Neutral Citation Number: [2023] EWHC 3219 (TCC)

Case No: HT-2023-000113

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Rolls Building, London
Date handed down: 15 December 2023

Before :

His Honour Judge Stephen Davies sitting as a High Court Judge

- -

Between :

JENNI GLOVER & LITTLETON GLOVER	**Claimants**
- and -	
FLUID STRUCTURAL ENGINEERS & TECHNICAL DESIGNERS LIMITED	**Defendant**

- -
- -

Mek Mesfin (instructed by **Penningtons Manches Cooper LLP**) for the **Claimants**
Helena White (instructed by **Beale & Company Solicitors LLP**) for the **Defendant**

Hearing date: 1 December 2023
Supplemental submissions 7 and 8 December 2023

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APPROVED JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10am on 13 December 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

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The application

1. This is my judgment on the defendant's application for strike-out or summary judgment on the claimants' claim, which has been extremely well argued before me on 1 December 2023 by counsel for the applicant defendant, Ms Helena White, and by counsel for the respondent claimants, Mr Mek Mesfin.

2. In short, it is said by the defendant that neither of the claims advanced by the claimants can succeed as a matter of law and, hence, should be struck out or dismissed summarily rather than be allowed to go to trial.

3. I have been referred to well-known authorities as to the proper ambit of and approach to such applications. The following principles are common ground.

4. A court may strike out a claim where, amongst other things, the statement of case discloses no reasonable grounds for bringing or defending the claim (CPR r3.4(2)(a)).

5. A court may give summary judgment where: (a) the claimant has no real prospect of succeeding on the claim or issue (CPR r24.2(a)(i)); and (b) there is no other compelling reason why the case or issue should be disposed of at a trial (CPR r24.2(b)).

6. Where applications are made to strike out under CPR r.3.4(2)(a) as disclosing "no reasonable grounds" for bringing the claim and, in the alternative, for summary judgment, there is no difference between the tests to be applied: see Hamida Begum v Maran (UK) Limited [2021] EWCA Civ 326, per Coulson LJ at paragraphs 20-21.

7. Proper grounds for strike out under CPR r 3.4(2)(a) and for summary judgment exist where the facts of the case, do not, even if true, amount in law to a defence to the claim.

   "If the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better": ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725

8. However, it is generally not appropriate to strike out a claim on assumed facts in an area of developing jurisprudence: see Begum (above), per Coulson LJ at paragraphs 23-24, citing the House of Lords in Barrett v Enfield DC [2001] 2 AC 550, per Lord Browne-Wilkinson at pp. 557e-g and the Supreme Court in Vedanta Resources PLC & Another v Lungowe & Others [2019] UKSC 20, per Lord Briggs at paragraph 48.

9. Proper grounds for summary judgment include that, as contended here, on current evidence a claim has no realistic prospects of success and there is no additional evidence that can reasonably be expected to be available at trial (including any oral testimony) that is likely to add to or alter the evidence that will be available to a trial judge and so affect the outcome of the case.

10. However, the court should not conduct a mini-trial on disputed evidence: see Begum (above) per Coulson LJ at paragraph 22, citing Swain v Hillman [2001] 1 All E.R. 91.

The parties

11. The claimants are the residential owners and occupiers of 124 Westbourne Grove, London, W11 2RR ("the property"). They wished to undertake extensive works to refurbish and extend the property, including the construction of a new basement underneath the property, construction of a full loft space at roof level and complete internal reconfiguration (the "project" and the "works").

12. The defendant ("Fluid") is a firm of structural engineers. The claimants appointed Fluid as structural engineer, under a written appointment dated 3 December 2013 (the "appointment"), which incorporated the terms of the Association of Consulting Engineers (ACE) Agreement 1 (Design) 2009 and under which Fluid agreed to provide various structural and civil engineering services to the claimants in respect of the project.

13. The claimants employed a main contractor (Chase) to undertake the works under a JCT standard form of building contract. They also appointed architects to provide architectural and contract administration services in relation to the design and administration of the works.

Chronology

14. This is an abbreviated summary, given the basis of the application and the need to avoid the temptation of being drawn into the detail of factual disputes. I shall refer to the relevant contractual terms at a later stage of the judgment where they are of particular importance.

15. The works commenced in September 2016. During the works, damage and cracking was caused to the property and adjoining properties at 122, 126 and 128 Westbourne Grove (the "neighbouring properties"). The cracking led to the works being paused and recommenced on a few occasions. Fluid undertook a number of inspections and produced a number of reports in relation to the extent of any movement and the progress of the works. The works should

have been completed by February 2018, but were not. In June 2019, Fluid produced a report which contained, as Fluid admit, an incorrect statement as to the way in which the works had been undertaken and what Chase should have, but did not, do. In July 2019, Chase's employment was terminated and, shortly afterwards, it went into liquidation. The claimants appointed another contractor to complete the works which were completed on 6 May 2021. The claimants have incurred costs in that respect and have also faced claims made by the owners of the neighbouring properties which they are seeking to direct at insurers.

16. As early as December 2019, the claimants issued a protective Claim Form against Fluid and various other parties, namely Chase and four insurance companies, including one which provided non-negligent damage insurance cover to the claimants and Chase (formerly known as XL Catlin and now known as Axa XL - "XL"), and another being Chase's insurers ("Chubb").

17. The proceedings were stayed on a number of occasions. Eventually, after the proceedings were served, they were only pursued against Fluid and XL. The claimant had to pay £14,000 to one of the insurers against whom it discontinued.

18. The claim against XL is a relatively substantial claim for compensation for property damage under the policy. Nothing more needs to be said about this claim in this judgment.

