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Judgment: approved by the Court for handing down
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Delivered: 27/10/00

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

GARY McBLAIN AND JANET ROBERTA McBLAIN

Plaintiffs;

and

JOSEPH McCOLLUM AND FIONA BOYLE
PRACTISING AS CLERY & McCOLLUM AND
STEPHEN THOMPSON AND KAREN THOMPSON

Defendants.

COGHLIN J

In or about November 1995 the plaintiffs, a husband and wife, retained the first and second-named defendants, a firm of solicitors ("the solicitors"), to act upon their behalf in the purchase of a dwelling house at 3 Strangford Gate, Newtownards which was being sold by the third and fourth-named defendants ("the vendors"). The solicitors acted on behalf of the plaintiffs who eventually purchased the premises for the sum of £90,000. However, the plaintiffs subsequently discovered that no Building Control Approval or Final Architects Certificate had been issued in respect of

the purchased premises nor were the premises the subject of a National House Building Council warranty.

On the morning of the hearing the solicitors formally admitted liability for negligence and breach of contract in failing to inform and advise the plaintiffs that this documentation did not exist in relation to the subject premises and, accordingly, the only issue which remained to be considered was that of damages.

Mr Ferriss QC and Ms Daynes appeared on behalf of the plaintiffs while Mr Kennedy QC and Mr Marrinan represented the defendants. I gratefully acknowledge the assistance which I derived from the clear and well constructed submissions, both written and oral, placed before the court by both sets of counsel.

The facts

The plaintiffs, who have two children aged 13 and 10, decided to purchase 3 Strangford Gate in 1995 and engaged the defendant solicitors ("the solicitors") to advise them in relation to the transaction. The premises were purchased for £90,000, the major portion of which was provided by way of a mortgage of £83,512 from the Woolwich Building Society.

The plaintiffs were very attracted to 3 Strangford Gate and, in the course of giving evidence, Gary McBlain described the premises as their "dream home" where they intended to spend "the rest of their days". They moved into 3 Strangford Gate on 5 January 1996, but within about 4-5 weeks the first defect became apparent when the main staircase started to become detached from the wall. Arrangements were made for someone to attend in order to repair the staircase, but when that person arrived he confirmed that the damage was so extensive as to be beyond his capabilities. The

plaintiffs' contacted Newtownards Building Control and, when the inspectors attended, they informed the McBlains that no final Building Control Approval Certificate had ever been obtained. Within a relatively short period of time significant damp appeared in the front living room, the dining room and a child's bedroom above the living room. In cross-examination Mr McBlain agreed that, by November 1996, he appreciated that it would cost approximately £9,600 to carry out the remedial work sought by Newtownards Borough Council before it would consider granting the appropriate certificate, but he said that he would not have been prepared to spend this money because there was no guarantee that, even if the work was done, a Certificate would be forthcoming, he would not have been able to raise the money and he and his wife believed that a great deal more work was necessary.

Both sides called expert chartered surveyors in relation to the defects which have developed in the subject premises – Mr Wilson on behalf of the plaintiff and Mr Woods on behalf of the defendant. Agreement was reached between the experts that the cost of repairing the problems with the damp-proof course, the rain water goods, the roof lead work, staircase, the external manholes and the ventilation in the roof space would amount to £7,600. There were two areas of disagreement which related to repairs to the cavity walls, with the associated insulation, and the structure of the ground floor. Mr Wilson expressed the opinion that the only satisfactory way of dealing with the cavity walls and insulation was to remove the outer skin and fix insulation board to replace the loose insulate which had not been installed under adequate pressure leading to the creation of voids. Mr Wilson also believed that, as a result of failure to properly install the damp-proof membrane during the course of

constructing the floor, the conditions for rising damp had been created. He felt that the only way to deal adequately with this problem was to excavate and re-lay the floor. If all this work was carried out he and Mr Woods agreed that a reasonable price would be £31,000.

