THE HIGH COURT

[2017 No. 7745 P.]

BETWEEN

MARY EGAN AND PAUL BARRON

PLAINTIFFS

AND

NOEL THOMAS RICHARD HEATLEY

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 6th day of June, 2019

Introduction

1. This is an action for specific performance, or for damages in lieu of specific performance, of a contract for the sale and purchase of a serviced site in Wicklow Town. The defence, in substance, is that the defendant was induced to make the contract by a misrepresentation of fact.

Background

2. The plaintiffs are husband and wife. The first plaintiff is a teacher by profession and the second plaintiff is an architect. The defendant is a builder.

3. In 2015 or so the defendant acquired a residential development site in Wicklow Town. He planned to build a number of speculative houses and to sell off six serviced sites. The plaintiffs, at that time, were planning to sell their house in Wicklow and to build a house in Wicklow.

4. The defendant's solicitor was Mr. Fachtna Whittle. Mr. Whittle knew Mr. Barron and knew that Mr. Barron was looking for a site. Mr. Whittle told Mr. Barron of the availability of sites at Mr. Heatley's development. In 2015 or so Mr. Barron agreed orally with Mr. Heatley to buy one of the sites for €85,000 and, with a letter of consent from Mr. Heatley, made an application for planning permission.

5. By the end of October, 2016 the plaintiffs had sold their house and obtained a grant of planning permission for the site. Mr. Barron had lined up a builder, Mr. Ciaran Rodgers, to build the plaintiffs' new house, and was keen to get started. The house was to be a four bedroomed, two storey house of timber frame construction. It was said that the timber frame had been ordered by Mr. Rodgers from a firm in Newry called QTF Limited.

The negotiations

6. On 2nd November, 2016 there was a meeting between the plaintiffs, the defendant, and Mr. Whittle. There is not much between the parties as to what was then said. Mr. Whittle said that the purpose of the meeting was not to provide legal advice but to "*clarify certain issues*". Nine issues were discussed, including planning permission, compliance with the planning conditions, the requirement for a management company, the fencing of the site, and, most importantly for present purposes, the question of insurance. Mr. Heatley was anxious to ensure that there was insurance in place to cover the activities of all of the contractors on the site. He had taken advice from an insurance broker, Mr. Linus Devlin of Sheridan-Colohan, in Wicklow, as to what was required. Mr. Devlin had advised that site purchasers should either use an insured contractor or take out a self-build insurance policy: which latter option, if required, Sheridan-Colohan could arrange.

7. The plaintiffs, specifically Mr. Barron, had by then identified Mr. Rodgers as the contractor they would use. Mr. Barron had worked with Mr. Rodgers before and believed him to have insurance. It is common case that Mr. Barron said at the meeting that Mr. Rodgers had insurance. On foot of that representation, Mr. Rodgers was allowed to go onto the site and start work on the following day. That, as everyone now recognises, was unwise.

8. Over the course of the following five weeks or so Mr. Rodgers was repeatedly asked by Mr. Heatley for a copy of his insurance policy. Mr. Rodgers repeatedly assured Mr. Heatley that he had insurance and offered a variety of excuses for not producing it. In the meantime, he was working away and by early November had laid the foundations and constructed the sub-structure for the plaintiffs' house.

9. On 8th December, 2016 Mr. Heatley observed some workmen going onto the plaintiffs' site - or at least the site upon which Mr. Rodgers was building the plaintiffs' house - without personal protection equipment. Mr. Heatley telephoned Mr. Barron to say that he wanted Mr. Rodgers off the site.

10. Mr. Heatley was working elsewhere on the development site with his partner, Mr. Chris Dunne, and one of their workman, Mr. Eddie Kelly. Mr. Barron drove up to where Mr. Heatley was standing with Messrs. Dunne and Kelly and said that he wanted to talk to him. Mr. Barron's evidence was that he was initially calm but that Mr. Heatley was excited. Mr. Heatley's evidence was that he was initially calm, but that Mr. Barron was excited.

11. It was common case that Mr. Heatley demanded that Mr. Barron and Mr. Rodgers leave the site and that the reason for that was that Mr. Rodgers had not produced a policy of insurance. As whichever it was of Messrs. Heatley and Barron as had not initially been excited became excited, Mr. Heatley walked or ran away from the group to his van, which was parked a little distance away. Mr. Barron followed.

12. There was some, but in the end not a huge, difference in the evidence as to what happened next. Mr. Barron swore that after Mr. Heatley got into his van he, Mr Barron, opened the door and put his head in. Mr. Heatley, he said, told him not to put his hands on him and, said Mr. Barron, he did not. It was put to Mr. Barron that Mr. Heatley asked him to "*please leave the site and get the insurance sorted out*" but that Mr. Barron had followed Mr. Heatley to his van "*yelling and screaming*". It was suggested by counsel that Mr. Barron had pushed in the door of the van and caught Mr. Heatley by the arm and that Mr. Kelly had put his arm across Mr. Barron to block him. Mr. Heatley's evidence was that Mr. Barron stopped him getting into his van by jamming the door and putting a

hand on his shoulder saying *"I'll f****** sort you out".* Mr. Heatley said that Mr. Kelly came over and put a hand on Mr. Barron's shoulder and said "would you leave him alone".

13. Mr. Chris Dunne swore that Mr. Barron chased after Mr. Heatley and dragged him out of his van and that Mr. Kelly got between them to try to get Mr. Barron off Mr. Heatley. Mr. Dunne thought that Mr. Barron had closed the door on Mr. Heatley but that Mr. Kelly had pulled him away. Mr. Kelly said that Mr. Barron put his hand on Mr. Heatley's shoulder and that he, Mr. Kelly, put a hand on Mr. Barron's shoulder. Mr. Kelly said that he thought that they were going to start boxing.

14. Messrs. Heatley, Dunne and Kelly all said that Mr. Barron accused them of being gangsters and knowing nothing about building or insurance. Mr. Barron denied it. Mr. Barron said that Mr. Heatley had said that he would pay him for whatever had gone into the ground, and Mr. Heatley denied this.

