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Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: 07/06/00

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

WESLEY WATERWORTH

Plaintiff;

and

VAUGHAN DEVELOPMENTS LIMITED AND THOMAS DEREK REA

Defendants;

and

TURVEN CONSTRUCTION

First 3rd Party;

and

B.A.I. RUN OFF LIMITED

Second 3rd Party;

and

ROBERT MORROW & CLIFFORD CHARLTON T/A MORROW & CHARLTON PARTNERSHIP

Third 3rd Party;

and

PYPER McLARNON PARTNERSHIP A FIRM SUED AS A FIRM

Fourth 3rd Party.

AND

BETWEEN:

ROBERT MORROW T/A MORROW CHARLTON PARTNERSHIP

Plaintiff;

and

VAUGHAN DEVELOPMENTS LIMITED T/A VAUGHAN ENGINEERING GROUP

Defendant.

(Consolidated Actions)

McLAUGHLIN J

Background

In early 1993 Mr Rea engaged the Morrow Charlton Partnership, architects, (hereinafter "MCP") to design a nursing home at Cedarhurst Road, Belfast. Initially Turven Construction Limited ("Turven") entered into negotiations with Mr Rea with a view to constructing the home. Turven then approached the Vaughan Engineering Group Limited in connection with the mechanical and electrical services but they were reluctant to act as sub-contractors to Turven. In the event Vaughan Developments Limited ("Vaughan"), of which Vaughan Engineering Group is a part, agreed to take over responsibility for the delivery of the project to Rea with Turven, acting as its sub-contractor, taking on the construction and fitting out of the development. The firm of Pyper McLarnon Partnership ("Pyper") was engaged as consulting engineers.

Course of the building and these proceedings

Mr Waterworth, the plaintiff, owned land adjacent to the site of the nursing home on which he ran a public house and restaurant. The construction work in connection with the nursing home was carried out in a somewhat chaotic fashion. It appears that spoil heaps were created at different points of the site, including within the area to be built upon, and also trespassed upon Mr Waterworth's land. Machinery was parked in a haphazard fashion and obstructed the approach to his premises with consequent disruption of business and loss of profits. Mr Waterworth therefore sued Vaughan and Rea in connection with his losses. Vaughan in turn joined Turven, MCP and Pyper as third parties. BAI Run Off Limited was joined because Turven went into liquidation and their liabilities, or some of them, were insured by Builders' Accident Insurance. Unfortunately it too went into liquidation and BAI

Run Off Limited was responsible for dealing with its liabilities and accordingly it was joined as a third party by Vaughan in connection with any liability which might fall on Turven.

The building work commenced on site on 26 January 1994. The project did not get off to a good start. The site sloped from the rear to a central plateau area and then an escarpment dropped to the road boundary and entrance. Since stripping of the site was not carried out completely before the setting out of the building began, and spoil heaps remained on the site, the builder could not set out the entire footprint of the building at the one time. He proceeded by doing it in a piecemeal fashion. Somehow in the setting out process an error was made, but because the entire footprint had not been set out initially this error was not discovered until construction of a portion of the building was already well under way. If the building had been completed on the basis of the erroneous footprint part of the new building would have overhung the escarpment! The best solution agreed by all was that a re-design of the building should take place making use of the elements already in position.

In the course of the hearing possible explanations were advanced for this error. Firstly, if the distance from a given tree to a corner of the building was measured from the plan (hereinafter referred to as "plan 94001") and the same measurement on site was taken from an adjoining tree rather than the one used to measure the distance on the plan it would coincide with the altered position of the building. Mr Morrow QC, who appeared for MCP, demonstrated this with a diagram and a two-dimensional model which showed that the building if so measured would have followed the line which would have led it over the escarpment. A second theory was that a dimension had been taken from plan 94001 from a roadside kerb line to a point on another corner of the building but, because on site this dimension actually extended up the escarpment slope it came up several metres too close to the edge of it. In other words no allowance had been made for the fact that the distance shown on the plan was a horizontal distance whereas on site it was the hypotenuse of a triangle and therefore would come up short of the true point. This is so fundamental an error that it is difficult to believe it could have happened but it has been demonstrated

mathematically as a potentially correct explanation of the cause of the error. The slope was at an angle of approximately 31 degrees. The actual distance between the kerb line and the intended corner of the building was to be 21 metres. The cos of the angle is .857 which reduces 21 metres to 17.99 metres on the horizontal. As a result the corner of the building was actually constructed 18 metres from the kerb line instead of 21 metres, enough eventually to cause the building to extend over the escarpment if construction had continued accordingly to the original plan 94001.

