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Judgment: approved by the Court for handing down | *Delivered:* **20/12/2010**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

J & J PROPERTIES (ANTRIM) LIMITED

Plaintiff;

-and-

PAUL DURNIEN

Defendant.

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HART J

[1] J & J Properties (Antrim) Limited is a company formed and controlled by its principal shareholders, Mr Joseph McMullan and Mr John McKendry. The company was formed about 1995 to enable them to pursue their first construction project. This involved the purchase of a listed building in Antrim, its demolition except for the façade, and its redevelopment as a commercial property. Mr McMullan is a hairdresser by occupation and Mr McKendry a nutritional advisor to the farming industry.

[2] Other than the successful development of this building in Antrim neither Mr McMullan nor Mr McKendry had any experience of development matters, apart from subsequently purchasing a site for which they obtained planning permission before they sold the site on.

[3] Mr McMaster is an architect and worked on the Antrim project for the plaintiff. Mr Durnien is a quantity surveyor with some 20 years experience in that profession. In late 1999 or early 2000 he was aware of a site at Woodcot Avenue in East Belfast which was available for possible redevelopment. He was particularly experienced in the requirements of housing associations, and was aware that at that time a number of housing associations were prepared to invest in design and build schemes, one of these being Clanmil Housing Association Limited (Clanmil).

[4] Mr Durnien was introduced to the plaintiff by Mr McMaster, and Mr McMullan met Mr Durnien on site with Mr McMaster towards the end of 1999 or early in 2000, and they discussed its development potential. The site was a former allotment and was very overgrown. Between that meeting and June 2001 the plaintiff, principally through Mr McMullan (to whom I shall therefore refer instead of the plaintiff where appropriate), Mr McMaster and Mr Durnien prepared a detailed set of proposals which ultimately came to be crystallised in the form of an offer made by the plaintiff to and accepted by Clanmil in 2001.

[5] This action relates to the defendant's role in the preparation of the contract between the plaintiff and Clanmil whereby the plaintiff contracted to design and build 28 houses on the Woodcot Avenue site for a total tender price of £2,030,000. In order to perform the contract the plaintiff contracted with John Surgenor and Son (Mr Surgenor) as building contractors for the construction works at the site. The plaintiff accepted Mr Surgenor's tender of £1,285,065.94 for the construction works. These works naturally made up the largest element in the plaintiff's tender price, however, the ultimate tender had three principal elements.

(i) £470,000 was allowed for the purchase price of the site, exclusive of fees. No allowance was made for fees in the contract sum analysis to which reference will be made. It emerged during the hearing that the purchase price was actually £471,000, exclusive of fees but nothing turns on this.

(ii) £135,000 was allowed for professional fees. I shall have occasion to refer to both (i) and (ii) later in this judgment.

(iii) £1,425,000 was allowed for construction costs, of which Mr Surgenor's contract price of £1,285,000 formed the greatest part.

[6] The plaintiff's claim is that the defendant was in breach of his contract to act as quantity surveyor and project manager for the plaintiff in two respects. The first was that when he prepared the bill of quantities upon which Mr Surgenor's contract was based, and later when he prepared a breakdown of the total costs of the project which was submitted to Clanmil in the form of a contract sum analysis, he failed to make allowance for two substantial elements of the cost of construction. The first was the cost of the necessary construction work to prepare the site, referred in the course of the evidence as "civils", and the second was the cost of piling. Ultimately the plaintiff had to employ a sub-contractor to do the construction work, who was Mr Surgenor, and another sub-contractor to do the piling. Altogether Mr Surgenor was paid £230,138 for this work, and the piling sub-contractor was paid £60,458.20, a total of £290,596.20. Only £140,000 had been allowed for earth works in the bill of quantities and the contract sum analysis, leading ultimately to a shortfall of £150,596.20 over the amount paid for the works

necessary to prepare the site for the building work which Mr Surgenor had contracted to do. Although the actual outlay by the plaintiff to Mr Surgenor was significantly greater than this amount of £150,926.20, at the conclusion of the case Mr Humphreys for the plaintiff recognised that as many of those costs related to either under measurements in the bill of quantities by the defendant (to which separate reference will be made), or to design changes which were not the responsibility of the defendant, the plaintiff's claim is limited to the amount of £150,596.20 under the construction and piling head.

