JUDGMENT : MR RECORDER ROGER STEWART Q.C:. TCC. 30th March 2007

Introduction

2. In this action the Claimant seeks to hold the First Defendant responsible for the collapse of part of the front and side façades of a building which it owns at 53-55 Queens' Avenue, Muswell Hill. The collapse took place on 5th and 6th February 2004.

3. The first defendant, Mr Fidler, is an engineer, and denies responsibility for the collapse. He was employed under circumstances, which I shall explore more fully later on, by the Claimant and by the Second Defendant building contractor - a company now in liquidation.

4. This is the trial of liability, which was ordered by his Honour Judge Coulson, Q.C., earlier this year. By the same order the judge made certain directions and unless orders in respect of the second defendant contractor, and it is for failing to comply with those orders that judgement in default has been entered against the second defendant.

5. In summary, the claimant alleges that Mr Fiddler is liable to it in contract, alternatively in tort, for two alleged failings;
   a. Failing to design any, or any appropriate scheme for the temporary support of underpinning, which surrounded a deep basement excavation; and/or
   b. Failing to require the contractor to take precautions so as to support the underpinning when, it is said, Mr Fidler saw that the underpinning was unsupported.

6. In summary Mr Fidler's case is:
   a. that he had no contractual responsibility to the claimant for the temporary works, which included the propping of the underpinning;
   b. that he owed no tortious duty to the claimant to prevent economic loss of the sort claimed in this action;
   c. that, in any event, he did design for the contractor, an entirely appropriate scheme which is set out in a drawing number 2, version A, B or C, to which I shall again return later;
   d. that he did not, prior to the collapse, see anything to suggest that the contractor had not carried out the scheme which he designed; and
   e. that he did not, in any event cause the collapse in question.

7. The basis of the last submission is that as it is common ground between the expert engineers that any competent contractor should have know not to carry out the excavation without propping the deep basement, nothing that Mr Fidler did or said would have made any difference to the contractors.

8. Although I am trying only the issues of liability, I have been helpfully provided with a schedule summarising the losses claimed. I have not considered the recoverability or any elements of quantum in relation to these losses, but it may be relevant to identify their nature. The primary loss claimed are direct: the cost of clearing the debris; the cost of propping remaining elements of the work; and the cost of rebuilding the collapsed sections. Other consequential losses are also claimed in the nature of delay and other matters.

The Issues

7. The issues which I have to consider are accordingly as follows:
   a. the factual issue as to what, if any, design of the temporary works for the propping had been carried out by Mr Fidler prior to the collapse;
   b. the factual issue as to what, if anything Mr Fidler observed of the nature of the excavations prior to the collapse;
   c. the extent of Mr Fidler's contractual responsibility;
   d. if necessary, whether Mr Fidler owed a tortious duty to the claimant in respect of the heads of loss, in respect of which claim is made in this action; and
   e. whether any failings of Mr Fidler caused the collapse.

The Property

9. 53 to 55 Queen's Avenue were once a pair of semi-detached houses in Muswell Hill. It is apparent from the photographs with which I have been provided that they were reasonably substantial properties, with reasonably large gardens, at any rate for London. From 2002 or thereabouts they were owned by the claimant, a property investor and developer, which decided to redevelop the site.

10. I heard evidence from Mr Andrew Hart, a director of the claimant, who told me that the precise nature of the redevelopment was uncertain, and the precise use of the property, once redeveloped, was also uncertain. He told me that there were four applications for planning permission. The four possibilities being considered which were:
   a. the continuing use of the premises as a residential care home;
   b. the provision of a nursery and self-contained flats;
   c. the provision of self-contained flats; or
   d. a hotel.

   Whichever of these four possibilities was undertaken by the claimant, it was a requirement of the planning permission that the front and side façades of the premises be retained, and it was, accordingly, always going to be necessary to have a façade retention scheme which would require propping in its temporary condition. The façade would, of course, eventually form part of the permanent works.

11. By, at latest, the summer of 2003 it was a feature of whichever scheme was going to be carried out, that there should be a deep double basement. This is shown on Mr Fidler's drawing 02. The bottom of the basement was some 5.3 metres below the existing foundations, which were themselves some 900mm below ground level. Self-evidently, as I shall describe later, once the excavation was dug out, it would require support. In its permanent condition that support was to be provided, as I understand it, by the basement slabs, and no doubt interlocking walls so as to ensure that the retaining walls which would form the walls of the basement stayed in position.

