KINEHAN

251

THE HIGH COURT

No. 3637P/1977

BETWEEN/

FREDERICK J. KINEHAN

PLAINTIFF

-and-

MICHAEL McNAMARA & COMPANY LIMITED

AND PATRICK WHELAN

DEFENDANTS

Judgment of O'Hanlon J., 1st March, 1985

Architect (second-named Defendant) admitting liability to pay damages to Plaintiff for defects in newly-built dwellinghouse. Claim for contribution against the builder (the first-named Defendant). Whether on the facts of the case any claim for contribution could be sustaine .

THE HIGH COURT

No. 3637P/1977

BETWEEN

FREDERICK J. KINEHAN

PLAINTIFF

-and-

MICHAEL McNAMARA & COMPANY LIMITED and
PATRICK WHELAN

DEFENDANTS

Judgement delivered the 1st day of March, 1985, by O'Hanlon J.

The Plaintiff brought proceedings against the first-named Defendant as builder and against the second-named Defendant as architect, claiming damages for breach of contract and negligence in respect of alleged defects in design and workmanship in a dwellinghouse erected for him at Cratloe, Co. Clare, and consequential loss and damage flowing therefrom.

In the course of the hearing of the action I was informed that the Plaintiff's action had been settled on terms that the proceedings were to be struck out as against the first-named Defendant with no order as to costs, and the second-named Defendant submitted to judgment in the sum of £74,000 damages and costs. I was then asked to proceed with the trial of the issue as between the two Defendants, to determine whether the second-named Defendant was entitled to recover indemnity or contribution against the first-named Defendant in respect of the damages and costs payable by him to the Plaintiff on foot of the settlement concluded by him as aforesaid. At a very late stage in the proceedings I was informed that the settlement figure involved an additional payment by the first-named Defendant of a sum of £12,000

in discharge of sums payable by the Plaintiff to the architect consulted by him for the purpose of making his claim against the Defendants, and I therefore approach the trial of the issue on the basis that the second-named Defendant has accepted liability to pay an all-in figure of £86,000 and costs to the Plaintiff.

Sec. 22 of the Civil Liability Act, 1961, deals with the situation which arises where a Defendant settles with an injured person, and seeks to recover contribution from another party alleged by him to be a concurrent wrongdoer. Before allowing such a claim, the court must conclude (a) that the Party sued should be regarded as a concurrent wrongdoer, and (b) that the amount of the settlement was reasonable. If unable to come to the latter conclusion, by reason of the amount being regarded as excessive, it may fix the amount at which the claim should have been settled.

One of the contentions made on behalf of the builder was that the architect should not have settled with the Plaintiff because the Plaintiff's claim was barred by the Statute of Limitations, or should have settled at a much lower figure because of the possibility, if no the likelihood, that the Plaintiff's claim would have been defeated by pleading the Statute.

It is a curious fact that while the building agreement was made as far back as 1970, the Plenary Summons issued in 1977, and the Defences were filed in 1981 and 1983 respectively, it does not appear to have occurred to either Defendant to plead the Statute of Limitations until the trial was about to commence in February, 1985. It does not suggest that either Defendant placed much confidence in the Statute operating in his or their favour. The evidence in the case disclosed that the building works tended to drag on into 1975 before the parties finally severed diplomatic relations, with remedial works being

proposed by the Defendants and acceded to by the Plaintiff, and I am unable to hold that the Plaintiff allowed over six years to elapse from the time his cause of action crystallised against the architect before commencing proceedings. Sec. 31 of the Civil Liability Act, 1961, in dealing with claims for contribution, provides that such an action may be brought within the same period as the injured person is allowed by law for bringing an action against the contributor, or within the period of two years after the liability of the claimant is ascertained or the injured person's damages are paid, whichever is the greater. Thus, the architect's claim for contribution against the builder, if otherwise sustainable, is not defeated by lapse of time.

