Neutral Citation no. [2006] NIQB 85 | *Ref:* **MCCC5657**

Judgment: approved by the Court for handing down | *Delivered:* **11/12/06**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

J & A DEVELOPMENTS LTD

Plaintiff

and

EDINA MANUFACTURING LTD

First Named Defendant

and

ARMOURA LTD

Second Named Defendant

and

JOHN FRANCIS McBRIDE, PETER ANTHONY DOLAN, GERARD COYLE and BARRY GALLAGHER T/A ADP ARCHITECTS AND DESIGN PARTNERSHIP

Third Parties

SIR LIAM McCOLLUM

[1] The plaintiff is a limited company engaged in building and development. It is controlled by Mr James Henry Bleeks. Mr Bleeks also trades under his own name and uses an umbrella description of JB Developments but it is the plaintiff company which engages in the performance of major contracts.

[2] The first named defendant is a limited company engaged in the manufacture of generating machinery. It is controlled by Mr Paul Daniel Gibbons. The third named defendant is a wholly owned subsidiary of the second named defendant and appears to be essentially a property holding company. There is a potential issue about which defendant may have been contractually involved with the plaintiff. Both are represented by Mr Thompson QC and Mr Lockhart, and Mr Thompson assures me that no point is to be taken about any distinction in the roles occupied by the defendants. I

propose to refer to "the defendants" when dealing with any matter which concerns one or other or both of the defendants.

[3] The third parties were, at the material time, partners in an architectural practice and the fourth third party, Mr Barry Gallagher, acted as architect for the defendants in the matter out of which the action arises.

[4] The case raises an interesting and unusual point about the contractual effect in certain circumstances of the preparation of a tender for building work.

[5] In early 2001 the defendants proposed to erect a workshop, offices and associated works at Lissue Industrial Estate West, Lisburn. They employed Mr Gallagher to act as architect for the project. A select list of builders was drawn up and those on the list were invited to submit a tender for the works and six contractors did so.

[6] The conditions of tender were set out principally in a document entitled "The Summary Schedule of Work".

[7] Under the heading "A30 Tendering/Sub-letting/Supply.
Main Contract Tendering"
paragraph 120 provides:

> "Tendering procedure will be in accordance with the principles of the Code of Procedure for single stage selective tendering 1996."

I shall refer to the Code of Procedure as "the Code."

[8] Relevant sections of the code are as follows:

> Section 2.4 "good tendering procedure demands that the contractor's tender price should not be altered without justification."
>
> Section 7.1 "As previously stated in Clause 2.4, good tendering procedure demands that a contractor's tender price should not be altered without justification. In particular the NIJCC strongly deplores any practice which seeks to reduce any tender arbitrarily where the tender has been submitted in free competition and no modification to the specification, quantity or conditions under which the work is to be executed or to be made, or to reduce tenders other than the lowest to a figure below the lowest tender."

> Section 7.2 "Should the tender under consideration exceed the employer's budget the recommended procedure is for a reduced price to be negotiated with the tenderer or based on agreed changes to the specification or the quantity of the work. The basis of negotiations in any agreement should be fully documented."
>
> Section 7.3 "Only when these negotiations fail should negotiations proceed with the next lowest tenderer. If these negotiations also fail similar action may be taken with the third lowest tenderer."

[9] The invitation to tender was addressed to the plaintiff as "the JB Group" and the tender document was submitted in that name but no point is taken in relation to the plaintiff's right to maintain the proceedings. The plaintiff submitted its tender for the works in the sum of £1,074,982.38 excluding VAT on 9 April 2001.

[10] It was the lowest tender and the architect so informed the defendants in a letter dated 13 April 2001 which I reproduce in full.

> "Tenders from 6no. Contractors were received on 9th April 2001 and opened in our offices by Mr John Mc Gowan and witnessed by Mr John Mc Bride and myself.
>
> Tenders were invited from 7no. Contractors, however only 6no. tendered as follows:
>
> | Contractors | | Tender Amount |
> |---|---|---|
> | a) | JB Group | £1, 074982.38 |
> | b) | Kylen Construction | £1, 082189.00 |
> | c) | McCallion Construction | £1,121826.77 |
> | d) | KJ McElroy Limited | £1,139500. 00 |
> | e) | Q Mac Construction | £1,146000.00 |
> | f) | Kennedy Contractors | £1,174512.00 |
>
> Messrs Mc Laughlin & Harvey declined to tender due to present pressure of workload.
>
> As you will note the sum difference between the lowest and highest tender is £99,529.62 which is considered a small differential given the size of the project.

Tender figures received would appear to reflect that a competitive tender approach has been taken by most of the Contractors.

The sum difference between the lowest and second lowest tender received is £7,206.70 and the lowest and third lowest is £46,844.40.

As discussed and agreed with John Mc Gowan 9th inst we have examined the 3no. lowest tenders.

On checking the `Priced Summary Schedule Costs' received from the three lowest tenderers, ie, JB Group, Kylen Construction and Mc Callion Construction all were found to be arithmetically correct.

On examination of the lowest Priced Summary Schedule of Costs the following observations have been noted;

1) Preliminaries priced at £69,715 is some £25,215.25 higher than the second lowest tender, although Ground works item priced at £33,594.42 by JB Group is considerably lower than Kylen Construction price of £38,884.00. Further examination is necessary on both items.

2) Although the 'Structural Steelwork' item priced at £139,480 compares favourably with McCallion Construction price of £144,440.90 it is some £14,320.00 above Kylen Construction price of £125,160.00. Further discussion is necessary on this item to clarify exactly the extent of works included.

3) The lowest tender price for item 'lining/sheathing/dry partitioning works' is £73,250.28 which is some £37,397.28 above second lowest tender and £45,653.08 above third lowest tender. This item requires further examination.

4) JB Group price for item `Surface Finishes' is £63,479.88 which is some £43,531.12 below second lowest tender price and £61,921.25 below third lowest tender price. This item requires further

examination to clarify exactly the extent of works included.

