Case No: 8T-00168; MB04220; HL00147

Neutral Citation Number: [2011] EWHC 1811 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
LEEDS DISTRICT REGISTRY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2011

Before :

THE HON. MR. JUSTICE RAMSEY

- -

Between :

Mr Andrew Harrison and Others	**Claimants**
- and -	
(1) Shepherd Homes Limited	**Defendants**
(2) National House Building Council	
(3) NHBC Building Control Services Limited	

- -
- -

Andrew Bartlett QC, Robert Stokell, and Crispin Winser (instructed by **Tilly Bailey & Irvine LLP**) for the **Claimants**
Roger Stewart QC, Anneliese Day and Sian Mirchandani (instructed by **Weightmans LLP**) for the **First Defendants**

JUDGMENT NUMBER 2

- -

Judgment

The Hon Mr Justice Ramsey :

Introduction

1. These proceedings involve claims by freehold owners of homes built by the Defendant, Shepherd Homes Limited ("SHL"), at a housing development at Eden Park in Hartlepool in 2002 to 2004. The development was situated on a former landfill site.

2. The properties were constructed between September 2001 and February 2004 in two stages: Phase 1 consisting of 46 houses and Phase 2 consisting of 48 houses. All 94 properties are four or five bedroom two storey detached houses. There are six different house types arranged along four estate roads: Clover Drive, Barley Close, Meadowgate Drive and Hayfield Close.

3. The properties stand on cast in-situ concrete ground beams above piled foundations. The Phase 1 houses are founded on circular steel piles installed from July to September 2001. The majority of the Phase 2 houses are founded on 250mm square pre-cast concrete piles installed between August and November 2002.

4. Defects have become apparent in a number of properties and this has resulted in the claims in these proceedings. The properties had cover under the Buildmark scheme operated by the Second Defendant, NHBC and supervision of the work was carried out by the Third Defendant, NHBC Building Control Services Limited. The claim is currently stayed against the two NHBC parties and they have played no direct part in the present trial.

Background

5. SHL purchased Phase 1 land in 2001, the site was piled and the Phase 1 houses constructed. They then purchased the Phase 2 land in 2002, piled the site and constructed the Phase 2 housing. In about March 2003 the first cracking was noticed at Plot 9 and investigations carried out.

6. Knowles Construction Technology ("Knowles") were instructed to inspect and report. Cracking was then reported in Plot 10 in about June or July 2003 and this led to further investigations by Knowles and to testing, with Encia Remediation Limited ("Encia") who had carried out the piling. Further cracking was reported at Plot 56 and Knowles provided a report in March 2004.

7. On 15 April 2004 BSCP Ltd ("BSCP"), who were consulting civil and structural engineers, visited plots 9, 10 and 56 and produced a preliminary report.

8. On 10 August 2004 SHL instructed BSCP to comment on the latest Knowles Report dated 25 June 2004 relating to 3, 6, 7, 8, 11 and 12 Barley Close and 15 and 17 Hayfield Close. BSCP were to visit the properties and report. BSCP then visited the site on 18 August 2004 with Mr Spencer of SHL. BSCP said they were broadly in agreement with the opinions and recommendations expressed in the Knowles report dated 25 June 2003. They said that both they and Knowles agreed that there had been some significant settlements of the uncompacted landfill under and around the affected houses. They also said that it was very likely that the fill in settling around

the tops of the piles had caused some negative skin friction to develop at the pile/soil interface thereby causing some of the piles to settle. They said that inevitably this had then caused distress in the walls of some houses, evidenced by the extensive cracking. They said they agreed that the cracking in the walls of 6 Barley Close required urgent action to be taken to remedy the situation.

9. In conclusion BSCP said that negative skin friction acting on the piles was the most likely cause of the defects seen in the properties at 5, 6, 7, 8, 9, 10 and 11 Barley Close and 56 Hayfield Close.

10. They recommended that bore holes should be drilled close to 9 and 10 Barley Close and that Testconsult should be commissioned to carry out testing on pile B1 or pile B6 under the gable wall of 9 Barley Close.

11. In October 2005 SHL commenced proceedings against its piling contractor, Encia. The Encia case came to trial in mid 2007 on the issues of liability, causation of damage and entitlement to contractual indemnity. In the Encia litigation it was ultimately common ground that Encia had not exercised reasonable skill and care in the design and construction of the piling of any of the 94 properties on the part of the estate built by the defendant. The judgment in Shepherd Homes Ltd v Encia Remediation Limited [2007] EWHC 1710 (TCC) ("the Encia Judgment") was delivered by Jackson J in July 2007.

12. SHL bought back five of the houses over the period May 2004 to June 2005. It undertook remedial work to those five repurchased houses, including in each case driving new piles supporting a raft between August 2006 and November 2007. Whilst SHL did not buy back any further houses, it undertook similar remedial works to an additional seven properties. Between February 2008 and August 2009 it re-piled and carried out remedial work at another eight homes.

13. These proceedings were commenced on 29 February 2008.

14. On 12 May 2008 SHL entered into an agreement with the NHBC which divided up the properties so that SHL took responsibility under Section 2 of the Buildmark cover for certain plots and NHBC took responsibility under Section 3 of the Buildmark cover for the remainder. NHBC has since that date repiled seven properties and, it is understood, will repile three more properties. SHL indicated on 20 May 2010 that it would carry out remedial work to two further properties.

15. In the present trial I have considered the case by the following ten lead Claimants against SHL:

(1) Mr and Mrs Knight at Plot 15, 15 Barley Close.
(2) Mr and Mrs Dobson at Plot 20, 16 Clover Drive.
(3) Mr and Mrs Frostwick at Plot 34, 25 Clover Drive.
(4) Mr and Mrs Simpson at Plot 39, 15 Clover Drive.
(5) Mr and Mrs Manners at Plot 43, 7 Clover Drive.
(6) Mr and Mrs Willis at Plot 50, 26 Meadowgate Drive.
(7) Mr and Mrs Henderson at Plot 59, 15 Hayfield Close.
(8) Mr and Mrs Adamson at Plot 87, 57 Meadowgate Drive.

(9) Mr Jeffery/Ms McDermott at Plot 89, 53 Meadowgate Drive.
(10) Mr and Mrs Pettite at Plot 90, 51 Meadowgate Drive.

16. On the basis of my findings on these lead cases it is hoped that the parties will be able to resolve the claims on the remaining properties. There are a number of issues of liability and quantum.

Claims against SHL

17. Eight of the ten lead Claimants claim against SHL in contract because they entered into a contract for sale with SHL. Those claims are made under the express or implied terms of the contract for sale. Two of the lead Claimants, the Knights (Plot 15) and the Frostwicks (Plot 34), are subsequent purchasers and do not have a contractual claim against SHL under an original contract for sale.

18. All of the lead claimants make claims against SHL under section 1 of the Defective Premises Act 1972 and under Section 2 of the Buildmark cover which provides for SHL to have liability for Defects and Damage in the first two years and, under Section 3, for NHBC to have liability for Damage caused by Defects in years three to ten.

Claims under the contracts for sale

19. There are two forms of contract for sale, one for Phase 1 and one for Phase 2. The documents follow a standard format. There are definitions of Specification, Standard Conditions and Works.

20. The Phase 1 sales contract applies to Mr and Mrs Willis at Plot 50 (26 Meadowgate Drive) and Mr and Mrs Henderson at Plot 59 (15 Hayfield Close). It contains provisions at Clause 2 dealing with defects; at Clause 4.1 dealing with the Works; at Clause 5 containing an entire agreement clause and at Clause 5.2 dealing with non-merger. The Phase 2 sales contract applies to Mr and Mrs Dobson at Plot 20 (16 Clover Drive), Mr and Mrs Simpson at Plot 39 (15 Clover Drive), Mr and Mrs Manners at Plot 43 (7 Clover Drive), Mr and Mrs Adamson at Plot 87 (57 Meadowgate Drive), Mr Jeffery/Ms McDermott at Plot 89 (53 Meadowgate Drive) and Mr and Mrs Pettite at Plot 90 (51 Meadowgate Drive). Under the Phase 2 sales contracts there are similar provisions but different clause numbers. Clause 5 deals with defects; Clause 7 deals with the Works; Clause 8 is an entire agreement clause and Clause 10 is a non-merger clause. There was some altered wording to Clause 5 and an additional Clause 7.5 for Plots 43, 87, 89 and 90. The Law Society's Standard Conditions of Sale, Third Edition (1995), were incorporated.

The issues and the evidence

21. The issues for determination as a result of the trial concern the liability and quantum of the claims by the ten lead Claimants against SHL. There are a number of issues of liability which arise from the sales contracts, Section 2 of the Buildmark Cover and the Defective Premises Act 1972. There are then issues of fact and expert evidence relating to liability and quantum.

22. I heard factual evidence from the lead Claimants themselves. I have dealt with that below when considering the claims in respect of each of the lead properties. It was clear that the Claimants felt let down by SHL and it is clear that for each of the

Claimants the experience of living in the properties has caused them worry, concern and other problems. I found the witnesses generally truthful even if at times they felt that the trial gave them, at last, an opportunity to ventilate their frustration at the position they found themselves in.

23. I also heard evidence from other claimants but, whilst this was helpful to set the context and background for the claims as a whole, it has only had limited relevance and I was conscious that because disclosure had not been given for those other claimants, the ability for SHL to cross-examine was limited.

24. SHL called a number of witnesses who, essentially, answered questions related to the way they had handled the claims from the Claimants and criticisms which were made arising out of the need to bring these proceedings. I have referred below to the limited extent that this evidence was relevant to the issues which I had to decide.

25. So far as expert evidence is concerned, I heard engineering expert evidence on behalf of the Claimants from Mr Graham Taylor, a chartered civil and structural engineer whose experience of piling was largely related to civil engineering projects on which he had worked both in the UK and overseas. He is now an independent consultant. SHL called Mr Jim Johnson who is a chartered engineer and a director and head of geotechnics with Ove Arup and Partners. His experience is very much related to the geotechnical assessment of projects and problems which have arisen on them.

26. After cross-examination of the engineering experts, with the agreement of the parties, there was a process of concurrent evidence, colloquially known as “hot tubbing” so as to deal effectively with the ten individual properties. This highlighted the extent of agreement between the experts and also showed the limited differences in approach on which I have had to make a decision.

27. I also heard valuation expert evidence. The Claimants called Mr Edward Watson who is a Fellow of the Royal Institution of Chartered Surveyors and a Member of the Chartered Institute of Arbitrators. He is a consultant with the firm bearing his name based in Newcastle after being senior partner for many years. SHL called Mr Tony Lewis who is also a Fellow of the Royal Institution of Chartered Surveyors and the sole principal in his own firm based locally to the Estate.

28. Finally, although they were not called to give evidence both parties provided evidence from quantity surveying experts. The Claimants instructed Mr David Pearson, the Managing Partner of Elliotts Associates and SHL instructed Mr Keith Miller, a director at Gleeds Advisory. In the event, they were able to reach substantial agreements and did not need to be called although, as set out below, there is some further detailed calculation needed as a result of this judgment.

The sales contracts

29. There are a number of issues between the parties in relation to the obligations under the contracts for sale which it is convenient to deal with by reference to the Phase 2 contracts. First, there is the question of the scope and extent of the obligations under

Clause 7.1. Secondly, there is a question of whether there are implied terms of the contracts of sale which, in turn, raises the question of the effect of Clause 8, an "entire agreement" clause. Thirdly, there is a question of whether the obligations merged on conveyance. Fourthly, there is a question whether the terms, as properly construed, are affected by the statutory control on contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 ("the 1999 Regulations") or the Unfair Contract Terms Act 1977 ("UCTA"). I shall deal with each of those issues in turn.

Clause 7.1 of the Sales Contract

30. Clause 7.1 states:

> "*The Works shall be completed by the Seller in a good and workmanlike manner and shall be so completed and made ready for occupation with all reasonable despatch after the Agreement Date…*"

31. The Works were defined as: "*The house of the House Type and any ancillary works constructed or to be constructed by the Seller on the Site in accordance with the Specification*" and the Specification was defined as "*the drawings and specifications relating to the Works previously approved by the relevant authorities and any amendment of them from time to time*".

Submissions

32. In relation to Clause 7.1, the Claimants submit that the clause properly construed contains the following two obligations.

33. First, the phrase "*good and workmanlike manner*" requires all the work to be done properly, with reasonable skill and care. In the context of design, they submit that a builder providing a house has an obligation to carry out the work to a proper design because all the work, including initial design, review and verification of the design during construction, driving the piles, and making judgments on how deep to take each one, must be carried out in a good and workmanlike manner and the Claimants rely on the decision in Bellefield Construction v Turner [2002] EWCA Civ 1823 at [76].

34. Secondly, the Claimants say that the obligation that the Works must be "*made ready for occupation*" includes a further obligation to provide a property suitable for occupation.

35. Further, the Claimants say that if the obligation to carry out the work to a proper design is not part of the obligation to carry out the work in a "*good and workmanlike manner*" then there should be an implied term to that effect either at common law as part of the terms in Hancock v Brazier (Anerley) Ltd [1966] 1 WLR 1317 or under the obligation to carry out the service with reasonable skill and care under section 13 of the Supply of Goods and Services Act 1982.

36. SHL say that the obligation in Clause 7.1 does not include a requirement that the Works are to be carried out to a professional design or that the property is to be "suitable" for occupation. It is contended that the obligation is a limited one which merely deals with what has to be done to achieve completion.

37. Further, SHL say that the obligation to complete the Works "*in a good and workmanlike manner*" only applies to the work done between the date of the contract for sale and the date of completion of the Works and that there is no obligation as to the work done before the date of the contract.

38. The Claimants say that this is contrary to the express words which require the "Works", that is the whole of the Works and not just the parts not yet worked upon, to be completed in a good and workmanlike manner. In addition they say that, on SHL's construction, the operation of the term would be entirely capricious, depending on when the contract of sale was entered into and how much work had been done and was still to be done. The Claimants say that a similar argument was advanced and rejected in Hancock v Brazier [1966] 1 WLR 1317 where the defendant building company agreed to sell to each plaintiff a plot of land bearing a partially erected house.

Decision

39. SHL's obligation was that "*The Works shall be completed ... in a good and workmanlike manner.*" That forms the first part of the threefold duty implied at law in building contracts as set out in Hancock v Brazier. Clause 7.1 is not in my judgment limited to an obligation related to the definition of completion as SHL submitted and applies whenever the work is carried out. It is an obligation which applied to all the Works, defined as the house type and any ancillary works and set the standard by which SHL had to perform those Works. If at completion the Works have not been carried out in a good and workmanlike manner then there will be a breach giving accrued rights which would give rise to liability for damages.

40. The fact that Clause 5.1 provided that SHL would remedy minor defects or outstanding works of a minor nature as soon as practicable after completion does not mean that there was not an obligation to complete the Works in a good and workmanlike manner and, as Diplock LJ said at first instance at 1328 and Lord Denning said at 1334 in the Court of Appeal in Hancock v Brazier in relation to a similar argument raised, it would need very clear words for the obligation to make good minor works or complete minor outstanding works to take away the rights which normally follow at common law in the case of a breach of contract and the obligation in Clause 7.1 covers the obligation in respect of the whole of the Works and not just the matters dealt with in Clause 5.1.