As to whether the amount of the settlement should be regarded as reasonable or not, this involves an examination of the defects for which the architect would probably have been found liable, had the action against him proceeded to judgment, and an assessment of the damages which would in all probability have been awarded for breach of contract and/or negligence against him, and I will now refer briefly to this topic.

The photographs which were put in evidence show that the dwelling-house which was planned by the architect and built by the builder, for the Plaintiff, is a very substantial and spectacular-looking premises of unusual design. It is a flat-roofed dwelling built in the shape of a square, with a hollow square in the centre where it was proposed to locate a patio and swimming-pool. The house is situated in a commanding position on a rocky hillock overlooking the Shannon Estuary, on the main Ennis to Shannon road, and the building is surrounded by an extensive farm.

It is small consolation to a house-owner, however, to be the proud

possessor of an impressive dwelling, if his living conditions leave much to be desired, and the very features which contributed to the attractive appearance of the house also made it more vulnerable to the elements. It has large areas of window-space; it is in a very exposed position with no natural shelter-belt of any kind, and its geographical location in close proximity to the Shannon Estuary places it in an area where it is battered by high winds and heavy rain over a significant part of the year.

The Articles of Agreement between the Plaintiff and the builder are dated the 15th September, 1970. The contract price was £28,848.17. and the date for completion was given as the 14th May, 1971. The work had reached the stage of virtual completion by the month of October, 1971, when the Plaintiff took possession of the site, and he moved into occupation in June of the following year. The amount ultimately paid by him to the builder was £34,500, all of which had been certified by the architect as being due, and the final instalment was paid under protest and in response to court proceedings by the builder.

During the course of the building work and after it had been completed to the extent that it was completed by the builder, serious defects manifested themselves and form the subject-matter of the present proceedings. They were dealt with in considerable detail by Mr. Wilfr Cantwell, Consultant Architect, who was engaged by the Plaintiff to advise him after he had ceased to rely on the architect who was responsible for the design of the house and who had supervised the building works. When the second-named Defendant settled with the Plaintiff, Mr. Cantwell was called as the principal witness in support of that Defendant's claim for contribution against his co-defendant.

In his report to the Plaintiff and in the course of his evidence dur ng

the hearing of the case, Mr. Cantwell endeavoured to segregate the long list of defects into groups, one of which could be regarded as the sole liability of the architect, one the sole liability of the builder, and a third group where, in his opinion, a situation of joint liability arose.

One of my difficulties in dealing with the present claim for contribut stems from the fact that the settlement figure has not been broken down in the same way. I am unaware how much of that figure is referable to remedial work which should be the sole responsibility of the architect, how much to the work which may be regarded as the joint responsibility of both parties, and how much (if any) refers to work which, arguably, is the sole responsibility of the builder. The claim for consequential loss is also affected by the same consideratio Only part of the claim made by the Plaintiff for general damages for the way his life has been affected, and of his claim for the cost of moving out to allow remedial works to be executed, can be attributed to the defects which are alleged to be the sole responsibility of the builder, or his responsibility in common with that of the architect.

As a result, I am unable to deal with the present claim for contributi with the same meticulous attention to detail which is found in the reports of the architects and quantity surveyors who have represented the parties' interests. I propose, instead to take a general, over-a view of the case and then to state the conclusions I have come to in relation to the position of the architect vis-à-vis the builder.

I propose to do this by referring to the Schedule of Repair Works prepared by Mr. Cantwell as part of his report, and which he advised should be carried out in order to remedy the many defects which had appeared in the building works. A total of 42 separate

items appear in that Schedule, and with it may be linked the Bill of Quantities in which Mr. Vincent Drum, Chartered Quantity Surveyor, priced the work which had been specified as remedial work by Mr. Cantwell.

