Approved

THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2020] IECA 215

Court of Appeal Record No: 2018 /114

High Court Record No: 2011/7987 P

Costello J

Haughton J

Collins J

BETWEEN

SHANE O' REILLY &

ANTOINETTE O' REILLY

Plaintiffs/Respondents

AND

SEAMUS NEVILLE, LIAM NEVILLE, COLM NEVILLE,

ANTHONY NEVILLE, BRENDAN NEVILLE, and WILLIAM

NEVILLE AND SONS CONSTRUCTION LIMITED trading as THE

NEVILLE DEVELOPMENT PARTNERSHIP

Defendants/Appellants

JUDGMENT of Mr Justice Maurice Collins delivered on 31 July 2020

THE PROCEEDINGS

1. On 31 July 2017, following a 12-day hearing, the High Court (Binchy J) gave judgment determining the substantive issues in these proceedings: [2017] IEHC 554 (*"the Judgment*"). The Plaintiffs had made a claim for breach of contract, negligence and breach of duty in relation to the construction of a duplex dwelling at 19 Millrace Crescent, Saggart, County Dublin ("*the Property*"), which was constructed by the Defendants (hereafter "*the Contractor*") pursuant to an agreement with the Plaintiffs entered into in March 2005 ("*the Building Agreement*"). Construction was completed and the Plaintiffs entered into occupation in September 2005. The price paid by the Plaintiffs for the Property was just under €280,000.

2. It is evident from the Judgment that the Plaintiffs had issues with the Property from an early stage. Some remedial works were undertaken by the Contractor but these did not resolve the issues to the satisfaction of the Plaintiffs and, according to the Plaintiffs, in fact made matters worse. In August 2010 – by which time they had two young children – the Plaintiffs moved out of the Property. Their principal reason for taking that drastic step was a concern that conditions in the Property were having a harmful effect on the health of their children. In particular, the Plaintiffs were concerned that the health of their two children was being compromised by the damp and mould present in the Property, especially in the attic. These developments are all set out very clearly in the Judgment.

3. Contact continued between the parties and their professional representatives with the object of resolving matters but, while it appears that the Contractor accepted that certain remedial works were required, no agreement could be reached on the nature and extent of those works. Proceedings issued in September 2011. The principal relief sought by the Plaintiffs was rescission of the Building Agreement of 30 March 2005 and repayment of the contract price. Damages were claimed in the alternative. In their Defence, the Contractor pleaded that specific performance of the Building Agreement was the appropriate remedy for the Plaintiffs, relied on the terms of the Building Agreement as an answer to the claim, pleaded negligence on the part of the Plaintiffs and also pleaded that they had at all times been willing to address the Plaintiffs' complaints but that the Plaintiffs had failed to engage with them. Specific reference was made in that context to an "*open letter of offer*" of 5 April 2012 in which the Defendants had offered to carry out works recommended by their engineer, which offer (it was said) remained open. It will be necessary to refer to that letter in more detail below.

4. The Building Agreement (which was in the standard form issued jointly by the Law Society of Ireland and the Construction Industry Federation (2001 ed)) contained an arbitration clause (Clause 11). At paragraph 111 of the Judgement, the Judge expresses the view that arbitration would have been "*a far more suitable form of dispute resolution*" because of the technical nature of the matters in dispute. I agree. In other jurisdictions, specialist courts have been established to hear building disputes. That is not the position here. Generally, such disputes are determined by arbitration or other form of alternative dispute resolution (ADR). The inclusion of an

arbitration clause in the standard form building agreement reflects that position. The Judge goes on to observe that the parties were nonetheless fully entitled to have recourse to the courts instead. That is true but only up to a point. Having regard to the fact that there was an arbitration clause in the Building Agreement, it was open to the Contractor to seek to have the proceedings stayed pursuant to the provisions of the Arbitration Act 2010 (and Article 8(1) of the UNCITRAL Model Law to which effect is given by the 2010 Act) but it did not do so.

5. In the course of the appeal hearing the Court asked why the Contractor had not sought arbitration. Counsel for the Contractor explained that his clients did not want to have a "*technical fight*" about repairing the Property; rather, he said, his clients simply wanted to repair it. While that is a fine sentiment, I have difficulty in taking it at face value. The Contractor could have avoided a "*technical fight*" by agreeing to carry out the works required by the Plaintiffs (and, in particular, the removal and replacement of the roof structure) but did not. That was, of course, its entitlement but it had the consequence that a "*technical fight*" was inevitable and the issue thereafter was in what forum and/or by what process that fight would be determined. The Plaintiffs invoked the jurisdiction of the High Court. The Contractor was not compelled to submit to that jurisdiction – it could have sought arbitration. Any arbitration could have been conducted by an engineer or architect and, for that reason, would likely have been shorter in duration than an action in the High Court. Instead, the Contractor sought to have the "*technical fight*" resolved on its terms, by a process of expert determination.

6. In any event, while efforts to resolve the dispute continued, the proceedings moved – albeit slowly – toward a hearing. The action was listed for hearing in the Chancery list on 24 November 2015 but no judge was available to hear it. Apparently prompted by the court, a mediation took place in January 2016 but did not produce a settlement. Later that month, the action was relisted for hearing in December 2016. At that stage, the Contractor made another offer to the Plaintiffs, by way of an open letter of 18 February 2016. It will be necessary to refer in more detail to this letter in due course.

7. That offer was rejected and the hearing commenced before Binchy J on 8 December 2016. While it was listed for 6-8 days, the hearing ultimately took 12 days. In the course of the hearing a large number of witnesses gave evidence. On the Plaintiffs' behalf, in addition to the Second Plaintiff, Binchy J heard evidence from a civil engineer, a GP, an occupational hygienist, a microbiologist, a consultant paediatrician, a structural engineer with particular expertise in fire safety, and a chartered quantity surveyor. On the Contractor's side, evidence was given by the Second Defendant, as well as by a microbiologist, and an architect, with the report of a fire safety specialist apparently being admitted into evidence also.

8. Such an array of witnesses would do justice to a multi-million construction dispute but, from a financial point of view at least – and without in any way minimising the significance of the dispute to the parties – the dispute here was of much more modest dimensions. The Plaintiffs' primary claim was for rescission of the Building Agreement and repayment of the amount paid by them for the Property. In the event, that claim was abandoned at the conclusion of the evidence, leaving the Plaintiffs'

claim for damages. The respective positions of the parties on the issue of damages/cost of remediation is conveniently summarised in paragraph 108 of the Judgment:

> *"The defendants acknowledge that there are defects requiring remediation in the dwellinghouse. In the Scott schedule furnished by the parties to the Court, the defendants indicate agreement to the carrying out of works having a value of approximately €19,444.07. This is out of a total claimed in the sum of €72,241.02 (the balance of the plaintiffs' claim of €97,000 is made up of VAT, the cost of a performance bond and an estimate for the costs of design and related expenses)."* (my emphasis)

9. As the Judge explains (at paragraph 109 of the Judgement), the difference between €19,400 and €72,241 was accounted for by what he described as "*the single biggest issue of contention as between the parties*", namely whether or not it was necessary to remove and replace the roof structure of the Property in its entirety. While that was clearly the most significant issue between the parties as regards the scope of the remedial works required to be carried out (and that is clearly what the Judge was referring to), there were two other significant issues, each of which had a potentially significant financial impact. The first was the Plaintiffs' claim to recover the rent paid by them for alternative accommodation after they moved out of the Property in 2010. The Plaintiffs had stayed with family for the first year (approximately) but after that had rented accommodation for €1,250 per month. By the time their action came on for hearing, the total value of that claim was in the order of €75,000. In addition, the Plaintiffs claimed general damages and, at trial, relied on the decisions

of the High Court in *Mitchell v Mulvey Developments Ltd* [2014] IEHC 37 and *Leahy v Rawson* [2004] 3 IR 1 to assert that they were entitled to damages under this heading "*at least at the level awarded by Hogan J. in the Mitchell case of €10,000 per person per annum."* Each of these claims was strongly disputed by the Contractor.

