THE HIGH COURT

1980 No. 9905 P

BETWEEN/

JOHN CORRIGAN

Plaintiff

-and-

MYLES CROFTON AND KARIN CROFTON

Defendants

Judgment delivered by O'Hanlon J., the16th day of February, 1984.

By agreement in writing made in 1979, (the day and the month being omitted) and expressed to be made between the Defendants as Vendors and the Plaintiff as Purchaser, the Defendants agreed to sell and the Plaintiff agreed to buy for the sum of £36,000, a bungalow premises on almost one acre of ground at Loughtown Lower, Newcastle, in the County of Dublin. The house had been built by the Plaintiff and was virtually complete when the contract was signed, but the Purchaser asked for the inclusion of a special condition in the contract for sale, and the Vendors acceded to that request.

The special condition was No. 5 in the Second Schedule to the Agreement for Sale, and reads as follows:-

"5. Nothing herein contained shall deprive the Purchaser of his Common Law rights which are hereby guaranteed, in the same manner as if the Contract herein was a Building Contract".

At the hearing of these proceedings for damages for alleged defects in workmanship and materials, it was conceded on behalf of the Defendants that the effect of this clause in the Agreement for Sale was to give the Plaintiff a right of action for breach of ordinary terms as to workmanship and materials which would be implied in a building contract in the absence of their exclusion or modification by express terms in the contract. (See judgment of Davitt P. in Brown -v- Norton, (1954 IR 34). The Defendants were prepared to treat the case as one where they had agreed to build a house for the Plaintiff, subject to an implied term that the work would be carried out in a good and workmanlike manner and with sound and suitable materials.

It is material to note, however, that in the Defence filed on behalf of the Defendants, they denied the existence of any such condition, as well as denying everything alleged by the Plaintiff as to defects in materials or workmanship and as to damage claimed to have been suffered by the Plaintiff.

The Plaintiff's case is that serious defects appeared in the house from an early stage after the sale was closed in mid 1979; that he repeatedly brought these matters to the notice of the first-named Defendant but that nothing was done to remedy them. In May, 1980, the premises were inspected by an architect, Wilfred Cantwell, on behalf of the Plaintiff. His report contained a catalogue of defects which suggested that the house had been erected in anything but a workmanlike manner. It is unnecessary to list his comments in detail. The principal complaint concerned the roof which, he says, was inadequately supported, and has become progressively more dangerous and may not survive another year if remedial work

is not undertaken. The walls of the house, in his opinion, have been affected by pressure from the inadequately supported roof, and were already defective by reason of poor quality blockwork. He found all the windows in the house had not been properly secured, and were loose, and he referred to many other defects which he found in the internal and external fabric of the house.

In 1981, Mr. Cantwell prepared drawings and specifications for such remedial works as he thought were necessary and obtained tenders from three differend building contractors. The lowest of these, and the one which he recommended the Plaintiff to accept, was for a sum of £13,731.56. The Plaintiff had commenced proceedings for damages by Plenary Summons dated the 6th November, 1980, and a Statement of Claim claiming the amount referred to in the lowest tender was delivered on the 14th August, 1981. The Defence was not delivered until the 24th May, 1982, traversing the entire of the Plaintiff's claim, save the

fact that an agreement for sale had been made between the parties. It contained a plea that the Defendants had paid money into Court in satisfaction of the Plaintiff's claim herein, but I was informed during the course of the hearing that, in fact, no sum whatever had been paid into Court with the Defence. The Plaintiff then delivered a Reply on the 5th October, 1982, and the case eventually came on for hearing in the month of February, 1984.

This sequence of events is of some importance in the case, as there was a good deal of argument as to whether the damages (to which it is now for the first time conceded, the Plaintiff is entitled), should be measured by reference to the cost of remedial works at the time when the tender from the builder was received, or by reference to the present time, when that figure has had to be up-dated from £13,731.56 to a figure of £21,685.

The Defendants also challenge the whole basis for that tender, and say that the house could be made good by means

of a much less ambitious scheme of building works. An architect called on behalf of the Defendants, Lindsay, Johnston, felt that a figure in the region of £5,000, even on present-day figures, would be sufficient, and that the Plaintiff's architect had over-stated, to a very considerable degree, both the defects and the nature of the remedial works which would be required to remedy them.