15. I dwell rather on the detail because there is a counterclaim for damages for assault. Mr. Heatley said that after the altercation he was shaking and had back pain in his bad back for a few days. He said that he wondered to himself why what had happened had happened, and ruminated on what might have happened.

16. It is common case that there was an altercation on the site on the evening of the 8th December, 2016. Mr. Heatley, I am sure, had had enough of Mr. Rodgers' excuses and was not prepared to discuss the matter of insurance further. Mr Barron, I think, was probably surprised and indignant that Mr. Rodgers was summarily put off the site. Most, if not all, of Mr. Heatley's requests for sight of Mr. Rodgers' insurance policy had been made directly to Mr. Rodgers. Mr. Barron had been speaking to Mr. Rodgers about insurance but he, too, had been fobbed off with talk of a new policy and policy amendments and the level of cover.

17. In the end there is not much between Messrs. Barron and Heatley. If not at the start of the encounter, then by the end of it, both men were agitated. I think that both raised their voices and both probably used coarse language. I think that Mr. Barron put a hand on Mr. Heatley's shoulder to engage his attention. Mr. Kelly put a hand on Mr. Barron's shoulder to calm him down. Not least by reason of the presence of Messrs. Kelly and Dunne, I do not believe that Mr. Heatley was in fear of being struck. Mr. Heatley, by his solicitors, in a letter dated 16th August, 2017 asserted that he had in his possession an incident report from An Garda Síochána but he did not suggest in evidence that he had ever made a report to the Gardaí. I have no doubt that the encounter was unpleasant, but I do not believe that it amounted to an assault.

18. From 8th December, 2016 there was an impasse. Mr. Barron had built the sub-structure of a house on land for which he had no contract. Mr. Heatley had a sub-structure on one of his sites which had been put there with his conditional permission. Unless and until a way forward could be found, Mr. Barron would not be able to build his house and Mr. Heatley would not be able to sell his site.

19. On 15th December, 2016 Mr. Whittle convened a meeting with Mr. Heatley, Mr. Barron and Ms. Egan. Mr. Whittle had heard of the altercation on the site. In advance of the meeting, Mr. Barron went to Sheridan-Colohan and took out a self-build insurance policy and he brought this to the meeting. It was noted that the risk address on the policy was wrong and Mr. Barron agreed to go back to the brokers to have it changed. There was also talk at that meeting about insurance in respect of the period from 3rd November, 2016 to 15th December, 2016, which was the date of commencement of Mr. Barron's self-build policy. Mr. Heatley was adamant that Mr. Barron agreed to provide insurance in respect of the earlier period and that is what Mr. Whittle's file note records. Mr. Barron denied that he then agreed to provide insurance for that period but said that he was continuing to push Mr. Rodgers.

20. Mr. Barron's self-build policy was not expensive. The premium was €1,293 for a year. But however inexpensive the self-build policy was, it made no sense that Mr. Barron would take out a policy unless, at the very least, he seriously doubted that Mr. Rodgers had insurance. If Mr. Rodgers did not in fact have insurance, there was no prospect of Mr. Barron obtaining retrospective cover.

21. I am satisfied that at the meeting of 15th December, 2016 Mr. Heatley was insisting on insurance for the period between 3rd November and 15th December. I am not sure that Mr. Barron unequivocally agreed to provide insurance for that period but neither did he make known his doubts that he ever could. With a view to moving matters on, Mr. Barron was content to allow Mr. Heatley, and possibly Mr. Whittle, to believe that insurance could be provided for the earlier period.

22. On the following day Mr. Barron went back to the broker to collect the corrected policy. Mr. Barron was a bit miffed to find that besides the amendment of the risk address, the cover had been extended to provide indemnity to Mr. Heatley and to Mr. Heatley's building company, Wicklow Cosy Homes Limited. This amendment, he said, showed that Sheridan-Colohan were wearing two hats. But there was no additional premium and Mr. Barron took the amended cover note away with him.

23. I pause here to deal with a few ragged ends of detail. Mr. Barron's evidence was that in the course of the discussions about insurance, Mr. Heatley said that he wanted public liability cover of €6.4 million. Mr. Barron said that he had conveyed this to Mr. Rodgers who said that he would arrange it, but later said that such a policy would cost him €4,500. Mr. Heatley denied that he had ever referred to limits of indemnity. I think that Mr. Heatley's recollection on this issue is more likely to be correct. Mr. Heatley had in his possession an e-mail from Sheridan-Colohan summarising their advice and it made no reference to a limit of indemnity. Moreover, when Mr. Barron eventually produced his self-build policy, that policy had a limit of indemnity for public liability of €2.6 million and there was not a word said about it. I accept Mr. Heatley's evidence that Mr. Whittle may have mentioned that €6.3 million was the standard level of indemnity but that Mr. Heatley was leaving the matter of insurance to his broker.

24. Mr. Heatley's evidence was that Mr. Barron agreed at the meeting of 2nd November, 2016 that the insurance would provide indemnities for himself personally and for Wicklow Cosy Homes Limited. Mr. Barron said that the question of indemnities arose later. He said that he had a call from Mr. Heatley on the afternoon of 30th November, 2016 asking for indemnities and that he said that he would look into it. On this issue, I prefer Mr. Barron's evidence. Mr. Heatley acknowledged that he was dependant on his brokers for advice as to what was needed, and he relied on their e-mail as a summary of the advice. There was no mention in the e-mail of indemnities.

25. I should say that nothing, in the end, turns on this detail but the differences in recollection show that there was a lot of talk about insurance and it does rather appear that Mr. Rodgers may have exploited this to fob off both Mr. Barron and Mr. Heatley.

