

THE HIGH COURT**2004 19063 P****BETWEEN****WOODQUAY PROPERTIES LIMITED****AND THOMAS F. KEARNEY****AND****LEO W. WILSON ASSOCIATES LIMITED****PLAINTIFFS****DEFENDANT****Judgment of Mr. Justice Hedigan delivered on the 25th day of January 2011.**

1. The first named plaintiff is a limited liability company whose registered office is at Kilgil, Claregalway, Co. Galway. The second named plaintiff is a businessman whose address is Kilgil, Claregalway, Co. Galway and is the controlling shareholder and manager of the first named plaintiff.

2. The defendant is a limited liability company whose registered office is situated at the Commercial Block, Galway Technical Park, Parkmore, Galway and it is and was at all material times consulting structural engineers carrying on its practice at the Commercial Block, Galway Technical Park, Parkmore, Galway.

3. At all material times, the second named plaintiff was the owner of lands and premises situated at St. Brendan's Avenue/Bóthar na mBan, Woodquay, Galway, Co. Galway. The second named plaintiff proposed to build a development on site consisting of a three storey development over a one storey car park basement comprising nine apartments and nineteen car parking spaces. This development was in two phases. Phase 1 was completed in 2001. In July 2003, the plaintiffs' contractors commenced works on the site. By 24th October, 2003, the basement floor and retaining walls were completed.

4. Unfortunately in early November it became clear there were major structural defects which manifested themselves in the catastrophic failure of the floor of the parking area. It became apparent this failure was as a result of inadequate structural plans drawn up by the defendants. In the result it is agreed there was a six month delay in the completion of the project. It was necessary to engage in extensive remedial work to effectively replace the basement floor slab which, by about 17th November, 2003, it was clear, had suffered total structural failure. The plaintiff engaged new structural engineers and the project was completed in January 2005.

5. The losses alleged to have been sustained by the plaintiffs are:-

(a) Construction costs - €169,000

(b) Professional fees - €28,159

(c) Additional costs re adjoining property - €23,958

(d) Loss of rental for car parking spaces - €6,555

(e) Loss of rental on apartment - €64,926

(f) Bank interest on extended loan period on apartments not ready for occupation. Bank interest on a loan facility drawn down to finance the remedial work - €134,538

6. Liability is admitted and the case proceeds as an assessment. The losses claimed at (a) and (b) are agreed as set out above. The loss claimed at (d) is withdrawn. This leaves in dispute the losses alleged at (c), (e) and (f).

7. At the end of the case, in submissions, counsel for the defendants questioned whether the losses claimed herein were economic loss flowing from an act of negligence. If so, he submitted they were irrecoverable. It seems to me that this argument is unsustainable in the light of the agreement that formed the basis of the relationship between the parties. The case as pleaded by the plaintiff is of a relationship based upon a contract and the failure to carry out the obligations under that contract. In short, the duty situation herein arises contractually and not from the tort of negligence. The issue, therefore, does arise.

The Loss to Adjoining Properties

8. The evidence was that there was directly adjacent to the development, a house inhabited by an old lady of 93 years. It was expected that substantial disturbance would be caused to her by the building of the development. It had been agreed with her daughter who acted on her behalf that a new gable wall and chimney fireplace would be built on her house. It may be presumed this is why she did not object to the development.

9. Because of the failure that occurred, the old lady who had moved out to live with her daughter was obliged to stay out of her home for six months longer. The second named plaintiff, in order to compensate for this extra disturbance agreed to further structural improvements to the house i.e. a rear extension, a new kitchen and re-roofing the rear. The second named plaintiff also gave €5,000 in cash.

10. Mr. Kearney gave evidence as to the above and emphasised how important it was to maintain the goodwill of the adjoining householder. Invoices were produced in respect of this extra work to an amount of €18,958 which together with the amount of €5,000 came to the figure claimed of €23,958. Mr. Kearney gave evidence that seemed frank and honest. I consider that he did the right thing by the old lady in question. It was very reasonable and sensible to offer some further gesture of goodwill both to keep them onside but more importantly to make fair recompense for the extra disturbance caused by a six month delay. The cost of doing the works seems relatively reasonable and I would therefore allow the sum claimed in full.

Loss of Rental on Apartments

11. This claim is based upon the 24 weeks delay in the availability of the apartments for rental. The claim is for a sum of €64,926. The loss is claimed to arise from the unavailability for rent of the apartments as summer accommodation in the months of June, July and August and as student accommodation during the first term of the academic year for September to December. Evidence given by Michael Duffy of Premier Property Management was that owing to its central location, two minutes from Eyre Square, this accommodation was in high demand. He said the apartments were always sold out since they became available and it was reasonable to believe they would have easily been rented out during the above six month period. As to quantum, this evidence seemed eminently reasonable. However, it is submitted by the defendants that allowing damages under this heading and the following heading would amount to double counting the loss.

Additional Bank Interest Charges Incurred in Financing the Development

12. The claim now finally particularised at €134,538 arises from two sources. Firstly, the unavailability for sale of the nine apartments for the delay period of six months resulting in a continuing need to finance the loans which existed. This claim for the agreed 24 week delay is particularised at €46,534. Secondly, as a result of the cost of the loan of €313,000 additional finance to pay for the extra works acquired to remedy the problems caused by the designed default. This claim is particularised at €88,004.

13. In relation to the first part, it is hard to see how the plaintiff can claim for the loss due to the unavailability for sale of the nine apartments whilst recovering damages for lost letting of the apartments. If they had been available for sale during the six month delay period in 2004, the apartments would not have been available for rent. It seems to me therefore that, as submitted by the defendants, allowing both loss on rental and loss on non-completion of sales in respect of the nine apartments amounts to double counting the loss. It is either one or the other. I would award the amount claimed for loss on rental of €64,926 but not therefore any amount in respect of the lost sales during the 24 week agreed period of delay.

14. As to the second part of the claim, the plaintiffs did not include details of this part of their claim until their letter of 24th May, 2010. Up to this letter the losses under this heading referred to the loss incurred in interest charges owing to the unavailability for sale of the apartments during the delay period. This updated particularised loss, oddly enough, fits in more neatly into the description of "additional bank charges incurred in financing the development" than the "unavailability for sale" loss. However, the defendants claim they are taken by surprise and this claim, therefore, should not be allowed. I agree that it was very late in the day to be raising another heading of loss, yet it is so obviously a loss that flowed from the defendant's acknowledged default that I would consider it unjust to disallow it. I consider that this was a heading of loss that could easily have ended up as agreed had it been detailed properly and furnished in a timely manner. Whilst I will allow the amount claimed, I think at least one half day of court time was lost as a result of the plaintiffs' default in this regard and consequently the defendants should not have to bear one half days costs.

15. There will be judgment therefore as follows:-

(a)	Construction costs	€169,000
(b)	Professional fees	€28,159
(c)	Adjoining property	€23,958
(d)	Loss on rental	€64,926
(e)	Additional bank interest charges	€88,004
	Total	€374,047

16. There will be judgment, therefore, in the amount of €374,047 together with costs. The case continued for three days and for the reasons set out above costs should be awarded to the plaintiffs on the basis they are equivalent to two and a half days costs.