

**THE HIGH COURT**

**2002 3591 P**

**BETWEEN**

**GABRIEL GILMORE**

**PLAINTIFF**

**AND**

**THE COUNTY COUNCIL OF THE COUNTY OF GALWAY AND DOOLIN CONSTRUCTION LIMITED AND BY ORDER CHARLOTTE SHERIDAN AND KEVIN WOODS PRACTISING UNDER THE STYLE AND TITLE OF SHERIDAN WOODS, ARCHITECT AND URBAN PLANNERS**

**DEFENDANTS**

**AND**

**2002 3592 P**

**PATRICK GERAGHTY**

**PLAINTIFF**

**AND**

**THE COUNTY COUNCIL OF THE COUNTY OF GALWAY AND DOOLIN CONSTRUCTION LIMITED AND BY ORDER CHARLOTTE SHERIDAN AND KEVIN WOODS PRACTISING UNDER THE STYLE AND TITLE OF SHERIDAN WOODS, ARCHITECT AND URBAN PLANNERS**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Roderick Murphy delivered on the 9th day of November, 2010.**

**1. Background**

Both plaintiffs' claim are against the three defendants, the Local Authority, Contractor and Architects in respect of an environmental improvement scheme for Market Square, Mountbellew, Co. Galway. The contract was based on a GDLA82 form dated the 22nd January, 2002. The contract price was €133,610 including VAT. The work included the excavation of a wide trench of some 1m or 4ft for ESB ducts on the pavement.

On the 29th January, 2002, complaints were made to Galway County Council regarding the effect that the excavation had on both Mr. Geraghty and Mr. Gilmore's premises.

**2. The Evidence**

The court considered the expert evidence of Tom O'Brien BE, John Gallagher BE, MBA, Thomas White FSCS, FRICS, and the evidence of Mr. and Mrs. Geraghty in relation to their plaintiffs claim.

The court also considered the evidence of Brian Bond BAI, PLD, FIEI and of Pdraig Arthur MRICS, MSCS who gave evidence on behalf of the three defendants.

Mr. Gallagher specified the remedial and reinstatement works necessary for the front walls to the first and second floors of both premises.

He agreed that there was some pre-existing damage. He indicated structural damage at points B, C, and D of the common drawings which had been discussed by the parties at a meeting in Portlaoise on the 3rd of June, 2010. He specified 48 number of piles and a contingency fee of €20,000 as necessary. He agreed that the specification would involve an enhancement of both premises planning.

Mr. White gave evidence that he had no input into the scope of the remedial work which he had priced in 2009. He did not believe that there should be a reduction of 20% in respect of the reduction in construction prices generally as it was not new work.

He said he had not got Mr. Arthur's estimate until the day before the hearing.

Mr. Geraghty referred to the disruption of his business. While he had continued his business some 100yds away, that premises was "off the beaten track". He said that he had to pay €150 per week for those premises. He did not specify as to when the new premises were rented by him. He said that he had received rent from a Michael Hughes of €120 per week up to 2003, the year after the excavation and consequent damage.

He claimed a sum of €42,000 in respect of loss of rent for the seven years.

He made no claim in respect of the letting to Mary Flaherty of €50 per week as she was still in occupation.

He also claimed the sum in respect of the de-valuation of the premises.

In cross examination he admitted that he had not contacted his accountant with regard to his annual income.

Brian Bond gave evidence as to the pre-existing poor condition of the premises which he assumed from, what he believed to be, pre-existing structural faults and cracks. He examined the dry lining and found no crack in relation to some of the structural defects. He concluded that most of the movement causing the large cracks in the party wall were old and had occurred a long time before January 2002. This was confirmed by the testing of the verticality of the external walls and the inspection of the adjoining archway. He believed that the movement of the front wall and its separation from the cross walls was an existing problem which existed before the works were carried out by the second named defendant, Doolin Construction Limited.

However, while the buildings were in a poor condition, there was little doubt that the excavation along the front of Mr. Gilmore's premises which extended to Mr. Geraghty's premises did trigger off some additional movement and cracks which had not existed previously.

He believed that the rebuilding of the front walls of both premises was not an excessive specification particularly in relation to damage at point C on the common drawing.

He noted that there had been no dilapidation report prepared by either defendant. He did not agree that shoring would resolve the problem. However, he believed that every structural remedy would constitute an improvement.

In relation to the number of piles required, he believed that 38 would be adequate and not 48 as specified by the plaintiffs engineer.

He believed that a contingency fee of €20,000 as suggested by the plaintiffs' advisers was excessive.

### **3. Procedures**

The entitled actions were both commenced by plenary summons issued on 7th March, 2002.

