

THE HIGH COURT

[2024] IEHC 135

[Record No. 2008/10770 P]

BETWEEN

BRENDAN DUNCAN AND IRENE DUNCAN

PLAINTIFFS

AND

**DAVID BUTLER, MANOLO DEMERY, JOHN SUTTLE, MARKUS SUTTLE, NORDIC SOLUTIONS
AND NORDIC SOLUTIONS AND CONCEPTS LIMITED**

DEFENDANTS

JUDGMENT of Ms Justice Marguerite Bolger delivered on the 7th day of March 2024

1. This is the defendants' application to dismiss the plaintiffs' proceedings in negligence, breach of duty and breach of contract for what they say were badly installed windows and doors in their home, on grounds of delay. An agreed timetable of relevant events is attached to this judgment. For the reasons set out below, I am refusing this application.

The law

2. The defendant must establish inordinate and inexcusable delay and must then establish, having regard to the prejudice it has suffered, that the balance of justice favours the dismissal of the proceedings. The *Primor* principles have been refined by a number of subsequent decisions, most notably that of the Court of Appeal in *Cave Projects v. Kelly* [2022] IECA 245 where Collins J. analysed the nature of the prejudice that a defendant must establish and held that moderate prejudice can suffice depending on "*all of the circumstances, including the nature and extent of the delay involved, the nature of the claim and of the defence to it and the conduct of the defendant.*" Collins J. confirmed, as has been consistently emphasised in the jurisprudence, that "*the jurisdiction is not punitive or disciplinary in character*", the dismissal of a claim should be seen as an option of last resort and proceedings should not be dismissed "*unless, on a careful assessment of all the relevant facts and circumstances, it is clear that permitting the claim to proceed would result in some real and tangible injustice to the defendant.*" (at para. 37)

Discussion

3. There has been inordinate delay of some thirteen years from when proceedings were instituted in 2008 and thirteen years to when the defendants issued this motion to dismiss. At least some responsibility for that rests with the defendants, for example, in asking the plaintiffs not to proceed with a threatened motion for judgment on more than one occasion and then not acting expeditiously to take the steps for which they had sought time. However, much of the delay rests with the plaintiffs who bear responsibility for moving their case along and getting it ready to be set down for hearing. The defendants' partial blame for the delay does not excuse the plaintiffs' greater contribution to the delay. I am satisfied that the delay here is both inordinate and inexcusable.

4. I therefore turn to consider where the balance of justice lies, which requires careful consideration of the prejudice which the defendants claim they will now suffer as a result of the delay.

5. The fourth defendant swore a replying affidavit on 11 November 2021 on behalf of the other defendants, though the sixth defendant company was dissolved as of 16 November 2012, almost four years after these proceedings were instituted. Mr. Suttle refers to frequent visits to the plaintiffs and to their property by members of the defendants' business following on the completion of the work in February 2008 and the plaintiffs' expressed dissatisfaction with it shortly thereafter. He refers to a site inspection of the property which took place on 13 October 2008 and was attended by a number of supplier representatives including one who came from Denmark, for the purpose of providing further advice and expertise in rectifying the alleged issues. Following on that meeting, it seems that an engineer for the defendants attended the site and prepared a report, which is referred to in a letter from the plaintiffs' then solicitors of 7 October 2008. Further engineers' reports were prepared or attempted to be prepared over the following years.

6. In assessing the prejudice the defendants say they will suffer as a result of the delay, it is relevant that they, their suppliers and their engineer inspected the windows and doors, about which the plaintiffs complained, relatively soon after they were installed.

7. The defendants set out their assertions of prejudice at paras. 42 and 43 of Mr. Suttle's affidavit reports as follows:-

"42. I say that immeasurable difficulties arise out of these proceedings after the passage of thirteen years. The difficulties in tracing expert witnesses are immense and in this regard I refer to former employees of the Business and the representative in Denmark. There are

also issues with recollection and the ability to locate and produce documentary evidence which will further hamper the Defendants' ability to maintain any substantive Defence. I say and believe that severe prejudice is also caused by the sheer passage of time since the dissolution of the corporate Defendants, coupled with the fact that the individual Defendants have not been employed in the windows business for many years.

