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Judgment: approved by the Court for handing down | *Delivered:* **30/06/2010**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

TERENCE NOEL LIGGETT & DENISE LIGGETT

trading as Period Homes

Plaintiffs

-v-

MELANIE BROWNLEE

also known as MELANIE HARRISON

Defendant

WEATHERUP J

[1] The plaintiffs are husband and wife who operate a building firm known as Period Homes from premises in Portadown. The defendant is the owner of lands at Silverwood Lane in Lurgan. Both the plaintiffs and the defendant acted as litigants in person in these proceedings.

[2] On 8 September 2000 Mr Liggett entered a licence agreement with the defendant concerning a proposed residential development to be known as Silverwood Leaves to be constructed by Period Homes on the defendant's lands. The agreement provided for the construction of 90 dwelling units in seven phases over a period of 7½ years commencing in 2000.

[3] The terms of the licence agreement included clause 5, which required the plaintiffs, having agreed the sale of a dwelling to be built for a purchaser, to proceed to construct the dwelling expeditiously and to complete as soon as reasonably practicable; clause 6, which provided that the defendant was required to agree to the transfer of each plot to the relevant purchaser; and clause 7, which provided that the plaintiffs would pay the defendant a site

fine in relation to each dwelling that was purchased. Initially the site fines were agreed at £13,500 for a semi-detached house and £19,500 for a detached house.

[4] The plaintiffs commenced work on the development in the year 2000. Joyce Estate Agents were appointed by the defendant to market the houses. The plaintiffs approach to the development was to sell the houses off plan and receive payments from purchasers in three tranches, namely a 10% deposit, a 20% initial payment at wall plate level and the balance purchase price on completion. The licence agreement was subsequently amended by supplementary agreements which were made on 29 April 2002, 1 October 2002, 24 February 2003 and 21 April 2005.

[5] After the execution of the licence agreement the defendant married Lester Brownlee and unknown to the plaintiffs entered into a business partnership with him. On 24 January 2003 and without the knowledge of the plaintiffs the defendant transferred the property at Silverwood Lane into the joint names of herself and her husband as tenants in common in equal shares. As a result, the signature of Lester Brownlee, who was not a signatory to the licence agreement or the supplemental agreements, was required for the transfer of title to the plots to the purchasers.

[6] Later in 2003 the defendant and Lester Brownlee separated and became involved in divorce proceedings. Their business partnership was dissolved. The plaintiffs claim that the performance of the licence agreement was adversely affected by these matrimonial difficulties. By way of example it is claimed that Lester Brownlee declined to sign certain documents in relation to the agreements to transfer and the actual transfer of plots to purchasers and that he refused to sign a cheque for planning permission in respect of the final phase of the development, thus disrupting the progress of the development. Further the plaintiffs claim that, arising out of the financial implications of the defendant's matrimonial difficulties, Derek Harrison, the defendant's father, stated that he did not want any further work to be undertaken in relation to the development, that he gave instructions to David McMaster, the architect, to suspend certain work in relation to the development and that he informed Joyce Estate Agents, the agents handling the sales of the houses, to restrict or stop the advertising and promotion of the sales of properties.

[7] Proceedings were issued in February 2005. The final supplementary agreement of 21 April 2005 increased the site fines payable to the defendant and also provided that any increase in the sale price of a property beyond the basic selling price was to be apportioned as to 60% to the developer and 40% to the builder.

[8] Further difficulties emerged in 2005 concerning the involvement of Joyce Estate Agents and in November 2005 there was an application to the

High Court by the plaintiffs for injunctive relief against the defendant by which they sought to secure the defendant's signature on all necessary documentation, to restrain any difficulties about the marketing of the properties and to secure expedition in the sale and transfer of the properties. By agreement on 11 November 2005 a joint estate agency arrangement engaged not only Joyce Estate Agents but also another agent, Michael Hannith.

[9] The development ultimately was to comprise a total of 86 houses. In the year ending April 2002 there were 19 properties completed, to April 2003 17 completed, to April 2004 10 completed, to April 2005 10 completed, to April 2006 6 completed and to April 2007 7 completed. The licence agreement came to an end in 2007. The total build of houses was therefore 72. Of the remaining 14 sites, two houses were largely completed and remain available for purchase, namely Nos. 85 and 86. Six houses have had foundations completed but no further work has been undertaken. Six sites have not been started and the sites are vacant.