The Parties

12. The claimant company did not have considerable experience of undertaking the sort of development work which was the subject of this contract. Mr Andrew Hart told me that this was the first project of its type undertaken by the claimant. Nevertheless, the claimant employed professionals, including an architect, Mr Greenberg, and quantity surveyors Truemans. It also appeared that there were some individuals, first a Mr Shapiro, and subsequently his replacement who acted in some form of project management role on the site for the Claimant.

13. The first defendant, Mr Fidler, is an experienced structural engineer. He has been qualified since the early 1970s, and is self-evidently, a man of considerable experience. Between 1970 and 1985, he was a partner of Robert Fish, the brother of John Fish who acted on behalf of the Second Defendants, Larchpark Ltd, in relation to this matter. Then Mr Fidler entered into partnership with a building surveyor until about 1994. In 2004 and 2005 he practised on his own account, and he now acts as a consultant to a company which is operated, as I understand it, principally by his sons.

14. Having observed him in the witness box, he seems to me to be a man of considerable practical experience. He himself said that he was not, at the stage when these works were being undertaken, particularly familiar with computer aided drawing, and it also appears that he was not prone to taking too many notes on site - or indeed making any detailed records of the works that he was undertaking.

15. The second defendant, Larchpark Limited, the contractor, had some relevant experience and although it is now defunct, I have no reason to suppose that it appeared as anything other than as a competent contractor for the sort of works in question. The persons acting on behalf of it included Mr John Fish and also Mr Pat Ryan. It is apparent that over the years Mr Fidler has done a reasonably considerable amount of work for Mr John Fish, and it is also apparent that Mr Fidler enjoyed a good working relationship with operatives of Larchpark Limited.

The Contractual Arrangements

16. It appears that Larchpark Limited were initially appointed pursuant to a limited letter of intent dated 1st November of 1992, which had an initial anticipated contract sum of £446,000. At that stage the claimants had themselves retained as a structural engineer, a Mr Alan Lipton. I am not clear precisely when Mr Fidler first had an involvement in relation to these works. The documents disclose that by early March of 2003 he was giving advice to Mr John Fish on behalf of Larchpark. In particular, by a letter dated 3rd March 2003 -- bundle 5, page 8 -- he commented on the then existing structural engineer's drawings. He made the point that the mixing of foundation types apparently then in existence was not satisfactory, and he went on:

   "The drawings also make it extremely difficult to set out the temporary works, as there is no setting out information. Finally, I am also of the opinion that there should be substantially more information, in respect of the underpinning methodology and how the bulk excavations can take place after underpinning, prior to the retaining walls being formed."

   It is thus apparent that by that stage he was considering the temporary works necessary for the contractor to undertake the permanent works, and he was in particular considering the problems of bulk excavations and underpinning - although I am not certain as to the precise depth of the basement at that time.

17. It is also apparent from documents at about that time that it was then contemplated that he would be paid on the basis of an hourly rate as an employee of Larchpark Limited for designing the temporary works. At some stage, and I am not clear when, that arrangement was replaced by a fee basis, as I have been shown invoices whereby he charged lump sums for the temporary works, and it is apparent that Mr Fidler retained a role in relation to the temporary works - certainly up until the collapse a little under a year later.

18. Mr Andrew Hart told me that there was some tension between Mr Lipton as the engineer then employed by the claimant, and Mr Fidler undertaking the temporary works. In June of 2003 it is apparent that Mr Fidler replaced Mr Lipton as engineer in relation to those permanent works. By a letter dated 14th June 2003 Larchpark wrote to Andrew Hart with a copy to Mr Fidler in the following relevant terms:

   "Dear Andrew,

   Further to our recent meeting on site with Terry Fidler, I write to confirm what was agreed as follows:

   Terry will take over the responsibility for the whole of the structural design utilising design drawings and calculations so far produced by Alan Lipton. Terry will provide you with the benefit of his PI insurance with a current cover of £5m.

   The fee receivable by Terry from Hart Investments Limited should be £10,000 plus VAT.

   We shall make a contribution of £5,000 plus VAT to this fee. We are prepared to make such a contribution, bearing in mind our need for prompt receipt of structural information.

We are pleased that this matter has now been resolved, and we are confident that Terry will provide the information required when it is needed to ensure the proper progress of works."

No more formal contract was entered into between the claimant and Mr Fidler.