19. The claim against Fluid is conveniently summarised in Mr Mesfin's skeleton for this application at paragraphs 10 -12 as follows:

> "10. The Claimants' claim against the Defendant alleges that it acted in breach of duty by failing to (i) make site visits fortnightly (or at an adequate frequency) during the structural works; (ii) adequately report to the Claimants whether the structural works were being executed generally in accordance with the contract documents and with good engineering practice; (iii) adequately record, or produce any documentation that records, its visits to site to consider the construction of the structural works.
>
> 11. As a result of those breaches, the Claimants did not have a clear picture of how the works were performed which resulted in discrepancies between how the Claimants reasonably understood the Works to have been performed and how they were actually performed. Not only did Fluid fail to produce written records of its site visits, but (some of) the limited documentation it produced was misleading – for example, in its report dated 4 June 2019 the Defendant incorrectly advised that a two-stage underpinning process was being undertaken, when in reality – and as was admitted by the Defendant nearly 2 years later in its letter of response – this was wrong.
>
> 12. The Defendant's breaches resulted in the Claimants incurring considerable costs investigating matters (primarily relating to negligent design/construction by members of the project team) which turned out to be unsustainable. Had the Defendant performed its duties, the Claimants would not have incurred those costs and would have immediately (and only) pursued claims under the non-negligent insurance policies. Accordingly, the

> Claimants claim the legal and investigation costs which they have incurred (the "costs claim") and repayment of fees which they paid to the Defendant in relation to those duties (the "repayment claim")."

20. The total value of the claim is said to be £134,256.47, of which £118,526.12 comprises the costs claim and the balance of £15,730.35 comprises the repayment claim. Given the issues raised by the application it is necessary to summarise the individual components of these claims.

The costs claim

Costs claim item 1 - £64,002. Solicitors fees for work done in relation to claims made against the defendant, Chubb and XL said to be "wasted and incurred due to and/or materially contributed to by Fluid's breaches".

Costs claim item 2 - £30,458.52. Expert fees said to be "incurred / wasted investigating, asserting, and defending matters caused and/or materially contributed to by Fluid's inadequate provision of services (excluding expert fees incurred for matters not relating to Fluid's monitoring and reporting of the as-built arrangement).

Costs claim item 3 - £10,065.60. The cost of opening up works in April 2022.

Costs claim item 4 - £14,000. The claimant's costs liability to the insurance company against whom it discontinued.

The repayment claim

Repayment claim 1 - £10,717.35. A claim for repayment of 15% of Fluid's fees which were invoiced for services during the construction period pursuant to clause 17 of Fluid's appointment.

Repayment claim 2 - £5,013. A claim for repayment of sums paid to Fluid for inspections relating to cracks and party wall issues.

21. The first CCMC took place before me on 23 February 2023, when I ordered that the claims against XL and Fluid, having no direct connection in terms of the claims made and the issues raised, should be case managed and heard separately. As regards Fluid, I gave stripped-down directions for limited disclosure, limited witness statements and limited evidence from a single joint expert in order to reduce the time and cost of this relatively modest value litigation and directed that the parties should engage in ADR before the trial, now listed for 2 days before me in early May 2024, takes place. (The parties have sensibly provisionally agreed to undertake a mediation on 30 January 2024.) I reduced the claimants' cost budget significantly to reflect these stripped down directions.

22. At the CCMC, Fluid invited me to allow in the timetable for the listing of an application along the lines of that now before me which it had already said that it intended to issue but had not done so. I declined to do so. The application was eventually issued in June 2023. The original hearing date of 13 October 2023 was vacated by order, made on the claimants'

application, and was re-listed for today. In the meantime the parties have completed disclosure and exchanged witness statements and the single joint expert has provided his report and answered questions.

23. It follows that I now have all of the evidence before me which will be available at trial, although I do not of course have the benefit of hearing the witnesses give evidence or considering the totality of the evidence and the legal submissions in the round.

24. The claimants are, with some justification, critical of Fluid for making this application at a late stage, especially because the grounds relied upon were first raised in pre-action correspondence. However, if I was satisfied that the application was well-founded I should in my view nonetheless strike out or summarily dismiss the claim now rather than allow it to proceed to a trial which, on this analysis, the claimants simply could not win. However, in such circumstances the claimants might well have arguments in relation to the costs incurred in the case from when, on proper analysis, the application ought first to have been made and thus determined, if earlier, but that is a matter for another day.

The respective arguments summarised

25. In relation to the costs claim, Ms White's submission is that the costs incurred and claimed by the claimants are not losses which fall within the scope of the duty agreed or assumed by Fluid in respect of the services they carried out pursuant to the appointment. She submits that this clearly appears from an application of the purpose and scope of duty principle as explained by the majority of the UK Supreme Court in Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20 (the "Manchester BS case"). She submits that the application of that principle by Fraser J in relation to a claim against a structural engineer in BDW Trading Limited v (1) URS Corporation Limited (2) Cameron Taylor One Limited [2021] EWHC 2796 (TCC) shows that the principle holds good and applies in the present case. She relies on the decision of the Court of Appeal in dismissing the appeal against Fraser J in URS Corporation Ltd v BDW Trading Ltd [2023] EWCA Civ 77. She was prepared to accept that, on one analysis, the cost of opening up works claim might pass the arguability threshold but even if that claim was allowed to proceed the others should not, and the court would have to deal with the case on the basis that it was, effectively, a small claims track case in value.

26. In relation to the repayment claim, Ms White's submission is that the fees claimed to be recovered by the claimants cannot be claimed by way of abatement, which only operates as a defence to a claim (the claimants accept this argument) and, whilst she accepts that they can be recovered by way of a claim for repayment, such a claim can only be made where it can be said that the professional services were either not provided at all or were worthless, either as to the whole or as to some specific part of the services. She relies upon the judgment of Jackson J in Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2006] EWHC

1341 (TCC) as followed and applied by me in William Clark Partnership Ltd v Dock St Pct Ltd [2015] EWHC 2923 (TCC).