[10] The plaintiffs claim that the actions of the defendant and her representatives delayed the completion and marketing and sale and transfer of the properties in the development and resulted in loss and damage sustained by the plaintiffs. A forensic accountant's report prepared on behalf of the plaintiffs measured the plaintiffs' loss in the sum of £1,316,997. The defendant denies the complaints that have been made by the plaintiffs and disputes liability to the plaintiffs. By her defence the defendant accepts the involvement of Lester Brownlee and that of the defendant's father Derek Harrison and that of Joyce's Estate Agents but denies that any of their involvement had any impact on the outworking of the development of Silverwood Leaves or that an action by her or by any of her representatives occasioned any loss to the plaintiffs.

[11] The defendant counterclaims against the plaintiffs for the non-completion of the development, there being the fourteen uncompleted houses. The loss claimed is £947,240, calculated as the loss of site fines and 60% uplift on the sale prices for all of the fourteen houses.

[12] The position in relation to the purchase of the properties was in broad terms that the purchasers would agree to purchase from the plans. There would thus be an agreement to purchase prior to the commencement of building. The building would then commence and the payments would be made by the purchaser in the three stage payments. The defendant would sign an agreement of transfer of the site to the purchaser and when completion was required would transfer the plot to the purchaser.

[13] The difficulties that emerged on the site were numerous. It is proposed to summarise the position by outlining the events that caused concern during

a number of periods in the course of the development. The parties disagreed fundamentally as to what happened and as to responsibility for what happened.

[14] First of all the autumn of 2003, when serious issues began to emerge. Relevant correspondence commenced on 23 October 2003 between the plaintiffs' solicitors R M Cullen & Son and the defendant's solicitors Tughan & Company. The issues that emerged at that time concerned Lester Brownlee, the transfer of sites to purchasers and the application for planning permission. The letter of 23 October 2003 on behalf of the plaintiffs referred to extreme urgency in relation to, first of all securing the transfer of plots to purchasers, where it was said that there were four completions requiring immediate attention, secondly, securing the execution of the sales to purchasers, for which it was said there were then seven sales in anticipation, and thirdly to secure a cheque to obtain planning permission for the final phase of the development. The reply on behalf of the defendant indicated that Tughan's instructions were confined to dealing with an ongoing partnership dispute between the defendant and Lester Brownlee. A further letter on behalf of the plaintiffs of 5 November 2003 indicated that Senior Counsel had been engaged on each side in relation to the differences that had emerged. There was a problem with completion on site 39, which was scheduled for November, but was being hindered by the absence of a cheque required to accompany an application for planning permission for a change of house type. Retentions were being held back because planning permission had not been resolved.

[15] It was the position under the licence agreement that planning in relation to house types was a matter for the plaintiffs and planning in relation to overall development was a matter for the defendant. Planning permission for the overall development took place in two stages. It was the responsibility of the defendant to obtain planning permission for the final phase of development. However it was alleged by the plaintiff that there was a further agreement in respect of the application for change of house types whereby Derek Harrison on behalf of the defendant had agreed with the plaintiffs that the defendant would undertake the application for change of house types in tandem with the application for the final phase of development. Hence the plaintiffs were asking the defendant about the planning permission for the change of house type.

[16] A further letter of 12 November 2003 indicated that completion of site 39 had not proceeded and there was concern because the proposed purchaser was threatening legal proceedings against the plaintiffs. The letter stated that in an attempt to mitigate any loss an emergency application had been made in respect of planning permission but that would not be decided for many months. It was stated that the cheque to accompany the planning permission awaited co-signature on behalf of Mr Brownlee.

[17] In a further letter from the plaintiffs' solicitors of 14 November 2003 it appears that an agreement had been made with the purchasers of site 39 and they were going to be given possession. There was then a reference to house Nos 36 to 40 and the issue of planning permission for the house types having been agreed to be made by the defendant contemporaneously with the change of planning permission for the final phase of the development and that they would be dealt with in what the letter describes as an umbrella form. It was stated that the architect was still waiting for a cheque in order to make the applications and that this was being held up by Mr Brownlee who was refusing to sign. It was then stated that because of the hold ups there was a delay in respect of the final phase of planning permission and there was a delay in receiving the deposits, referring to sites 40, 48, 51, 52 and 36 to 39.

[18] The letter further stated that the failure to obtain planning permission had had a serious impact on the financial plans and projections which were in place for the completion of the development and that the builders were primarily dependent upon the final phase of the development because of the way the finance of the development was structured. Thus the implications of the failure to apply for and secure the planning permission for the final phase was said to be particularly acute. I will refer later to the evidence of Don Carville as agent on behalf of the plaintiff who gave evidence on the financial structure of the development as far as the plaintiffs were concerned.