41. The obligation to carry out work "*in a good and workmanlike manner*" was construed by Diplock LJ in Hancock v Brazier as dealing with the way in which the work was to be carried out. He said this at 1327 D in relation to an express clause of the contract in that case:

> "*There is first a reference to the completion of the house in a proper and workmanlike manner. My inclination would be to regard that express clause as relating to the way in which the work was carried out rather than to the materials, and that clause requires that the work shall be carried out with due skill, care and judgment.*"

42. The fact that the work has to be carried out with proper skill and care was also reflected in Young & Marten v McManus Childs [1969] 1 AC 454 at 465C to D by

Lord Reid. When considering the standard to be applied to the supply of materials he said:

> "*This is a contract for the supply of work and materials and this case raises a general question as to the nature and extent of the warranties which the law implies in such a contract. As regards the contractor's liability for the work done there is no dispute in this case: admittedly it must be done with all proper skill and care.*"

43. As the Claimants submit and as recognised in the judgment of May LJ in Bellefield Construction v Turner [2002] EWCA Civ 1823 at [76], there is a blurred borderline between design and the construction details needed to put the design into effect. As May LJ said "*A carpenter's choice of a particular nail or screw is in a sense a design choice, yet very often the choice is left to the carpenter and the responsibility for making it merges with the carpenter's workmanship obligations.*" Where a contractor carries out both the design and construction of the works the intention is to avoid the blurred borderline, or sometimes gap, that may exist between the obligation to design and the obligation to construct. In such circumstances, a contractor responsible for both the design and construction who agrees that the works will be carried out in a proper and workmanlike manner, that is with proper skill and care, cannot say that the works were constructed in a proper and workmanlike manner and avoid the same obligation applying to responsibility for the design. The works which include both the design and the construction must be carried out in a proper and workmanlike manner.

44. The Claimants also contend that SHL's obligation in Clause 7.1 that "*The Works... shall be so completed and made ready for occupation with all reasonable despatch after the Agreement Date…*" imposes an obligation to complete the Works so that they are "*fit for habitation*".

45. In my judgment, the phrase "*made ready for occupation*" is equivalent to an obligation that the houses should be "*fit for occupation*" or "*fit for habitation*". I see no difference in principle between a house fit for occupation and one fit for habitation. Equally, the words "*made ready for*" a purpose must require the houses to be suitable or fit for that purpose. If they are not suitable or fit for that purpose they are not ready for it.

46. In my judgment therefore the Claimants are correct in their submissions that, properly construed, Clause 7.1 of the contracts includes an obligation on SHL to carry out the design with proper skill and care and an obligation on SHL to complete the Works so that they are fit for habitation.

47. If that were not correct then it would be necessary to consider whether there were implied terms to that effect.

Implied Terms
Submissions

48. In relation to the existence of the implied terms, SHL rely on the fact that such terms are inconsistent with the scheme of the contractual obligations as contained in the relevant contracts. They say that the scheme of the contractual obligations under the contracts for sale and the Buildmark cover means that the particular terms which

might ordinarily be implied in contracts for the building and subsequent sale of a dwelling house should not be implied.

49. SHL refer to Miller v Emcer Products [1956] Ch 304 for the proposition that an express term in a contract excludes the possibility of the ordinary implication of any term dealing with the same subject matter as the express term. They also refer to the passage in the judgment of Evershed MR said in Lynch v. Thorne [1956] 1 WLR 303 at 306 where he said that "*a term prima facie to be implied must, according to well established principle, always yield to the express letter of the bargain.*" They say that in some cases difficult questions will arise as to whether terms which would otherwise be implied will be excluded by express terms which appear to cover the same ground but are not necessarily inconsistent with the implied terms and refer to the following passage in the judgment of McKinnon LJ in Broome v Pardess Cooperative Society of Orange Growers [1940] 1 All ER 603 at 612:

> *"Where the parties have made an express provision as regards some matter with regard to the contract, it is, and must be, extremely difficult for either of them to say in regard to that subject matter, as to which there is an express provision, that there is also an implied provision or condition in the contract.*"

Decision

50. If, contrary to my view, the existing express term at Clause 7.1 did not include the obligations in respect of design and fitness for habitation, then subject to the entire agreement clause, I consider that the usual terms as to the design being carried out with reasonable skill and care and as to fitness for habitation, would be implied under section 13 of the Supply of Goods and Services Act 1982 and at common law as part of the terms set out by Diplock LJ in Hancock v Brazier (Anerley) Ltd [1966] 1 WLR 1317 at 1327C to D.

51. If clause 7.1 did not include obligations in respect of design and fitness for purpose then the contracts for sale would not contain express terms covering that subject and therefore there is no question of the implied terms yielding to or being inconsistent with the express terms. The fact that the Buildmark Cover imposes obligations in respect of Defects and Damage, as defined, does not in my judgment conflict with the implied terms. It provides in Sections 2 and 3 a remedy where there are Defects or Damage in years 1 and 2 or in 3 to 10. However Section 1 of the Buildmark Cover, which deals with the position before completion, is only concerned with insolvency or fraud of the Builder or with what happens when the Builder fails to do what is instructed by the NHBC. That provides no obligation which deals expressly with or covers the same ground as the implied terms as to design or fitness for habitation.

52. Accordingly if, contrary to what I have found, there was not an obligation in Clause 7.1 to design the Works with proper skill and care and complete the works so as to be fit for habitation, I consider that such terms would fall to be implied, subject to the effect of the entire agreement clause.

Entire Agreement Clause

53. SHL rely on the terms of Clause 8 as being an "entire agreement" clause which excluded any implied terms by providing that:

> "*This Agreement and the "Buildmark" Offer of Cover constitute the entire contract between the parties and shall be only varied or modified....in writing under the hands of the parties and any terms undertakings promises or agreements not set out in this Agreement are released by both parties and shall have no effect. The buyer acknowledges that save as to such of the written statements of the Seller's Solicitors prior to the Agreement Date as were not susceptible of independent verification by inspection and search and enquiry of any local or other public authority (and whether or not such inspection search and enquiry has been made) the Buyer has not entered into this Agreement in reliance wholly or partly on any statement or representation made to him*."

Submissions

54. SHL submit that the wording of Clause 8 that "*any terms undertakings promises or agreements not set out in this Agreement are released by both parties and shall have no effect*" precludes there being implied terms because the alleged implied terms were not set out in the agreement and were accordingly released and the continued existence of such terms would be inconsistent with clause 8 with the consequence that the requirements of Section 16(1) of the Supply of Goods and Services Act 1982 are fulfilled.

55. In addition, I was referred to Clause 3.4, an additional clause in the Phase 2 Agreements, which provides:

> "*The Buyer agrees that no oral representations have been made to the Buyer prior to the date of this Contract by the Seller or its employees or agents which has [sic] influenced or persuaded the Buyer to enter into this Contract. In any event, the Buyer will not be able to rely upon any oral or written representations and this Contract contains all of the terms of the Contract.*"

56. The Claimants say that the entire agreement clauses do not, in themselves, preclude implied terms because an implied term is an unexpressed part of the contract itself, as opposed to a collateral agreement or pre-contractual representation. They submit that it is the latter categories that entire agreement clauses are aimed at and they rely on the decision in Inntrepreneur Pub Co v East Crown Ltd [2000] 2 Lloyd's Rep 611. By way of example, they refer to the fact that, in general, there is an implied agreement by each party not to hinder the other and to co-operate as necessary and refer to London Borough of Merton v Leach (1985) 32 BLR 51. They submit that it could not be argued that an entire agreement clause would prevent such an implication.

57. They also refer to the decision in Exxonmobil Sales and Supply Corp v Texaco Ltd [2003] EWHC 1964 (Comm) in which Nigel Teare QC (now Teare J) accepted in principle that terms could be implied notwithstanding the existence of an entire agreement clause, although the particular wording of the clause in that case did prohibit the implication of a term based on usage or custom.

58. They also rely on the decision at first instance and on appeal in Seadrill Management Services Ltd v OAO Gazprom [2009] EWHC 1530 (Comm) and [2010] EWCA Civ 691 where the court had to consider a clause in a drilling contract which provided at Clause 501:

> "*Contractor … assumes only the obligations and liabilities stated herein. Except for such obligations and liabilities specifically assumed by Contractor, Operator shall be solely responsible and assumes liability for all consequences of operations by both parties … notwithstanding … the negligence or fault of Contractor, its employees, agents or servants …*"

59. The issue was whether there was an implied term as to reasonable skill and care and it was argued that such a term was inconsistent with Clause 501. Moore-Bick LJ, giving the judgment with which the other members of the Court of Appeal agreed, said this at [27] and [28]:

> "*27 The primary obligation of importance for present purposes is that contained in paragraph 502, under which the contractor undertakes responsibility for the operation of the rig. It was common ground that under that paragraph the contractor specifically assumes an obligation to operate the rig in order to perform the services provided for by the contract, but Mr. Rainey submitted that, unless the contract otherwise provides, it also assumes an obligation to carry out the work with reasonable skill and care, since that is an incident of any obligation of that kind, originally imposed by the common law and now by section 13 of the Supply of Goods and Services Act 1982.*
>
> *28 The judge accepted Mr. Rainey's submission and in my view he was right to do so. When paragraph 501 refers to obligations and liabilities which the contractor has "specifically assumed" it must naturally refer to the obligations which arise out of the express terms of the contract with all the incidents which the law ordinarily attaches to them, since those incidents are inherent in them. It may, of course, be possible for the parties to agree otherwise, but unless they have done so, they can only be presumed to have accepted that the ordinary incidents apply. To proceed on any other basis would make commercial life impossible. To say, therefore, that under this form of contract the contractor specifically assumes an obligation to operate the rig but does not specifically assume an obligation to do so carefully is to approach the question from the wrong end. Prima facie it assumes the obligation as expressed and all that the law attaches to it, unless there is agreement to the contrary.*"

60. SHL say that the cases cited by the Claimants do not deal with the wording of Clause 8 in this case or the question whether that wording is sufficient to exclude an implied term. They submit that the wording of Clause 8 in this case does have that effect.

Decision

61. Whilst SHL are obviously correct in their submission that the cases cited do not deal with the wording of Clause 8 or the impact on the term in this case, I consider that they do give guidance as to the approach to be adopted. In this case, it is evident that the purpose of Clause 8 was to ensure that the sales contract constituted the entire contract between the parties. Clause 8 starts by precluding any variations or modifications to the agreement unless they are in writing. It then continues by saying that "*any terms undertakings promises or agreements not set out in this Agreement are released by both parties and shall have no effect.*" That evidently is aimed at precluding "*terms undertakings promises or agreements*" which were the subject of

discussion or other consideration by the parties and which could have been but were not set out in the sales contract. Undertakings, promises and agreements evidently come within that category and I consider that the word "terms" should be construed consistently with the other words in the phrase as being *eiusdem generis*.

62. That meaning also reflects the general purpose of such clauses as expressed by Lightman J in Inntrepreneur where he said that the purpose was to "*preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim...*".

63. In this case, the first sentence, in precluding the parties from relying on variations or modifications not in writing and the final sentence and Clause 3.4 in relation to reliance on statements or representations, are consistent with that purpose, as is the wording relied on by SHL.

64. In addition it seems to me that if it had been intended to exclude terms that would usually be implied then, as stated by Lord Diplock in Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Limited [1974] A.C. 689 "clear unequivocal words" would be needed because parties do not normally give up valuable rights without making it clear that they intend to do so.

65. In the case of the term implied under section 13 of the Supply of Goods and Services Act 1982, section 16(1) of that Act provides that, subject to section 16(2) and UCTA, a duty under the Act may be negatived or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract. Section 16(2) provides that "An express term does not negative a term implied by this Part of this Act unless inconsistent with it". In this case there is nothing in Clause 8 which, in my judgment, negatives or varies or is inconsistent with the term implied by section 13 of the Act.

66. Accordingly, if contrary to what I have found, there was no obligation in Clause 7.1 to design the Works with proper skill and care and to complete the works so as to be fit for habitation, I consider that such terms would fall to be implied and the "entire agreement" provision in Clause 8 would not preclude the implication of those terms.

Merger

Submissions

67. SHL also say that clause 7.1 merged in the conveyance, so that it ceased to be enforceable once completion of the transaction took place. They say that this arises from the terms of Clause 10 which would, SHL submit, have been unnecessary if it was not intended that the other clauses would merge. Clause 10 provides as follows:

> "*Any obligation of this Agreement or of the Buildmark Offer of Cover which is expressed as or which implies any obligation which will remain to be performed or observed after the completion of the sale and purchase and the*

Lease or Transfer of the Property to the Buyer shall remain in full force and effect after such completion."

68. SHL also rely on the final words in Clause 7.5, "*This clause will not merge on completion*", which do not appear in Clause 7.1 and which they submit would have done so if Clause 7.1 were intended not to merge.

69. The Claimants say that the doctrine of merger in real property conveyancing depends upon the intention of the parties and that the real property rights acquired by the purchaser depend upon the transfer in the case of the conveyance of an existing house. However they submit that in the case of the sale of a property in the course of erection the contract has two aspects: the transfer of real property rights and the building of the property. They say that the obligation to build the house properly does not disappear suddenly on the day of legal completion making the obligation meaningless.

70. The Claimants refer to the decision of the Court of Appeal in Lawrence v Cassel [1930] 2 KB 83 which was cited by Diplock LJ in Hancock v Brazier as negativing any merger. In relation to Clause 10 the Claimants say it provides that certain obligations will not merge but it says nothing about what obligations will merge and the fact that certain obligations were expressly preserved from merger does not mean that other obligations, which are not referred to, do merge. They say that, in most cases the purchaser will not discover until after legal completion whether, for instance, SHL carried out the Works in a good and workmanlike manner under Clause 7.1, or carried out other obligations under Clauses 7.2.1, 7.2.2, 7.2.3 or 7.3. If those obligations did not survive legal completion then the Claimants say those provisions would have no purpose.

71. In addition, the Claimants rely on the Law Society's standard condition 7.4 which states that: "*Completion does not cancel liability to perform any outstanding obligation under this contract.*" They say that if the obligation under Clause 7.1 to build in a good and workmanlike manner and to make the Works ready for completion is outstanding because it has not been completely fulfilled, those obligations are preserved from merger by condition 7.4.

Decision

72. As set out by the Court of Appeal in Lawrence v Cassel [1930] 2 KB 83 at 89, an agreement to complete a house, being collateral to the deed of conveyance, was not merged in the conveyance. In Hancock v Brazier the same argument based on merger was raised. Diplock LJ, at first instance, said at 1324E to G:

> "*But when the contract is of a dual nature, as is the case with building contracts of this kind — and they are very common — namely, a contract to do two things, one to convey the land and the other to build a house, it is in my view quite clear that there can have been no intention on the part of the parties that the contract to build a house should disappear because the contract to convey the land is merged in the actual conveyance of it. That was said very clearly by Scrutton L.J. in Lawrence v. Cassel. It has been acted upon time and time again since that date, and I have no doubt that the*

obligation, such as it was, on the defendants under clause 9, as well as clause 11, of the contract survived the transfer."

.

73. I see no basis, on the terms of the sales contract, for the obligations in Clause 7.1 merging with the conveyance. I do not consider that a merger is to be easily inferred so as to take away the rights which would normally exist and so negative the position established in Lawrence v Cassel. The terms of Clauses 7.5 and 10 of the sales contracts and Clause 7.4 of the Standard Conditions do not, in my view come near to having that effect. Again, I bear in mind the observation of Lord Diplock in Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Limited [1974] A.C. 689 that "clear unequivocal words" would be needed to rebut the presumption that parties do not abandon any remedies such as those available under Clause 7.1 of the sales contracts.