27. In response, as regards the costs claim, Mr Mesfin's submission is that on a proper application of the purpose and scope of duty principle in accordance with the Manchester BS case the claims are either claims which are good in law and thus must be allowed to go to trial for determination on the facts or, at the very least, are claims which cannot be summarily determined as being bad in law, because the application of the purpose and scope of duty principle is fact-specific and should only be determined at trial. He submits that the URS case does not provide any support for the defendant's argument and is simply an example of the application of the Manchester BS principle to the facts of that case.

28. As regards the repayment claim, Mr Mesfin's submission is that it cannot be determined on a strike out or summary judgment application that the claimants have no prospect of establishing that the services were either not provided or worthless, especially in the light of the (paucity, he submits) of the documentary and witness evidence provided by the defendant and the adverse opinions reached by the single joint expert, and that the question as to whether or not this can be said to apply to some specific part or parts of the services provided is also a fact-sensitive investigation which cannot be determined summarily, but only after a trial, as it was in the Dock Street case on which Ms White relies.

Liability for the costs claim

Manchester BS

29. In the Court of Appeal in URS Coulson LJ observed at paragraphs 35 and 36 that[1]:

> "(a) The decision of the majority in Manchester BS, which at [6] sets out the six-stage checklist, is designed to provide a useful way of analysing whether an alleged duty of care properly correlated to the harm claimed.
>
> (b) It was, I think, primarily designed to analyse duties of care alleged to arise in novel situations which had not previously been considered by the courts, or where the type of loss claimed was unusual or stretched the usualcboundaries imposed by the law.
>
> (c) The checklist was not primarily intended to be applied by rote to the well-known and much-reported standard duties of care, such as those owed by doctors to their patients, or structural engineers to their employers, where the damage claimed is, respectively, the personal injury caused by a botched operation or the consequences of the errors in the structural design.

[1] Sub-paragraphs added by me.

(d) That said, I accept that the judgment of Lord Hodge and Lord Sales in Manchester BS sets out a useful checklist which does, even in a conventional case like this, act as something of a 'sanity check'."

30. In my view, this is a case where the losses claimed are arguably at least unusual or do at least arguably stretch the usual boundaries of claims against structural engineers and, hence, it is appropriate to consider the case by reference to the Manchester BS checklist. The only questions which need to be considered for the purposes of this application are those identified at sub-paragraph 6(2) and (5), namely:

(2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question).

(5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (the duty nexus question)

31. These questions were discussed further at paragraphs 8 - 27. It is necessary only for me to refer to the following points:

(i) The fact that the defendant owes the claimant a duty to take reasonable care in carrying out its (the defendant's) activities does not mean that the duty extends to every kind of harm which might be suffered by the claimant as a result of the breach of that duty (paragraph 8).

(ii) It is necessary to ask whether and to what extent the loss for which damages were claimed was within the scope of the duty of care (paragraph 10).

(iii) The burden of proof lies upon the claimant (paragraph 11).

(iv) Where – as here - the scope of duty question is relevant to the extent of loss of a particular kind, it is generally more appropriate to examine this after first ascertaining on a simple "but for" basis what is the extent of the loss which has flowed from the alleged breach of duty. This means identifying the losses which are in fact in issue to focus with greater precision on the extent to which they fall within the scope of the duty of care owed by the defendant (paragraph 12). (Of course, that is something which can only be established at trial, so that I have to proceed at this stage on the assumed basis that the claimants can and will establish breach and factual causation.)

(v) The scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the reason why the advice is being given and paid for, neither cutting them down so that the claimant obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the defendant a liability greater than he could reasonably have thought he was undertaking (paragraph 13)

(vi) The distinction between advice and information cases is too rigid and there is a spectrum where it is necessary to identify the purpose to be served by the duty of care assumed by the defendant (paragraphs 18 and 19).

(vii) The starting point is to consider the purpose of the obligations pleaded by the claimants as having been owed to them by Fluid and allegedly breached and having allegedly resulted in them suffering the loss claimed. This is a case where there is not said to be any difference between the duties owed by Fluid under the contract and in tort.

The claimants' pleaded case

32. Here, the alleged breaches are all said to have taken place during the site phase element of Fluid's works. The key contractual obligation was to "visit site during the construction of the works to assist the architect to monitor that the works are being executed generally in accordance with the contract documents and with good engineering practice". The claimants' pleaded case this in this regard, which Fluid accepts is reasonably arguable for these purposes, can be summarised as that Fluid was required Fluid to visit site at least fortnightly, to make and keep and report on the result of these visits and to inform the claimants if the works were not being properly undertaken (paragraph 16).

33. The claimants' pleaded case includes allegations that during the course of the design stage: (a) Fluid commissioned a ground movement assessment report ("the GMA report") which predicted estimated movements and which: (i) included reference to a "regime of monitoring will be in place to enable the excavation to be fully controlled"; and (ii) included movement predictions for neighbouring properties; and (b) Fluid issued a party wall movement monitoring document which indicated what should be done both by Chase and Fluid if movement exceeded specified levels.

34. The claimants also plead that "as private individuals, [they] were relying on Fluid, as their professional adviser, to perform its obligations by competently monitoring and contemporaneously recording how the Works were being constructed. During the Works, Fluid's breaches of duty caused and/or materially contributed to an absence of clarity and/or confusion about how the Works were to be or had been constructed, of which a limited number of examples are set out in this section E".

35. They plead details of how Fluid breached its duties in this respect in its correspondence and dealings with representatives from the adjoining properties and with Chase in late 2017 and again in early May 2018 and in June 2019. They plead that the two main issues are: (a) "Fluid's failure to accurately monitor, observe, appreciate and inform the Claimants as to the as-built arrangement of the works and that Chase's construction was not in compliance with Fluid's design"; and (b) Fluid's failure to make itself aware of whether the underpinning had been performed in one or multiple stages and its contribution to the confusion in that respect by making inaccurate statements about this to others, including in the June 2019 report.