5) JB Group price for item 'External Works – Ground Finishes' is £98,934.85 which is some £64,633.85 above second lowest tender price and £38,680.00 below the price given by the third lowest tenderer. This item requires further detailed examination.

6) JB Group price for item 'External Works - fencing, gates' is £29,178.05 which compares favourably with second lowest price of £34,938.00, but is considerably lower than the third lowest price of £79,057.58. This item requires further detailed examination.

It should also be noted that the second lowest tender from Kylen Construction would appear to have 'front loaded' the Preliminaries and Groundwork item.

Therefore and having fully considered the information received we would recommend that further detailed discussion take place as soon as possible with only the lowest tenderer Messrs JB Group. The Contractor will be expected to produce for this meeting his 'Detailed Breakdown Schedule of Costs' which should be forwarded to both yourselves and ourselves, for examination prior to scheduled meeting.

Please advise if you are in agreement with our recommendation as soon as possible."

[11] On 24 April 2001 a series of meetings took place at the request of Mr Gibbons with each of the three lowest tenderers at which they were invited to reduce their tender price. Mr Bleeks, on behalf of the plaintiff refused, but Kylen Construction agreed to reduce its price by £25,000 and was awarded the contract.

[12] Mr Bleeks described what happened after the plaintiff submitted its tender. He received a telephone call a few days after the tender and Mr Gallagher told him that no decision had yet been made and the arrangement was that Mr Bleeks would ring back in a few days time.

[13] When Mr Bleeks did so he was told that the tenders had been opened; they were close in amount, the plaintiff was the lowest tenderer and that Mr Gallagher would be recommending the plaintiff to be awarded the contract.

[14] The next contact with Mr Gallagher was a fax message asking the plaintiff to attend a meeting at offices in Lisburn beside the site. Mr Bleeks telephoned Mr Gallagher to discuss the meeting. He described himself as "miffed" because the meeting had been asked for; he just wanted to clarify a few details of what the meeting was going to involve.

[15] He was told that the client, Mr Gibbons on behalf of the defendants had asked for the three lowest tenderers to attend the meeting. Mr Bleeks said that he "would have said `sure we are the lowest tenderers'". Mr Gallagher said "as I told you before my recommendation is that you get the job but the client has requested a meeting of the three lowest tenderers". Mr Bleeks said he probably agreed reluctantly that he would go to the meeting.

[16] According to Mr Bleeks the meeting consisted of fairly routine discussions about the identity of the individuals who would be concerned in the work and no difficulty arose until the end of the meeting when, as he put it, the purpose of the meeting became clear and Mr Gibbons asked for a reduction in price. Mr Bleeks said he was a bit confused and taken aback. This was not a normal procedure; his firm had expended a considerable amount in tendering and there was no point in pricing the job in such circumstances. He said:

> "You are not in a position to start to horse deal. There was no way, since I had put the effort into the price. My proposition was to reduce the specification but he said "no", the reduction in price was wanted for what had been priced for.
>
> This was point blank refused. I said at least three times I would not reduce the price. I was told that there was a 5pm deadline."

[17] Mr Bleeks said he would not have tendered if he had known that he would be asked to reduce his price. He later spoke to Mr Gallagher who told him that they had until 5 o'clock and he was still waiting for his instructions. The next time they were in touch Mr Gallagher made it clear that another contractor had reduced its price to below the plaintiff's and he, Mr Gallagher, was reluctantly employing the other person. He said to Mr Bleeks "I know you have been treated badly but that was the way it was done" and told him that he would have recommended the plaintiff to be granted the contract.

[18] There was no mention of budget at all in these discussions. He said it was not uncommon to be told that a price was over budget and the architect would then reduce the specification to reduce the price but this would never be done with three tenderers involved.

[19] He had thought that Edina was the contract client but Armoura Limited appear on documentation which appeared later.

[20] Mr Paul Daniel Gibbons effectively trades through the medium of the defendants in the manufacture of power generation equipment.

[21] His description of the meeting is that Mr Bleeks arrived at about 9.30 and after the usual introductions Mr Gallagher had a list of questions based on the tender submission. It took some time to go through these matters including issues about sub-contractors, staff, insurance, a bond, previous projects the plaintiff had been involved in and their ability to start the job quickly. He said that Mr Gallagher asked for more detailed information and he took the view that Mr Bleeks made a very negative response for someone looking to take up a job of that nature. As to the prospect that he was prepared to adjust price it was clear that he was not going to go back on his figures. He was asked if there was a possibility that Mr Bleeks might have said that he was prepared to reduce his figure if the specification was reduced and he replied: "He might have made a comment like that I didn't pick up that he spoke about reducing specification."

[22] Mr Gibbons indicated that he believed that he did use the word budget and told Mr Bleeks that they were over budget and could Mr Bleeks see what they could do.

[23] Mr Gibbons had not known that Mr Bleeks knew that he was the lowest tenderer at that time. He took the view that the fact that Mr Bleeks knew that was like playing poker with your opponent knowing what your hand is. He had only heard it for the first time at the trial. He did not have the impression that Mr Gallagher had said that he recommended the plaintiff. This remark is supported by the communication from Mr Gallagher to Mr Gibbons dated 03 October 2001.

[24] Mr Gibbons did not like Mr Bleeks's attitude; he was not prepared even to give a comparatively small discount to make sure that he would secure the job. He had a discussion with Mr Gallagher and thought it was going to be a tough day if the other two meetings were on the same lines.

[25] In considering what took place at the meeting I prefer Mr Bleeks's evidence to that of Mr Gibbons on the points upon which they differ.

[26] Mr Bleeks struck me as being a meticulously honest and accurate witness.

[27] I accept that Mr Gibbons is a reliable business man but took the view that as a witness he was prepared to say what suited his case rather than to state his accurate recollection.

[28] I am satisfied therefore that Mr Bleeks did offer to reduce his price if his specification was reduced and that he was not told that the reduction in price was related to budgetary constraints on the part of the defendants. He knew that he was the lowest bidder but it is not clear whether this was mentioned at the meeting.

