

THE HIGH COURT

1983 No. 7886P

BETWEEN/

PETER McLOUGHLIN AND MARIE LOUISE McLOUGHLIN

PLAINTIFFS

AND

GUARDIAN BUILDERS LIMITED AND CHRISTOPHER MOLLOY

DEFENDANTS

AND

RENTOKIL LIMITED

THIRD PARTY

Judgment of Mr. Justice Johnson delivered the 14th day of
December 1987.

This case arises out of a Third Party issue and relates to a claim brought by the Defendants against the Third Party in respect of moneys paid by them in settlement of a claim by the Plaintiffs against the Defendants.

The claim arose out of defects in a house which was sold by the Defendants to the Plaintiff in 1982.

As is quite clear from the evidence there is a complete controversy regarding the facts of this case and indeed both Counsel have gone so far to say that it is impossible that both parties are telling the truth.

Under these circumstances the net issue in the case in reality is as to which of the parties I believe.

Certain of the facts are not in controversy and the issue in dispute between the parties is readily identifiable. However, I intend briefly to state the chronology of the events which led up to the present situation. These facts I think can be taken to be uncontested.

Mr. Molloy, the Defendant, and Guardian Builders can be taken as one and the same. Mr. Molloy is a man who spent a considerable length of time in the building business building apartments. However, his evidence was that at no time prior to this incident had he at any time come into contact with dryrot nor had he any knowledge of it whatsoever. This is despite the fact that he had done training in the building industry in the technical school, had been in the furniture trade and had been continuously in building and associated therewith for a period of approximately 17 years before the incidents involved in this case occurred.

In January 1979 the Defendant purchased the premises of 135 Mount Merrion Avenue mainly for the purposes of acquiring a site in which he intended to build a house for himself and which he subsequently did.

At that time the premises of 135 Mount Merrion Avenue was divided in two, the basement was separated from the other

two floors. It was not in particularly good condition and the Defendant attempted to sell the house in the condition in which it was. However, in the course of the attempts to make the said sale, one of the potential purchasers who was viewing the house pointed out distorted skirting-boards which indicated that there was dryrot present in the premises.

In November 1980 the Defendants requested the Third Party to come and give an estimate in respect of the eradication of dryrot in the basement. In accordance with the said request Mr. Rigley, on behalf of the Third Party Company, went to the premises and carried out an inspection of the basement and quoted therefor a price of £406. The Defendants did nothing about that particular quote and subsequently in June or July 1981 Mr. Rigley was re-called to the premises and requested to carry out work. Mr. Rigley did certain works in the premises over the next three months in the course of attempting to eradicate dryrot from the premises.

It is in respect of this work done between June and September 1980 that the issue in this case arises and it arises basically on the simple question as to what was Mr. Rigley's brief when he was called into the house in 1981.

Subsequently after the departure of the Third Party, Mr. Rigley, in approximately September 1981 the premises were done up and placed on the market for sale in 1982. For the purposes of assisting the sale, an auctioneer's brochure was produced. This document to put it at its mildest was extremely misleading.

The Plaintiff in the case, Mr. McLoughlin, purchased the premises in or around July 1982 and it appears he moved into the premises and commenced living there. In July 1983 a letter

was written by the Plaintiff to the Defendants complaining about the condition of the house. Certainly not later than October 1983 the Defendants were aware that the problem was based on the problem of dryrot. The Defendant went and inspected the premises and became fully conversant with its condition as a result of having spoken to Mr. Griffith, the Architect. Nothing further was done by the Defendants and there was no communication made to the Third Party. However, a letter was received from the Third Party from Croskerrys, Solicitors, dated the 17th of December, 1983 requesting payment of the account of £885 due by the Defendant to the Third Party. In reply to that the Defendants wrote a letter on the 9th of January, 1984 accusing the Third Party of submitting an account for approximately twice the initial quote of £406 and requesting a guarantee in respect of the work which was done. This, having regard to the now known and agreed facts, is an extraordinary letter and quite clearly totally fails to take into account the fact that additional work had been done and agreed to be done over and above the original estimate of November 1980.