43. I say and believe that undue prejudice has been and will be suffered by the Defendants herein due to the inordinate and inexcusable delay throughout these proceedings. I say that given the current status of the corporate defendants to these proceedings, the sheer passage of time, the causal difficulties arising out of alleged breach of contract/ negligence over the windows and doors, that this Honourable Court would struggle to make fair final orders as against the defendants if the Plaintiffs were successful at trial."

8. Those assertions of prejudice are vague and verge on speculative. There is no detail of the claimed difficulties in tracing expert witnesses or how the records or reports of the work, including from the site inspections of 2008 that must be available to the defendants, are inadequate to address whatever they expect or expected those unidentified expert witnesses could have said. Neither is anything said about why there are difficulties in tracing the witnesses or what attempts have been made to contact them. Similarly, there is no detail about the unidentified "*former employees*" of the business and representatives in Denmark (at least one of whom had a representative attend the site visit in 2008). The defendants claim difficulties with recollection and locating and producing documentary evidence, which are bare, unsubstantiated allegations without any explanation of why or what will be difficult or what attempts have been made to overcome those difficulties, including by reference to whatever documentary evidence the defendants have in their possession from when they were first made aware of the plaintiffs' concerns shortly after the work was completed.

9. Mr. Suttle goes on to refer to "*the causal difficulties arising out of alleged breach of contract/negligence over the windows and doors, that this Honourable Court would struggle to make fair final orders as against the defendants if the Plaintiffs were successful at trial*". This is also an unsubstantiated and speculative assertion of prejudice without the detail that would be required to bring it to the level of moderate prejudice that Collins J. (at para. 2 above) analysed in applications such as this require. Insofar as Mr. Suttle asserts that this Court "*would struggle to make fair final orders as against the defendants if the Plaintiffs were successful at trial*", I am satisfied that the trial judge will be well able to address the challenges that arise in hearing a case with aged allegations

such as these and will be better positioned, having heard the evidence, arguments and submissions of both parties, to ensure fairness to both sides.

10. I therefore refuse this application.

11. The plaintiffs had, prior to this application, brought a motion seeking case management and that seems to have been put on hold pending the outcome of this application. The proceedings will now continue and would very likely benefit from case management, particularly given the confirmation from the plaintiffs' solicitor at para. 64 of his affidavit sworn on 9 December 2021 that he believes *"any remaining procedural issues could be quickly resolved if the proceedings were admitted to case management and that the case would be ready for a hearing in relatively early course."*

12. I will put the matter in before me at 10.30am on 13 March 2024 when I will consider making directions for case management along with whatever final orders may be required.

13. My indicative view on cost is that, as the plaintiffs have succeeded in defeating the defendants' application to dismiss the proceedings, that the plaintiffs should, in accordance with s. 169 of the Legal Services Regulation Act 2015, be entitled to their costs of the motion, but I am also of the indicative view that a stay should be put on the execution of that costs order pending the final resolution of these proceedings. I will hear whatever the parties wish to say about costs when the matter is back in before me.

