THE HIGH COURT

[RECORD NO. 2011 7987 P]

BETWEEN

SHANE AND ANTOINETTE O'REILLY

PLAINTIFFS

AND

SEAMUS NEVILLE, LIAM NEVILLE, COLM NEVILLE, ANTHONY NEVILLE, BRENDAN NEVILLE AND WILLIAM NEVIN AND SONS CONSTRUCTION, TRADING AS THE NEVILLE DEVELOPMENT PARTNERSHIP

DEFENDANTS

COSTS RULING of Mr Justice Donald Binchy delivered on the 18th day of January, 2018

1. On 31st July, 2017, I handed down judgment (the "principal judgment") in these proceedings. In summary, I made an order for specific performance, in favour of the plaintiffs of a building agreement entered into between the parties on 30th March, 2005 (the "building agreement"), and I also ordered that the defendants pay the plaintiffs the cost of renting alternative accommodation since they vacated, in August, 2010, the dwellinghouse constructed for them by the defendants pursuant to the building agreement. I left over the issue of costs pending submissions from the parties which I heard on 13th December, 2017.

2. In the proceedings, the plaintiffs claimed rescission of the building agreement, together with an order for repayment to the plaintiffs of the contract price provided for therein and paid to the defendants by the plaintiffs. In the alternative, the plaintiffs claimed damages for breach of contract, negligence and breach of duty. At the conclusion of the hearing, the plaintiffs abandoned their claim for rescission of contract and instead sought damages for breach of contract comprising special damages of €97,000, being the estimated cost of repairs required to be undertaken to the dwellinghouse, special damages in respect of the cost of renting alternative accommodation (which at the conclusion of the trial amounted to of the order of €75,000) and general damages in respect of the adverse impact upon the lives of the plaintiffs caused by the defects in the dwellinghouse. By reference to the decision of this court in the case of *Mitchell and Anor v. Mulvey Developments Ltd & Ors* [2014] IEHC 37, counsel for the plaintiffs invited the Court to measure general damages at the rate of €10,000 for each year since the plaintiffs were required to leave the dwellinghouse. In the event, I acceded to submissions made on behalf of the defendants that the appropriate order should be one of specific performance, thereby eliminating the amount claimed for cost of repairs. I made no order in respect of the general damages claimed. And, as mentioned above, I did make an order requiring the defendants to discharge all of the costs incurred by the plaintiffs, since they left the dwellinghouse, in renting alternative accommodation, pending the carrying out works of repairs by the defendants in the manner directed in the principal judgment.

3. As regards the costs of the proceedings, it is submitted on behalf of the plaintiffs that in obtaining an order for specific performance of the building agreement, they have succeeded in the "event" in the proceedings and that, accordingly, they are entitled to an order for the costs incurred by them in obtaining this order in accordance with the general principle that costs follow the event. It is submitted that there is no reason to depart from the general rule. Counsel for the plaintiffs relies upon the decision of the Supreme Court in *Dunne v. Minister for the Envir*onment [2007] IESC 60. Counsel for the plaintiffs further submitted that this is not a case in which the Court should depart from the general rule that costs follow the event for reasons such as those articulated by Clarke J. in *Veolia Water UK PLC v. Fingal County Council (No 2)* [2006] IEHC 240. It was further submitted by counsel for the plaintiffs that the issues that gave rise to the court departing from the general rule in *Veolia* were complex issues dealt with at interlocutory hearings that added substantially to the costs of those proceedings, and that no such issues arise in this case.

4. On behalf of the defendants, it is submitted that this was a complex case, that it is necessary for the court to analyse the "event" and in particular that it is necessary for the court to take into account the various opportunities afforded to the plaintiffs, by the defendants, to resolve the dispute. In this regard, counsel refers to the following: -

> (1) An offer made in writing by Mr Seamus Neville, on 13th July, 2010, to address the issues raised by the plaintiffs. The defendants suggested starting remedial works in August 2010, but at this point the plaintiffs decided to instruct a new consulting engineer to advise them, their previous engineer having advised them that further investigations into the state of the dwellinghouse were required . So they did not respond to the defendants' offer, and instead instructed Mr Declan Gibbons, Consulting Engineer to prepare a report on the state of the dwellinghouse. Mr Gibbons presented his report to the defendants in late 2010.
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> (2) The defendants then obtained a report from a consulting engineer of their own, a Mr Paul Forde, following which the defendants made an offer to carry out the works identified by Mr Forde as being necessary to remedy the defects in the dwellinghouse. This was in April, 2011. Mr Forde's report did not specifically address the problem of mould in the attic which was a key issue for the plaintiffs, and their consulting engineer. There was no response to this offer.
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> (3) An offer made in writing on 5th April, 2012, by the solicitors for the defendants to the solicitors for the plaintiff. I quoted an extract from this letter in the principal judgment which bears repeating here:-
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> > "…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."

An open response was not delivered to this offer on behalf of the plaintiffs until 23rd March, 2015, possibly because of settlement discussions in the intervening period. In any case, the offer was rejected.