By separate statements of claim dated 20th June, 2002, the plaintiffs claimed that the defendants in or about the month of January, 2002, carried out road/footpath excavations outside each of the plaintiff's premises at The Square, Mountbellew, Co. Galway and carried out these works so negligently and recklessly that they damaged the easement of support to the foundations of the plaintiff's premises with the result that damage was caused to the plaintiff's premises and they thereby trespassed on their premises.

Mr. Gilmore, the plaintiff in the first case (2002/3591P) claimed the cost for remedial and reinstatement of his premises which constitute a private dwelling house and public house known as Higgins Public House at the Square, Mountbellew, Co. Galway.

Mr. Geraghty, the plaintiff in the second case (2002/3592P) claimed loss and damages arising from the undermining of the easement of support and foundations of vegetable shop at the same address.

It is alleged by each of the plaintiffs that damage occasioned to each building was brought about by environmental improvement works carried out by the second named defendant on behalf of the first named defendant under the supervision of the third named defendant.

As a result, each of the plaintiffs sustained personal injury, loss, damage and expenses. The relief sought in both cases is damages for nuisance, negligence, trespass, breach of duty and breach of statutory duty plus costs against the defendants or one or other of them.

Full defences were delivered on behalf of each of the three defendants.

Over the hearing in the High Court on 15th June, 2010, the defendants admitted liability. Accordingly, the only issue remaining for the Court is to adjudicate on the appropriate damages to be awarded and the costs of the proceedings.

Counsel for the plaintiffs advised the Court that it had been agreed between the parties that the cost of remedial and reinstatement building work in both actions should be decided together on the basis of a single sum to be binding on both plaintiffs. This is because the engineers for all parties agreed that the necessary works should be carried out on both premises at the same time in the interest of convenience and economy.

While Mr. Geraghty then proceeded with his claim for consequential losses, in addition to the other headings of loss, Mr. Gilmore, being unable to attend Court, reserved his claim for consequential losses, apart from the cost of remedial building works, for another day.

### **4. Decision of the Court**

#### **4.1. Principles**

Liability has been accepted by the defendants and the case proceeded as an assessment only. Significant differences, however, arose between the plaintiffs and the defendants on the cost of reinstatement works and the parties did not agree on the appropriate measure of damages. The defendants, furthermore, denied that they are liable for the various consequential losses claimed for.

The defendants submit that there are issues of causation and foreseeability arising before the measurement of damages and the issue of betterment or "new for old" can be resolved.

In relation to causation, the test is what an informed person in the building industry, not the "man in the street", would take to be the cause without too microscopic an analysis but on a broad view. Where a loss has been occasioned by more than one cause, a plaintiff must show, on the balance of probabilities, that the breach complained of caused or materially contributed to the loss complained of.

The Court should, accordingly, take account of any evidence of the pre-existing state of the premises. If reinstatement or remedial works would have proved necessary at some point given that the buildings were over 100 years old and were built on unsatisfactory foundation structures, judged by modern standards, then that factor should also be taken into account.

The damage claimed had to be reasonably foreseeable as a consequence of the breach.

The plaintiffs claim that the damage was wholly foreseeable and was the natural and probable consequence of the works carried out by the defendant.

The defendants claim that an award of damages in respect of an injury which the defendants could not foresee and had no duty to guard against would lack the necessary support that the injury was caused by their negligence and breach of duty (*O'Mahony v. Ford* [1962] I.R. 146 per Lavery J.).

The difficulty in deciding between diminution in value and cost of reinstatement arises from the fact that the plaintiff may require the property to be put into a state equivalent to that as before the commission of the tort. However, the amount required to effect this may be substantially greater than the amount by which the value of the property has been diminished (per Widgery L.J. in *Harbutts "Plasticine" v. Wayne Tank & Pump Co. Ltd.* (1970) 1 Q.B. 447).

The test in that case which appeared to be the appropriate one is the reasonableness of the plaintiff's desire to reinstate the property. This will be judged in part by the advantages to him of reinstatement in relation to the extra cost to the defendant in having to pay damages for reinstatement rather than damages calculated by the diminution in the value of land.

The principle of reinstatement has to be dealt with in the context of damages being reasonable as between the plaintiff, on the one hand, and the defendant, on the other.

This principle was approved by the Supreme Court in *Munnelly v. Calcon Ltd.* [1978] I.R. 387 where Henchy J. stated at p. 400:

"I accept these two principles as being basic to, although not necessarily exhaustive of, the concept of *restitutio in integrum* on which the law of damages rests in cases such as this. It is in the application of those principles that difficulty may arise, for a court, in endeavouring to award a sum which will be both compensatory and reasonable, . . . to matters such as the nature of the property, the plaintiff's relation to it, the nature of the wrongful act causing the damage, the conduct of the parties subsequent to the wrongful act, and the pecuniary, economic or other relevant implications or consequences of reinstatement damages as compared with diminished-value damages."