Mr. Drum divides his Bill of Quantities into four sections. Section 1 is headed "General Conditions and Preliminaries" and produces a figure of £12,771 to cover such matters as the provision of a bond to secure the completion of the work; the provision of all necessary plant and equipment; the cost of overseeing the works, and other general matters. Section 2 is headed "Claim Against Contractor". It refers to 24 of the list of 42 items in Mr. Cantwell's Schedule and it produces a total figure of £28,144.94. Section 3 is headed "Claim Against the Architect". It refers to 11 items in Mr. Cantwell's Schedule. It produces a total figure of £42,518.25. The few remaining items in the list of 42 are covered by the works involved in the list already attributed to the liability of the contractor or the architect, or are stated to be the client's own liability or to have been attended to already.

It is not clear how the Quantity Surveyor came to divide up the works in this manner, but it is reasonable to assume that he did so on advice given to him by or on behalf of the client. It does not tally exactly with the report of Mr. Cantwell, who had adopted not two, but three categories, one dealing with defects for which, in his opinion the architect must bear sole responsibility, one dealing similarly with the sole responsibility of the builder, and a third dealing with situations of joint responsibility. However, I think there is a good deal of significance in the division of costs of remedial works as between the architect and the builder which was adopted by Mr. Drum. Omitting the smaller items which feature in the list of prices, the

principal figures which appear in each Section are as follows:-

Section No. 1

General Conditions and Preliminaries	£12,771.00

Section No. 2

Claim Against the Contractor

Replace drip moulds over all windows and other work to sashes, casements etc.	£ 1264.86
Kitchen Hatch	307.75
Replace catches and stays on windows etc.	719.34
Plaster concrete colums	178.84
New fire-resistant door	622.67
Mortar screed to external steps	693.75
Rebed Liscannor slabs	619.04
New sashes and casements and reglaze	2980.67
New mastic around windows etc.	3623.24
Replaster external ring beam	2017.79
New damp proof course at ring beam and over ring beam to courtyard	1791.68
New carpets and underlays	5463.53
Brass screws missing	161.00
External and internal redecoration	7026.64

Section No. 3

Claim Against the Architect.

Rebuild upper parts of external cavity walls, form reinforced ring beams, etc.	10,385.30
Line upper floor ceilings	495.04
New ceramic tiles in lower floor corridor	900.00
New ceiling to covered parking area	742.11
Replace existing roof with pitched roof of concrete tiles etc.	27,543.44
Remove timber beams under floor joists and replace with steel beams etc.	862.00
New chimney stacks and fireplaces	1061.16
Rooflights	371.00

Section No. 4 refers to "Dayworks".

The description of the works given above is only a shorthand version of the description given in the Schedule of Works and will suffice for the purpose of referring in a general manner to the work which was to be carried out. The grand total, having added cost of Dayworks

(£1275) and VAT (£2541) for the work comprised in all four Sections is the sum of £87,249.44, and the Bill of Quantities is dated November, 198

Other sums claimed by the Plaintiff were as follows:-

Fees to Architect (Mr. Cantwell)	£12,400
Fees to Quantity Surveyor	3,540
Temporary roof work	3,100
Removal and storage of furniture approx.	4,000
Accommodation pending remedial works approx.	4,000

Finally, there was a claim for general damages for the upset and inconvenience and extreme discomfort endured by the Plaintiff as a result of the matters complained of, so that the over-all claim he was maintaining against the Defendants was in excess of £120,000.

It seems to me, however, that while Mr. Cantwell's very comprehensive report may be regarded as a counsel of perfection for the Plaintiff, it forms the basis for a claim which I must regard as being in some important respects unsustainable. The Articles of Agreement started off with what now seems to be a modest figure of £28,848.17.3., given that we are speaking about the year 1970 and not 1985. That figure mounted up to £34,500 by the time the work was completed. The plan envisaged a flat roof covered in felt, and this was provided. It was badly designed and not adequately supported, and began to deflect in a serious manner even while the building works were in progress. The architect at first made light of this development, and later advised that the roof should be jacked up into a correct position again and that further supports consisting of six rolled steel joists should be inserted ex post facto. Not surprisingly, the roof did not stand up well to this major surgery and has given trouble ever since. I agree with the view put forward by the expert witnesses that the best solution now is to take it down and put up a new roof.