[19] A further letter of 18 November 2003 demanded confirmation of a number of matters. At that time the concern was in relation to the completion of sites 36, 37 and 38. Documentation in the form of an agreement to transfer was required in respect of house Nos. 40 to 55 and continuing concern was expressed about the cheque for the planning permission for the final phase of development of the site.

[20] There followed in July of 2004 a schedule that set out losses which the plaintiffs claimed to have incurred as a result of the complaints that were made in the earlier correspondence. I draw attention to one aspect, namely that site fines were said to have been wrongly calculated on sites 37 and 38 in that they should have been for a semi-detached house and not a semi-detached bungalow, resulting in an overpayment to the defendant in respect of two sites in the total sum of £11,100, which sum the plaintiffs required to be repaid. This item appears as part of the financial claim that was formulated by the forensic accountants on behalf of the plaintiff.

[21] Next, I move on to illustrate what was happening by reference to events in the autumn of 2004. A number of events occurred in September of 2004 and the correspondence from 1 October 2004 captures the position of the parties up to the issue of proceedings in January 2005. Issues were raised at that time concerning the defendant's father, where it is said that problems

arose because of his requests that work should not proceed and with the processing of a planning application and with the manner in which the estate agents should market the properties.

[22] The plaintiffs' solicitors letter of 1 October 2004 referred to Mr Harrison having advised Mrs Liggett in the presence of Stephen Maxwell, the solicitor in the office of T D Gibson, that he did not wish any further work to have taken place in relation to the Silverwood Leaves development. Mr Maxwell did not remember that conversation when he was giving his evidence but he did not claim that it did not happen. Rather he said that he did not remember it happening. The letter of 19 November 2004 indicated that a complaint was being made because progress in relation to planning permission had been thwarted by giving a direct instruction to the architect to suspend any additional work. An enclosed letter of 17 September 2004 from David McAllister to the plaintiffs indicated that that was the case. The letter of 19 November referred to the plaintiffs having discovered that the latest phase of the development was not being advertised or promoted by Joyce Estate Agents and that the plaintiffs had been advised by telephone on 3 September 2004 that the agents had been instructed not to advertise and promote sales in the new phase. A reply from Tughans on 29 November 2004 stated that it was the responsibility of their clients, the developers, and not that of the builders, to obtain planning permission and the client has appointed an architect other than David McAllister to progress matters as quickly as possible. While that did not happen it was obviously contemplated at that time that there might be a change of architect.

[23] Proceedings were launched by the plaintiffs in January 2005 and a meeting occurred in an attempt to resolve the issues that were then ongoing, that meeting being on 18 February 2005. A letter from the plaintiffs solicitors of 16 March 2005 referred to the meeting and indicated that there were a number of matters that it had been possible to agree, namely the development was to proceed, sites fines were agreed, there was an unresolved issue about underbuild costs and there was to be an adjustment to the licence agreement to provide for the 60/40 apportionment on added profit. The letter sought clarification on three issues. First of all that Tughans had communicated with Walker McDonald, who were then acting for Mr Brownlee, that he had to execute all necessary documentation. Secondly, in relation to the underbuild costs, as to how that matter would be addressed. Thirdly, that "Mr Harrison indicated to our clients that the damages claimed by our clients related in substance to issues arising between his daughter Melanie and her husband Lester Brownlee and forming part of the financial issues arising which remained to be either negotiated or adjudicated upon". It was suggested that the lawyers dealing with the matrimonial matters should be made fully aware of the claims in respect of the Silverwood Leaves development and notice was given that forensic accountants were being retained on behalf of the plaintiffs.

[24] Matters did not run smoothly and a letter of 14 April 2005 indicated that Walker McDonald, acting for Mr Brownlee, had suggested that their client might not proceed with the final phase of Silverwood Leaves while there were legal issues outstanding between the plaintiffs and the defendant. The proceedings had been issued in January 2005 and in a letter of June 2005 Tughans on behalf of the defendant stated that they were preparing third party proceedings for service on Lester Brownlee.