In that case, the Supreme Court was dealing with No. 66, Aungier Street in the City of Dublin, purchased by the plaintiff in 1972 for the purpose of an auctioneering business in rooms in the ground floor and the letting of the rest of the premises at a gross weekly rent of £62.50. The pre-damage value of the premises was found to have been £35,000. It was also found that the sum would purchase similar premises in the south side of the city. As a result of the defendants negligence the premises had to be totally demolished. The plaintiff wished to reinstate the premises which would cost £65,000 plus fees. The plaintiff had acquired the premises in 1972 for £7,000 and had renovated them at a cost of £12,000.

There was evidence to suggest that the reconstructed value of the premises in that case would be over £100,000 and the letting value would be £2,500 per annum greater than the old premises.

In the circumstances the Supreme Court deemed that reinstatement damages of £65,000 would not be justified as it would enrich the plaintiff excessively and unnecessarily and would mulct the defendants unreasonably.

That court reduced the damages of £35,000.

O'Sullivan J. applied the principles in *Munnelly in Leahy v. Rawson* [2004] 3 I.R. 1.

Similar provisions applied in *Ruxley Electronics and Construction Ltd. v. Forsyth* [1996] 1 A.C. 344 where in breach of contract a contractor had constructed a shallower swimming pool than required. The reconstruction cost of £21,560 was rejected and damages were awarded for loss of amenity in the sum of £2,500.

#### 4.2 Submissions

The second named plaintiff submitted that the defendant used no evidence in relation to the claims for alternative accommodation, loss of rent, or for the cost of temporary premises being modified to health board standards and that, accordingly, Mr. Geraghty should recover all of these items of damage without reduction. The court is of the view that it is a matter for a plaintiff to prove loss.

The plaintiffs had submitted that the measure of damages should be that sum of money which would put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reputation.

The plaintiffs acknowledge that it is often impossible to repair damage to property without putting that property in a better position than it was before the damage had been inflicted but that repairing with old and worn materials is not a practical possibility.

The defendant's submission that the re-instatement works proposed by the plaintiff would have proved necessary at some point for the plaintiffs even if the works complained of had not occurred should, the plaintiffs submit, be rejected as mere speculation.

The court does not accept that, where a building has been destroyed or damaged, that the *prima facie* rule regarding compensation is the cost of restoration. In the case of an old building it may be more in the case of listed building but less in the case of a building already in need of substantial restoration or renovations. The court has to take into account what is reasonable having regard to the evidence adduced.

4.3 The court in applying these provisions to the present case distinguishes between the estimates for remedial and re-instatement works for both Mr. Gilmore and for Mr. Geraghty and the estimates for consequential loss by Mr. Geraghty. As already noted, due to the unavailability of Mr. Gilmore, the court is not in a position to deal with his consequential loss claim.

#### 4.4 Analysis of Quantity Surveyor's Estimates

The analysis prepared by Padraig Arthur and Associates, compares Mr. White's with his estimates on a like for like basis by including legal fees and VAT. The combined adjusted total for the plaintiffs is €292,928, while a combined sum for the defendants is €150,700 – a difference of €142,228.

The confirmation by PJ Edwards the proposed contractor, that contingency raking shore and wall support allowances are not required, reduce the estimates from €117,964 in respect of Mr. Gilmore and €129,397 in respect of Mr. Geraghty to €76,410 and €81,837 respectively. To this sum a reduction of some 20.7% being the tender price index adjustment based on the figures produced by the Society for Chartered Surveyors for the second half of 2008, is appropriate. That would give a further reduction from the balance left of €15,817 in respect of Mr. Gilmore and €16,940 in respect of Mr. Geraghty.

Padraig Arthur and Associates net figure before professional fees and VAT is, accordingly €60,593 for Mr. Gilmore and €64,897 for Mr. Geraghty. The relatively small difference is derived from both scope and rate differences.

The figures for other matters such as fixtures and fittings and signage claimed by the plaintiffs are, in all cases round figures and would appear to have been guessed rather than assessed.

Given the element of betterment in the enhanced construction, it seems to me that the estimates for the other matters, other than storage are not consequential.

The court is satisfied that, notwithstanding the absence of the schedule of dilapidations, that the pre-existing state of repair does not justify the cost of refurbishment estimated by Mr. White. The court accepts the evidence of Brian Bond that the cracks pre-existed the work carried out by the defendants. These existing defects would have affected any prospective sale if either or both properties were put on the market. The court also has regard to the argument that further cracking caused by the defendants, on its own, would not have rendered the properties unsaleable as damage had already been done and some substantial works would have been required to rectify those pre-existing cracks.