[7] The second part of the plaintiff's claim relates to items in the bill of quantities which it is alleged that Mr Durnien under measured. At an early stage of the hearing three items which were originally claimed under this heading, namely street lighting, service ducts and gabions, were abandoned by the plaintiff, leaving 11 other items in respect of which under measurements were alleged amounting to £88,500. During the course of the hearing discussions between the defendant and the plaintiff's advisors reduced the 11 heads to 7 as the plaintiff abandoned roofing, top soiling, bituminous macadam and fencing and gates completely, as well as reducing the claim for wall plaster by £300 from £2,500 to £2,200. The plaintiff's claim under the general heading of under measurement in the bill of quantities now comes to £60,200. The defendant concedes £24,000 of this amount, £12,000 for staircases and a further £12,000 for facing brickwork, although the balance of £36,200 remains in dispute between the plaintiff and defendant under this head, and in due course I will deal with this separately.

[8] Before turning to the areas of dispute between the plaintiff and the defendant in relation to the omission of "civils" and piling, I consider it appropriate to touch upon one matter which I consider provides a useful pointer to the resolution of the other disputes between the plaintiff and the defendant, and that relates to the different figures which were given for the cost of the purchase of the site in various earlier offers submitted by the defendant on behalf of the plaintiff in correspondence with Clanmil. On 27 March 2000 the figure was given as "£580,000 (inclusive of VAT, stamp duties etc)". However, in a calculation which appears in bundle 1 at page 170, and apparently sent under cover of a 'with compliments' slip dated 6 March 2001, the cost of the site is given as £370,000. By 7 June 2001 the site value is shown as £470,000, although on this occasion no mention is made of stamp duty, VAT or solicitor's fees. That letter became part of the contract (see page 220). These fluctuations in the amount attributed to the purchase price of the site seem surprising. The defendant said that he believed that the site had been purchased subject to planning for 30 units, and therefore that it was open to the plaintiffs to seek to renegotiate the purchase price to reflect the fact that by the time the project was put out to tender there were to be two fewer units. He suggested that it would therefore be possible to save £95,000 on the cost of the site in order to increase the margin of profitability when it became apparent to him that the costs of the project were such that it was less likely to

make a significant, or indeed any, profit. Given that the indenture of lease had been signed on 1 March 2001 this seems an unusual approach to take, and I find it hard to see how these different figures were included at various times by the defendant, other than on the basis that he was prepared to alter the component parts of the total transaction as seemed most expedient at the time. It may well be the case that when assessing the overall commercial viability of the total package being put forward on its behalf the plaintiff was prepared to absorb expenditure already incurred under one head in the hope that it could be recouped elsewhere, nevertheless the inclusion of £370,000 as the site value as late as 6 March 2001 seems unusual. I did not find the defendant's explanation that he thought that the purchase price of the site could be renegotiated plausible.

[9] However, the most significant evidence relates to the final few months of the negotiations between the plaintiff and Clanmil, to the various documents created by, or sent to, the defendant at that time, and to the defendant's evidence about what he did or did not do at that time.

[10] When the tenders came in March 2001 it was immediately apparent to the defendant and the plaintiff that the tenders were too high, and that unless other tenders could be obtained at a lower price the project was not financially viable. The defendant now says that in March 2001 he had a telephone conversation or conversations with Mr McMullan about the viability of the project because the tenders had come in higher than expected. I accept that it is possible that there may have been some such discussion at that time, because Mr McMullan decided to approach Mr Surgenor in order to see if he would be prepared to tender for the contract. However the precise allegation was never put to Mr McMullan by the defendant.