Counsel for the plaintiffs: Proinsias Ó Maolchalain BL

Counsel for the defendants: James Nerney BL

AGREED TIMELINE

- 28 November 2007 – Plaintiffs contracted with Defendants for the supply and fitting of windows and doors for a total consideration of €30,800.
- 4 February 2008 – Defendants supplied and installed windows and doors.
- 3 October 2008 – Letter from Defendants’ (former) Solicitors, A&L Goodbody (ALG), to Plaintiffs’ (former) Solicitors, Chris Ryan Solicitors (CRS) re partial engineer’s report received from CRS and proposed on-site meeting on 13 October 2008 [**Exhibit JR1 – Tab 2**].
- 7 October 2008 – Letter from CRS to ALG re. previous inspections by Defendants and on-site meeting on 13 October 2008 [**Exhibit JR1 – Tab 3**].
- 16 December 2008 – Plenary Summons issued.
- 9 January 2009 – Appearance entered on behalf of Defendants by Deirdre K. Ryan & Co.
- 14 July 2009 – Statement of Claim delivered.
- 6 October 2009 – Letter Clerkin Lynch (CL) to CRS seeking consent to late filing of Appearance.
- 23 October 2009 – Notice of Change of Solicitor for Defendants from Deirdre K. Ryan & Co. to Clerkin Lynch filed.
- 28 October 2009 – Letter CL to CRS enclosing Notice of Change of Solicitor, seeking consent to matter being referred to arbitration, seeking consent to filing of conditional Appearance in order to allow dispute to proceed to arbitration, and requesting inspection of the Plaintiffs’ property by the Defendants’ engineer [**not exhibited**].
- 19 November 2009 – Letter CL to CRS re Defendants “*keen to progress matters*” and referencing previous letter dated 28 October 2009 [**Exhibit MS2**].

- 25 November 2009 – Letter CL to CRS enclosing Notice of Change of Solicitor dated 23 October 2009 [**Exhibit MS2**].
- 1 December 2009 – Letter (WP) CRS to CL re site inspection on 13 October 2008 [**Exhibit MS2**].
- 20 January 2010 – Letter (WP) CL to CRS re site inspection by Defendants' engineer, history of previous inspections and inability to file conditional appearance [**Exhibit MS1; Exhibit MS2 and Exhibit JR1 – Tab 5**].
- 28 January 2010 – Defendants' engineer completes site visit.
- 1 February 2010 – Report of Tobin Consulting Engineers on behalf of Defendant arising from inspection of property on 28 January 2010 [**Exhibit JR1 – Tab 4**].
- 22 February 2010 – Letter CRS to CL re. arbitration [**Exhibit MS2, p. 41**].
- 8 March 2010 – Letter from CL to CRS re. Defendants' engineer's inspection, seeking arbitration and threatening application to stay proceedings pending arbitration [**Exhibit MS2, p. 42 and Exhibit JR1 – Tab 4**].
- 8 September 2011 – Letter CL to CRS (referenced in letter dated 05.10.12) requesting, *inter alia*, confirmation as to whether the Plaintiffs wished to have the matter referred to arbitration and stating that, upon receipt of the response, CL would take their clients' instructions in relation to filing their Defence [**not exhibited**].
- 20 June 2012 – Letter CRS to CL in reply, seeking to agree dates for joint inspection and requesting delivery of Defence [**not exhibited**].
- 26 July 2012 - Letter CRS to CL seeking joint inspection [**not exhibited**].
- 24 August 2012 – Letter (WP) CRS to CL (referenced in letter dated 04.09.12) [**Exhibit MS3**].
- 4 September 2012 – Letter CL to CRS re. inordinate delay and Defendants ceasing trading and stating that they had been unable to contact their clients since receipt of the Plaintiffs' solicitor's correspondence and "*accordingly have not obtained their instructions*". [**Exhibit MS4, p. 20 and Exhibit JR1 – Tab 6**].