19. It is apparent that from then on Mr Fidler was retained directly by the claimant in relation to the permanent works design. It appears that somewhat earlier than that Mr Fidler had ordered and received the ground investigation report on behalf of Hart Investments Ltd. Mr Hart described how, once work commenced, Mr Fidler attended onsite regularly, and he estimated some three times a week. There does not appear to be a substantial issue between the parties as to Mr Fidler's attendance on site. In a letter by his solicitors in January 2005 Mr Fidler identified the occasions upon which he had attended site taken from his diary, namely seven times in September, ten times in October, six in November, five in December, eight in January, and I would observe there also appears one occasion in February of 2004 prior to the collapse. There were thus some 37 occasions upon which his diary records him as attending site. Mr Fidler fairly accepted in the course of his cross-examination that not all visits to site would necessarily have been recorded in his diary , although he made the point that on occasions he sometimes attended site to have breakfast, on the basis that the food was apparently good in the canteen on site. In overall terms, taking into account the Christmas break, it seems to me likely that Mr Fidler attended site on some two to three occasions per week during the time when works were being undertaken.

20. No express terms were agreed about inspection. Against that, it was plain to the parties that Mr Fidler was, in fact, attending site in accordance with their expectations, and it seems to me that it was implied that he should undertake the normal inspection duties to be inspected of a structural engineer on behalf of the claimant. As Judge Bowsher Q.C. pointed out in ***Corfield v. Grant*** (1992) 29 Con. L.R., at 58 to 59, the frequency and duration of inspections required of a professional should be proportionate to the nature of the works going on at site from time to time. I consider that given the nature of this relationship it was implicit that Mr Fidler should make reasonable efforts to inspect the important elements of the permanent structural works.

21. The question which may, however, arise in this case is the extent to which an engineer who is employed in relation to permanent works is obliged to point out defects in temporary works to a contractor. That issue was considered briefly by His Honour Judge William Stabb Q.C. . in ***Old School v. Gleeson*** 4 B.L.R. 103. That case, on its facts bore a striking similarity to the present case. The claimants were the owners of two adjoining properties in North London, which they were proposing to develop. The first defendants were the building contractors, and the second defendants were consulting engineers. The works necessitated the complete demolition of one of the two properties, and partial demolition of another. When the work was almost completed the party wall separating the properties from the adjoining property collapsed. The contractors admitted liability to the owner for the damage which had to be paid to the adjoining owners, and sued the consulting engineers for contribution on the basis that those consulting engineers should have pointed out the dangers of the contractor's method of working on the site. The judge rejected the claim by the contractors on its facts, holding that there had, in fact, been warnings put forward which the contractors had, for reasons of its own, ignored. However at 124 he said this:

"As I have already indicated, I do not consider that the consulting engineer's duty of supervision extends to instructing the contractors as to the manner in which they are to execute the work, and I think that that is probably accepted by the first defendants to a large extent. What is said however, is that when the consulting engineers knows, or ought to know that the contractors are heading for danger whereby damage to property is likely to result, then he owes the contractors a duty of care to prevent such damage occurring. If he sees the contractor is not taking special precautions without which a risk of damage to the property is likely to arise, then he, the consulting engineer, cannot sit back and do nothing. I am not sure that the consulting engineer's duty extends quite that far, but even if it does, I do not believe that he is under a duty to do more than warn the contractors to take the precautions necessary, and in so far as those precautions consisted here of shoring, and providing temporary support and immediate blinding excavations in the vicinity of the party wall, I am satisfied that Mr Gabriel gave Mr Craven ample warning."

As appears, the learned Judge was there considering the duty to the contractors, but it appears likely that it would also have been doubtful as to whether a duty would have been owed to the employer.

22. In my judgment if an engineer employed by an owner in respect of permanent works observes a state of temporary works which is dangerous and causing immediate peril to the permanent works in respect of which he is employed, he is obliged to take such steps as are open to him to obviate that danger. It seems to me that that follows, partly as a matter of common sense, but also because the engineer is, after all, instructed in relation to the permanent works as a whole. It would appear strange if he is under a duty to take such steps as he can to see that they survive for say, the next 25 years, or whatever the design life for the building is, but is not obliged to take any steps to warn of an immediate danger to those works caused by an imperilling act by the contractor.