[25] I move forward now to the autumn of 2005. The plaintiffs applied for an injunction compelling the defendant to sign the documentation in respect of house Nos 57, 58, 59, 76 and 77 and restraining the defendant from hindering the marketing of the properties and compelling them to take the necessary steps to effect expeditious sales and transfers of the remaining properties. The affidavit of Mr Liggett referred to Joyce Estate Agents as a Harrison family business. The plaintiffs considered that the estate agents were not proceeding with the marketing of the property, dragging their feet as it was put. This resulted in the plaintiffs taking a more active marketing role and eventually issuing a notice to Joyces Estate Agents on 2 September 2005 that Joyces were no longer to act as agents. The defendant did not accept that intervention and the response was to refuse to sign certain documentation in relation to sales. This resulted in a further agreement on 11 November 2005 in an attempt to resolve the impasse that had been reached between the parties. By a letter of 11 November 2005 Tughans indicated the terms of the agreement to the effect that there was to be a joint agency between Michael Hannith and Joyce Estate Agents who were to split the 1% commission, that T D Gibson were to release the documentation in relation to the five houses and that the defendant would not delay in executing any further sales of the premises.

[26] Again that was not the end of the matter because further interlocutory proceedings became necessary and Mr Liggett filed a further affidavit on 30 August 2006. The affidavit indicated that after the agreement of 11 November 2005 further properties had been released, Nos. 78 to 81, four other properties were being considered for release, Nos. 82 to 85, there was a dispute about when the they were going to be released and then further concerns were expressed about Nos. 86 and 87. As indicated above, by 2007 a total of 72 houses had been sold, Nos. 85 and 85 had remained unsold and the period of the licence expired.

[27] The defendant's evidence was in accordance with an initial skeleton argument which stated that the plaintiffs were responsible for holding up the sales of the houses on the site. First of all the plaintiffs failed to obtain the amendments to the planning permission and building control for the change of house types. Secondly the plaintiffs failed to get a road bond which had resulted in proceedings against the parties in 2007 and Road Service stopping work on the site. Thirdly the plaintiffs failed to build the houses in a timely

fashion, referring to the many months taken for the completion of some houses, for example Nos. 81, 82 and 83 had been agreed for sale in August 2006 and were not completed until July 2007. Fourthly the plaintiffs failed to pay the fees to the estate agents and tried to terminate the retainer of the estate agents. The defendant fixed the blame for the non-completion of the whole development on the plaintiffs.

[28] A number of issues emerge from the brief annual snapshots set out above. First of all, the issue of planning permission. The license agreement provided that overall planning permission was a matter for the defendant. This was obtained in two stages and during the course of the development the defendant was required to obtain planning permission for the final 30 houses of the development. Amendments to planning permission were the responsibility of the plaintiffs and therefore the change of house types was a matter for the plaintiffs. I am satisfied that Mr Harrison, on behalf of the defendant, agreed with the plaintiffs that the planning application in respect of the house types and the application for planning permission for the final phase of the development would be treated as an umbrella application to be lodged on behalf of the defendant by Mr McAllister the architect. The application for planning permission was delayed because Lester Brownlee did not sign the cheque and this impacted on the applications for the final phase of the development and for the change of house types. Eventually the plaintiffs sought to obtain the planning permission.

[29] As I am satisfied that there was an agreement for an umbrella application it follows that responsibility fell on the defendant to secure the planning permission both for the final phase of the work and for the amendment of the house types. The application for the planning permission for the change of house types would otherwise have been the responsibility of the plaintiffs had the defendant's agent not agreed that it should be undertaken on behalf of the defendant. There was a delay in completing that exercise that certainly impacted on the working relationship between the parties and on the work that was undertaken on the site. I am satisfied that it was the responsibility of the defendant to progress this application, that it was not progressed, that it was effectively put on hold, that Mr Harrison sought to hold matters back, that the architect was instructed not to proceed with the work, that there was a threat to engage an alternative architect and that the delay impacted on the manner in which the development proceeded.

[30] The second issue concerns the underbuild costs and the related issues about a retaining wall and a laneway. The underbuild costs were part of the build costs and responsibility fell on the plaintiffs as the builder. The builder would seek to recover those costs from the sales of the properties. In relation to the agreement between the plaintiffs and the defendant on the financial arrangements for the development, the plaintiffs' agent was Don Carville and the defendant's agent was Roderick Joyce. They sought to reach agreement in

relation to build costs, site fines and possible profits. On Mr Carville's part it was obviously his concern to ensure that the plaintiffs' interests were properly catered for and as far as Mr Joyce was concerned he was obviously anxious to further the interests of the defendant.

[31] Mr Carville's evidence was that in the discussions about build costs and site fines and profits he raised the added costs that had emerged after the commencement of the works. The cost of improvements to the laneway into the site arose because the roads authority decided that the laneway required to be upgraded. A retaining wall had to be added and this had not been costed at the beginning as it had not been decided how to deal with the rear of premises 12 to 22. It was only on completion of those houses that it was agreed that a retaining wall was required. In addition there were increased underbuild costs as the requirements on site were much greater than had been anticipated. The added costs arose during the early stages of the development and were matters for the plaintiffs to absorb as they were responsible for such costs.

