

## THE HIGH COURT

## SOUTH EASTERN CIRCUIT COUNTY OF WEXFORD

[2001 Record No. 633]

BETWEEN

JAMES RYAN TRADING AS JAMES RYAN AND SONS

PLAINTIFF

AND  
BRIAN McMANUS

DEFENDANTS

## JUDGMENT of Mr. Justice Herbert delivered the 14th day of October, 2005

1. I have carefully considered the evidence given in this appeal by Mr. James Ryan, the plaintiff appellant, by his son Mr. John Ryan, by Mr. Brian McManus, the defendant counter claimant who is also the respondent in this appeal but who has not made a cross-appeal and by Mr. Paul Nolan, a quantity surveyor of the firm of Nolan Ryan, Chartered Quantity Surveyors and Mr. James A. Griffin, Consulting Engineer both called in evidence on behalf of the defendant respondent.

2. The claim of the plaintiff appellant is for a sum of 12,549.98 (former currency). This relates to work done and services rendered by five invoices dated respectively, 7th January, 1999, 2nd February, 1999, 29th March, 1999, (two invoices) and 16th April, 1999, with a total cost of 14,303.98 (former currency). A Credit Note dated 16th April, 1999, provides for an allowance of 6,793 (former currency), in favour of the defendant respondent. A Statement dated 29th July, 1999, describes the above mentioned invoices as relating to, "extras".

3. This statement is in the following terms:-

"To - Contract price. £42,000.00

Extras as per invoices, encl. £14,303.98

£56,303.98

VAT at 61/4 % £ 3,519.00

£59,822.98.

Credits

Payments. £10,000.00

£19,980.00

£10,500.00

£40,480.00

Credit Note £ 6,793.00

Total Credit £47,273.00 £47,273.00

Total Balance due. £12,549.98."

4. A most enigmatic letter dated 26th July, 1999 from the defendant respondent to the plaintiff appellant was admitted into evidence. It states as follows:

"Dear Jim,

Re: Your invoice of 16th April, received on 24th July. As you have already been paid £40,000, Please explain how you could be owed a final stage payment of £16,000 as per your invoice.

Yours sincerely."

5. During the course of the hearing no evidence was given of a final stage payment of £16,000 (former currency) dated 16th April, 1999, or on any other date, or of any invoice dated 16th April, 1999 or any other date for such a sum. A single page undated note, which by a reference to the penultimate paragraph thereof was directed to Mr. John Ryan, who, it was accepted by both sides, was the person who performed the contract as the plaintiff appellant had retired to an accountancy role only, was stapled to this letter. In the third paragraph of this note a reference is made to, "my breakdown previous page". No such page was produced in evidence and no explanation offered in relation to it. Significantly, in my judgment, the 8th paragraph of this note states as follows:-

"My total credit should be £19,088 less your invoice of £12,549 equals £6,593.00 (sic) owed to me. Plus the cost of correcting the various outstanding problems in the engineers report."

6. The report of Mr. James A. Griffin, the only Report offered in evidence is dated on its face, "July 1999".

7. On the evidence given at the hearing of the appeal, the only reference to the sum of £12,549.98 (former currency), is in the Statement dated 29th July, 1999. This statement expressly states on its face that the five invoices amounting to £14,303.98, (former currency) were enclosed.

8. Mr. James Ryan gave evidence that these invoices were posted to the defendant respondent on the day that they were dated. Copies of these invoices were kept on an Invoice File. Mr. Brian McManus, the defendant respondent, told the court that all five invoices came to him in July 1999 in one envelope which also contained the Credit Note. He said he wrote the letter of the 26th July, 1999, in reply. This letter, as I have already indicated, refers to an invoice of 16th April, having been received on 24th July. It makes no reference to invoices dated 7th January, 2nd February, or 29th March. The only invoice dated 16th April, 1999, produced in evidence, is for 800.00 (former currency) for building nine inch concrete block walls to accommodate floor slabs.

9. Mr. McManus gave evidence that he was obliged to ask Mr. John Ryan to leave the site in April 1999, because of constant bad work on the part of unsupervised sub-contractors and unfulfilled promises by Mr. John Ryan to make good these defects. Mr. John Ryan told the court that Mr. McManus took over the work himself in April, 1999, and that they had parted on amicable terms. I am unable to accept this recollection on the part of Mr. John Ryan. Having regard to the evidence of Mr. James A. Griffin, the consulting engineer, as to defects and the contents of the final two paragraphs of the note pinned to the letter of 26th July, 1999, - the Civil Bill in this case was issued on 11th June, 2001, I am satisfied on the balance of probabilities that the recollection of Mr. McManus is to be preferred in this instance.