23. I consider that the position is analogous to that considered by Laddie J in the solicitor's negligence case of ***Credit Lyonnaise v. Russell Jones and Walker*** [2003] PNLR 17. In that case the defendant solicitors were instructed in relation to the exercise of a break option in a lease. The defendants failed to advise the claimants that the payment required on the exercise of the break option was a condition precedent and was time critical. As a result the option was lost, and the claimant had to buy its way of the lease on the best terms available. The defendants contended that their retainer was very narrow, and did not include any instructions to provide advice on the meanings of the relevant clause, on the law, or on the law of conditions precedent in tenants' options. Laddie J considered those submissions and found that if there was a plain and obvious danger it was the solicitors' duty to

point it out, even if he was not strictly employed in relation to that danger. At page 24 paragraph 28 he said this:

*"A solicitor is not a general insurer against his client's legal problems. His duties are defined by the terms of the agreed retainer. This is the normal case, although **White v. Jones** [1995] 2 A.C. 207 suggest that obligations may occasionally arise outside the terms of the retainer or where there is no retainer at all. Ignoring such exceptions, the solicitor only has to expend time and effort in what he has been engaged to do and for which the client agreed to pay. He is under no general obligation to expend time and effort on issues outside the retainer. However if, in the course of doing that for which he is retained, he becomes aware of a risk or a potential risk to the client, it is his duty to inform the client. In doing that he is neither going beyond the scope of his instructions nor is he doing "extra" work for which he is not to be paid. He is simply reporting back to the client on issues of concern, which he learns of as a result of, and in the course of, carrying out his express instructions. In relation to this I was struck by the analogy drawn by Mr Seitler. If a dentist is asked to treat a patient's tooth and, on looking into the latter's mouth, he notices that an adjacent tooth is need of treatment, it is his duty to warn the patient accordingly. So too, if in the course of carrying out instructions within his area of competence a lawyer notices or ought to notice a problem or risk for the client of which it is reasonable to assume the client may not be aware, the lawyer must warn him. I do not need to consider what would be the consequences if the lawyer does more than asked for, for example reads documents which he was not asked to read, and discovers a risk to the client."*

24. I have yet to make findings of facts in relation to what Mr Fidler actually saw. In considering the proper extent of his duty it seems to me, however, to be relevant to consider how, factually, he carried out his duties on site to the knowledge of the Claimant. I take, by way of convenient example, the visit that he made to site on the morning of 3rd February 2004. In his witness statement he says that he went to site to inspect the reinforcing bars at the rear of the site. This was plainly an important thing for him to have done. The reinforcing bars would form part of the basement slab which was to be cast, and would form an important part of the permanent works. In order to get to the bottom of the site he would, as is apparent from the photographs, have to go on to the site, past the area where it is said that the excavation had taken place. If, on going down there he had seen an unsupported section of wall, some 5.3m in height, which he knew ought to be supported by temporary props, and I pause to point out that he knew that not merely because he would have designed that, on the hypothesis that he had designed it, but as a matter of engineering common sense as is apparent from the expert evidence of both engineers, then it seems to me that he was under a duty to the client, that is the owner of the building, to point out to the contractor the plain and obvious danger which was represented. It seems to me that it would be taking too fine a point to suppose that at that point he simply would only be under a duty to his other client, the contractor. As I say, in my view that occurs even if he had had no obligations at all to the contractor. In the present situation, where he was actually having a combined retainer, it seems to me that it would simply be an impossible distinction to draw to say that in that position, he owed no duty at all to his client to point out the plain and obvious defect – on the assumption of course, that he saw the same.

The Design and The Collapse

25. I turn now to the facts concerning the design and also the collapse itself. By June 2003 Mr Fidler had designed the underpinning to the basement, and that is shown on the original drawing 02. That is annexed to his witness statement and shows a conventional form of deep underpinning intended to be done in narrow pins with an order of casting. The method of working was to dig down by the wall to be underpinned, then to cast concrete, then to backfill so as to permit adjacent sections of the underpinning to be undertaken.

26. That original drawing 02, and indeed a revised version of that drawing in July 2003 was supplied to the party wall surveyor. The party wall surveyor acting for Hart Investments Ltd was a Mr Crook, who gave evidence before me. One can see that drawing 02 revision A was supplied to Mr Crook, because it is signed by him and his counterpart. The first revision A to drawing 02 shows the sequence and sizing of the underpinning having been changed in July 2003. Following receipt of that drawing the party wall surveyors issued a party wall award.