36. As to causation and loss, they plead that: "Fluid's inadequate monitoring, inspection, and reporting created or materially contributed to creating a confused picture and/or the absence of a clear understanding or record of how the structural/underpinning works had been constructed. This resulted in the project team and the Claimants not having a clear record or understanding of how the structural / underpinning works had been constructed and resulted in the Claimants suffering loss as a result of them instructing investigations and/or bringing and defending claims" They plead that this loss related to investigating and advancing claims against Fluid itself and the insurers named in the claim form and responding to the defences raised, the costs being those of the claimant's lawyers and expert advisers and ultimately resulted in their commissioning a further opening-up investigation which identified discrepancies between Fluid's original design and the works as constructed. They plead that had they known this from the outset, as they say they should have done, they would not have incurred the costs which they say they previously incurred in ignorance of the true position. The conclusion, as pleaded at paragraph 79, is that "had Fluid properly identified and reported on Chase's as-built arrangement during the Works, the Claimant would not have incurred the losses specified in Appendix 1 to these Particulars of Claim. The Claimants would have directly pursued the claims under the XL Policy and the Chubb non-negligent insurance policy".

Fluid's arguments in detail

37. Ms White summarises the case as originally identified and advanced against it as concerning what it describes as one for "conventional construction losses" for damage to the party walls and neighbouring properties, being remedial works including professional fees and the costs of various investigations, as well as claims that have, in any event, been abandoned in respect of the "glass box" and lift works at the property.

38. Ms White submits that that there is no basis for a finding that it accepted responsibility for protecting the claimants from incurring costs (or suffering losses) that they might incur in pursuing litigation, whether as pleaded in the Particulars of Claim or otherwise. She submits that there is nothing in either their appointment or in their reports which demonstrates that it had agreed to or had provided any information on the basis that it should be relied on by the claimants when deciding how to investigate and/or litigate the claims identified and advanced at pre-action stage, whether against Fluid or XL or any other one of the original proposed defendants against whom no substantive claim was advanced.

39. Ms White submits that the losses claimed are simply not recoverable, as a matter of principle, because they are not "conventional construction losses" of the kind identified by Fraser J in BDW case - that is to say remedial and professional costs directly associated with remedial works required as a result of alleged breach by a structural engineer undertaking a conventional appointment such as in the instant case.

40. However, in my judgment nothing in the BDW case, whether at first instance or in the Court of Appeal, assists Fluid in relation to the particular facts of this case. The pleaded losses in

BDW comprised (see paragraph 36 of the first instance judgment) both "conventional investigation and remedial works costs", which were – unsurprisingly – held to fall fair and square within the scope of the structural engineer's duty[2], and a separate claim for damages for loss of reputation, which Fraser J held was outside its scope. His decision on both points was upheld by the Court of Appeal. There is no similarity between the claims in this case and the claim for loss of reputation in that case. Indeed, as I have already indicated, Ms White had to accept that on one analysis of the pleaded case the investigation costs claimed in this case at least arguably fell within the same category as was upheld in that case.

41. Ms White submits that if the court was to allow such a loss to be classed as a "conventional loss" and, thus, recoverable, it would mean that professionals such as Fluid, appointed to provide information and advice in respect of design and construction of a specific construction project, could be liable for absolutely any losses that a claimant might incur as a result of its reliance on that information outside of the specification construction project for which the advice or information was provided, no matter what those losses might be. She submits that such a result would have "seismic consequences on the industry" including (i) the wording of all standard form appointments and (ii) the insurance available to professional consultants, where an insurer will expect to provide an indemnity only in respect of professional services it has been told a particular insured undertakes.

42. Ms White submits that there is no previous authority in which it has been held that a structural engineer providing conventional design and inspection (and record keeping) services will be liable for legal costs incurred by a client, who has investigated and pursued litigation (of any sort) in reliance on the structural engineer's services.

43. Ms White however had to meet the claimants' reliance on the decision of Akenhead J in National Museums and Galleries on Merseyside v AEW Architects and Designers Ltd [2013] EWHC 2403 (TCC) where, as part of its claim against the defendant architect, the employer (the museum) claimed and was awarded its costs of an adjudication against the contractor, which occurred because of the architect's breaches, on the basis of the employer's argument that if the architect had properly designed and co-ordinated the design, there would have been no dispute between the employer and the contractor. Ms White submits that this case is of no assistance to the claimants because the scope and nexus questions were not argued or addressed by Akenhead J possibly, she surmised, because the case pre-dated Manchester BS. It is true that the specific questions posed in Manchester BS were not raised and answered. However, it is apparent from paragraph 125 that the issues of reasonable foreseeability and causation linking the architect's breach to the adjudication were argued and addressed in some detail in paragraphs 125 – 127. SAAMCO as the forerunner of Manchester BS had

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[2] The only argument to the contrary depended on the very particular facts of that case, where the claimant developer had already transferred its interest in the properties before the alleged structural defects became known and remedial works undertaken and further planned.

been decided as long ago as 1997, followed by cases such as Aneco at the same level in 2001. In my view it is unlikely in the extreme that the defendant architects in that case, represented by experienced professional negligence lawyers, would not have taken the point had it been thought a good one, or that such an eminent specialist TCC judge as Akenhead J would not have addressed the point had the claim been so obviously bad for the same reasons as advanced by Fluid in this case.

44. Ms White also relies upon the decision of Coulson J in McGlinn v Waltham Contractors [2005] EWHC 1419 (TCC) in support of a submission that costs incurred in the pre-action stage were irrecoverable. However: (a) that case was only concerned with the recoverability of costs as costs and there was no claim for or discussion or the recoverability of costs as damages; (b) the only issue raised was whether a defendant who had incurred costs in responding to pre-action claims should have its costs when such claims were not pursued in the litigation, to which Coulson J held that they were not, which does not assist Fluid at all in this case.