74. Clause 10 provides that any obligation "*which is expressed as or which implies any obligation which will remain to be performed or observed after the completion of the sale and purchase ... shall remain in full force and effect after such completion.*" This clause is merely reinforcing the position that completion of the purchase does not affect unperformed obligations. Clause 7.4 of the Standard Conditions is to similar effect. Where Clause 7.5 contains an express non-merger term I do not consider that it adds anything to Clause 10 as the obligations still have to be performed. Further, if obligations have been performed then there is no need for those obligations to continue and, in principle, those obligations once performed could not continue.

75. In any event, it is evident that Clause 5.1 envisages that defects and work may be completed after completion and Clause 7.1 would apply so as to set the standard for completion of that work. To the extent that, at completion, SHL have not completed the Works in accordance with Clause 7.1, the provision continues to operate. In addition, to the extent that SHL have not at the date of completion complied with Clause 7.1 then SHL are in breach of that provision and I do not consider that such accrued rights arising from breaches of Clause 7.1 could be affected by any concept of merger.

76. As a result, I do not consider that there is anything in Clauses 7.5 or 10 of the sales contracts or Clause 7.4 of the Standard Conditions which could lead to Clause 7.1 merging in the conveyance, so that the rights and liabilities accrued or otherwise under Clause 7.1 ceased to be enforceable once completion of the transaction took place.

Statutory Control

77. In the light of the conclusions I have reached on the terms of the sales contracts, the contentions of the Claimants that because of the statutory control of unfair terms under the 1999 Regulations and UCTA certain terms are not binding so as to restrict the Claimants' rights, do not arise. However, for completeness I deal briefly with the submissions on this aspect on the basis that Clauses 7.1, 7.5, 8 and 10 do have that effect.

Claimants' submissions

The 1999 Regulations

78. The Claimants rely on the 1999 Regulations and submit that they are consumers, SHL is a seller or supplier within regulation 3(1) and SHL's standard contractual terms were not individually negotiated. As I stated in Mylcrist Builders Ltd v Buck [2008] EWHC 2172 (TCC) the following principles are to be derived from previous decisions in relation to the application of the 1999 Regulations:

(1) A term is unfair if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith.

(2) There is "significant imbalance" if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour.

(3) The element of "detriment to the consumer" makes clear that the Regulations are aimed at significant imbalance against the consumer, rather than the seller or supplier.

(4) The requirement of good faith is one of fair and open dealing in which:

  (a) Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer.

  (b) Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 to the 1994 Regulations (an inducement to the consumer to agree to the term, whether goods or services were sold or supplied at the special order of the consumer or whether the seller or supplier dealt fairly and equitably with the consumer). The supplier should deal fairly and equitably with the consumer.

(5) Schedule 2 to the Regulations is best regarded as a check list of terms which must be regarded as potentially vulnerable to being unfair.

(6) Useful approaches include:

  (a) assessing the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it.

  (b) considering the effect of the inclusion of the term on the substance or core of the transaction; whether if it were drawn to his attention the consumer would be likely to be surprised by it; whether the term is a standard term, not merely in similar non-negotiable consumer contracts, but in commercial contracts freely negotiated between parties acting on level terms and at arms' length; and whether, in such cases, the party adversely affected by the inclusion of the term or his lawyer might reasonably be expected to object to its inclusion and press for its deletion.

(7) Where the consumer has imposed the term either by their own choice or a choice made by their professional agent then it is unlikely that there would be

any lack of good faith or fair dealing with regard to the incorporation of the terms into the contract.

79. The Claimants submit that, if the contract terms have the effect contended for by SHL, the terms are caught by the Regulations. The Claimants say that the foundations of their houses were not designed and constructed as they ought to have been, resulting in uncertainty as to the future performance of the houses and inability to sell at a normal price and that they have already suffered that uncertainty and restriction for 7 to 8 years. The Claimants say that in such circumstances for SHL to contend that the contracts permit SHL to take full payment from the claimant purchasers and provide them with a house that is not readily mortgageable and saleable at a full price because it was badly designed is a significant imbalance in the parties' rights and is contrary to the requirements of fair dealing.

80. The Claimants say that the fact that they were represented by conveyancing solicitors, who did not advise the Claimants to renegotiate the wording of clauses 7.1, 7.5, 8, or 10, does not assist SHL because, on the evidence in the Claimants' witness statements, the bargaining strength was all on SHL's side because if a Claimant did not like the terms, another potential purchaser would step in. Further it is pointed out that for solicitors executing cut-price domestic conveyancing, the small fee does not allow for time spent trying to guess whether the seller, as a reputable housebuilder, might in the future raise some ingenious argument on its standard terms. The Claimants also refer to the fact that many of the Claimants received a financial inducement to use a solicitor recommended by SHL and submit that, whilst the financial or other arrangements between SHL and that solicitor have not been disclosed, it is likely that the solicitor regarded SHL as reputable and it is unlikely that the solicitor understood that his duty required him to search for possible traps in SHL's standard wording. The Claimants also say that the fact that they were all represented by solicitors who did not see the possibility of the meanings and effects now contended for by SHL indicates that the unclear language was a trap.

81. The Claimants say that SHL cannot save the position by pointing to the protection of Buildmark Cover because Buildmark is limited to its particular terms which contain serious unfairness for consumers. SHL rely on the 2 year written notice provisions to try to escape all liability under it for many plots, including plots 15, 20, 34 and 39. NHBC relies on the provision in Section 3 which purports to exclude from cover anything which was or could have been reported to the Builder under Section 2.

82. Accordingly the Claimants submit that if Clauses 7.1, 7.5, 8 and/or 10 or any other clause has the effect of preventing the Claimants from relying on the usual implied terms, those clauses would "cheat" the purchasers out of the ordinary rights which the law provides and which they would have expected to have. They rely on the reference in Chitty on Contracts (30th Edition 2008) at paragraph 15-105 when discussing entire agreement clauses that: "*... while the Office of Fair Trading concedes that these sorts of clause are not always intended to cheat consumers and that their potential effect is not invariably unfair, in its experience virtually all entire agreement clauses drawn to its attention were potentially unfair*." The Claimants also refer to the policy under the Defective Premises Act 1972, section 6(3), to prevent any contracting out of

the provisions of that Act, and say that this is a clear indication of public policy for the protection of consumers in this area.

83. Further, the Claimants say that Regulation 7(1) requires a seller or supplier to ensure that any written term of a contract is expressed in plain, intelligible language. If the contract clauses discussed above have the meaning which SHL submit, they were not so expressed and where, as here, there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail under Regulation 7(2).

The Unfair Contract Terms Act

84. The Claimants also rely on section 2(2), which they submit applies because of the definition of negligence in section 1(1)(a) so that SHL cannot exclude or restrict its liability for breach of an express or implied contractual duty to take reasonable skill and care except in so far as the term or notice satisfies the requirement of reasonableness.

85. The Claimants say that section 3 of UCTA applies in this case so that SHL cannot by reference to any contract term:

(1) when itself in breach of contract, exclude or restrict any liability in respect of the breach; or

(2) claim to be entitled

(a) to render a contractual performance substantially different from that which was reasonably expected of it, or

(b) in respect of the whole or any part of its contractual obligation, to render no performance at all,

except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness

86. The Claimants refer to the test of reasonableness in section 11, which provides:

> In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act...is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made. ...
> (5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.

87. The Claimants also refer to section 13 which provides:

To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents—

making the liability or its enforcement subject to restrictive or onerous conditions;

excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy...

88. They also refer to Schedule 2 which sets out matters to which regard may be had for the application of the reasonableness test:

(1) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;

(2) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having a similar term;

(3) whether the customer knew or ought reasonably to have known of the existence and the extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

(4) where the term excludes or restricts any relevant liability if some condition was not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;

(5) whether the goods were manufactured, processed or adapted to the special order of the customer.

89. The Claimants say that SHL claim that Clause 7.1 of the sales contracts entitles them to render a contractual performance substantially different from that which was reasonably expected of them and/or claim in respect of the whole or part of their contractual obligation (i.e. as to the quality of the works before the date of contract), to render no performance at all.

90. The Claimants also submit that if Clauses 7.5, 8, 10 and/or any other Clauses of the sales contracts have the effect of restricting the Claimants' rights to damages as SHL contend, then SHL is seeking when in breach of contract, to exclude or restrict liability in respect of the breach.

91. As a result the Claimants say that if and to the extent that SHL's interpretation of the terms of the sales contracts is correct, those terms were not reasonable for the purposes of UCTA at the time of the sales contracts because by reference to the matters in Schedule 2:

(1) As to (a), as appears from the Claimants' witness statements, SHL had a far stronger bargaining position than the Claimants. Even had the Claimants realised the alleged effect of this term, they would not have had the bargaining position to cause SHL to alter it;

(2) As to (c), the Claimants who had sales contracts all say that they did not understand the terms to have the effect SHL alleges and, given the difference between what a consumer would expect from a contract with a reputable housebuilder and what SHL says these contracts mean, it cannot fairly be said that the Claimants ought reasonably to have known the existence and extent of the term as alleged by SHL.

92. In summary, the Claimants say that the terms of the sales contracts and particularly Clauses 7.1, 7.5, 8 and 10 are subject to control under UCTA and insofar as SHL's contentions as to the meaning of those clauses are correct, those clauses fail the reasonableness test and SHL is prevented by UCTA from relying on them.

SHL's submissions

93. SHL point out that it was in the Reply that the Claimants sought, for the first time, to rely on the 1999 Regulations and UCTA and say that neither of these statutory provisions prevent the relevant clauses from having the construction contended for by SHL.

The 1999 Regulations

94. SHL say that the requirement for fairness contained within the Regulations is restricted to terms of standard form contracts and they refer to Regulation 5(2) which provides that *"a term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term"*. In this case, SHL says that the Claimants were represented by solicitors who were sent the contract terms for approval/amendment and who could and should have provided adequate advice to their clients in relation to the same.

95. Further and in any event SHL say that, even if the Regulations did apply, the terms now sought to be attacked are fair given the fact that the Claimants all had solicitors acting for them at the time the contracts were entered into and those professional advisers could and should have been acting so as to protect their interests.

96. SHL say that, as set out in Bryen & Langley Ltd v Boston [2005] EWCA Civ 973: "*...It was not for [the suppliers] to take the matter up with [the consumer] and ensure that he knew what he was doing; they knew that he had the benefit of the services of a*

professional...to advise him on the effects of the terms". This is applicable regardless of who proposes the relevant terms.

97. In relation to the Claimants' submissions that the involvement of solicitors on behalf of the Claimants should not make a difference, SHL say that the involvement of the professional means that the need to ensure fairness as between supplier and consumer disappears as there is no longer any imbalance in the relationship in respect of protecting the consumer's interests. They say that the essence of the lawyer's job is to ensure that such interests are protected and thus, there is no room for doctrines of unfairness in this context. In relation to the evidence of the Claimants, SHL note that none of the Claimants could remember the advice in fact given to them by their lawyers and that the "standard form" of advice drew attention to the importance of NHBC cover suggesting that this was viewed as being satisfactory and adequate protection.

98. Further, SHL say that the existence of Buildmark Cover is relevant not only to the issue of construction but to the issue of fairness. Contrary to what the Claimants now submit, SHL say that the Claimants do have reasonable protection under Buildmark in the form of transmissible warranties against a party who can pay, alternatively any arguments in relation to the fairness of the Buildmark terms relate to the Buildmark cover and not to the contractual provisions now in issue.

99. In relation to the Claimants' reliance on the decision of His Honour Judge Havery Q.C. in Zealander v Laing Homes (2000) 2 TCLR 724, SHL say that, in that case, the relevant documents concerning the arbitration clause were not sent to the Claimants until after contracts were exchanged; the Judge relied on the fact, specifically made relevant by the legislation, that the purchasers were irrevocably bound where they had no real opportunity of becoming acquainted with the terms and that they were excluded or hindered in taking legal action in that they would both have to commence arbitration and litigation. SHL say that none of those points are apposite or relevant in the present case.

The Unfair Contract Terms Act

100. SHL say that, in contrast to the 1999 Regulations which apply to all types of terms, UCTA only applies to terms that purport to exclude or restrict liability, namely exemption clauses. The Act does not in general affect the basis of liability, so the first inquiry is whether or not the person seeking to rely on the terms is in fact under any obligation apart from the term. Thus, UCTA cannot be argued to apply to all the clauses of the contract as contended for by the Claimants but rather only to any truly exclusionary or exemption clause. It cannot be used to define what the contractual obligations are in the first place, for example, what terms survive upon completion.

101. SHL accept before this court, but reserve their position if the matter goes further, that the Act applies to a contract for the sale of land.

102. SHL submit that the terms of the sales contracts were fair for the reasons already set out in relation to the Regulations. SHL dispute the Claimants' submission that the clauses are unfair because they will not be compensated for substantial losses, on

SHL's case. SHL says that this submission presupposes knowledge of the effect of the contractual outcome. Furthermore they say that the terms of the Buildmark Cover were plain and easy to assess. Finally they say that no authority is supplied to support the assertion that UCTA has application in relation to the clear entire agreement clause in the present case.

Decision: The 1999 Regulations

103. The first question is whether the 1999 Regulations apply to the terms of the sales contracts. Regulation 5 provides:

> "*(1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.*
>
> *(2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.*
>
> *(3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract.*
>
> *(4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.*"

104. The impact of legal advice on whether a term has been "individually negotiated" was considered by the Court of Appeal in UK Housing Alliance v Francis [2010] EWCA Civ 117 at [19] where Longmore LJ giving a judgment with which the other members agreed said:

> "*The fact that a consumer or his legal representative has had the opportunity of considering the terms of an agreement does not mean that any individual term has been individually negotiated. The supplier must prove that the relevant term was individually negotiated. The concept of ability to influence the substance of a term comes from regulation 5(2) which provides:*
>
> > *"A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term."*
>
> *This therefore imposes an absolute prohibition on a finding of individual negotiation if there has not been an ability to influence the substance of a term. It does not follow from the existence of the ability to influence the substance of a term that the term has, in fact, been individually negotiated. That is still a matter for the supplier to prove and, in my judgment, the landlord did not prove that in this case.*"

105. I do not consider that the terms at Clauses 7.1, 7.5, 8 or 10 of the sales contracts were excluded as being individually negotiated. The terms in this case were standard terms which were drafted in advance by SHL and sent to the solicitors for the Claimants. The question is whether or not the Claimants were able to influence the substance of the terms. As Longmore LJ said there is an absolute prohibition on a finding of individual negotiation if there has not been an ability to influence the substance of a term but it does not follow from the existence of the ability to influence the substance of a term that the term has, in fact, been individually negotiated. In this case SHL has not proved under Regulation 5(4) that the terms were individually negotiated and, given that the same terms applied as appropriate to the properties in Phases 1 and 2, the evidence would indicate that they were not individually negotiated. Therefore I do not consider that the fact that a consumer had legal advice affects the question of whether the Regulations apply to the relevant terms of the sales contracts.

106. The question then is first whether it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Then there is a question whether that imbalance is contrary to the requirements of good faith.

Clause 7.1

107. Clause 7.1, if it had the meaning contended for by SHL would mean that the Claimants could not after completion bring a claim against SHL for breach of the obligation to complete the works in a good and workmanlike manner and could not bring a claim for failure to carry out the design of the works with proper skill and care. In this respect, I bear in mind the provisions of the Buildmark Cover. However these depend on notice being given, relate to the Builder being able to remedy the Defect and Damage and contain a number of exclusions. I consider that if the Claimants no longer had the right to bring a claim against SHL for breach of the obligation to complete the works in a good and workmanlike manner and could not bring a claim for failure to carry out the design of the works with proper skill and care, that would cause a significant imbalance in the parties' rights and obligations arising under the sales contract, to the detriment of the Claimants as consumer.