[11] On 20 April 2001 Peter P Fitzpatrick, the consultant civil and structural engineers on the project, wrote to the defendant with budget costings for the civil engineering works required at Woodcot Avenue, together with the cost of pre-cast concrete piling also required. The total cost of the civil engineering works was estimated at £315,000 and the cost for the concrete piling at £40,000. This was not copied direct to the plaintiff, and asked by Mr Humphreys the defendant accepted that he did not revise the costings, nor did he inform the plaintiff of these figures. This is a very surprising omission indeed, and one which the defendant sought to explain by saying that he was not asked to provide advice on costings, nor was he aware whether the project would proceed because the plaintiff did not seek any information from him.

[12] That was plainly incorrect because, as Mr Humphreys pointed out to the defendant, on 1 June 2001 he sent, amongst other documents, the contract sum analysis to the John Neil Partnership who were acting as Clanmil's agents. That indicates that, contrary to the impression the defendant was

anxious to make, he was still responsible for the preparation of the detailed costings on behalf of the plaintiff to be submitted to Clanmil as part of the contract sum analysis. At that time the contract sum analysis included the total construction cost at £1.425m, that is the earlier figure of £1.4m to which has been added £25,000 which Clanmil was persuaded by the plaintiff to pay to the plaintiff.

[13] When cross-examined about the composition of the contract sum analysis, and the absence in it of any reference to the civil engineering works or to the piling, the defendant sought to explain this by saying that the civil engineering and the piling together only constituted one element in a larger commercial deal, that it was still open to the design team to vary the specification; presumably in order to increase or restore the profitability of the offer; and that the plaintiff was at fault in not seeking his advice, in accepting alterations to the design and failing to control the costs in that respect.

[14] I find the defendant's evidence on this unconvincing and disingenuous, as was his explanation as to why he had not expressed his reservations about the viability of the contract in correspondence to the plaintiff before he composed the final offer of 7 June 2001 which he sent to Clanmil on behalf of the plaintiff. When he was pressed as to why he had not made that clear to Mr McMullan he claimed that Mr McMullan had told him that the plaintiff wanted to build a relationship with Clanmil.

[15] I infer from this that the defendant asserts that the plaintiff was willing to take a chance that this contract would make a loss in order to establish a longer term relationship with Clanmil, something which appears highly improbable given that the figures prepared by the defendant and included in the contract sum analysis and other correspondence did not include the civils and the piling, and therefore the design and build contract that the plaintiff intended to, and in the event did, enter into with Clanmil was not likely to be profitable.

[16] The defendant was asked why he had not put to Mr McMullan that they had had this conversation and he sought to account for his failure to do so that he was not experienced in advocacy. I make due allowance for that, but Mr Durnien skilfully and tenaciously made the various points that he wished to make throughout this case, and I do not accept his explanation as to why he did not put that point to Mr McMullan. I am satisfied that this was a late invention by him in order to extricate himself from the dilemma in which he found himself.

[17] The defendant has taken issue with the plaintiff's case that the plaintiff relied upon him to act as the "project manager". The documents contain numerous references to various actions by him which show that the defendant throughout the preparation of the various initial offers, and in the

run up to the preparation of the final offer which was accepted by Clanmil, played a significantly greater role than would have been the role of someone who was simply acting as the quantity surveyor who had prepared the bill of quantities.

[18] First of all, it was he who told the plaintiff about the availability of the Woodcot Avenue site. Secondly, at the very early stages of this project it was he who suggested the possible cost of the project, see for example his letter of 30 January 2000 to Mr McMullan. By the time he sent his e-mail of 12 March 2000 he had prepared sufficiently detailed calculations to enable him to suggest that it would be possible to make a profit of £288,867.10, which could be increased to £438,867.10 if part of the site could be sold for £150,000 to another purchaser who wished to erect a crèche. Thirdly, it was he who prepared the first offer contained in the letter of 27 March 2000. Fourthly, he co-ordinated various elements of the proposals as can be seen from the terms of his fax to Mr McMullan of 9 May 2000. Finally, on 11 May 2000 he described himself as the "QS and Project Manager for the developer" in his letter to Mr Lavery of the John Neil Partnership.

