

Case Study

Major Damage to Adjacent Residential Property During Construction – Muswell Hill

In the summer of 2015, a leading commercial building contractor commenced a contract to demolish an existing building and redevelop the site with a complex of 12 luxury apartments in Muswell Hill, North London. The site was on Muswell Hill itself, which is a busy main road with a significant gradient.

An initial phase of the project following demolition of the existing structure was to shore up the ground uphill from the new development on which stood an adjacent substantial residential property. On the 31st July 2015 it was reported that the sheet piling and other groundworks supports were failing, resulting in severe structural cracking and movement to the adjacent residential property.

Following a period of emergency stabilisation works and concurrent investigations it was discovered that the sheet piling and other groundworks had been defectively designed and/or installed by structural engineers and specialist groundwork subcontractors.

The resultant damage to the adjacent residential property was significant and meant that all residents needed to be rehoused. The owners of the adjacent residential property immediately instigated an action against the main contractor's employer via the party wall act. Our client's employer sought immediate and direct remedy for all claims presented to them and all costs incurred by them as a result of the failure and resultant damage via a generously worded indemnity clause in the JCT contract. Our client also had an immediate financial detriment due to the employer deducting costs and losses from ongoing valuations in the construction project via payless notices.

Claims were notified under the main contractor's public liability, professional indemnity and contract or risks policies. The subcontractor and structural engineers involved with the groundworks were also put on notice of claims under their respective professional indemnity and public liability policies.

Thompson & Bryan were appointed to collate details of the various losses, claims and quantum generally with a view to securing the optimum recovery under the various insurance policies. Added to that, due to the inclusion of various (relatively commonplace) exclusions on the insurance policies in place, Thompson & Bryan were appointed to prepare and negotiate the uninsured loss claim against the groundworks subcontractor and/or structural engineer.

A significant challenge on the quantum aspect was that the employer was able to deduct costs and losses without challenge via the payless notices in the JCT contract. We in turn had to obtain review and collate evidence of those costs with a view to allocating them between the public liability, professional indemnity, contract or risk policies and uninsured loss claim. Due largely to the number of different interested parties and the time taken to resolve the party wall awards the claim continues to be pursued at this point.

One significant technical aspect of the claim was the question as to whether the neighbouring residential property owner was entitled to claim the full cost of reinstatement of their building (which was deemed structurally unsafe to the extent that it required complete demolition) or, alternatively a diminution in market value

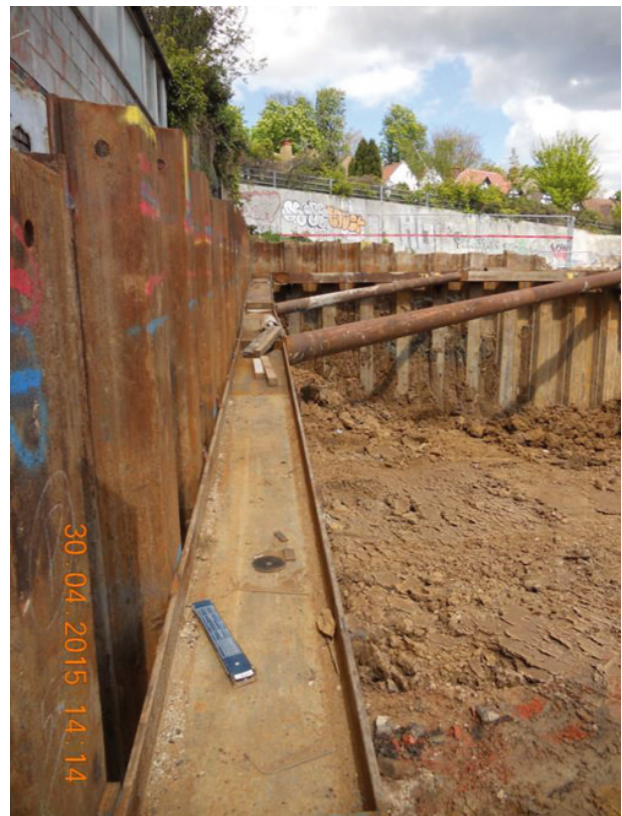
based indemnity settlement. While the neighbour expressed no intention or active plans to reinstate the property, the outcome of the party wall discussions and court review of the legal principals resulted in the neighbour being awarded a full reinstatement settlement including loss of rent and interest.

Another interesting aspect to this claim was establishing the extent to which defective design was responsible for the piling failure versus defective workmanship. Given the engineering complexities to this discussion a percentage agreement was sought between the public liability and professional indemnity insurers, partly for the purposes of the subsequent subrogated recovery action.

Addressing the significant cash flow issue created by the employer’s utilisation of payless notices in the JCT contract was another challenging aspect. In most cases, professional indemnity and public liability insurers will only actively engage and or make any payment in relation to a claim following the submission of a particularised claim from the third party which satisfactorily demonstrated a legal liability on the part of their policyholder. In this case, following lengthy representations and discussions the public liability and professional indemnity, insurers were persuaded to release payments on account in response to the payless notice deductions and or other presented costs from the employer.

The argument presented in this regard was that the party wall awards issued are essentially non contestable, the indemnity clause within the JCT contract was non contestable and therefore aside from any costs or losses that might fall foul of a policy exclusion on either policy the contractors legal liability was effectively established.

The quantification exercise itself involved assessment of remedial works and resultant financial impacts on the significant overrun in the project programme. Continuous review of the different policy conditions was required in



order to ensure that we could optimise the recovery from each of the three interested insurers. We could also consider the effect of policy exclusions in terms of costs that fell outside of the insureds claim and therefore were included in the uninsured loss recovery action.

In terms of building an evidence bundle to support the quantum in the case we were mindful that there are differing burdens of proof between a first party insured claim and a third party liability claim. In the latter case the burden of proof is strict, i.e. without submission of supporting documentation and or technical evidence the claim could be refuted entirely.

The practical effect of this was that we were required to approach the quantification exercise entirely with a view that we may need to provide strict proof evidence for any or all of it. Seeing that the primary insurers were inevitably going to pursue a third party recovery the requirement for strict proof prevailed even in relation to costs presented under first party policies.

This case is a good example of where independent expertise and experience can add significant value as well as resource support in terms of compiling and ultimately negotiating these major and complex claims.

Where there is a subrogated recovery and the policy holder has a substantial interest in that process in terms of their uninsured losses, it is all the more important that the policy holder's interests are protected and the claim process carefully managed throughout.

The case continues with the subrogated recovery still in the pre-litigation phase.

Thompson & Bryan (UK) Limited
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