennan in February, 2000 can now be considered to be a failure to mitigate the damage in respect of which the claim is being pursued.

64. In relation to the final submission, I do not consider that the plaintiffs failed in their duty to mitigate by failing to carry out the remedial works at an earlier date than the hearing of these proceedings. The explanation given was that it made no sense to carry out remedial works in No. 17, even after the roof had been repaired in 2001, by reason of the continuing derelict internal state of No. 16 until such time as work was also carried out on No. 16. I am satisfied on the evidence of Mr. Carthy and the evidence of Mr. Slattery, called by the second named defendant, that the condition of No. 16 in the period from 2001 to date, even after the roof was made weatherproof, was such that it was reasonable for the plaintiffs not to carry out the remedial works in No. 17 until such time as it became apparent that remedial works were also being carried out in No. 16.

Exaggerated claim

65. The defendants sought, in reliance upon the obiter statements of Hardiman J. in *Shelly-Morris v. Bus Átha Clíath* [2003] 1 I.R. 232 at 257 and in *Vesey v. Bus Éireann* [2001] 4 I.R. 192 at 199, to submit that, on the facts of this case Mr. Larkin in the evidence given, particularly in dealing with his reaction to the report obtained from Mr. Brennan in February, 2000, was deliberately intending to deceive the Court and further, that the plaintiffs had deliberately exaggerated their claim herein such that the claim for damages should be disallowed.

66. Mr. Larkin is a senior bank official. His evidence in direct examination and, in cross-examination as to precisely what he did following the receipt of the report from Mr. Brennan, was unclear and not satisfactory. If active dry rot had been found to be present in No. 17, his failure to take further professional advice and appropriate steps following that report would probably have precluded him from recovering the full amount of the loss and damage to the plaintiffs by reason of any such active dry rot. In the event, no active dry rot was found to be present.

67. However, I did not form the view that Mr. Larkin in giving his evidence was at any stage intending to deliberately deceive or mislead the Court. Nothing in his evidence forms the basis for an application of the principles referred to in the above decisions. There is, however, a further issue of the alleged exaggerated claim.

68. The plaintiffs' claim for the cost of the reinstatement works alleged to be necessary to No. 17 Upper Leeson Street in the updated particulars of loss and damage delivered on the 30th June, 2005, was in the sum of €1,184,668.43. The agreed figure is now €275,000.00. No evidence was given to the Court of the precise reason for the difference between the two figures. However, from the evidence given in the proceedings before the order was made for the inspection by Dr. Ridout the following facts appear relevant. Mr. O'Malley was retained initially by the plaintiffs in August, 2000 in relation to No. 17 Upper Leeson Street. He was directly involved on behalf of the plaintiffs with the second named defendant from that period forward. It was he who wrote letters in October and November, 2000 after the vesting of the property in the second named defendant. It was Mr. O'Malley who met with a Mr. Bloomer,

an architect on behalf of the second named defendant, in January, 2001 in relation to the carrying out of the repairs on the roof of No. 16 and permission for access to the roof of No. 17. It was Mr. O'Malley who wrote setting out the damage which had occurred to the plaintiffs' property over the weekend in February, 2001 when water came through the roof of No. 17. Mr. O'Malley prepared and submitted to the second named defendant an initial bill of quantities for repair works in December, 2001 in the sum of £480,796.26. This appears to have been updated in June, 2003 to €687,969.49. The bill of quantities prepared by Mr. O'Malley and furnished with the amended particulars in June, 2003 was dated the 8th June, 2005. This followed the report of Mr. Carthy, the architect for the plaintiffs, dated May, 2005. That report set out the opening up works and repair works considered to be necessary by reason of the water damage in No. 17 and the perception of the risk of dry and wet rot in No. 17. Mr. Carthy gave evidence of inspecting No.16 and seeing dry rot in No. 16. He further gave evidence of a risk of such rot from No. 16 travelling through the party wall to No. 17. In cross-examination he was not challenged on behalf of the second named defendant on his assertion that he had seen dry rot in No. 16. It was only when Mr. Slattery gave evidence on behalf of the second named defendant that the distinction between "active" dry rot and "dead" dry rot was made.

69. As a matter of probability, it appears to me that the reason for the significant difference between the estimated cost of repairs and agreed amount is that the former was prepared on an assumption that active dry rot was present in No. 16 and likely to have travelled into No. 17, whereas the latter was agreed when it was ascertained that no active dry rot was present.