The claimants' arguments in detail

45. Mr Mesfin submits that by reference to the claimant's case as to Fluid's retainer, as pleaded above, the purpose of its retainer was not limited to undertaking its design and inspection services so as to ensure, so far as within its power, that the works were satisfactory from a structural perspective. In particular, the purpose of the inspection and recording duties in relation to the construction phase was not limited to identifying non-compliant works or problems and advising as to appropriate remedy, but extended to protecting so far as within its power against the risk of disagreement or dispute about what, if any, non-compliant works or problems were present during construction and by protecting against the consequences of such disagreements or disputes. He submits that there was no difference in this respect between structural engineers taking on construction phase duties and other professionals, such as architects and contract administrators, who are routinely held responsible for negligence in the construction phase leading to financial losses above and beyond the narrow confines of remedial works to remedy defects.

46. He submits that projects such as this, involving substantial structural works to create basements in terraced properties, are notoriously liable to lead to disagreement and dispute in relation to such matters as party wall disputes, damage to adjoining property and resultant claims by neighbours against the employer and by claims over by the employer against the builders, professional team and insurers, so that it cannot credibly be submitted by Fluid that just because it is a structural engineer its only liability is for losses directly flowing from physical damage due to structural defects. He submits that there is no basis for limiting liability for losses such as those claimed here to cases where the structural engineer specially undertook an investigatory or advisory role in relation to anticipated litigation.

Decision

47. It follows in my judgment from the nature and circumstances of the appointment that it is at least arguable that, objectively speaking, Fluid was or should have been aware that the purposes of its performance of its duties in the construction phase extended to protecting the claimants' interests as a whole in relation to the consequences of the risk of damage to adjoining properties from the works. This included the need for site visits by Fluid to monitor compliance and to monitor movement, not only so that action was taken in the event of non-compliance or movement beyond estimated maxima, but also so that: (a) any claims made by the owners of adjoining properties alleging property damage due to movement caused by the works could be properly and effectively investigated and resolved, whether by litigation, adjudication or negotiated dispute resolution; (b) any claims against the contractors or the professional team (including Fluid itself) or against the clients' insurers or third party insurers could also be properly and effectively investigated and resolved in the same ways.

48. It also follows, in my judgment, that if, as is alleged, the claimants were exposed to claims made by adjoining owners and needed to investigate and resolve both such claims and/or claims against contractors, the professional team and/or insurers, then it is arguable that losses caused by such investigations and resolution being sent down a wrong track through Fluid's alleged negligent performance of its construction phase duties are not outside the scope of Fluid's duty and are sufficiently connected to the subject matter of Fluid's duty.

49. That applies in my judgment to each of the heads of loss claimed namely:

    (i) Solicitors fees for the initial work done in relation to claims initially made against the parties the subject of the initial pre-action correspondence on the basis that it was wasted because it was made on a flawed basis due to an incorrect understanding of the true position as a result of Fluid's alleged breaches.

    (ii) Expert fees on the same basis.

    (iii) The cost of opening up works in April 2022 to seek to gain a true understanding of the true position.

    (iv) The claimants' costs liability to the insurance company against whom it discontinued.

50. Of course, it will be a question for trial whether or not the claimants can make out their case in relation to these questions at trial. The claimants will also need to make out their case in relation to breach, in relation to factual causation and in relation to issues of legal causation / responsibility, and nothing in this judgment is intended to touch on those issues.

51. I do not accept Ms White's submission that a clear dividing line can and should be drawn between what she identifies as the conventional types of recoverable loss resulting from breach of a conventional structural engineer's appointment, limited to investigating and remedying defective work or property caused by such breach, and loss by way of legal and other dispute-related related costs, only recoverable where the structural engineer has been appointed to provide dispute-related services. In my judgment the question is far more

nuanced and fact-sensitive than that, so that legal and other dispute-related related costs can in principle be recovered against a structural engineer by an application of the Manchester BS principles in any case.

52. Nor do I accept that such a result would have such far-reaching consequences for structural engineers or their insurers as Ms White fears. The application of the Manchester BS principles provide a perfectly satisfactory limit to the nature and extent of the losses for which structural engineers may be liable which may, in appropriate cases, extend to a liability for legal and other dispute-related costs incurred by their client or for which their client is liable.

53. For completeness, I have considered a selection of relevant textbooks to see whether there is anything in them which may be relevant to my judgment. In short, there is nothing which causes me to change my decision.

54. Thus, the editors of McGregor on Damages 21st edition devote a whole chapter to the recovery of costs, damages and fines in previous proceedings. The only passage of arguable relevance is at paragraph 21-003, where it is said that:

> "In a civil action the successful party will generally recover costs against the other party. In earlier days these were called party and party costs, or taxed costs, to be distinguished from solicitor and client costs, which was the term formerly used for the greater amount of costs, however reasonable, payable by the client to their solicitor. It would make nonsense of the rules about costs if the successful party in an action who has been awarded costs could automatically claim in a further action by way of damages the amount by which the costs awarded to them fell short of the costs actually incurred by them. This has naturally never been allowed, and it is hardly surprising that there is a dearth of authority on the point. Cockburn v Edwards is probably the only case in which such a claim was attempted but without success, the refusal being at Court of Appeal level (1881) 18 Ch. D 449 CA as, curiously, the extra costs had been allowed as damages below."

55. That, however, is of no direct or determinative application as regards the current case.

56. The editors of Keating on Construction Contracts 11th edition refer to the issues discussed above at 9-035, where they say as follows:

> "Cost of reports
>
> Subject to principles discussed in this chapter, it seems that the cost of experts' reports and the like are recoverable as damages if their main purpose was to help the claimant deal with the defendant's breach of contract, but (if at all) as costs in the proceedings if their main purpose was related to the conduct of the proceedings. There may possibly be circumstances where the claimant has a choice between making the claim as damages or as costs. A corporate litigant may also sometimes recover as costs the actual direct costs of expert assistance provided by its own staff."