[29] I am satisfied that the interviews, once the preliminary matters had been disposed of, were purely with the objective of playing one contractor off against the other and trying to force a reduction in price.

[30] Mr Gibbons attempted to present himself as someone quite inexperienced in matters relating to building, especially of commercial properties, but it is quite clear that he was prepared to take a leading part in negotiating the conditions under which the tenders would be re-negotiated and I also note that he was prepared to act as mechanical and electrical engineer in the project. I assess him to be an experienced businessman of considerable acumen and grasp of business issues who had no difficulty in appreciating the simple issues involved in deciding how to select the appropriate tender.

[31] One small matter helps to illustrate his attitude, in that he said in his evidence that he was completely reliant on Mr Gallagher to lead him through all the stages of the project.

[32] However he admits that Mr Gallagher recommended to him that he should employ a quantity surveyor. It is quite clear that he rejected that advice, apparently on financial considerations. There may well have been discussions between him and Mr Gallagher, but there is no doubt that Mr Gibbons's view prevailed. The penultimate paragraph of Mr Gallagher's letter of 13 April 2001 contains a recommendation that further discussion should take place with only the lowest tenderer, advice which was obviously not followed.

[33] If the provision incorporating the Code is a binding one then it is not relevant that the price might have been above Mr Gibbon's original budget figure, since it would have been contrary to the principles of the Code to attempt to negotiate a lower contract figure on the basis of the original specification.

[34] On behalf of the plaintiff it is argued that the plaintiff and the defendants entered into an agreement the effect of which was that the tendering procedure would conform with the principles of the Code in consideration of the plaintiff devoting time and expense to preparing a tender for the construction works.

[35] The effect of the "privilege" clause establishing the right of the defendants to refuse any or all tenders is acknowledged as is the situation that the employer and his representatives offered no guarantee that the lowest or any tender would be accepted or recommended for acceptance.

[36] However it is argued on behalf of the plaintiff that under the Code this does not go beyond empowering the employer to accept or reject any or all of the tenders and does not permit him except in circumstances in which the code permits renegotiation to renegotiate the tendered price.

[37] The defendants made no formal concessions as to whether there was in fact a tendering contract in existence but made a number of observations more particularly relevant to the third party proceedings to the following effect;

(i) that the Code itself does not state that it is merely advisory;

(ii) that the terms are not ambiguous;

(iii) that the Code was incorporated into the tender documents;

(iv) the interpretation of a contract is a matter to be approached objectively. The cardinal presumption is that the parties have intended what they have in fact said so that their word(s) must be construed as they stand;

(v) it is a novel concept to argue that the terms have no binding effect and are only advisory because that is the view taken by practitioners the Code would then be meaningless; and

(vi) the proposition that claims might be brought by dissatisfied tenderers against private parties in the law of contract is regarded as a possibility although not discussed in keeping on building contracts. The argument that a tendering contract is outside the ambit of the common law is not found in the relevant authorities.

Their case was further developed by the following submissions:

1. The issue for the defendant is straightforward. Either a tendering contract did not exist in which case the tender submission by the plaintiff was a mere invitation to treat and the action must fail or

alternatively there was a contract in which case the defendant was wholly reliant upon the advice of the Third party to guide him through the implications of the tender process. No evidence has been given by the Third Party or his witnesses which underlines or contradicts the defendant's fundamental contention that he was wholly reliant for guidance in the tendering process on the Third Party.

2. The defendant makes no concessions as to whether there was in fact a tendering contract in existence.

[38] The first issue is whether the clause already referred to which provides that tendering procedure would be in accordance with the principles of the Code has the effect of creating a contractual obligation on the defendants to comply with those principles and in particular those already set out in this judgment.

[39] The code itself does not have legal effect and if not specifically incorporated into the tendering process its recommendations would not be binding upon the parties. Had paragraph 120 not been included in the Summary Schedule of Work then the task of the plaintiff would obviously have been a great deal more difficult and the result of the proceedings might also have been entirely different.

[40] It is clear as illustrated by the case of Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council [1990] 1 WLR 1195 that a collateral contract can exist between a tenderer and an employer.

[41] In that case a local authority had sent out invitations to tender for the renewal of a concession to operate pleasure flights from the local airport. The form of tenders stated that they did not bind themselves to accept any tender and also that no tender received after the specified date and time would be admitted for consideration. The existing concessionaires delivered their tender on time by hand but there was a failure to clear the letterbox by the town clerk's staff so that their tender was not considered in time and the council in fact accepted a tender lower than that of the plaintiffs who claim damages for breach of contract and also allege the duty of care in tort. It was held by the Court of Appeal affirming the judge on a preliminary point that although the form of tender did not explicitly state that timely and conforming tenders would be considered, and although contracts were not to be lightly implied, there had been a clear intention to create a contractual obligation on the council to consider the plaintiff's tender in conjunction with other conforming tenders and that the council were in principle contractually liable to the plaintiffs.

[42] It is necessary therefore to consider the implications of Clause 120, the first issue being what is contemplated by the expression "tendering procedure".

[43] In my view the term "tendering procedure" embraces the entire process of the tender and the way in which it was dealt with by the employer up to the point of acceptance or abandonment.

[44] I am fortified in this view by the remarks of Earl CJ in AG v Sillem [1863] 2 H&C 431 at 627 in relation to the significance of the word "procedure" in matters of practice:

> "I would premise that procedure in a suit includes the whole course of practice, from the issuing of the first process by which the suitors are brought before the court to the execution of the last process on the final judgment; and … `procedure' is used as equivalent to `process, practice and mode of pleading'."

[45] Procedure therefore cannot be limited to the preparation of the tender but must also include its consideration and the final decision made upon it by the employer.

[46] I must also consider the significance of the phrase "in accordance with the principles of". It appears to me that this expression implies that the code of procedure need not be followed to the letter in every respect so long as its principles are respected.