108. In this context, after the judgment was handed down by the Court of Appeal in Robinson v PE Jones (Contractors) Ltd [2011] EWCA Civ 9, I received submissions from both parties as to the effect of that decision and in particular the judgment of Jackson LJ at [60] and [61] where he referred to a clause in the relevant contract which gave rights under the relevant Buildmark Cover (a different version to the one in this case) and excluded a common law duty of care.

109. The question was raised as to whether such a provision was reasonable in the light of the provisions of UCTA. Jackson LJ said at [61]:

> "*I readily accept that the protection given to house owners by those provisions is not total. On the other hand, that protection is of very substantial benefit to a huge number of house owners across the country. The biggest single risk which house owners face is that the original builder may be unable (e.g. through insolvency) or unwilling to put right defects in relatively new houses. The NHBC affords substantial protection against this risk. In my view, against that background it is quite impossible to say that*

contractual terms limiting a house purchaser's rights to those conferred by the NHBC agreement are unreasonable."

110. That is a different question to the one which I have to consider under the 1999 Regulations. Equally the term which was being considered was one giving NHBC cover but excluding common law rights not the type of obligations in this case. I do not consider that the decision affects my view on the questions under the 1999 Regulations or the reasonableness or otherwise of the terms in this case with the Buildmark Cover in this case.

111. In relation to the requirement of good faith, in UK Housing Alliance Longmore LJ also considered the impact of legal advice on the question of whether, contrary to the requirement of good faith, the term caused the relevant imbalance. At [29] he said:

> "*Again I do not see that the agreement that the landlord can retain the final payment is contrary to the concept of good faith. It cannot be suggested that the term is not fully, clearly and legibly expressed or was not given appropriate prominence. No doubt Mr Francis was short of money when he made the contract for the sale and lease-back of the property but it cannot be said that he has been "taken advantage of" unfairly. The very nature of the transaction necessitated that he instructed a solicitor which he did. There was (probably inadmissible) evidence that his solicitor made a careful report to him on the contracts which he was about to sign drawing specific attention to the fact that, if the court granted an order for possession in the event of his being in breach of the terms of the tenancy agreement, he would not receive the final payment. This evidence was probably inadmissible because the matter has to be judged at the time when the contract was made without regard to privileged communications passing between a solicitor and his client. But the fact is that Mr Francis necessarily had the protection of a solicitor at the time and he would have the protection of the court if and when a possession order was sought by the landlord. I cannot see here any failure to conform with "good standards of commercial morality and practice"*."

112. As I said in Mylcrist v Buck the requirement of good faith is one of fair and open dealing in which openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Fair dealing requires that SHL should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 to the 1994 Regulations (an inducement to the consumer to agree to the term, whether goods or services were sold or supplied at the special order of the consumer or whether the seller or supplier dealt fairly and equitably with the consumer). The supplier should deal fairly and equitably with the consumer.

113. If Clause 7.1 had the effect contended for by SHL then I do not consider that the term would have been expressed fully, clearly and legibly and it would have contained concealed pitfalls in not giving the Claimants an ability to claim for failure to complete the works in a good and workmanlike manner or for failure properly to carry out the design. I consider that on that basis SHL, although there is nothing to show that it would have been other than unconsciously, would be taking advantage of a house purchaser wishing to purchase a property with all the pressures on them which

are familiar to those involved in such property transactions. Whilst they were advised by solicitors, the evidence indicates that the Claimants were not alerted to any problems with the terms and whilst the opportunity for them to be advised has to be weighed in the overall assessment of good faith, I do not consider that it detracts sufficiently from the other matters to show that there would have been fair and open dealing in this case. I should say that I see nothing to suggest that there was anything in terms of the nature of the conveyancing role or fee or the way in which the solicitors were engaged by the Claimants which makes the particular circumstances in which the solicitors were engaged by the Claimants in this case different from any other conveyancing transaction.

114. I therefore consider that, if Clause 7.1 of the sales contracts had the effect contended for by SHL and meant that the Claimants could not, after completion, bring a claim against SHL for breach of the obligation to complete the works in a good and workmanlike manner and could not bring a claim for failure to carry out the design of the works properly then that term would be unfair because it was not individually negotiated and contrary to the requirement of good faith it would cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the Claimants as consumer.

Clauses 7.5 and 10

115. I take these clauses together because I have to consider whether these provisions would be unfair if they had the effect that, on merger, the Claimants could no longer pursue claims under Clause 7.1. Again, I bear in mind the provisions of the Buildmark Cover. However, as I have said the rights under the Buildmark Cover depend on notice being given, relate to the Builder being able to remedy the Defect and Damage and contain a number of exclusions. I consider that if the Claimants no longer had the right to bring a claim against SHL for breach of Clause 7.1 after completion, that would cause a significant imbalance in the parties' rights and obligations arising under the sales contract, to the detriment of the Claimants as consumer. The Claimants would be deprived of significant rights if Clauses 7.5 and 10 had that effect.

116. If Clauses 7.5 and 10 had the effect contended for by SHL then I do not consider that the terms would have been expressed fully, clearly and legibly and that they would have contained concealed pitfalls in not giving the Claimants an ability to make a claim under Clause 7.1 after completion. Again, although unconsciously, I consider that SHL would be taking advantage of the Claimants as house purchasers in those circumstances and whilst they were advised by solicitors, they were not alerted to any problems with the terms. As with Clause 7.1, whilst the opportunity for them to be advised has to be weighed in the overall assessment of good faith, I do not consider that it detracts sufficiently from the other matters to show that there would have been fair and open dealing in this case.

117. I therefore consider that, if Clauses 7.5 and 10 of the sales contracts had the effect contended for by SHL and meant that the Claimants could not, after completion, bring a claim against SHL under Clause 7.1, then those terms would be unfair because they were not individually negotiated and contrary to the requirement of good faith they

would cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the Claimants as consumers.

Clause 8

118. I have to consider whether Clause 8 would be unfair if it had the effect that it excluded the implied terms under section 13 of the Supply of Goods and Services Act 1982 and those usually implied as set out in Hancock v Brazier. The effect of "entire agreement" clauses is referred to in Chitty on Contracts (30th Edition) at 15-105, cited by the Claimants. Again I bear in mind the provisions of the Buildmark Cover as stated above but if Clause 8 had the effect of excluding important implied terms then that seems to me to be a good example of a significant imbalance in the rights and obligations arising under the sales contract, to the detriment of the Claimants.

119. If Clause 8 had that effect I do not consider that the terms would have been expressed fully, clearly and legibly and they would have contained concealed pitfalls in excluding the implied terms. Clause 8 generally deals with other matters and there is no reference to implied terms. Again, albeit unconsciously, I consider that SHL would be taking advantage of the Claimants as house purchasers and whilst they were advised by solicitors, they were not alerted to any problems with the terms. As with Clause 7.1 whilst the opportunity for them to be advised has to be weighed in the overall assessment of good faith, I do not consider that it detracts sufficiently from the other matters to show that there would have been fair and open dealing in this case.

120. I therefore consider that, if Clause 8 of the sales contracts had the effect contended for by SHL in excluding implied terms, then that term would be unfair because it was not individually negotiated and contrary to the requirement of good faith it would cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the Claimants as consumer.

Unfair Contract Terms Act

121. In the light of the above it is unnecessary to go further than the 1999 Regulations but I can state my conclusions briefly. I consider that, on SHL's contentions as to the meaning of Clauses 7.1, 7.5, 8 and 10, those provisions would exclude and/or restrict SHL's liability for breach of an express or implied contractual duty to take reasonable skill and care and/or SHL would by reference to those terms, when in breach, be seeking to exclude or restrict liability or be claiming to be entitled to render a contractual performance substantially different from that which was reasonably expected of it or in respect of the whole or any part of its contractual obligation, to render no performance at all.

122. The question would then be whether those terms satisfied the requirement of reasonableness. On balance I do not consider that they would. I bear in mind the existence of Buildmark Cover and its limitations, the inequality of bargaining power between the Claimants as house purchasers and SHL as developer at the time the sales contracts were made, the fact that the Claimants had legal advice and the other matters considered under the 1999 Regulations. These considerations lead me to the conclusion that overall it would not be reasonable for SHL to rely on those Clauses. Again in coming to that decision I have considered the impact of the Court of Appeal

decision in Robinson v Jones but have concluded that it does not affect my view of the reasonableness of the particular terms in the context of the present case.

123. I therefore conclude that, on SHL's contentions as to the meaning of Clauses 7.1, 7.5, 8 and 10, those terms of the sales contracts, to the extent they excluded or restricted liability or had the other effects dealt with by UCTA, would be unreasonable and unenforceable under UCTA.

Claims under the Defective Premises Act 1972

124. The Claimants make claims under section 1(1) of the Defective Premises Act 1972 ("the 1972 Act") which provides as follows:

"*Duty to build dwellings properly.*
(1)A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty—
(a) if the dwelling is provided to the order of any person, to that person; and
(b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling;
to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed."

Liability under the 1972 Act

125. The Claimants submit that this gives rise to a threefold duty to see that the work is done, first, in a workmanlike or professional manner; secondly, with proper materials and, thirdly, so that as regards that work the dwelling will be fit for habitation when completed.

126. SHL submit that it is a single duty in the sense that it has to be done in a workmanlike or professional manner with proper materials with the particular result that the dwelling will be fit for habitation when completed. Thus, SHL submit that there is no breach if the work is not done in a workmanlike or professional manner with proper materials unless that results in the dwelling not being fit for habitation when complete.

127. SHL submit that it is not open to this court to construe section 1 of the 1972 Act in the way in which the Claimants submit it should be construed because this court is bound by the decision of the Court of Appeal in Alexander v Mercouris [1979] 1 WLR 1270, as was recognised by His Honour Judge Esyr Lewis QC in Thompson v Alexander (1992) 59 BLR 77.

128. The Claimants contend that the observations by the Court of Appeal in Alexander v Mercouris as to this question were *obiter*, that the Court of Appeal was not referred to the relevant Law Commission Report No. 40 "Civil Liability of Vendors and Lessors for Defective Premises" nor to Hancock v Brazier (Anerley) Limited [1966] 1 WLR 1317, on this point, nor to the decision of the Court of Appeal in Batty v Metropolitan Realisations [1978] 1 QB 554. Nor, they submit was Judge Esyr Lewis QC referred to that report or those decisions. Mr Bartlett QC also relies upon statements in the House of Lords in D&F Estates Limited v Church Commissioners for England [1989] 1 AC

177 and in Murphy v Brentwood District Council [1991] 1 AC 398 which, he submits, support his contention.

129. In Alexander v Mercouris the plaintiff entered into an agreement with the defendants on 20 November 1972 under which the defendants arranged for the plaintiff to purchase a dwelling house and make the necessary arrangements for its modernisation and conversion into two flats. The plaintiff purchased the property and entered into a contract with a firm of builders to carry out the work, with the defendants being appointed as the supervising officer. The work on the building reached practical completion in February 1974. The issue in that case was whether the 1972 Act, which came into force on 1 January 1974, applied to those works.

130. At first instance the judge held that the relevant date for determining whether the 1972 Act applied was the date of the agreement and not the date of the completion of the dwellings. On appeal, Buckley LJ summarised the contentions of the parties in the following way at 1273 [B] to [D]:

> "*The plaintiffs have contended that the Act creates a single and continuing duty, which is not either completely performed or breached until the work has been completed. It is, they say, a duty to provide a dwelling which is fit for habitation by work done in a workmanlike or professional manner with proper materials. If work taken on is not completed until after January 1, 1974, the statutory duty becomes enforceable after the commencement of the Act which, when so construed, does not, the plaintiffs submit, have a retroactive effect.*
> *The defendants, on the other hand, contend that upon the language of the section the statutory duty arises when a person takes on work for or in connection with the provision of a dwelling, and continues throughout the course of the work, so that when the work is completed it will have been done in a workmanlike manner with proper materials and the dwelling will be fit for habitation. They say that the plaintiffs' construction involves giving the Act a retroactive effect and should therefore be discarded.*"

131. At 1274A to C Buckley LJ set out his conclusions in the following terms:

> "*It seems to me clear upon the language of section 1 (1) that the duty is intended to arise when a person takes on the work. The word "owes" is used in the present tense, and the duty is not to ensure that the work has been done in a workmanlike manner with proper materials so that the dwelling is fit for habitation when completed, but to see that the work is done in a workmanlike manner with proper materials, so that the dwelling will be fit for habitation when completed. The duty is one to be performed during the carrying on of the work. The reference to the dwelling being fit for habitation indicates the intended consequence of the proper performance of the duty and provides a measure of the standard of the requisite work and materials. It is not, I think, part of the duty itself. If, at an early stage in the provision of the dwelling — for instance, the putting in of the foundations — someone who had taken on that part of the work failed to do it in a workmanlike manner, then in my judgment, assuming that the section applied, an immediate cause of action would arise. It would not be*

necessary to await the completion of the dwelling to claim relief on the basis of a breach of statutory duty.
The argument that the duty is a single duty which continues in operation until completion of the dwelling but in respect of which no relief can be obtained until the dwelling is completed, is in my view inconsistent with, or at least accords very ill with, section 1 (5) , which is in these terms:..."

132. Goff LJ agreed with the judgement of Buckley LJ and said this about the plaintiff's submissions at 1275D to F:

> "*Mr. Browne argued that "taking on work" in section 1 (1) of the Defective Premises Act 1972 is equivalent to "doing," that there is only one duty imposed by the section, namely, to provide a dwelling fit for habitation when completed, and that, therefore, a breach of the statutory duty occurs when the building is finished and not earlier, so that the Act applies if it comes into force before that happens, even if but very little remains to be done.*
> *This argument could not be sustained without some qualification, because the statutory duty must, in my judgment, be broken as soon as bad workmanship, or the use of faulty materials, takes place. Indeed, as Buckley L.J. has pointed out, and I agree, the concluding words of the section do not state the duty but the measure of the duty imposed by the earlier words, that is to say, to do the work in a workmanlike or, as the case may be, professional manner and to do it with proper materials, so that the result may be produced that the dwelling will be fit for habitation when completed.*"

133. He then continued at 1275H to 1276A as follows:

> "*It seems to me that the judge was right to give the words "taking on work" in section 1 (1) their natural meaning, and they clearly point to the beginning of operations and not the end. For my part I cannot read them as equivalent to "doing," still less to "having taken on" or "having done." Where there is no contract the time when a person takes on work must, I think, be when he starts to do it. Where there is a contract, I would think the time would be when the contract is made; but in any case it cannot be later than when the party starts to perform it.*"

134. Waller LJ also agreed and said this at 1277C to E:

> "*I would only add that the phrase "taking on" is an unusual phrase to find in a statute, and in my opinion would appear to be incapable of being construed in a manner which is different from the starting of the work or the entering into of the contract. In other words, the latest time at which "taking on" could possibly mean would be the time when the work was started.*
> *Mr. Browne's submission that the duty was an all-embracing duty, including the completion of the work, is, I think, further made difficult by the words towards the end of the section. The duty is to see that the work which he takes on is done in a workmanlike manner, etc., so that as regards that work the dwelling will be fit for habitation when completed. As it seems to me, the duty starts when the person takes on and continues while the work is done,*

and the test of the manner in which the work is done is that when the building is completed it is fit for human habitation."