10. In his Judgment, the Judge concluded that it was "*reasonable that the roof structure should be replaced, to put the plaintiffs in the situation that they should have been in from the outset*". Thus, "*the single biggest issue of contention as between the parties*" relating to the scope of the necessary remedial works was determined in favour of the Plaintiffs. However, rather than awarding damages in the amount claimed by the Plaintiffs, the Judge considered that it was more appropriate to direct specific performance of the Building Agreement by the Contractor, subject to the supervision and direction of an engineer or architect appointed by agreement of the parties. The Judge clearly considered that that would be a less expensive option and was satisfied on the evidence – and in particular the evidence of the Plaintiffs' engineer, Mr Gibbons – that it was a workable solution.

11. As regards the Plaintiffs claim for the cost of renting alternative accommodation, the Judge stated:

> *"121. I turn now to the question of special damages and specifically the rental costs incurred by the plaintiffs in the rental of alternative accommodation since they left the dwellinghouse in August 2010. The first point to be made*

> *is that they kept their losses to a minimum in the first year in that they stayed with Mrs. O'Reilly's mother at no cost at all. Since then however, they have rented alternative premises at what appear to be reasonable levels of rent. It is fair to observe that the defendants made several significant efforts to resolve these proceedings through various offers, but the difficulty is that at all times the defendants were unwilling to agree to replace the roof structure, and therefore it was inevitable that these proceedings would have to be brought to a conclusion. While there were delays on the part of the plaintiffs in doing so, it may reasonably be pointed out that the defendants could have taken steps to bring the proceedings on earlier had they wished to do so, having delivered a defence in April 2012. Accordingly, since it was necessary for the plaintiffs to bring these proceedings to a conclusion in order to achieve the remedy now afforded to them, I do not think it would be fair to deprive them of any of the costs of renting alternative accommodation, and I will make an order for the full costs of the same upon the conclusion of the remediation works by the defendants."* (my emphasis)

12. The final aspect of the Judgment that requires to be noticed relates to general damages, the Judge concluding that, having regard to "*the very extensive other reliefs granted to the plaintiffs*" by his decision, an award of general damages was not merited.[1]

[1] Paragraph 122.

13. Unusually, it appears that no order has been drawn up giving effect to the Judgment. It was, of course, open to either party to seek to have the order drawn up by the registrar and, if any difficulty arose in that regard, it could have been mentioned to the Judge.

THE COSTS HEARING AND COSTS ORDER

14. The Judge heard submissions on costs on 12 December 2017. He gave his ruling on 18 January 2018 ([2018] IEHC 228, "*the Costs Ruling*") and the order the subject of this appeal ("*the Costs Order*") was made on the same day (and perfected on 23 February 2018).

15. The Plaintiffs argued that they had succeeded in their claim and that, in accordance with the general rule, costs should follow the event. In response, the Contractor made a number of points. It was suggested that this was complex litigation in the sense used by Clarke J in *Veolia Water UK plc v Fingal County Council (No 2)* [2006] IEHC 240, [2007] 2 IR 81. In that context, it was submitted that the Plaintiffs had abandoned their claim for rescission and had failed in their claim for general damages. Complaint was made of the Plaintiffs' delay in bringing their claim to trial. However, the principal point made by the Contractor was that it had repeatedly offered to address the Plaintiffs' complaints but the Plaintiffs had failed or refused to engage, or engage properly, with them. The "*juggernaut*" of the claim could and should have been stopped had the Plaintiffs accepted the offer made by the

Contractor in April 2012 or the later offer made in February 2016. As it was put by Counsel for the Contractor:

> *"So, Judge, on the fixing of the house issue our prelitigation offer, or pretrial offer wasn't beaten. They did no better after 11 days of hearing about house repairs and about roof repairs than they would have had they accepted the April 2012 offer and, Judge, the rules are quite simple. Order 99 rule 1A says that those letters must be taken account of...*
>
> *... you have to decide first of all on the basis that as I said from April 2012 it is impossible for the plaintiffs now to argue that they did any better after the trial than they would have had they accepted the offer in 2012. If not convinced by that, Judge, there is certainly no argument about refusing the offer of February 2016, which means that by the time the action came for trial in November 2016 the house would have been fixed. My clients at all times offered to fix the building. But in this way according to the plaintiffs' submissions they had to go to an 11-day trial for the privilege of doing what they had offered to do four and a half years previously. Judge, in my respectful submission that is what Order 99(1A) is there to discourage."*

16. In response to these submissions, Counsel for the Plaintiffs emphasised that the need to have the roof removed had been flagged by the Plaintiff's engineer in 2011 but had never been addressed by the Contractor.

17. Before turning to the Costs Ruling, it is necessary to say more about the two letters of offer on which the Contractor relied in answer to the Plaintiffs' application for costs. Both of these offers were open offers. The first is a letter of 5 April 2012 which in material part stated:

> *"…we confirm that our clients are prepared without admission of liability to carry out all of the works recommended to be carried out in the report of DBFL Consulting Engineers together with such other works which your clients may reasonably require to have carried out. Our clients have made many attempts to carry out repair works over the last few years but your clients have failed, refused or neglected to make facilities available for this purpose. Should your clients again refuse facilities to our clients to carry out the works, this letter will be used during the course of the hearing of the proceedings as part of our clients' defence and with a view to fixing your clients with the costs of proceedings….*
>
> *We will be obliged if you will be kind enough to confirm that facilities will now be made available to our clients to carry out the recommended works. Following this your clients will be fully entitled, if they consider it necessary, to pursue their proceedings with our clients in relation to any other issues in respect of which they consider our clients have a liability."*

18. The DBFL report referred to in this letter is a report of 26 April 2011. Its recommendations are set out at paragraph 12 of the Judgment. For present purposes, it is sufficient to note that that DBFL did not recommend the replacement of the roof.

19. The second letter of offer is that of 18 February 2016 and, so far as material, was in the following terms:

> *"As a perfectly reasonable manner in which to progress the case between now and November, 2016, our clients hereby offer the following:-*
>
> *(1) Our clients' architect (Mr. Pat Halley) will liaise with your clients' engineer (Mr. Declan Gibbons) to discuss and, if possible, agree on the condition in which the plaintiffs' house should be (to include position of vents, damp proofing, fire proofing etc).*
>
> *(2) If no agreement can be reached, both Mr. Halley and Mr. Gibbons will provide their respective views as to an independent expert, acting as expert and not arbitrator or adjudicator, who will decide on what the condition should be, and whose decision will be final.*
>
> *(3) When there is agreement or determination on the final condition, Mr. Halley and Mr. Gibbons will liaise and if possible, agree a specification for the works required to meet the agreed or determined condition.*
>
> *(4) If no agreement can be reached, both Mr. Halley and Mr. Gibbons will provide their respective views to an independent expert, acting as expert and not arbitrator or adjudicator, who will decide on what the specification should be, and whose decision will be final.*

(5) Our clients will carry out the required works, according to the agreed or determined specification.

(6) Mr. Halley and Mr. Gibbons will have equal rights to supervise and inspect work as it is ongoing and, in the event of an issue arising, the person who believes there to be an issue will liaise with the other and discuss, and if possible agree, a solution.

(7) If no agreed solution to a perceived problem arising during the course of the works can be found or reached, both Mr. Halley and Mr. Gibbons will provide their respective views to an independent expert, acting as expert and not as arbitrator or adjudicator, who will decide on what the solution should be, and whose decision will be final.

(8) When the works are claimed to be complete, Mr. Halley and Mr. Gibbons will be invited to inspect the works, and when both are satisfied that it is appropriate, the independent expert will be invited to inspect and certify the works as complete and satisfying the specification, and his certificate shall be final.

(9) If at completion stage there is a difference of opinion between Mr. Halley and Mr. Gibbons, the subject matter of such difference will be referred to the independent expert for his expert opinion, which shall be final.

