

THE HIGH COURT

[2009 No. 4373 P]

BETWEEN

MICHAEL MITCHELL AND MARGOT MITCHELL

PLAINTIFFS

AND

MULVEY DEVELOPMENTS LIMITED, STEPHEN GARVEY PRACTISING UNDER THE STYLE AND TITLE OF ADEPT CONSULTING ENGINEERS (AND BY ORDER THOMAS MULVEY, ROBERT MULVEY, DESIGN DEVELOPMENT LIMITED AND NATIONAL HOUSE BUILDING GUARANTEE COMPANY LIMITED) (No.2)

DEFENDANTS

THE HIGH COURT

[2009 4370 P]

BETWEEN

MARY BRETT

PLAINTIFF

AND

MULVEY DEVELOPMENTS LIMITED, STEPHEN GARVEY PRACTISING UNDER THE STYLE AND TITLE OF ADEPT CONSULTING ENGINEERS (AND BY ORDER THOMAS MULVEY, ROBERT MULVEY, DESIGN DEVELOPMENT LIMITED AND NATIONAL HOUSE BUILDING GUARANTEE COMPANY LIMITED)

DEFENDANTS

THE HIGH COURT

[2009 No. 7559 P]

BETWEEN

CIARÁN ADAMS AND NIAMH DEASY

PLAINTIFFS

AND

MULVEY DEVELOPMENTS LIMITED, STEPHEN GARVEY PRACTISING UNDER THE STYLE AND TITLE OF ADEPT CONSULTING ENGINEERS (AND BY ORDER THOMAS MULVEY, ROBERT MULVEY, DESIGN DEVELOPMENT LIMITED AND NATIONAL HOUSE BUILDING GUARANTEE COMPANY LIMITED)

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on the 6th day of February, 2014

Part 1: Introduction

1. The development of a new housing complex at Strand Hill, County Sligo between 2004 and 2005 seems to have attracted much attention at the time. There must have been many who considered that the purchase of such a house at this development would represent an excellent choice as a family home. The properties were located about seven kilometres outside Sligo town and many of them had balconies overlooking Sligo Bay with its stunning scenery. To the east lay the equally stunning vista presented by Knocknarea mountain, while to the west lay the Ox mountains, Balisodare Bay and Culleennamore strand.

2. The plaintiffs in these proceedings all purchased these properties in this belief and expectation. As the details of this case will chronicle, these expectations were all too quickly dashed. Instead, as the plaintiffs have found out to their cost and dismay, they have been the victims of abysmal building practices and systemic and massive breaches of the relevant Building Regulations. This has meant that the plaintiffs have been left with properties which, as matters stand, are unmarketable and, in some instances at least, must be close to being uninhabitable.

3. The present action is as against the first defendant (Mulvey Development Ltd.), the second defendant (Stephen Garvey, practising

under the style and title of Adept Consulting Engineers), the third defendant (Thomas Mulvey) and the fifth defendant (Design Development Services Ltd.). While an appearance was entered on behalf of Mr. Garvey on 30th May 2011, none of these other defendants have filed an appearance. None of them have filed a defence. Judgment in default of appearance was entered against Mulvey Developments Ltd. and Thomas Mulvey on 11th April 2011. A similar default judgment was marked against Design Development Ltd. on 23rd May 2011. Judgment in default of defence against Mr. Garvey was given by me on 13th May 2013.

4. By decision of this court delivered on 11th March 2013, the action against the fourth defendant Robert Mulvey was dismissed, since he was merely one of the vendors of the land on which the properties stand. The evidence established that he had no role in the construction of the properties.

5. There remains the claim against the sixth defendant, National House Building Guarantee Company Ltd. ("Homebond") whereby it is sued pursuant to that guarantee which it gave under the Home Bond Agreement. Under that the terms of that agreement Homebond agreed to repair defectively constructed private dwellings in the event that one its members defaulted on its obligation to effect such repairs. Although the agreement contained an arbitration clause, in a reserved judgment delivered by me on 20th December 2012 I held that Homebond was precluded by its own conduct from invoking that clause: see *Mitchell v. Mulvey Developments Ltd.* [2012] IEHC 561.