[32] What was negotiated between Mr Carville and Mr Joyce included the manner and timescale within which the returns from sales would be apportioned between the parties. There was discussion about whether the underbuild costs might be taken into account in relation to the whole development or whether they would have to be recovered in the later stages of the development. The level of site fines would directly affect the amount the plaintiffs would recover from each sale. The lower the site fines the sooner the plaintiffs would recover their outlay and move into profit. According to Mr Carville he could not secure agreement with Mr Joyce to take into account the added build costs in fixing the level of the site fines. The plaintiffs return on their added costs was effectively postponed to the latter stages of the development.

[33] The consequence was that the plaintiffs had to wait to the end of the project to recover the underbuild costs. It is correct to say that the plaintiffs had to bear the costs of the underbuild and that it was not the responsibility of the defendant. It is also correct to say that the plaintiffs had to be afforded the opportunity to recover those costs because that was the effect of the failure to agree recovery across the project by modified site fines. If there were delays or if the development was not to be completed then that had the potential to impact on the plaintiffs prospects of recovering the extra costs that they had incurred.

[34] In the report of Harbinson Mulholland at appendix 9 the underbuild claim is expressed in a confusing manner. The appendix states that the additional underbuild costs from phase 1 would have applied throughout the site but the licence agreement was altered from site 23 onwards. That appears to suggest that there was some change to the agreement after the completion

of site 23. According to Mr Carville the site levelled out after site 23 and the claim for additional underbuild was in respect of the houses up to site 23. The claim seeks to accord blame to the defendant for the plaintiffs' inability to recover the additional costs. The failure to complete the final 12 buildings on the site affected the plaintiffs' ability to recover the additional underbuild costs.

[35] The third issue relates to the defendant's father and his involvement in the site. He did have a power of attorney for a time but outside the existence of a power of attorney he acted for and on behalf of the defendant from time to time in respect of the development. Mr Harrison attended the hearing and he did not give evidence and so I do not have his version of events in relation to the various incidents. I accept the evidence given by and on behalf of the plaintiffs of his involvement in the various matters outlined. I am satisfied of a number of matters in relation to his involvement. First of all, that he told the plaintiffs to stop work on site at one point, although of course the plaintiffs did not do that. Secondly that he told the estate agents to hold up the promotions and the sales at one point and that the agents did so. Thirdly that he told the architect not to process the planning permission and threatened to engage another architect. Fourthly that he agreed to the planning permission umbrella application which in the event did not proceed as agreed.

[36] The reason for his actions is said to be related to the dispute concerning Lester Browlee and the matrimonial settlement which was being negotiated for the defendant. It appears to have been the desire, quite understandable, on the behalf of the defendant, not to promote sales when Lester Brownlee might benefit. This was said to be behind the efforts that were being made to determine how the site would be developed and that grew into the animosities about other matters between the plaintiffs and the defendant.

[37] The next matter that was the subject of debate concerned the supplementary agreements. The plaintiffs complain that they were unfairly coerced into the agreements. I do not accept that there is any basis for interfering with the supplementary agreements that were entered into from time to time. There were pressures applied undoubtedly but I consider they were commercial pressures that were applied from time to time in order to secure alterations to the agreement as the disputes between the parties developed. The parties were negotiating such arrangements as they found necessary, pressed by financial and other concerns on the part of the plaintiffs and the defendant.

[38] A further complaint concerned the sale by auction of Nos. 82 to 84 in 2006. The plaintiffs felt excluded from the marketing of these houses and disagreed with the method adopted. It took five months in order to complete the sales, although this involved an increase in the sales prices. The plaintiffs

contend that the sales prices could have been secured much sooner had the bidding been pressed to an earlier conclusion. I cannot say if that would have occurred. Here we have a matter of commercial judgment in relation to how best to market these houses. The agents and the developer and the builder might have had different views in relation to how best to conduct the marketing. It is clear that while the agents took a little longer to complete the sales they did secure higher prices over time. It may be that the higher prices could have been achieved sooner had pressure been applied to the buyers or the process closed earlier. However I have no reason to conclude that any criticism should fall on anyone for the method or the time taken or the manner in which the marketing was conducted.