In those circumstances Mr Waterworth's claim for trespass against Rea and Vaughan developed into a story of claim and counterclaim amongst the present parties. On the first day of the trial however the parties reached an agreement which settled all disputes but one. Vaughan continued to blame MCP for the problems with setting out encountered by the builder, alleging negligence and breach of contract by reason of their failure to provide adequate drawings for the builder and thus causing or contributing to the errors made and the consequential loss and the damage which followed. MCP denied liability and maintained a claim for their fees arising from the re-design work which they carried out after the error was discovered and is the subject of the second action which was consolidated with the main action. As these issues could not be resolved by agreement the action proceeded to trial with Vaughan, second defendant, suing MCP, the third-named third party.

The action was heard before me between 16-19 May 2000 inclusive. At the start of the second day Mr Morrow QC, together with Mr Declan Morgan QC (who appeared for Vaughan) agreed many of the outstanding matters and put before me a single question and agreed that the answer to that question would resolve the liability aspects of the dispute in favour of one party or the other. The question is:

> "Did drawing 94001 contain all the information required by the builder to set out the building footprint accurately?"

If the answer is `Yes' then Vaughan's claim fails. If the answer is `No' then it

follows that the architect was in breach of contract and negligent. In the event of the latter circumstance arising I have been asked to adjourn the further hearing of the case to enable the respective quantity surveyors to discuss a possible settlement figure. The answer to this question will also determine the outcome of the claim for additional fees by MCP.

I heard evidence from Mr Cyril George `Paddy' Andrews on behalf of Vaughan and from Mr Alan Jones and Mr Maurice Alexander Girvan on behalf of MCP.

Vaughan's case

Mr Andrews is a Chartered Architect, Associate of the Royal Institute of British Architects, Fellow of the Chartered Institute of Arbitrators, Fellow of the Royal Irish Architectural Institute and a past president of the Royal Society of Ulster Architects. He retired recently after more than 40 years in practice as an architect. In the course of the action he wrote three separate reports, including one dealing with this dispute and was clearly familiar with all aspects of the litigation. He took me through various RIBA publications. The RIBA Standard Terms of Appointment, "The Blue Book", defined the work comprised, inter alia, in stages E-L, which were incorporated by MCP and Vaughan into the contract for architectural services. The Architects Job Book, Vol 1, "Job Administration" deals with the duties of the architect in greater detail. Finally, the "Plan of Work" book contains, inter alia, directions as to the production information which is required to be given to the contractor, including setting out details. All of these publications are in widespread use in the contracting industry and were designed for use primarily with the JCT family of standard form contract documentation. I am satisfied however that they have much wider application and indicate the general standards of care and best practice to which the profession aspires.

Paragraph 1.20 of Part 1 of The Blue Book specifies the architect's services at Work Stage J as including the duty to "provide production information as required by the building contract". The Job Book at Part F3.3, Section 2, lists general information to be shown on the architect's drawings and schedules including a duty that:

> "Drawings should show all important dimensions between structural elements and/or centre lines, as well as structural or planning grids. A logical system of dimensioning should provide co-ordinating and actual dimensions."

Production information is then specified in Section F3 as requiring plans which show the outline of buildings with the main dimensions and information required to position the building on site. Section K5 deals specifically with setting out and under that heading the architect is required to:

> Provide the contractor with all the information he needs to set out accurately (preferably by dimensioned drawings).

The Plan of Work book contains further directions to the architect to prepare production information drawings, specifications, schedules, etc.

Mr Andrews said, and I accept, that these provisions imposed upon the architect a duty to produce drawings which were sufficient to enable the correct setting out of the building to take place. That duty is not disputed in any event. He said however that drawing 94001 was not a setting out plan. He pointed out that it had been prepared by Pyper who described it as `Proposed Site Levels'. He said it did not contain the information required to set out the building as it had not indicated the fixed point to be used or any dimensions from that fixed point to any of the angles of the proposed building. Had these been marked on the plan then MCP would have complied with their duties as architects in respect of setting out drawings, even though this drawing had not been prepared by them. It was accepted that it was permissible for MCP to `borrow' this drawing from fellow professionals engaged in the same project. It seems the drawing was produced with the aid of a Distomat system which by utilising global positioning technology via satellite can place relevant site features onto a scale plan with pinpoint accuracy. Again there was no dispute about this matter.