> *By agreeing to this proposal, your clients can be assured that all works will be independently approved and their house restored to the condition in which it should be.*
>
> *When the works are complete, there may be other issues remaining in the case which can be litigated over a much shorter timeframe."*

20. In his Costs Ruling, the Judge referred to Counsel for the Contractor's argument that "*throughout this litigation, the defendants showed a willingness to engage with the plaintiffs to resolve the matters in dispute, but this was not reciprocated by the plaintiffs*." In the Judge's view, "*[n]o reasonable person could disagree with this submission.*" He then referred to Counsel's argument that "*that the order for specific performance which the plaintiffs obtained was no more than they would have achieved had they accepted either the offer made by the defendants in the letter ofApril, 2012 or the letter of 18th February, 2016*." Counsel had submitted that "*had the plaintiffs accepted either of these offers, the only issue that would have remained to be determined as between the parties would have been the responsibility for the cost of alternative accommodation pending the carrying out of works of remediation*."

21. In the Judge's view, that was "*certainly so as regards the offer made in February, 2016*". That offer set out a step-by-step procedure for identification and remedying of defects, with provision for the intervention of an independent expert to resolve any disputes that might arise along the way. The Plaintiffs' own engineer, Mr

Gibbons, had confirmed that he could see no reason why that offer was not accepted and did not know why it had not been accepted by the Plaintiffs. As regards the earlier offer made in April 2012, the Judge noted that it did not address "*the central issue of dispute between the parties i.e. the elimination of mould in the attic space, because this was not addressed by Mr Forde in his report*." While the Contractor had offered "*to do such other works as the plaintiffs might reasonably require*" the Judge thought it was "*unlikely that that offer if accepted, would have resolved the proceedings because the defendants were adamant that there was no necessity to replace the roof, the removal and replacement of which was included by me as part of the order requiring specific performance of the building agreement. Nor was there any provision for independent resolution of disputes in this letter and I do not think that such a proposal can be implied as submitted by counsel for the defendants*." That said, the Judge thought that the Plaintiffs had to accept some criticism for not responding in any meaningful way to that letter.

22. The Judge then expressed his conclusions in the following terms:

> *"12. But any shortcomings in the proposal advanced on April, 2012 were fully addressed by the offer made in February, 2016. That offer should have been accepted, and by their failure to do so, the plaintiffs caused almost all of the costs that followed, with the sole exception of those costs that are exclusively related to the recovery of rent paid by them for alternative accommodation.*
>
> *13. Letters of the kind written on behalf of the defendants in February, 2016 would be deprived of much of their benefit and intended effect if*

defendants are free to refuse such offers with impunity. Parties to proceedings are to be encouraged and not discouraged from putting forward proposals which will lead to an early resolution of litigation with all attendant benefits, including significant savings of costs and court time. All of this is recognised by O 99, r 1 A (1) of the Rules of the Superior Courts.

14. It follows from this that the defendants should be awarded all costs incurred by them in these proceedings from 18th February 2016 onwards, save only those costs that were incurred in connection with the claim of the plaintiffs for reimbursement of the cost of renting alternative accommodation. The plaintiffs are entitled to an order for all other costs incurred by them in the proceedings i.e. all costs incurred by them up to 18th February, 2016, together with such costs as may be deemed to relate only to recovering the cost of renting alternative accommodation. I appreciate that separating this latter cost from all other costs is a somewhat difficult exercise. To make this easier for the parties, and, if need be, for the Taxing Master, I propose to order that the plaintiffs shall be entitled to be awarded the costs of one day in respect of this issue and on the basis that it would not have been necessary for the plaintiffs to call any expert evidence in relation to the defects in the premises because responsibility for those defects was effectively acknowledged by the letter of 18th February, 2016 and the necessary remediation works would have been identified and possibly even completed by the time the trial of the issue concerning recovery of rent only came on for hearing. The brief fees in respect of that one day shall be measured by reference to that issue alone."

[The Judge went on to allow €7,500 in respect of "*whatever work might have been required of the plaintiffs' engineer"* in the event that the February 2016 offer had been accepted]

23. The Costs Order drawn up on foot of this Ruling recites:

"And the Court finding that the offer of the Defendants made in February 2016 should have been accepted by the Plaintiffs, and by their failure to do so, the Plaintiffs caused almost all of the costs that followed, with the sole exception of those costs that are exclusively related to the recovery of rent paid by them for alternative accommodation".

***IT IS ORDERED** that*

1. *The Defendants do recover as against the Plaintiffs all costs incurred by them in these proceedings from 18th February 2016 onwards, save only those costs that were incurred in connection with the claim of the Plaintiffs for reimbursement of the cost of renting alternative accommodation*

2. *The Plaintiffs do recover as against the Defendants*

   - *all costs incurred by them in the proceedings up to 18th February, 2016;*

- *such costs as may be deemed to relate only to recovering the cost of renting alternative accommodation, equivalent to one day's costs of the hearing of this case (excluding any experts or expert evidence);*

- *and an allowance measured in the sum of €7,500.00 (plus VAT) for whatever work might have been required of the Plaintiffs Engineer after the 18th day of February 2016*

AND IT IS FURTHER ORDERED *that the costs liability of the Defendants to the Plaintiffs together with the allowance for the Plaintiffs Engineer aforesaid shall be credited against the Plaintiffs costs liability to the Defendants arising out of the said Orders made"*

24. At the hearing of this appeal the Court was told that the costs payable on foot of the Costs Order have not yet been taxed or otherwise quantified. It seems clear, however, that the net effect of the Order is to leave the successful Plaintiffs with a potentially significant costs liability to the Contractor, in addition to their liability for their own costs, including the costs and expenses of the various experts who gave evidence on their behalf and whose evidence appears to have been instrumental in achieving a successful outcome for the Plaintiffs.

THE APPEAL

25. The Plaintiffs appeal against the Costs Order. They say that that the Costs Ruling ignores and/or contradicts the findings in the Judgement. The Plaintiffs stress particularly the passages emphasised in paragraph 10 above. The February 2016 offer was, they say, uncertain in many fundamental respects, including as to liability for the Plaintiffs' costs and as to what steps would be taken to address the mould issue in the attic. It did not address the rent issue and did not include provision for the costs of the independent expert. It left over many issues which would have to be litigated in any event. The offer was a "*conditional and limited*" one which did not meet the Plaintiffs' reasonable requirements in relation to the remediation of the Property. In this context the Plaintiffs emphasise the findings in the Judgment regarding the need to remove and replace the roof. That was, it is said, "*the main element*" of the Judgment's reasoning and it was not properly reflected in the Costs Order. The offer was not, the Plaintiffs contend, effective in relation to the costs of the litigation in that "*it failed the essential test of 'Who, as a matter of substance and reality had won?'*", citing the decision of the High Court (Laffoy J) in *Murnaghan v Markland Holdings Ltd.* [2004] 4 IR 537. In any event (so it is said), the Contractor could and should have made a lodgment against the Plaintiffs' claim, by reference to the Scott Schedule which was furnished by the Plaintiffs (and on which the Plaintiffs place significant emphasis, stressing the repeated requests made to the Contractor to complete the Schedule which went unheeded until shortly before the hearing in the High Court) and the particulars of loss which were updated from time to time.

26. The Plaintiffs also complain about the costs hearing itself. They say that it was "*truncated*" and that their Counsel did not have sufficient time to address the Court. They also say that the booklet of correspondence provided to the Court by the Contractor omitted a number of important letters such that it was deficient and misleading.

27. Finally, the Plaintiffs seek to advance a complaint about the order for specific performance made by the High Court, as well as the alleged failure of the High Court to specify a mechanism for the selection of the independent expert in the event that the parties are unable to agree as to who should be appointed to that role. Given that the appeal before this Court relates only to the Costs Order (see section 2 of the Notice of Appeal), these complaints are, in my view, clearly outside the scope of the appeal. If the Plaintiffs wished to appeal any aspect of the Judgment, it was incumbent on them to procure the perfection of the appropriate order and to bring an appeal within the time stipulated by the Rules. However, they appear to have taken no steps to do so. In any event, the Court was told at the hearing of this appeal that the parties had duly agreed the appointment of an independent expert (Mr Mansfield) and that, under his supervision, the remediation works (including the removal and replacement of the roof) had proceeded to the point where Mr Mansfield was "*on the cusp*" of certifying completion. In these circumstances, there appears to be no reality to any attempt to revisit or review those aspects of the Judgment at this stage.