- 12 September 2012 – Letter CRS to CL to say that they would write directly to the Defendants [**not exhibited**].
- 5 October 2012 – Letter CL to CRS confirming receipt of instructions from Defendants, raising issue with delay and want of prosecution, and requesting that the Plaintiffs refrain from issuing a motion for judgment in default of Defence until an assessment of defects had taken place. [**Exhibit MS4 and Exhibit JR1 – Tab 7**].
- 4 April 2013 – First Notice of Intention to Proceed filed.
- 12 April 2013 – Letter CRS to CL advising Plaintiffs' engineer, Peter McAleer, formally briefed and in a position to carry out joint inspection and referencing deterioration of windows and ongoing damage to property [**Exhibit MS5 and Exhibit JR1 – Tab 8**].
- 25 April 2013 – Letter CRS to CL re. inspection by Plaintiffs' engineer on 26.04.2013, referencing letter dated 17.04.2013 and requesting Defendants' engineer contact Plaintiffs' engineer [**Exhibit JR1 – Tab 9**].
- 29 April 2013 – Letter CL to CRS referencing letter dated 04.04.2013 and Plaintiffs' refusal to engage for long periods without explanation [**Exhibit MS6 and Exhibit JR1 – Tab 10**].
- 4 July 2013 – Letter CRS to CL advising Plaintiffs' engineer due to inspect property shortly and providing his contact details [**Exhibit MS7 and Exhibit JR1 – Tab 11**].
- 12 September 2013 – Letter CRS to CL (21 day warning re Defence) [**Exhibit MS8**].
- 24 September 2013 – Letter from CL to CRS advising that Defendants were no longer trading, that CL had difficulty obtaining instructions, and that they were in process of obtaining contact details for their clients and seeking confirmation that a motion for judgment in default of Defence would not issue [**Exhibit MS9 and Exhibit JR1 – Tab 12**].
- 5 February 2014 – Plaintiffs issue Notice of Motion for Judgment in default of Defence against the Defendants
- 21 February 2014 – Letter CL to CRS serving Defence and Counterclaim and Notice for Particulars and requesting consent to remit proceedings to Circuit Court [**Exhibit MS10**].

- 21 February 2014 – Defence and Counterclaim and Notice for Particulars delivered.
- 25 July 2014 – Plaintiffs’ Notice of Particulars delivered.
- 18 August 2015 – Second Notice of Intention to Proceed filed and served [**Exhibit MS14**].
- 4 February 2016 – Plaintiffs issue Notice of Motion to compel the Defendants to reply to Notice for Particulars dated 25 July 2014.
- 18 February 2016 – Letter CL to CRS stating Replies to Particulars would be provided by 17 March 2016 and re. Plaintiffs’ failure to “*diligently prosecute their claim, which is now in its ninth year*” [**Exhibit MS11**].
- 19 February 2016 – Letter CRS to CL re Plaintiffs’ motion for replies to particulars and proposing that Defendants’ engineer contact Plaintiffs’ engineer and conduct joint engineering inspection to prepare Scott Schedule [**Exhibit MS11 and Exhibit JR1 – Tab 13**].
- 29 March 2016 – Defendants deliver Replies to Plaintiffs’ Notice for Particulars.
- 29 March 2016 – Letter CL to CRS enclosing Defendants’ Engineer’s Report, agreeing to preparation of Scott Schedule and seeking suitable dates for joint engineering inspection [**Exhibit MS11 and Exhibit JR1 – Tab 14**].
- 3 November 2016 – Letter (WPSATC) CRS to CL seeking details of Defendants’ engineer, giving details of the Plaintiffs’ engineer and suggesting settlement talks, advising legal costs were substantial [**Exhibit JR1 – Tab 15**].
- 7 December 2016 – Letter CRS to CL threatening motion to dispense with requirement for a Scott Schedule if details of Defendants’ engineer not provided within 14 days [**Exhibit MS12 and Exhibit JR1 – Tab 15**].
- 23 December 2016 – Letter CL to CRS advising that they would revert in the New Year [**Exhibit MS12 and Exhibit JR1 – Tab 16**].
- 4 January 2017 – Letter CL to CRS noting that their engineer produced a report dated 1 February 2010, stating that the Defendants were currently attempting to make contact with their old engineer and that the delay of seven years