The certificate of guarantee requested was provided on the 25th of January, 1984 together with a letter of the same date. This letter itself is the centre of a controversy regarding a certain portion thereof. This I will deal with later. In the course of the meeting which took place at that time between Mr. Rigley and Mr. Molloy, Mr. Rigley complained to Mr. Molloy about the absence of co-operation which he had received during the carrying out of the work.

The next step in the proceedings happened on the 7th of March, 1984 when a letter was sent by the Third Parties to the

Defendants including certain sketches and the wording of this is extremely interesting. It says "We are including two sketches which show the area of treatment by this company and the area which is not covered by our guarantee". In addition it put on record the fact that they had received no co-operation during the work and further stated they were forced to leave the job for this reason. This letter is of interest because of the sketches which were enclosed which quite clearly detail a much smaller portion of work than the Defendant now alleges was done as can be clearly seen by comparing the sketches produced by the Defendant and the sketch produced by the Third Party. In this regard I would particularly point out that subsequently a major dispute arose as to whether or not the cellar had been treated. Quite clearly from the sketches as laid out by Mr. Rigley and the Third Party the cellar had not been treated. Equally clearly according to Mr. Molloy the cellar had been treated. However, it is interesting to note that even if the cellar had been treated the cellar was then cut off completely and it was only when remedial work was done by Mr. McLoughlin that he discovered the existence of the cellar at all. However despite the discrepancy in the sketches no query was raised by the Defendant regarding such discrepancy. No question was raised suggesting that the complaints regarding the conduct of the Defendant's personnel and the Defendant himself had not been made in January in the office of the Third Party.

A further letter was written on the 27th of March asking for clarification regarding the question of assistance given. The matter is continued to be debated on that basis by a further letter from Rentokil on the 1st of May, 1984 and a

subsequent letter from the Defendants to the Third Party on the 4th of May, 1984 and the 8th of May, 1984. In the course of this correspondence still no mention was made of any defect in the work though the Defendants were aware of it for now a period of at least six months.

The first notification the Third Party appears to have got regarding the existence of dryrot in the premises may be as late as the 11th of December, 1984. The failure of the Defendant to bring the existence of dryrot to the attention of Rentokil even after it had obtained its guarantee is extremely difficult to understand.

The condition of the house at that time is of great interest and it is interesting to note the evidence of Mr. Griffith who was Mr. McLoughlin's Architect for the purpose of the case and his evidence is quite clear that the work done on this house was of a shoddy nature and above all was done by way of cosmetics to cover up the true situation in the house. Right through the evidence there appears to have been positive efforts made on the part of the Defendant to give the impression that the house had been well and properly restored when in actual fact poor workmanship and deliberate cosmetics were utilised throughout the premises and it is interesting to note that the Defendant did not call his own Architect who had allegedly supervised the restoration of the house to contradict this evidence. In addition to the foregoing, one further piece of evidence has come to light, and apparently it came to light only from the Plaintiff's case, though it is represented by a document which ought very clearly to have been in the possession of the Defendant and which ought certainly to have been discovered by the Defendant and that is the report from

Biotox. Biotox is a firm in a similar business to that of Rentokil which was invited to examine the house in July of 1980 and it is interesting to note that in that report the area inspected consisted of the back room at basement level and the front room at first floor level. It is difficult to understand how only these two places could have been examined by Biotox Limited when quite clearly in the previous November a greater area than that had already been acknowledged and discovered by Rentokil in the basement area alone where positive signs of dryrot were found in the front room.

If it was the Defendants' intention properly to carry out a full investigation of this house why was it that Biotox only went to the back room at basement level when we know there was more dryrot than that there.