6. While Homebond remain in the proceedings, it has been agreed that the actions against them will stand over pending the determination of the claim against Mulvey Development, Mr. Thomas Mulvey, Mr. Garvey and Design Developments Ltd. Since, as we have seen default judgments have been marked against all of these particular defendants, my task is simply to assess damages. I should further record that some six other similar claims brought by other residents of the estate stand adjourned pending the outcome of the assessment of damages in the present three sample cases.

7. To complete this picture it should be also recorded that Design Development Services Ltd. was placed into liquidation by its members in September 2013 and a liquidator was then appointed. I have been further informed that an issue either has or may arise with regard to the repudiation of the Mr. Garvey's professional indemnity insurance by the insurer.

8. We can now proceed to consider the individual claims of the three separate sets of plaintiffs.

Part II: The claim of the Mitchells

9. Michael and Margo Mitchell bought a five bed room property at 8 The Waves, Strandhill in May 2005. Since then they have had to contend with a multitude of defects which I can only endeavour inadequately to summarise in this judgment.

10. Within a month of moving into the property the Mitchells noted water staining in the ceiling in the playroom. The developers promised to attend to this and it was decided that the balcony slabs should be removed and replaced with tiles. The object of this was to prevent water getting into the patio doors on the balcony and down to the playroom below. These repairs were not immediately attend to and yet worse was to befall them.

11. On a rainy Sunday afternoon in September, 2005 Ms. Mitchell was alerted by the cries of the children that it was raining in the playroom. It transpired that water was streaming through the playroom ceiling and down through the downlights. This required the emergency evacuation of the house and later that evening the plasterboard on the playroom ceiling collapsed. The ceiling was repaired in December 2005 and the balcony was then tiled.

12. Yet the problems continued, apparently unabated. The tiling was replaced twice, but on another rainy Sunday in November 2006 the playroom ceiling collapsed again. The photographs of this event show masonry slabs on the floor.

The evidence of Mr. Michael Conmy

13. The Mitchells' engineer, Mr. Michael Conmy, visited the premises shortly afterwards at a time when the builder had opened up the block work for inspection. He prepared a report at this time which, among other things, recorded that no damp proof course had been fitted over the door and that the windows of the opening and in other places was either undersized or fitted down too low. A section of the cavity wall had no insulation fitted and in other places the insulation was plainly inadequate. In other places the tiling and the lead flashing was inadequate or defective. Even though the house was little more than a year and one half old, yet by this stage the structural beam supporting the back wall was deeply pitted with rust.

14. As if this were not enough, photographs taken at this time show inadequate balustrading; water ponding in the balcony and lack of insulation on the pipes and water tank. There were also cracks in the footpath; plaster blotches on the brickwork; unfinished paintwork; an unfinished garden fence and an undesirable (and potentially dangerous) protruding step in the garden patio.

15. Mr. Conmy followed up with a series of further reports. Following a further inspection on 4th April 2008, he stated:

"Responsibility for the legacy of disasters discovered to date rest firstly with the building contractor and his staff; secondly with the sub-contractors and thirdly with the supervising engineers.

It is hard to understand how so many people on a building site allowed work to be carried out to such an appalling standard. I can only conclude that quality of work was never a priority and that the sub-contractors adopted the lowest standards possible on the site."

16. These comments rather pithily sum up all that was wrong with these premises. Mr. Conmy added in evidence before me that he had seen no evidence of any engineering input whatever in the construction process. Nevertheless, remarkable as it might seem, this was not to be the end of the litany of travails which have been visited on this most unfortunate family. Mr. Conmy visited the property again on 7th May, 2013, to assess the condition of the property. He did a short further report on 12th December, 2013, in which he noted the following deterioration in the premises:-

- "1. The continuous seepage of water has corroded the Universal Beam supporting the rear wall of the property.
2. The blockwork and plasterwork on the rear wall and the living area in the kitchen is damaged due to moisture ingress.
3. Water is coming into the upstairs bedrooms through the chimneys.