However, the Plaintiff had originally accepted a design which provided for a flat, felt-covered roof. Mr. Cantwell does not think this would be a suitable type of roof for that location, but it is possible to build one which will be adequately supported and waterproof. To give the Plaintiff a pitched roof of concrete tiles would be to give him a much more costly roof than the one provided for in the Articles of Agreement. The quantity surveyor called as a witness for the builder said that a new flat roof could be provided for £10,000 at present day prices, contrasted with the figure of £27,543 as claimed for a pitched and tiled roof.

Much of the other remedial work prescribed by the Plaintiff's architect is designed to cope with the serious problems caused by the incursion of damp into the premises. There are very large claims referable to replacement of windows, replastering of ring beam, making good damage to decoration, and replacement of carpets damaged by water. The validity of many of these claims depends on discovering the source or sources of water damage which has undoubtedly affected the interior of the house, and this gave rise to considerable conflict between the expert witnesses called on both sides.

The defective roof must certainly have been responsible for much of the damp which got into the premises. While Mr. Cantwell was highly critical of the builder's workmanship in the construction of the roof, I incline to the view that most, if not all, of the responsibility for the defective roof must be laid at the door of the second-named Defendant - the architect who designed it and supervised its erection. As designed, the roof was inadequately supported. The builder said that he queried the adequacy of the support provided for the floor by means of trimmer beams, having had a similar problem while working on a school building under the supervision of the same architect. He was

assured by Mr. Whelan that the design was adequate - this later proved incorrect - and he said that having received this assurance he thought the same type of supports which were provided in the roof design would also be adequate.

In this situation I find it hard to fault the builder for not challenging the judgment of the architect once again in relation to the roof design, and I think the roof reconstruction costs should be the architect's responsibility and not the builder's. Apart from the fault in design I would also accept the criticisms voiced by Mr. Jones, a structural engineer, who felt that the combination of felt, wet vermicalite screed and strawboard on timber was guaranteed to give trouble. The material used - Stramit - was required by the manufacturers' directions to be supported on all four of the slab edges, and this was neglected by the architect. It seems highly probable to me that however carefully the builder did his work on the roof it was doomed to fail sooner rather than later. I accept the evidence that it is still inadequately supported.

It seems clear to me that this major item is correctly located in the section of the Quantity Surveyor's Bill of Quantities entitled "Claim Against the Architect". This would also throw upon the architect the responsibility for rain coming through the roof and damaging the interior of the house, and for so much of the work of redecoration and cost of replacement of carpets as may be linked with it. Mr. Cantwell was of opinion that in any event the builder had failed to provide a proper fall in the roof towards the inner courtyard (on which side the gutters were located) but this was strongly challenged by Mr. Jones, who took levels at 40 points on the roof for the purpose of showing that the fall at all times was away from the outer perimeter of the building. He also said that the design was responsible for the minimal fall of less than one in 80 which was provided in the roof

levels.

Another major cause of the damp conditions inside the building was condensation of an unusually severe character - attributed by Mr. Cantwell to inadequate insulation. I am not clear why blame is attached to the builder on this score. Mr. Jones agreed that very heavy condensation obviously did take place on windows and window boards upstairs, and from them to the walls. This he, too, attributed to pooor insulation; inadequate heating; lack of ventilation - windows not being opened sufficiently, and the expectionally large amount of window space in the house. He said that he could not find that anything had been omitted by the builder which would give rise to these conditions.