The refurbished properties would be substantially improved. This enforcement would render them more saleable.

#### 4.5 Mr. Geraghty

Mr. White's estimates on behalf of Mr. Geraghty and Mr. Arthur's estimate on behalf of the defendants are as follows:

	<u>White</u>	<u>Arthur</u>
Remedial works, foundation and walls	€57,765	€24,750
Work to Fruit and Vegetable shop	€ 8,159	€ 5,439
Work to butchers shop	€21,857	€ 9,582
External façade	€ 8,427	€ 982
First floor	€15,039	€ 2,398
Electricity	€15,650	-
Plumbing	€ 2,500	-
Preliminary Items	-	€11,485
Contingency	-	€ 3,000
Fees	€17,817	<u>€ 5,000</u>
Total excluding VAT		€62,636
VAT (13.5% on building works, 21% on fees)		<u>€ 8,831</u>
Total for direct works		€71,467
Indirect costs		€ 3,681
VAT		<u>€ 497</u>
Total		€ 4,178
Total Direct and Indirect Works		<u>€75,645</u>
In respect of the consequential damages Mr. Geraghty claims		
Loss of rent being €33,360 and	€11,400.	
Rent	<u>€43,760</u>	
Accommodation	€15,000	
Public health Standard	€40,000	
Storage	€5,000	
Travel	€1,000	

The court takes into account that the estimates of Mr. Arthur are based on more recent construction costs than those of Mr. White.

The court accepts that Mr. Arthur has measured the scope of works on the basis of Brian Bond's advice as a result of the 2½ hour meeting between the experts in Portlaoise.

Some contingency is factored in the estimate prepared on behalf of the defendants.

Mr. Arthur indicates that these estimates are based on a decline in costs of over 20% rather than the decrease in 10% maintained by Mr. White. While Mr. White submitted that such a reduction was confined to new work the court has not been referred to any statistical evidence from the Construction Industry Federation or from official building notices in that regard.

Mr. Arthur agreed that a figure of €1,000 should be allowed in respect of signage in addition to his estimates.

The court will, accordingly, decree the sum of €75,645 inclusive of VAT together with a sum of €1,000 and VAT @ 13.5% in respect of signage for remedial and reinstatement works in respect of Mr. Geraghty's claim. Total is €1,135 + €75,644 = €76,780.

4.6 Mr. Geraghty's claim in relation to consequential damage is largely unvouched.

The claim for alternative accommodation at €15,000 needs to be examined in relation to the evidence given.

The loss of rent at €42,000 (estimated by Mr. White as \$43, 760) does not appear to arise in the pleaded case.

The claim for €40,000 for refurbishing the premises to health board standards is far too remote as the pre-existing state of the building did not come to that standard. The Court rejects such a claim.

The claim for alternative premises has to be seen in the context of the evidence given.

It does seem that the claim for consequential damage is exaggerated.

In addition the court will also decree, subject to satisfactory evidence in relation to the loss of rent, a figure to be agreed by the parties. In the absence of receipt the court will so determine.

In the absence of evidence the court will make no allowance for accommodation. The claim in respect of public health standards is not a foreseeable ground.

The court does not consider the claim for storage and so €5,000 to be satisfactorily proved.

The court will allow a figure of €1,000 in respect of travel and other out of pocket expenses.

Consequential loss is allowable, accordingly, in the sum of €26,000 which together with the figure of €76,780 is €102,780.

#### 4.7 Mr. Gilmore

In respect of Mr. Gilmore's claim, the quantity surveyor's estimates are as follows:-

	<b>White</b>		<b>Arthur</b>
Remedial works to foundations and walls	€55,435	Engineering and associated works	€25,225
Work to Mr. Gilmore's bar	€24,938	Works to main bar area	€7,725
Works to external façade	€ 6,700	First Floor	€4,455
Work to first floor	€15,471	Works to main front façade	€924
Work to electrics	€12,100	Preliminary items	€13,510
Work to plumbing services	€3,050	Recommended contingency allowance	€3,000
		Owners professional fees	€5,000
Total excluding VAT and Professional Fees	€117,964	Total including VAT for indirect scope works	€68,292
		Indirect costs	€6,763
		Total for indirect and indirect works	€75,055

The court is satisfied that this figure of €75,055 represents a fair assessment of the direct and indirect costs associated with the remedial and reinstatement works on Mr. Gilmore's property as of the 9th June, 2010.

The court will, accordingly, decree the said sum in respect of Mr. Gilmore's claim for reinstatement.