28. The Contractor robustly opposes the Plaintiffs' appeal. It refers in detail to the terms of the February 2016 offer which, it says, "*dealt with every aspect of the claim of the*

Plaintiffs" (in context, I think this must be taken to refer to the remediation claim rather than the entire claim made by the Plaintiffs). Had it been accepted, "*it would have satisfied the remediation requirements identified*" at paragraph 109 of the Judgment "*and all other issues in their entirety*". That offer was clear in that "*anything which was not agreed between the parties was to be referred to a jointly chosen independent expert, or was to be reserved for consideration by the High Court*". The Contractor refers to a number of authorities, including *Calderbank v Calderbank* [1976] Fam 93 (which of course gave its name to *Calderbank* offers) as to the status and effect of offers such as the February 2016 offer. The position had been "*put beyond doubt*" by the insertion of Order 99, Rule 1A into the Rules. The offer here was in fact an open offer which "*provided a complete framework for remedial works to the Premises*". The Contractor "*had offered to be bound by the decision of the independent engineer and had no control over the outcome*". As regards the suggestion that the Costs Ruling and Order were inconsistent with the findings in the Judgment, and in particular the Judge's conclusion that the roof should be replaced, the Contractor argues that "*the Open Offer unequivocally allowed for an independent engineer to specify the removal of the roof*". The Contractor relies on the evidence of the Plaintiffs' engineer, Mr Gibbons, to the effect that the February 2016 offer was a "*good proposal*" and that he could see "*no possible reason*" from an engineering point of view why it should be refused. The Contractor takes issue with the Plaintiffs' complaints relating to the costs hearing, noting that no suggestion was made by Counsel for the Plaintiffs at the time that he had a concern that he had not had sufficient time to make his submissions. As regards the missing correspondence, it was not of any materiality and in any event the Judge had seen it during the substantive hearing.

29. The Contractor accepts that the substance of the February 2016 offer was limited to the remedial works issue and that the offer did not address the cost of alternative accommodation, general damages, or costs – these were, Counsel acknowledged, *"left at large*" – but says that an offer can be made in relation to a part of a claim and relies on the terms of Order 99, Rule 1A(1)(b) in support of that submissions.

30. The Contractor has not brought any cross-appeal but in its Respondent's Notice identifies the previous offers that it made, and the Plaintiffs' stated failure to engage with those offers, as additional grounds on which the Costs Order should be affirmed.

DISCUSSION

General

31. At the outset I note that Costs Order at issue in this appeal was made before the commencement of sections 168 and 169 of the Legal Services Regulation Act 2015 and the consequent recasting of Order 99, effected by the Rules of the Superior Courts (Costs) 2019 (SI No 584 of 2019).

32. Section 169(1)(f) of the 2015 Act provides that "*whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer*" is a matter to which a court is to have regard in determining costs. Order 99, Rule 3(1) now requires a court to have regard to the matters set out in section 169(1), where applicable, in considering the awarding of the costs of any action or step in any proceedings and Rule 3(2) provides that for the purposes of section 169(1)(f), an offer to settle includes any offer made without prejudice save as to the issue of costs.

33. For the purposes of this appeal, however, the relevant provision of Order 99 is Order 99, Rule 1A, (1)(b) (inserted by the Rule of the Superior Courts (Costs) 2008 (SI No 12 of 2008) which is in the following terms:

> *"(1) Notwithstanding sub-rules (3) and (4) of rule 1* [which provide, subject to certain qualifications, that costs follow the event]

> …
> *"(b) The High Court, in considering the awarding of the costs of any action (other than an action in respect of a claim or counterclaim concerning which a lodgment or tender offer in lieu of lodgment may be made in accordance with Order 22) or any application in such an action, may, where it considers it just, have regard to the terms of any offer in writing sent by any party to any other party or parties offering to satisfy the whole or part of that other party's (or those other parties') claim, counterclaim or application."*

Rule 1A(2) provides that an "*offer in writing*" includes an offer made without prejudice save as to the issue of costs.

34. Before addressing Order 99, Rule 1A further, it is important to identify the fundamental costs rule, namely that costs should follow the event. The default position – at least prior to the coming into operation of sections 168 and 169 of the 2015 Act – is that the party who succeeds on the "*event*" is entitled to their costs, even if that party may not have prevailed on every issue or succeeded in every argument: see the decision of this Court in *Chubb European Group SE v The Health Insurance Authority* [2020] IECA 183, per Murray J at paragraph 10.

35. The judgment of McKechnie J for the Supreme Court in *Godsil v Ireland* [2015] IESC 103, [2015] 4 IR 535 cogently expresses the importance of this basic rule in the Irish legal order:

"[19] Inter partes litigation for those unaided is, or can be, costly: certainly it carries with it that risk. It is therefore essential in furtherance of the high constitutional right of effective access to the courts on the one hand and the high constitutional right to defend oneself, having been brought there, on the other hand, that our legal system makes provision for costs orders. This is also essential as a safeguarding tool so as to regulate litigation, and the conduct and process thereof, by ensuring that it is carried on fairly, reasonably and in proportion to the matters in issue. Whilst the importance of such orders is therefore clearly self-evident, nevertheless some observations in that regard, even at a general level, are still worth noting.

[20] A party who institutes proceedings in order to establish rights or assert entitlements, which are neither conceded nor compromised, is entitled to an expectation that he will, if successful, not have to suffer costs in so doing. At first, indeed at every level of principle, it would seem unjust if that were not so but, it is, with the "costs follow the event" rule, designed for this purpose. A defendant's position is in principle no different: if the advanced claim is one of merit to which he has no answer, then the point should be conceded: thus in that way he has significant control over the legal process, including over court participation or attendance. If, however, he should contest an unmeritorious point, the consequences are his to suffer. On the other hand, if he successfully defeats a claim and thereby has been justified in the stance adopted, it would likewise be unjust for him to have to suffer any financial burden by so doing. So, the rule applies to a defendant as it applies to a plaintiff."

36. The right of access to the courts is, in our legal order, one of fundamental value. However, there is also an important interest in encouraging the settlement of disputes. Court resources are finite. Litigation carries a significant cost, most obviously and immediately in terms of the legal costs involved but also including the uncertainties that litigation produces until it reaches finality. While, in the memorable words of Lord Simon, litigation is "*preferable to personal violence*" as a means of resolving civil disputes, it is not "*intrinsically a desirable activity.*"[2]

37. Various means for encouraging settlements have been adopted from time to time. Perhaps the longest-established – dating at least as far back as the late 19th century – is the procedure for payment into court (or, as it is more commonly referred to, lodgment) now contained in Order 22 RSC, the terms of which were considered by the Supreme Court in *Reaney v Interlink Ireland Ltd (t/a DPD)* [2018] IESC 13. The potential costs consequences of failing to beat a lodgment can provide a powerful incentive to settle, though it should be noted that in *Reaney*, O' Donnell J (with whose judgment Clarke CJ, MacMenamin and Dunne JJ agreed) considered that an overly mechanical application of Order 22, Rule 6 – one in which no weight was given to the margin by which and/or the circumstances in which a plaintiff had failed to beat a lodgment – might call into question the validity of that rule on proportionality grounds.[3]

---

[2] *The Ampthill Peerage* [1977] AC 547 at 575E.

[3] Section 169(1)(e) of the 2015 identifies as one of the factors to which a court may have regard as "*whether a party made a payment into court and the date of that payment*".

38. More recently, both in this jurisdiction and elsewhere, actual and potential litigants are encouraged to pursue alternative dispute resolution (ADR). Order 99 was amended in 2010[4] by the insertion of Rule 1B so as to provide – in terms similar to Order 99, Rule 1A – that a court may, where it considers it just, have regard to the refusal or failure without good reason of any party to participate in any "*ADR process*" which a court has invited them to participate in.[5]

39. Order 99, Rule 1B seem clearly to contemplate that a successful party may be denied some part of their costs if found to have unreasonably refused to pursue ADR. Section 21 of the Mediation Act 2017 is broadly to the same effect, though confined in its application to mediation. I am not aware of there being any authority addressing the application of these provisions.