[19] Whilst it is correct that there was a subsequent reference in a letter to Mr McMaster by Mr Lavery of 28 February 2001 that the John Neil Partnership was under the impression "from talking to your client [presumably Mr McMullan] that you had been asked to undertake the Project Management/Employer Liaison role" in the project, the prominent role played by the defendant at the pre-contract meeting on 25 May 2001 is at variance with this. At that meeting he undertook, amongst other matters, responsibility "for collecting and collating the outstanding data and supplying to" the John Neil Partnership.

[20] All these matters point to the defendant producing information for the plaintiff above and beyond that which would normally be expected of someone simply fulfilling a quantity surveyor's role, and I am satisfied that the plaintiff has shown that the defendant acted not merely as a quantity surveyor but as the project manager as well. In the statement of claim the plaintiff framed its case against the defendant at paragraph 3 in the following fashion.

> "In or around early 2000, the plaintiff engaged the defendant to act as its quantity surveyor for the proposed development. The terms of the said engagement provided, inter alia, as follows:
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> (i) The defendant would prepare Bills of Quantities in respect of the contract works;

(ii) The defendant would advise the plaintiff as to the cost of the proposed works;

(iii) The defendant would prepare the packages for the construction of the works and draw up a contract sum analysis."

[21] I am satisfied that the plaintiff has proved on the balance of probabilities that those were the terms of the engagement between the plaintiff and the defendant. Looking at the evidence as a whole, I accept the plaintiff's case that whilst it was notified that piling and civil engineering works were required, it believed that these had been allowed for by the defendant in the bill of quantities. I accept that these items should have been in the bill of quantities, and I can see no reason why they were not, other than an oversight on the part of whoever prepared the bill of quantities, whether it was the defendant personally or someone in his employment. I am further satisfied that the defendant realised that these items had not been included, and thought that it would be possible for savings to made be elsewhere in the contract so as to ensure that a small profit could be made by the defendants, notwithstanding that their profit would be otherwise wiped out by the sub-contracting costs in relation to the civil engineering works and the piling. The contrary view must be that the plaintiff knew all along that it was going to enter into a contract which would certainly not show a profit and may well have shown a substantial loss. The defendant sought to argue that, as already indicated earlier, the plaintiff was anxious to establish a relationship with Clanmil. I do not regard as credible the inference that the plaintiff would have entered into a contract of this nature had it been fully advised by the defendant that the omission of the provision from the bill of quantities and the contract sum analysis of the necessary amounts for civil engineering works and piling rendered the contract unprofitable.

[22] I am therefore satisfied that part of the plaintiff's case which relates to the shortfall of £150,596.20 has been proved, subject to the question of any failure on the part of the plaintiff to mitigate its loss. The defendant asserted that the plaintiff could have sought to enter into what he referred to as a "back to back" contract with Mr Surgenor, that is a contract which would be identical in all respects with the contract which the plaintiff had entered into with Clanmil. I regard this as a diversion of the part of the defendant. It is true that at the pre-contract meeting the defendant made a reference to consideration being given to such a contract, however there is nothing to suggest that he ever drew this expressly to the plaintiff's attention, and indeed he concedes he did not.

[23] I have considered whether the plaintiff could be said to be at fault for not identifying the absence from Mr Surgenor's contract price and from the bill of quantities of the civil engineering works and piling. I am satisfied that