27. Mr Fidler says that in October 2003 he carried out a further revision to that drawing. The effect of that revision was, he says, to include on a version of revision A, a scheme for propping of the retaining walls when the excavation took place. There exist various revisions of drawing 2 upon which such a scheme is shown. They are helpfully annexed to his witness statement. Unfortunately, as Mr Fidler freely accepted in cross-examination, his system for dealing with drawings in relation to revision 2, was far from satisfactory. In particular, he did not save, as he should have done, each revision as it went through, nor did he show what revisions had taken place on each occasion. The consequence is that there are in the bundle, and attached to his witness statement, a number of separate drawings – some of which have, admittedly, been arrived at by a process of re-construction

28. At page 74 at bundle 2 is what is said to be revision B showing a version of the drawing with additional raking props added in October 2003 with a note under the relevant drawing which simply says, "Temporary props to excavations prior to casting base slab."

29. At page 75 is a version which is said to be version A, which has the same drawing, but with a different location under it and the words, "These props to install when bulk excavation progresses are added."

30. At page 76 is a version of revision B with the words, "Additional raking props added," but a note showing that this was plainly produced after the collapse had taken place. It is this drawing which the claimant says was the

genuine revision B. The other documents to which I have referred being, it is said, essentially fabrications after the event.

31. There is also at page 77 a revision C, created expressly in February 2004 showing the collapse note on it.

32. In his diary for October 2003 the claimant has a note showing that he, according to him, attended site and delivered both a drawing, and a method statement for the underpinning works. Mr Joseph, on behalf of the claimant does not shrink from the assertion that that note too was a fabrication, added, he says, as a matter of inference, after the event and not at the time.

33. There are also produced two slightly different method statements dated 3rd October 2003, which provide for the exercise of putting in place the pins. One of those versions is at bundle 5, page 56(a). The other version is at page 56(b). The difference between them is that one of them says that the excavations at basement level are not to be deeper than 2m above formation level, whereas the other one contains no such note. Both, however, provide for a mechanism for undertaking the propping, which was in summary as follows: first there should be trenches dug perpendicular to the walls which were to be propped so as to allow concrete bases to be put in place. After seven days, that is after seven days curing the concrete, the props could then be placed, and after the basis were 21 days old, that is after a further 14 days, the reduced excavations could be continued. Accordingly, it will be seen that the proposed method of working would involve a minimum period of 21 days from when the trenches were dug before it would be safe to undertake the bulk excavations according to the method statement. Mr Joseph said, as I have said, that these method statements were also fabrications.

34. Mr Joseph also very fairly accepted that given the serious nature of the allegations being made, it would only be appropriate for me to find that Mr Fidler had fabricated the relevant documents if I was satisfied to a standard commensurate with the seriousness of the allegation, in effect, the standard for civil fraud. He relied on a large number of factors which were, he said, consistent and taken together should lead me to the conclusion that the relevant documents have indeed been fabricated. I shall turn to those factors in a minute.

35. Mr Sampson, for the defendants, urged me not to make a finding that there had been fabrication of the sort which I have indicated. His points, as one might expect , could be summarised quite shortly. There was, of course, the seriousness of the allegation. There was also Mr Fidler's emphatic evidence that he had given directions for the scheme, as he said in the witness box, and he relied in particular on the fact that in a report shortly after the event Mr Fidler had referred to a scheme for raking props in a way which would be unnecessary -- I refer to bundle 5, page 115 -- and which would, I add, have been capable of being shown to be untrue easily if the drawings had not been produced. Thus on page 115 Mr Fidler said in his report, that on the morning of Thursday, 5th February 2004, after the concrete to the central section across the site had been completed, the side excavations were started to allow the installation of the temporary bases ready to receive the raking props as detailed on TFP drawing 22(b). This document would have been likely to have found its way into the hands of Larchpark Ltd, and if that had not been true Mr Fidler would have been in very grave danger of having been found out.

36. He also relied on a statement put in under the Civil Evidence Act from Mr John Fish. That statement which was witnessed by a nurse in August of 2005, shortly before Mr Fish sadly died, stated that in October 2003 Larchpark had indeed received drawing number 02(b) and there was the method statement, and a version of 02(b) was signed by Mr Fish. It is apparent from the manuscript that Mr Fidler was involved in obtaining this statement, and there are a couple of oddities as to the circumstances in which it was received. Nonetheless, this statement would have been plainly directly against the interests of Larchpark Limited, and should, therefore, according to Mr Sampson, be taken into account by me in any decision which I reach.