40. While a powerful mechanism for encouraging settlements, there are many areas of litigation in which the option of making a lodgment may not be practicable. In such circumstances, a practice arose in England and Wales of making offers "*without prejudice save as to costs*", commonly referred to as *Calderbank* offers. *Calderbank v Calderbank* itself was a family law action but, as is evident from the judgment of

[4] By the Rules of the Superior Courts (Mediation and Conciliation) 2010 (SI No 502 of 2010),

[5] Order 56A is also relevant in this context. As well as providing for orders supporting mediation (subsequently reinforced by the enactment of the Mediation Act 2017), Order 56A (which was inserted in 2010 and amended by substitution of a recast Order in 2018) provides that the High Court may, on application to it or on its own motion, adjourn proceedings and invite the parties to use an "*ADR process to settle or determine the proceedings or issue*". "*ADR process*" is defined as "*conciliation or such other dispute resolution process as may be approved by the Court*". It is not clear whether expert determination would be considered an "*ADR process*" within the meaning of Order 56A but, in any event, Order 56A was never invoked by the Contractor.

Oliver LJ in *Cutts v Head* [1984] Ch 290, the use of such offers quickly became established in other areas of litigation where payment into court was not an appropriate or available option. While generally endorsing the use of *Calderbank* offers – recognising that a consciousness of a risk as to costs if reasonable offers were refused "can only encourage settlement" – Oliver LJ (Fox LJ specifically agreeing on this point) emphasised that it should not be thought that such an offer "*can now be used as a substitute for a payment into court, where a payment into court is appropriate*". In the case of a "*simple money claim*" a defendant must in the ordinary way back any offer by making a payment in and, in such a case, Oliver LJ would not be inclined to treat a *Calderbank* offer as carrying the same consequences as a payment in.

41. It appears that *Calderbank* offers first received detailed consideration in this jurisdiction in *Murnaghan v Markland Holdings Limited* [2004] IEHC 406, [2004] 4 IR 537. That was, as it happens, a building dispute (though between neighbouring landowners rather than between employer and contractor) which also took 12 hearing days in the High Court, at the end of which Laffoy J awarded the plaintiff damages totalling some €239,000. Subsequently, the Court was informed that, on the date that the hearing had commenced, a *Calderbank* offer had been made to the plaintiff in the sum of €300,000 in full and final settlement of all claims in the proceedings. The letter made it clear that the defendants were not prepared to accept liability for the plaintiff's costs but also made it clear that the plaintiff was at liberty to accept the offer and then argue that an award of costs should be made against the defendants in his favour (and the defendants would equally be free to seek their costs against the

defendant). The defendants argued that the *Calderbank* offer "*should not have a bearing*" on the costs of days 2-12 of the hearing.

42. Laffoy J rejected that argument, for two reasons. The first related to the timing of the offer. Secondly, and more importantly, the terms of the offer made it impossible to apply the test postulated in *Roache v News Group Newspapers Ltd* [1998] EMLR 161. That test was encapsulated in the following passage from the judgment of Sir Thomas Bingham MR which was quoted by Laffoy J:

> "*The judge must look closely at the facts of the particular case before him and ask: Who, as a matter of substance and reality, has won? Has the Plaintiff won anything of value which he could not have won without fighting the action through to a finish? Has the Defendant substantially denied the Plaintiff the prize which the Plaintiff fought the action to win?*"[6]

In Laffoy J's view, the offer left liability for costs "*wholly at large*". That being so, it was impossible to say who, as a matter of substance and reality, had won, because it was impossible to form a judgment as to what would have happened in relation to costs if the evidence had not unfolded as did at the hearing. In her view:

[6] Quoted at paragraph 5 of the judgment.

> "*the offer lacked certainty as to the totality of the outcome flowing from either acceptance or non-acceptance, which must be a prerequisite to penalising the offeree for non-acceptance.*"[7]

43. At the conclusion of her judgment, Laffoy J averted to the probability that costs payable by the defendants would be disproportionate to the *quantum* of damages which the plaintiff was awarded. The Rules, she continued, "*provide a mechanism for avoiding this type of outcome: lodging money in court*."

44. This brings us to Order 99, Rule 1A(1)(b), inserted in the Rules some years after the decision in *Murnaghan v Markland Holdings Ltd.* As is noted by the authors of *Delany and McGrath on Civil Procedure* (4th ed; 2018), Rule 1A is drafted in wide terms. It does not prescribe the form of the offer that may be made (and is not confined to *Calderbank* offers, though it clearly does not apply to strictly "*without prejudice*" offers) and does not prescribe the effect to be given to such offers, providing simply that the court "*may, where it considers it just, have regard to the terms of any offer …*". The prescriptive machinery found in Order 22, Rule 6 has no equivalent in Order 99, Rule 1A. Whether – and, if so, how – regard is to be had to an offer is, it seems, left to the judgment of the High Court.

45. However, Rule 1A(1)(b) expressly does <u>not</u> apply to actions in respect of a claim or counterclaim concerning which a lodgment or tender may be made in accordance with Order 22. *Delany and McGrath on Civil Procedure* identifies that as "*a very*

[7] At paragraph 8.

important limitation" on the ambit of the rule which, the authors suggest, mirrors the position in England and Wales.[8] An issue arises as to whether that exclusion applies on the facts here.

46. Given the clear public interest in encouraging the settlement of litigation, it appears to me that the exclusion in Rule 1A(1)(b) (which, notably, is not repeated in section 169(1)(f) of the 2015 Act) ought to be construed narrowly rather than expansively and applied with a degree of flexibility. The terms of Rule 1A(1)(b) make it clear that it has no application to a "*simple money claim*". Where such a claim is made, a defendant is able to make a payment into court in accordance with Order 22 RSC. Unless a defendant is one of the class of litigants permitted to make a tender in *lieu* of a lodgment, Order 22 requires an actual payment into court. To allow a defendant to rely on a *Calderbank* offer in such circumstances would permit that defendant to gain an advantage by making an offer without having to back it in hard cash, as well as potentially circumventing the time-limits in Order 22.

47. Here, however, while a claim for damages was made by the Plaintiffs, that claim was advanced in the alternative to the Plaintiffs' primary claim for rescission. This was not, in my view, a "*simple money claim*." In its defence, the Contractor pleaded that it ought to have been given an opportunity to remedy any defects in the Property. None of the offers that it made – including the February 2016 offer – were monetary offers but were, in broad terms, offers to carry out remedial works on the Property. As Mr Mooney (for the Contractor) observed in the course of the hearing, such an

[8] At para 18-63, citing (*inter alia*) *Chrulew v Borm-Reid & Co (a firm*) [1992] 1 All ER 953.

offer cannot be lodged in court pursuant to Order 22. The Contractor clearly *could* have lodged against the Plaintiffs' damages claim. If the High Court had ultimately made an award of damages, it may be that the offers made by the Contractor would have been *nihil ad rem*. That was a risk which the Contractor took. In the event, the High Court was persuaded to make an order for specific performance. That being so, it seems to me that it would unjust to exclude *a priori* any consideration of the offers made by the Contractor. Permitting such offers to be considered does not undermine the policy underpinning Order 22 in any way and is consistent with the important policy of encouraging settlements.

48. The effect (if any) such offers should properly be given is, of course, another matter. As already observed, Order 99, Rule 1A(1)(b) provides little guidance on that issue, other than to direct the High Court to consider what appears to it to be "*just*".

49. In its submissions to the High Court, and again before this Court, the Contractor argues that the essential test is whether, looking at the outcome of the proceedings and comparing that outcome to what was available to the Plaintiffs by way of offer, the Plaintiffs achieved a better outcome by having litigated their action to a conclusion.