10. Mr. McManus told the court that when in April 1999 he informed Mr. John Ryan that he wanted him off the site with immediate effect, he did not complain that he was owed money and that all five invoices for extras only arrived in July 1999 in the same envelope. It is clear on the evidence that Mr. McManus had made three payments amounting to 40,480.00 (former currency) - the dates of these payments were not given in evidence, - and that he and Mr. Ryan had been fox-hunting friends so that it is not improbable that Mr. John Ryan did not raise the issue of outstanding money on that occasion, especially as on the evidence Mr. James Ryan dealt with accounts. However, I am satisfied on the balance of probabilities that each of the five invoices had been received by Mr. McManus in the ordinary course of post after the dates appearing on those invoices, so that he was well aware of the claim for extras and the amount of that claim in April 1999. I am satisfied on the evidence that copies of all these invoices were additionally enclosed with the Statement dated 29th July, 1999, as indicated on the face of that Statement and, that this had led to a mistaken recollection on the part of Mr. McManus in 2005 that they only came, all in the same envelope, in July 1999. By a letter dated 17th April, 2001, Messrs. Boland and Company, Solicitors, of Kilkenny, wrote to the defendant respondent seeking payment of the sum of 12,549.88, (former currency) within ten days, failing which proceedings would be issued. No payment was made by the defendant respondent.

11. At paragraph IV of the Defence delivered on 24th January, 2002, it is denied that the defendant respondent requested the plaintiff appellant to carry out extra works or that the defendant respondent agreed to pay £14,303.98 in respect of these works. I am satisfied, having heard the evidence of Mr. John Ryan, Mr. James Ryan and Mr. Brian McManus that there was no express agreement on the part of Mr. McManus to pay this sum of £14,303.98. If the plaintiff appellant carried out extra works at the request of the defendant respondent, he can only base his claim to be remunerated on an implied agreement on the part of the defendant respondent to do so or on a quantum meruit basis.

12. The Quotation by, James Ryan and Sons, Builders and Developers, dated 11th September, 1998, proved in evidence, was as follows:

"We proposed to build the above house for the sum of £42,000.00.

This price is for:

Foundations - Concrete ground floor - 1st fix plumbing in ground floor slab - all block work - 1st floor joists - R.S.J's  
- Roof - P.V.C. gutters."

13. The invoice dated 29th March, 1999, for 3,600 (former currency) is in respect of, "Pre-cast decking". Mr. James Ryan gave evidence that he paid this sum directly to DuCon Concrete Limited, a manufacturer and installer of pre-cast concrete floor slabs. Mr. John Ryan told the court that they started work in October 1998 and that in December, 1998, the defendant respondent advised him that internally that the house was to be changed from a single habitation to four self-contained apartments. Mr. McManus told the court that he had obtained planning permission for this change of use, though no copy of this permission was produced in evidence. Consequent on this change Mr. McManus requested concrete floor slabs at first floor level in lieu of the timber joists as provided for in the Quotation. Mr. John Ryan gave evidence that his firm could not carry out this work and they therefore engaged DuCon Concrete Ltd., whom Mr. James A. Griffin accepted in cross-examination where a reputable and leading firm in the design manufacture and installation of such floor slabs, to do the work. Mr. John Ryan told the court that a representative of this firm visited the site and advised that the block work in the ground floor hallways would have to be increased from the four inches necessary to support timber joists to nine inches in order to support the concrete slabs. The Invoice dated 16th April, 1999, for £800 (former currency) relates to, "building nine inch concrete block walls to accommodate floor slabs".