I am left with a strong impression that there was probably a lack of good housekeeping over the years, by reason of irregular occupation of the house. Mr. Minahan's domestic circumstances were not enquired into fully, but it does appear that after taking over control of the house in 1971 and completing it by 1972, he continued to live and work in Cork for several years, up to 1980, leaving one of his sons to look after the new house in Cratloe. His wife carries on a guest-house business about a quarter of a mile away from the new house. He said that "some of the family were living in the house at all times" but his evidence did not convey to me that the house was being fully occupied or used as a family home. Given its design and location it required constant attention to keep it warm and dry, and probably a much higher than average expenditure on the central heating system. I do not believe the house was given the necessary care and attention under these headings, and there was also a failure to redecorate both internally and externally since the house was built. Even if it had been perfectly built and none of the defects complained

of had appeared, it would be long past the time for complete redecoration both internally and externally, and it is difficult to sustain this part of the claim as being something attributable to faulty design or workmanship at the time the house was built.

The next major source of damp is attributed by Mr. Cantwell to water penetrating through the outer fabric of the house above and below and through the outer ring-beam which is a prominent feature of the external walls, and which penetration of damp, he believes, is caused by bad workmanship in erecting the beam and providing proper damp-proof courses. It is very difficult to make a positive finding about this after the work of construction has been completed, and the expert witnesses called on behalf of the builder were adamant that no fault could be found with this part of the work. There are undoubtedly very serious indications of damp on the inner walls and ceilings at some places which coincide with the location of the ring beam. The contrary theory put forward is that these damp areas are caused by other factors, notably condensation from the windows, and, secondly, a major problem of leaking radiators forming part of the central heating system. Mr. Cantwell said that he examined the radiators on all occasions when he visited the house, and only found a slight leak from one inlet valve on one occasion. For the builder, Mr. Crotty, an engineer, found considerable evidence of leaking from radiators; Mr. Jones, the structural engineer said that he found 17 valves leaking in the partly-open or fully-open position, by reason of the seals having perished, and Mr. Patrick Lynch, a heating and plumbing contract said that of 13 radiators he was allowed to examine, 12 were leaking, some very badly. In his opinion some of them had been leaking for as long as five years.

At all stages in the trial of the issue, the architect is cast in the role of Plaintiff and the builder is cast in the role of Defendant.

270

This means that the onus of proof must be borne by the architect to satisfy the court, as a matter of probability, that the matters he alleges against the builder are correct. As regards the ring-beam I find myself in a state of doubt as to whether it is defective in the manner alleged, and as to whether it is a significant contributor to the problem of damp which affects the building. I rather incline to the view that it is properly-constructed and this means that I cannot find as a matter of probability that it is defective in the manner alleged. Conversely, however, I find that leaking radiators which the Plaintiff, Mr. Minahan, neglected to maintain properly, have caused a lot of damage to the interior of his house, and to the carpets and decoration, and for this damage neither the builder nor the architect should be held responsible.

The other major remedial works required by Mr. Cantwell to cope with the incursion of damp into the premises, and listed by the Quantity Surveyor as part of the claim against the builder, involve the replacement of all the windows in the house, and ancillary works such as replacement of drip moulds over all the windows. The necessity for this remedial work is, once again, a matter of considerable controversy Mr. Cantwell said that drip-moulds should have been provided; that no drawings have been provided by the architect; that there was a design fault in the windows, and that he would recommend double glazing to eliminate condensation from the windows. He said that all the opening sections were very loosely finished and inadequately designed; that all windows were made much too small for the opes and the joints much too wide, and the mastic could not hold - the gap filled was 25 mm. whereas the maximum should be 10.

The builder said that the windows had been made to the architect's plan, with a small variation to which he had agreed. He said there was

a rebate on the outside of the timber frame, 3" or more which was covered over and this made the sealing appear unusually wide, whereas the rebate was put there to lap over and seal the joint, thus helping to prevent the penetration of damp. This explanation was corroborated by Mr. Crotty, who said that the over-all gap appeared to be 20mm. but the rebate was concealed, and in fact only 5, 6 or 7 mm. was filled by mastic. Mr. Jones said he examined all the windows and found the opening casements were, if anything, too tight and not too loose as suggested by Mr. Cantwell. He said that the signs of damp at the window reveals were, from his experience, attributable entirely to condensation.

