 30 E.R. 230 (1789)

Small deviations from a plan agreed upon for building not material; otherwise, if obstinate or corrupt.

In *March* 1787, Plaintiff a builder, having already begun the house in question, entered into an agreement with Defendant; by which Plaintiff was to complete it as a public-house according to a plan given by Defendant's surveyor *Wilmot*. Plaintiff was to lay out £300 upon it. All the expence above that sum was to be defrayed by the Defendant. The house was to be completed by *December*; and from the time of its being finished Defendant was to accept a lease for seventy years at the yearly rent of £35, 10*s*. There was a proviso, that the workmen should be paid according to the measure and value. After the parties had proceeded some time according to the agreement, *Wilmot* got possession of the plan by a stratagem, and refused to re-deliver it, and endeavoured to stop the workmen. Plaintiff however proceeded, and finished the house, of which he gave Defendant notice, desiring him to fulfil his part; and, no answer being received, brought the bill for specific performance, and an account of what was expended above £300. This bill was resisted upon the ground of deviations from the plan, which according to the evidence consisted in having a step at the door; which was said not to be usual in public houses; there were also two chimnies in the club-room, which, though originally intended, was contrary to *Wilmot's* subsequent directions; and there was some variation as to the bar; by all which the expence was increased £50. There was also evidence, that it would be a very great rent for a private house. It was also objected for the defendant, that Plaintiff had undertaken to procure a licence, and failed.

Mr. *Mansfield* and Mr. *Alexander* for Defendants, objected to a witness for Plaintiff. He was employed in the building, and Defendants are to pay according to measure and value; and if they are right in their defence by proving a deviation; he cannot make a title to be paid; so he is interested; as he swears to entitle himself to payment.

Lord Chancellor [Thurlow]. He is to be paid by his employer, whether Plaintiff or Defendant; but not by force of this agreement; all, it amounts to is, that beyond £300 the expence shall be defrayed by the Defendant. The witness can recover nothing in the present suit; which is a sufficient answer. But besides he can claim nothing under this agreement, which is not with him, but only between Plaintiff and Defendant. If the work is not done according to the plan, he cannot maintain an action against Defendant; but he may against Plaintiff. If otherwise, he may against Defendant.

For Defendant. If the plan has been departed from, Plaintiff is not entitled to relief in a Court of Equity. Indeed he could not recover at Law; and if he could, your Lordship would leave him to it. Plaintiff thought himself bound to procure a licence; for he applied to the Justices; having represented it to Defendant as the constant practice, and assured him, it would be granted. The practice is, when a number of houses are built together so as to form a new town, the builder makes one of them a public house for the convenience of the inhabitants; and a licence is granted to him upon that account.

Lord Chancellor. That practice of granting a licence to the house instead of the person is very improper. The agreement is very loose. Small deviations from the plan would not affect it much; but if there is any obstinate or corrupt deviation, that would materially. The Defendant has got the plan, and yet does not produce it in evidence. The Plaintiff's case is, that Defendant's surveyor withdrew the plan, hoping thereby to turn the burthen upon Plaintiff, and so to defeat him. The circumstance of not producing the plan is a signal defect in Defendant's case. *Wilmot* has got possession of it, keeps it, and then talks of variation from it.

For Defendant. The particular variations were so expressly stated in the answer, that it was thought the plan would be unnecessary. They might have pointed their interrogatories to that, but have avoided it, and examined in general terms. But if the answer and evidence is not a sufficient bar to the bill, yet at least it may operate

in diminishing the sum to be paid. It is clear there are deviations, which are not contradicted; they occasioned the additional expence of £50; therefore if they are not a sufficient impediment to a specific performance, yet this sum ought to be allowed; and the Master ought to be directed to allow it; or inquire what the additional expence amounted to.

Lord Chancellor. The lease was to be dated from the time the house was completed; therefore there must be an inquiry as to that. The Master will state, when it was completed according to the contract. It is immaterial, that the house was actually begun before. Here the agreement is, that the lessee under-leases it to Defendant; agreeing to lay out £300 upon it to be employed upon the direction of Defendant. The lessee allows lessor to go on with it: then they quarrel. If they had managed that quarrel right, it might have put an end to the Plaintiff's going on to build, and then they must have finished the house *instanter*; it is evident, it was a kind of house to be finished immediately; but they could not stop Plaintiff's workmen. He undertook to proceed, and therefore came under an obligation to execute the contract, and to finish; and the lease cannot be given till the house is finished. Therefore the Master must inquire first, whether the house is completed, and if so, when it was completed according to the contract; and then Defendant must be directed to accept a lease according to the terms of the contract. (*Note*: As to specific performance of a covenant to build, see post, 235. *Moseley* v. *Virgin*, 3 Ves. 184.) If the house was not finished in 1787 they cannot bind Defendant to take a lease from that year. Then the Master must inquire, what money has been expended above the sum of £300; and interest must be given upon it since it was laid out.

For Defendant. This debt will not carry interest; it is a mere simple-contract debt; and even upon a common action at Guildhall, interest would not be given.

Lord Chancellor. The money referred to inquiry is the money laid out by the Plaintiff in execution of the contract. Money paid to the workmen, who were to be paid by the Defendant, is money advanced for him, and it is the constant practice at Guildhall (I do not speak from my own experience, but from conversations I have had with the Judges on the subject) either by the contract, or in damages,(1) to give interest upon every debt detained. The interest depends upon the house being completed.

Immediately after the decree was pronounced, it appeared, that a licence was obtained, upon which the parties agreed, that upon Defendant's paying £300 into Court, he should be let into possession immediately.

(1) 1 *Atk.* 151; 2 *Ves.* [*sen.*] 589. See 1 *Ves. J.* 451, *Creuze* v. *Hunter*. *Deschamps* v. *Vanneck*, 2 *Ves. J.* 157, 716. *Parker* v. *Hutchinson*, *Sharpe* v. *Earl of Scarborough*, 3 *Ves.* 133, 557. *Upton* v. *Ld. Ferrers*, 5 *Ves.* 801. *Clarke* v. *Seton*, 6 *Ves.* 411. *Lowndes* v. *Collens*, 17 *Ves.* 27. *Lithgow* v. *Lyon*, *Coop.* 29. But in the case of a surplus in bankruptcy interest subsequent to the commission was confined to debts, carrying interest by the contract. *Ex parte Mills*, 2 *Ves. J.* 295. *Ex parte Kock*, 1 *Ves. & Bea.* 342; 1 *Rose*, 317. *Ex parte Williams*, 1 *Rose*, 399. *Ex parte Greenway*, *Buck*, 412. *Ex parte Boyd and Paton*, 1 *Glyn & Jam.* 285, 332. *Burgess's Case*, 2 *J. B. Moore*, 745, until the stat. 6 *Geo.* IV. *c.* 16; see *s.* 57, 132.