[47] In my view Clause 7[1] of the Code lays down a clear principle which declares that it is a deplorable practice to seek to reduce any tender arbitrarily where the tender has been submitted in free competition and no modifications to the specification quantity or conditions under which the work is to be executed are to be made or to reduce tenders other than the lowest to a figure below the lowest tender.

[48] It is obvious that a tenderer who is not the lowest tenderer has a strong incentive to reduce his price below that of the lowest tenderer if invited to do so and if he believes that this may make the difference between his being awarded the contract and not being awarded it. In my view therefore the action of Mr Gibbons acting on behalf of the defendants was a clear breach of the principles of tendering procedure laid down in the code.

[49] Mr Bowsher for the Third Parties submitted a number of points towards rebutting the plaintiff's case against the defendants;

(i) where parties have not expressed their agreement to enter into any contract a party asserting the existence of a contract to be implied

between the parties must prove that that implication is necessary to give effect to the intention of the parties.

This case does not turn on the issue of implying a term or a contract but of determining the meaning and effect of a specific term contained in the contract.

(ii) such contracts have only hitherto been found in tendering situations were the party seeking tenders is a public body. In the absence of that public element or some other special facts there is not necessity for the contract to be implied. There is no authority for incorporation of any tendering Code as a term or terms of such a contract.

Incorporation in this case of the tendering Code does not rely on authority or implication but on the clear words of the agreement between the parties; moreover while there may be a statutory distinction in the position of a public body and a private employer the common law recognises no such distinction;

(iii) if any contract were to be implied in this case the only limited obligation imposed by it would be an obligation upon the parties seeking tenders to open and consider tenders that have been received in accordance with the specified requirements of the invitation to tender;

This proposition relies on the supposition that a term has to be implied into the tendering procedure which was the position in Blackpool and Fylde Aero Club v Blackpool Borough Council (supra); however in this case no question of implication arises;

(iv) even if any contract were to be implied the purchaser, whichever defendant that may be, cannot be obliged to award a contract to any particular tenderer;

I accept this submission but take the view that had the defendants adhered to the terms of the Code the plaintiff was virtually certain to be awarded the contract;

(v) even if there is some obligation which the defendants have breached the defendants are entitled to render the minimum performance and there is at the very least therefore irrefutable presumption that damages are to be measured by reference to the least costly course of action open to the defendants. The defendants liability for such costs is in any event excluded by the express terms.

In my view if the defendants' were in breach of contract that entitles the plaintiff to recover both his outlay in preparing the tender in the expectation that the Code would be complied with and the profit of which he has been deprived by reason of the defendants' breach of contract .

[50] My conclusion is that there was a binding contract to the effect that the principles of the code would be applied and that therefore while there was no obligation on the defendants to accept the lowest tender they bound themselves to accept either no tender at all of those submitted or one at the price at which it was submitted subject to the possibility of reduction in circumstance contemplated by the Code.

[51] I find it helpful to refer to the concurring remarks of Nolan LJ in Fairclough Building Limited v Borough Council of Port Talbot ,[Building Law Reports] [1993] Vol. 62 at p. 94 :

> "A tenderer is always at risk of having his tender rejected either on its intrinsic merits or on the ground of some disqualifying factor personal to the tenderer. Provided that the ground of rejection does not conflict with some binding undertaking or representation previously given by the customer to the tenderer the latter cannot complain. It is not sufficient for him to say however understandably that he regards the ground of rejection as unreasonable."

The arrangement in the present case falls firmly within the provision mentioned by Nolan LJ, in that a binding undertaking or representation was given by the defendants to the plaintiff that the tendering procedure would be conducted in accordance with the principles of the Code.

[52] I therefore hold that by entering into a process of negotiation by which tenderers were invited to reduce their tenders and awarding the contract to the second lowest tenderer at his reduced price the defendants were in breach of contract and that the plaintiff is entitled to recover damages.

[53] The defendants seek contribution or indemnity from the third parties on the basis that Mr Gallagher was the expert in preparing the contract documents and in advising Mr Gibbons how to respond to the tenders. The defendants claim against the third parties to be indemnified against the plaintiff's claim on the grounds that at all times material to the action the third parties were retained as professional architects for consideration to advise and inform and guide the defendants in the pre-tender and pre-contract process and the third parties prepared all relevant documents and materials necessary for the tendering and contract process and conducted the tender and contract process on behalf of the defendant and that accordingly if

the plaintiff has suffered the alleged or any loss or damage that was caused by the negligence and breach of contract of the third parties in and about the provision of advice and professional services as architects to the defendant and in an about the conduct of the pre-tender tender, pre-contract and contract procedures.

[54] The particulars of negligence and breach of contract alleged are as follows:

(a) causing or permitting the tender in respect of the said works to be subject to the principles of the Code of Procedure for single stage selective tendering 1996 here and after referred to as "the Code";

(b) failing to seek and secure the authority of the defendants or either of them to the inclusion of the said Code in the tender process;

(c) failing to advise or inform the defendants or either of them of the inclusion of said Code in the tender process and failing to advise and inform the defendants or either of them their servants or agents as to the implications, consequences or potential liabilities of the defendants by the inclusion of the said Code in the tender process;

(d) if the defendants or either of them were obliged to accept the tender of the plaintiff, failing to so advise the defendants or either of them adequately, in time or at all;

(e) causing or permitting the defendants or either of them to accept a tender in breach of the said Code;

(f) advising the first named defendant and its servants and agents that the said Code was not applicable to the tender or contract process; and

(g) failing to take any or adequate precautions and failing to advise, inform and conduct business on behalf of the first or second defendants or either of them in a proper manner so as to avoid and prevent the defendants' exposure to litigation.

[55] Mr Gibbons on behalf of the defendants said in evidence that when the prices came in he would have expected them to be better than those actually tendered and suggested that they should meet the three lowest tenderers to discuss the tenders with them. He said that Mr Gallagher's reaction was that he made no kind of real response but suggested "that might be the best way of going forward".