57. I need not trawl through all of the cases referred to in the footnotes. What this passage shows is that there is no authority holding that in no circumstances may a party in the position of the claimants in this case recover costs such as those claimed here as damages.

58. In conclusion, in my judgment the answer to the application which has been argued before me is that the costs claim is not destined to fail on the law in relation to scope and nexus of duty and harm and, thus must go to trial on that and the other issues raised by the statements of case.

Liability for the repayment claim

The case as pleaded

59. As regards the repayment claim the pleaded case is as follows:

"At items 4 to 6 of Appendix 1, the Claimants seeks a repayment and/or abatement of the sums which they have paid Fluid in relation to (i) the service of the provision of monitoring, inspection and reporting services during the construction period of the works as set out at clause 17 of the Fluid Terms; (ii) inspections which were not adequately or at all performed and/or inspection reports which were not adequately or at all provided; (iii) inspections in relations to cracks and party walls issues set out in the June 2019 Report on the basis that the inadequate and/or lack of performance of these services amounted to a total failure of consideration and/or those services were not performed at all and/or were performed so poorly that they were worthless to the Claimants".

The relevant contractual provisions

60. Under clause 3 the appointment provided for Fluid to provide the services set out in schedule G2 of the ACE Agreement with provision for additional services on an additional fee basis charged on a time basis. Clauses 15 and 16 specified the services to be provided under design phase (G1 to G2.6) and site phase, comprising the G2.7 tender phase and the G2.8 construction phase. Under the site phase, Fluid was to provide services set out in 6 bullet points from attendance at the pre-contract meeting through to agreeing site footings, with two such bullet points referring to the obligation to visit site during the construction phase as already set out above. Clause 17 stated that Fluid would "invoice monthly on the basis of progress through the work stages as defined in the ACE Conditions of Engagement" with a specified percentage payment being made against each phase from G2.1 through to G2.8, where G2.8 was the "construction" phase within which Fluid would be entitled to the final 15% of its fee.

61. It follows, in my judgment, that Fluid was entitled to 15% of its fee for the services provided under the G2.8 construction phase, invoiced on a monthly basis. As a matter of the proper construction of the appointment the construction phase was a discrete work section of the contract with the separate specified payment percentage payable in return for the substantial completion of the works the subject of that phase.

The invoices the subject of the repayment claims

62. Appended to the witness statement of Mr Lonsdale in support of the application were the only six invoices which Fluid has on its system, of which four appear to have been rendered in relation to the construction phase and thus the subject of the repayment claims. (The two previous invoices he attaches are invoices numbered 13 and 14 dated 31 July 2016 and 6 September 2016 respectively and, thus, which pre-date the pre-start meeting held on 21 September 2016 which marked the beginning of the construction phase.)

63. The first relevant invoice is invoice number 15 dated 30 September 2016, which identifies recent work undertaken as comprising:

> "- Ongoing coordination with the Architect and Contractor.
>
> - Submission of structural calculations to assist the party wall engineer.
>
> - Attendance at pre-start meeting 21/09/16.
>
> - Liaison with the contractor regarding further required investigatory works.
>
> - Issue of Plans, Details and Specification for Construction."

64. The second invoice number 16 dated 31 October 2016 identifies recent work undertaken as comprising:

> "- Ongoing coordination with the Architect and Contractor.
>
> - Ongoing liaison with the Party Wall surveyors for 126 and 122 Westbourne Grove.
>
> - Issue of revised sketches and calculations for the party wall engineers.
>
> - Issue of Sections for Construction.
>
> - Review of revised temporary works."

65. The third invoice number 17 dated 30 December 2016 identifies recent work undertaken as comprising:

> "- Ongoing coordination with the Architect and Contractor.
>
> - Ongoing liaison with the Party Wall surveyors for 126 and 122 Westbourne Grove.
>
> - Issue of revised plans and sections for Construction
>
> - Review of revised temporary works.
>
> - Liaison with the Contractor regarding, (and review of) steelwork connection
>
> - Calculations.

66. The fourth invoice number 18 dated 31 July 2017 identifies recent work undertaken as comprising:

> "- Ongoing coordination with the Architect and Contractor.
>
> - Ongoing design development."

67. A total of £8,300 exclusive of disbursements and VAT was thus invoiced which is just under 15% of the contractual fee of £60,800 being 1.9% of the project cost of £3.2 million as set out in invoice number 18.

68. Neither party had attached to their witness statements the invoices for inspections and reports, being the second of the repayment claims. I asked to see them and allowed the parties to file short supplemental submissions in relation to such invoices. The claimants' solicitors were able to produce three of the four invoices in question. They are dated 29 June 2018, 31 August 2018 and 28 June 2019 respectively. They are all calculated on the basis of time spent and disbursements incurred in respect of inspections and reports dated 23 May 2018, 10 August 2018 and 4 June 2019 respectively, undertaken pursuant to emails dated 22 May 2018 and 10 May 2019, and they total £3,213. The difference between this figure and the claimed total of £5013 is £1,800 and in his supplemental submissions Mr Mesfin indicated that in the circumstances that £1,800 was not pursued. It is common ground that these services were provided and invoices rendered under the provision for additional services in the appointment referred to above.

The relevant legal principles and their application to this case

69. As already stated, the two authorities to which I was referred were first the judgment of Jackson J in Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2006] EWHC 1341 (TCC) and second my own judgment in William Clark Partnership Ltd v Dock St Pct Ltd [2015] EWHC 2923 (TCC).

