District Court

New South Wales

Case Name:	The Owners SP No 8075 v Esh Group Pty Ltd
Medium Neutral Citation:	[2019] NSWDC 93
Hearing Date(s):	27, 28 & 29 March 2019
Date of Orders:	29 March 2019
Decision Date:	29 March 2019
Jurisdiction:	Civil
Before:	Abadee DCJ
Decision:	There should be judgment for the plaintiff as against each of the defendants for the sum of $494,665.78. If I am mistaken as to the amount of the interest, it will be for the parties to apply for a variation of the amount of the judgment.
Catchwords:	BUILDING AND CONSTRUCTION – s 177 of the Conveyancing Act 1919 (NSW) – duty of care "not to do anything that removes the support to any other land – whether encompasses omissions – where owner holds non-delegable duty of care. NEGLIGENCE – breach of duty – reasonable-precautions – whether failed causation established – whether recurrent costs reasonable. PRACTICE AND PROCEDURE – defendants' failing to adduce evidence. Jones v Dunkel defence. Blatch v Archer Maxim – pleading – whether plaintiff precluded from relying on s177 of Conveyancing Act

Legislation Cited:	Civil Liability Act 2002 (NSW) Conveyancing Act 1919 (NSW)
Cases Cited:	BCI Finances Pty Ltd (in liq) v Binetter (No.4) [2016] FCA 1351 Blatch v Archer (1774) 98 ER 969 Burnie Port Authority v General Jones Pty Ltd (1994) 170 CLR 520 Evans v Balog [1976] 1 NSWLR 36 John Llavero v Brett Anthony Shearer [2014] NSWSC 1336 Jones v Dunkel (1959) 101 CLR 298 Lym International Pty Ltd v Marcolongo [2011] NSWCA 303 Pantalone v Alaouie (1989) 18 NSWLR 119 Port Kembla Coal Terminal Ltd v Braverus Maritime Inc (2004) 140 FCR 445 Roads and Traffic Authority (NSW) v Dederer (2007) 234 CLR 330 Strong v Woolworths (2012) 246 CLR 182 Water Board v Moustakas (1987) 180 CLR 491
Texts Cited:	Meagher, Gummow and Lehane's Equity: Doctrines and Remedies Law Reform Commission of New South Wales, Report 84 'The Right to Support from Adjoining Land' (1997)
Category:	Principal judgment
Parties:	Strata Plan 8058 (Plaintiff) Esh Property Group Pty Ltd & Ors (Defendants)
Representation:	Counsel: Mr Perla (Plaintiff) Mr Follino-Gallo (First to Fifth Defendants) Mr Cazzi – (Sixth Defendant) Solicitors: TurksLegal (Plaintiff) Blackstone Waterhouse (Defendants)
File Number(s):	2016/285463

JUDGMENT

NATURE OF THE CASE

The parties and their general contentions

1 The plaintiff is the Owners Corporation of a block of units located at 17 Frazer Street Collaroy, in the northern beaches of Sydney. Adjacent to that land was property situated at 19A Frazer Street. In early August 2014, pursuant to Developmental Consent granted by the Land and Environment Court, excavation and construction works commenced on 19A Frazer Street.

2 In the course of those early works, the plaintiff raised a concern about the stability of its land. On 17 August 2014, the plaintiff's driveway was undermined by excavation. The excavation eventually collapsed on 19 August 2014. Somewhat belatedly, the defendants have admitted the collapse of the wall.[1]

3 Between August 2014 and December 2017 repair works were undertaken to the driveway and a retaining wall. The plaintiff says that by reference to an independent report of a quantity surveyor (Mr Barker), who compared the estimated costs against the actual costs of repairs, the costs incurred were reasonable.

4 By this proceeding, the plaintiff brings actions in negligence against multiple defendants which it says were involved in the works which caused the aforesaid damage to its driveway. The plaintiff seeks damages, being the cost of the repairs which have been quantified in the sum of $412,453.40; to which a claim is made for interest.

The insurer's claim

5 It emerged at an early part of the trial (following matters raised in the opening for the Counsel for the defendants) that the plaintiff brings this proceeding on behalf of an insurer, Strata Unit Underwriters, who, having paid all but one of the invoices for rectification works, exercised its right of subrogation. This was pursuant to a residential strata insurance policy. SUU indemnified the plaintiff in respect to its claim upon that policy.

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[1] In the case of the first to fifth defendants, this admission was made in a response to a Notice to admit facts. In the case of the sixth defendant, the admission is deemed by that defendant's failure to dispute that notice (by operation of rule 17.3 of the Uniform Civil Procedure Rules.)

The defendants

6 The first defendant was alleged to be the principal contractor or builder which carried out the construction. It advertised itself as being the builder of the site. The plaintiff alleges that it was responsible for overseeing, supervising and conducting the construction work in a manner not removing support to the plaintiff's land.

7 The second defendant is alleged to be the contractor undertaking the excavation work. It was the sub-contractor. The plaintiff alleges that it had a duty to perform the excavation works in a way that would not remove support to the plaintiff's land.

8 The third defendant is the registered proprietor of the land. The plaintiff alleges that it was responsible for obtaining expert advice, prior to the excavation work commencing, to engage competent subcontractors to carry out the design and/or construction of the works and/or to supervise the subcontractors.

9 The fourth and fifth defendants may be grouped together. They are the developers who had brought the developmental application to Warringah Council. It is said that the development consent contained a condition regarding support and removal of land support to the plaintiff's land. The plaintiff's case against them is that it permitted other defendants to act in breach of that condition.

10 The sixth defendant performed some excavation works.

11 For ease of classification, in his closing argument, counsel for the plaintiff grouped the defendants into two categories:

(a) those who performed the physical works (the first, second and sixth defendants) (loosely the '**builders**') and

(b) those who managed, supervised and instructed the works to be performed (the third, fourth and fifth defendants) the '**owner/developers**'.

I shall also use this classification since it helps explain, and indeed was referred to, in the central evidence that the plaintiff relies upon to establish liability.

12 I mentioned earlier that the plaintiff brings actions in negligence.

13 The plaintiff did not, by terms, refer specifically to s 177 of the *Conveyancing Act 1919* (NSW) in its amended pleading. Reference was made only to a duty of care in the common law. Nevertheless, there was no real or substantial inconsistency between the content of s 177 and the way that any general duty of care was pleaded. In the circumstances, it is not unfair that the plaintiff be permitted to invoke this provision.

14 The first to fifth defendants (incl) were jointly represented. The sixth defendant was separately represented. This is explicable by the contention raised by the first to fifth defendants that it could only be the sixth defendant that could be liable to the plaintiff. Subject to that contention, the interests of all defendants were aligned and without exception, during the trial, when it came to evidentiary rulings or any other disputed matter, the legal representative for the sixth defendant adopted the position of the first to fifth defendants. For this reason, unless indicated otherwise, the description 'the defendants' will be taken to include the sixth defendant.