For his part, Mr Woods, on behalf of the defendants, did not accept that it was necessary to excavate and re-lay the floor and he considered that the problem with damp could be remedied by carrying out repairs to the chimney breast and to the surrounds of six windows. Mr Woods and his partner had costed the repairs which they considered to be necessary to remedy the defects at £6,120 for the damp in the walls together with some £200 for repairs to the floor.

In cross-examination by Mr Ferriss QC, Mr Woods accepted that the NHBC warranty lasted ten years and the house was only approximately half way through that period. He also conceded that, even if the remedial work was satisfactorily completed, he would still have advised a building society considering purchase to carry out a separate survey because of the history of the premises and the absence of an NHBC warranty.

Expert valuers were also called by both sides with regard to diminution in value. On behalf of the plaintiff, Mr McQuitty, who has been an associate of the Royal Institute of Chartered Surveyors since 1970, expressed the view that without the NHBC warranty, Building Control Approval or an Architects Final Certificate in January 1996 the premises would have been worth £60,000. Mr McQuitty said that he had been involved in a number of cases involving similar problems and that, in his view, a discount of about one-third seemed reasonable. Mr McQuitty said that he was

very well acquainted with the housing market in the Newtownards area and that he was familiar with comparative values in 1996 and at the present time. In his view, if the defects in the subject premises were remedied and a Building Control Certificate was granted, the present day value of the house, without either an NHBC warranty or Architects Final Certificate, would be approximately £165,000. He considered that if all the documentation was present , the defects repaired and the gardens landscaped and drained the present value would be about £180,000.

Mr McQuitty was closely and effectively cross-examined by Mr Marrinan on behalf of the defendants with regard to the comparable properties which he had considered when attempting to reach a valuation. During the course of cross-examination Mr McQuitty was compelled to make a number of significant concessions and, overall, I formed the view that his evidence was less than impressive. In particular Mr McQuitty referred to No 9 Strangford Gate as a suitable comparator which was currently on the market for £190,000 but, eventually he was compelled to concede that No 9 had an extra bedroom, an extra garage, a conservatory and was 150 square feet larger than No 3.

The defendants called Mr Rodgers, an estate agent, who is a partner with the Eric Cairns Partnership and has been in business as an estate agent for some 25 years. Mr Rodgers stated that it was his estate agency which originally sold No 3 Strangford Gate to the plaintiffs. Mr Rodgers confirmed that No 1 Strangford Drive was 1,700 square feet and currently on the market for £175,000. Mr Rodgers valued the subject premises at £150,000-£160,000 with the defects remedied, the garden made up but still lacking both an NHBC warranty and Architects Final Certificate.

The law

In County Personnel (Employment Agency) Limited v Alan R Pulver & Company [1987] 1 WLR 916 the plaintiff company sued the defendant solicitors for negligence in negotiating the under lease of rooms to be used as business premises. In the proceedings which followed, it was contended on behalf of the defendants that the diminution in value rule should be applied. At page 925C Bingham LJ (as he then was) identified a number of principles to be applied when assessing damages in the this type of situation noting that, whilst it was almost always appropriate where property was acquired following negligent advice, the diminution in value rule was not the invariable approach, at least in claims against solicitors, and should not be mechanistically applied.

In Banque Bruxelles Lambert SA v Eagle Star Insurance Company Limited [1997] AC 191 Lord Hoffman emphasised the importance of deciding "for what kind of loss" the plaintiff was entitled to compensation and observed at page 216D:

> "The measure of damages in an action for breach of a duty to take care to provide accurate information must also be distinguished from the measure of damages for breach of a warranty that the information is accurate. In the case of breach of a duty of care, the measure of damages is a loss attributable to the inaccuracy of the information which the plaintiff has suffered by reason of having entered into the transaction on the assumption that the information was correct. One therefore compares the loss he has actually suffered with what his position would have been if he had not entered into the transaction and asks what element of this loss is attributable to the inaccuracy of the information. In the case of a warranty, one compares the plaintiff's

> position as a result of entering into the transaction with what it would have been if the information had been accurate. Both measures are concerned with the consequences of the inaccuracy of the information but the tort measure is the extent to which the plaintiff is worse off because the information was wrong whereas the warranty measure is the extent to which he would have been better off if the information had been right."