[39] There was a further issue about a pathway at Nos. 85 and 86. There had been a building control issue in relation to another group of houses and the requirement for a path at the back of those houses. In relation to Nos. 85 and 86, the two houses which are still on the market, there was some confusion about the requirements of building control and eventually, in 2009, a request to the building control officer about the building control certificates for the houses resulted in the issue of the certificates. The houses remain unsold and the reasons for this are disputed. In the end the market has not found a buyer.

[40] In broad terms I am satisfied that the activities of Mr Brownlee and Mr Harrison, as agents of the defendant, amounted to breaches of contract on the part of the defendant and resulted in disruption and delay in relation to the progress of the development that accounts for the slow down in the progress of the site from 2003.

[41] The claim for damages that has been formulated by the plaintiffs is set out in the report of Harbinson and Mulholland. There is a supplementary report dated 5 May 2010. I accept that there are certain losses that accrued to the plaintiffs as a result of the matters for which I hold the defendant responsible.

[42] The first heading is for extra costs in the sum of £165,755. It is set out in Appendix 9 of the report and comprises six items.

The first item is for solicitors fees of £4,200 for Walker McDonald. The fees relate to the involvement of Lester Brownlee and indeed the defendant accepted that this was a matter for which the plaintiffs should not be responsible.

Secondly there are solicitors fees for King Gowdy in the sum of £5,250. These fees are considered to be additional fees arising because of the breakdown in the relationship between the plaintiffs and the defendant. There had been a common solicitor in respect of whose fees the plaintiffs were

liable. The breakdown led to the engagement of other solicitors at added costs. The added fees are a consequence of the breakdown in the relationship for which the defendant is responsible and the added fees are recoverable.

There are then three items that relate to the underbuild, the road improvements and the retaining wall as referred to above. The added underbuild costs are stated to be £96,728. Had that amount been recovered across the houses it would have been about £1,200 per house. The plaintiffs' recovery of that amount was based on anticipated recovery over the last phase of the development. In effect the plaintiffs had undertaken the front loading of expenses and expected to recover from the last phase of the property sales. Had there been such recovery over the last 30 houses the amount would have been in the sum of £3,200 per house. There are 12 houses unbuilt. I propose to allow the plaintiffs for the non-recovery of the £3,200 per house in respect of the unbuilt 12 houses because as a result of the manner in which this development proceeded they have been prevented from recovering that part of the additional costs that they would otherwise have recovered had the site been completed. That amounts £38,400.

Similarly, in relation to the road improvements, the claim is for the added costs of £36,682. Again that is a cost that the plaintiffs had to incur but expected to recover at the final stage of the completion of the work. The claim averages out at about £500 per house but had it been attributed to the last 30 houses, which is how it was finally anticipated it would be recovered, that would have been £1,200 per house. For 12 houses that is £14,400.

Then there is the retaining wall at £11,895. I accept the plaintiffs evidence was that there was an agreement that the defendant would be responsible for the payment of that cost. I propose to allow that item at £11,895.

Finally, there is an item for incorrect site fines at £11,000. I do not believe I heard a contest in relation to that item. Extra site fine were imposed in respect of house Nos. 37 and 38 in the sum of £11,000.

The total allowed in respect of the extra costs for the six items under the first head of claim is £82,250.

[43] The second heading claims fixed costs in the sum of £225,000. The supplementary report does have something further to say about the fixed costs. The claim is based on the probable completion of the development by mid 2005 so that the plaintiffs have incurred unnecessary fixed costs since that time. The amount claimed in respect of the period up to 31 March 2008 is at the rate of £1,495 per week and from that date the estimated fixed costs are claimed at £300 per week. I cannot accept these figures. The plaintiffs remained on the site until 2007. There are two houses unsold on the site. I

cannot be satisfied that the plaintiffs would, despite the early expedition with which they proceeded with the development, have finished the site before 2007, being the time provided by the licence agreement. It is completely speculative as to how the development might have progressed. I do not propose to allow any added costs of administration up to 2007 when I believe the plaintiffs would probably have been on site in any event. From 2007 the plaintiffs have been incurring some costs, such as undertaking maintenance work and paying insurance and other costs. The total of such costs remain speculative. The report suggests a figure of £300 per week. I am not satisfied that that is an amount that could have been incurred since 2007. I estimate ongoing costs to be more of the order of £150 per week. I propose to take a round figure of £20,000 in respect of costs since 2007.