15 As to the position of the first to fifth defendants, their defences to the claims put against them, as stated in their Counsel's opening, is:

(1) to deny that any of them owed a duty of care;
(2) deny that any duty found to have been owed by them was breached;
(3) to deny that the plaintiff has suffered any loss;
(4) to dispute the quantum of such loss.

16 Some of the defences require some initial observation.

17 As to the issue of whether the plaintiff has suffered any or all loss, the real point was that an insurer had paid the plaintiff's invoices for the cost of the repairs. It was said that this was, in substance, a proceeding by which the insurer was subrogated to the rights of the plaintiff against the defendants. The subrogation claim failed, however, because the insurance policy was not proven nor was it proven who paid the invoices for the repair of the work.

18 To address these evidentiary gaps, on the second day of the trial, the plaintiff sought to adduce evidence on behalf of the insurer. I allowed the affidavit (sworn 28 March 2019) of Yasa Zand, a claims service officer of Strata Unit Underwriting Agency to be read, over the objection of the defendants.

19 A further answer to this is that the circumstance that an insured has been paid out under a contract of indemnity is not a matter that benefits a third party debtor to the insured. If the insured is paid twice, then the insurer has an action against the insured in restitution or a trust relationship may subsist (Meagher, Gummow and Lehane's *Equity: Doctrines and Remedies*) [9-215].

20 As to the issue of quantum, the defendants contend that approximately $75,000 worth of the costs were not recoverable as they were incurred merely to determine whether they fell within the scope of an indemnity to be recouped from the insurer.

21 The first to fifth defendants also raise a challenge to the claim for interest. This is put on the basis that the plaintiffs have not suffered any losses as it has not paid anything for the cost of the repairs. To some extent, this is a reprise of the subrogation point I referred to earlier.

22 The sixth defendant accepts that it was the principal contractor responsible for all the works. Its position, in relation to the issues is: (a) that it owed no duty of care; and (b) that it did not breach any duty of care; (c) it adopts the position of the first to fifth defendants on the general questions of loss and quantum.

23 The sixth defendant also accepted the binary proposition put by counsel for the first to fifth defendants: that if the first to fifth defendants were liable; the sixth defendant was not, but if the sixth defendant was liable, the first to fifth defendants were not so liable.

24 I note that although the plaintiff's claim against all of the defendants may be characterised as a claim for damage to property in an action for damages arising from a failure to take reasonable care, none of the defendants have invoked the proportionate liability defence, or limitation, contained in Part 4 of the *Civil Liability Act 2002* (NSW).

The issues

25 From this overview, it may be seen that the issues for the Court's determination are:

(1) the circumstances in which the plaintiff's wall collapsed on 19 August 2014;

(2) whether any or all of the defendants owed the plaintiff a duty of care and, if so, the scope or content of such duty;

(3) whether any or all of the defendants were in breach of any duty of care;

(4) whether the plaintiff suffered loss or damage caused by such breach; and

(5) Quantum (an issue embracing the reasonableness of the costs of the repairs).

LIABILITY

Factual narrative

26 On 27 July 2012 the fourth and fifth defendants lodged a development application with Warringah Council for the demolition of the existing two story dwelling and construction of a new nine unit apartment building, with basement car parking at the neighbouring property. Included with the documentation supplied to the council was reports prepared by SMEC Testing Services Pty Ltd ('SMEC'). SMEC were the geotechnical engineers. The council granted development consent on 20 December 2012. A construction certificate was issued by Kudos on 17 June 2014.

27 The plaintiff relies upon the opinion of Mr Zenon in a report dated 23 April 2018.

28 Mr Zenon is the principal of the engineering firm JK Geotechnics. Mr Zenon is qualified as a Bachelor of Science (Eng), is a fellow of the Institute of Engineers (Australia). He has been a practising engineer for nearly 50 years. In his last 20 years, as the principal of his engineering firm, he has costed, planned, coordinated and directed geotechnical investigations for a wide variety of of projects. These have included Rock excavation stability assessments, rock excavation techniques and vibration assessments, the assessment of cause of distress to buildings, structures and pavements (usually involving detailed forensic investigations). The types of projects he has been involved in are broad: they are include residential buildings, earthworks, basements and pavements. He is well qualified to opine on matters within his expertise and I note that, in certain instances in his report, he has properly refrained from commenting on some matters which he considers outside his expertise.

29 In what follows, I draw extensively upon Mr Zenon's evidence of engineering practice. Mr Zenon's evidence was not challenged.

30 The project works included excavations which extended to, or very close to the northern boundary of the construction site at 19A Frazer Street. The excavation also extended close to the eastern and southern boundaries of the plaintiffs premises at 17 Frazer Street. The closer an excavation extends to adjoining property, the greater the risk that the excavation can result in a removal of support to the property. This risk is, as Mr Zenon remarked, ever present even with a properly engineered and executed shoring system.

31 The excavation was to be undertaken to a depth of between 10 m and 12 m.

32 Generally, it is the structural engineer's responsibility to design a building to have such strength and stability so as to resist the forces to which it would be subjected. But with respect to the portion of the structure that is below the ground, such as basement and footings, reliance will be placed by the structural engineer upon the recommendations of a geotechnical report prepared by a geotechnical engineer for the particular building.

33 On or about August 2014, excavation and construction works commenced at the neighbouring property (19A Frazer Street) for the development of a new residential building.

34 The subcontractor responsible for the excavation was the second defendant: this is apparent from markings on the hydraulic excavator and the banner on the construction fence indicated in photographs before the court.

35 Those photographs suggest that attempts had been made to support the sub-vertical excavation faces using piles along portion of the northern excavation face (adjoining the plaintiff's property at 17 Frazer Street) and shotcrete over some of the northern, western, eastern and southern excavation faces. Shotcrete is a concrete-like substance (with a smaller diameter aggregate) which is sprayed under pneumatic pressure at high velocity onto a surface.

36 A major risk associated with excavation is that support for the site, or adjoining sites, can be removed as the excavation increases below ground level. This explains why an engineered support system is required to ensure that there is

no loss of support for the adjoining site. Part of the geotechnical engineer's role is to consider the particular site and to provide the necessary advice and recommendations as to the appropriate engineered retention system - also called a shoring system.