26. On 16th December, 2016 Mr. Whittle sent out draft contracts to Augustus Cullen Law Solicitors, where the matter was being dealt with on behalf of the plaintiffs by Mr. David Lavelle. The contracts showed a purchase price of *"€73,775.00 (VAT inclusive)"* and a deposit of €7,377.50. There is no evidence as to where the figure for the purchase price came from. It is not far off, but not quite, €85,000 inclusive of VAT. As had been agreed on 2nd November, 2016, the named purchaser was Ms. Egan, only. There were a number of special conditions dealing with the management company, fencing, services and the like but nothing about insurance. Mr. Lavelle made a few amendments to the special conditions and returned it, signed by Ms. Egan, and accompanied by a cheque for the

deposit, under cover of a letter of 22nd December, 2016.

27. Mr. Heatley was not agreeable to Ms. Egan's proposed amendments and he wanted to make amendments to the special conditions as originally proposed. Mr. Whittle proposed a further meeting.

The contract

28. On 26th January, 2017 Ms. Egan, Mr. Barron, Mr. Lavelle, Mr. Heatley and Mr. Whittle met at the offices of Augustus Cullen Law. The purpose of the meeting, as declared by Mr. Whittle, was to try to overcome the difficulties which had arisen in the past and to move matters on. Mr. Heatley was given the floor. Mr. Barron said that Mr. Heatley was a bit heated. Mr. Heatley acknowledged that he was a bit agitated. Mr. Barron swore that he did not say a word throughout the meeting. I am unconvinced of that but I accept the evidence of Ms. Egan that she and her husband went into the meeting with a plan to say as little as possible to get the contract signed.

29. Mr. Heatley gave evidence that he brought up the assault, which Mr. Barron dismissed as a figment of his imagination. That sounds about right to me. It was common case that Mr. Heatley raised the question of insurance, specifically the question of insurance cover for the period from 2nd November, 2016, when Mr. Rodgers had gone onto the site, to 15th December, 2016, which was the commencement date of Mr. Barron's self-build policy. Mr. Barron said that he had said nothing. Mr. Heatley said that Mr. Barron said that the insurance was available but that Mr. Rodgers had still not sent it to them. Mr. Whittle's file note, dictated that day, was that Mr. Barron agreed that insurance could be produced and that all insurance policies would be provided to Mr. Lavelle and that Mr. Lavelle, in turn, would forward them to Mr. Whittle's office. I find that if Mr. Barron did not unambiguously say so, he conveyed the impression that evidence could be produced that Mr. Rodgers was insured. At such a remove from the time at which Mr. Rodgers had first been asked to produce insurance, any hope that he might appears to me to have been rather forlorn but Mr. Barron's judgment was clouded by the fact that he had paid Mr. Rodgers far more than the value of the work on site and, indeed, had paid Mr. Rodgers money in December, after he had been put off the site.

30. Mr. Whittle's file note is that Mr. Heatley "*had made it a condition precedent*" to the contract that insurance would be provided showing that Mr. Barron's contractor had insurance from the day he entered onto the site. Mr. Heatley's evidence was that the availability of insurance was "*a precondition of going onto the land*".

31. When whatever was said about insurance had been said, the parties discussed the terms of the contract.

32. The first issue discussed was the price, and the solicitors withdrew while this was being done. Mr. Heatley suggested a figure of €95,000 and eventually a price of €90,800 was agreed. When the solicitors re-joined the meeting there was a discussion as to the boundary fences, access to the site while the building work was to be carried on, and a new closing date. The completion date on the contract was changed and new special conditions were written into the contract to record what had been agreed.

33. The question of insurance came up again. Mr. Barron wanted access over the adjoining sites to his site to facilitate the building work. Mr. Heatley was agreeable to that but wanted indemnities in addition to those already discussed. A new special condition was written into the contract to provide:-

> *"19. The purchaser shall provide insurance indemnifying Noel Heatley, Wicklow Cosy Homes 2015 Ltd. and the purchasers of sites 3 & 5 when required."*

34. When all of the agreed changes had been made, the contract was dated and signed by Mr. Heatley and all of the changes to the original draft were initialled by both parties. The new completion date was 30th January, 2017. Before Christmas Mr. Barron and Ms. Egan had put Mr. Lavelle's office in funds for the deposit and on 6th January, 2017 had transferred a further €70,000. On the day after the contract was signed they transferred a further €15,000. On 27th January, 2017 Mr. Whittle presented the deposit cheque for payment and wrote to Mr. Lavelle enclosing the closing documents, which he asked Mr. Lavelle to hold in trust pending receipt of the balance of the purchase money and Mr. Lavelle's searches. This letter appears to have arrived in Mr. Lavelle's office on 2nd February, 2017. The stakeholder receipt on the contract was not signed but Mr. Whittle confirmed in evidence that, as far as he was concerned, the deposit was held by him as stakeholder.

35. On 31st January, 2017 Mr. Lavelle wrote to Mr. Whittle enclosing "insurance particulars". What was enclosed with that letter was the cover note from Sheridan-Colohan confirming the self-build insurance from 15th December, 2016, with indemnities for Mr. Heatley and Wicklow Cosy Homes Ltd. The letter and enclosure arrived in Mr. Whittle's office on the following day and was sent on by e-mail to Mr. Heatley at 15:54 on 1st February, 2017 with a request for his comments.

Mr. Heatley responded at 21:18 that evening. He wrote:-

> *"Fachtna, I am surprised to get copy of one insurance policy when we met last week a condition on going ahead with this transaction was that copies of the original which they had used from the start together with an updated copy of the Sheridan Colohan policy dated from 15/12/16 were to be provided to me by Monday last. The contract was signed on that basis and it seems like another promise broken and at this stage we tear up the agreement as conditions were not met. Send me your account for what you have done as I do appreciate its not your fault and I don't blame you for this mess and I don't want you to be at a loss, its just dealing with unworthy people."*

36. On 2nd February, 2017 Mr. Whittle forwarded Mr. Heatley's e-mail to Mr. Lavelle, asking him to address the issues raised and revert as a matter of urgency. On the following day Mr. Whittle sent back copies of three insurance policies. One was a professional indemnity policy for QTF Limited and QTF Services Limited. One was a combined all risks policy for QTF Limited and QTF Services Limited. The third was a contractor's plant policy was QTF Limited. Mr. Barron's evidence was that he had not been told by anyone that these policies were not adequate but was concerned that they might not have been. Mr. Heatley's evidence was that he did not think that they covered Mr. Rodgers but he telephoned the insurance company and QTF. Counsel for the plaintiffs objected to Mr. Heatley saying what he had been told on the telephone, but whatever it was was not, at the time, relayed to Mr. Lavelle or to Mr. Barron. To my eye, it was as plain as day that these policies did not cover the work that Mr. Rodgers had done on the site but if it was not clear to Mr. Heatley without making a series of phone calls, I suppose that it might not have been absolutely clear to Mr. Barron.