70. As to these, the position is conveniently summarised in Jackson & Powell on Professional Liability 9th ed. at paragraphs 3-012 under the heading section 3 – loss of remuneration, where the editors say this:

> 3-012: A further question which commonly arises is whether a finding of negligence disentitles the professional person to their fees. If the fees have been paid, the client will probably seek to recover them. If they have not been paid, there will often be a counterclaim for the amount owing. With the coming into force of the Consumer Rights Act 2015 (CRA) which provides for a remedy by way of a reduction of fees in relation to a contract to supply a service to which that Act applies, the position at common law is of less relevance. The position at common law is of remaining relevance only to such contracts preceding the CRA and to such contracts to which the CRA does not apply.

71. It is common ground that the CRA does not apply to this case given the date of entry into the appointment and, hence the common law governs the issue.

72. At paragraphs 3-013 and 3-014 Jackson & Powell continue as follows:

> "3-013
>
> As to the common law position, in spite of the frequency with which the question arises, the courts have not been entirely consistent in their approach to it: see, for example, the surveyors' cases mentioned below. The first matter to consider in every case is the nature

> of the contract between the parties. A solicitor's retainer to bring or defend an action is usually an entire contract. An agreement with an architect to provide the normal services as defined in the RIBA conditions of engagement is not entire, but severable into stages. In a contract of the latter kind there can be no dispute as to the defendant's entitlement to be paid for those stages of the work which have been properly carried out. The crucial questions are:
>
> 1.In the case of an entire contract, what remuneration can be recovered where the defendant was negligent? and
>
> 2.In the case of a severable contract, what remuneration can be recovered for that part or stage of the work which was negligently performed?
>
> 3-104
>
> This topic is discussed in the chapters on individual professions. The approach which is adopted in most cases, and which, it is submitted, is correct, is that where the defendant's negligence renders the services provided valueless, the defendant is not entitled to recover (or to retain) any remuneration for the work in question. In any other case, where the defendant has substantially (albeit negligently) performed the work, the defendant is entitled to be paid the normal remuneration and the client must rely upon a remedy in damages. A more difficult question is whether there is an intermediate band of cases in which the defendant's entitlement to fees is neither wholly extinguished by the negligence nor wholly preserved. In *Mondel v Steel* (which concerned a shipbuilder's claim for the balance of the price of a ship) it was held that there could be an abatement of the price to reflect "how much less the subject matter of the action was worth, by reason of the breach of contract". In *Hutchinson v Harris*, the Court of Appeal expressed doubt whether the principle of *Mondel v Steel* could ever be applied to contracts for professional services. It is submitted that this doubt is well founded. Once it is established that the professional person has substantially performed their task and provided services of some value to the client, an award of damages (if properly computed) should afford sufficient compensation to the client."

73. It is common ground that the claimants are unable to rely upon the defence of abatement to found the basis of a claim for damages (as opposed to a partial defence to a claim for professional fees) and, hence, the only question in this case is whether the services rendered in relation to the relevant part or stage of the work were rendered worthless by reason of Fluid's alleged breach.

74. In the chapter on construction professionals Jackson and Powell say this at 9-249

> "In *Multiplex Constructions (UK) Ltd v Cleveland Bridge (UK) Ltd*, Jackson J reviewed the law on abatement and concluded that abatement is not available as a defence to a claim for payment in respect of professional services. This conclusion was obiter because the claim concerned abatement as a defence to a claim under a building contract. The

decision in *Turner Page Music Ltd v Torres Design Associates Ltd* was apparently not cited but Jackson J's conclusion is respectfully regarded as a correct statement of the general principle[582].

[582] That abatement is not available as a defence to a claim for professional fees was confirmed in *Pickard Finlason Partnership Ltd v Lock* [2014] EWHC 25 (TCC). However in *William Clark Partnership Ltd v Dock St PCT Ltd* [2015] EWHC 2923 (TCC); 163 Con. L.R. 117 the same judge pointed out that this does not prevent a client being relieved of the obligation to pay fees for a service which was not performed at all or was performed so poorly as to be worthless."

75. In Multiplex Jackson J said at paragraph 657 that:

> "Schedule 1C is a claim for defective design work. This is a claim in respect of professional services. Accordingly, the defence of abatement is not available. Multiplex's only remedy for unsatisfactory drawings which required revisions or modifications is a claim for damages for professional negligence. However, if there are some drawings which were so unsatisfactory that they were discarded altogether and no use was made of them, in my view Multiplex could refuse to make any payment whatsoever in respect of those drawings. However, any defence on this basis or any claim for repayment on this basis would not be a plea of abatement. It would simply be a contention that no payment should be made at all for professional services which were worthless."

76. Dock Street was a case where it was submitted by counsel for the client that even though abatement may not be available in a professional negligence case there was, as Jackson J recognised in Multiplex, a right not to pay anything or to obtain repayment for professional services which were worthless. What I said in paragraph 5.9 was as follows:

> "I am satisfied that it is open to Dock Street as a matter of law to defend itself in relation to a claim for payment for services rendered by a professional by contending that all, or some specific part, of those services were either not performed at all or were performed so poorly that they were worthless. Insofar as the complaint only applies to a specific part of the contracted-for services, Dock Street may defend itself by reference to the value of that specific part. What Dock Street may not do, however, is to defend itself by contending that all, or some specific part, of the services were performed, but not fully or properly in every material respect, so as to seek a reduction of the price payable in relation to the whole or the specific part."

Application of the legal principles to this case

77. It will be recalled that the repayment claim comprises two separate claims, being: (a) a claim for repayment of 15% of Fluid's fees invoiced for services during the construction period pursuant to clause 17 of Fluid's appointment; and (b) a claim for repayment of sums paid to Fluid for inspections relating to cracks and party wall issues, on the pleaded basis that "the

inadequate and/or lack of performance of these services amounted to a total failure of consideration and/or those services were not performed at all and/or were performed so poorly that they were worthless to the Claimants".

78. In my judgment, it is clear as a matter of law that in order to recover in respect of either of the two repayment claims it is necessary for the claimants to be able to show, in relation to the services the subject of the invoices for the construction phase, and separately in relation to the services the subject of each of the inspection and report invoices, either that the services were not performed at all or were performed so poorly that they were worthless.