135. In Thompson v Alexander the plaintiffs alleged that houses, which had been built to the designs of the defendant and supervised by them, were defective and started proceedings claiming damages for breach of section 1 of the 1972 Act. Some of the defects were not pleaded as rendering the house unfit for human habitation but only as being a failure to use proper materials and carry out the work in a workmanlike or professional manner. The parties sought the determination of a question of law whether under section 1 of the 1972 Act it was sufficient for the plaintiffs to prove merely that a defect arose out of a failure to carry out work in a professional manner or with proper materials or whether it was also necessary for the plaintiffs to prove that the defect rendered the dwelling unfit for habitation when completed.

136. At 82 Judge Esyr Lewis QC said this:

> "*The researches of counsel have revealed that there is no reported case in which the particular point of construction raised in this summons has been directly raised for consideration. The substance of Mr Twigg's argument on behalf of the first defendants is founded on observations made by the three Lords Justices in the Court of Appeal in Alexander and Another v. Mercouris [1979] 1 W.L.R. 1270.*"

137. The judge then referred to the relevant passages from the judgements of Buckley, Goff and Waller LJJ. He then referred to those judgments in the following terms at 84:

> "*It will be seen that all three Lords Justices explicitly said in slightly different language, that the reference in section 1(1) to the dwelling being fit for habitation is a measure of the standard of the work to be done and the materials to be provided and Buckley L.J. said that he did not think the reference to fitness for habitation was part of the duty itself.*
> *Mr Twigg has submitted that, although the question that arose in that case was not the same as that which arises in the present summons, the observations of the three Lords Justices were an integral part of their reasoning and are decisive of the question that arises in this case. He has referred me to the latest editions of three text books, namely Winfield and Jolowicz on Tort (13th ed.), Salmond and Heuston on the Law of Torts (19th ed.) and Charlesworth and Percy on Negligence (8th ed.), all of which adopt without question the views expressed in the Court of Appeal in Alexander v. Mercouris that the reference to fitness for habitation in section 1(1) of the Act simply sets the standard required by the duty created in the section.*"

138. At 86 Judge Esyr Lewis referred to submissions by Counsel for the Plaintiffs as follows:

> "*Mr Seymour has submitted that the observations of the Lords Justices in Alexander v. Mercouris to the effect that the fitness for habitation provision of section 1(1) is simply a measure of the standard of the requisite work and materials were obiter and therefore not binding on me.*"

139. Judge Esyr Lewis then continued at 86 and said this as to Alexander v Mercouris:

> "*It is not within my competence critically to analyse judgments of the Court of Appeal which are binding on me and I approach Mr Seymour's argument with caution. I should emphasise, in fairness to him, that his argument that there was an inconsistency in Buckley L.J.'s reasoning was directed solely to what he submitted were obiter dicta in relation to the scope of the duty imposed by section 1(1).*
> *As I have said, all three Lords Justices in Alexander v. Mercouris plainly said that the fitness for habitation reference in section 1(1) related to the standard of duty imposed by the section. It seems to me that their views on this matter were intimately bound up with their reasoning on the matters in issue in that case and that I am obliged to follow them*."

140. In relation to an argument that there was inconsistency between finding that the duty required the defect to render the dwelling unfit for habitation when completed and certain statements in the judgment of Buckley and Goff LJJ, a submission which was also made to me on behalf of the Claimants, Judge Esyr Lewis said this:

> "*Although both Buckley L.J. and Goff L.J. explicitly indicated that the duty imposed by section 1(1) would be broken as soon as bad workmanship took place, it seems to me to be obvious that a person who acquired an interest in the dwelling after completion which, at the time of completion, had no defects making it unfit for habitation, would have no cause of action whatever defects there may have temporarily existed during the course of construction. If a breach of duty was committed during the course of construction which led to the dwelling being unfit for habitation on completion, the position would obviously be otherwise. In the latter case the date when the breach occurred would be earlier than the date of completion. I see no illogicality or inconsistency in this.*"

141. In any event Judge Esyr Lewis QC held that the proper construction of section 1(1) of the 1972 Act was that the provision regarding fitness for habitation was a measure of the standard required in performance of the relevant duty. He held that it was there to ensure that defects which were trivial did not come within the scope of the Act because such defects would, in many cases, if not all, be reflected in the price paid by the person acquiring an interest in the dwelling.

142. Not without some initial reluctance, I have come to the conclusion that the decision of the Court of Appeal in Alexander v Mercouris is, as Judge Esyr Lewis QC held, binding on me at first instance. Whilst I accept that, as the Claimants submit, the narrow issue was whether "taking on work" in section 1(1) of the 1972 Act arose when a party to a contract agreed to carry out work or whether that duty arose at a later date, it seems to me that on a fair reading of the judgments of the Court of Appeal their decision was based both on a construction of the phrase "taking on work" but also on construing the nature of the duty, which in turn required them to analyse the nature of the duty.

143. Whilst I consider that both the plaintiffs and the defendants argued in that case for a duty which was essentially a single duty, the Court of Appeal had to decide whether the duty was one which only arose when completed or whether the duty was one which could arise at an earlier date on the basis that the work will be fit for habitation when completed. In coming to that determination I consider that, as Judge Esyr Lewis QC held in Thompson v Alexander, the statements in the judgments of the Court of Appeal that fitness for habitation provided a measure of the standard of the requisite work and materials was "intimately bound up with their reasoning on the matter in issue in that case" and are therefore binding upon me.

144. I come to that conclusion that I am bound by Alexander v Mercouris with reluctance because I would otherwise have come to a different conclusion on the basis of the matters put before me but not put before either the Court of Appeal in Alexander v Mercouris or Judge Esyr Lewis QC in Thompson v Alexander.

145. First, I was referred to Law Commission Report No. 40 which considered changes in the law so that a purchaser of a new house should have greater assurance that he was obtaining a soundly built property. That report attached a draft bill in which section 1(1) was in the same terms as what became the 1972 Act. The report stated at paragraphs 33 and 34 as follows:

> "*33. As regards the content of the proposed obligation, we have considered the terms of the obligation implied in building contracts by the common law (in the absence of terms to the contrary effect); and, in particular, whether it is necessary to provide both that the work should be done efficiently, and with proper materials, and that the house should be fit for habitation. In Hancock v B.W. Brazier (Anerley) Ltd, Diplock L.J. described the requirement of fitness for habitation as being merely an alternative way of formulating the requirement for good work and proper materials. It is not, however, the view normally taken, and the implied obligation is generally thought to have threefold application covering:*
>
> *(a) good workmanship, and*
>
> *(b) proper materials, and*
>
> *(c) fitness for habitation,*
>
> *all three of which must be met. We think that there are good reasons for the latter view.*
>
> *34. It may be that proper work with good materials will usually produce a house which is fit for habitation, but it is possible to imagine cases in which, however skilful the work and however good the material, there is some defect of design or lay-out which makes the resulting dwelling unsuitable for its purpose. We propose, therefore that the statutory obligation should follow the form last outlined and should contain each of those three requirements.*"

146. In addition, in the explanatory notes to section 1(1) it stated as follows:

> "*This clause will impose a threefold statutory duty upon:-*
>
> *(a) any person who takes on work for or in connection with the provision of a new dwelling; and*
>
> *(b) any person who, in the course of a business or in the exercise of statutory powers of providing or arranging for the provision of new dwellings, arranges for others to take on such work.*

…
Where building contractors undertake the provision of dwellings, the common law implies a term into their contracts which has the same content as the threefold statutory duty, unless all the circumstances are such as to exclude its implication...."

147. Secondly, as stated by Diplock LJ in Hancock v Brazier at 1327A, based on the judgment of Macnaghten J in Miller v Cannon Hill Estates Limited [1931] 2 KB 113:

> "*it can hardly be doubted that the obligation of the builder was an obligation to build properly, to build with proper materials, and in a proper manner, and to provide a house fit for the purposes for which, to the knowledge of both parties, the house was required-namely for the habitation of the plaintiff and his wife.*"

148. Diplock LJ then said at 1327C to D:

> "*That formulation of the implied warranty is sometimes varied by the use of the words "a house fit for human habitation", but I think it is very clear from the judgments of the Court of Appeal in Perry v Sharon Development Co Ltd, which I have already cited, that there is no substantial or significant difference between the formulation of the warranty that the house should be built of materials suitable and fit and proper for the purpose and the work should be carried out in a proper, efficient and workmanlike manner, and the alternative way of stating it, that the house is habitable and fit for humans to live in.*"

149. Thirdly, in D&F Estates v The Church Commissioners Lord Bridge considered the 1972 Act and cited from Law Commission Report number 40. At pages 193 to 194 he cited paragraph 26 of that report which stated that the law should be amended so that a builder should be placed under a duty, similar to his common law obligations.

150. Fourthly, in Murphy v Brentwood District Council at 480 Lord Bridge stated

> "*By section 1 of the Defective Premises Act 1972 Parliament has in fact imposed on builders and others undertaking work in the provision of dwellings the obligations of a transmissible warranty of the quality of their work and of the fitness for habitation of the completed dwelling."*

151. Fifthly, in Batty v Metropolitan Realisations Ltd [1978] 1 QB 554 the question which arose for decision was the meaning of an express warranty in the following terms:

> "*The vendor hereby warrants that the dwelling has been built or agrees that it will be built: (i) in an efficient and workmanlike manner and of proper materials and so as to be fit for habitation....*"

152. In giving a judgment, with which the other members of the Court of Appeal agreed, Megaw LJ said this at 563H to 564B:

> "*For the first defendants it is said that the obligation imposed by the warranty "and so as to be fit for habitation," though expressed as a separate warranty, co-ordinate with the two warranties which precede it in the clause, ought to be read as though it were expressed as "and so as to be fit for habitation so far as compliance with the two preceding warranties can achieve that result."*
> *I am afraid that I cannot accept that construction.*"

153. On the basis of the Law Commission Report and the decisions which have been put before me, if not bound to decide otherwise, I would have found that section 1(1) of the 1972 Act was intended to give rise to a threefold duty on builders similar to the implied terms set out by Diplock LJ in Hancock v Brazier, and not a single duty. In the event I hold that section 1(1) of the 1972 Act gives rise to a single duty on builders, so that the obligation to do the work "*in a workmanlike or, as the case may be, professional manner, with proper materials*" is a duty which has to be read subject to the requirement "*as regards that work the dwelling will be fit for habitation when completed*" so that there is no breach unless the dwelling is not fit for habitation.

Fitness for habitation

154. The other aspect of the 1972 Act is whether, on the basis of the defects in this case, the properties are unfit for habitation. It is convenient to deal with that issue now.

Submissions

155. In relation to the meaning of fitness for habitation, I was referred by the Claimants to paragraph 26 of Law Commission Report No 40, which was cited at first instance in Bole v Huntsbuild [2009] EWHC 483 (TCC) at [22]:

> "*34. It may be that proper work with good materials will usually produce a house which is fit for habitation but it is possible to imagine cases in which, however skilful the work and however good the materials, there is some defect of design or lay-out which makes the resulting dwelling unsuitable for its purpose.*"

156. The Claimants referred to the citation by His Honour Judge Toulmin CMG QC to the Housing Act 1985 and submitted that the use of this statutory provision to interpret the 1972 Act is contrary to what was said in the judgment of Swinton Thomas LJ in Bayoumi v Protim Services Ltd (1998) 30 H.L.R. 785. They also submitted that the reference to the phrase "fit for habitation" in the Housing Act 1936 was similarly inappropriate.

157. The Claimants referred to the summary of the law on fitness for habitation by Judge Toulmin at [38] that:

> "*i) The finding of unfitness for habitation when built is a matter of fact in each case.*
> *ii) Unfitness for habitation extends to what Lord Bridge described as "defects of quality" rendering the dwelling unsuitable for its purpose as well as to "dangerous defects".*
> *iii) Unfitness for habitation relates to defects rendering the dwelling dangerous or unsuitable for its purpose and not to minor defects.*
> *iv) Such a defect in one part of the dwelling may render the dwelling*

> *unsuitable for its purpose and therefore unfit for habitation as a dwelling house even if the defect does not apply to other parts of the dwelling. This is also the case under the Housing Act – see Summers v Salford Corporation.*
> *v) The Act will apply to such defects even if the effects of the defect were not evident at the time when the dwelling was completed.*
> *vi) In considering whether or not a dwelling is unfit for habitation as built one must consider the effect of the defects as a whole.*"

158. They submitted that whilst they agreed with the majority of those propositions, they disagreed with propositions (iii) and proposition (vi), to the extent that it did not require consideration of individual defects, as the Court of Appeal held on appeal at [2009] EWCA Civ 1146.

159. In relation to the decision of the Court of Appeal which upheld the first instance decision, the Claimants referred to the passage in the Court of Appeal where they dealt with the use of the term "unfit for purpose" and at [29] Dyson LJ said:

> "*...it might have been better if the judge had explained what he meant by a dwelling being unfit for its purpose. It is perhaps understandable that he used the phrase "unfit for purpose" in the light of paragraph 34 of the Law Commission report. I cannot, however, accept that there is any material error here. In my view, it is clear that the judge meant that defects which render a dwelling unfit for its purpose, are defects which render it unfit for habitation. The obvious purpose of a dwelling is for it to be occupied and inhabited safely and without inconvenience.*"

160. Then the Claimants referred to [30] where Dyson LJ said:

> "*As regards the particular point made by Mr Hussain in relation to paragraph 174 of the judgment, I accept the submission of Mr Crowley that this was based on the evidence. The fact that the doors to the garage could not be locked was a relevant but not the only consequence of RMA's unprofessional work, which made the house unfit for habitation. Part of living in a house is to be able to maintain the security of the home.*"

161. The Claimants submit that in this case where the foundations are defective and the properties have suffered from cracking and other signs of movement the properties should be treated as not fit for purpose.

162. SHL submit that, applying the six propositions in Bole to the present case the properties have now stood for some considerable period of time and have not moved significantly or suffered material damage. They therefore cannot be said to be unsuitable for their purpose as they have been lived in and are properly capable of future occupation. They say that the cases where the 1972 Act has been invoked have all concerned cases of substantial physical damage.

Decision

163. It was common ground that the question of whether a dwelling is fit for habitation is one of fact and degree. In this case there are defects in the foundations which have caused, as set out below, only cosmetic defects in the properties, that is category 1

defects under the definition in BRE Digest 241. This is not a case where the defects have caused category 4 defects as in Bole. It is not a case where significant damage is likely. However, as the Claimants submit, the judgment of Dyson LJ at [30] would indicate that security is one of the criteria for fitness for habitation and at [29] there was a reference to inconvenience.

164. In this case there are essentially two aspects: the defective piles and the damage caused to the properties by the defective piles. Whilst I do not consider that the damage to the properties has rendered them unfit for habitation, on balance, I am persuaded that any significant defects in foundations are properly matters which could be said to give rise to a lack of fitness for habitation. On that basis I would conclude that this is a case where the properties are, to that extent, not fit for habitation.

165. I therefore find that the defects in this case were caused by the foundation work not being done in a workmanlike or professional manner so that as regards that work the properties were not fit for habitation when completed.