A further dispute in this case arises over the letter of guarantee given by the Third Party to the Plaintiff. The Plaintiff produced a letter containing a statement and I quote "At time of inspection there was no evidence of fungal decay in any other part of this building". This sentence does not appear in the copy retained on the files of Messrs Rentokil. Both parties have acknowledged that Miss Delaney, the typist, is an honest witness and she said she did not type in those two extra lines. Mr. Molloy says he did not do it. Mr. Rigley says he did not do it. Three experts were called on regarding typewriters, two of whom say that it was done on the typewriter in the Rentokil offices on the same typewriter that had typed the rest of the letter. One said it was not. On initial examination it certainly appears not to have been written on the same typewriter. However the evidence went both ways. It is not necessary for me in the decision of this case to decide

what precisely the origins of this letter were. Suffice it to say that insofar as it is relevant I take it in combination with the letter of the 8th of March and together with the sketches attached thereto subject to the limitations thereon imposed.

In ascertaining the reliability of the Defendant in establishing his case a large number of circumstances have come to light, namely, prior to November 1980 and prior to the first request of Rentokil to visit the premises Mr. Molloy was aware that dryrot existed on the first floor as well as the basement. This appears quite clearly from answer 52 of the transcript. In question 72 Mr. Molloy contradicts this and claims he first became aware of dryrot on the other two floors in June 1981. There has been a great deal of contradiction between the actual occurrence and the dates upon which the work was done. Reference has been made by Mr. Molloy to his diaries regarding certain dates upon which he does have a written note. However, the contradiction would appear to arise under four headings with regard to the essence of the case.

- (a) What brief was given.
- (b) On what dates was the work carried out.
- (c) What was the level of co-operation given.
- (d) To what extent was Mr. Rigley given an opportunity of going over the house and how far did he examine the house.

There is no doubt that after the work done by Mr. Rigley the house proceeded to be done up and unless one rejects Mr. Griffith's evidence which I have no intention of doing this work was carried out in an extremely bad manner. A brochure was then produced which I have already stated to be at least of a seriously misleading nature. There is undoubtedly further

contradictions between the work sheets of the Third Party and Mr. Molloy's diaries. However, after that period no further evidence in the case would appear to be relevant until mid 1983 when Mr. Molloy and the Defendants received a letter from the Plaintiff indicating deep dissatisfaction with the house. By October 1983 it is quite clear to the Defendants that the complaint is in relation to among other things dryrot and so we have in October 1983 Mr. Molloy, a builder of 20 years, who has renovated a house with the assistance of Messrs Rentokil, an international company of repute, who has sold it to a solicitor and who is now faced with complaints which quite clearly he was aware were going to involve Mr. McLoughlin in substantial expense in renovating the house. In these circumstances what did he do? Did he immediately call in Rentokil and indicate to them that they had made a botched job? No, he did nothing and it was not until December the 9th in response to a letter from Rentokil requesting payment that he first of all contradicted the amount and then requested a guarantee. When he obtained the guarantee he still did nothing and two months later having obtained sketches as to what work was done which were quite clearly at variance with what he now claims was to have been done and was done by the Third Party he still did nothing but continued in correspondence until May the 4th. Subsequently it was not until late 1984 at least one year after the original complaints had been made that Messrs Rentokil, the Third Party, became aware that there was a complaint regarding the dryrot in the premises. It is in the light of these facts that I have to view the evidence as presented. I have had the advantage of seeing the witnesses and observing not only what they said but the manner in which they gave their evidence. The onus in this

case is on the Defendant to establish to my satisfaction that the balance of probabilities is that he, when he engaged Messrs. Rentokil, engaged them with a full brief to investigate the full house and to eradicate dryrot from the whole structure and taking the evidence as a whole and in particular the individual items which I have mentioned above I am satisfied that the Defendant has failed to discharge the onus of proof herein, and I therefore dismiss the claim.

A handwritten signature in black ink, appearing to be the initials 'M.A.' or similar, written in a cursive style.