37. I propose to list the factors relied on by Mr Joseph, which seem to me to be his strongest points. I do not ignore any of the other ones, but I hope he will forgive me for not having listed all of them, because I think he managed to reach 21 different points in his favour. The first was that there was actually no reason at all for a scheme to be designed in October 2003. There was, he said, no reason why the propping scheme should not have come into existence in July of 2003 when the original drawing was done. Secondly, there were a number of features about the various drawings, which could not be explained by Mr Fidler in evidence. These included the fact that the note immediately under the drawing reflecting how the underpinning was to be carried out was renewed, and Mr Fidler could not explain why. That same note conflicted with the method statement, and again, Mr Fidler could not explain why. Further, Mr Joseph relied upon the existence of the three revisions A, B and C themselves, and said that there was no reason for those three revisions.

38. Mr Joseph also relied, and relied heavily, upon the report immediately after the collapse at page 114, to which I have already referred. It is not clear to me precisely how this report came into existence. Nevertheless, it appears plain that this was a report which was intended to have a reasonably wide circulation, including no doubt to the client, to representatives of the local authority, and to the Health and Safety Executive, and quite possibly to insurers as to how the collapse had taken place. There are a number of strange features about this report to which I will refer, but one of those features is that it does not anywhere refer as a cause of the collapse to the fact that the ground had been excavated otherwise than in accordance with Mr Fidler's method statement and drawing, which he had, he said, produced.

39. Mr Joseph also relied on a programme which had been circulated by Mr Fidler immediately before the Christmas construction industry break in December 2003. That program is to be found at page 69 of bundle 5. On its face

the program, which appears to have been drawn up by Mr Fish, shows the completion of demolition and erection taking place in the four week period between 7th December and the week commencing 10th January, allowing for the two weeks off, as I have said, for construction. It was issued and sent out to a number of people, including the client, on 19th December at page 72 of the bundle. Given that according to Mr Fidler no provision had been made for side excavations by 19th December, the remaining period of one week was plainly quite insufficient for a completion of demolition and excavation if his method statement was to be followed because, as I have said, that would require a minimum of three weeks before the excavation could be completed.

40. Now I have, I confess, been extremely troubled about the circumstances in which the drawings and method statements, to which I have referred, were produced. It does seem to me that there are a large number of inconsistencies in relation to the production of these documents, including those which I have inelegantly summarised, put forward by Mr Joseph.

41. Mr Fidler's explanation was in summary, that he was not competent to operate the CAD drawing system, and that he had, as it emerged, had to re-create certain drawings after the event in order to reflect what he said had been the position in October.

42. I have, having considered the matter, come to the conclusion that a version of drawing 2 showing the propping was in existence prior to the collapse. I am far from certain as to which version of the drawing that was, or precisely what notes were on it. I have also come to the conclusion that a version of the method statement was in existence prior to the collapse. Again, I am not certain as to which of the two versions it was. I make these findings for three principal reasons, the most important is the reference in the report to which I have referred of a drawing showing propping. It seems to me that given the circulation of that report would inevitably have involved Larchpark Limited, it is very unlikely that Mr Fidler would have made that up unless there had been some form of conspiracy between himself and Larchpark, which I am not prepared to find on the evidence before me.

43. Secondly, it does seem to me that the seriousness of the allegation does require me to be convincingly satisfied that the drawings and other documents were fabricated, and I did not think, having seen Mr Fidler in the witness box, that he was someone who would go to those dishonest lengths in order to provide a dishonest explanation for what had happened.

44. Thirdly, I consider that the likelihood is that some form of scheme would have been necessary and demanded, and it is inherently unlikely that anyone would have got to the stage of actually undertaking the excavation without some form of scheme being in existence. For those reasons I find on the facts that the first limb of the claimant's complaint against Mr Fidler is not made out. Nevertheless my finding on the first limb has certain consequences. Those consequences include that Mr Fidler must have known that it was an essential requirement of undertaking the excavations safely that there be propping in accordance with his scheme. In other words, it must have been something which was in his mind.

What did Mr Fidler see?