[56] Mr Gibbons was saying to Mr Gallagher that he was unhappy with the prices starting out so high. He said they had a discussion and the feeling was that "there might be a bit of fat in the prices".

[57] . The meetings with tenderers all took place on the same day. Mr Gallagher had arranged the order. Mr Bleeks was first.

[58] Mr Gallagher had not told him about the phone calls in connection with the tendering process and the first he had heard of the call to Mr Bleeks was when he heard of it in evidence.

[59] At first the witness did not know anything about any of the contractors. Mr Gallagher gave him a brief outline and told him that their prices were quite close and that they should be able to get someone out of the three of them.

[60] They did discuss the strategy. Mr Gallagher would deal with the technical issues and he would say could they improve or have a look at their price for the project.

[61] He then described the discussion with Mr Bleeks that I have set out earlier.

[62] Mr Gibbons made the point that he had never been involved in a substantial commercial building enterprise before, the only building experience he had was in building a private house.

[63] He said that Mr Gallagher advised him to have a quantity surveyor but at the end of a discussion between them he decided not to have one. They discussed the need for one and the decision made was that it was desirable but not required. Mr Gallagher said that because it was a fixed price contract they could do without a quantity surveyor.

[64] He had made a very simple calculation on a price per square foot basis and came to a figure of between £900,000 and £1,000,000 sterling.

[65] In cross-examination he said that if Mr Gallagher had said that there was a procedure under the Code and "we were not supposed to do that" ie to bargain with the tenderers:

> "I don't think I'd have had the meeting. I'd have had to take his advice. I don't think I'd just accept that. I'd probably have asked him a few more questions. I would still have tried for reduction. I think if he'd told me we would probably have discussed other options. I'd have asked him what other options we

> had. Reducing specification was an option. Mr Gallagher said no to a reduction in specification. I went ahead with the guidance of Mr Gallagher throughout."

Later Mr Gibbons said:

> "If I'd known my bargaining position was reduced I would not have gone into the meeting and if I'd known the Code applied I would not have held the three meetings."

[66] On behalf of the third parties the main point advanced against the defendant's case was that no finding of negligence can properly be made against a professional unless that person has failed to exercise the skill and care of a person professing to have the relevant special skill. No such finding should normally be made unless there is evidence from someone active in the same field giving expert evidence as to what the requisite standard is and the respect in which the profession has fallen short of that standard. The third parties also rely on the express terms of the Code as to the reasonable expectations of an architect as to the consequences of the application of the Code.

[67] Mr Gibbons said that when he received the letter from the plaintiffs he rang Mr Gallagher and copied the letter to him; the latter said he would draft a letter as they would have to respond to it. He was not sure how to respond, his response simply consisted of repeating word for word what Mr Gallagher had given him. He did not check; he assumed Mr Gallagher knew better than he did. He commented "I would have been on the back foot if I thought Mr Bleeks knew that he was the lowest bidder."

[68] The witness referred to a letter dated 5 October 2001 sent by his firm Edina in answer to the plaintiffs claim which I set out below:

> "We acknowledge receipt of your letter dated 27th September 2001 and refute allegations contained therein.
>
> Tenders were not stated as being sought in accordance with NICC Code of Procedure. Returned tenders were above our construction budget for the project. Contractors were requested to reconsider their tender and re-submit best offer for the works. You will recall that you declined this invitation to reconsider your tender.

> In the circumstances, we must consider this matter now closed."

This letter had been drafted by Mr Gallagher.

[69] The defendants' submissions in the third party proceedings were as follows:

> Are there any circumstances in which it could be held that the defendant had a liability to the plaintiff and that the Third party had no liability to the defendant? It is submitted that it would be entirely unjust if the Third Party were somehow able to avoid responsibility in a situation where he drew up the tendering contract and advised the defendant throughout the process.
>
> The evidence of Mr Vipond on behalf of the Third Party was that an ordinary competent architect would not necessarily advise his client that the tender was subject to the provisions of the NJCC Code and further that he believed the Code to be merely advisory and not legally binding. This is essentially an attempt to introduce the *Bolam* test.
>
> It has to be remembered that there is in any event ample evidence of negligence and breach of duty by the Third Party in this case. The matters alluded to below were accepted by Mr Vipond as matters which an ordinary competent architect should have considered:
>
> (i) The failure to even understand that the NJCC Rules which had been introduced by the Third party were applicable to the invitation to tender.
>
> (ii) The failure to advise the defendant that any attempt to revise the tender price without a corresponding change in the specification was in breach of the NJCC Rules.
>
> (iii) The failure to inform the defendant that the Third party had already instructed the plaintiff that he was the lowest tender.
>
> A finding of negligence may be made notwithstanding expert evidence in support of the Third Party's conduct. The exercise of judgment involved in deciding whether the Third party was negligent or in breach of duty does not of itself require any special architectural skills. The trial Judge does not have to "get under the skin of a different profession" in order to assess whether or not the Third Party has failed to use reasonable skill and care. *Michael Hyde and Associates Limited v JD Williams and Co Ltd 2001 PNLR 233 CA*.

> When an architect agrees to act in some field of activity commonly carried on by architects in which a knowledge and understanding of certain principles of law are required and if the clients interest is to be protected the architect must have a sufficient knowledge of those principles of law in order to reasonably protect his client from danger and loss. *BL Holdings Ltd v Robert J Wood and Partners 1978 10 BLR.48*
>
> In many particular cases a professional man engaging in such work would have and display a sufficient knowledge of the relevant principles of law by knowing and by advising his client that he knows little or nothing of them and by refusing to incur expense on behalf of his client to expose him to risk of financial loss until his client had obtained legal advice or decided to act upon his own judgment. *B.L Holdings Ltd supra*
>
> There is clear evidence that the defendant had no experience of industrial construction or competitive tendering. He was wholly reliant on the architect for advice on how best to proceed. If the architect had been in the position of employer he would clearly have been in breach of his professional standards and ethics in engaging in any form of "Dutch auction" having regard to the provisions of the NJCC Rules. The ordinary competent professional architect would be expected to warn a client that a particular course of action breached the NJCC Code. In this case, but for the failure of the Third party to so warn the client the "Dutch Auction" proceeded. Had the defendant been warned of the breach of the Code his uncontroverted evidence is that he would not have had the meeting at all.