- in providing a Scott Schedule had caused significant prejudice and querying where the RSC required that a Scott Schedule be prepared. [**Exhibit MS12** and **Exhibit JR1 – Tab 16**].
- 10 January 2017 – Letter CRS to CL re. current practice and rules and stating “*I will proceed as I see fit, and in the interests of my clients*” [**Exhibit MS13**].
- 17 April 2018 – Draft Notice of Change of Solicitor from CRS to Rogers Law (RL) sent to CL [**Exhibit JR1 – Tab 17**].
- 17 April 2018 – Letter RL to CL enclosing draft Notice of Change of Solicitor and advising of quotation of €22,250 + VAT @ 13.5% (i.e. €25,253.75) received from Eco Window Concepts for replacement windows and doors and proposing settlement of proceedings and advising that if offer not accepted would set matter down immediately [**Exhibit JR1 – Tab 17**].
- 13 February 2019 – Notice of Change of Solicitor from CRS to Rogers Law (RL) filed [**Exhibit MS14**].
- 13 February 2019 – Third Notice of Intention to Proceed filed.
- 18 February 2019 – Letter RL to CL confirming Plaintiffs’ intended to set the matter down for trial [**not exhibited**].
- 19 March 2019 – Letter CL to RL stating *inter alia* that the Notice of Trial was “clearly premature”, they had not been provided with a copy of the Plaintiffs’ engineers’ report, that witness statements had not been furnished and that the Defendants needed to be provided with discovery from the Plaintiffs before the matter could go to trial. It was noted that Defendants’ RTP delivered on 29 March 2016 and agreement to Scott Schedule on same date but no progress had been made for the previous two years. [**Exhibit MS15** and **Exhibit JR1 – Tab 18**].
- 17 April 2019 – Letter RL to CL noting that the Defendants had refused to provide their engineer’s details in order to hold a joint inspection, referring to letter 7 December 2016, advising that would proceed to serve Notice of Trial, and alleging that CL’s letter “*simply issued in an attempt to avoid this*

- matter reaching trial*” [Exhibit MS16 and Exhibit JR1 – Tab 19].
- 12 July 2019 – Letter RL to CL advising of list number (NJ19117DN) [Exhibit JR1 – Tab 20].
- 12 July 2019 – Letter RL to CL serving Notice of Trial [Exhibit JR1 – Tab 20].
- 26 July 2019 – Letter CL to RL expressing surprise at service of Notice of Trial, stating *inter alia* that the Plaintiffs’ Notice of Trial was “misconceived” and proposing a timeline to allow the proceedings to be heard promptly [Exhibit MS17 and Exhibit JR1 – Tab 21].
- 3 September 2019 – Letter RL to CL seeking details of Defendants’ engineer, noting that although CL wrote to them on the 26 July 2019 indicating that they hoped to revert within a week with details of their engineer as of the date of letter the Plaintiffs still did not know the identity of the Defendants’ expert witness. [Exhibit JR1 – Tab 22].
- 3 September 2019 – Letter CL to RL enquiring re lack of reply to letter dated 26 July 2019 and advising that Defendants’ engineer is Jens Kuechenmeister. [Exhibit MS18 and Exhibit JR1 – Tab 23].
- 14 July 2020 – Letter RL to CL advising that it was regrettable that they had failed to engage with a view to getting the matter listed for hearing and that Counsel for the Plaintiffs would seek to have matter listed for case management [Exhibit MS19 and Exhibit JR1 – Tab 24].
- 12 April 2021 – Plaintiffs’ Notice of Motion for Case Management and Directions issued (returnable on 5 July 2021) [Tab A].
- 5 July 2021 – Return date of Plaintiffs’ Motion for Case Management – Defendants submit that application should not be admitted to case management, and they are given liberty to issue the present motion. Plaintiffs’ motion adjourned to 15 November 2021.
- 7 July 2021 – Letter RL to CL re Plaintiffs’ adjourned motion and Defendants’ intended motion to dismiss [Exhibit MS20].
- 12 November 2021 – Defendants’ Notice of Motion to Dismiss issued (returnable to 15 November 2021) [Tab E].

- 15 November 2021 – Both motions transferred to Non-Jury List.
- 10 December 2021 – Replying Affidavit of John Rogers filed [**Tab H**].