4. Condensation is forming in the property due to the absence of the sliding patio door in the master bedroom. If this level of deterioration and moisture ingress continues, the house will not be fit for habitation in 12-15 months."

17. Mr. Conmy further confirmed that he had noticed in his latest inspection that the condition of the property had greatly deteriorated since the previous visit. He thought that the reconstruction work would take about one year.

18. This catalogue of miseries has gravely impacted on family life over the last nine years or so. The balcony has had to be boarded up and this has obviously been the subject of comment in the community. Traditional parties for the children – such as birthdays, Christmas and Halloween – have been overshadowed by a playroom which is a poor state of repair. The master bedroom is so cold that Ms. Mitchell was forced to don a ski cap to keep warm and in the last twelve months she abandoned the effort and moved out of that bedroom.

The Evidence of David Hanney

19. The quantity surveyor, David Heaney, thought that the repairs would cost €202,090. He had also inspected the building and he considered that there had been a "total failure" of the external envelope of the property. He noticed that the plaster was turning into powder and that the rainwater was seeping through the blockwork, all of which would have to be drylined.

Calculation of the damages to be awarded to the Mitchells

20. In *Leahy v. Rawson* [2004] 3 I.R. 1 O'Sullivan J. allowed the sum of IR£5,000 per year in respect of general damages for "anxiety and upset as a consequence of the negligence of the building contractor defendants." This, of course, was an Irish pounds sum and it further referred to events which took place over the late 1990s and early 2000s. While it is true that inflation has, on the whole, been low since 2003 (the date of that judgment), I propose to allow each of the plaintiffs the sum of €10,000 per year as measured by that benchmark. The extent of the inconvenience and distress in *Leahy* was admittedly considerable, but this case is, if anything, probably worse. I will accordingly award the two plaintiffs €20,000 for each of the last nine years, i.e., a total sum of €180,000 for anxiety, distress, upset and inconvenience as a result of negligence and breach of contract.

21. I will further allow the sum of €202,090 for repairs as per the estimate of Mr. Hanney, together with the €18,000 for repair works paid for by the Mitchells which have proved fruitless. I will also allow the Mitchells the sum of €24,000 in respect of the costs and inconvenience of moving out of the property for the one year necessary while repair works are performed. In sum, therefore, I will make an award in the sum of €424,090 in favour of the Mitchells.

Part III: The claim of Ms. Brett

22. Ms. Brett purchased No. 3, The Waves, Ocean Links, Strandhill in 2003 and moved a year later. At the time Ms. Brett was working on secondment in Italy and she lived at Strandhill only during holidays. She returned permanently to Ireland in 2009. Nevertheless from an early period Ms. Brett realised that there were significant defects, but early endeavours to raise these issues with the builders were summarily rebuffed.

23. In the first place Ms. Brett noticed cracking appearing in the outside front wall, running from the upstairs window to the downstairs window. Soon, however, the cracks became pervasive and unsightly cracks could be seen in upstairs rooms and in the sitting room walls. By 2006 Ms. Brett noticed that the sitting room floor was starting to slope. Plaster began to fall off the walls on a regular basis.

24. Cracking began to get worse so that by 2009 it reached to the bathroom and the hall. More recently Ms. Brett has begun to notice that the kitchen tiles have sounded hollow under foot, so that she fears that the parts of the kitchen floor may give way. All of this has proved embarrassing when visitors arrive.

25. There were a myriad of other problems. There was no dividing wall in the attic. As this was a major safety issue, Ms. Brett arranged with her neighbours to have such a wall constructed at a cost of €1,000.