[70] The expert witnesses are in agreement that the course taken by the defendants was in breach of the terms and spirit of the Code. In those circumstances an assessment of the duty to be imposed upon the third party must be considered.

[71] Commensurate with his professional standing Mr Gallagher should, when the question of dealing with the tenders arose, have warned Mr Gibbons that the Code applied and that his proposed negotiations were in breach of its principles and were to be deplored and he should have taken a stand against the course proposed by Mr Gibbons; he failed to uphold the highest standards of his profession by allowing Mr Gibbons to engage in the procedure which he did if he did so without protest. It is immaterial whether it may be said that the duty arises in contract or in tort. It was irrelevant whether he told him that Mr Bleeks knew that his was the lowest tender.

[72] The question arises therefore as to what further advice Mr Gallagher should have given the defendants through Mr Gibbons. Should he have advised that the course taken by Mr Gibbons might amount to a breach of contract and result in successful litigation against Mr Gibbons?

[73] It is a matter for speculation as to what the best advice from a purely financial standpoint might have been if one had a client set upon negotiating a reduction who was unconcerned with the proprieties. At that point it was not possible to forecast whether the plaintiff might agree to reduce its price with a subsequent saving to the defendants and little risk of litigation from the higher tenderers. If Mr Bleekes had not been so resolute the defendants might have made a substantial saving.

[74] The question therefore arises as to whether Mr Gallagher could have been expected to know that the conduct being engaged in by Mr Gibbons was liable to prove to be a breach of contract.

[75] The law set out in Charlesworth and Percy on Negligence 8th Edition, para 8/42 "Architects, surveyors and engineers are expected to have a practical working knowledge of the law relating to their professions, which is sufficient to enable them to perform their duties adequately."

[76] Should Mr Gallagher have known therefore that Mr Gibbons was in danger of facing successful breach of contract proceedings?

[77] I had the benefit of considering quite a volume of evidence from architectural experts on this issue. In the circumstances of this case it must be considered in the light of the passage from the judgement of Oliver J in Midland Bank Trust Company Ltd v. Hett, Stubbs @ Kemp [1979] 1 Ch 384 at 402:

> "The extent of the legal duty in any given situation must, I think, be a matter for the court. Clearly, if there is some kind of practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he might have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendants, is of little assistance to the court, whilst evidence of the witnesses' view of what, as a matter of law, the solicitor's duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the court's function to decide ."

[78] It is therefore of no real value to hear the action that another architect might have taken if placed in the position of Mr Gallagher especially if that course of action is said to be based on professional standards rather than legal obligation.

[79] An expert witness report was prepared by Mr John James Reid of Robinson McIlwaine Chartered Architects on 21 October 2005. Mr Reid is a Chartered Architect with over 20 years experience in the design and procurement of buildings involving tendering procedures and he has had a significant involvement on the council of the Royal Society of Ulster Architects, including acting as vice-president. He has been involved in providing expert witness opinion for some 6 years. He is obviously an impressively knowledgeable member of the architectural profession. He has considered the papers with great care and attention and has concluded categorically that no contract existed between the plaintiff and the defendants.

[80] Mr Paul R Vipond who has considerable experience in litigation and forensic work and holds an MSC in Construction Law and Arbitration with merit as well as many other qualifications took the view that a reasonably competent architect would conclude that the code was advisory in nature only.

[81] On 20th November 2005 the two experts agreed a minute in respect of architectural matters arising in the case and in particular agreed the following matters

> 24.0 The experts consider that the decision to use the NJCC Code was purely that of the third parties. It is agreed that the third parties had no duty to advise the 1st defendant that the Code was to be referred to in the tender documents or to seek approval so to do.
>
> 25.0 Mr Reid considers that there was a duty to warn the 1st defendant that there might be implications in departing from the Code.
>
> 26.0 By its incorporation into the tender documents Mr Reid is of the opinion that the status of the Code was "strengthened" from "advisory" to something more. This is a legal point outside the expertise of an architect.
>
> 27.0 Although it is a matter for legal expertise it is the opinion of the experts that, notwithstanding any lack in the use of the Code, a competent architect would not be in a position to advise that the procedure followed by the 1st defendant would give rise to any legal liabilities between the plaintiff and the 1st defendant.

[82] In the face of this agreement it is impossible for me to come to the conclusion that Mr Gallagher, dealing with a rapidly developing situation, could have been expected to take the view that he should advise his client that a contractual element had been introduced into the tendering procedure by the adoption of the code.

[83] That very issue is live in these proceedings and has not been conceded by the defendants. Exercising my own judgement in the matter I would take the view that a competent architect could not have been expected to be able to form a view on such a debatable point of law.

[84] I conclude therefore that a competent architect would not have been aware that he should advise his client that an action for breach of contract was a likely consequence if the client followed the course taken by Mr Gibbons.

[85] If the advice was that the principles of the Code were not being complied with but no advice was given on the legal consequences what would have been the effect of such advice in this case?

[86] In Bolam v. Friern Hospital Committee [1957] 1 WLR 582 McNair J, in what is regarded as a classic exposition of the law, directed the jury in the following terms on the issue of a doctor's duty to warn a patient of the dangers involved in a particular course of treatment :

> "There are two questions that you have to consider. First—does good medical practice require that a warning should be given to a patient before he is submitted to electro-convulsive therapy? Secondly---- if a warning had been given, what difference would it have made? Are you satisfied that the plaintiff would have said: "You tell me what the risks are. I won't take those risks. I prefer not to have the treatment ."