(4) The offer made in the preceding paragraph was repeated defendants in their defence delivered on 25th October, 2012. There was no reply delivered to the defence and no correspondence in relation to this offer.

(5) An offer from the defendants' solicitors to the plaintiff's solicitors by letter dated 18th February, 2016, and rejected by the solicitors for the defendants on 2nd March, 2016. This letter, which is quoted almost in full in the principal judgment, set out a comprehensive mechanism for the objective identification of defects in the dwellinghouse as well as the measures required to address those defects, and also merits repetition here : "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).
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> (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.
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> (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.
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> (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.
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> (5) Our clients will carry out the required works, according to the agreed or determined specification.
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> (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.
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> (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.
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> (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.
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> (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."

5. Counsel for the defendants argues 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. No reasonable person could disagree with this submission, While in the principal decision I was critical of the workmanship of the defendants that gave rise to the defects in the dwellinghouse, the defendants cannot be criticised for the manner in which they addressed the plaintiffs' complaints before the issue of proceedings, or for the manner in which they addressed the proceedings once issued. On the contrary, the open offers made by the defendants to the plaintiffs with a view to resolving these proceedings were exemplary. But whatever may have been going on behind the scenes by way of settlement discussions, the open offers of the defendants were repeatedly rejected by the plaintiffs. Counsel for the defendants submits that O.99, r.1A(1)(c) requires the Court to take such offers into account in determining the issue of costs. That order provides:-

> "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."

6. Counsel for the defendants argues 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 of April, 2012 or the letter of 18th February, 2016. Counsel for the defendants argues that there is really very little difference between these letters of offer, and in this regard, argues that the letter of April 2012 contemplated the kind of independent supervision specified in the February, 2016 letter. He submits 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.

7. This is certainly so as regards the offer made in February, 2016, which was made some nine months before the matter came to trial. As can be seen from its text, 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. As I mentioned in the principal judgment, the plaintiffs' own engineer, Mr Declan Gibbons, confirmed that he could see no reason why that offer was not

accepted. He said he did not know why it was not accepted by the plaintiffs. It appears from the evidence of the second named plaintiff that they were reluctant to permit the defendants to carry out remediation works, having lost faith in the defendants. However, Mr Gibbons in his evidence confirmed that any such concerns were adequately addressed in the offer through the involvement at all stages in the proposal of the plaintiffs' own engineer, as well as the provision for resolution of disputes by an independent expert.

8. Mr Gibbons however did not agree that the letter of April, 2012 was a sufficient proposal to resolve matters, or that it should have been accepted by the plaintiffs. He said that that letter did not put forward a specific proposal in relation to the eradication of mould from the attic space, which was the main issue of concern to the plaintiffs.

9. It is submitted on behalf of the defendants that had either of these offers been accepted, the only matter that would have proceeded to trial would have been the claim for the cost of renting alternative accommodation. This would have involved relatively brief evidence and a short hearing, and would have resulted in very significant savings of costs. As it is, the trial ran for eleven days.

10. For all of these reasons, counsel for the defendants submitted that the court should fashion a costs order that reflects the offers made by the defendants to resolve these proceedings well in advance of the trial, and he referred to the cases of *Veolia*, and also *McAleenan v. AIG (Europe) Limited* 3 I.R. 202, as authority for the proposition that the Court should award any costs unnecessarily incurred in proceedings against the party responsible for causing such costs, so, for example, in *McAleenan*, Finlay Geohegan J. apportioned costs in the round; having awarded the plaintiff 40% of the costs and the defendant 60% of the costs, she made a net award of 20% of the costs of the proceedings in favour of the defendants. She made similar orders in the case of *Revenue Commissioners v. Anthony J. Fitzpatrick* [2017] IECA 115.

11. The letter of offer made on behalf of the defendants of April, 2012 was indeed a commendable offer. It is correct however to say 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. Insofar as the defendants went on to offer to do such other works as the plaintiffs might *reasonably* require, I think it is 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 plaintiffs must accept some criticism for not responding in any meaningful way to this letter.

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.

15. However, had the plaintiffs accepted the offer of 18th February, 2016, they would have incurred a certain amount of additional costs to their engineer in engaging with the defendants' engineer and possibly also with an independent expert. The defendants would have been liable to discharge those costs. The quantification of the same is obviously a hypothetical exercise, since we can never know exactly how much work would have been required of the plaintiffs' engineer in this scenario. However, some of his work would already have been done and covered by the costs the plaintiffs are entitled to recover up to February, 2016 i.e. his initial inspection and report, as well as work on specifications. We know also that the plaintiffs were placing a value of €97,000 on the cost of the works, assuming they were undertaken by a third party. Having regard to these factors, I think that €7,500 would be a reasonable allowance for whatever work might have been required of the plaintiffs' engineer, and this amount (together with the VAT payable on it) should be credited against the costs liability of the plaintiffs to the defendants arising out of the orders made above.