Claims under Section 2 of the Buildmark cover

166. The Claimants make claims under section 2 of the Buildmark cover. This provides, under the heading "*the Builder's obligations*" that: "*this part of the cover tells you what the Builder must do if you give him written notice of Defects or Damage in your Home. This notice must be given as soon as possible within the period of cover.*"

167. Section 2 then contains a column which states that the Builder must take certain actions as follows:

> "*Within a reasonable time and at his own expense, to put right any Defect or Damage to your Home or its Common Parts which is notified to him in writing within the period of the cover.*
> *Any reasonable costs you incur, by prior agreement with the Builder, for removal storage and appropriate alternative accommodation if it is necessary for you or anyone normally living in the Home to move out so that work can be done.*"

168. It also states that the builder is not liable for "*any cost or expense greater than that necessary to carry out a workmanlike repair of the Defect or Damage.*"

169. The definition of Damage is "*physical damage to the home caused by a Defect.*" Defect is defined as "*a breach of any mandatory NHBC requirement by the Builder or anyone employed by him or acting for him….*" Home is defined as "*the house.. referred to in the Buildmark Offer, together with any of the following which are included in the original Contract: …. (d) any garage, permanent out building, retaining wall, boundary wall, external hand rail or balustrade, path, drive, garden area or paved area newly built by the Builder at the date of the Insurance Certificate.*"

170. The NHBC Requirements which are relied upon by the Claimants as giving rise to liability under the Buildmark Cover are Design Requirement R2 that "*Design and specification shall provide satisfactory performance.*"; Workmanship Requirement R4 that "*All works shall be carried out in a proper neat and workmanlike manner*" and

Structural Design Requirement R5 that "*Structural design shall be carried out by suitably qualified persons in accordance with British Standards and Codes of Practice.*" The Claimants say that these requirements were broken and there are both Defects within the meaning of section 2 of the Buildmark cover and there is also Damage. They contend that SHL is therefore required to rectify the Defect or Damage.

Notice

171. A threshold issue in relation to four of the properties is whether a notice was given within the relevant two year period so as to bring into operation the liabilities of SHL under Section 2 of the Buildmark Cover. SHL contend that no notice was given by Mr and Mrs Knight (plot 15, 15 Barley Close); by Mr and Mrs Dobson (plot 20, 16 Clover Drive); by Mr and Mrs Frostwick (plot 34, 25 Clover Drive) or by Mr and Mrs Simpson (plot 39, 15 Clover Drive).

172. The Claimants at paragraph 21 and 22 of the Amended Particulars of Claim referred to the dates of written notices which were set out in Appendix H. It was not alleged in Appendix H that any written Notice was given in respect of these four properties. Rather for any of the Claimants where it was not alleged that written notice had been given, it was stated that they notified SHL orally and/or that by March 2003 SHL had constructive notice of the defects which existed at the Claimants' properties.

173. The constructive notice was pleaded to arise by SHL having been notified in writing by at least two residents by May 2002; by oral notifications by the Claimants telephoning SHL from in or about February 2002 and by SHL stating in the Encia proceedings that it knew in March 2003 about cracking to the Claimants' properties generally. It is further stated that in or about June 2005 SHL had appointed a public relations agent to deal with the Claimants' complaints; that SHL issued proceedings against ENCIA on 18 October 2005 and that a notice was sent on 3 May 2005. In addition, in relation to each Property, in the Particulars of Loss the Claimants say they rely on three letters written by Nabarro Nathanson to the Claimants on 17 January 2006, 17 February 2006 and 18 June 2007. They say they rely on those letters as admissions that actual or constructive notice had been given pursuant to Section 2 of the Buildmark Cover and/or that SHL is liable for remedial works to the Claimants' properties and also as evidence of waiver of the notice requirements and/or waiver of any defence to a claim pursuant to Section 2 of the Buildmark Cover.

174. In relation to the four houses where notice is disputed by SHL, a supplementary note was produced by SHL during the reply submissions summarising SHL's position in respect of each of the four claimants. In submissions in response the Claimants stated that they relied on oral notice having been given within the two year period in the case of Mr and Mrs Simpson (plot 39) and that in all four cases constructive notice and/or waiver was relied upon. The Claimants submit that there was constructive notice in that SHL had sufficient knowledge to understand that it should investigate a claim under Section 2 of the Buildmark Cover in relation to foundations and ground movement, notwithstanding that the knowledge may not have come directly from the particular claimant. They rely on Marchant v Caswell and Redgrave Limited [1976] EGD 172 and Barrett Bros. v Davies [1966] 1 WLR 1334.

175. The Claimants contend that SHL's letter of 3 May 2005 and Nabarro Nathanson's letters of 17 January and 17 February 2006 do not themselves constitute waiver but are compelling evidence that the notice requirement had been sufficiently satisfied or waived before those letters were written. The Claimants rely on the letters as showing that SHL must have received, at an earlier date, sufficient notice in relation to all plots to put it on enquiry of possible claims concerning foundations and or ground movement in respect of all houses under Section 2 of the Buildmark Cover. They rely particularly on the following statements made in the letter of 17 January 2006:

> "*Our clients have made it clear throughout that in any situation where they have not met the contractual standards of construction required… they will accept full responsibility to carry out remedial works…*
> *Given that each property has had the benefit of a full 10 year NHBC Warranty, and that our clients have confirmed all along that they will carry out remedial works required…*
> *SHL have notified all residents that they will not only carry out any necessary works but will also meet the costs of those works...*
> *SHL admits openly that where they have not met their contractual obligation and the standards required… they will accept full responsibility to carry out remedial works...*
> *SHL have always stated and continue to accept that in circumstances where they have not met the contractual standard required… they will accept full responsibility to carry out the remedial works…*"

176. SHL contend that Mr Simpson in cross-examination accepted that he had not given notice of anything other than snagging defects to SHL during the first two years subsequent to purchase. They say he also accepted that he knew he had to give notice to SHL within the first 2 years but had not done so in relation to the matters complained of. They therefore say that no oral notice was given by Mr Simpson in relation to Plot 39.

177. In relation to waiver SHL submitted that Marchant v Caswell and Redgrave is an estoppel case rather than a waiver case but at page 188 of that decision Judge Sir William Stabb QC cited a *dictum* of Lord Denning MR in Lickiss v Milestone Motor [1966] 2 All ER 972 where Lord Denning said:

> "*The principle of waiver is simply this, that if one party by his conduct leads another to believe that the strict rights arising under the Contract will not be insisted on, intending the other should act on that belief, and he does act on it then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him so to do."*

178. SHL also referred to the Court of Appeal decision in Kosmar Villa Holidays PLC v Trustees of Syndicate 1243 (2008) [2008] EWCA Civ 147 in which the Court of Appeal considered the doctrine of waiver by election. I was also referred to paragraph 11-005 of Keating on Construction Contracts (8th Edition) which dealt with the need for consideration before waiver became contractually binding and new rights and obligations arose.

Decision

179. There are three issues relating to notice. First, whether Mr Simpson gave adequate oral notification. Secondly, whether SHL had constructive notice of the claims. Thirdly, whether there has been waiver of notice as a defence.

180. Mr Simpson gave evidence that in about 2002 he had noticed that some cracks had appeared internally in the ceiling and stairs and that there was rucking of the ceiling tape. He says that he reported it to the SHL site office and was given some paint to cover up the cracking and glue down the tape. On the basis of the engineering experts' evidence such rucking of the ceiling tape is, as Mr Simpson states, very likely to have been caused by movement. In his evidence on Day 4 he said that he thought he had given notice by going into the office although he did not put the notice in writing. I accept Mr Simpson's evidence as to what he did.

181. It is accepted by SHL that any notice does not have to set out the cause or any detail but only has to set out the defect. It is clear that Mr Simpson's oral notification would have been sufficient if it were in writing. As was accepted on behalf of SHL in closing oral argument, correctly in my judgment, if somebody gave oral notice of a problem with a request for the contractor to deal with it then the contractor ought to say that a written notice must be given. Equally, it would be expected that a visit to a site office might give rise to a record which would provide a written notice. In my judgment the important aspect of the notice under Section 2 of the Buildmark Cover is for there to be notice. Whilst a written notice is required as a record to prevent disputes, in the circumstances of this case I consider that the actions of Mr Simpson were sufficient to be a notice in this case and SHL cannot now say that they did not have sufficient notice of the defects in the Simpsons house at Plot 39 within the relevant two year period.

182. The question of constructive notice of defects raises a question of whether, on a housing development such as this, where SHL has notice of generic defects on that development they have sufficient constructive notice. It is not disputed that for a large number of plots SHL did receive written notices of defects which related to the foundation defects which have now been shown to be a generic problem over the whole development.

183. It is clear from the chronology that the first cracking was reported at Plot 9 in about March 2003 and on Plot 10 in about June/July 2003. During and by the end of 2004 it is clear that SHL must have been aware that the problem of defective foundations was a development wide problem of which, as they accept, they have received written notice, including for six of the ten lead properties. In my judgment on the facts of this case, SHL had written notice of the development wide problems and as such they had actual written notice which I consider was sufficient to amount to constructive notice.

184. Finally, there is the question of waiver. I have seen the correspondence which includes the letter from Nabarro Nathanson of 17 January 2006 set out above. Anyone reading that letter would assume that there was no defence based on lack of notice. Written by solicitors with knowledge, actual or presumed, of the notice provisions of Section 2 of the Buildmark Cover, I consider that it can be construed as saying by inference or implication that SHL would not be relying on notice provisions but would accept responsibility for any liability under the Buildmark Cover.

185. The doctrine of waiver by election relied on by the Claimants was considered by Rix LJ, with whom the other members of the Court of Appeal agreed, in Kosmar where he considered the analysis in Insurance Corpn of the Channel Islands v The Royal Hotel Ltd [1998] Lloyd's Rep IR 151, where Mance J (as he then was) said at 162–163:

> "*Where it is said that there has been an election to affirm rather than to avoid, the position is more problematic. Is it sufficient for affirmation that there is knowledge and a communication (by words or conduct) which, assuming such knowledge, demonstrates an unequivocal choice? Or must the communication itself or the surrounding circumstances demonstrate such knowledge to the other party? In principle, it seems to me that the latter approach is correct in the context of affirmation. The communication itself or the circumstances must demonstrate objectively or unequivocally that the party affirming is making an informed choice … Whether conduct amounts to an unequivocal communication of a choice to affirm requires therefore, an objective assessment of the impact of the relevant conduct on a reasonable person in the position of the other party to the contract. A reasonable person in that position must, it seems to me, be treated as having a general understanding of the possibility of choice between affirmation and objection. In affirmation (as distinct from estoppel), the actual state of mind of the other party is not the test. Affirmation depends on the objective manifestation of a choice.*"

186. At [74] in Kosmar Rix LJ said this:

> "*That was said in a case concerned with an established area of true election, the affirmation of an insurance contract which an insurer is entitled to avoid for non-disclosure. I take this analysis as relating to what in that context needs to be objectively available to the non-electing party. I do not think that it is saying that in cases of election the party with the choice will be bound by sufficiently clear appearances even in the absence of any informed choice. That is a potentially difficult subject: on the whole it is necessary for the election to be exercised and to be exercised with sufficient knowledge. ...However, there will be some circumstances where, even in the absence of an actual election, the party with the choice created by relevant knowledge, actual or obviously available, will be regarded as having exercised it after a reasonable time has passed: see Lord Goff in The Kanchenjunga [1990] 1 Lloyd's Rep 391, 398 and Clough v L & NW Railway Co (1871) LR 7 Ex 26, 34–35. This is, I think, part of the rationale of a doctrine which seeks to give a pragmatic response to parties in contractual relations who need to know where they stand.*"

187. It seems to me that, even if Mr Simpson's oral notice was not sufficient in the particular circumstances and if the written notices already given in the circumstances of knowledge of SHL were not sufficient constructive notice for the other plots, then the letters sent by SHL and their solicitors were a sufficiently clear unequivocal choice with knowledge, actual or presumed, of the notice provisions that they gave rise to a waiver by election by the time that SHL came to take the notice points as a defence in this case. It follows that, in any event, there was a waiver by election of the notice provisions.

188. Accordingly, SHL cannot rely on a failure of the Claimants to give notice within two years in relation to Plots 15, 20, 34 or 39.

Issues of liability

189. There is little difference between the parties on the defects in the work. It is broadly agreed that the piles to the ten lead properties were constructed to a negligent design and constructed in a negligent manner; that those lead properties all suffer from piles that do not have adequate factors of safety and that to assess the likely future performance of the foundations, extensive investigatory work has been required. The focus of the issues has therefore been on the likelihood of future damage to the properties and whether the damage which has been exhibited in the properties up to now is properly attributable to foundation movement.

190. The engineering experts produced a very useful Joint Statement dated 7 December 2009 which dealt with a number of general issues as well as particular issues relating to each property. The experts have followed a procedure in assessing the performance of each of the lead properties. First, the experts have individually assessed the loading applied to each pile but have agreed to take the loads calculated by Mr Johnson to calculate factors of safety. Secondly, the experts have assessed the ground models based on available borehole information and have agreed to use the ground model prepared by Mr Johnson for the Encia litigation. This has been used to calculate predicted ground movements to 2032 and these have been validated, where possible, against actual ground movements. Thirdly, in assessing the performance of the lead properties the experts have started by calculating pile capacity and Factors of Safety and have then considered observations of cracking, including available level and crack monitoring data. Fourthly, the experts have followed a decision making process for each property which consisted of assessing the pile design, the structural stability of the properties and any evidence of current movement and, if so, whether it is progressive and whether it will need remediation.

191. In relation to Factors of Safety, the experts agreed to use the Factors of Safety, FOS(A) and FOS(B) calculated by Mr Johnson for the Encia litigation, as set out at Schedule 1 to the Joint Statement. FOS(A) is calculated using only the loads applied by the house structure whilst FOS(B) is calculated also taking into account the possible loads arising as a result of negative skin friction applied on the pile by the made ground and the alluvial deposits. Negative skin friction applies loading when the soil around a pile is settling relative to the pile so that the pile will settle under negative skin friction even if there is no other load on the pile. In assessing the piles, the experts differ slightly in what they consider to be appropriate values of the Factor of Safety. For the design stage they take a value of 2.5 to 3.0 (Mr Taylor) and 2.0 to 3.0, say 2.5 (Mr Johnson) but for the assessment of piles at this stage with the knowledge now available they take values of FOS(A) of 2.0 (Mr Taylor) and 1.5 (Mr Johnson) and FOS(B) of 1.5 (both Mr Taylor and Mr Johnson).

192. The experts have taken into account the results of surveys which were carried out of the levels and tilt of the lead properties and of ground movement. They have also taken account of their own observations of the structural performance of the lead properties as well as observations made by GTC, BSCP, Arup and the NHBC in their various inspections of the properties, as appropriate.

193. I have dealt below in relation to each of the lead properties with the summary of the findings by the experts in relation to that property. In relation to each of the lead properties Mr Taylor has summarised his view in the following terms. He accepts that "*from a purely structural performance point of view, the observed cracking and movement registered from January 2007 to October 2009 would not warrant (in themselves) underpinning of the foundations.*" However he considers that "*At this point in time, the only way to remove any uncertainty in respect of the future performance of the property is to underpin it or demolish and rebuild with appropriate foundations*".

194. Mr Johnson on the other hand considers that for each of the lead properties: "*The levels of remediation required and the future movement of the property do not justify an underpinning solution*". He also considers that, for the lead properties, "*the probability of any future significant movement of the structure is extremely remote*" (Plots 34, 39, 43, 50, 59, 87, 89, 90); "*there is a low probability of significant movements of the foundations in the future*" (Plot 15); "*a remote probability of significant movements of the foundations in the future*" (Plot 20).

