Neutral Citation No: [2021] NICA 18 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **OHA11407** *ICOS No:* **2013 053519** *Delivered:* **11/02/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

ARMOURY DEMOLITION AND RECYCLING LTD

Third Defendant/Appellant;

and

HIGHWAY BARRIER SOLUTIONS LTD

Third Party/Respondent.

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION

BETWEEN:

KARL JAMES JOYCE (A PERSON UNDER A DISABILITY) BY JACQUELINE CRAIG HIS MOTHER AND NEXT FRIEND

Plaintiff;

and

MATTHEW BRADBURY
NORTHERN IRELAND HOUSING EXECUTIVE
ARMOURY DEMOLITION AND RECYCLING LTD
EASTWOOD LTD
ROBERT RUSH
DORAN CONSULTING LTD

Defendants.

and

HIGHWAY BARRIER SOLUTIONS LTD

Third Party.

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Mr S Spence (instructed by Ferguson & Co) for the Appellant
Mr F O'Donoghue QC and Mr C Campbell (instructed by BLM Solicitors) for the Third Party

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Before: TREACY LJ, HORNER J and O'HARA J

O'HARA J (delivering the judgment of the Court)

Introduction

[1] The plaintiff was seriously injured when he was knocked down as he crossed a road in Larne on 29 September 2010 by a car driven by the first defendant. Damages were agreed at £1,000,000. After a deduction of 15% for contributory negligence an award of £850,000 was made by Maguire LJ in a judgment delivered on 28 June 2019. The learned trial judge assigned 55% responsibility for the accident to the first defendant. The remaining 30% was divided between two defendants. Armoury Demolition and Recycling Ltd ("Armoury"), the third defendant, was found liable for 20% and Doran Consulting Ltd ("Doran"), the sixth defendant, for 10%.

[2] There is no appeal against any of these apportionments of fault as between the plaintiff and the various defendants. The only issue before this court is Armoury's appeal against the dismissal in its entirety of its third party proceedings against Highway Barrier Solutions Ltd ("HBS"). Armoury had sought an indemnity, or at least a contribution, from HBS.

Background

[3] The factual background is set out with great clarity in the 47 page judgment of the learned trial judge from which this summary is taken. The NIHE was the owner of a large block of flats known as Gardenmore House in Larne which were to be demolished. In preparation for the demolition work hoarding was erected around the site. This hoarding was 2.4 metres high and was made up of chipboard sheeting attached to a wooden framework. At the point which is relevant to this case the hoarding on Pound Street extended to the outside edge of the pavement thereby preventing pedestrians from walking along it.

[4] At the point where the pavement was closed off by the solid hoarding there was an uncontrolled crossing (i.e. not a pedestrian crossing and not one with lights). This crossing had three features. The first was that there was a traffic island in the middle of the two lane road which acted as a halfway house for pedestrians crossing. Secondly there were dropped kerbs at the road edge. Thirdly there were areas of tactile paving at the stepping off point i.e. paving of a different colour and with a pimpled surface.

[5] The plaintiff was knocked down as he crossed the road towards the traffic island which he did not quite reach. At the point where he crossed HBS employees had placed two signs. One said "Footway Closed" and the second said

"Pedestrians" with a large arrow below that word directing pedestrians to cross the road.

[6] Normally crossing at this point would have been quite safe – pedestrians would have had a clear view in excess of 100m of oncoming traffic to their right and drivers would have a similarly unobstructed view of any pedestrians who were crossing or about to cross to the traffic island. Unfortunately the presence of the hoarding changed the setting drastically. The plaintiff's view to his right was severely reduced by the hoarding being right out to the edge of the footpath while the first defendant's view was similarly limited.

[7] Maguire LJ held that the views of the plaintiff and the driver would have been approximately 40m but he further found that the driver was going too fast, at a speed well in excess of 30mph despite the hoarding and the limited sightlines while the plaintiff had not kept a proper lookout, perhaps because of the headphones he was wearing.