26. The plumbing was also defective, as the hot water pipe had not been connected properly. The bedroom radiators would not heat and a plumbing inspection revealed that the two radiators were connected with each other, rather than to the heating circuit.

27. Ms. Brett got married in July 2009. Unfortunately, her enjoyment of what should have been a very special and memorable day was significantly compromised by a leak in the kitchen which manifested itself on that morning. She spent much of the wedding reception with the nagging concern that the ceiling in the kitchen might collapse. The first days of her honeymoon were spent engaging with plumbers by mobile telephone.

28. This leak (the costs of which was admittedly covered by insurance) was hugely disruptive. The soaked ceiling had to be opened up in order to find the leak. It transpired that the fittings used to join the pipes were not the appropriate size for the pipes and it was this which caused the leak.

29. During the course of these repairs some of the plaster fell onto the kitchen wall. On inspection one could see that it was not simply the plaster which was cracked, but the internal brickwork was also cracked, something which was also confirmed by the engineering evidence. Not surprisingly, the house was cold and was always vulnerable to draughts. It was very difficult to heat. So far from giving the owner joy and pleasure, the property has been the source of endless worry and misery.

Evidence of Patrick Barrett

30. Ms. Brett's engineer, Mr. Barrett, gave evidence in terms of his earlier report of October 2009. He confirmed what had been said in that report, namely, that a trial hole had revealed that the house had been constructed "on loose sandy type material" which on inspection was found not to be compacted. It is this which has led to subsidence and cracking. Further inspections of an opening in the gable wall revealed an inadequate damp proof course over the brickwork. A bonding agent suitable only for internal use had been used for the external plaster finish. Not surprisingly, this material was not weather resistant: it expanded and exploded, pushing the plaster off the walls, allowing rainwater to penetrate to the blockwork. Thermal imaging revealed the absence of insulation in places such as the attic, water tank and pipeworks.

31. It is only fair to record, however, that tests carried out in July 2013 showed that the cracking had been arrested and the settlement of the foundations has stopped. Yet this should give us but little comfort, as Mr. Barrett put the matter starkly by saying in conclusion that he was "shocked" that any professional person could give the appropriate certificates in relation to either the

building work or the finish of the house. His inspections had revealed wholesale violations of the Building Regulations.

Evidence of Mr. Damien Hanney

32. Mr. Hanney, the quantity surveyor, estimated the repairs work would cost €120,175 and that they would be about 4 months in duration. He thought that the house showed poor workmanship "from start to finish" and that the property was unmarketable as it presently stands.

The award of damages to Ms. Brett

33. Given that Ms. Brett was only in partial occupation of the property in the period between 2004 and 2009 and her stays in the property were limited in duration, I will allow her the sum of €20,000 for this period for upset, annoyance, anxiety and loss of expectation. I will allow herself and her husband the figure of €100,000 for the subsequent five year period in respect of distress, anxiety, upset and disappointment.

34. I will further allow her the sum of €120,175 for future repairs and €5,000 for past repairs. Finally, I will allow the sum of €5,000 for rent and inconvenience associated with the four month period while the property is under repair.

35. I will accordingly award Ms. Brett the sum of €250,175.

Part IV: The claim of Mr. Adams and Ms. Deasy

36. The claim of Mr. Adams and Ms. Deasy discloses another case of unrelieved misery and woe.

The Evidence of Ciarán Adams

37. Mr. Adams gave evidence that he and his wife, Niamh Deasy, are both nurses who returned to Ireland in 2002 in order to get married. They both obtained permanent employment in 2003 and settled in Sligo. They purchased their property – which is a four bed detached property – for €352,000.00. Not surprisingly, they chose this property for its stunning views over Sligo Bay and the surrounding mountains.

38. Mr. Adams and Ms. Deasy moved into the property with their young daughter, Clodagh, in mid 2005. They quickly became concerned that there were underlying defects in the property because the house was cold and very difficult to heat. Fuel bills were very high and then, to their alarm, they found cracks opening in the kitchen wall. These cracks extended the entire length of the major supporting walls of the kitchen and, worse again, the cracks were manifest both inside the dwelling and also outside.