14. It was the recollection of Mr. John Ryan that Mr. McManus was present at this meeting but Mr. McManus in his evidence was adamant that he was not there and believed that he was on holiday on the occasion. Mr. John Ryan told the court that after the change of use from a single occupancy family home to four self-contained apartments the defendant respondent instructed him to effect a change from stud-plaster internal partition walls to partitions constructed from, "Quinlite Blocks". The third item on the Invoice dated 29th March, 1999, is for £1,674.40 (former currency) being the cost of these blocks at £23 per sq. mtr. Mr. John Ryan gave evidence that Mr. McManus requested that he also replace rendered concrete blocks at the angles of the external walls with stone quoins and that he insert an external decorative string course at first floor level. These features are clearly visible in the photograph, admitted into evidence, - obviously produced for a letting brochure. The cost of these stone quoins is the first item on the Invoice dated 29th March, 1999, "112 stone quoins at £29.74 E.A. = £3,330.88". The string course is the second item on this Invoice of 29th March, 1999, costed at £353.70.

15. None of these matters were denied in evidence by the defendant respondent as having been requested by him. An issue was raised, but no evidence was offered in support of it by the defendant respondent that the plaintiff appellant had over charged for the stone quoins which Mr. McManus claimed should have been charged at £16.50 (former currency) each and not £29.74 as per the invoice. Neither the consulting engineer, Mr. James A. Griffin, nor the quantity surveyor, Mr. Paul Nolan gave evidence in support of this contention. Mr. McManus and Mr. James A. Griffin gave evidence that the system employed to support the pre-cast concrete floor slabs over the hall was unsatisfactory and in the opinion of Mr. Griffin even hazardous. A section of steel angle had been attached to a block work wall at one end and used as a cantilever to support and stabilise a section of floor slab which was then bolted to it with flat steel straps. An additional inch and one half of concrete floor screed would be necessary to cover these steel straps which Mr. Griffin felt might result in cracking in this screed. Mr. John Ryan gave evidence that because it was outside the area of his expertise the whole work of designing, manufacturing, and installing these floor slabs was carried out by DuCon Concrete

Limited. This was accepted in cross examination by Mr. James A. Griffin who also accepted that DuCon Concrete Limited was a very reputable company in this field. In its Invoice the plaintiff/appellant was in fact doing nothing more than seeking to recoup the money which he had paid to this company to put into effect this variation required by the defendant/respondent. Mr. McManus also contended that the preformed concrete floor slabs should have been laid from front to rear of the building instead of sideways over the hall so as to provide supports for balconies at the rear of the building. Mr. John Ryan insisted that he had received no such instructions as alleged from Mr. McManus and one will recall that Mr. McManus insisted in evidence that he was on holidays when the representative of DuCon Concrete Limited carried out his inspection and made his recommendations. Mr. James A. Griffin accepted that there is nothing in the drawings on which the quotation was based requiring such an arrangement. On the contrary, the drawings very clearly show the balconies as fixed to the external wall of the house and each supported by two free standing columns. The drawing also carries the legend, "proposed balcony structure and fixing to engineers approval". Mr. John Ryan gave evidence, which was accepted as correct by Mr. James A. Griffin and not challenged by Mr. McManus, that no engineer was retained nor was any engineer design and detail furnished. I am satisfied on the balance of probabilities that no such oral instructions involving such a major structural variation in the design of the property was given by the defendant/ respondent to Mr. John Ryan. If such instructions had been given I can think of no reason why Mr. John Ryan would have failed to communicate them to the representative of Du Con Concrete Limited.

16. No challenge was made at the hearing of this appeal to the invoice dated 7th January, 1999, for "forming roadway at entrance to outhouse - IR£135". Mr. McManus did not suggest that he had not requested this work and neither Mr. James A. Griffin nor Mr. Paul Nolan suggested that the quantities of materials stated to have been used were excessive or that the price charge was unjustifiable. Mr. John Ryan gave evidence, which was not denied or challenged, that as regards the four loads of stone delivered to the stables owned by the defendant/respondent at Carrickbyrne, he had charged for carriage only at a rate of £40 (former currency), per trip.

17. As regards as the Invoice dated 2nd February, 1999, for the sum of £3,510 (former currency), for clearing and levelling work at the site and taking unwanted material to the dump, Mr. McManus accepted that he had requested this work. His contention was as also appears in the note attached to the letter of 26th July, 1999, that the plaintiff/appellant did not carry out this work properly and left material uncleared. He claimed that the plaintiff/appellant had carried out the work in exceptionally inclement weather so that the job took three times longer than it should and a lot of stone became buried on site because of the amount of clay churned up by the construction equipment used. He also claimed that a neighbour's footpath had been damaged by a tractor and trailer having been driven over it repeatedly. He claimed that the work should only have taken three days and cost £720 (former currency), which he alleged it would cost him to replace the damaged footpath. The invoice states that the work took from 18th to 26th January, 1999 and from 1st February to 2nd February, 1999, a total of 117 hours at £30 per hour.