37 A shoring system is the process of supporting the walls to the excavation to ensure that there is no collapse of the site, or the adjoining site, as the excavation takes place. A common shoring system involves concrete piles placed at various intervals along the wall of the excavation so as to prevent and minimise movement, collapse and any undermining of the support for the site, or the adjoining site. In shoring systems used in excavations, shotcrete is commonly used to reinforce the walls of the excavation, to prevent or minimise collapse or movement. For example it may be sprayed between the piles in a shoring system to assist with minimising and preventing the movement of piles and the walls of excavation.

38 Mr Zenon considered that there was strong evidence that the piles had not been reinforced; nor laterally restrained with anchors, or other means. Nor were they provided with behind wall drainage. Anchors are used to attach the piles onto the wall of the excavation. They provide additional natural support for the piles and restrict the actual movement. Behind wall drainage is an engineering technique used to divert groundwater out of the base of the pile wall in order to reduce pressure on the shoring. The less water that accumulates behind the walls of the excavation, or between the walls of the excavation the pile wall, lower the pressure and thus, the less risk of collapse or movement exists. Although shotcrete appears to have been sprayed onto the cut faces, there was no evidence of reinforcing steel or pins for fixation.

39 Although the top of the piles along the northern excavation face were provided with a concrete capping beam, the piles were not structurally connected to the capping beam. A capping beam functions to tie the individual piles together and thereby inhibit lateral displacement of the installed retaining piles during the excavation process.

How property damage was suffered

40 On 13 August 2014, residents of the plaintiff's property observed moving and slipping of soil and sand around the excavation. They notified the builder, who responded by spraying shotcrete onto the sides of the excavation.

41 After a period of heavy rain, on 17 August 2014, residents of the plaintiff's property noted that their driveway had been undermined by the excavation on the construction site. Two days later the excavation on the neighbouring property collapsed, following further rain. The collapse was mainly concentrated over the western end of the northern excavation face.

42 Mr Zenon said that other than the SMEC geotechnical investigation comprising the May 2012 reports, he had seen no evidence of the involvement of a geotechnical engineer. In his view, a reasonably prudent developer and builder, excavating to a depth between 10 and 12 m into the rocks of the 'Newport Formation', in proximity to the plaintiff's property, should have involved a geotechnical engineer on the project. That involvement would, at a minimum, have included having the geotechnical engineer on site during the excavation process and requiring him or her to to advise upon the structural engineering drawings.

43 Mr Zenon opined that if a reasonably prudent geotechnical engineer had been on site during the excavation process, and provided appropriate advice, it would have alerted the developer and/or the builder to the problems and inadequacies of the shoring system. These included, but were not limited to, the absence of anchors, behind wall drainage, reinforced piles and structural connection between the capping being and the piles; as well as the lack of detail on the engineering drawings. If these matters had been raised with the developer and/or builder, prior to, or during the early stages of the excavation, steps could have been taken to implement one or more preventative measure(s) or, alternatively, the whole shoring system could have been re-evaluated. In this way, the risk of property damage to the plaintiffs property could have been avoided or, at least, minimised.

44 Mr Zenon identified a range of omissions which he says led to the collapse and subsequent damage to the plaintiffs property.

45 First, there was the inadequacy in a geotechnical investigation which did not have necessary detail in relation to the shoring system on the engineering plans. This culminated in inadequate precautions being taken by the builder and/or developer in carrying out the excavation. Mr Zenon emphasised the importance of a geotechnical stability assessment report, in this context, because that was a requirement of the development application. This indicated a risk or potential risk to the neighbouring property as a result of excavation below the ground surface into the 'Newport Formation'.

46 Mr Zenon reviewed the stability assessment report that had been prepared by SMEC and found several significant shortcomings. The main shortcoming, in his view, was that the risk levels had not been correctly identified. This resulted in recommendations which were very general.

47 Mr Zenon also regarded the geotechnical investigation as being inadequate. The site was underlain by the "Newport Formation", which was known to be variable, both horizontally and vertically. He says that it was incumbent upon the developer and/or builder to review the geotechnical investigation. At a minimum, upon such review, a reasonably prudent developer and/or builder should have raised concerns regarding the issue with the investigated depth, with the geographic geotechnical engineer and/or the structural engineer tasked with designing the shoring system. Such enquiry may have led to further consideration of the geotechnical investigation and the shoring system and thereby reduce or minimise the risk to the plaintiff's property.

48 Mr Zenon said that, upon review of the geotechnical investigation, it should have been obvious to a reasonably prudent developer and/or builder that the boreholes did not extend to a depth anywhere near the depth of the proposed excavation. This ought to have triggered a chain of enquiry with the geotechnical engineers. Had such enquiry been undertaken, the problems with the geotechnical investigation could have been considered and discussed between the relevant parties which, in turn, would have triggered the need for a general review of the shoring system and the inadequacies in respect to that system.

49 With regards to the proposed excavation to a depth of 10 to 12 m into subsurface conditions, Mr Zenon said that he would have expected that a full depth engineer retention system to be appropriate. The unreinforced concrete piles were totally inadequate to act as shoring, to support a vertical excavation in the conditions, particularly having regard to the depth of the excavation and without provision of anchors, or any other form of lateral restraint, or drainage.

50 Mr Zenon considered that the shotcrete by itself did not provide lateral support. Although it may have temporarily reduced erosion, without reinforcement, drainage and rock bold support, it would eventually have dropped off the rock face; particularly in a wet environment.

The roles and responsibilities of each defendant

51 As will be seen, Counsel for the defendants heavily emphasised what he submitted was a disjunction between the pleaded case against the defendants and the way that the plaintiff put its case at the trial. It is necessary, therefore, to closely identify the pleaded allegations against each individual defendant and then compare it to the case ultimately presented.

52 I will deal first, with both the first defendant and sixth defendant. This is because there was an issue, as between the first and sixth defendants, as to who was the principal contractor overseeing the construction. The first defendant said that it was merely a related company to the developer involved in the works and that it was the sixth defendant who is the principal contractor.

53 The pleading asserts (paragraph 11A) that at the relevant time, the first defendant was “a contractor” involved in the design and/or construction of the project works. It then avers (par 12) that the first defendant owed a duty of care to the plaintiff to exercise due care and skill to ensure that the project works were carried out in an appropriate and safe manner and; it supervised subcontractors in a reasonable manner.

54 The pleading asserts (paragraph 30K) that the sixth defendant contracted with the developers to design and carry out the project works as principal contractor. It then avers (paragraph 30L) that the sixth defendant was the occupier of the 19A Premises; and/or had the control and management of the premises. This, it is said, gave rise to a duty of care to the plaintiff to ensure

that it did not, during the course of the project works, interfere with, or otherwise jeopardise the foundations, structural support or structural integrity of the land comprising the plaintiffs premises.

55 There is no express reference to s 177 of the *Conveyancing Act* in either case.

Who was the principal contractor?