[44] The fourth heading claims for bank charges in the sum of £127,050. That is set out in appendix 12 of the report. These bank charges are measured as 11% of the value of four properties owned by the plaintiffs. The title deeds in respect of the properties were provided as security for an additional loan required by the plaintiffs. The bank's letter of 25 July 2005 specifies that the overdraft limit had been increased to £100,000. Interest was to be at base rate plus 3½%. This additional facility from the bank required a fee equal to 11% of the value of the properties, to be paid on the sale of each or any of the properties, which I understand has not happened, repayment of the debt due to the Ulster Bank, which I understand has not happened, or on the fifth anniversary of the date of the letter, which is now imminent. This is a potential liability that arose out of the financial circumstances of the plaintiffs and their relative impecuniosity at that time. I have not been satisfied that these are sums which ought to be recoverable from the defendant. The sums that may be payable to the bank may yet be a matter of dispute and negotiation. Whatever such sums might be, the fact that the plaintiffs had to increase their financial liabilities is not a matter in respect of which I have been persuaded that the additional costs to which they agreed should be visited on the defendant. I do not allow anything in respect of the bank charges claimed.

[45] The fifth heading claims loss of profit on the part developed sites, namely Nos. 85 and 86. This is referred to in appendix 13. These are the two houses that have been built and remain unsold. The claim is made up of the loss of profit in respect of the two sites. I do not propose to award loss of profit. I propose that the value of the properties should be determined by the market and that the entitlement of the parties will be determined according to the prices recovered on the eventual sale of the properties.

[46] The next heading claims for loss of profit on the sites not developed, being the sum of £182,753 as set out in appendix 16. This concerns the profit which it is contended would have been earned on the sale of the twelve houses that have not been built. This heading of claim is not accepted. I have

already allowed the plaintiffs the amount that they would have recovered, had the 12 houses been completed and sold, to cover the added costs for underbuild and the laneway. No expenditure has been incurred in respect of the 12 houses except for the cost of installing the foundations on six of the houses. I do not propose to allow any further sum, except in respect of the six sub-structures. The defendant contends that the sub-structures may be out of date and will not be sufficient for whatever houses are now to be built on the sites. However, the completion of the substructures resulted in costs that have actually been incurred by the plaintiffs. I propose to allow the plaintiffs the costs that they have incurred in completing the sub-structures. Mr Carville has valued those costs in respect of the six houses at £32,060.

[47] The next heading claims loss of opportunity for the plaintiffs to make profits on two other developments which the plaintiffs claim they would have undertaken had they been able to complete the sales of the houses at Silverleaves in 2005. The first property is at Bramley Court, Loughgall and the claim for loss of profit is for £372,350 as calculated in appendix 16. This I consider to be wholly speculative. I cannot know what might have happened about that proposed development and I cannot know what profits might or might not, or indeed what losses might or might not, have been incurred. I do not allow anything in respect of that proposed development.

[48] The second loss of opportunity relates to Carrickblacker Avenue, Portadown, where it is claimed that the development would have resulted in a profit of some £501,000 as calculated in appendix 18. Again it is just not possible to know what might have happened in relation to that proposed development. It would have been built, as the defendant pointed out, over a period when the housing market collapsed and may or may not have resulted in a loss to the plaintiffs had they undertaken the project. I do not allow anything in respect of that item.

[49] A further heading claims loss of earnings on behalf of Mrs Liggett in the sum of £35,000 up to 31 March 2008 as calculated in appendix 19. Mrs Liggett worked as a nurse and a memorandum was furnished which indicated that she reduced her hours from 20 to 10 per week on a permanent basis from 1 April 2002. The issues between the plaintiffs and the defendant did not emerge until some time later so I do not accept that any reduction in hours from April 2002 was related to difficulties that might have emerged on the site. I do however accept that from the time that difficulties emerged from 2003 Mrs Liggett has clearly devoted a lot of time to the problems on the site. The report refers to the plaintiffs not having to pay an employee to deal with the issues and without the involvement of Mrs Liggett there is no doubt some other employee would otherwise have been engaged in dealing with all the issues that arose. I propose to allow for the time Mrs Liggett devoted to the problems with the development that would otherwise have been undertaken by an employee of the plaintiffs from 2004 to date, a total of seven years. I

propose to allow her 500 hours a year. I propose to adopt the rates that she earned from nursing. That amounted to £11 per hour for three years and then £12 an hour for four years, a total of £40,500. Mrs Liggett would have been liable to income tax on such earnings. I allow £30,000 in respect of the time that Mrs Liggett devoted to working on these issues.