[87] In my view the same consideration applies to the present case in which it is alleged that Mr Gallagher should have warned or dissuaded Mr Gibbons from pursuing his chosen course. The defendants must therefore prove that if they had received the advice that Mr Gallagher should have provided they would not have engaged in the negotiations to obtain lower figures.

[88] Although as against the third parties Mr Gibbons' evidence is uncontroverted I do observe other matters including the fact that Mr Gibbons overrode Mr Gallagher's suggestion that a quantity surveyor should be employed. I also note that in the letter of 13 April 2001 Mr Gallagher recommended that further detailed discussions should take place as soon as possible with only the lowest tenderer "Messrs J B Group". Clearly therefore

Mr Gibbons did not in all matters simply accept without question the advice or recommendation of Mr Gallagher.

[89] Having assessed Mr Gibbons's evidence and demeanour in the witness box I am satisfied that at the post-tender stage he was determined to engage in a battle of wits to force the price down as low as he could and that he was unconcerned by the propriety of the situation or the extent to which his actions might have complied with professional or trade standards.

[90] To my mind, apart from the application of the Code to the procedure involved in trying to get the tenderers to reduce their prices, and adopting the reference to poker made by Mr Gibbons, to have asked the lowest tenderer to reduce his quotation without informing him that he was the lowest tenderer would be akin to requiring him to play poker without seeing his own hand. Each tenderer had already calculated his lowest price in competition with other contractors without knowing their prices; it is unfair and to my mind obviously so even to someone with no experience of the process to require the lowest tenderer to further lower his price without being aware that he has tendered the lowest figure. So far as I am concerned Mr Gibbons's reference to poker was a significant one and I have no doubt that he saw the situation as simply a battle of wits in which he could produce a substantial saving for his firm without any consideration of ethics or fairness.

[91] The issue of the exact nature of the advice that would have deterred Mr Gibbons from negotiating a reduced figure on the tenders was not robustly addressed by either party. This is not surprising, since neither party directly advanced the proposition that Mr Gallagher should have given some advice discouraging Mr Gibbons, but falling short of advice on the contractual consequences

[92] The onus of proof is on the defendants to prove that Mr Gibbons would have changed course if he had received the advice which as a matter of his duties under the contract Mr Gallagher should have given him. Mr Gibbons's evidence did not satisfy me that if warned that his actions were strongly discouraged by the Code but not that he risked a finding of breach of contract he would have desisted. I have already quoted his remarks on this point. He said inter alia that he would still have tried for reduction. This is despite the fact that he has had ample time to understand the issues. He did not , to my mind, address what his attitude would have been if told that his action was ethically questionable or contrary to architectural professional standards. Mr Gibbons was not asked to distinguish between his attitude to a warning that he was in breach of the Code without any contractual implications and one in which he was warned of legal consequences. Neither of his remarks "knowing that the Code applied" or "that we were not supposed to do that" amounts to a clear statement that knowledge of the

impropriety without knowledge of the legal consequences would have affected Mr Gibbons's actions.

[93] I am not satisfied that if Mr Gallagher had given him the kind of professional advice that is suggested as appropriate by the expert witnesses that such advice would have had any effect whatsoever. I am not satisfied that if told that the Code applied or that the tender process required as a matter of proper procedure that the Code be observed Mr Gibbons would have been deflected from the course he took.

[94] I am satisfied also, having observed Mr Gibbons give evidence and considered his evidence carefully, that he would not have been deterred from following the course he did by being advised that it was a questionable or deplorable practice or placed Mr Gallagher in an untenable professional situation. As a matter of commercial caution he would probably have declined to try to reduce the amount of the tenders if advised that an undercut lowest tenderer would be likely to have a valid claim for breach of contract, but in my judgement he would not have been deterred by advice that the Code applied and that his conduct was "deplorable" according to the principles of the Code.

[95] During his evidence, at a time when he must have had some understanding of the principles of the Code and when he had an opportunity of declaring what he would have done if Mr Gallagher had advised him of the application of the Code but not of its legal effect he did not satisfy me that that fact would have deterred him from following that course. His demeanour and attitude displayed no sign of recognition that his conduct might be regarded as less than commendable, even in the absence of the Code or any sense of regret that he might not have observed the provisions of the Code. It is significant that he should show regret that Mr Bleeks should have been informed that his was the lowest tender, a matter which was only of relevance to the outcome of the negotiations, which by this stage he should know was contrary to the Code. I am not satisfied that if warned that he was in breach of the Code but not that he was in breach of contract his actions would have been different.

[96] It appears to me that Mr Gallagher's situation was a difficult one. He set out the proper course to follow in his letter of 13 April 2001. It may show some lack of character that he was prepared to associate himself with what occurred at the subsequent meetings with the three lowest tenderers but he was clearly in a dilemma. However any sympathy for his position fades in the light of the e-mail he sent on 3 October 2001 to Mr Gibbons in the following terms:

"Hello Paul

Tried to reach you but unsuccessfully. Spoke briefly to John McGowan regarding above.

Having carefully considered the contents of JB Group letter his dispute appears to hinge on the "N.J.C.C. Code of Procedure for Tendering." Therefore in consideration this is the important part of his letter.

Having discussed the matter with an experienced Quantity Surveyor friend following checking of all tender documents issued by us (obviously neither Employer or Contractor names were mentioned in the interest of confidentiality) no mention was made of N.J.C.C. Tendering Rules Procedure in any of our documents other than in the Summary Schedule of Works page 18 which briefly relates to "Subletting" but this relates to the Contract not Tendering Procedures.

In all we did not seek tenders using N.J.C.C Rules but simply requested a Fixed Price for the works.

When Tenders were received all were over your budget. You then considered the three lowest tenders and invited all three to a meeting to request their consideration of submitted tender and offer of any improvement to same. The Contractor in question stated that there would be no improvement to his tender.

Therefore in examination of JB Group letter the following is not a true reflection of events;

1. The Tender was not covered by the N.J.C.C. Rules.

2. He was not informed he was the lowest he was informed that his tender was under consideration.

3. If he assumed that he was being awarded the job he should not have done so as the project tenders were still under employer consideration and therefore still in tender procedure.