The MCP case

Maurice Alexander Girvan, a builder of more than 30 years standing, with widespread experience in the contracting industry involving jobs priced between £25,000 and £1.5 m, gave evidence on behalf of MCP. He said he had 35 employees at present and also put a considerable amount of work out to sub-contract. He had worked with MCP recently on a hotel contract in Belfast but had not worked with them before. He had been asked to give evidence just the day before doing so. He had not seen plan 94001 until just prior to the court sitting for the afternoon session on Thursday 18 May. In the witness box he was asked if he would consider the plan and state whether in his opinion it contained all the information he would require to set out the building. He replied unhesitatingly that it did. He went further and explained in detail to me, which I need not now repeat for it was not challenged, how he would go about the task. His starting point (fixed point) was taken from two kerbed corners of a nearby car park so as to establish the two southern-most corners of the building and, once these were established, from which he would identify a third fixed point of reference which he would use in double checking the work at the end of the setting out exercise. He was emphatic that he did not need anything further to set out and would not have expected any help from the architect in doing so. He explained that when he would have completed the setting out he would then carry out a series of checks to make doubly sure that the dimensions were accurate and that the building would sit in juxtaposition to the boundaries and other features of the site as required by the architect.

Under cross-examination it was elicited that his recent working relationship with MCP had not yet terminated because the final certificate for the job had not been issued. It was acknowledged by him that Mr Morrow, a partner of MCP, would be responsible for certifying his final payment. He was asked whether he would have commenced a setting out operation before the site had been stripped properly and whilst spoil heaps were still within the area intended to be built upon? He said that he would not do so and would not commence any construction work until all of the building had been set out properly and the dimensions checked.

Mr Alan Jones, Chartered Architect, Associate of the Royal Institute of British Architects, Fellow of the Royal Society of Ulster Architects and an Architect currently in practice with 43 years experience, then gave evidence on behalf of MCP. He confirmed the contract was not a standard form JCT contract, describing it as a hybrid having features of JCT 80 and JCT 81, but customised in favour of the employer. In essence it was a design and build contract. He had considered plan 94001 and in his opinion it satisfied the duty placed upon the architect. He did not resile from this position in cross-examination. Provided the drawing showed the site accurately with the building positioned on it, then, provided it was to scale and showed relevant fixed points, there was nothing necessary in addition to achieve accurate setting out.

Conclusions

It is apparent that there was a major conflict of evidence between Mr Andrews and Mr Jones. A judge faced with such a conflict of opinions is in an especially difficult position. Mr Andrews and Mr Jones are highly experienced and highly regarded architects. They gave evidence honestly and impressively and therefore my task is all the more difficult. Faced with such a conflict the judge is not rendered powerless however. It is for him to use his own experience and common sense to attempt to resolve it. It is not open to the judge to say that he cannot decide and therefore the case is not proved on a balance of probabilities, unless compelled to do so. If he can weigh the evidence of the experts by reference to objective facts, or other opinions or evidence which are reliable, then he must do so and determine whether that enables him to favour the evidence of one side or the other.

The conflict between these distinguished men is profound. I have considered their evidence and would be placed in an almost impossible position if I had no other evidence before me. I have considered the evidence of Mr Girvan with particular care therefore, both as to what he said and his way of saying it. I consider him to be a very experienced builder and his more than 30 years in the business supports that proposition. When shown plan 94001 in the witness box he was able to explain to me in detail how he would go about

the setting out exercise using it. He had no problem in doing so and demonstrated his technique articulately and in a down to earth and honest fashion. What is most important is that his methodology was not challenged as being incorrect in any way. Mr Andrews was recalled to give evidence dealing with this matter. It was his view that the angle from the car park kerb corners to the south east corner of the building was less than optimal and could result in inaccuracies. He had to accept however that if the setting out was done as a whole, rather than piecemeal, and the work checked by reference to another fixed point it could be done quite satisfactorily. He also accepted that the angle was merely less than optimal and did not say that it rendered its use so unreasonable as to be negligent.