[8] He further held that the presence of the hoarding was a factor in the accident, rejecting the proposition advanced by various defendants that it had played no part. Having reached that conclusion he turned to the issue of responsibility for the hoarding and for the management of pedestrians who were required to cross at the uncontrolled crossing with reduced sightlines. For reasons which are not necessary to go into because of the limited issue which this court has to answer he held that no liability attached to the NIHE nor did any attach to either Eastwood Ltd or Robert Rush who were both subcontractors.

[9] Doran was the designer and co-ordinator of the demolition work. It had relevant experience, especially as it had been the consultant on a recent similar project in Larne in which another block of flats was demolished. It was its drawings which made it clear that there was to be hoarding which was 2.4m high which would subsume the footpath.

[10] Doran's specification for the obligations imposed on the main contractor (Armoury) included the following two paragraphs at Section 1.8 which are of significance:

> "Access to the site for all construction traffic shall be as shown in the drawings. The contractor shall ensure that his works do not interfere with or disrupt normal public access to adjacent areas. The contractor shall take all measures necessary to ensure the safe passage of pedestrians around the site area …
>
> The contractor shall erect a 2.4 metre high secure temporary timber hoarding around the

> perimeter of the site as indicated in the tender drawings. The hoarding shall be suitable to prevent unauthorised access into the site and shall remain in place for the duration of the contract ..."

[11] As part of its work Doran was involved in discussions with the Road Service about the necessary paperwork and permits relating to footpath and road closures. It appears that Road Service had a particular concern about site traffic entering and leaving the site at a different point in Pound Street and about site lines there. This led to various discussions including one between Mr Mills of Armoury and Mr Spence of Doran who met on site on 18 August 2010. That discussion covered a number of topics including the improvement of the sightlines adjacent to the spot where the plaintiff's accident later occurred on 29 September. It was agreed that a splay would be created in the hoarding i.e. a v-shaped insert which would improve the view. This was done.

[12] On or about 24 August Armoury approached HBS with a view to HBS producing a traffic management plan ("TMP") which would deal with the signage that would be required on the ground in light of footpath and road closures. It appears that on the same day HBS produced a TMP in the form of a drawing which it sent to Armoury. This TMP is stated on its face as not being to scale and sets out various necessary signs which would have to be put in place including those described at paragraph 5 above. On the drawing however they are shown as being 30m away from where the plaintiff's accident later occurred i.e. 30m back from the traffic island.

[13] A significant feature of the drawing is that it did not refer at all to the demolition site hoarding. On the finding of the learned trial judge this was because Armoury did not inform HBS about the hoarding. There is no record of the telephone or other discussions which led to HBS producing the drawing and the only documentation is the drawing itself and a quote provided, again on 24 August, to Armoury by Mr Shane Brennan of HBS. The work proposed by HBS was described by Mr Brennan in the quotation as follows:

> "Set up traffic management for road closure of Riverdale and provide diversion. Also supply pedestrian diversion signage. …"

[14] HBS put the signage in place over two days, on 7 and 9 September. They had to do this work before the hoarding went up, rather than afterwards, so their workmen did not see at that time the height or type of hoarding which the sub-contractor then erected over the following days. A HBS employee did return on 16 September at Armoury's request to deal with a minor issue about signage but not one which related to the area where the accident later occurred.

[15] When the signs were put in place by HBS on 7 and 9 September they were not placed at the spot identified on the drawing of 24 August. Instead they were placed 30m away, adjacent to where the accident occurred. The learned trial judge was not told how or why this happened but no issue was raised about it by Armoury before the accident.

[16] On 6 October, barely a week after the accident, NIHE convened a meeting to discuss the safety implications of the accident. Those present included representatives of the PSNI, the Department for Regional Development (which is responsible for Road Service) and Doran. HBS was not advised about or invited to the meeting. A decision was taken to move the hoarding back to the inside line of the footpath and to place low level barriers on the outside line. The effect of this work was to restore in large measure the sightlines which had previously been so reduced.