50. Such a comparison is, according to *Delany and McGrath on Civil Procedure,* the "*starting point of the court's analysis*" and the authors caution that even where a court concludes that a plaintiff has not "*beaten*" the *Calderbank* offer, that is not the end of the matter and the court retains discretion to award a plaintiff some or all of

the costs incurred in the post-offer period.[9] As authority for that proposition, they refer to another decision of Laffoy J, *Re Skytours Travel Ltd: Doyle v Bergin* [2011] IEHC 518, [2011] 4 IR 676. In *Skytours*, Laffoy J cited the passage from the decision of Master of the Rolls in *Roache v News Group* set out above, describing it as a "*useful yardstick in a court's assessment of what is just in a situation to which r 1A applies*."[10] Later in her judgment, Laffoy J stated:

> *"[14] What the introduction of r. 1A(1)(b) of O. 99 has done is to point to one situation in which the court, in exercise of its discretion under O. 99, may depart from the normal rule that costs follow the event. That situation is where there has been an offer in writing, including an offer which is made without prejudice save as to the issue of costs, offering to satisfy the whole or part of the other party's claim. In that situation the court may have regard to the terms of the offer, where it considers it just to do so. As is the case with the lodgment, or tender offer in lieu of lodgment, procedure provided for in O. 22, the rationale underlying O.99, r. 1A is obviously to encourage compromise of legal claims with a view to shortening the duration of civil litigation. That is clearly a rational policy which the court should implement where it is just and fair to do so.*
>
> *[15] Having said that, in any particular case, it may not be sufficient to base a conclusion that it is just to deprive a party who has rejected an offer to satisfy the whole or part of the claim and who, as a matter of substance and*

[9] At paragraph 18-66.
[10] At paragraph 8.

> *reality, has not achieved anything more than he was offered as a result of the decision of the court, of the costs which accrued after the date of the offer…"*

51. *Skytours* was an action brought pursuant to section 205 of the Companies Acts 1963 in which the Court ultimately directed the respondent to purchase the shareholding of the petitioner for €58,769. Prior to the hearing of the petition, the respondent made a *Calderbank* offering to pay €75,000 for that shareholding. Despite his failure to "*beat*" that offer, the petitioner was awarded his costs, though excluding of the costs of the valuation evidence which he was directed to pay to the respondent.

52. Certain of the authorities from England and Wales speak in terms of whether the claimant "*ought reasonably to have accepted*" the *Calderbank* offer: see, for instance, *Chrulew v Borm-Reid & Co (a firm*) [1992] 1 All ER 953, at 960a. That formulation appears to allow that there may be circumstances where it was reasonable not to accept an offer even where the ultimate outcome was less valuable than that offer. However, as I read those authorities, they do not appear to suggest the converse, such that a court might properly take the view that a litigant ought reasonably to have accepted an offer even where the ultimate outcome achieved by them in proceedings was more valuable. No doubt, there will be cases where it may be difficult to make a comparison of offer and outcome and in complex cases each may have relative advantages and disadvantages. However, unless an offer is, in the round, as valuable to a claimant as the outcome achieved by proceeding with litigation, it is difficult to see how, as a matter of principle, it would be "*just*" to deprive a litigant of costs on the basis of a failure to accept such an offer. There may

be room for debate at the margins and scope for arguments about proportionality and cost/benefit – and in the area of costs it is always desirable to retain flexibility, given the variety of circumstances that litigation presents – but the current appeal does not raise these issues and it would be unwise to address them in the abstract and I do not propose to do so.

53. Even where a litigant fails to "*beat*" a *Calderbank* offer, the consequences are a matter for the court's judgment. That follows both from the express wording of Order 99, Rule 1A ("... *may, where it considers it just, have regard to…*") and from the absence from it of the prescriptive provisions found in Order 22, Rule 6. Order 99, Rule 1A appears to require a case-by-case assessment and, in my view, it would not be appropriate to adopt any general or inflexible approach based on the application by analogy of Order 22, Rule 6. While Waller J in *Chrulew v Borm-Reid & Co* appears to express a contrary view on this point at page 960a-b, that was based on the fact that the applicable rules expressly assimilated payments into court and *Calderbank* offers for the purposes of (the equivalent of) Order 99 RSC. That is not so in this jurisdiction.

Appellate Review of the Costs Order

54. Neither party specifically addressed the standard of review to be applied by the Court.

55. Decisions as to costs under Order 99 generally involve a significant degree of judgment/discretion, though of course the High Court is not at large. The discretion must be exercised judicially and on a reasoned basis: see for instance *Cork County Council v Shackleton* [2007] IEHC 334, at para 4.1. As I have already observed, the specific terms of Order 99, Rule 1A(1)(b) clearly confer a large measure of discretion on the High Court.

56. On appeal, this Court will be slow to interfere with the exercise of a High Court judge's discretion in relation to costs and significant weight is given to the views of the judge. But even a discretionary decision of the High Court is subject to review – that is, of course, an important part of the rationale for requiring cost decisions to be reasoned, so that they can be reviewed. Furthermore, it is clear that this Court's power of review is not dependent on the demonstration of any error of principle on the part of the High Court judge: see *Godsil v Ireland*, at paragraphs 65 & 66, as well as *MD v DD* [2016] 2 IR 438, at paragraph 46 (per MacMenamin J).

The February 2016 Offer

57. It is appropriate at this point to consider the February 2016 offer and the Judge's analysis and characterisation of it.

58. As of February 2016, it was evident that the issue of whether the roof should be replaced was the principal issue of dispute between Plaintiffs and Contractor in terms what was required to be done by remediation of the Property. The Contractor could, in its February 2016 offer, have accepted that the roof should be replaced but it did

not. In fact, the offer does not, in terms, acknowledge that *any* specific works needed to be carried out. Instead, it provided for engagement between Mr Halley (the Contractor's Architect) and Mr Gibbons (the Plaintiffs' engineer) to discuss, and if possible to agree, what was required. Whatever might have been agreed by them, it is clear that agreement could never have been reached on the need to replace the roof. As the Judge noted in his Judgment, the Contractor was at all times unwilling to agree to that and in due course Mr Halley gave evidence that replacement of the roof was not required (recited at paragraph 59 of the Judgment), as did Professor Buckley, the microbiologist who gave evidence for the Contractor (Judgment, paragraphs 52 & 53) and the First Defendant himself (Judgment, paragraph 79).

59. Thus, the February 2016 offer involved not an offer to replace the roof but an offer to have the issue of whether the roof should be replaced (and any other issues regarding the scope of the remedial works required) determined by a third party, the independent expert. In the event that the offer was accepted, that expert, when appointed, might or might not have concluded that the roof should be replaced. Accordingly, the February 2016 offer was, at best, a *conditional* or *contingent* offer to replace the roof. The Contractor would do so if the independent expert told it to, but not otherwise. With respect to the Judge, I do not believe that he had sufficient regard to this fundamental feature of the February 2016 offer when he came to adjudicate on the costs.

60. That the Judge had subsequently concluded that the roof should be replaced cannot, in my opinion, give rise to any inference or presumption that the same conclusion

would have been reached by the independent expert. It appears from paragraph (2) of the offer that the material to be considered by the independent expert was to be considerably narrower than the material ultimately presented to the Judge – in essence the expert would be provided with the respective views of Mr Halley and Mr Gibbons and would make his (effectively unappealable) decision on that basis.[11] In contrast, the Judge heard the evidence of a range of witnesses and it is apparent from his Judgment that all of that the evidence – and not just the evidence of Mr Gibbons – led to his conclusion that the roof should be replaced.[12] There was nothing inevitable about that conclusion. It is evident from the Judgment that the Judge did not consider the issue to be clear-cut. On the contrary, it was precisely the kind of close-run issue which could reasonably have been decided either way. In any event, I do not think that it would lie in the mouth of the Contractor to suggest that the independent expert must inevitably have determined that the roof should be replaced given its consistent refusal to accept that position between 2011 and 2017.