195. To summarise the evidence for each property the engineering experts produced a summary sheet ("the Summary Sheet") which set out the past and future ground movement predicted for that property, the values of FOS (A) and FOS (B) for each pile and the future pile movement based on a spring stiffness calculation for a fixed (F) or a pin (P) condition.

196. As I have said, there is broad agreement between the experts and the parties on liability in this case. The focus of the issues has therefore been on the likelihood of future damage to the properties and whether the damage which has been exhibited in the properties up to now is properly attributable to foundation movement.

197. On the first question I was particularly impressed by the evidence of Mr Johnson. It seemed to me that his approach took account of the knowledge which he had of this development built up over a number of years. He had to assess all the houses for the purpose of the Encia litigation and, whilst there are some differences, his evidence has been broadly consistent with the evidence given in that case. It seems to me that his views on the risk or probability of future damage should be given great weight. As a geotechnical engineer whose ground model and calculations of factors of safety have been relied on, I consider that his assessment of risk is the one on which I should rely. I therefore accept and adopt his views on the risk of significant future damage. The approach of Mr Taylor on this issue seemed to me to be that he wished to have a position where there was no risk. That is an unrealistic approach and one which is not achievable in practice. There is always a risk that something unforeseen may happen, for instance a change in water table or some other such event, and that event may give rise to movement of houses built on piles. It is the assessment of the risk which is of importance. On this aspect it seemed to me that Mr Johnson's approach was correct.

198. On the second question, I was impressed by Mr Taylor's evidence on the way in which the structure would perform and the effect on the brickwork and the internal finishes in terms of the distribution of loading and stresses. In many cases, as became clear during the concurrent evidence of both experts given in relation to each plot, Mr

Johnson's evidence was that he could not be sure what the cause of a particular crack would be. Whilst that is understandable because many of the cracks were fine and were difficult to interpret, it seemed to me that Mr Taylor's assessment of the cause of the cracking being derived from building movement as a result of the foundations settling was justified both in terms of likely causes and also given that the cracks appeared some time after the normal drying or shrinkage defects.

199. In the light of what is essentially common ground, I can state briefly my overall conclusion in terms of liability. First, I accept that the breaches of the relevant duties are those relied upon by the Claimants. The piles for the lead properties were not designed and constructed with the required factors of safety. This was because the design assumptions for the piles were inappropriate; no proper consideration was given to the risk of differential settlements causing overstress or damage to the structures or to their finishes; there was no proper verification of the design assumptions during the construction stage; the piles should have been designed and constructed so that every pile had a factor of safety of 2.5 to 3.0; negative skin friction should have been but was not allowed for and there was a poor and unreliable standard of construction. The external areas were also not properly designed and built.

200. As a result of the findings I have set out above, this gave rise to liability on SHL for breach of Clause 5.1 of the Phase 1 sales contracts or Clause 7.1 of the Phase 2 sales contracts, alternatively implied terms, in respect of all Claimants except for Mr and Mrs Knight (Plot 15) and Mr and Mrs Frostwick (Plot 34) who were not original purchasers. For all lead properties there was liability on SHL both under Section 2 of the Buildmark Cover and under section 1 of the Defective Premises Act 1972.

201. On that basis I can now turn to consider quantum.

Issues of Quantum

The Claimants' claims for damages

202. The Claimants' primary case is that all of the ten lead properties should be repiled and remediated. They say that repiling is the only way to give those properties the foundations which they ought to have had and a certain future. They refer to the speech of Lord Upjohn in East Ham Corporation v Bernard Sunley & Sons Ltd [1966] AC 406 and submit that, in the case of defective building work, reinstatement is the normal measure of damages. They say that this is the proper measure of damages because of the uncertainty of the position and the risk of uncompensated losses if the properties are not underpinned. Otherwise the Claimants submit that they would not be properly compensated if the properties need underpinning in the future or if sales of the properties are even more difficult than expected.

203. As well as the cost of the remedial works, the Claimants also claim the costs associated with those remediation works to cover the inevitable consequence of Claimants needing to move out of the properties for repiling work to be undertaken. They also claim the estimated costs of dealing with the issues in the external areas of their properties.

204. In addition, the Claimants claim the diminution in value after repiling. They say that there is a stigma attached to a property which has had to be repiled. The stigma should diminish over time, but it is a true and present loss.

205. The Claimants' secondary case is that they are entitled to the cost of the necessary remedial works to repair the damage to the properties and the external areas and to the diminution in value because of the uncertain future of the properties. The Claimants say that they should be compensated in this way so that they can sell their properties if they wish to do so, without suffering a loss, given that their properties have not been properly saleable since the problems with the foundations on the Estate became known.

206. On this basis the Claimants also claim either the estimated future costs of remaining in properties with uncertain foundations which will include the consequential costs of repairs and redecoration, future maintenance due to ground movement around the property and the increased costs of obtaining mortgages and insurance or the costs associated with selling their uncertain property and buying a normal house.

207. On either their primary or secondary basis the Claimants also claim their pre-trial expenditure, past and future general damages and other loss. This includes a sum for distress and inconvenience.

Damages for defective properties

208. As the Claimants state, those Claimants with contractual claims are entitled to damages for breach of contract and the starting point is set out in the well known passage in the judgment of Parke B in Robinson v Harman 1 Exch 850 at 855: "*that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same position, with respect to damages, as if the contract had been performed.*"

209. The Claimants submit that the same rule applies to breach of the 1972 Act so that the Claimants are to be put in the position they would have been in if the breach had not occurred, that is, if the duty under section 1(1) of the 1972 Act had been fulfilled. They refer to the decision of the Court of Appeal in Bayoumi v Protim (1998) 30 HLR 785 at 791 where it was stated that the damages recoverable under the 1972 Act will include damages which are the natural consequence of the breach and to the decision in Bella Casa Ltd v Paxton [2005] EWHC 2807 where the court confirmed at [28] to [30] that general damages for loss of use are recoverable under the 1972 Act. They also refer to Keating on Construction Contracts (8th edition 2006) where it states at paragraph 15-007 that all reasonably foreseeable losses that are the natural consequence of the breach are recoverable, which may include economic loss as well as consequential economic loss. Accordingly, the Claimants say that they are entitled to claim all the sums set out in their primary or secondary cases either as damages for breach of the sales contract, for breach of Section 2 of the Buildmark Cover or for breach of the 1972 Act.

210. The Claimants did seek to argue that because the obligation under Section 2 of the Buildmark Cover was "to put right any Defect or Damage" this altered the approach because it led to damages for remedying the defect, not for instance diminution in value. I do not consider that there is any difference between damages for breach of an obligation to carry out work properly in the first place or to remedy defects when it comes to the approach. Neither obligation, in my judgment, leads to a limit on the proper approach at law to assessing damages for defective buildings.

211. By the end of the hearing SHL accepted that the approach to quantum does not differ dependent on whether there is liability for breach of the sales contracts, Section 2 of the Buildmark Cover or section 1 of the Defective Premises Act 1972.

212. I therefore proceed on the basis, which I consider to be the correct basis, that there is no distinction to be drawn for present purposes between the approach to damages for the three heads of liability under the sales contracts, Buildmark Cover or the 1972 Act.

The Claimants' primary quantum case

213. The Claimants submit that piling is the only way to achieve the contractual objective of providing them with normal houses in a normal condition.

214. They refer to the speech of Lord Lloyd in Ruxley Electronics v Forsyth [1996] AC 344 where he said: "*If the court takes the view that it would be unreasonable for the plaintiff to insist on reinstatement, as where, for example, the expense of the work involved would be out of all proportion to the benefit to be obtained, then the plaintiff will be confined to the difference in value.*" In this case they say that whilst the cost of remedial work will exceed the value of the property when remediated, for example for Plot 20 the remediation cost is £291,707 (including VAT) while the value of the property if in good condition is £232,500, the cost is not "*out of all proportion to the benefit to be obtained*".

215. The Claimants say that repiling is the only way in which they can receive what contractually they ought to have received, and not be either subjected to the risks of a diminution in value award proving to be insufficient compensation or for those claimants who did not wish to move, being forced to move house to some other location which was not their first choice.

216. They say that the risk of a diminution in value award proving to be insufficient compensation is serious in this case because the assessment of the diminution is exceptionally difficult, the prospect of early sales is low in the light of remedial work to other properties and the engineers cannot exclude the possibility that a Claimant, who receives damages for diminution in value based on current evidence and decides not to sell, may discover at some future date that repiling is required and unavoidable. The Claimants say that whilst neither engineering expert considers that repiling of the lead properties is currently required from an engineering point of view and Mr Johnson's opinion is that the chances of serious damage in the future are small, the fact remains that there is uncertainty.

217. The Claimants point to the fact that 27 properties have been repiled and a further five are due to be repiled. They say that SHL and NHBC clearly consider that, despite the cost, the reasonable approach was to put the houses back into the condition they should have been in. They refer to the evidence of Mr Murray, Mr Ellis and Mr Hare which they say justifies this approach. The Claimants say that the economic arguments are the same for the lead properties as for the remediated properties: in neither case can repiling be justified simply on economic grounds, because the cost is far greater than the diminution in value; the justification for it is that it provides the homeowners with what they ought to have received in the first place. They all claim both diminution in value and the alleged cost of re-piling because the re-piling will not even restore the value of the properties.

218. SHL submit that the Claimants' recovery is limited to the diminution in value of their properties and the claim to recover the costs of repiling is wholly inconsistent with the ordinary principles of recovery of damages. They say that at best the Claimants are entitled to be placed in the position, so far as money can do it, that they would have been in but for any relevant breaches and that requires a comparison between the position they would have been in and the position they are now in. SHL submit that had the contract been performed according to its terms, the Claimants would have had properties with values now agreed by the expert valuers. Instead they have properties with a substantial value and if they are awarded the costs of repiling, that cost will exceed the value that their properties would have had if properly constructed in the first place. If the Claimants are therefore awarded the cost of repiling then SHL submit that the Claimants' position will be substantially improved because they will have a valuable asset in the form of their existing property in its existing condition and damages which substantially exceed the value which the house would have had if undamaged. SHL say that it is exceedingly unlikely that any of the Claimants will actually use any damages awarded for the costs of repiling, to re-pile their properties. Rather they will not remediate the properties but sell their properties at a discounted price and the result will be that the Claimants will own more valuable properties than they could ever have afforded.

219. So far as breach of the Buildmark Cover is concerned SHL submit that the Claimants are incorrect in saying that for breach of the obligation to "put right" the Defect or Damage damages could not be awarded as an alternative to this. SHL say that, in effect, the Claimants are seeking damages in lieu of specific performance even though there is and could be no claim for specific performance.

220. SHL submit that, whilst the Claimants have cited Ruxley, that case is simply an illustration of a case where a claimant sought the cost of reconstructing a swimming pool but this was unreasonable and the House of Lords, instead, upheld a modest award of damages.

221. SHL say that in this case the Claimants do not claim to have suffered any physical inconvenience at all as a result of the very small cracks in their buildings. None of them allege that they were, for example, unable to use rooms or were presented with any physical difficulties at all.

222. In this case SHL submit that the diminution in value of the properties, if awarded, would, unlike Ruxley, provide full compensation for any physical defects which actually exist in the properties and compensate for any "risk" which the Claimants take with their properties. Accordingly SHL submit that Ruxley illustrates both why the claim for the cost of repiling is misconceived and why there is no basis for any additional award in this case.

Damages for distress and inconvenience

223. In relation to the Claimants' claim for general damages for distress and inconvenience, the Claimants submit that they are entitled to damages for such matters as the physical inconvenience and discomfort of living in a defective house, vacating rooms while repairs are carried out and the associated distress. They rely on Watts v Morrow [1991] 1 WLR 1421 at 1439 to 1443, Ruxley Electronics v Forsyth [1996] AC 344 and Farley v Skinner [2001] UKHL 49.

224. SHL submit that the general rule is that damages for breach of contract do not include damages for mental distress and refer to the decision of the House of Lords in Addis v Gramophone Co Ltd [1909] AC 488. They say that cases where such damages are awarded are exceptions to this general rule and the position in law was well summarised by Bingham LJ (as he then was) in Watts v Morrow [1991] 1 WLR 1421 at 1445 where he said:

> "*A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.*
> *But the rule is not absolute. Where the very object of the contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead."*

225. SHL refer to the House of Lords' decision in Farley v Skinner [2001] UKHL 49 and submit that it is sufficient if a major or important object of the contract was to give pleasure, relaxation or peace of mind, it need not be the sole object of the contract. They submit that Farley is also authority for the proposition that an award of damages may be made for "loss of amenity". However they submit that outside this 'contract for enjoyment' exception, damages are not recoverable for disappointment caused by a breach of contract, or for the frustration or anxiety caused by the subsequent pursuit of legal proceedings and they rely on the judgment of Kerr LJ in Perry v Sidney Phillips [1982] 1 WLR 1297 at 1307. They submit that damages are awarded, if at all, under this head only for the physical consequences of the breach suffered and refer to what Bingham LJ said in Watts v Morrow at 1445:

> "*In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort. If those effects are foreseeably suffered during a period when defects are repaired I am prepared to accept that they sound in damages even though the cost of repairs is not recoverable as such."*

226. SHL say that following the decision of the House of Lords in Ruxley an award of compensation for loss of amenity due to a breach of a building contract can be made but in Ruxley that award of general damages was instead of any other award of damages because the cost of re-instatement was unreasonable and disproportionate and there was no diminution in value. SHL submit that the award of sums such as that in Ruxley should be limited to cases where without an award for non-pecuniary loss the claimant would be confined to nominal damages, despite a breach of contract.

227. SHL also say that any award of damages to compensate for vexation, worry and distress is intended to be modest. They refer to Lord Denning's judgment in Perry v Sidney Phillips [1982] 1 WLR 1297, to the judgment of Ralph Gibson LJ in Watts v Morrow at 1443 and to the speech of Lord Steyn in Farley v Skinner [2002] 2 AC 732 at 751 where he said:

> "*Like Bingham LJ in Watts v Morrow [1991] 1 WLR 1421, 1445H, I consider that awards in this area should be restrained and modest. It is important that logical and beneficial developments in this corner of the law should not contribute to the creation of a society bent on litigation."*

228. SHL say that the Claimants appear to be seeking to claim damages for distress and inconvenience for the following heads: uncertainties; loss of satisfaction; the inconvenience of investigations; the need for and carrying out of repairs; restrictions on their ability to sell their property and 'trade up'; restrictions on their ability to pursue work or investment opportunities; the manner in which they claim they have been given unjustified reassurance and their feelings of betrayal and being let down by SHL. SHL also point to the fact that the Claimants state that the damages should be assessed with regard to their "reasonable expectations bearing in mind the intended nature of the estate" at the time of purchase.

229. SHL say that the Claimants' expectations are entirely irrelevant to a claim for damages which requires, as a starting point, some physical discomfort. They submit that unless there are such physical consequences caused by the breach, there is no basis for an award of damages for the mental distress resulting from that physical inconvenience. They also submit that there is no evidence of such physical discomforts as might actually sound in damages under this head of claim. There have been no instances or evidence of true "physical distress".

230. The Claimants' evidence, SHL submit, was that they are aggrieved with SHL and distressed by their positions but this emotion cannot be attributed to a physical inconvenience that they have endured nor can it be separated from the Claimants' distress, frustration and tension caused by having to pursue these proceedings, all of which do not sound in damages.

231. SHL says that the Claimants cannot re-cast what are indisputably contracts for sale of property as being, or being similar to, contracts for pleasure or enjoyment. Any such claim would have to be made, SHL submit, on the basis of "loss of amenity" after Farley and Ruxley and, on this aspect, Ruxley should be confined to instances where such non-pecuniary damages are the only basis for an award.