37. On the evening of 2nd February, 2017 Mr. Heatley telephoned Mr. Barron to say that he was not completing the contract and that Mr. Barron should take anything he wanted off the site. Mr. Heatley's evidence was that Mr. Barron said "*Hang on, wait a minute, I've been conned"* to which he, Mr. Heatley, replied that it didn't really matter to him, he was fed up. Mr. Barron denied

saying that he had been conned, but he had been conned, and I think that he did say so. The plaintiffs' next communication was less conciliatory.

38. On 20th February, 2017 Mr. Lavelle wrote to Mr. Whittle setting out three options. The first was that the sale would be completed, with an abatement of €15,800. The second was that the contract would be rescinded, on terms that Mr. Heatley would pay the plaintiffs €125,000. The third was to "*proceed with all haste to litigation and the cost and expense for both parties that will entail and the collateral damage that will ensue*." Mr. Lavelle said that if agreement could not be reached, he would have to cease to act. The plaintiffs' next communication was more sensible.

39. In March or April, 2017 the plaintiffs instructed Lacy Walsh, solicitors, who, on 20th April, 2017 served a completion notice, calling for completion of the contract in accordance with its terms.

40. In early June, 2017 Mr. Heatley instructed D. M. Burke solicitors. By letter dated 17th July, 2017 the plaintiffs' solicitors gave notice of unquantified substantial loss said to have been incurred by reason of Mr. Heatley's failure to complete, enclosing a bundle of documents from which the losses might be divined. D. M. Burke replied on 16th August asserting that it was an express condition that evidence of adequate insurance would be provided for the period from 3rd November, 2017; that no such evidence had been provided; and that the failure to produce evidence of insurance was a fundamental breach of contract. Mr. Heatley purported to exercise his right under general condition 41 to forfeit the deposit, without prejudice to his entitlement to damages for the cost of reinstating the site to its previous condition.

41. The plenary summons in this case issued on 24th August, 2017. Although Mr. Barron was not party to the contract he was joined as a plaintiff. The defence admitted the contract but pleaded that it is unenforceable owing to a misrepresentation of fact as to the existence of insurance, by which the defendant was induced to enter into the contract. The defendant counterclaimed for a declaration that he was entitled to rescind the contract, as well as damages for misrepresentation and assault.

42. Mr. Gavin Ralston S.C., in opening, indicated that the plaintiffs had decided that they no longer wished to purchase the site but asked for damages in lieu of specific performance.

The enforceability of the contract

43. The first issue I have to decide is whether the defendant was induced to enter the contract, or that the contract is unenforceable, by reason of a misrepresentation on the part of the plaintiffs. Mr. Barron was present at each of the meetings on 2nd November, 2016, 15th December, 2016 and 26th January, 2017 the detail of which has occupied the court for three days. I find that Mr. Barron had Ms. Egan's authority to negotiate on her behalf, but it was clear from the outset that the site was to be purchased in the sole name of Ms. Egan.

44. The case turns on what was said and done at the meeting of 26th January, 2017. What was said at the meetings on 2nd November and 15th December, 2016 inform my assessment of what was likely said at the meeting of 26th January, 2017 but the object of that meeting was to move the matter on, if that could be done. In advance of that meeting Mr. Heatley had been provided with evidence of insurance in respect of the period after 15th December, 2016. At the start of that meeting Mr. Heatley was annoyed that despite repeated assurances (more from Mr. Rodgers than from Mr. Barron) he had not been provided with evidence of cover for the period prior to 15th December, 2016. The admitted justification for Mr. Heatley's request for insurance on 2nd November, 2016 was an apprehension that in the event of an accident of the site, there might be a claim against him. As far as anyone knew on 26th January, 2017 there had been no accident and there was no claim. If Mr. Rodgers had insurance, there was no sensible reason why that could not have been produced long before the meeting. If he did not, there was nothing that anyone could have done about it. Any problem, if any, in relation to the period prior to 15th December, 2016 was not going to be solved by refusing to sell the site. I find that as a matter of probability when Mr. Heatley was given the floor to air his grievances, Mr. Barron placated him and probably repeated, as he had previously said, that Mr. Rodgers had insurance, or at least that Mr. Rodgers said that he had and would produce it. That got Mr. Heatley to the table.

45. What the parties did next was not to reduce to writing anything that had previously been agreed but to negotiate a contract for the sale and purchase of the site. It was not contested that the bargain originally struck was for €85,000, inclusive of VAT. Mr. Heatley considered himself at large to renegotiate and he did, exacting a further €5,800. The obligations of the purchaser in relation to insurance were dealt with in special condition 19. As I have said, I find that there was no reference to indemnities when the issue of insurance was first discussed. Mr. Heatley later asked for indemnities for himself and his building company, which he got. It was at the meeting of 26th January, 2016 that the question of indemnities for the purchasers of the adjoining sites was raised. Ms. Egan agreed to provide insurance and all of the indemnities sought and bound herself by initialling the new special condition to do so.

46. It was not a condition of the contract that Ms. Egan would provide evidence of insurance in respect of the period from 3rd November, 2016 to 15th December, 2016. If Mr. Heatley had wanted to make it a condition, it would have been a simple matter to have written that into the new special condition. If it was a condition precedent, Mr. Heatley could have refused to sign the contract until he saw the insurance policy. He did not do that. Instead, the deposit cheque was presented and soon after Mr. Heatley relied on the contract to purportedly forfeit the deposit.