61. So, whereas the February 2016 offer carried with it the *possibility* that the Contractor would be directed to replace the roof, such an outcome was, as I have pointed out

[11] In the course of the appeal hearing, the Court raised the point that the process proposed before the independent expert appeared to involve only Mr Halley and Mr Gibbons. In response, Mr Mooney made the point that there would have been nothing to prevent Mr Gibbons from submitting other experts' reports to the independent expert. That may be the case but, on any view, the proposed process was significantly narrower than an oral hearing in the High Court. In fact, the defining characteristic of expert determination is that it is not an adversarial process – the expert does not act judicially but rather is entitled and expected to determine whatever is in dispute on the basis of his or her own specialist knowledge and experience: see Dowling-Hussey & Dunne, *Arbitration Law* (3rd ed; 2018) at paragraph 1-26.

[12] It is evident from the Judgment that the Judge gave particular weight to the evidence of Dr Crook (microbiologist) and Dr Greally (Consultant Paediatrician) in this context.

above, contingent and uncertain. In the face of that fundamental uncertainty, the Plaintiffs proceeded and succeeded on the issue before the High Court. In my view, it cannot plausibly be suggested that, in pursuing and obtaining a determination to the effect that the roof should be replaced, the Plaintiffs did not win "*anything of value*". On the contrary, it appears to me that that determination was and is much more valuable than an offer of a process that might or might not result in a determination to that effect.

62. There were many other significant uncertainties about the February 2016 offer. It made no offer in respect of the Plaintiffs' costs. That, it seems clear, was not some inadvertent omission nor was it the case that the Contractor's readiness to pay the Plaintiffs' costs was so obvious as to go without saying. The offer quite consciously left a number of issues – including that of costs – to be litigated or, as it was put by Mr Mooney in argument, "*at large*". In that respect, the offer was similar to the offer made in *Murnaghan v Markland Holdings* which Laffoy J regarded as too uncertain to have any effect in terms of "*penalising*" the successful plaintiff. That was because it was "*impossible to form a judgment as to what would have happened in relation to costs if the evidence had not unfolded as it did at the hearing.*"[13] That is the position here also. The Plaintiffs and their advisors simply could not predict how the costs of the proceedings – or at least that part of the proceedings concerned with the issue of remediation – might be dealt with in the event that they accepted the February 2016 offer. The outcome of the independent expert process – in itself uncertain – would presumably be a significant factor but one can readily anticipate

[13] At paragraph 8.

significant dispute as to whether and how the High Court should adjudicate on the issue of costs in circumstances where (on the hypothesis that the offer had been accepted) "*the evidence had not unfolded as it did at the hearing*".

63. There were further uncertainties about the offer. Who would be liable for the costs of the independent expert was unclear and/or how and by whom that liability might be determined was not addressed. That was, from the Plaintiffs' perspective, an important issue. The elaborate process proposed by the offer had the potential for significant involvement by the independent expert, potentially involving four separate determinations by him and if the Plaintiffs were to be responsible for the expert's costs that could involve a significant liability. The costs that would be incurred by Mr Gibbons in dealing with the independent expert were not addressed either.

64. Mr Mooney submits that an offer may be made in respect of a part only of a claim and points in this context to the express wording of Order 99, Rule 1A. The Contractor was, he says, entitled to make an offer directed to the remediation issue, leaving open the other issues such as the claims for rent and general damages. That is undoubtedly so. But, whether directed to the whole or only to a part of the Plaintiffs' claim, any offer made by the Contractor had to be clear and certain in its terms so as to enable the Plaintiffs to assess its value to them. In my opinion, the February 2016 offer failed this test. As a result, what the offer would deliver to the Plaintiffs, in the event of its acceptance, was fundamentally uncertain. The Plaintiffs characterisation of the offer as "*conditional and incomplete*" is entirely apt.

65. I would add that, while the Contractor was entitled to make an offer directed to the issue of remediation only, in assessing that offer the Plaintiffs were, in my view, entitled to consider the extent and nature of the remaining claims and how acceptance of the offer might impact on those claims and, specifically, whether it might adversely affect the determination of their remaining claims. That issue is one that would have to be taken into account in any consideration of the reasonableness or otherwise of refusing the offer made in February 2016.

66. At the conclusion of his Judgment, the Judge observed that, in light of the Contractor's consistent unwillingness to agree to the replacement of the roof, it was "*necessary for the plaintiffs to bring these proceedings to a conclusion in order to achieve the remedy now afforded to them*."[14] He made that observation in the knowledge of the Contractor's "*several significant efforts to resolve these proceedings through various offers*" including the February 2016 offer. I agree with that observation. Replacement of the roof was never on offer to the Plaintiffs. It might, or might not, have been specified by the independent expert in the event that the offer had been accepted. In my view, that uncertain possibility does not provide a basis for the Costs Order subsequently made by the Judge and I respectfully disagree with the characterisation of the February 2016 offer subsequently adopted by him in the Costs Ruling. Having regard to the fundamental uncertainties inherent in that offer I do not believe that the Plaintiffs can fairly be criticised for declining to accept it.

[14] At paragraph 121.

67. In my view, the outcome achieved by the Plaintiffs in the Judgment was manifestly more valuable than what was offered in February 2016. It was entirely reasonable for them to have rejected that offer and, in my opinion, it was not just to have regard to that offer for the purpose of departing from the fundamental principle that, having succeeded in their claim, the Plaintiffs were entitled to their costs, less still was it just to depart from that rule in the radical way that the Costs Order does.

68. One further point needs to be addressed in this context, namely the evidence given by Mr Gibbons in relation to the February 2016 offer. He accepted in his evidence that the offer was "*a good proposal*" and he stated that "*as an engineer*" he could not see any reason why the offer would be refused. This evidence was referred to in the Judgment and in the Costs Ruling and it is also emphasised by the Contractor. I do not accept that Mr Gibbons' evidence on this issue is to be given the weight suggested by the Contractor. From an engineering point of view, the February 2016 offer may have made great sense. As an engineer, Mr Gibbons no doubt considered that it would be preferable if the construction issues in dispute – principally whether the roof should be replaced – were determined by an expert rather than by the High Court. But the issue before the Judge – and now before this Court on appeal – is not the relative merits of expert and judicial determination in building disputes. Rather, the issue was whether (to adapt the language of Laffoy J in *Skytours*) the Plaintiffs had, "*as a matter of substance and reality, … achieved [] more than [they were] offered as a result of the decision of the court*". That is the test that was urged on the High Court and on this Court on the Contractor's behalf. For the reasons already set out, it seems to me that the Plaintiffs did achieve more than they were offered and nothing said by Mr Gibbons in his evidence affects that position.

The offer of 5 April 2012

69. For completeness, I will also mention the earlier offer of 5 April 2012. Although relied on in the Respondent's Notice, no submissions were addressed to the Court as to why the Judge's characterisation of this offer might have been mistaken. The Judge essentially concluded that the failure of that offer to address the issue of the replacement of the roof meant that it would not have resolved the proceedings (by which, as I understand it, the Judge meant that it would not have resolved the proceedings to the satisfaction of the Plaintiffs) and that therefore the Plaintiffs were reasonably entitled to reject that offer. I agree.

Veolia Water

70. While the decision of the High Court (Clarke J) in *Veolia Water UK plc v Fingal County Council (No 2)* [2006] IEHC 240, [2007] 2 IR 81 was relied on by the Contractor before the High Court, it does not appear that the Judge was invited, in addressing the issue of costs, to limit the costs awarded to the Plaintiffs and/or make an order for costs in favour of the Contractor, on the basis that the Contractor had been successful on certain issues.

71. The Plaintiffs had, of course, advanced a claim for rescission which they ultimately abandoned and also failed in their claim for general damages. In addition, the Contractor had succeeded in persuading the Court to make an order for specific performance of the Building Agreement rather than making an award of damages as

sought by the Plaintiffs. However, as Clarke J emphasised in his judgment in *MD v ND* [2015] IESC 66, [2016] 2 IR 438, the mere fact that an otherwise successful party was unsuccessful on one or more points raised by it does not justify a departure from the principle that (full) costs follow the event. Such a departure will be warranted only where the raising of those points "*actually and materially increased the costs of the case*."[15]

72. It was not suggested to the High Court, or to this Court on appeal, that such was the case here and accordingly *Veolia Water* provides no basis for departing from the normal rule.