70. As observed by Hardiman J. in *Shelly-Morris v. Bus Átha Clíath* and *Vesey v. Bus Éireann*, the onus of proof in a claim for damages for negligence lies on the plaintiff "who is, of course, obliged to discharge it in a truthful and straightforward manner". In this case, in relation to the quantum of the loss, the onus was on the plaintiffs to establish, as a matter of probability, the cost of repairing the damage caused by the alleged wrongs. It became clear in the course of the hearing that the existence or non-existence of active dry rot in Nos. 16 and 17 had a central bearing on the nature of the opening up required, repairs needed and the cost of same. The plaintiffs did not in advance of the hearing carry out the necessary inspections to ascertain whether or not active dry rot was present.

71. I do not wish to express any view, until I have given counsel an opportunity of making submissions as to whether or not the plaintiffs were under an obligation in the preparation of their case to carry out such inspections. Even if they were, it appears to me that their failure to do so is a matter which goes to the costs of the proceedings rather than the plaintiffs' entitlement to recover the sums now agreed as the measure of the loss and damage suffered by the plaintiffs. I am satisfied on the facts of this case that there was no deliberate exaggeration of the plaintiffs' claim in the sense under consideration by Hardiman J. in the decisions referred to. Mr O'Malley knew the property well and prepared costings based on Mr Carthy's view of the works required which in turn was predicated on the probable presence of rot by reason of the rot observed in No 16. Rather, on a worst case scenario for the plaintiffs (which I am not now holding) there was a possible failure to carry out certain preliminary inspections and investigations which ought to have been done in the formulation of the claim. I say "possible" as I have indicated I am not forming a definitive view until I hear submissions from counsel on the issue in relation to costs.

72. Accordingly, there will be a judgment against each of the defendants (in accordance with s. 14 of the Act of 1961) in the sum of €530,000.00.

Claim for contribution

73. I was informed by counsel that there are claims for contribution made between the first and third named defendants on the one hand and the second named defendant on the other hand. Counsel requested that I determine the respective contributions on the evidence given. In accordance with s. 21(2) of the Act of 1961 the contribution recoverable is "such as may be found by the court to be just and equitable having regard to the degree of that contributor's fault …". The Court was not asked to make any finding as between the first and third named defendant and, for the purposes of the contribution claims, I propose considering the first and third named defendant as a single defendant and determining at present the joint contribution of those defendants.

74. I have concluded on the evidence given that a contribution of 50% jointly from the first and third named defendants and of 50% from the second named defendant is what appears just and equitable having regard to their respective degrees of fault. The principal reasons for which I have reached this conclusion are as follows.

75. Counsel for all defendants submitted that the approach of the Court under s. 21 of the Act of 1961 should be in accordance with the decision of Costello J. in *Patterson v. Murphy* [1978] I.L.R.M. 85. In that decision he held that this provision should be interpreted in accordance with the decision of the Supreme Court in *Carroll v. Clare County Council* [1975] I.R. 221 in relation to s. 34 of the Act of 1961 and in particular the test stated by Kenny J. at p. 227:

> "I think that 'fault' in s. 34 of the Act of 1961 means a departure from a norm by a person who, as a result of such departure, has been found to have been negligent and that 'degrees of fault' expresses the extent of his departure from the standard of behaviour to be expected from a reasonable man or woman in the circumstances. The extent of that departure is not to be measured by moral considerations, for to do so would introduce a subjective element while the true view is that the test is objective only. It is the blameworthiness, by reference to what a reasonable man or woman would have done in the circumstances, of the contributions f the plaintiff and defendant to the happening of the accident which is to be the basis of the apportionment."

76. In *Patterson v. Murphy*, Costello J., having referred to the above, stated at p. 102:

> "Following this test I should consider the blameworthiness of the contribution which each defendant made to the damages which the plaintiff suffered by reason of the acts complained of – the test of blameworthiness being an objective one and applied by reference to what a reasonable man or woman would have done in the circumstances of the present case."

77. Taking a similar approach to the facts of this case I consider the degree of blameworthiness of the contribution made by the respective sets of defendants to be similar. Whilst the Joosub defendants failed over a longer period to repair the roof at No. 16, at the time the property vested in the second named defendant the hole in the roof of No. 16 was a more obvious source of damage to No. 17 with the consequent duty to repair same than during earlier periods. Further, in accordance with the evidence of Mr. O'Malley, which I accept, significant damage occurred by reason of direct water through the roof of No. 17 as a result of the careless acts of the contractor employed by the second named defendant (for which it is liable) leaving part of the roof of No. 17 unprotected over a weekend in February, 2001.

78. Accordingly, there will be a determination of a joint contribution of 50% in respect of the first and third named defendants and 50% in respect of the second named defendant. I will hear counsel on the precise form of the order on the claims for contribution having regard to the joint contribution of the first and third named defendants.