56 Counsel for the First to Fifth defendants submitted that there was an inconsistency between the pleadings and what it said was the plaintiff's ultimate submission that the first defendant is to be regarded as the principal contractor. I disagree. For one thing, the plaintiff's written submissions were not as specific as the defendant's submissions would suggest. Ultimately, what the plaintiff submitted was that I should treat the first defendant as playing a significant role both before and after the incident, in carrying out the excavation and piling works for the project works. That was to be 'involved in the design and/or construction'. Secondly, the pleadings themselves were slightly more nuanced than the defendants gave credit for: what the plaintiff said about the sixth defendant's role was that the description of 'principal contractor' was only conferred upon the sixth defendant by reason of its contractual arrangements with the developers. I note, in this regard, that all of the defendants, be they builders, subcontractors or developers, were within or under the umbrella of the Haddad Group of companies. Conceivably, internal arrangements as between those related companies may have posited a status which may have been at odds with the practical reality. I note that the defendants did not put on evidence as to the internal arrangements as between the defendants, as to which entity was to perform which particular role or adopt which particular responsibility. I shall say more about the consequence of the defendants not putting on evidence below.

57 Counsel for the plaintiff referred me to several objective circumstances which suggest that the first defendant was, indeed, the principal contractor and builder for the construction site. Those circumstances included:

(a) that it was the first defendant's name and contact details which appeared as the principal contractor on the sign placed on the construction site; as required by a condition to the development consent;

(b) a report prepared by Mr Tony Colenbrander, of GHD dated 19 December 2014, which was sent to Warringah Council and which expressed a report of the likely causes of damage to the property. The report identified the first defendant as the head contractor;

(c) a quote for piling works on the construction site was sent to the first defendant on 11 November 2015;

(d) an email sent from the first defendant's email address to the Council on 7 March 2016 referred to construction works that "we" (ie the first defendant) were conducting as well as the geotechnical and structural engineering inspections which would be conducted.

58 In answer to these indications, counsel for the defendants submitted that the reference to 'Level 33' in the evidence identified by the plaintiff did not establish that it was connected with the first defendant, as distinct from some other entity. The short answer to this is that if the defendant sought to suggest that this was a trading name applicable to some or other entities within the Haddad group, this matter could have been established by evidence from the defendants. Plainly the reference to Level 33 leads to a natural inference that it is the first defendant. The defendants have not discharged an evidentiary onus to suggest otherwise.

59 The defendants seek to persuade me that the sixth defendant was the principal contractor by reference to statements in their pleadings. Whilst statements in the pleading may be used as admissions, this is usually admissions that are adverse against the interest of the defendant who makes them. They are not customarily to be used as a sword by a defendant to prove a positive contention against another defendant. I therefore do not place any weight in this matter and regard the submission as amounting to self-serving assertions not otherwise supported by evidence.

60 The defendants relied specifically upon two circumstances. First, that a search of the register performed on the last day of the hearing indicated that the sixth defendant is, in fact, a licensed contractor; and, secondly, that in the construction certificate lodged (on behalf of the first defendant) it is the sixth defendant that is identified as the 'principal contractor'.

61 The legal representative for the sixth defendant ultimately made no submission to the contrary: he merely adopted the position of Counsel for the first to fifth defendants.

62 I am satisfied that the first defendant was, involved in the design and construction of the works at 19A Fraser Street. I also consider, on the balance of probabilities, that it was in fact the “principal contractor”, however its position was defined within the Haddad group.

63 The evidence discloses, also, that the Sixth Defendant was involved, in a general way, in the construction of the works. However, the extent of that involvement was not indicated beyond the matters I have referred to.

Second Defendant

64 The pleading (par 22) relevantly alleged that the second defendant owed a duty of care to the plaintiff to ensure that the excavation work was carried out in an appropriate and safe manner. It also averred (par 23) that it was reasonably foreseeable that an uncontrolled excavation of the 19A Premises may cause damage to nearby properties, including the plaintiffs premises.

65 The second defendant admitted that it was involved in the excavation works. When pressed for particulars as to the extent of that involvement, no response was forthcoming.

66 Photographic evidence reveals that the second defendant’s name appeared on a sign erected on a fence outside the construction works. The sign identified the second defendant as being involved in ‘demolition and excavation’. Another photograph revealed a large crane on the works which bore the second defendant’s name.

67 I am satisfied that the second defendant was a sub-contractor carrying out excavation works on the construction site.

Third Defendant

68 The plaintiffs alleged (par 30B) that the third defendant, as owner, owed a non-delegable duty of care, in any development of the project works at the 19A premises to ensure that no damage was caused to the plaintiff’s premises.

69 The third defendant admitted it was the sole registered proprietor of the 19A premises. I will thereafter refer to it as the 'owner'.

70 Evidence before me indicated that it procured the construction certificate and commissioned the geotechnical report in relation to the subject site. It was also involved in commissioning the appointment of an independent geotechnical engineer in relation to a different site.

Fourth and Fifth Defendants

71 I said earlier that I would group these two defendants together.

72 By its pleading the plaintiff alleges (paragraph 30G) that the fourth and fifth defendants were both developers who each owed a duty of care in the development of the project works at the 19A premises to ensure that no damage was caused to the plaintiffs premises.

73 Both entities were identified as the applicant for the Development application lodged with Warringah Council. They were also the applicants for development consent and obtained an order from the land and environment Court.

74 Both entities were identified in the GHD report to Warringah Council that I previously referred to, as the "Developers".

75 Being the recipients of the development consent, counsel for the plaintiff submitted, and I accept, that they knew, or should be taken to be aware of the condition in the consent which provided as follows:

> "Development that involves an excavation that extends below the level of the base of the footings of a building on adjoining land, the person having the benefit of the development consent must, at the person's own expense:
>
> (a) protect and support the adjoining premises from possible damage from the excavation; and
>
> (b) where necessary, underpinned the adjoining premises to prevent any such damage."

Adverse inferences

76 There was a dispute as to the significance to be ascribed to the defendants not calling evidence at trial.

77 The plaintiff submits that I should find this omission significant. This is in relation to precise terms of the actual involvement of each of these defendants.

It relies, firstly, upon the well-known maxim from *Blatch v Archer* (1774) 98 ER 969 at 970 that all evidence *"is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other two have contradicted".* It says that, that having exhausted its power to prove the involvement of these related companies within a single corporate group, it was effectively up to the defendants to establish what precise involvement each of them had had.

78 Secondly, the plaintiff submits that *Jones v Dunkel* inferences should be drawn that are adverse to the defendants.

79 Counsel for the defendants resisted these submissions. He did so on the basis that because certain procedural orders made of trial were made as they were, forensic decisions that had previously been chosen by the defendants meant that no adverse inference should be drawn from the circumstances no evidence was given.