47. The language used in the pleadings and in argument was rather loose, but if Mr. Heatley's case was that the contract he and Ms. Egan signed was not binding, what he needed to do was to return the deposit.

48. If I am wrong in my analysis of the circumstances in which the contract came to be executed by the vendor and the purchaser, the legal effect of any representation or misrepresentation which induced Mr. Heatley to make the contract was that it was voidable, and Mr. Heatley by purporting to rescind and forfeit the deposit elected to treat it as valid.

49. Mr. Damien Sheridan, in his closing submissions, offered a number of further arguments as to why the court ought not award to damages in lieu of specific performance. To understand those arguments, it is necessary to examine the damages claim, to which I shall come in due course.

The engineering evidence

50. Both sides to this dispute engaged engineers to examine and opine on the quality of the work which was done on the site. Mr. Martin Dunbar, who was called for the plaintiffs, acknowledged some shortcomings in the work but said that it was generally satisfactory and such shortcomings as there were is it were capable of remediation at little expense. Mr. Deane Turner was called on behalf of the defendant. Mr. Turner is the engineer engaged by Mr. Heatley and Wicklow Cosy Homes on the speculative building

project. He wrote a letter to Mr. Heatley in March, 2017 to the effect that he would not be in a position to sign off on the sub-structure as it stood and on 15th February, 2019 wrote a comprehensive report, concluding with an opinion that the works were substandard and did not comply with the Building Regulations.

51. I was puzzled as to the relevance of the engineering evidence. For so long as the plaintiffs were making a claim for specific performance, I cannot see how the quality of the work done by Mr. Rodgers was relevant to their case. The counterclaim, to be sure, had pleaded that the work carried out on the site was substandard and would have to be removed. But there was no claim for the cost of removal and Mr. Heatley did not say that he intended to remove the sub-structure. Mr. Turner "*recommended*" that the structure be removed and reconstructed, but had not applied his mind to the cost of remediation. In his report of 15th February, 2019 Mr. Turner went beyond matters engineering to surmise that the planning contribution might not have been paid and that a letter from Irish Water might not have been obtained. To the extent that there is any difference between the engineers, I prefer the evidence of Mr. Dunbar: but whatever difference there was in the views of the engineers as to what remedial work might be necessary, there was no dispute as to the value of the work.

52. At the end of the third day of the trial the defendant called Mr. Alan Noble, a quantity surveyor and claims assessor. Mr. Noble had carried out a survey and prepared a bill of quantities for the part completed house in March, 2017 which put a value on the works of €24,029.84, exclusive of VAT. That bill of quantities had been shared before the trial. When he came to give evidence, Mr. Noble said that he had been asked in February, 2019 to update the value of the work on site, which he had done, and the figure was €29,391.72, exclusive of VAT. At that time, he had also been asked to estimate the cost of removal of what was on the site, which he had, and the figure was €9,876.50, exclusive of VAT. Mr. Noble had prepared bills of quantities for both estimates on 21st February, 2019 but these had not been made available to the plaintiffs. So, at the end of the third day of the trial, the defendant wanted for the first time to put a figure on the cost of removing the works. Mr. Ralston was initially inclined to object but having been afforded time for reflection, said that he was not objecting to the late quantification of the claim, or to Mr. Noble's evidence, and he did not cross-examine.

The damages claim

53. It will be recalled that in their then solicitors' letter of 20th February, 2017 the plaintiffs asked for damages of €125,000. Along the way, the claim increased to €135,000 and then to €167,505.50, before it settled down at €138,115.85, which was the basis on which the case was opened.

54. The plaintiffs advanced a claim for twelve items of special damage, seven of them vouched, and five unvouched. The items were rather jumbled and I have grouped them, as far as I can, into heads of claim.

55. The first head of claim was for the premium paid for the self-build insurance policy for two years. The premium for the first year was vouched by an invoice from Sheridan-Colohan. For no good reason that I can think of, there was no voucher for the second year but the payment of the premium for the second year was admitted.

56. The second head of claim was for €6,209.40 in respect of fees for Barron Architectural Services, which was the name under which Mr. Barron carried on his architectural practice. It was "*vouched*" by a form of invoice dated 6th October, 2016 addressed to Ms. Egan at the address of the house which the plaintiffs sold in October, 2016. It carried a VAT number, but no charge to VAT. Mr. Barron was vague as to whether, at that time, he was still practicing, or still registered for VAT. Mr. Barron admitted that the invoice had been made up long after the event and that Ms. Egan, who is the purchaser, has no legal liability to him. Not altogether unsurprisingly, there was no suggestion that Ms. Egan had paid her husband for the design work on their proposed new house. This head of claim falls away.

57. The third head of claim is for €7,513.67 for the fees of Augustus Cullen Law. It is vouched by an invoice dated 5th April, 2017 for €6,055.83 plus VAT and outlay of €65.00. That claim is nearly four times the €2,000 inclusive of VAT which the plaintiffs paid the same firm for the sale of their previous house. It was not suggested that this had been paid.

58. The fourth head of claim is for monies allegedly paid out in respect of the building work.

59. There is no figure put on the cost of the work carried out on the site. This made a certain amount of sense for as long as Ms. Egan was pressing her case for specific performance. If specific performance was ordered, the plaintiffs would have been able to build out the house, and would have had the benefit of the work done. It was at the opening, for the first time, that it was said that the plaintiffs were electing for damages in lieu of specific performance. I will return to this.

60. The plaintiffs claimed four items of special damage, amounting in total to €75,106.78 for expenditure allegedly incurred in respect of the work which was not done on the site. At least for so long as the plaintiffs were asking for specific performance, this, to my mind, made no sense. If specific performance had been ordered, the plaintiffs would have had to build out the house and I cannot see how they could possibly have hoped to mulct Mr. Heatley with the either the cost they would have had to incur if he had performed when the plaintiffs claimed he ought to have performed, or more or less the same cost if he was compelled to complete. If the plaintiffs could not have hoped to recover this expense as damages in addition to specific performance, it follows that it is difficult to contemplate how they might recover it as damages in lieu. The claim, however, goes to the defendant's arguments as to the exercise by the court of its discretion and so it is necessary to analyse it.