45. Furthermore, it seems to me that that knowledge makes all the odder the report to which I have previously referred, and to which I now need to go back. On his account of events between the time that he had last visited the site on the morning of 3rd February 2004 and the morning of 5th February 2004, the contractor had suddenly, and without notice to him, undertaken dangerous excavations contrary to the drawing which he provided, and the method statement which he had set out. The explanation for not pointing this out in the report was that Mr Fidler was seeking to explain the mechanism of the collapse and not give a precise history.

46. In my judgment that is simply not a satisfactory explanation. The conclusions which Mr Fidler draws at page 116 purport to set out the primary points for the clients for reference. Those are said to include poor brickwork above ground level, excessive rain, extremely poor brickwork below ground level, very weak existing foundations and a concrete ground spreader beam assisted in the downward movement. I find it extraordinary in those circumstances that he did not point out that the contractor had not complied with the scheme which he had himself devised. I also pause to note that the statement which I had previously read out at the beginning of the paragraph under the heading, "Observation of events," must be inaccurate, because when he says, "Last week on the morning of Thursday, 5th February 2004, after the concrete to the central section cross the site had been completed the side excavations were started," that simply cannot be right. On his case he must have been aware given the time of the collapse, that they had been started considerably earlier.

What did Mr Fidler see on 3rd February?

47. I turn then to consider the state of the site when Mr Fidler last visited the site on morning of 3rd February 2004. In relation to this it seems to me that the relevant evidence is as follows: first Mr Andrew Hart told me that he visited the site regularly, and had not been aware of lorries going on to the site in order to take away spoil. Secondly, the expert engineers, Mr Porter and Mr Wasilewski, who both gave helpful evidence on their respective sides, told me that the excavation of what has been referred to as the right-hand side of the excavations, that is where the collapse occurred, could not have taken place unless a lorry had gone on the site and there had been direct movement from a digger into the lorry. Furthermore, to excavate only the right-hand side would have taken almost the entirety of the two days which were available between the morning of 3rd February and the morning of 5th February.

48. Next, according to Mr Fidler himself, site conditions had been extremely wet prior to the collapse on 5th February. Given the state of the site, which is apparent from the photographs, it appears to me unlikely that a lorry would have been driven onto the site, at any rate easily, during that time if the site conditions were wet as he said.

49. Next, and importantly, there are photographs in the bundle which show the excavations not on the right-hand side where the collapse occurred, but on the left-hand side, that is on the other side of the property, and I refer in particular to the photograph which one sees at page 33 of the bundle of photographs. It appears that this excavation could not have taken place within the two day period which would have been necessary to excavate the right-hand excavation. The photographs also show that even after the collapse no temporary propping was in place for a reasonably considerable period.

50. Mr Fidler gave evidence that after the collapse he considered whether it was necessary to have propping on the left-hand side, and came to the conclusion that it was not, because the basement of the adjoining property restricted the ground pressure which was forming on the wall. Nevertheless, he cannot have come to that conclusion before he drew his drawing in October, and he does not give any evidence that he came to that conclusion between October and February. Furthermore, as Mr Joseph points out, props **were** actually installed there after a period of time. If one looks at the language of Mr Fidler's report he says at the top of page 115:

"The excavation has been open for some five months, with the façade being retained for that period of time whilst the building has been gradually dismantled, through various stages to suit the various schemes, and the bulk excavations have been taking place."

The impression is not given of some sudden and frenzied activity over the two days since he was at the site, but rather at a more gradual process.

51. I also take into account the programme which he himself issued, and therefore saw immediately before Christmas. That indicated that the excavations were to be completed in the first week of January. That it seems to me would strongly indicate that the remaining excavations would start then. Absent some other explanation, I consider it likely that they did in fact start in January and were well advanced by 3rd February.

52. Having looked at the photographs of the site itself, although I do not consider this is determinative, it does seem to me that it would have been very tight if one looks, for example, at the photograph on page 34, to have the lorry and the digger in the positions necessary for the excavation to be taking place in two days.

53. And finally, given the good relations which Mr Fidler undoubtedly had with the contractor, and the regular times when he appeared on site, it appears to me most unlikely that the contractor would in fact have undertaken an operation such as digging out the excavations without any reference at all to Mr Fidler.

54. In those circumstances I find that the excavations had started and had progressed to a level where they were themselves dangerous – and obviously so - prior to 3rd February 2004 when Mr Fidler attended site. I also find that that was the reason why he did not make any reference to the fact that his own drawing and method statement had not been followed in his report immediately afterwards. Had he not himself felt vulnerable because of his failure to point the matter out to the contractor, he would have said the drawing had not been followed. Instead, he gave reasons for the collapse, which do not appear to me to be well founded. Both the expert engineers were agreed that had the propping which had been designed, been in place the collapse on 5th February would not have taken place.