18. No evidence was given at the hearing of the appeal of the nature or extent of the alleged damage to the neighbour's footpath. The neighbour was not called to give evidence. No photographs were produced. No letter of complaint from any neighbour or from the area Roads Authority was mentioned or produced in evidence. Mr. Paul Nolan said that he visited the site at Butlersland, New Ross, on two occasions. He estimated the cost of repairing the damaged footpath to be £630 (former currency). However I am not satisfied that the defendant/respondent has discharged the burden of establishing on the balance of probabilities that any or all this damage was caused by the plaintiff/appellant, his servants or agents. In my judgment, significantly, there is no reference to this alleged damage in the report of James A. Griffin dated July, 1999, based on a site inspection carried out on 30th June, 1999.

19. No evidence was led by the defendant/respondent to establish that the work indicated in the Invoice dated 2nd February, 1999, - which he accepts was done, - could have been done in three rather than 10 days and at a sum of £720 (former currency) rather than £3,500 (former currency). Mr. Paul Nolan produced what appears to be a photocopy of an undated invoice from James Whitty, Digger Hire, New Ross, addressed to the defendant/respondent for:-

"Work done to front of house for Brian McManus at Hospital Road. For digging out and levelling and supply and levelling of four loads of stone, £950 incl. V.A.T. at £105.56, total excluding V.A.T. £844.44."

20. Mr. Whitty did not give evidence and there is nothing in the evidence given by Mr. McManus which would enable me to identify to what this work relates. Mr. John Ryan gave evidence that the defendant/respondent had cleared the site himself and had left heaps of soil and sub-soil on it and that he had not quoted for levelling the entire site. Mr. McManus in his evidence stated that he believed it to be normal building practice to level the site unless a split level site was being developed. Mr. James A. Griffin gave evidence in accordance with his report which states as follows:

3. In the writers opinion the contractor failed to take account of the cross fall on the site. This has resulted in a variation in the height of the plinth over ground level from 12 inches at the top corner of the house to 32 inches at the bottom (right hand) corner.

4. It has also resulted in the necessity for three steps to the front door - a maximum of two and probably only one would have been necessary if appropriate excavations had been carried out at the upper side of the site. Furthermore there will now be a necessity to construct a significant length of retaining wall to separate the driveway from the front garden immediately outside the front of the house.

5. Again this would not have been necessary had the appropriate excavation been carried out."

21. It is clear from the Quotation of 11th September, 1998, that James Ryan & Sons did not quote for levelling the entire site. The Drawings dated 4th June, 1997, by Tony Fortune, architectural technician, state at note 13:-

"Note drawings are planning application drawings only and subject to structural engineers additional detail and approval."

22. Under the heading "wall construction" the drawing states as follows:-

"Provide 900 by 400mm reinforced concrete strip foundations to engineer's design and detail."

23. Lines have been drawn through these words and, as already indicated, the evidence was that no engineer was engaged on this project and no engineer's designs and details furnished. There is no express indication on the drawings from which the quotation was prepared that the site should be completely levelled before the foundations were laid. Mr. John Ryan gave evidence, which was not challenged, that Mr. McManus lives opposite this site and came to the site very frequently if not daily. Mr. John Ryan gave evidence that Mr. McManus frequently renovates his own properties and Mr. McManus told the court that he had been doing building work as a side line for 30 years. On the evidence the defendant/respondent accepted the quotation which did not provide for levelling the entire site and from his residence or on his visits to the site must have observed the foundations being laid without the site having first been

levelled. There is no evidence even by reference to the note attached to the letter of 26th July, 1999, that he had any problem with these matters until they were raised by Mr. James A. Griffin on, one may infer, one or other of his site visits in June and August, 1999. In his evidence Mr. McManus stated that it was Mr. Griffin who pointed out to him that if the site had been suitably levelled only one step would be needed to the front door instead of three. In this respect Mr. Griffin refers in the section of his report to which I have already adverted to a, "maximum of two and probably only one...if appropriate excavations had been carried out at the upper side of the site".