80 I do not accept the submission for Counsel for the defendants. The particular complaint to which he referred, was the late notification by Counsel for the plaintiff of its intention to rely upon documents that had been produced on subpoena many months before the trial. He referred me to an extract from one of the Court's Practice Note to suggest that documents produced on subpoena should be served before the status conference that is an ordinary incident of case management of civil proceedings in this Court. As indicated in argument, however I do not regard the extract upon which he relied as having any preclusionary role in preventing the issue of a subpoenae, and the production of documents pursuant to such subpoenae, after the status conference. I was not taken to any direction of this court requiring the plaintiff to notify the defendants of the documents it would rely upon at the trial. Finally, parties to whom access is ordinarily granted to inspect documents produced on subpoenae are generally taken to be on notice of their contents and cannot invoke the notion of surprise if another party relies upon such document at trial.

81 In short, I consider that the defendants took a calculated forensic decision not to give evidence at trial; which was unaffected by the plaintiff's indication, closer to the trial, that it would rely upon documents produced on subpoenae.

82 In the circumstances, where a matter arises, from the evidence, which could have been the subject of persuasive evidence from the defendant, but that the defendant elected not to give evidence about it, I do draw inferences favourable to the plaintiff's case. Put another way, where a matter was particularly within the knowledge of the defendants, slight evidence by the plaintiff may be sufficient to prove the fact in circumstances where the defendant refused to explain away the evidence. (see the principles referred to by Gleeson J in *BCI Finances Pty Ltd (in liq) v Binetter (No.4)* [2016] FCA 1351 at [122]-[125].

83 I find that it is plainly the case that the plaintiff has proven the involvement of the defendants, in each of the differing capacities that it alleged. The defendants were peculiarly positioned to explain away the different capacities in which they all acted under the Haddad Group, but refused to do so, without adequate explanation.

Legal principles

84 This is an action for damages in negligence and so general principles of liability contained in the *Civil Liability Act 2002* (NSW) are applicable.

Duty of care

85 A partial exception to this is the content of the duty of care. In general law, building professionals owe a duty of care not to cause property damage that is reasonably foreseeable as a result of their careless conduct: see, for example, *Pantalone v Alaouie* (1989) 18 NSWLR 119.

86 But in the context of damage caused by building professionals to adjoining properties to a construction site, the duty of care is affected by s 177 of the *Conveyancing Act 1919* (NSW). That provision, so far as is presently relevant, is in the following terms:

> "(1) For the purposes of the common law of negligence, a duty of care exists in relation to the right of support for land.
>
> (2) accordingly, a person has a duty of care not to do anything on or in relation to land (the supporting land) that removes the support provided by the supporting land to any other land (the supported land).
>
> (3) for the purposes of this section, supporting land includes the natural surface of the land, the subsoil of the land, any water beneath the land, and any part of the land that has been reclaimed.

> (4) the duty of care in relation to support for land is not extend to any support that is provided by a building or structure on the supporting land except to the extent that the supporting building or structure concerned has replaced the support that the supporting land in its natural or reclaim state formally provided the supported land.
>
> (5) The duty of care in relation to support the land may be excluded or modified by express agreement between a person on whom the duty lies and a person to whom the duty is owed.
>
> …….
>
> (10) This section extends to land and dealings under the Real Property Act 1900.
>
> ……
>
> (12) A reference in this section to the removal of the support provided by supporting land to supported land includes a reference to any reduction of that support.

87 In argument, I queried whether the statutory provision codified the circumstances in which a duty of care was owed by a building professional, working on one site to an adjoining property, or whether it dealt only with the specific circumstance where damage is caused to a 'right of support for land'. Neither counsel submitted that it codified the law.

88 I was referred to extrinsic material. The provision was the product of a report of the New South Wales Law Reform Commission, Report 84, published in 1997 and titled 'The Right to Support from Adjoining Land'. That report, inter alia, recommended the abolition of the law of nuisance in relation to actions for the withdrawal of support. It also recommended that the more regular law regulating the rights of owners and users of one piece of land continued to enjoy the support of that land from other land be governed by the ordinary principles of negligence.

89 Section 177 was considered by the New South Wales Court of Appeal in *Lym International Pty Ltd v Marcolongo* [2011] NSWCA 303. In that case, Campbell JA (with whom Basten JA agreed on this point, and Sackar J agreed generally) said (at [198]) that the duty that s 177(2) imposes is a duty to take reasonable care "not to do anything on or in relation to land … that removes the support provided by the supporting land to any other land."

90 Then at [209], Campbell JA said that the inquiry called for by s 177(2) calls for is:

(i) "whether the defendant has done anything on or in relation to land;

(ii) if yes to (i), has what the defendant did in fact removed the support, and

(iii) if yes to (ii), did the defendant exercise reasonable care in doing that particular thing."

91 On the facts that they arose in that case, the Court of Appeal determined that a decision by a developer, to permit a sheet piling system to be used was 'doing something' in relation to land; and when that system was used on the land, the giving of approval was 'in relation to' the land.

92 The provision was also considered by Young AJA in *John Llavero v Brett Anthony Shearer* [2014] NSWSC 1336. At [44], his Honour, relevantly (and without reference to *Lym*) rejected the proposition that the provision does not create any liability for omissions: his honour found that if a person allowed their supporting land to be eroded to such an extent that the land next door lacks support, there was a breach of the duty.

93 On the basis of these authorities, it appears to me that the provision may potentially extend beyond active facts of construction works and decision-making about those works and may extend to omissions in such matters as the preparation and planning for those works to be performed. That would, relevantly, encompass, omissions in procuring systems, investigations and procedures on a construction site to avoid or minimise the risk that support to a neighbouring land may be removed

94 His Honour also found (at [45]), that in the context of the general law of negligence, affected as that is by section 177, an owner has a non-delegable duty not to deprive its neighbour's land of support.

Breach of duty

95 S 5B(1) of the *Civil Liability Act* provides that a person "is not negligent in failing to take precautions against a risk of harm unless:

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known);

(b) the risk was not insignificant;

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions."

96 S 5B(2) provides that in "determining whether a reasonable person would have taken precautions against the risk of harm, the court is to consider the following (amongst other relevant things):

(a) the probability that the harm would occur if care were not taken,

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm,

(d) the social utility of the activity that creates the risk of harm."

97 As has been repeatedly emphasised, it is critical in the assessment of breach to identify the relevant risk of harm, before consideration is given to what precautions a reasonable person in the position of the defendant should take (*Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330).