39. Similar cracks opened up in the bedroom above the kitchen again, both internally and externally. There then followed a long litany of other defects: they found cracked wall tiles cracked, the granite worktop in the kitchen shifted, the kitchen cupboard doors began to come loose and the kitchen windows jammed as if due to downward pressure and became unsuitable for ventilation. Wind came in through the cracks and when driving rain came from the west – a not uncommon occurrence in Sligo – it came through these cracks and flowed inside the kitchen walls. The oak kitchen units have accordingly been severely damaged by water ingress.

40. As if this was not enough, there were a myriad of other problems which this judgment can only briefly and all too inadequately summarise. There was an intermittent odour from the sewage system and there was water ingress causing large internal damp patches and peeling of paint. Plaster has frequently either just fallen on to the floor or peeled away. The balustrading on the stairs and landing was loose and defective. The seals on all the windows and doors were inadequate and will need to be replaced.

41. It proved almost financially prohibitive to run the central heating system and the bedrooms were extremely cold. The radiators were not installed with thermostats and the water pressure was relatively weak. The water tank and the pipes were not lagged and the attic insulation was inadequate. The engineering evidence was that the ceiling over the kitchen and the dining room is very possibly not insulated at all. The engineering team recommended that this ceiling needs to be taken down in order to allow proper insulation to be supplied.

42. As it happened, the development was still under construction when Mr. Adams and Ms. Deasy moved into their own property. They regularly approached the developers who were then working on other houses in the immediate vicinity in an effort to have these problems addressed. The developers made attempts on numerous occasions to seal draughts with a silicone gun. They also attempted minor plasterwork and damp proof course repair which did not work. The external walls were repainted but this simply camouflaged the cracks which were to open up and reappear at a later stage. The toilet near the kitchen was repositioned in a failed attempt to stop the sewage odour.

43. In the end, Mr. Adams was forced to use duct tape to seal cracks in the walls and the draughts between the windows. Depending, therefore, on the weather and the seasonal conditions, the Adams family have had to deal with draughts, rainwater ingress, mould, odours, leaks and insect infestation.

The evidence of Ms. Deasy

44. Ms. Deasy gave evidence along similar lines. She chronicled the frustrations and challenges which living in this property posed. She candidly described the many conversations which she and her husband have had concerning the property. Not surprisingly, these conversations have led to mutual recrimination and upset. All of this is understandable, even if, of course, objectively, neither of them are to blame for the predicament in which they find themselves.

45. Ms. Deasy also recounted a personal incident which touched her deeply. Her sister, Therese, died in 2011 as a result of multiple sclerosis. Ms. Deasy had hoped that her sister could have stayed with her at Strandhill, but this proved impossible because the entry to the bathroom was narrower than the minimum standards required for such access by the Building Regulations.

The evidence of Mr. O'Connell, Structural Engineer

46. Mr. Cathal O'Connell, a consulting engineer attached to CST Group Consulting Engineers, gave evidence based on detailed reports compiled in March 2009 and January 2010 following several site visits. He had also revisited the property again on 10th July 2013.

47. When, then, was the major source of the problems confronted by the Adams family? Mr. O'Connell explained that the problems with the property were so pervasive that it was deemed necessary to inspect the foundations by means of trial holes.

48. Two trial holes were opened by the engineering team. One proved unexceptionable. The other trial hole was opened under the retaining wall beside the kitchen and dining room and the sun room where the cracking was most evident. This trial hole told an altogether different story. The engineers observed voids under the strip foundations at this point and they also found that the

foundation was constructed on loose clay fill material which was quite unsuited for the building's foundations. Some of this clay fill appears to have been mixed with builders' rubble, as timber, plastic sheeting, paint cans and even (according to Ms. Deasy) a wheelbarrow were found in this mix.