Both County Personnel (Employment Agency) Limited v Alan R Pulver & Company and Banque Bruxelles Lambert v Eagle Star Insurance were considered by the Court of Appeal in the valuable case of Stanley K Oates v Anthony Pitman & Company [1998] PNLR 683 which was a case that involved solicitors alleged to have been negligent in acting in connection with the purchase of a property which the plaintiffs required as a home for themselves and also for the purpose of carrying on the business of holiday lettings. In giving the judgment of the court, Sir Brian Neill said, at page 694/95:

> "In the ordinary case it may be possible to apply the diminution in value rule without difficulty by considering evidence as to the market value of comparable properties. Such evidence, from witnesses with knowledge of the relevant market, should enable the court to decide the market value of the property in question with the attributes, or lack of attributes, which it possessed at the time of the transaction concerned.
>
> The application of the diminution in value rule may be more difficult, however, where the property is unusual, or where, to the knowledge of the solicitor, it is being purchased for a particular purpose, or where a substantial interval has elapsed between the purchase and the defects coming to light. In such a case there may be no satisfactory evidence which would enable the court, by making a comparison with other properties, to decide the market value of the property in question. The court may then have to consider the price which the hypothetical reasonable buyer would have been willing to pay had he known of the

> defects, and the estimated cost of removing or correcting the defects may be the most reliable guide to the reduced market value. Any other method of calculating the market value might be too speculative.
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> In a third class of case the negligent advice or other negligent conduct of a solicitor may have led the plaintiff to enter into a transaction from which subsequently he has had to extricate himself. Hayes v James and Charles Dodd [1990] 2 All ER 815 was such a case, and the damages were assessed in effect on the basis of the cost of the extrication."

Conclusions

In arriving at the conclusions which I have reached I have taken the following factors into consideration:

(i) While referring to the subject premises as his "dream home" Mr McBlain has, at all material times, emphatically maintained that had he been informed by the defendants that the house was not subject to Building Control Approval, an NHBC warranty or Architects Final Certificate he would not have completed the purchase at all and, instead, he would have sought alternative premises.

(ii) There is no dispute as to the value of the premises, respectively, with and without the relevant documentation at the time of the purchase. The figures put forward by Mr McQuitty on behalf of the plaintiff of £90,000 and £60,000 have not been contradicted.

(iii) Mr McBlain agreed in cross-examination that "we knew from day one that we had work to do" but, to date, none of the work has been carried out. The reasons given by Mr McBlain for not carrying out the repairs included a lack of trust with regard as to whether Newtownards Building Control would issue a certificate even if the work was done, the realisation that, apart from

Building Control requirements, there was a lot more work to do, difficulties in securing alternative legal representation, the failure of the defendants to make any admission as to liability until the morning of the hearing and lack of funds.

Prior to the hearing, the plaintiffs had steadfastly maintained that they should be compensated on the basis that the subject premises should be demolished and a new house re-erected on the site. The plaintiffs were not supported in this by their expert witnesses, Mr Ferriss QC conceded that such an approach lacked legal authority and, in the circumstances, I reject this submission as a proper basis for compensation.

As I have noted above, there is no difficulty in identifying the relevant differential in value at the time of purchase which has been established at £30,000. The cost of necessary repairs assessed by the plaintiffs' witnesses, to include the sums which Mr Wilson, chartered surveyor, recommended would be necessary to meet NHBC requirements came to £39,350. However, in my opinion, to allow compensation at this level would be to compensate the plaintiffs on the basis of a warranty given by the defendants contrary to the principles set out in the Banque Bruxelles decision. Such a figure significantly exceeds the diminution in value at date of purchase and to use it as a basis for compensation would provide the plaintiffs with a bargain which would not have been available even if the defendants had properly performed their contract and would permit recovery upon a warranty basis – see Phillips v Ward [1956] 1 All ER 874; Watts v Morrow [1991] 4 All ER 937.