61. The first element of this head of claim is for €54,685, the euro equivalent of stg.£47,500 and is "*vouched*" by a letter of 27th June, 2017 to "*Ciaran*" purportedly emanating from "*Q t f Ltd.",* acknowledging payment of stg.£35,000 and asking for payment of a balance of stg.£12,500. The letter is quite obviously home-made. The logo and presentation is completely different to a quotation from QTF dated 28th October, 2016, which was also provided to the defendant's solicitors. That quotation was for stg.£47,500, plus VAT if applicable, for the supply and erection of the timber frame kit, upon which someone had written in manuscript "*Payment received on a/c £28,000 Dec. '16*". Apart altogether from the get-up of the letter, it made no sense that QTF might be asking for payment of the balance when the frame had not been supplied, never mind erected. For good measure, to the extent, if any, that this letter is evidence of anything, it purports to be a receipt from, and make to a claim against, Mr. Ciaran Rodgers, and not the plaintiffs.

62. The second element of this head of claim is for €11,100 and is "*vouched*" by what purports to be a letter to Mr. Rodgers from "*SK Windows*", dated 14th July, 2017 with an address at the house which the plaintiffs sold in October, 2016. The document suggests that €7,000 was paid and €4,100 was past due in respect of "*windows and doors received from ourselves*." Again, to the extent, if any, that this letter is evidence of anything, it purports to be a receipt from, and to make a claim against, Mr. Ciaran Rodgers, and not the plaintiffs.

63. The third element of this head of claim is for €3,453.83, for the euro equivalent of stg.£3,000, for "*Quality Timber Frames Storage*". This is "*vouched*" by a purported letter dated 1st January, 2018 from "*Q t f Ltd."* to "*Ciaran*", in the same obviously home-made form as the purported letter of 27th June, 2017. The same observations apply to this document as to the earlier one. Moreover, while there was a claim for storage for the calendar year 2017, there was no further claim in respect of any later period.

64. The fourth element of this head of claim is an unvouched claim for €5,867.95 in respect of scaffolding.

65. To add to the confusion, in reply to a request made on 19th December, 2017 for particulars of the amount claimed in respect of materials and labour to date, it was said that this was included in the sums claimed for QTF Newry, which it plainly was not.

66. The fifth head of claim, for which no vouchers were offered, is for €10,700 arising out of the purchase by the plaintiffs of another site, made up of €7,000 for cost of site differential and €3,700 for additional stamp duty.

67. The sixth head of claim is an unvouched claim for €2,500 for moving costs.

68. The seventh head is for €33,500 for rent between November, 2016 and March, 2019, in respect of which a bundle of receipts was available.

69. In his evidence in chief, Mr. Barron was brought through the bundle of "*vouchers*" and explained what they were, or what they were supposed to be. He explained that it was Mr. Rodgers who had dealt with QTF and the window suppliers. The "*vouchers*" had come from Mr. Rodgers. Mr. Barron qualified the claim in respect of the windows and doors by saying that he and his wife had paid Mr. Rodgers €4,000 in respect of those. He could not really explain the claim for storage of the timber frame, volunteering that neither he nor his wife had seen the timber frame in storage. He had not paid anything in respect of scaffolding, but said that he and his wife were expecting a bill, or had been.

70. As to the claim for €7,000 for the cost of site differential, he said that he "*would have expected*" the claim to have been €5,000, which was the difference between the €90,000 which the plaintiffs had paid for the other site and the €85,000 (*sic*.) which they had agreed to pay Mr. Heatley. The €3,700 for stamp duty was claimed because the rate of stamp duty had increased from 2% to 6%.

71. Mr. Barron explained that he and his wife had moved house four times, and he gave evidence of the rent they had paid since they sold their previous house until the date of the trial.

72. In cross-examination, Mr. Barron confirmed that he and his wife had contracted in April, 2018 to buy another site and that they had applied for, and obtained, planning permission for that site in June, 2018. He said that they could not build on that site because their money was tied up with their solicitors, so that they would be able to show that they were ready, willing and able to complete the contract the subject of these proceedings. Mr. Barron dealt with the new planning application and confirmed that he had not raised an invoice for that work. He said that he had not discussed the bill he had received from Augustus Cullen Law for their work in connection with the contract with Mr. Heatley, but said that he had paid €2,000 inclusive of VAT for their work in selling their previous house.

73. Mr. Barron confirmed that he had no dealings with anyone in respect of scaffolding and had paid no money for scaffolding and had had no approach from anyone in relation to scaffolding.

74. As to the claim for €7,000 which had been made, or the €5,000 which Mr. Barron would have expected to have been made, Mr. Barron accepted (as he had to) that the contract price for the site the subject of these proceedings was €90,800. Apart altogether from that, there was no evidence by reference to which any assessment could have been made as to whether the two sites were comparable. This element of the claim was more or less abandoned by Mr. Heatley, but the fact that it was made is significant. I will return to this.

75. Mr. Sheridan was quite measured in his cross-examination about the various elements of the €75,106.78. He put it to Mr. Barron that the purported QTF and SK Windows documents were obviously fake. Mr. Barron, now that it was pointed out to him, readily agreed. He had paid no money to anyone other than Mr. Rodgers. It was not suggested that Mr. Barron or Ms. Egan had generated the fake documents.

76. It was in the course of cross-examination that Mr. Barron produced, for the first time, a bank statement which showed three credit transfers to Augustus Cullen Law and six cash withdrawals, between 11th November, 2016 and 22nd December, 2016, and amounting in total to €60,000, against which someone had written in manuscript, Ciaran Rodgers. He said that these withdrawals had been made in cash, and that he had seen some cash, possibly €10,000, handed over to QTF on one of two visits he made to Newry in 2016. He suggested, without saying who had told him or why otherwise he might have thought so, that the timber frame might have been water damaged. He thought that Mr. Sheridan's question as to how QTF or anyone else might sensibly claim money for storing material which had been damaged was a good question. Mr. Rodgers, he said, had gone to ground. He said that he had had no communication with QTF apart from two visits in 2016, although he acknowledged that someone from QTF had attended court when the action was previously listed for hearing but not reached. Mr. Barron gave the impression of being interested in the questions, as opposed to having been exposed in a transparent attempt to advance a claim for which there was no conceivable justification.