98 In this case Counsel for the plaintiffs submitted that the relevant risk was the risk of property damage (suffered by the plaintiff) arising from the removal of support to the plaintiff's land. Counsel for the defendants (respectively) did not dispute that identification of the risk.

Causation

99 By a combination of ss 5D(1) and 5E, the plaintiff bears the onus of proof, on the balance of probabilities:

(a) that the defendants negligence was a necessary condition of the occurrence of the harm ("factual causation") and

(b) it is appropriate for the scope of the negligent persons liability to extend to the harm so caused ("scope of liability").

100 In particular, proof of the requisite causal link between the various omissions I have found and an occurrence requires consideration of the probable course of events had those omissions not occurred (*Strong v Woolworths* (2012) 246 CLR 182 at [18]).

Consideration

101 Citing *Lym International*, the plaintiff submits that all the defendants, in their various differing capacities, all owed the statutory duty in s 177(2) of the

Conveyancing Act, "not to do anything on .. land … that removes the support provided by the supporting land to any other land".

102 The defendants submit that, having regard to its pleadings, it is not open to the plaintiff to invoke s 177. It submits, correctly enough, that no reference to the provision was made in the pleading, and therefore the plaintiff is not entitled to rely upon it.

103 In reply to this, counsel for the plaintiff relies upon the decision of the High Court in *Water Board v Moustakas* (1987) 180 CLR 491 where, at 497, the plurality said:

> in deciding whether or not a point was raised to trial no narrow or technical view should be taken. Ordinarily the pleadings will be of assistance for it is one of their functions to define the issues so that each party knows the case which he is to meet. In cases where the breach of a duty of care is alleged, the particulars should mark out the area of dispute. The particulars may not be decisive if the evidence has been allowed to travel beyond them, although where this happens and fresh issues are raised, the particulars should be amended to reflect the actual conduct of the proceedings. Nevertheless, failure to amend will not necessarily preclude a verdict upon the fact they have emerged…

104 Then later, on the same page, the plurality said "it is necessary to look to the actual conduct of the proceedings to see whether point was or was not taken a trial, especially where a particular is equivocal"

105 There may be force in the point advanced by counsel for the defendants if there was some material difference in the way that the case was pleaded and how the case was run. But in my opinion, there is no substantial inconsistency between the way the plaintiff pleaded the duty of care in respect to each individual defendant and its attempts to rely upon s 177 of the *Conveyancing Act.* The pleading clearly indicates that the plaintiff's case against each of the defendants is to assert that they owed a duty of care, by their conduct, not to physically damage the plaintiff's property. Section 177 of the Act is expressed in more specific terms – the duty not to remove support provided by the supporting land - but the practical consequence of such breach is damage to the plaintiff's property. Although, in my view, it would have been preferable and probably the more technically correct course for the plaintiff to have sought leave to amend to expressly rely upon s 177, consistently with what the High

Court said in *Water Board*, this omission is not fatal to the plaintiffs attempt to rely upon the provision.

106 As I understood their counsel, the defendants also submitted that the statutory provision was confined to positive acts. However, as I have indicated, I agree, with respect, with Young AJA when he said in *John Llavero* that the provision extends also to omissions.

DETERMINATION

Duty of care

107 I accept the plaintiff's submission that each of the defendants owed the statutory duty. It is plain that the duty in s 177(2) renders it irrelevant or immaterial the capacity in which a defendant may engage in construction work. The provision speaks of "a person" bearing the duty. I note that in *Lym International*, the duty extended to conduct of the developers of the site. There is no reason why it could not apply also to an owner of the property; as well as the contractor, contractors and any sub-contractor.

108 By reason of the matters I have referred to earlier, where I note the evidence of the responsibilities or roles of each defendant, I am satisfied that each of them were doing things in relation to the land on 19A Frazer Street.

109 In respect to the position of the third defendant, I agree with the view of Young AJA in *John Llavero* that the owner of premises upon which construction works are undertaken and which cause support to be removed to supporting land may owe a non-delegable duty of care. That is supported by the general law (*Burnie Port Authority v General Jones Pty Ltd* (1994) 170 CLR 520. I do not see anything in the context of the enactment of s 177 that would displace that principle. In this case, the consent of the owner would have been required to allow the works to be performed. The works themselves would have been to the third defendant's economic benefit as increasing its land value. Plainly, the plaintiff was placed in a vulnerable position by reason of the works being performed.

110 I find each of the defendants were subject to the duty of care created by s 177.

Breach of Duty

111 Mr Zenon identified (paragraphs 6.2.1 - 6.2.5) the causes of the property damage as follows. Contrary to the ANA civil basement plan, which showed a contiguous pile wall along most of the northern face, most of the southern face and the western face of the excavation, the piling that was used in the sub-vertical excavation faces was inadequate. Piling was only used along the portion of the northern excavation face (adjoining the plaintiff's property) and shock treatment over some of the northern, western, eastern and southern excavation faces.

Failure to devise and implement an adequate shoring system

112 The necessary anchors, behind wall drainage, reinforcing of piles and the structural connection between the capping being and the piles were not installed in the shoring system that was implemented.

113 Mr Zenon said (paragraph 6.6) that any reasonable person in the position of the principal contractor and subcontractor responsible for this development should have foreseen the risk posed by a 10m to 12m deep vertical excavation; and that such risk could lead to damage to the plaintiffs property. The closer an excavation extends to property, the greater the risk that the excavation could result in removal of support for the property.

114 Mr Zenon says that the existence of that risk meant that reasonable precautions had to be implemented in the form of a properly engineered shoring system, so as to minimise or avoid the risk of harm. This did not occur in circumstances where:

(1) the geotechnical investigation was inadequate: it did not properly investigate the subsurface profile to a depth that was appropriate, taking into account the nature of the bedrock;

(2) the design of the shoring system was inadequate;

(3) the shoring system was inadequate in respect to its implementation: it did not include the necessary anchors, behind wall drainage, reinforcing of piles and a structural connection between the capping being at the piles;

(4) the excavation ensuring commenced, and almost completed, without adequate documentation.

115 Mr Zenon said that a reasonable person in the position of principal contractor and subcontractor, and a reasonable person in the position of the developer, should not have proceeded with the excavation without addressing each of these matters. These matters are all referable to the circumstances of the first and second defendants; and the fourth and fifth defendants.

Commencing the works without any adequate planning

116 Mr Zenon said there was a serious lack of documentation which suggested that the excavation ensuring had proceeded without engineering drawings or input. This was in circumstances where the risk of property damage was well known as a result of the requirement for the geotechnical stability assessment. He considered that persons undertaking the excavation (the first, second and sixth defendants) and the persons undertaking the development (the third, fourth and fifth defendants) had responsibility for ensuring that adequate engineering advice was obtained and followed. In fact, there were significant shortcomings in both the planning and development stage. These were he said, or should have been obvious and of the concern to a reasonable person in the position of the developer and the builders. What should have occurred was further investigations planning in detail being obtained from necessary engineering experts so as to reduce or avoid the risk of property damage as a result of the excavation.