As an alternative to the diminution in value at the purchase, Mr Ferriss QC submitted that the plaintiffs should be compensated by reference to the present day value of the house as it stands and the present value of the comparable type of house

which the plaintiffs would have bought as an alternative if the contract had been properly performed by the defendants. The Court of Appeal in Perry v Sydney Phillips & Son [1982] 3 All ER 705 rejected such a submission and at page 709 of the judgment, when dealing with the points raised, Oliver LJ said:

> "The first is the question whether the appropriate measure of damage on the basis of what the deputy judge described as 'differential in valuation' is, as counsel for the defendant submits, the difference between the price paid by the plaintiff and the value at the date of its acquisition, the property which he actually got, or whether it is, as counsel for the plaintiff suggests, the difference between the value of the house at the date of the trial in its defective condition and the value which it would then have had if it had been in the condition in which on the basis of a surveyors report it should have been. Speaking for myself, I have no doubt whatever that the basis suggested by counsel for the defendants is the right one. What counsel for the plaintiff contends for in effect makes the surveyors warrant the value of the property surveyed … ."

Oliver LJ also considered it to be significant that in Perry v Sydney Phillips the plaintiff had been aware of the defects but had chosen not to cut his losses by selling. In Watts v Morrow, Ralph Gibson LJ thought that it was arguable that inflationary increases might be taken into account if the defects were not discovered for a substantial period of time after the purchase. On the other hand, as the learned authors of 16th Edition of McGregor on Damages point out, at paragraph 1286, the normal measure of damages applies if there is a collapse in the market – see Banque Bruxelles. In this case I am satisfied that one of the primary reasons for the plaintiff continuing to remain in the subject premises was their misconceived apprehension that the house should be demolished and rebuilt. I note that the prima facie rule as stated by the learned authors of Jackson & Powell on Professional Negligence (4th Edition 1997)

para 3-137 was recently confirmed as correct by the Court of Appeal in Patel v Cooper & Jackson [1999] 1 All ER 992 at 1000.

Accordingly, it seems to me that the proper basis upon which to compensate the plaintiffs is the diminution in value at the date of purchase, namely, £30,000.

In addition, the plaintiffs claimed a total of £8,061.07 in respect of solicitors fees and stamp duty, tiling, wardrobes, bathroom cabinets and lawn laying, being sums which they claimed they would not have expended if they had received proper advice from the defendants. While there are no doubt cases in which plaintiffs may be properly compensated on the basis of the costs of extricating themselves from the consequences of negligent advice, for example, County Personnel (Employment Agency) Limited v Pulver & Company [1987] 1 WLR 916; Hayes v James and Charles Dodd [1990] 2 All ER 815, as I have already noted above, since the date of the original purchase, these plaintiffs have remained in occupation of the subject premises and, on the basis of the evidence, I remain far from convinced that they intend to leave. Accordingly, I do not allow these items by way of damages. For the same reason, I do not allow the sum of £2,500 claimed in respect of the alleged cost of transfer of furniture to be incurred on removal.

In my view, the cost of investigative works carried out by Mr Wilson properly fall to be measured as part of the costs of the hearing.

The plaintiffs also claim compensation for the discomfort and inconvenience that they had endured in not being able to enjoy the full amenities of the house. In essence, the evidence in relation to this aspect of the case was restricted to the plaintiffs' inability to make full use of the three rooms effected by damp. Mr McBlain described

how the family had Christmas dinner on a "plastic picnic table" for four years. Mrs McBlain said that they tended to keep the central heating system on to cope with the damp. On the balance of probabilities, I find that the plaintiff's have established that, as a consequence of the defendants fault, they suffered some degree of discomfort and inconvenience caused by the damp but this has to be seen in the context of the complete omission by the plaintiffs to take any steps whatever to deal with the problem since the purchase of the premises. In Patel v Cooper the Court of Appeal affirmed an award of £2,000 general damages to each of the plaintiffs as a consequence of being compelled to live in alternative accommodation for some seven years. In the circumstances, it seems to me that an appropriate figure to award is £1,000 to each plaintiff. Consequently, I propose to make a total award of £32,000 in respect of damages together with interest thereon at the appropriate rate.

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JUDGMENT

OF

COGHLIN J