[17] In analysing responsibility for the hoarding and for traffic management the learned trial judge held that NIHE bore responsibility for the events which occurred but that it was entitled to an indemnity from those with whom it had contractual relationships. Having held the two sub-contractors effectively did what others had directed, the court's analysis led it to pose the following three questions:

> "(i) Is Armoury in part responsible for this accident because of its responsibility for the hoarding and/or traffic management? If it is, to what extent is it responsible? Must it therefore indemnify or contribute to any liability which falls on the NIHE? Alternatively, is Armoury directly liable to the plaintiff?
>
> (ii) Is Doran in part responsible for this accident because of its responsibility for the hoarding and/ or traffic management? If it is, to what extent is it responsible? Must it therefore indemnify or contribute to any liability which falls on the NIHE? Alternatively, is Doran directly liable to the plaintiff?
>
> (iii) If Armoury does bear a measure of responsibility as aforesaid, can it obtain indemnity or contribution from the third party, HBS?"

[18] As between Armoury and Doran the learned trial judge assigned greater responsibility to Armoury (overall 20% as against 10%) because Armoury had control of the site and "a more pronounced role in respect of not just the issue of the sight lines but also the issue of traffic management." His reasoning can be summarised as follows:

(i) At the time of the accident, the construction phase of the contract (i.e. the demolition) had begun and Armoury had control over the site.

(ii) The specification, especially paragraph 1.8 cited at paragraph 10 above, obliged Armoury to ensure the safety of pedestrians.

(iii) The measures which had been taken in relation to signage were substandard and insufficient.

(iv) The introduction of the splay was not sufficient to resolve the problem.

(v) Nobody reconsidered the safety issues after the hoarding was erected.

(vi) Doran should have recognised that its design of the project was flawed in that it created the danger to pedestrians and road users which could have been avoided.

(vii) The creation of a danger was in breach of the duties imposed on Doran by the Construction (Design and Management) Regulations (NI) 2007, in particular Regulation 11(3) which requires designers to "avoid foreseeable risks to the health and safety of any person."

(viii) The fact that the construction work had started did not mean that Doran's duties came to an end and passed entirely to Armoury.

[19] As already indicated there was no appeal by any party against this finding of liability or the division between them. This court has had the comparative luxury of focussing on only one issue – whether the learned trial judge was correct in law and on the facts in the circumstances of this case in holding that none of Armoury's share of liability should pass to HSB as a result of its input via the TMP and in particular the placing of the road signs at the uncontrolled crossing.

[20] Armoury's case against HBS was that it employed HBS to draw up a TMP which dealt in particular with what signs were required and where they should be placed. Since it relied on HBS and since the accident occurred, in part, because the signs were in effect in the wrong place, HBS should be held liable to Armoury.

[21] In response HBS contended that its role was much more limited. It contended, in effect, that this particular TMP was very restricted in its nature as is evidenced by the fact that it was asked for and provided on the same day. It was limited to the provision of a not to scale drawing on which the signage was depicted and an agreement reached to put the signage in place.

[22] The learned trial judge identified at paragraph [111] of his judgment the difficulties he faced when considering this part of the case. Armoury, which was a

company based in England and whose workers came from England, went into liquidation during the life of the contract in 2010/11 and did not provide any documents or call any witnesses at the hearing. For its part HBS said it had only been alerted to the claim in 2017, a delay which affected the extent to which it had retained any records.

[23] Having described this impediment to his decision, the learned trial judge went on to identify what he described as "the most striking aspect of the case", namely that the HBS plan contained no reference at all to the boundary of the project site (i.e. incorporating footpaths) and in particular the proposal for hoarding of 2.4m in height. As the learned trial judge said at paragraph [112]:

> "While it would be one thing for HBS to have come up with the drawing it has come up with if it had knowledge of the proposed boundary represented by a high hoarding and knowledge that a substantial footpath was being lost for this reason, it is quite a different matter if, through no fault on its part, its drawing was prepared without any such knowledge. This is so because appreciation of the significance of the abridged sight lines is central to an understanding of the risks which arise in this case. If HBS had not been in receipt of crucial information to its understanding of what it was being asked to do, it may be forgiven for neglecting to make the sort of searching enquiry the court would otherwise have expected it to make."

[24] Against that background the judgment continues with the following findings:

[114] - Armoury did not place any evidence before the court that it had communicated the whole picture to HBS. This is evidence which the court would have expected to see if it existed.

[115] - On the basis of the evidence before the court Armoury had the obligation to provide HBS with the necessary information. The court could see no reason why the HBS drawing and/or quotation read as they do (without reference to the hoarding) unless the full picture had not been communicated.