4. When asked to attend the meeting this was done as all tenders were over budget and he was told that two other contractors were also being asked to attend similar meeting (bearing in mind that unless these meetings had some positive outcome rejection of all tenders may have occurred). At this meeting he was not asked to revise his price but informed that as all tenders were over budget his re-consideration of his tender would be appreciated with a view to improving his offer if possible. The other two tender's were informed in exactly the same manner. Therefore in reality the matter was handled by you with a fairness and equality. Also no one was informed of tender amounts.

5. His suggestion that because he declined to revise his offer he was declared unsuccessful is untrue as a response was awaited from the other two at that stage and the out-come was unknown by all.

Therefore in consideration of all we would recommend that you respond and in the following manner which hopefully will put the matter to rest.

We acknowledge receipt of your letter dated 27th September 2001 and refute allegations contained therein.

Tenders were not stated as being sought in accordance with N.J.C.C. Code of Procedure.

Returned tenders were above our construction budget for the project.

Contractor's were requested to reconsider their tender and re-submit best offer for the works.

You will recall that you declined this invitation to reconsider your tender.

In the circumstances we must consider this matter now closed.

Paul this responds but hopefully the brief explanation will clarify his mis-understanding and shut the door to his allegations.

Please give me a ring to discuss.

Best Regards

Barry"

That account does Mr Gallagher no credit especially the sentences numbered 1 and 2. However it does not affect the legal position.

[97] It is not to Mr Gallagher's credit that he did continue with the project but he may well have felt that the bargaining process was inevitable anyway, irrespective of the course of action taken by him, especially if he did not believe that there was any question of breach of contract and that it was otherwise in the interests of his client for him to continue in his role as architect.

[98] It appears to me that it would have been very difficult for him to have contradicted his client during the course of the post-tender discussions.

[99] Mr Gallagher has not given evidence and Mr Gibbons account of what transpired between them is uncontroverted but I have had sufficient opportunity in the course of the proceedings to assess Mr Gibbons's role. I have no doubt that it was a dominant one; he it was who conducted the negotiations for reduction which he likened to a poker game. Mr Gallagher's position was subordinate during the course of those negotiations.

[100] Having regard to the unusual nature of the point at issue and the clear views expressed by the expert witnesses for both the defendant and the third party I am satisfied that a competent architect would not have felt in a position to advise a client taking the course which Mr Gibbons did that he was liable to answer in breach of contract for that course of action. I am not satisfied that any advice based on the propriety of the course decided upon by Mr Gibbons would have deterred him and accordingly I dismiss the third party proceedings.

[101] Evidence of the estimated loss by the plaintiff was provided by Mr W J Ferguson Bell. He has calculated that the cost of formulating the tender was £6,530. This figure has not been seriously challenged. I accept Mr Bleeks's evidence that he would not have formulated a tender if he had known that the bargaining process was going to be engaged upon. Accordingly I regard the cost of tendering as being part of the loss caused by the Defendants' breach of contract and I accept the figure of £6,530 as being the appropriate measure of damages under this head.

[102] I am satisfied as a matter of high probability that if the defendants had observed the Code the plaintiff would have been awarded the contract. Mr Gibbons has given evidence that he had no objection to any tenderer, and

while he may have been disappointed with Mr Bleeks's attitude at their meeting, it must be borne in mind that the attitude was largely a response to the suggestion that he should reduce the tendered price. I am not impressed by Mr Gibbons's suggestion that Mr Bleeks's answers in the earlier discussions were in any way unsatisfactory. My conclusion is that the conduct of the defendants deprived the plaintiff of the opportunity of obtaining the contract. Issues of the value of loss of a chance or opportunity arise where it is not possible to conclude with any degree of probability what is the likelihood of the chance being realised. However in this case the contest was completed and the plaintiff had submitted the lowest tender. There is no circumstance to suggest that there could have been any objection to the plaintiffs' right to be awarded the contract and there is no evidence that there is any likelihood that any of the other contractors would have been awarded the contract at their original tender figures therefore the issue of damages is comparatively clear.

[103] I see no reason to make any discount for the possibility that it would not have been awarded the contract and therefore I award as damages the loss incurred by the plaintiff by reason of its failure to obtain the contract without making any allowance for that possibility.

[104] Mr Stephens, on behalf of the plaintiff has suggested that the appropriate sum for damages for the loss of profits claim is the sum of £161,247. This appears to be reasonable on the assumption that the plaintiff would have been able to complete the contract as well as all other contracts continued or commenced during its course.

[105] Having heard Mr Bleeks's evidence I am satisfied that the plaintiff's operation is a very flexible one and that taking this contract would not have inhibited it from obtaining other comparable contracts during the same period of time nor was it enabled to take up any other substantial contracts by reason of being freed from the obligations which a contract with the defendants would have imposed. However it is impossible to accept that some regular employees were not freed for other profitable work which would have reduced the loss to the plaintiff. A considerable amount of work is done through sub contractors and essentially the plaintiff suffers no advantage or disadvantage from their availability. However there must be some element of profitability in the availability of regular employees and , while it is impossible to apply exact figures I think it fair to discount the loss of profits by 20%, providing a figure of £128,998, making a total of £135,528. This is an arbitrary figure, but in the absence of closer analysis is the best I can do.

[106] It is well nigh impossible to disentangle the affairs of one defendant from the other. The tenders were issued in the name of Edina Ltd but ultimately the property was bought by Armoura Ltd a wholly owned

subsidiary, for which the building was completed. Ultimately the second named defendant paid for the construction of the building and the first named for the fixtures and fittings.

[107] Mr Stephens suggested that an appropriate distribution of the award of damages between the defendants is 15% against the first defendant and 85% against the second. This has not been questioned by the defendants but should any issue arise I will deal with it. Meantime I award the plaintiff a total of £135,528 against the defendants to be apportioned as to 15% against the first named defendant and 85% against the second named defendant.