[50] Finally there is the heading for bank interest in the sum of £537,000, as calculated in appendix 10 of the report. The supplementary report of 5 May 2010 involved a closer consideration of the state of the plaintiffs' accounts. In the supplementary report the claim for interest was adjusted to take account of other liabilities and reduced from £537,000 to £286,530. The bank overdraft of Period Homes in the year ended April 2003 was some £200,000 and in 2004 it was some £800,000, where it remained. How did that arise? The report suggests several matters that may account for the increase. One matter which may account for £166,000 is that the plaintiffs had to make additional borrowings to pay the added costs of the underbuild, the laneway and the retaining wall. These added costs were to be recovered in the later phases of the development and in the event were not recovered to the full extent. A further matter, which may account for £360,000, is the cost of the building of the houses at any one time while the plaintiffs were waiting for completion of sales. By way of illustration it is stated in the report that if twelve houses were under construction, at an average cost of £60,000, it would involve £360,000 outlay outstanding at any time. There would be a substantial sum tied up in the actual building of the houses prior to receiving the proceeds of sale, although the plaintiffs would receive deposits and interim payments. An additional matter accounting for the increased overdraft was the interest payments. The interest rate was bank rate plus 3½%, which amounted in effect to interest at 8%. If the overdraft exceeded £400,000 the interest rate was 17%.

[51] I cannot accept the claim for bank interest as presented. The plaintiffs were involved in other contracts. The plaintiffs personal financial circumstances required them to borrow in order to build and they clearly did not have the capital to undertake the development without incurring high interest rates and charges. Those matters related to the financial circumstances of the plaintiffs and cannot be visited on the defendant. There are however aspects of the interest claim that should be awarded to the plaintiffs. The delays that occurred in the transfers and the agreements from time to time were relatively small items in the overall scheme of liabilities that arose. Where from time to time there were some delays in receiving deposits or other payments they are reflected in some of the costs that I have allowed. In addition there are financial costs that would have been incurred from the delays occasioned by the defendant from 2004 to 2007. I illustrate this by stating that if £100,000 was outstanding over the period of a year at 8% that would produce an interest charge of £8,000. I propose to take that £8,000 as a reflection of the bank interest charged if the plaintiffs were continually held

out of perhaps the price of one house as amounting to £8,000 a year. Against that measure I propose to allow £30,000 in respect of bank interest charges.

[52] The result is that I have allowed parts of five headings of claim. The first is for extra costs at £85,250, the second for fixed costs at £20,000, the third for sub-structure costs at £32,060, the fourth for personal costs of £30,000 and the fifth for bank interest at £30,000. The total amount is £197,310.

[53] Interest will be awarded. In respect of the first and third items I propose to allow interest at 8% from the date of the issue of the Writ on 10 January 2005. In respect of the fifth item I propose to allow interest at 8% from 1 April 2007. In respect of the second item I propose to allow interest at 4% from 1 April 2007 as the fixed costs were accumulating over the period and the whole amount was not due over the whole period. Similarly for the fourth item I allow interest at 4% from 1 April 2003.

[54] It follows from the above that I do not accept the defendant's counterclaim to the effect that the plaintiffs were responsible for the non-completion of the site. The counter-claim will be dismissed.

[55] The parties proceeded on the basis that a clean break would be preferable. A complete clean break is not achievable because house Nos. 85 and 86 remain unsold. The judgment will provide be as follows –

> First, the plaintiffs have judgment against the defendant in the sum of £197,310 together with interest calculated as follows –
>
> > on the sum of £85,250 and the sum of £32,060, interest at 8% from 10 January 2005;
> > on the sum of £30,000, interest at 8% from 1 April 2007;
> > on the sum of £20,000, interest at 4% from 1 April 2007;
> > on the sum of £30,000, interest at 4% from 1 April 2003.
>
> Secondly, the plaintiffs have judgment against the defendant on the counterclaim.
>
> Thirdly, in respect of the sales of house Nos. 85 and 86, the market will determine the sale price of the properties and there should then be an apportionment of the proceeds on the terms that existed under the final agreement between the parties.
>
> Fourthly, the plaintiffs shall relinquish their interest in the last twelve sites on payment of the sub-structure costs of £32,060 together with interest thereon.

Fifthly, the plaintiffs shall withdraw the inhibition on Folio AR22407 County Armagh, Registered owner Denise Harrison.

Sixthly, the plaintiffs shall discontinue maintenance of Silverleaves and the green belt company will be established by the defendant.

Seventhly, the defendant shall take over responsibility for the road bond as would have occurred upon the completion of the licence agreements.

Eighthly, the defendant shall pay the plaintiffs legal costs (the plaintiffs' solicitors having come off record around June 2009) and outlay, including witnesses expenses and the expert's reports. In default of agreement the amounts will be determined by the Taxing Master.