The fake cover note

77. On 8th August, 2018 Mr. Barron swore an affidavit of discovery, of sorts, of all documents in his possession or power in relation to insurance. Apart from the insurance policies to which I have already referred, Mr. Barron discovered what was described as "*Letter dated 23rd June, 2017 from AXA advising non extension of cover in respect of higher requirement of £6.5 million and inclusion of another company".* He was cross examined on this document. At a glance, it is a fake. The document carries the AXA logo but no address or contact details. Along the top of the page there is a line that reads "*? /4/2017 20170704_135452.jpg".* The logo was obviously copied and pasted. The document is in the form of a letter addressed to Ciaran Rodgers, without an address, and purports to outline insurance cover for "*CF Rodgers Construction Ltd.*", which, by reference to an invoice dated 24th June, 2017 from CFR Rodgers Construction Ltd. to Ms. Egan (at the address from which she moved in October 2016) is not even the name of Mr. Rodgers' company. According to this fantastic document, Mr. Rodgers was a customer of AXA for upwards of twenty years, holding both employers and public liability insurance. It held out that a new policy had been activated at 12:32 on 3rd October, 2016 but could not be activated "*on this particular site due to the increased requirement over £6.5 million and the inclusion of another company*". Of course it did not identify either the particular site or the other company. It was signed Mary Carson, for whom a mobile telephone number was given. Mr. Heatley, or someone on his behalf, dialled the number, which was answered, but whoever it was who answered was not in court and Mr. Ralston objected to anyone saying what was said by whomever it was who answered the phone. I am

confident that I can safely infer from the face of the document that whoever it was who answered the telephone, it wasn't anyone in AXA.

Clean hands

78. I presaged Mr. Sheridan's alternative arguments as to the exercise by the court of its discretion in this case. The case pleaded was based on misrepresentation but on the run of the case Mr. Sheridan submitted that the court should refuse to make an order for damages in lieu of specific performance by reason of the plaintiffs' inequitable conduct firstly, in relation to the payment of large amounts of cash to Mr. Rodgers, and secondly, their reliance on fake documents in support of their case.

79. I should say firstly, that I accept that the court has the same discretion in dealing with a claim for damages in lieu of specific performance as it has in dealing with a with a claim for the primary remedy. Secondly, I accept, and Mr. Ralston did not argue otherwise, that I can properly take account of facts and conduct that were not pleaded but which emerged in the course of the trial.

80. I have no difficulty in disposing of the first leg of the argument. The contract, or at least the performance of the contract, which Mr. Barron made with Mr. Rodgers was calculated to defraud the revenue and was illegal. It was, however, quite independent of the contract between Ms. Egan and Mr. Heatley. In my view, neither the making nor the performance of the building contract tainted the site purchase contract. The dealing between Mr. Barron and Mr. Rodgers was not inequitable to Mr. Heatley.

81. The consequences of the plaintiffs' reliance on fake documents exercised me more. On the one hand the fake QTF documents accounted for nearly €70,000, more than half of the total claim for damages. On the other hand, the documents were transparently fake and the claim for the cost of work not done was not sensible. Critically, it was not suggested that the documents had been generated by the plaintiffs.

82. With no disrespect to Mr. Sheridan, it was no great forensic feat to rubbish the documents, and the claim which they were supposed to support, and Mr. Barron came quietly. The purported AXA cover note was risible on its face. Moreover, what it conveyed was that Mr. Rodgers or some company had a policy of insurance but that it did not cover him on the site in Wicklow. So, it is a fake certificate purporting to confirm that Mr. Rodgers had no insurance. You couldn't make it up.

83. After careful consideration I have come to the conclusion that the fake documents do not go to my discretion to award damages in lieu of specific performance. This case comes before the court because Mr. Heatley refused to complete the sale. Mr. Heatley's refusal to complete predated, and had nothing to do with, the fake documents and I find that the plaintiffs' reliance on them does not disentitle them to the relief they seek. They do, however, go to the question of costs.

Legal principles

84. The applicable legal principles are well settled and were agreed at the Bar. They are succinctly set out, abundantly justified by the authorities in the footnotes, in Vol. 5 of the fifth edition of *Halsbury*. A plaintiff in an action for specific performance may elect whether to ask the court for an order for specific performance, or an order for damages in lieu. Any damages, whether in addition to or in lieu of specific performance, are *prima facie* to be assessed as at the date on which the plaintiff elects to abandon his claim for specific performance, but the court has a discretion to choose another date. The object of an award of damages is to put the plaintiff in the position, as near as may be, which he would have been in had the contract been performed.

85. It is submitted on behalf of the defendant that the appropriate date on which damages should be assessed is the date on which the plaintiffs bought their other site, which was in June, 2018. The same argument was rejected by the House of Lords in England in *Johnson v. Agnew* [1980] A.C. 367. In that case, as in this, the fact that the plaintiffs bought another house did not mean that they had abandoned their right to specific performance. What possessed the plaintiffs to buy another site when they were pursuing an action for specific performance of the contract the subject of these proceedings is a matter of speculation, but the demonstrable fact is that they put and kept their solicitor in funds to complete up to the date of the trial. If they had recovered that money from their solicitors, I would have had no hesitation in finding them to have elected at that date and would have assessed damages as at that date, even though the election was not communicated to the defendant, but that is not what they did.

86. I find that the plaintiffs are entitled to damages in lieu of specific performance, to put them in the position, as nearly as can be done, that they would have been if the contract had been performed on 21st May, 2019.

Assessment of damages

87. By reason of the defendant's refusal to complete the insurance premiums for the self-build policy were thrown away. I will allow €2,586 in respect of those premiums.