49. While Mr. O'Connell considered that further excavations are necessary – not least to explain the curious fact that the concrete footpath running parallel with the gable wall has settled and is now sloping away from the house – he estimated that some 40% of the foundations have inappropriate fill material of this kind. Mr. O'Connell concluded his second report by stating:

"We believe that the cracking to the kitchen gable and rear wall has occurred due to foundation movement as a result of the house being partially constructed on clay fill. Significant remedial works will have to be carried out to the existing structure to rectify the problem. The masonry boundary retaining wall adjacent to the gable of the dwelling is under-designed and will need to be strengthened.

Fine and hairline cracks observed in walls and ceiling throughout the building in areas away from the affected area do not appear to be structurally significant and appear to be normal shrinkage cracks.

The property is not in full compliance with the Building Regulations (current at the time of construction) [with] regard to disabled access, heat conservation (insulation) and ventilation. Other defects such as damp ingress, poor plumbing and drainage are listed in the body of the report and are generally as a result of poor workmanship and poor building practice."

50. All of this speaks for itself, but in oral evidence Mr. O'Connell described as "awful" the quality of workmanship in relation to the foundations. He considered that the engineers should have inspected the foundations and that this evidently did not happen. He further expressed the view that while the property was still salvageable, nevertheless unless major remedial works were performed there was a real risk that the property would become uninhabitable over the next year or so.

The Evidence of David Heaney, Quantity Surveyor

51. Mr. Heaney gave evidence that he had never seen anything like the dilapidation which he had encountered in this particular property. It was plain that the wrong type of foundation fill had been used. He estimated the bill of quantities for the repair of the property at €247,805.

52. He estimated that the repair works would take up to five months, as new foundations would have to replace and supplement the existing foundations.

Calculation of the Damages to be awarded to Mr. Adams and Ms. Deasy

53. In line with the other awards, I propose to award these plaintiffs in total €20,000 per year for total sum for anxiety, distress, upset and inconvenience as a result of negligence and breach of contract. This sum comes to €160,000. I will allow a figure of €12,000 for the cost of renting alternative accommodation for a five to six month period in which the family were required to move out of the dwelling while repair works are being carried out. Finally, I will allow a sum of €5,000 for the repairs which the family have been forced to pay for, the expenditure for which has been wasted.

54. I will accordingly award Mr. Adams and Ms. Deasy the sum of €424,805.

Part V: Conclusions

55. From the legal perspective the claims against the relevant defendants in both tort and contract are absolutely straightforward. The defects chronicled in this judgment are systemic and all pervasive throughout all three properties. The evidence of poor workmanship and defective supervision of the construction work is overwhelming and one cannot avoid observing that there appears to have been a very complete departure from the requirements of the Building Regulations.

56. I have endeavoured – all too belatedly and perhaps, I fear, inadequately – to compensate these plaintiffs for the manifold wrongs that they have been obliged to endure over the last eight to nine years, although it is as yet unclear as to whether these awards are actually enforceable in practice. What happened to these three families was simply unconscionable. Even though the judicial task has now come to an end, yet it would be altogether remiss of me not to express the hope that the appalling plight of the three families as revealed in this judgment may yet prove to be a clarion call for action in relation to the proper enforcement of building standards.

57. Mindful of the fact that what I described in *Hussein v. Labour Court* [2012] IEHC 264, [2012] 2 I.R. 704, 714 as "a healthy dialogue" between the various branches of government can only serve the public interest, it seems to me appropriate that the two other branches of government should be made expressly aware of the contents of a decision which may call for important policy review, not least in such vital matters as the quality of construction work and the effective operation of the Building Regulations. It is in this vein that I propose to transmit a copy of this decision to the Minister for the Environment, Community and Local Government and to the Chairman of the Oireachtas Committee on the Environment, Culture and the Gaeltacht so that the Oireachtas and, if needs be, the Government, may give such consideration to the policy issues raised by the judgment as they may consider appropriate.