Faced with this wide divergence of opinion between the expert witnesses called on both sides, I must have regard to the fact that Mr. Cantwell, the Plaintiff's architect, has been in close touch with the premises since his first inspection in May, 1980. He has inspected the premises in great detail on a number of occasions and has been able to monitor the progress of defects which were apparent to him from his first visit. The Defendants' architect, on the other hand, is at the disadvantage that he was only consulted when the case was about to come on for hearing and was confined to one rather brief visit of inspection to the

house, without having the assistance of any of Mr. Cantwell's reports as to the defects which he claimed to have found in the course of his inspections.

For these reasons I found the evidence of Mr. Cantwell more convincing and it did not appear to me that it was in any way shaken by cross-examination. In these circumstances I feel bound to give effect to it, and not to resort to the device of adopting a compromise figure somewhere between the figures suggested by the two architects.

That disposes of one of the issues of fact which has been in dispute in the course of the case, but it leaves unresolved a difficult issue of law, as to the date by reference to which the damages should be assessed. A tender had been obtained and a builder was ready to proceed with the remedial works by mid '81, but the work has never yet been carried out and the costs of the work has, in the meantime, escalated by several thousand pounds.

The Plaintiff said he had purchased the house with the help of a mortgage from the First National Building Society

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and that he would not have had the means to undertake the cost of the remedial works suggested by his architect - this was the reason why nothing had been done since 1981, when the tender for the work had been obtained.

In Liesbosch, Dredger (Owners) -v- Owners of Steamship Edison, (1933) AC 449, the House of Lords, after a very comprehensive review of all the leading authorities on the subject, firmly adopted the principle that where part of a Plaintiff's damages, in an action for damages for tort, is attributable to his own impecuniosity and not to damage flowing directly from the wrong he has suffered, such part of his claim is not sustainable.

In the present case it can be argued with a good deal of force that the Plaintiff could have mitigated his loss by having the remedial works carried out promptly in 1981, and that he should not be entitled to saddle the Defendants with the increases in costs which have arisen in a period of high inflation, between that time and the present.

The Plaintiff, however, relies on the recent decision

of the English Court of Appeal in Dodd Properties (Kent) Ltd. -v- Canterbury City Council & Ors. (1980) 1 AER 928, where the cause of action approximated much more closely to that of the Plaintiff in the present case, than did that involved in the Liesbosch Dredger case.

The approach taken by their Lordships in the Court of Appeal in that case was to enquire whether the Plaintiff could be regarded as having acted in a reasonable manner in postponing the carrying out of the remedial works until he knew the outcome of his action for damages against the Defendants, and having come to the conclusion that he was justified in doing so, he was awarded damages based on the cost of those works at the date of the hearing.

While I detect a certain difficulty in distinguishing that case out of the strict application of the Liesbosch Dredger principle I feel that the approach adopted by the Court of Appeal in Dodd -v- Canterbury, is the appropriate one for me to follow in the circumstances of the present case. In doing so, I find it hard to fault the Plaintiff for

delaying the carrying out of remedial works which were at all times going to cost a massive amount by comparison with the original purchase price of the house. Any builder of this very modest type of residential accommodation would realise that his customers would generally be drawn from a category of people who might spend a life-time paying back the purchase price and who could not be expected to be able to face the costs of remedial works totalling 30% or 40% of the purchase price within a year or two of the purchase. There is the additional factor, which was commented on in Dodd -v- Canterbury, that the purchaser was faced with a denial of legal liability by the builder and could not be certain that any expenditure on the property would be recouped until the issue had been decided by litigation. I think the Plaintiff proceeded with reasonable expedition in prosecuting his claim, and should not be penalised by receiving only an award of damages which would fall far short of making good his loss at this present stage. As Oliver L.J. said in Radford -v- De Froberville, (1978) 1 AER 33 (at p.56):

"The older authorities in this area of the law were decided in times of relative financial stability in which the date of assessment made relatively little, if any, difference, and the passage of time could be adequately compensated for by an award of interest. But that is not the position today and if the law is to bear any relation to reality it must keep pace with the era in which we live ... In the ultimate analysis, the question is one of the reasonableness of the plaintiff's actions or inaction: see, for instance Mertens -v- Home Freeholds Co.