88. Ms. Egan has no legal liability for the costs of design and planning. I will disallow this claim.

89. The invoice from Augustus Cullen Law does not give any breakdown of the work done but it is clear that a good deal of it was referable to the fact that the plaintiffs had gone onto the site without a contract, rather than the defendant's refusal to complete. I will allow half of the sum claimed, €3,758.

90. The entirety of the claim in respect of the work done on the site is misconceived, and in any event unsupported by any evidence. However, by reason of Mr. Heatley's refusal to complete, Ms. Egan has lost, and Mr. Heatley has the benefit of, the value of the work on the site. I accept Mr. Sheridan's submission that the plaintiffs must look to Mr. Rodgers for anything above the value of the work on the site. I have the evidence of Mr. Noble that the present value of the work done on the site is €29,391.72. I will allow that. I do not overlook the fact that Mr. Noble's valuation was exclusive of VAT but in the circumstances I do not propose to add VAT.

91. I have pointedly referred to the site which the plaintiffs purchased in 2018 as "*another*" site. The premise of the claim for a differential cost was that this other site was bought as an alternative to the site the subject of these proceedings, but it seems to me that it was not. At all times up to the opening of the case the plaintiffs were pursuing a remedy in specific performance, and they kept their solicitors in funds to complete. So, apart altogether from the fact that there was no evidence of any differential, this element of the claim must fail. If an order for specific performance had been made, the stamp duty would have been €3,700 more than it would have been had the defendant completed when he should. In circumstances in which the purchase will not be completed, this element of the claim falls away.

92. By reason of the defendant's failure to complete, the plaintiffs have been in rented accommodation. It is true that had the sale been completed the plaintiffs would have been renting for about six months while their house was being built, but they will remain in

rented accommodation until they buy or build somewhere else. I will not disallow from the claim for rent the time that it would have taken to build the house. I will not, however, allow anything in respect of the period before the contract was signed. By reason of the defendant's refusal to complete Ms. Egan has paid rent for two months at €1,400, twelve months at €1,150, and twelve months at €1,050, total €29,200. During that time, she has had the benefit of the money that otherwise would have been spent on building and has invested some of it in the purchase of another site, which she otherwise would not have bought. On the other hand, I have the evidence of Mr. Noble that building costs have increased in that time. Setting one off against the other, I will not make a deduction from the €29,200.

93. The plaintiffs claim €2,500 for the cost of moving house four times. I accept the defendant's argument that the cost of the first move had nothing to do with his failure to complete. But I also accept the plaintiffs' argument that they will have to move again when they find or build an alternative house. I will allow the claim for €2,500.

94. The contract the subject of these proceedings was, to the knowledge of the defendant, a contract for the sale and purchase of a site on which the plaintiffs planned to build their principal private residence. That falls within the category of contracts for personal comfort, the breach of which may attract an award of general damages. Awards of general damages in such cases are to be modest. Taking account of the fact that the award of damages for rent will mean that the defendant will have housed the plaintiffs for two years, I think that a sum of €10,000 for general damages is fair.

95. There will be a decree for €77,435.72.

96. For so long as they plaintiffs were claiming specific performance, there was no claim for the return of the deposit. Having made her election, Ms. Egan is entitled to the return of the deposit, which was €7,377.50. The deposit is held by the defendant's solicitor as stakeholder, so the amount of it is not part of the decree against the defendant.

Costs

97. The preparation of this case was shambolic. The second plaintiff was joined in an action on a contract to which he was not party. A number of items were claimed by way of special damage which could not possibly be the responsibility of the defendant. The plaintiffs and their solicitors failed to recognise that the QTF and AXA documents relied on were obviously fake. A significant head of damage for which the defendant was responsible was not particularised. There was no agreement as to trial books. The reports of Mr. Deane and Mr. Noble which had been prepared in February, 2019 were not shared in advance of the trial. The defendant's claim for the cost of removing the works was first particularised on the third day of the trial. The lack of preparation caused the case to go into a fourth day, when it probably should have been finished in two days, or three at the very most.

98. Taking all these matters into account, in particular the failure to recognise that the fake documents were fake, the costs will be limited to two thirds of the costs of two days.

99. By order made on 22nd October, 2018 the plaintiffs were ordered to make discovery within three weeks of all notes of the meeting on 26th January, 2017. For reasons which I do not understand the notes of the meeting were not made available to the plaintiffs by their former solicitors but on 22nd February, 2019 Mr. Lavelle swore an affidavit listing and briefly describing in the First Schedule, first part "*1. All correspondence with Haughton McCarroll, and 2. Correspondence with D. M. Burke*." In the First Schedule, second part, he listed and briefly described 75 memoranda, e-mails and letters, the earliest of which was dated 12th September, 2016 and the latest 30th October, 2017, all of which documents were said to have come into existence in contemplation of these proceedings. Included in that list were a memorandum dated 2nd November, 2016, a number of memoranda dated December, 2016, and three memoranda and two e-mails dated 26th January, 2017. On 25th February, 2017, following a telephone call, Mr. Lavelle sent to Lacy Walsh copies of four manuscript file notes and typed versions: which was all that the defendant's solicitors had ever asked for.

100. The costs of the defendant's motion for discovery were ordered to be costs in the cause. The order for the costs of the proceedings will expressly exclude any costs of or incidental to the affidavit of David Lavelle sworn on 22nd February, 2019.

Orders

101. The second plaintiff was not party to the contract and his claim will be dismissed.

102. There will be a decree in favour of the first plaintiff for €77,435.72.

103. There will be a declaration that the first plaintiff is entitled to the return of her deposit of €7,377.50 held by the defendant's solicitors as stakeholder.

104. The counterclaim will be dismissed. The counterclaim did not add materially to the length or complexity of the case and there will be no order as to the costs of the counterclaim.

105. Unless there is money in court, there will be an order for the first plaintiff's costs, limited to two thirds of two days, and excluding any costs of complying with the order for discovery made on 22nd October, 2018.