117 Mr Zenon noted that for a proposed excavation of this nature, a full set of structural design drawings should have been prepared prior to the commencement of the works. These were not in evidence. The works should also have progressed with the input and inspections by structural and geotechnical engineers. There was no indication of this occurred had occurred.

118 Zenon opines that had those construction techniques and precautions being used, the risk to the plaintiffs property, as a result of the excavation, would have been minimised or avoided.

119 Mr Zenon's views were not challenged. Nevertheless, counsel for the defendants said that I should place little weight upon Mr Zenon's evidence. This was, so it was put, because he is not a qualified geotechnical expert nor was in a position to give opinions as to the conduct of developers. It was put

that Mr Zenon was not truly independent of the plaintiff and was a partisan. Aspersions of that kind should not lightly be made against an expert witness who, like Mr Zenon, has expressly purported to fulfil his primary function as an expert witness of assisting the court. Given that Counsel for the defendants elected not to cross-examine Mr Zenon, and so put these propositions to him, I reject the submission.

120 Counsel for the defendants specifically criticised Mr Zenon's evidence about the conduct of a reasonably prudent developer. He complained about his suggestion, as he put it, that Mr Zenon's evidence would require the developers to go behind the contents of an SMEC report. But again, that is precisely the type of criticism that I would ordinarily have expected a party to put to an expert witness as a basis for rejecting that part of the expert evidence.

121 Counsel for the defendant also criticises the use the plaintiff makes of Mr Zenon's evidence where the expert purported to identify what a prudent builder, sub-contractor or developer should have done in the circumstances. I have noted that Mr Zenon acknowledged limitations in his expertise in certain parts of his report. Nevertheless, it is clear that from his extensive experience in dealing with the various actors in a significant construction work, he is qualified to opine on his expectations of what each participant would do in accordance with that experience. I note further, that the limits of his experience were not tested in cross-examination. In my view, at any rate, to the extent that Mr Zenon does refer to the types of matters that he would expect a builder, or a developer to do, largely accords with what the Court would ordinarily expected these participants in a construction work to do. It is not as if this expert was expressing opinions that the developer, contractor and subcontractor in this case were, or should have been, doing things which were unconventional. I have been assisted, in this respect, by Mr Zenon's evidence, but of course, I am not bound by his evidence as to the responsibilities which reasonably should have been ascribed to each of the defendants in this case.

122 The Second Defendant also makes a point, in criticising Mr Zenon's opinion, as to how excavation could have proceeded on the basis of documentation. This is a matter that should have, but was not, put to Mr Zenon for his consideration.

123 Counsel for the plaintiff submitted that, for the purposes of s 5B, the risk of harm in this case was that of property damage arising from the removal of support to the plaintiff's land. The defendants put no contrary proposition. I accept the plaintiff's statement as a statement of the risk.

124 I also accept its submission that the risk was foreseeable and not insignificant. In respect to the latter expression, Mr Zenon said, and I accept, as a matter of common sense, that the closer an excavation extends to property on an adjoining land, the greater the risk that the extra excavation could result in a removal of support for the property. Again, the defendants did not appear to dispute this proposition.

125 The main issue is the element in s 5B(1)(c): that a reasonable person in the defendant's position would have taken the precautions as alleged. This is a matter which needs to be considered individually against each defendant.

126 I have referred to above, Mr Zenon's extensive critique of the adequacy of the shoring system and the planning (including the undertaking of appropriate investigations and engagement of appropriate experts) that preceded the construction of the works. I do not need to recite those matters here. They were not seriously challenged. As to the matter of reasonable precautions, I find that:

(1) a reasonably prudent developer in the position of the fourth and fifth defendants would have involved a geotechnical engineer, and have reviewed the geotechnical investigation into the shoring system;

(2) a reasonably prudent developer in the position of the fourth and fifth defendants would have followed the ANA civil basement plan, so that the shoring system (such as it was) was implemented

(3) a reasonably prudent principle contractor and subcontractor in the positions (respectively) of the first and sixth, and second defendants, would not have proceeded with the excavation works at all;

(4) reasonable persons in the position of the builder (first, second and sixth defendants) and developer (fourth and fifth defendants) should have but did not obtain adequate engineering advice so as to minimise or avoid the risk of property damage;

127 Three things should be apparent from these findings.

128 First, virtually all of these matters amount to omissions. As I have said, I agree with earlier authority of *John Llavero* which posited that if, by omission, land has been left in a state or condition that it is so eroded as to cause a collapse of support to land next door, that opens the door to liability. The omissions I have referred to above have had that effect.

129 Secondly, I am unable to ascribe specific failure by the third defendant, the owner of the property, as to what precautions it failed to take which a reasonable person or entity in its position would have taken. That being so, it will be responsible for the failure, by others, to perform the duty in s 177 being its non-delegable duty. It is unnecessary for the plaintiff to establish that the third defendant itself acted negligently.

130 Thirdly, it will be apparent that I draw no distinction between the first and sixth defendants. The evidence as adduced by the plaintiff disclosed that either could be regarded as a principal contractor, or contractor. The first and sixth defendants, who were separately represented, could have cast light by evidence – rather than bare assertion – as to which entity performed that task. In my view, there is no injustice in holding both of them jointly responsible to that extent.

131 I am therefore satisfied that in the case of each of the first, second, fourth, fifth and sixth defendants, each of the requirements in s 5B(1) are satisfied.

132 I am also satisfied, largely upon the basis of Mr Zenon's evidence, that in this case there was a high probability of harm occurring if reasonable care were not taken; the seriousness of that harm was very significant and there is no real indication of any burden on the part of any of the defendants I have identified in taking precautions to avoid the risk of harm.

Loss and damage

133 I have noted that by formal admission or, (in the case of the sixth defendant) deemed admission – that there is no issue that the northern wall of the excavation site at 19A Frazer Street collapsed.

134 Mr Zenon identified (paragraphs 6.3.1 – 6.3.4) particulars of the loss and damage to the plaintiff's property as comprising:

(a) total destruction to the section of the driveway;

(b) significant cracking of the concrete driveway and curbs adjacent to the destroyed areas;

(c) destruction of the southern and south eastern portions of the sandstone block retaining wall, to the south-east of the garage structure adjacent to block C.