[116] - Armoury was at fault in that it sought a service from HBS but did not provide it with relevant information.

[117] - The same conclusion can be reached by reference to the 2007 Regulations which impose an obligation on the contractor to furnish the subcontractor with relevant information.

[118] - The court rejected the proposition that there was any onus on HBS to elicit the missing information.

[25] Having held against Armoury and in favour of HBS the learned trial judge went on to deal succinctly with a number of issues. These are set out below because they are relevant to this court's consideration of the appeal. They include the following:

[121] - The learned trial judge rejected HBS's contention that it was not competent to advise on traffic and pedestrian sight lines, a contention which left him "unimpressed".

[122] - The learned trial judge rejected Armoury's contention that HBS should be fixed with knowledge of the hoarding (and hence the danger at the uncontrolled crossing) because an employee returned on 16 September to perform one limited task.

[123] - He similarly rejected the contention that because HBS knew the site was to be a demolition site it ought to have foreseen that the sort of fencing required would necessarily impact on sight lines.

[124] - He also rejected a contention that the fact that the signs were placed at a spot other than that marked on the drawing showed a lack of skill and care. On this issue the learned trial judge repeated his central point on this aspect of the case, that on the evidence before him it was probably not known to HBS that substantial hoarding was to be erected.

[125]-[126] - The learned trial judge declined to draw an adverse inference against HBS despite the fact that its only witness was not the person who discussed the request with Armoury on 24 August 2010 and prepared the plan and quotation, a Mr Brennan, but was a Mr Dumigan who had no direct contact with Armoury at the time (although he worked closely with Mr Brennan).

[127]-[128] - Similarly the learned trial judge declined to hold against HBS the terms of its third party defence in which it was admitted that it had entered a contract with Armoury to design and produce a TMP, that "it designed a safe and reasonable route for pedestrians around the site" and that it "provided a safe and straightforward and reasonable pedestrian diversion". The court's conclusion was that the terms of the third party defence were being wrongly interpreted and that Mr Dumigan's evidence as to the context of the agreement was more persuasive.

Submissions on Appeal

[26] For the appellant Mr Spence effectively took issue with almost every element of the reasoning of the learned trial judge. In particular however he challenged the court's reasoning on:

(i) Whether HBS should have known or made inquiries about the type of fencing/hoarding which was to be used.

(ii) Whether HBS, as an expert in traffic management, could possibly have performed its role in the dark, without knowing about the type of fencing/hoarding.

(iii) Whether the learned trial judge had been wrong to discount the issue about the terms of the third party defence and whether that defence amounted to a form of limited admission.

(iv) Whether the court had been wrong not to draw an adverse inference from the failure of HBS to call Mr Brennan as a witness given his direct involvement with Armoury.

(v) Ultimately, whether HBS had not been negligent and in breach of its contractual and statutory duty in placing the two signs at a location which became dangerous immediately the hoarding was erected.

[27] For HBS Mr O'Donoghue QC (who did not appear at the trial) submitted that:

(i) There was a proper basis for each of the court's findings.

(ii) The detailed analysis of all of the issues shows just how carefully the court had considered them.

(iii) In these circumstances the Court of Appeal should not upset the judgment even if some or all of the members of the court may have or would have reached a different decision.

(iv) The learned trial judge had the advantage of hearing all of the witnesses give evidence and weighing up what they said and how they said it.

(v) In respect of the "missing witness" he had explicitly referred to and considered the leading authority of *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 at 340.

(vi) In the circumstances the judgment should not be interfered with.

Consideration

[28] This court is slow to interfere with the judgment of Maguire LJ for two main reasons. The first is that as with all judges at first instance he heard and saw the witnesses give their evidence, a process which gave him a distinct advantage. Secondly, in the context of this particular case, the judgment challenged is one which is reasoned and explained in great detail. That is illustrated by the fact that, apart from this single issue as between the third defendant and the third party, the judgment is otherwise impeccable and unchallenged.