24. In the circumstances I am satisfied that the defendant/respondent has failed to discharge the burden of establishing on the balance of probabilities that the work carried out by James Whitty was necessary to remedy a breach of contract on the part of the plaintiff/appellant with regard to the levelling and filling of the site. However, I am satisfied that the plaintiff/appellant must have been aware that three steps would be required to reach the front door from the outside ground level. In the circumstances I am satisfied that the defendant/respondent is entitled to an allowance for the cost of having to construct two additional such steps. In the absence of any challenge to the evidence of Mr. Paul Nolan in this regard the court will accept his figure of £660 (former currency) as a reasonable sum to be allowed for the cost of this work. Mr. Nolan gave evidence that his evaluations were based on construction industry average figures and third parties carrying out the particular work.

25. The court therefore finds that the plaintiff/appellant has established his claim to the sum of £14,303.98 (former currency) as per the five invoices. There was no dispute that the parties had agreed that V.A.T. at the rate of 121/2 % would be divided equally between them so that there was no challenge to the sum of £3,519 (former currency) for V.A.T. In these circumstances the plaintiff/appellant has established his claim to the balance of £12,549.98 (former currency).

26. The plaintiff/appellant gave the defendant/respondent a Credit Note dated 16th April, 1999, for £6,793 (former currency). However, I have already found that the defendant/respondent is entitled to an additional allowance of £600 (former currency) as claimed by him for having to construct two additional steps needed from the area in front of the front door to the door itself because of the height at which the plaintiff/appellant decided to construct the foundation and lay the ground floor.

27. Mr. Brian McManus gave evidence that while the Quotation dated 11th September, 1998, included the roof and P.V.C. gutters, in the events which occurred the roofing was carried out by Mr. Michael Hayes, a building contractor engaged by Mr. McManus himself. The Credit Note from the plaintiff/appellant dated 16th April, 1999, allowed a credit of £3,320 (former currency), for 4,000 slates and £1,600 (former currency), for felting and labour. Mr. McManus proved in evidence an Invoice dated 8th July, 1999, furnished to him by Mr. Michael Hayes in the sum of £2,600 (former currency), "to felt, lath, flash and slate and put on Ridge Tiles to new two storey house, - labour only". There is written on this invoice, "Paid with thanks, £2,550, Michael Hayes", and Mr. McManus gave evidence that he paid the sum to Mr. Hayes. In addition to this sum, (which includes V.A.T.), Mr. McManus gave evidence that he paid £4,240 (former currency) for 4,000 slates, £404 (former currency), for ridge tiles and £237 (former currency) for lead, all these sums being V.A.T inclusive. His evidence was that the total cost to him of completing the roof was £6,911 (former currency) inclusive of V.A.T., whereas he only received a credit of £4,920 (former currency) from the plaintiff/appellant, - a difference of £1,991 (former currency). Mr. Paul Nolan, the quantity surveyor, considered the sum paid by Mr. McManus to be reasonable. No evidence was given by or on behalf of the plaintiff/appellant challenging the fact or the amount of these payments. In my judgment the defendant/respondent is therefore entitled to an additional credit of £1,991 (former currency) in respect of completing this roof. It was not suggested on behalf of the plaintiff/appellant that V.A.T. should be deducted from this figure so the court will not do so of its own motion.

28. Mr. McManus gave evidence that the actual cost to him of purchasing and installing the P.V.C. fascias, soffits, gutters and downpipes was £2,150 (former currency). He proved in evidence a quotation from Declan Byrne, Supplier of P.V.C. fascia, Soffit and Insulation, the date of which was indecipherable, for £2,193.75 (former currency), including V.A.T. at 121/2% (£243.75). The Credit Note dated 16th April, 1999, from the plaintiff/appellant only made an allowance of £500 (former currency) for, "fascias and downpipes". Again, Mr. Paul Nolan, the quantity surveyor, stated that in his expert opinion the sum of £2,150 was fair and reasonable based on construction industry average figures. As to the difference of £1,650 (former currency), between the amount of the credit note allowance and the actual cost to Mr. McManus, he said that it was notorious in the building business that extras were always large and allowances always small. Again, no evidence was given by or on behalf of the plaintiff appellant that this sum of £2,150 was not paid or that it was excessive or unreasonable. In my judgment the defendant respondent is entitled to an additional credit of £1,650 (former currency) in respect of these items and no challenge was made to the inclusion of VAT in this amount. Total of these extra allowances amounts to £4,241 (former currency). The Counterclaim includes, pleaded in a Schedule of defects, a large number of claims for the cost of making good alleged defective workmanship on the part of the plaintiff appellant its servants or agents in the performance of the contract. I am satisfied on the evidence that the defendant respondent is entitled to some or all of the reasonable cost of making good the following matters, but none other, namely:-