Mr McMullan on behalf of the plaintiff took an active role in the development of this contract in a number of ways. First of all, he approached Mr Surgenor when the initial tenders were too high. Secondly, he took part in discussions with Clanmil which resulted in them agreeing to a significant reduction in the specification and the payment of an additional sum of £25,000 by Clanmil to the plaintiff. Thirdly, on 15 May 2001 the John Neil Partnership wrote to Mr McMullan, and in the letter referred to "proposed ground stabilisation works now included in your proposals". That suggests that something had been said to the plaintiff to make it clear that this work was included in the plaintiff's proposal. In addition Mr McKendry was present at the pre-contract meeting on 25 May 2001 when express reference was made to "ground stabilisation works" and the consequent extension of the contract period from 15 to 18 months to allow for this. Despite that it appears that the plaintiff did not query whether the civil engineering works and the piling was included in the contract with Clanmil at that stage. The plaintiff was well aware about piling from correspondence about it from Mr Fitzpatrick on 9 May 2001 and from the John Neil Partnership on 15 May 2001. The plaintiff was also alert to the significance of piling as that had been part of their earlier Antrim project. Finally, Mr McMullan admitted in the course of his evidence that he knew piling had to be done.

[24] However, whilst the plaintiff was undoubtedly aware that piling had to be done, the question is whether the plaintiff knew, or could reasonably be expected to ascertained for itself, that the civil engineering works and the piling had not been included in the bill of quantities upon which Mr Surgenor had based his contract. Despite their taking a close interest in the costs, I accept Mr McMullan's evidence that they left it to the defendant to tell them what was in the bill of quantities and what was not, and that they believed that the figure of £1.425m covered everything. I accept this for the very simple reason that if the contrary had been the case Mr McMullan and Mr McKendry would never have entered into this contract because they could not make a profit on it. The defendant was the expert upon whom the plaintiff relied, and I am satisfied that the defendant was in breach of the implied terms of his contract with the plaintiff in that he failed to exercise proper care as the quantity surveyor and project manager to ensure that the necessary allowance for civil engineering work and piling was made in the bill of quantities, and that, when it became apparent that they had not been included, the plaintiff was not alerted to this in time for the plaintiff to decide not to proceed with its offer and withdraw from these negotiations. The plaintiff is therefore entitled to recover the figure of £150,596.20 from the plaintiff.

[25] I now turn to the remaining items of alleged under measurement which are the basis of the Scott schedule.

(1) Floor coverings. The plaintiff's claim for £4,500 is based upon the under measurement of the stairs. I accept that the stairs were under measured, in my judgment that follows inexorably from the admitted failure by the defendant to include the necessary number of staircases. The appropriate number of treads and risers were not allowed for and in my judgement it follows that the plaintiff is correct in arguing that the floor covering was also omitted. I allow the amount of £4,500 claimed.

(2) Facing Brickwork. The defendant asserts that because this was a predominantly timber framed building, the appropriate timber framed facing rate at 10/9/A should apply. I prefer the evidence of Mr McMaster on this, the area concerned is a communal staircase of solid construction where there is an external cavity wall and that is clear from 10/9/B. I therefore allow the full amount of £20,000.

(3) Wall Plaster. I accept that this follows from the facing brickwork issue and I therefore allow £2,200 under this heading.

(4) Drainage. In the bill of quantities only one diameter is given for both foul and storm water pipes, namely 150 mm, whereas Mr Fitzpatrick's drawing showed various sizes, some at 150, some at 200, some at 250 and some at 300 mms. The defendant pointed to the Drawing Revision C prepared in June 2001 which does not show larger pipe sizes. Mr McMaster accepted that that was correct, but pointed out that those plans only showed foul drainage. I am satisfied there is a mistake in the bill of quantities and I allow this amount of £15,000.

(5) Steel arches. A good deal of attention was devoted to establishing whether steel archways were necessary to support the lintels to which reference has being made. At 9/10M of the bill of quantities reference is made to "archway", but Mr McMaster pointed out that the bill does not measure support, and argued that somewhere within that page of the bill provision should have been made for an entry that steel arches were necessary to support the lintel. I accept that the archway had to be supported by steel arches and I therefore allow this amount also.

[25] I therefore allow the full amount now claimed by the plaintiff under the various headings of the Scott schedule at £60,200. To this must be added the £150,596.20 to which I have already referred, and there will therefore be judgment for the plaintiff against the defendant for £210,796.20 together with costs to be taxed in default of agreement.