Having regard to the different theories which have been put forward as to the sources of damp within the house, and the conflicting evidence about the adequacy or inadequacy of the present windows, I am again unable to find as a matter of probability that all the windows require to be taken out and replaced, or if they do, that the necessity arises by reason of faulty workmanship on the part of the builder in installing the original windows, and not to faulty design by the architect.

The provision of double glazing throughout the premises, while no doubt desirable in the Cratloe location, would seem to me to give the Plaintiff something more than he bargained for and something more than the builder was asked to undertake when he tendered for the contract.

The same observations may be made about other items of work which are not concerned with the problem of making the house wind and watertight. A hatch was provided between the kitchen and dining-room, which is not functioning properly. Mr. Cantwell has advised that it should be replaced by a hardwood slat roller shutter at a cost of £307.75. The builder's witnesses say that the present hatch is merely sticking at the last 4"/5" of its travel, and that a small repair job costing about £10 would restore it to working order. This is the hatch

provided for in the original plans and specifications and if it can be made to work, the Plaintiff is not, in my opinion, entitled to have a superior-type hatch put in its place.

A sum of £161 is claimed against the builder for brass screws missing but the evidence indicated that in almost all of the places where screws require to be provided, the screw-holes already exist, so that the builder did not fail in his duty to provide them originally.

Substantial sums are claimed to cover the costs of new screed for external steps, and to rebed the Liscannor slabs at the entrance to the house, but I am not satisfied that these major works are really necessary or would have been thought necessary by the Plaintiff if his own opinion had been sought.

The Plaintiff, in fact, was a most candid and honest witness. He was asked had the radiators been leaking on and off for ten years, and he replied: "I agree," (although he believed it only happened while they were being opened). It was put to him that but for the serious structural defects in the floor and ceiling he would not have institute proceedings at all, and he said that this was correct.

It is accepted that the major structural defect caused by failure to provide adequate support for the floor is the architect's sole responsibility, and leaving aside the controversy about the roof, the same may be said about most of the items referred to in Section 3 of Mr. Drum's Bill of Quantities. Some of them were not referred to at all in the course of the evidence on the trial of the issue and I take this as a tacit admission of sole responsibility on the part of the architect.

With regard to the very large claims for redecoration of interior and exterior, and the laying of new carpets and underlays, these matters are attributed in large measure to damage caused by damp or are linked

with other defects which have been referred to already. As I have not made a finding of fault against the builder in respect of the damp conditions which prevailed in the house, and as 14 years have gone by, in any event, without redecoration, these claims seem to me to go by the board with the others I have rejected already.

I do not consider it necessary to deal in detail with every item which has been included in the remedial works, save to say that I have taken them into consideration in reaching my over-all conclusion on the case. I have regard to the fact that the architect ultimately certified the full amount as being due to the builder on the Articles of Agreement, save for a small sum of £200 retained, so that he was, in effect, giving as his opinion to the client in the 1974/75 period that the builder had carried out his obligations in a proper manner, and he did not elect to give evidence in these proceedings to rebut that inference in any way. I also think that it is not without significance that the Plaintiff, who is an experienced electrical contractor, familiar with building practices, ultimately agreed to have his claim against the builder struck out with no order as to costs, and said that he would consider employing him again for the execution of the remedial works contemplated.

I believe the trouble in this case arose from design faults and that a case has not been made out which would justify me in imposing on the builder an obligation to make any contribution to the amount of the settlement which has been negotiated between the architect and the client.

Accordingly, I have to dismiss the claim of the second-named Defendant against the first-named Defendant on the trial of the issue between these parties.

R.J. O'Hanlon