1. Building up window openings made larger than as provided on the drawings.
2. Reducing a window opening to allow for flashing to an adjoining roof.
3. The provision of ventilation openings in already plastered walls.
4. Making good and levelling the uneven surface of the wall under the wall plate.
5. Making good a gap in the under floor damp proof membrane between the sitting room and kitchen.
6. Adding a third decorative feature to the chimney cap as provided by the drawings.

29. I am satisfied on the evidence of the defendant respondent that the drawings prepared by Mr. Tony Fortune and which were admitted into evidence unchallenged and upon which the plaintiff appellant based the Quotation of 11 September 1998 provide for window openings of very specific dimensions. I accept the evidence of Mr. McManus that Senator Windows Ltd prefabricated window frames from these drawings to fit the specific openings shown on the drawings and that the first he knew that the openings as actually constructed were too wide was when the representatives of Senator Windows Ltd pointed this out to him. I accept the evidence of Mr. McManus that the gap had too filled out with cement. In these circumstances I find it very improbable that Mr. McManus had asked Mr. John Ryan to leave an unspecified space for the fitting of granite facings on the sides of the top floor windows and that Mr. John Ryan decided to leave a space of 6 inches on each side because the suppliers - unnamed - of Granite Reveals would take three months to supply them and he could not wait this long. No reference to or record in writing of or relating in anyway to this variation was adduced in evidence either between the parties themselves or with any supplier or other third party. Mr. Paul Nolan considered his sum of £560 (former currency), should be allowed as a labour only cost to make good these defects, (two general operatives for two days equating to 32 hours at £17.50 per hour). However, this sum includes the cost of breaking out openings for granite heads to be inserted and the block work built up and made good. There was no evidence that this work was in

anyway referable to defective workmanship on the part of the plaintiff appellant. In the absence of any breakdown of this figure of £560 or of the time involved in the separate operations, the court will allow a figure of £280 (former currency) in respect of making good the window openings.

30. On the evidence of Mr. McManus and Mr. James A. Griffin a window in the rear first floor gable had to be adjusted in its dimensions to allow the flashing into that wall of an adjoining sloping roof. The drawings expressly provide for the insertion of lead flashing and counter flashing at this point. If the drawings, which expressly note that they are, "planning application drawings only", appear to show the particular window abutting directly on to the adjoining roof leaving no space for the expressly indicated flashings the plaintiff appellant as an experienced builder and developer ought to have made the necessary adjustment in the dimensions of the window or the angle of the adjoining roof or raised a specific query with the plaintiff respondent in relation to the matter. Mr. Paul Nolan considered that a sum of £280 (former currency) should be allowed on a labour cost only basis to remedy this defect, (16 hours at £17.50 per hour). This work on the evidence of Mr. McManus was done by him and his son perhaps with some additional assistance from Mr. Michael Hayes. In the absence of any challenge to the fact that the work was carried out or to the sum claimed the court will allow the sum of £280 (former currency) in respect of this item.

31. I accept the evidence of Mr. James A. Griffin that the ventilation openings in the walls should have been constructed or broken out before the walls were plastered. Mr. Paul Nolan allowed a sum of £280 (former currency), for work described as:- "Breaking out openings upstairs for air vents and putting in same and to breaking out openings for window cills upstairs". No evidence at all was led in respect of, "breaking out openings for window cills upstairs". In the absence of any apportionment of this sum or of the 16 hours claimed as necessary for the work, as between these respective operations the court will allow a sum of £140 (former currency), in respect of this item.