Secondly, once proceedings have been commenced and are defended, I do not think that the defendant can complain that it is unreasonable for the plaintiff to delay carrying out the work for himself before the damages have been assessed, more particularly where his right to any damages at all is being contested, for he may never recoup the cost. If, therefore the proceedings are being conducted with due expedition, there seems to me to be no injustice if, by reason of the time that it takes for them to come to trial, the result of inflation is to increase the pecuniary amount of the defendant's ultimate liability. She retains, after all, the use of the money in the meantime and can crystallise her liability by a payment into Court if she so wishes."

The Court of Appeal in England subsequently followed up their decision in the Dodd Properties case with another decision touching on the same issues in Perry -v- Sidney Phillips and Son, (1982) 3 AER 705, where they again distinguished the Liesbosch Dredger case and allowed damages in respect of a period when the carrying out of a remedial works was delayed in part of the plaintiff's impecuniosity. Lord Denning MR said at p.709 that the dictum of Lord Wright in the Liesbosch case that the loss due to the impecuniosity of the plaintiffs was not recoverable, "must be restricted

to the facts of the Liesbosch case." He continued: "It is not of general application. It is analysed and commented on this court in Dodd Properties (Kent) Ltd. -v- Canterbury City Council. It is not applicable here."

Oliver LJ said (at p.711):

> "The reason assigned by the plaintiff in his evidence for not carrying (the repairs) out was that he was too poor to do so by reason of the fact that he paid too much for the property and had not got the money to put the house into proper repair. Counsel for the defendants suggested, on the basis of the well known case of Liesbosch this is simply an attempt to create additional damage as a result of the poverty referred to and that this is too remote.
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> If counsel for the defendants were right, that is to say, if the only reason why the repairs were not carried out was the poverty of the plaintiff, then I think that something could be said for this proposition. But it seems to me that the real question, and it was one which was grasped by the deputy judge, was this: was it reasonable in all the circumstances for the plaintiff not to mitigate his damages by carrying out the repairs which were required? One reason no doubt was the plaintiff's poverty. As I said, if that were the only reason, the Liesbosch case might well provide an answer for the Defendants. But in fact the Plaintiff's conduct in not carrying out the repairs was quite reasonable for a number of other reasons; and one of the reasons why he did not do them was because the defendants were strenuously resisting any liability at all for the repairs and denying that they were responsible. The deputy judge found that the plaintiff's conduct in all the circumstances was reasonable."

Applying these principles to the facts of the present case, I propose to award damages by reference to the up-dated cost of making good the defects in the house as of the present

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time. The figures which should be allowed are as follows:

Builder	£21,685.03
Architects' charges	£ 2,293.44
Rent of alternative accommodation during building works	£ 1,500.00
Removal, storage and redelivery of furniture	£ 1,208.00
TOTAL	£26,686.47

I will round that sum up to £27,000 by allowing a nominal sum by way of general damages for inconvenience and upset caused to the Plaintiff. This is a matter which was never pleaded at any stage until the case came on for hearing. I have considered the further claim in connection with the replacement of the central heating system. The system installed by the Defendants worked perfectly but did not produce sufficient heat for the Plaintiff's requirements. He has since replaced it with a solid fuel system. It was never mentioned in correspondence or in the pleadings or particulars until a week or two before the action came on for hearing. The Plaintiff, when giving evidence, said, with commendable frankness: "I wasn't particularly interested in pursuing the central heating claim."

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Having regard to the size of the premises; the fact tha open fire-places were supplied in two living-rooms; and considering the price which was paid for the house, I do not consider that the implied terms as to workmanship and materials extended to include a warranty as to the level of heat which would be generated by the central heating system and I do not propose to allow this claim.

The second-named Defendant did not sign the Agreement for Sale, but the Defence which has been filed contains an admission that she was a party to the agreement; consequently there will be a decree in favour of the Plaintiff for £27,000 as against both Defendants.

The Plaintiff in this case had to seek very substantial concessions in the matter of amendment of the pleadings, which have resulted in a doubling of the original claim against the Defendants. Notice of some of these amendments were given by letter dated the 2nd February, 1984, only a week before the hearing, and further amendments were sought at the opening of the case, and again during the hearing. In

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these circumstances I will allow the Plaintiff only one-half of his costs of the proceedings.

R.J. O'Hanlon.
16th February, 1984.