The Plaintiffs' complaints about the hearing on 12 December 2017

73. I have considered the transcript of the hearing on 12 December 2017. It appears that it was the Plaintiffs that pressed for the costs issue to be dealt with on that occasion, even though the Judge had indicated that he had limited time in which to do so. At no stage in the course of the hearing did Counsel for the Plaintiffs suggest to the Judge that he had not had sufficient time to make his submissions or respond to the submissions made on behalf of the Contractor or seek an adjournment to permit further submissions to be made. That being so, it does not appear to me that there is any substance in the Plaintiffs' complaint of a "*truncated*" hearing. As regards the complaint that the correspondence put before the Judge was incomplete, it was open to the Plaintiffs to provide copies of any additional correspondence which they

[15] At paragraph 9. See also the discussion in *Chubb*.

considered material to the Judge. Furthermore, I am not persuaded that the "*omitted*" correspondence had the significance now suggested by the Plaintiffs and, in any event, it is clear from the transcript, and from the subsequent Costs Ruling, that the Judge had a very clear grasp of the respective positions of the parties. I would reject this grounds of appeal directed to the hearing of 12 December 2017.

CONCLUDING OBSERVATIONS

74. Notwithstanding the fact that this Court is slow to interfere with the exercise of a High Court judge's discretion in relation to costs and properly gives significant weight to the views of the judge on that issue, I have reached the clear conclusion that the Judge erred in his approach to costs in these proceedings. That Order does a significant injustice to the successful Plaintiffs and in my view it cannot be permitted to stand.

75. It was suggested by Counsel for the Plaintiffs that, in the event that the Court concluded that the Judge erred, it should remit the issue of costs back to him for further consideration. I see no reason to do so. It is in the interests of the parties as well as in the public interest that these proceedings are brought to finality and, in my view, this Court can and should deal with the costs itself.

76. The fundamental rule in costs is that costs follow the event. The Contractor does not (and could not) dispute that the "*event*" in these proceedings was determined in the Plaintiffs' favour. For the reasons already set out, I do not consider that the offer made by the Contractor in February 2016, or any of the earlier offers made by it, provide a valid basis for departing from the normal costs rule. Equally, there is no basis for departing from the normal rule by reference to the principles in *Veolia Water*. I would therefore substitute for the Costs Order an order awarding the Plaintiffs the costs of the High Court proceedings (including any reserved costs). In light of the fact that Part 10 of the Legal Services Regulations Act 2015 came into operation in October 2019, my understanding is that, in default of agreement, such

costs must then proceed to adjudication in accordance with the procedures set out in Part 10 but the parties can be heard on that issue if necessary.

77. Whatever the process, in quantifying the costs payable to the Plaintiffs regard should be had to the value of what was at issue in this claim. That is a relevant factor by virtue of Order 99, Rule 22(ii)(f) (prior to its replacement in December 2019) and Schedule 1, Paragraph 2(g) of the 2015 Act. Having regard to the value of what was at issue, and bearing in mind that the Contractor was represented by only one counsel (though one very experienced in this area), the Court considers that the Plaintiffs should be permitted to recover only the costs of one junior and one senior counsel.

78. There may well be compelling policy reasons for diverting building disputes away from the courts established by and under Article 34 of the Constitution. But that is primarily a judgment for the Oireachtas to make. Where – as here – parties have agreed to arbitrate such disputes, the courts will enforce such agreements when requested. Although not an arbitration agreement for the purposes of the Arbitration Act 2010,[16] an agreement to submit such disputes to expert determination would, in principle, be enforceable also. Recently, the Oireachtas has legislated (in the form of the Mediation Act 2017) to allow courts to give effect to agreements to mediate and, more broadly, to encourage and facilitate the mediation of disputes. But the

[16] Dowling-Hussey & Dunne, *op cit*, at paragraph 1-27, citing *Collis-Lee v Millar* [2004] IEHC 144.

Oireachtas has not – at least to date – enacted equivalent legislation in relation to the expert determination of building disputes (or any category of dispute).[17]

79. The Plaintiffs here had not agreed in advance to submit any disputes with the Contractor to expert determination. The Contractor could have proposed that the standard form Building Agreement be amended to include such a provision but it appears not to have done so. There was an arbitration clause which the Contractor elected not to rely upon. In the circumstances, the Plaintiffs were entitled to pursue their action in the High Court. The implication of the Costs Ruling and Order is that, once the Contractor made its offer, the Plaintiffs effectively lost their entitlement to pursue their action – or at least their core remediation claim – in court and were instead obliged to submit to a form of dispute resolution to which they had never agreed to and the outcome of which was wholly uncertain. If that is correct, the implications for litigants' right of access to the High Court are very significant. If the approach adopted by the High Court is correct, it would effectively mean that, in every building dispute, a contractor could, by making an offer in the terms similar to the offer of February 2016, compel a plaintiff to submit to expert determination because of the costs risk they would face if the offer was refused. It may be open to the Oireachtas to legislate for such an outcome but I do not believe it is one contemplated or permitted by Order 99, Rule 1A.

[17] The Construction Contracts Act 2013 provides for the adjudication of certain construction disputes but it is narrow in scope and has no application to disputes such as the present one.

80. This does not leave a defendant in the position of the Contractor helpless in the face of a claim. It may make a payment into court against any claim for damages. It may make an offer to carry out remedial works. Here, the Contractor could have offered to replace the roof. Had it had done so, it is likely that the debate about costs would have been a very different one. But the Contractor did not do so because it did not accept that the roof needed to be replaced and wanted to retain the right to argue against the replacement of the roof before the independent expert. That, in my opinion, serves to highlight the lack of any real substance in the Contractor's offer. The offer was concerned not with substance, but only with process.[18]

81. Having said that, the fact that these proceedings took 12 hearing days in High Court time must obviously give rise to concern, particularly when it was called on for 6 – 8 days. It is very desirable that when building disputes find their way to the High Court, they are actively and appropriately case-managed. The parties should seek case management where appropriate, so that their resources, and those of the High Court, are managed as efficiently as possible. The High Court is entitled to fix reasonable and proportionate time-limits for the hearing of such actions and is entitled, with the assistance of the parties, to fix a detailed timetable for the hearing of evidence and submissions. The High Court also has significant powers in relation to the giving of expert evidence. The Court's inherent power to regulate its own

[18] That is not to suggest that a dispute resolution process may not be an element of an effective offer. Thus, for instance, if in the offer here the Contractor clearly identified the works it was prepared to carry out by way of remediation, there could be objection to a term providing that any issue concerning the specification of the works to be done would be determined by an independent expert. The critical difference between that hypothetical offer and the offer actually made here is that the former makes a core substantive and certain offer.

procedures is supplemented by the Rules: see Order 39, Part XI RSC. None of these observations should be understood as criticisms of the Judge – for case management to be effective, it must take place in advance of the hearing of an action.

82. In conclusion, I would, for the reasons set out above, allow the appeal, set aside the Costs Order and substitute for it an order awarding the Plaintiffs the costs of the High Court (including any reserved costs), such costs to be adjudicated in accordance with Part 10 of the 2015 Act in default of agreement.

83. As regards the costs of this appeal, the Plaintiffs have succeeded and, *prima facie*, are entitled to their costs. If the Contractor wishes to contend that some different costs order should be made it may, within 28 days of this judgment, make a written submission to that effect, not to exceed 1,000 words. Any such submissions should be sent to the Plaintiffs' solicitors at the same time as being sent to the Court of Appeal Office and the Plaintiffs will then have a period of 28 days to respond, again subject to a 1,000 word limit. In the absence of any submissions within the time indicated, the Court will proceed to make an order in the terms indicated. If the issue of costs is contested, the Court will issue its ruling electronically after considering the submissions made to it.

In circumstances where this judgment is being delivered electronically, Costello J and Haughton J have indicated their agreement with it.