32. I accept the evidence of Mr. James A. Griffin and of Mr. McManus that gaps of up to three inches were left between the underside of the timber wall plate and the top of the external walls which had been packed with loose pieces of building material. While I accept that is not uncommon in the construction industry to use a piece of slate or some similar material to make up a small gap of this nature I find on the evidence, particularly of Mr. Griffin that in this instance the gaps were so great and so extensive that unless properly made up they would cause sagging in the wall plate which in turn would distort the roof line. Mr. McManus gave evidence that this was the defect which finally decided him to demand that the plaintiff leave the site. Mr. Paul Nolan allowed a sum of £874 (former currency), for making good this defect. This sum is made up of £14 for cement fill, £300 for hire of scaffolding and £560 for the labour cost of two general operatives at £16 hours each and £17.50 per hour. Apart from the challenge to the necessity for this work, these figures were not challenged. It is somewhat unclear on the evidence whether the work was done by Mr. McManus and his son or whether he employed someone else, - possibly Mr. Michael Hayes, to do it. No third party invoice for the work was produced at the hearing. The court will allow the claimed sum of £874 (former currency) in respect of this item

33. I accept the evidence of Mr. James A. Griffin that the existence of a gap in the under floor damp-proof membrane was a most serious defect in workmanship and probably indicative of the lack of care with which this entire contract was performed. I accept his evidence and that of Mr. McManus and that the ground floor slab had to be broken open a strip of membrane heat fused to the existing material to cover the gap and the opening in the floor made good. Mr. Paul Nolan allowed a sum of £419 (former currency) for making good this defect. This sum is made up of £15 for concrete and £4 for mesh, £80 for the hire of a "Kango" hammer for eight hours, £40 for the hire of a concrete saw for eight hours and 16 hours labour cost at £17.50 per hour or £280). It was not suggested by the plaintiff appellant that these sums were unreasonable or excessive. The court will allow the claimed sum of £419 (former currency) in respect of this item.

34. A sum of £662.50 (former currency) is claimed as the cost of completing the chimney capping in accordance with the drawings which clearly provide for three ornamental chimney caps. I am quite unable to accept the recollection of Mr. John Ryan that he met Mr. McManus on site and advised him that the capping would be too heavy and that Mr. McManus agreed that the third capping section would not be fitted. I accept the evidence of Mr. McManus as more probable that he had not agreed to any such suggestion by Mr. John Ryan. I accept the evidence of Mr. McManus that the drawings provided for three distinctive decorative features on the chimney cap and it would have been ridiculous for him to have accepted an opinion from Mr. John Ryan that the third leaf would have made this decorative feature too heavy. Mr. McManus gave evidence that he had to hire scaffolding and add this third decorative leaf himself with the help of his son. The figure of £662.50 (former currency), submitted by Mr. Paul Nolan as reasonable and appropriate for this work does not include any sum for scaffolding hire and as no evidence was offered as to the costs of this hire the court is unable to make any award in respect of it. The sum claimed of £662.50 is made up of £560 labour costs, (two general operatives for 16 hours each at £17.50 per hour), £50 for concrete and £52.50 for timber shuttering. The court will allow this claimed sum of £662.50 (former currency) in respect of this item.

35. Having regard to the absence of evidence or to the weight of the evidence actually given the court will disallow the following items of the counterclaim:-

1. Levelling and filling the site
2. Providing additional support to the R.S.J., over the entrance to the conservatory.
3. Tracing the line of the waste pipe serving the first floor en-suite bedroom.
4. Replacing the central heating system.
5. Repairing the footpath claimed to have been damaged by the plaintiff appellant in the course of construction works.
6. Adding additional screed to cover the exposed steel straps stabilising one of the floor slabs at first floor level.
7. Completing a stone string course at the front of the house.

36. In the circumstances the defendant respondent is entitled to a sum of £2,615.50, (former currency), as the costs of making good the defective work on the part of the plaintiff appellant as already found.

37. In my judgment the defendant respondent is entitled to recover the cost of the two on site inspections by Mr. James A. Griffin carried out on the 30th June, 1999 and 5th August, 1999 and the cost of his report dated July 1999, stated in the note attached to the letter of 26th July, 1999 to be £769, (former currency).

38. The Civil Bill was issued in this case on 11th June, 2001. Unlike the report from James A. Griffin, Consulting Engineer, the Nolan

Ryan Partnership Report dated 3rd February, 2004 was obviously prepared for the purpose of the Counterclaim in the proceedings and as such is clearly a matter of costs.

39. The defendant respondent is therefore entitled to the sum of £7,625.50, (former currency), on foot of his counterclaim. Setting-off the claim and counterclaim the plaintiff appellant is entitled to a decree for £4,924.48, (former currency), being €6,252.80. There will therefore be a decree in favour of the plaintiff appellant in the sum of €6,252.80 with appropriate costs and a certificate for counsel in both courts. There will be no order on foot of the Counterclaim.