[29] Each member of the court has felt uneasy about the dismissal of the third party proceedings. That is not enough however, as Mr O'Donoghue reminded us. The question is whether we conclude that the judgment is so far removed from how we assess the case that it cannot be allowed to stand. On reflection our unanimous conclusion is that it is so far removed that we should interfere with the judgment for the reasons which follow below.

[30] Dealing first with the extent of HBS's knowledge of the plan for the fencing, we cannot agree with the finding at paragraph [112] (see paragraph [23] above) that HBS "may be forgiven for neglecting to make the sort of searching inquiry the court would otherwise have expected it to make". HBS knew that the substantive work was the demolition of a block of flats. Far from having to make a searching inquiry, all that Mr Brennan had to do was to ask Armoury to confirm what type of fencing/hoarding was to be erected and where it would be. The court received expert evidence that on demolition sites it is more likely than not that any fencing would be solid hoarding rather than something like open fencing. A simple inquiry would have elicited this information, if it needed to be elicited. We respectfully agree with the learned trial judge that it might generally be unreasonable to expect a person in the position of HBS to make searching inquiries but, simply put, that is not what was required here.

[31] This takes us on to the question of who gave and did not give evidence for HBS. It was confirmed during the cross-examination of Mr Dumigan that Mr Brennan who had been directly involved in discussions (however limited) with Armoury was available to give evidence but he was not called to do so. The learned trial judge at paragraph [126] declined to draw any adverse inference because Armoury itself had not called any witnesses on this point and had no clear position. We respectfully disagree with that reasoning, in the specific circumstances of this case. It was Mr Brennan who spoke with Armoury and then provided the plan indicating where the signs would be placed. That place would have been a safe one. However the signs were not in fact placed there. It seems to us that it was incumbent on Mr Brennan, not Mr Dumigan, to explain why the plan was drawn up as it was and what then happened to depart from it. He would also have addressed the issue of why he did not ask about the type of fencing and where it would be placed (if in fact he did not do so).

[32] A further issue on which Mr Brennan could and should have given evidence is what he meant in the quotation which he provided on 24 August in which he wrote "set up traffic management … also supply pedestrian diversion signage …" The debate at the trial over the meaning of the contract would inevitably have been fuller if Mr Brennan who had drawn up the quotation had testified.

[33] In the opinion of this court that debate has added meaning in light of the terms of the third party defence – see paragraph 20 above. We are also struck by the evidence given for the third party by its own expert witness, Mr Dixon. This evidence was that he understood from his instructions that the obligation on HBS was the design and erection of a temporary traffic management system. He conceded in cross-examination that he only learned when he heard evidence in court that his client's case was that it was only engaged to place signs. He further conceded that the whole point of Armoury going to HBS was that, unlike Armoury, HBS held itself out as having expertise in traffic management and the safety of pedestrians.

[34] We accept entirely that there is room for debate as to what may be meant by a TMP. We further accept that some plans will be more expansive than others depending on the contract in question. It seems to us however that HBS quoted for this contract and then pleaded its defence on one basis before coming to court and resisting the third party claim on a different one, to the surprise of its own expert and in the absence of the very relevant Mr Brennan.

[35] In these circumstances the members of this court would each have drawn an adverse inference against HBS. The inference which we draw is that since Mr Brennan knew that the work area was to be a demolition site he also knew that it was more likely than not that the fencing would be solid hoarding rather than open. In the alternative he ought to have made that inquiry. Since an element of pedestrian safety is having adequate sightlines, this would or should have put Mr Brennan and HBS on notice that the signs had to be placed at a spot where a pedestrian could cross safely and a driver could see what lay ahead. That spot would have been in or around where the signs were shown on Mr Brennan's plan. The fact that they were not then placed there but at a dangerous location instead represents a failure of the TMP for which HBS must carry liability.

[36] The question then arises as to the extent of that liability. Mr Spence submitted that it should be a full indemnity. We disagree. There was a period of at least 2 weeks between the hoarding being erected and the accident happening. HBS were not on site during this period. During that time Armoury should have become alert to the danger and acted upon it. Armoury could have called HBS back to advise or simply moved the signs back to the original illustrated spot. It did neither. On our analysis the fair outcome is that Armoury is entitled to a contribution from HBS of 50% of the liability established against Armoury.

[37] We will hear the parties as to costs.