55. Mr Weslewski gave a particularly dramatic account of how, in relation to the left-hand wall, unless he had been satisfied as to the position of the basement, had he been the engineer on site, he would have immediately required the evacuation of the site. He would then have required the evacuation of the adjoining building before he, and then the insertion of temporary propping so as to render the site safe. If that was the position it seems to me that Mr Fidler, as an experienced engineer, must have had a reason for not pointing out the obvious and most apparent reason for the collapse on 5th February, and I find that that obvious and apparent reason was that he was concerned that he had not taken steps when he himself visited the site earlier that week.

56. It follows that I find that Mr Fidler was in breach of duty to the claimant in not warning the contractor as to the risks of the site collapsing, and indeed, in not taking immediate steps of the sort contemplated by the engineers of temporary propping with railway sleepers and so forth so as to prevent that danger.

Causation

57. So far as causation is concerned, I see no reason to suppose that had Mr Fidler given that advice, particularly given his close relationship with Larchpark, that Larchpark would not have followed that advice and taken care to ensure that the site remained safe.

The Case in Tort

58. Thus far, I have confined my considerations to a contractual one. I find, as I said, that Mr Fidler was in breach of a contractual duty direct to the claimant, that contractual duty being to point out an obvious danger to the permanent works which he himself observed when on site on 3rd February. Given the existence of that contractual duty, I also find that there was a concurrent duty of care in tort sufficient to extend to the prevention of economic loss of the sort contemplated by the House of Lords in ***Henderson v. Merrett.***

59. I have been addressed at some length as to the possible existence of a duty of care, even if there were no contractual duty of the sort which I have found. Given my main conclusions I do not need to express a concluded

view on that, but I will do so briefly in case the matter goes further, as follows: First, I am satisfied that contrary to the submissions of Mr Joseph, the loss claimed in this action is economic in its nature. That seems to me to follow inevitably from the observations and comments of their Lordships in ***Murphy v. Brentwood District Council.***

60. It follows that in the absence of a contractual duty I need to find some special circumstance or justification for extending a duty to prevent economic loss, and on the hypothesis that I am wrong as to the extent of the contractual. The distinction between economic and physical loss has, of course, been criticised by a number of commentators, including notably by Sir Robin Cook in an article in The Law Quarterly Review in January 1991, page 46. Nevertheless, the decision of the House of Lords is plainly binding on me.

61. So far as the existence of special circumstances is concerned, I find helpful in the context of this case, the analysis provided by May LJ in ***Merrett v. Babb*** [2001] QB 1174, where his Lordship summarises the strands of reasoning so as to consider when a duty of care will be found. I refer particularly to paragraph 41. In the circumstances of this case an important consideration is that the parties would have entered into contractual arrangements which would not include such a duty. In other words, there would have to be reliance on the pocket book of Mr Fidler in order to identify a relevant duty.

62. I would, if necessary, be prepared to find the existence of such a duty on the special facts of this case, as follows: It seems to me that in a closely allied respect, namely the permanent works, Hart Investments were indeed relying upon Mr Fidler's pocket book. I refer most expressly to the reference to professional indemnity in the June letter. Second, it seems to me that on any view the tasks in this case in relation to temporary and permanent works were closely intertwined, they were undertaken by the same person, Mr Fidler. He had the same job number. He did not, as far as I can see, distinguish, and one would not expect him to distinguish precisely what he was doing when. Further, I do not consider that the claimant or anyone in a position of the claimant would analyse too closely exactly what it was that Mr Fidler was doing whilst on site. Plainly, as it seems to me, there would not be a duty to the claimant that the temporary works be undertaken in a particular way, but it does not seem to me that it would a very limited extension to impose a duty in the circumstances of this case upon the engineer to prevent economic loss to a structure which he was himself seeking to safeguard for a considerable period of time. For those short reasons, I would, if necessary, have found the existence of a duty in respect of the second failing which I have identified, even if I had not found a contractual duty.

Conclusion

62. For those reasons I find that there will be judgment for damages to be assessed in favour of the claimant as against Mr Fidler.

MR CHARLES H. JOSEPH appeared on behalf of the Claimant
MR GRAEME SAMPSON appeared on behalf of the First Defendant