135 Mr Zenon opined that all of this damage was the direct result of the removal of support for the plaintiffs property, by reason of the excavation of the basement at the neighbouring property. He opined, although this may be regarded as an ultimate issue, that had reasonable precautions in respect to the shoring system been implemented, the risk of damage to the plaintiffs property as a result of the excavation would have been minimised or avoided.

136 Mr Zenon did not consider that the high rainfall experienced in Collaroy during August 2014 was the cause of the collapse. The rainfall which was experienced just before the collapse was 96 mm, over a seven-day period, or 70.2 mm over a three-day period. This was neither unusual nor unexpected; or below the medium and mean daily rainfall based on historical data. The shoring design should have catered for such a rainfall event. Had it been properly engineered and constructive, the risk to the plaintiffs property as a result of the excavation would have been minimised or avoided.

137 These opinions were not challenged. I accept them.

Causal connexion

138 In my opinion, the identified breaches of the duty of care by the defendants, singularly, and/or in combination, materially contributed to the collapse of the support to the plaintiff's property or, to use the statutory language, were necessary conditions for that result. But for the general lack of planning (obtaining necessary professional advice and conducting proper investigation), the works would not likely have been undertaken by the builders in the way that they were proceeded. But the contractor, or sub-contractor's conduct itself, in not properly following what plans that were available, was also a necessary condition of the harm.

139 It was specifically asserted, on behalf of the second defendant, that even if geotechnical engineering advice had been obtained prior to the commencement of the excavation it is not clear how that fact itself would have changed the situation. This was a strange submission. I would have thought that a competent subcontractor would have been assisted by the receipt of competent geotechnical engineering advice in order to undertake its responsibility.

140 Generally, and otherwise, little was said on the part of the defendants as to why if, as I have found, that the first to fifth defendants (inclusive) were in breach of the duty, it should not follow that such breach was causative of the damage. Their main point, was that all liability (including causal responsibility) should fall upon the sixth defendant.

141 No submission was made by the defendant as to why s 5D(1)(b) should permit any different result other than a finding that causation is made out. I agree with the plaintiff's submission that the observations of Campbell JA in *Lym* at [263] are apt to apply to this case as well.

QUANTUM

Principles

142 It has been long acknowledged that in a case involving tortious damage to a building, a principled basis for the assessment of damages is the cost of reinstatement and restoration; at least where that cost is not disproportionate to the diminution in value: *Evans v Balog* [1976] 1 NSWLR 36 per Samuels JA (with whom Moffit P and Hutley JA agreed). If rectification work has been carried out and the actual cost is known, the matter provides sound evidence of the reasonable cost and would ordinarily provide a basis for damages in preference to a theoretical calculation of the reasonable cost: *Port Kembla Coal Terminal Ltd v Braverus Maritime Inc* (2004) 140 FCR 445.

The rectification works

Mr Zenon's evidence

143 On 22 August 2014, Mr Zenon visited the site of the collapsed driveway, for the purpose of inspecting or assessing the damage and recommending options to repair the driveway. He found that the capping beam had previously collapsed

or had been demolished. Portions of the concrete driveway had been destroyed by the collapse and backfill extended into the plaintiffs property.

144 Mr Zenon was closely involved in the repairs. He provided recommendations for the temporary, and thereafter permanent long-term repair of the driveway and also the retaining wall. The permanent repairs included a new suspended driveway, supported by piles extending through the recycled concrete backfill and into the underlying natural material. Where the damage to the driveway had extended beyond the extent of undermining, the new driveway was designed and instructed as an on-grade pavement.

145 The repair work also included a new retaining wall arrangements, adjacent to the north-Western corner of the neighbouring property. Its design was altered to incorporate a stormwater pipe.

Mr Iles' evidence

146 The plaintiff also relied upon the evidence of Mr Iles. Mr Iles is a loss adjuster with the ASTA group chartered loss adjusters. He gave affidavit evidence for the plaintiff as to the required repairs and evaluation of the reasonable costs of repairing damage to the plaintiff's property. This was in accordance with the terms and conditions of the plaintiff's insurance policy. He was called upon by the insurer to attend the subject site on the same day as the wall collapsed and to inspect that collapse.

147 From September through to early December 2014 there was a period of temporary repairs. On 20 August 2014 the excavation site was backfilled with crushed concrete. The next day Mr Iles received a report from Keighran and Associates, a civil engineering firm, indicating that it was necessary to demolish and reconstruct the damaged section of the driveway on the plaintiffs premises and that, due to access restrictions, there was an inability to provide further recommendations on other damage that may have resulted from the collapse of the wall. Mr Iles received a second report from the same engineering firm on 1 September 2014. That report recorded that the backfill in the excavation site was poorly to moderately contacted. Recommendations were made for the temporary reinstatement of the driveway.

148 In September 2014, Mr Iles received a quote from UBS to complete a temporary driveway. That quote was accepted and the temporary driveway was constructed by 18 September.

149 The process of undertaking permanent repairs commenced from December 2014. On 8 December, Mr Iles received a 'scope of works' from Keighran & Associates. This document was sent to 3 separate building contractors for the purpose of their tendering for their permanent repair of the driveway. UBS provided the lowest cost in their quote ($179,963.30). That was the building contractor which was also endorsed by Keighran. In March 2015 UBS commenced works for the permanent repair of the driveway.

150 On 22 June 2015, Keighran confirms that the driveway had been reconstructed in accordance with Australian Standards.

151 In its submissions, the defendants challenged Mr Iles' evidence.

152 They refer to 'anomalies' in the evidence of Ms Zand and Mr Iles. However, they did not themselves challenge the evidence of these persons who had prepared evidence. It is a matter for speculation as to what answer either witness would have given if these anomalies were pointed out to them and they had the opportunity to respond to them.

153 Otherwise, there was no serious dispute. The defendants' main complaint was not the content of the evidence on loss.

Mr Barkman's evidence

154 In his report dated 25 May 2018, Mr Barker opined that the reasonable estimated costs of the repair and rectification works were $491,121.11 (incl GST). He considered that the incurred costs of $453,678.47 (incl GST) were a reasonable cost.

155 Mr Barkman was not required for cross-examination.

156 There being no evidence to the contrary, I accept, as a matter of fact that the plaintiffs incurred costs of $453,678.47 (incl GST) are reasonable and provide the appropriate basis for damages.

157 This evidence has not been challenged by the defendants. I accept it.

158 The plaintiff has made out its claim for actual repair and rectification costs in the sum of $412,453.40 (excl of GST). As at 28 March 2019, I was informed that the amount for interest was $82,212.38.

ORDERS

159 There should be judgment for the plaintiff as against each of the defendants for the sum of $494,665.78. If I am mistaken as to the amount of the interest, it will be for the parties to apply for a variation of the amount of the judgment.

160 I will hear the parties on costs.

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