The recent close working relationship between Mr Girvan and MCP was admitted readily. It may be that because Mr Morrow will have to certify his final payment in connection with the hotel job puts a question mark over his independence. I consider him to have been completely frank about these connections however and I do not believe that he is motivated by any hope or expectation of gain. I consider that his evidence establishes on the balance of probabilities that the building could be set out quite satisfactorily from plan 94001 and I accept that he gave his evidence fairly and impartially and I accept it.

It was the essence of Mr Andrew's case that the architect had not discharged his duty to the client because plan 94001 did not have actually written upon it the specific dimensions from a given fixed point. This means that the case has to be decided on a very narrow issue. It comes down to a decision whether or not it was the duty of the architect to measure the distance for the builder from a specified fixed point and to enter it on the plan for him, or whether it was sufficient to give him a plan drawn to scale, with pinpoint accuracy, with fixed points on it which were obvious, though not marked as such, and to expect him to perform the measuring exercise himself. Much time was taken up in considering the precise wording of Section K5 "Setting Out" in the Job Book. I believe it is important to remember however that these represent guidance as to good practice. They are also the indicators of the standard and duty of care to be fulfilled by the architect. They are not to be read as statutes however

and should be interpreted in the light of practical good sense bearing in mind that they are used in a day-to-day business context. A reading of Section K5 indicates that a dimensioned drawing is preferable, there is nothing to indicate it is mandatory or that failure to provide such dimensions renders the architect negligent.

It is also of vital importance to bear in mind that it is not the duty of the architect to set out the building. He has no function in that regard whatsoever. It is the exclusive responsibility of the builder. If the builder had considered that he did not have sufficient information on the plan then no doubt it would have sought more. It did not. Vaughan is a large firm, it was the contractor and it was in a direct contractual relationship with MCP who had no relationship with Turven. Both Vaughan and Turven admit plan 94001 was used as the setting out drawing and this is evidenced by correspondence put before me by agreement. In using the plan no suggestion was made that it was inadequate. In my opinion MCP were entitled to assume that Vaughan and its sub-contractors were competent and if Vaughan selected an incompetent sub-contractor then it is it's misfortune, but responsibility for the negligence or breach of contract of the sub-contractor vis à vis Vaughan cannot be visited upon MCP in this instance. No doubt the misfortunes of Vaughan have been compounded by the liquidation of both Turven and its insurers. I consider however that plan 94001 discharged the architect's obligations in contract and at common law and therefore I shall answer the answer the question posed `Yes'. In the light of the agreement between counsel Vaughan's claim shall be dismissed, therefore, and I shall hear counsel on the issue of costs.

Before leaving the matter however I feel it is incumbent upon me to pass some comment on the fact that a dispute of this kind had to come before this court. Lord Denning told the story of the man who used to parade outside the Royal Courts of Justice in the Strand carrying a placard stating "Arbitrate, don't litigate". In the time which has elapsed since then arbitration has, in too many instances, suffered from becoming over formalised, protracted and excessively expensive. What should have been an attractive alternative to litigation, often

conducted by persons expert in the matters in dispute, all too often came to resemble litigation and the expense that now goes with it. In those circumstances the changes brought about by the Arbitration Act 1996 and the shift to adjudication heralded by the Construction Contracts (NI) Order 1997 are to be welcomed. Despite the difficulties found in arbitrations on occasions however it is still clear that this particular dispute was one which was eminently suitable for resolution by a tribunal other than a court. No issue of law arose. It concerned exclusively a matter of professional standards and practice. The persons best placed to determine whether plan 94001 was an adequate drawing for the purposes of setting out are the persons responsible for producing such drawings, ie architects. Had this dispute been referred to an independent arbitral tribunal composed of one or more architects I have little doubt that a `Yes' or `No' answer could have been provided by it within a very short space of time, without expert evidence and with minimal expense, delay and inconvenience. Instead of that a trial lasting more than three days and requiring the time of two expert witnesses and a busy builder was required to resolve it. I consider that this is an object lesson in demonstrating the need for construction industry professionals to give greater forethought to the appropriate form of tribunal they ask to resolve such disputes.

Having said that I wish to repeat what I said at the end of the hearing, namely, that the counsel engaged in this case have conducted it with impeccable professionalism and skill. It was not their responsibility in any way that this dispute became entangled in a larger typical multi-party building contract action. I wish to thank them for all of the assistance which they have given me in connection with the case, for reducing the issues to be determined to a single question and for ensuring that the matter has been disposed of with the minimum expense possible in the circumstances.

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JUDGMENT

OF

McLAUGHLIN J