79. In oral submissions, Mr Mesfin contended that it was reasonably arguable that on a true construction of the appointment and the relevant legal authorities it was not necessary for the claimants to show that none of the construction phase services was provided or that none of them had any worth and that it was reasonably arguable that it was sufficient to show that discrete elements of the services to be provided were not provided at all or were worthless.

80. In my judgment, such an argument has difficulties, both as a matter of legal principle and as a matter of the proper interpretation of the appointment. The authorities indicate that a claim for repayment can only be made on the basis of no substantial performance, either at all or of any worth, and either as to the whole contract, if it is an entire contract, or as to a discrete part of it, if it is severable both as to the services to be provided and the price payable in respect of such services. Here, on the proper construction of the contract, it is plain that 15% of the contract price was payable in respect of the construction phase services. There is no further breakdown of that 15%, although there is – at least on the claimants' case - an absolute obligation to inspect fortnightly. The services required in the construction phase are not further broken down.

81. Nonetheless, I accept that there is no detailed analysis, either in the judgment of Jackson J in Multiplex or in my judgment in Dock Street, as to the legal basis for the deduction or repayment claim which Jackson J acknowledged was legally permissible or, thus, whether it is an absolute pre-condition that there has to be a whole or substantial failure of performance in relation to the entire services under the contract or to the entire services under a discrete part of a severable contract. The question as to whether it is possible to make out such an case where it is possible on the evidence at trial to apportion a value to discrete items of work, such as the drawings postulated by Jackson J in Multiplex, is at least open to argument.

82. However, Ms White's simple submission is that there is simply no possible factual basis for any contention that all of the services the subject of the construction phase or the subject of the subsequent inspection and report invoices were either not provided at all or were performed so poorly that they were worthless.

83. She referred to the explanation given by Mr Stockill, the claimants' solicitor, in his witness statement in response to the application as to why the claim could only sensibly be resolved at trial, which is that Fluid's case "must be tested against the oral, written and expert evidence

at trial, at which, it will be contended at trial by the Claimants that the Defendant's services were so poor that the Claimants are entitled to repayment. In other words, the Claimants' claim for repayment is for the Defendant's failure to attend fortnightly; alternatively, to the extent that the Defendant is able to establish that it attended site and performed inspections, it is for the absence in value caused by the Defendant's failure to produce any documentary records of those inspections; alternatively, to the extent that the Defendant establishes documentary records, such records are inaccurate and incomplete and therefore lacks value".

84. She submitted that regardless of these complaints:

(1) As regards the claim for repayment of the 15% construction phase fee the services provided extended to all the work required and undertaken during that phase and that: (a) the claimants have not attempted to argue that Fluid did not undertake any inspections or perform any of the services referred to in the appointment or in the invoices; (b) it is not possible as a matter of law to succeed in obtaining a full repayment on the basis of complaints as to the failure to undertake all of the fortnightly inspections or to provide documentary records of all of the inspections; and (c) it is not possible as a matter of law to obtain a partial repayment on the basis of such complaints. She gave as an example the references in invoice 17 to ongoing coordination and liaison, issue of revised plans and sections, review of revised temporary works and liaison about and review of steelwork connection calculations. She submitted that in the absence of any credible basis for contending that this is a work of pure fiction it is fatal to the claim for repayment of the 15% and nothing less will do.

(2) As regards the claim for repayment of the inspection and report invoices, in the absence of any credible suggestion that Fluid did not in fact inspect and provide a report on each occasion there is no basis for obtaining a full repayment on the basis of complaints that no documentary records were provided or those that were provided were inaccurate or incomplete or lack value.

85. Mr Mesfin's submission is that these are fact-sensitive issues which can only be determined at trial, in circumstances where:

(1) There is a startling lack of, and lack of explanation for the absence of, invoices for the construction phase.

(2) There is a complete lack of documentary evidence of inspections, which is noted by and the subject of critical comment from the single joint expert.

(3) The descriptions on the invoices are vague and generic.

(4) The witness evidence served by Fluid is limited and does not even address the period July 2017 to March 2018, during which much of the underpinning took place.

86. I have considered the pleaded case for the claimants and have considered the claimants' witness statements and the single joint expert report and Fluid's witness statements. The witness statements for both parties are relatively short on detail and contain little if anything

in relation to the repayment claim. However, it must be said that the single joint expert report is undoubtedly highly critical of Fluid, in particular as to the apparent failure to undertake fortnightly site visits and the apparent complete absence of site inspection records. It seems to me that it is at least possible that at the end of the trial the claimants may establish an evidential platform for a submission that the services provided by Fluid in relation to inspection and recording were so deficient that they were for all practical purposes worthless.

87. The question as to where, if anywhere, that may get the claimants is a matter for debate. I accept that that the claimants' case faces the difficulties of showing that: (a) no services of worth were provided in relation to the construction phase or how any repayment claim in relation to any part of that 15% is to be valued; and (b) no services of worth were provided in relation to each of the separate inspections and reports or how any repayment claim in relation to any part is to be valued. However, albeit with some reluctance given the modest value of the repayment claim and the obstacles which it faces, it seems to me that I cannot conclude at this stage that it must fail on the law, where there is room for doubt as to the true nature and extent of the applicable legal principles, or on the facts, where there is room for sufficiently damning findings to be made at trial as to render at least possible an entitlement to some right to some repayment.

88. In the circumstances, in my view the repayment claim will also have to go to trial. Indeed, the fact that I have already concluded that the costs claim will have to go to trial does buttress the conclusion that the associated repayment claim should also go to trial where much of the factual investigation will cover the same ground.

Conclusion

89. For the reasons stated the application must be dismissed and the case must go to trial unless it can be resolved at mediation which the court urges the parties to attempt in good faith and with open minds.