232. In any event, SHL submit that any award on this basis would overlap with both the Claimants' claims for diminution in value which are sought and for nuisance which has been settled. In relation to diminution in value, SHL say that some of the matters relied on for this claim would already have been taken into account by the claim for diminution in value, such as the asserted restriction on their ability to sell their properties. Equally, SHL point out that all the Claimants, except for Mr and Mrs Manners, have pursued claims for damages for nuisance suffered in the course of the remedial works that were carried out on the estate from 2006 to 2009 and the Claimants' evidence concerning this nuisance showed that the Claimants were caused distress, inconvenience and loss of enjoyment of their homes. In this respect SHL submit that the Claimants have suffered distress, inconvenience and loss of amenity due to this nuisance, for which they have already been compensated under that head of claim.

233. SHL therefore submit that any damages under this head must not take into account any circumstances already included in the nuisance claim or the diminution in value claim and must consider the distress, inconvenience and loss of amenity due to this head of claim separately from those claims.

Decision

Damages for Defective Premises

234. The starting point for a consideration of the appropriate measure of damages for defective premises is the decision of the House of Lords in East Ham Corporation v Bernard Sunley & Sons Ltd [1966] AC 406 where Lord Cohen at 434 and Lord Upjohn at 445 adopted a passage in Hudson's Building and Engineering Contracts, 8th ed. (1959) at page 319 where the editors stated that there are three possible bases of assessing damages, namely, (a) the cost of reinstatement; (b) the difference in cost to the builder of the actual work done and work specified; or (c) the diminution in value of the work due to the breach of contract and stated: "*There is no doubt that wherever it is reasonable for the employer to insist upon reinstatement the courts will treat the cost of reinstatement as the measure of damage.*"

The Ruxley Decision

235. In Ruxley Electronics v Forsyth [1996] 1 AC 344 the House of Lords was faced with a case where the court had to assess damages for a breach of contract because a swimming pool was 6 feet deep instead of 7 feet 6 inches but the trial judge had found that the cost of reinstatement was unreasonable and there was no diminution in value. He therefore awarded £2,500 for loss of amenity. The House of Lords considered the basis for the award of damages for building defects. It was argued that because there was no diminution in value, the cost of reinstatement was the proper measure because there was no ability to award damages for loss of amenity in cases of defective premises.

236. At 354D Lord Bridge of Harwich said, after holding that the court had power to award of damages for loss of amenity:

> "*But, quite independently of these conclusions, to hold in a case such as this that the measure of the building owner's loss is the cost of reinstatement,*

however unreasonable it would be to incur that cost, seems to me to fly in the face of common sense."

237. At 356C to 357E Lord Jauncey of Tullichettle reviewed the decisions on reasonableness in the context of reinstatement. He then said:

> "*Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party from which it follows that the reasonableness of an award of damages is to be linked directly to the loss sustained. If it is unreasonable in a particular case to award the cost of reinstatement it must be because the loss sustained does not extend to the need to reinstate. A failure to achieve the precise contractual objective does not necessarily result in the loss which is occasioned by a total failure.*"

238. At 358D he continued:

> "*What constitutes the aggrieved party's loss is in every case a question of fact and degree. Where the contract breaker has entirely failed to achieve the contractual objective it may not be difficult to conclude that the loss is the necessary cost of achieving that objective. Thus if a building is constructed so defectively that it is of no use for its designed purpose the owner may have little difficulty in establishing that his loss is the necessary cost of reconstructing. Furthermore in taking reasonableness into account in determining the extent of loss it is reasonableness in relation to the particular contract and not at large. Accordingly if I contracted for the erection of a folly in my garden which shortly thereafter suffered a total collapse it would be irrelevant to the determination of my loss to argue that the erection of such a folly which contributed nothing to the value of my house was a crazy thing to do.*"

239. At 360E Lord Mustill dealt with the underlying hypothesis that there were only two measures of damages, cost of reinstatement and depreciation in value so that the rejection of the latter entailed the adoption of the former. He then said at 360F:

> "*Having taken on the job the contractor is morally as well as legally obliged to give the employer what he stipulated to obtain, and this obligation ought not to be devalued. In my opinion however the hypothesis is not correct. There are not two alternative measures of damage, at opposite poles, but only one; namely, the loss truly suffered by the promisee. In some cases the loss cannot be fairly measured except by reference to the full cost of repairing the deficiency in performance. In others, and in particular those where the contract is designed to fulfil a purely commercial purpose, the loss will very often consist only of the monetary detriment brought about by the breach of contract. But these remedies are not exhaustive, for the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure.*"

240. Lord Lloyd of Berwick said this at 366C:

> "*In building cases, the pecuniary loss is almost always measured in one of two ways; either the difference in value of the work done or the cost of reinstatement. Where the cost of reinstatement is less than the difference in value, the measure of damages will invariably be the cost of reinstatement. By claiming the difference in value the plaintiff would be failing to take reasonable steps to mitigate his loss. In many ordinary cases, too, where reinstatement presents no special problem, the cost of reinstatement will be the obvious measure of damages, even where there is little or no difference in value, or where the difference in value is hard to assess. This is why it is often said that the cost of reinstatement is the ordinary measure of damages for defective performance under a building contract.*
> *But it is not the only measure of damages. Sometimes it is the other way round.*"

241. At 367B Lord Lloyd then set out two principles which he derived from the judgment of Cardozo J in Jacob & Youngs v Kent 129 NE 889: "*first, the cost of reinstatement is not the appropriate measure of damages if the expenditure would be out of all proportion to the benefit to be obtained, and, secondly, the appropriate measure of damages in such a case is the difference in value, even though it would result in a nominal award.*"

242. In relation to the question of whether the intention to reinstate is relevant to the question of what damages should be awarded, Lord Jauncey said this at 359C to D:

> "*The appellant argued that the cost of reinstatement should only be allowed as damages where there was shown to be an intention on the part of the aggrieved party to carry out the work. Having already decided that the appeal should be allowed I no longer find it necessary to reach a conclusion on this matter. However I should emphasise that in the normal case the court has no concern with the use to which a plaintiff puts an award of damages for a loss which has been established. Thus irreparable damage to an article as a result of a breach of contract will entitle the owner to recover the value of the article irrespective of whether he intends to replace it with a similar one or to spend the money on something else. Intention, or lack of it, to reinstate can have relevance only to reasonableness and hence to the extent of the loss which has been sustained. Once that loss has been established intention as to the subsequent use of the damages ceases to be relevant.*"

243. Lord Lloyd said this at 372C to D: "*I fully accept that the courts are not normally concerned with what a plaintiff does with his damages. But it does not follow that intention is not relevant to reasonableness, at least in those cases where the plaintiff does not intend to reinstate.*" He then said he was in complete agreement with a submission that: "*Where a plaintiff is contending for a high as opposed to a low cost measure of damages the court must decide whether in the circumstances of the particular case such high cost measure is reasonable. One of the factors that may be relevant is the genuineness of the plaintiff's desire to pursue the course which involves the higher cost. Absence of such desire (indicated by untruths about intention) may undermine the reasonableness of the higher cost measure.*"

244. In relation to the loss of amenity, Lord Bridge of Harwich said at 354D: "*...there is no reason in principle why the court should not have power to award damages of the kind in question and indeed that in some circumstances such power may be essential to enable the court to do justice.*"

245. Lord Mustill at 360H dealt with the fact that the remedies of reinstatement and depreciation in value were not exhaustive and that:

> "*...the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure. This excess, often referred to in the literature as the 'consumer surplus' (see for example the valuable discussion by Harris, Ogus and Philips (1979) 95 L.Q.R. 581) is usually incapable of precise valuation in terms of money, exactly because it represents a personal, subjective and non-monetary gain. Nevertheless where it exists the law should recognise it and compensate the promisee if the misperformance takes it away.*"

246. Lord Lloyd at 374A to G dealt with the loss of amenity head of damages. He said:

> "*Addis v. Gramophone Co. Ltd. established the general rule that in claims for breach of contract, the plaintiff cannot recover damages for his injured feelings. But the rule, like most rules, is subject to exceptions. One of the well established exceptions is when the object of the contract is to afford pleasure, as, for example, where the plaintiff has booked a holiday with a tour operator. If the tour operator is in breach of contract by failing to provide what the contract called for, the plaintiff may recover damages for his disappointment: see Jarvis v. Swans Tours Ltd. [1973] Q.B. 233 and Jackson v. Horizon Holidays Ltd. [1975] 1 W.L.R. 1468.*"

247. Lord Lloyd then continued:

> "*This was, as I understand it, the principle which Judge Diamond applied in the present case. He took the view that the contract was one 'for the provision of a pleasurable amenity.' In the event, Mr. Forsyth's pleasure was not so great as it would have been if the swimming pool had been 7 feet 6 inches deep. This was a view which the judge was entitled to take. If it involves a further inroad on the rule in Addis v. Gramophone Co. Ltd. [1909] A.C. 488, then so be it. But I prefer to regard it as a logical application or adaptation of the existing exception to a new situation.*
>
> *...*
>
> *That leaves one last question for consideration. I have expressed agreement with the judge's approach to damages based on loss of amenity on the facts of the present case. But in most cases such an approach would not be available. What is then to be the position where, in the case of a new house, the building does not conform in some minor respect to the contract, as, for example, where there is a difference in level between two rooms, necessitating a step. Suppose there is no measurable difference in value of the complete house, and the cost of reinstatement would be prohibitive. Is there any reason why the court should not award by way of damages for breach of contract some modest sum, not based on difference in value, but solely to compensate the*

buyer for his disappointed expectations? Is the law of damages so inflexible, as I asked earlier, that it cannot find some middle ground in such a case? I do not give a final answer to that question in the present case. But it may be that it would have afforded an alternative ground for justifying the judge's award of damages. and if the judge had wanted a precedent, he could have found it in Sir David Cairns's judgment in G.W. Atkins Ltd. v. Scott, 7 Const. L.J. 215, where, it will be remembered, the Court of Appeal upheld the judge's award of £250 for defective tiling. Sir David Cairns said, at p. 221:
'There are many circumstances where a judge has nothing but his common sense to guide him in fixing the quantum of damages, for instance, for pain and suffering, for loss of pleasurable activities or for inconvenience of one kind or another'"

248. In that case the court awarded Mr Forsyth £2,500 and there was no appeal on the quantum of that sum, however Lord Lloyd at 374C to D said this: "*I should, however, add this note of warning. Mr. Forsyth was, I think, lucky to have obtained so large an award for his disappointed expectations.*"

The decision in Watts v Morrow

249. In relation to the additional head of damages for inconvenience, distress or loss of amenity, I was also referred to Watts v Morrow [1991] 1 WLR 1421 in which a surveyor negligently said that certain defects could be dealt with by way of maintenance but in the event they needed extensive remedial work. In dealing with whether an award could be made for distress and inconvenience, Ralph Gibson LJ said at 1442C to D:

> "*It is clear, I think, that the judge was regarding the contract between Mr. and Mrs. Watts and the defendant as a contract in which the subject matter was to provide peace of mind or freedom from distress within the meaning of Dillon L.J.'s phrase in Bliss v. South East Thames Regional Health Authority [1987] I.C.R. 700, 718 cited by Purchas L.J. in Hayes v. James & Charles Dodd [1990] 2 All E.R. 815, 826. That, with respect, seems to me to be an impossible view of the ordinary surveyor's contract. No doubt house buyers hope to enjoy peace of mind and freedom from distress as a consequence of the proper performance by a surveyor of his contractual obligation to provide a careful report, but there was no express promise for the provision of peace of mind or freedom from distress and no such implied promise was alleged. In my view, in the case of the ordinary surveyor's contract, damages are only recoverable for distress caused by physical consequences of the breach of contract. Since the judge did not attempt to assess the award on that basis this court must reconsider the award and determine what it should be.*"

250. At 1445F to H Bingham LJ said this:

> "*A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.*
> *But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages*

will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category.

In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort. If those effects are foreseeably suffered during a period when defects are repaired I am prepared to accept that they sound in damages even though the cost of the repairs is not recoverable as such. But I also agree that awards should be restrained, and that the awards in this case far exceeded a reasonable award for the injury shown to have been suffered."

The decision in Farley v Skinner

251. The final case to which reference needs to be made is Farley v Skinner [2002] 2 AC 732 in which a surveyor was expressly asked to investigate whether a property was affected by aircraft noise and negligently advised that it was unlikely that it would suffer greatly from aircraft noise. The House of Lords considered whether general damages could be awarded for loss of amenity for that breach.

252. Lord Steyn at [15] referred to the passage cited above from the judgment of Bingham LJ in Watts v Morrow and said this: "*But useful as the observations of Bingham LJ undoubtedly are, they were never intended to state more than broad principles.*" At [16] he said that the entitlement to damages for mental stress caused by a breach of contract is "*dependent on the case falling fairly within the principles governing the special exceptions*". He then said this at [17] and [18]:

> "*17. ...the issue whether the present case falls within the exceptional category governing cases where the very object of the contact is to give pleasure, and so forth, focuses directly on the terms actually agreed between the parties. It is concerned with the reasonable expectations of the parties under the specific terms of the contract. Logically, it must be considered first.*
>
> *18. It is necessary to examine the case on a correct characterisation of the plaintiff's claim.*
>
> *...*
>
> *The case must be approached on the basis that the surveyor's obligation to investigate aircraft noise was a major or important part of the contract between him and the plaintiff. It is also important to note that, unlike in Addis v Gramophone Co Ltd [1909] AC 488, the plaintiff's claim is not for injured feelings caused by the breach of contract. Rather it is a claim for damages flowing from the surveyor's failure to investigate and report, thereby depriving the buyer of the chance of making an informed choice whether or not to buy resulting in mental distress and disappointment.*"

253. At [22] to [27] Lord Steyn then went on to consider what was meant by the "very object" of a contract as used by Bingham LJ in Watts v Morrow. Three arguments were put forward and rejected by Lord Steyn.

254. First, it was submitted that even if a major or important part of the contract was to give pleasure, relaxation and peace of mind, that was not enough; the object of the entire contract must be of that type. Lord Steyn said this at [24]: "*There is no reason in principle or policy why the scope of recovery in the exceptional category should depend on the object of the contract as ascertained from all its constituent parts. It is sufficient if a major or important object of the contract is to give pleasure, relaxation or peace of mind.*"

255. Secondly, it was submitted that the exceptional category did not extend to a breach of a contractual duty of care, even if imposed to secure pleasure, relaxation and peace of mind; it only covered cases where the promisor guaranteed achievement of such an object. Lord Steyn said that the distinction between contractual guarantees and obligations of reasonable care was unsound at [25].

256. Thirdly, it was submitted that by not moving out of the property the plaintiff forfeited any right to recover non-pecuniary damages. At [25] Lord Steyn rejected this argument as there was no basis on which the plaintiff's decision not to move out divested him of a claim for non-pecuniary damages.

257. There were various other observations about the relationship with other heads of damages. First, Lord Clyde said at [36] referring to the award of damages for loss of amenity in Ruxley: "*The cost of rebuilding it to conform to the required specification was an unreasonable and inappropriate measure of the damages. The House restored the judge's original award of general damages for loss of amenity. So also here, where the plaintiff has decided to remain in the property despite its disadvantage, he should not be altogether deprived by the law of any compensation for the breach of contract.*"

258. Secondly, Lord Hutton said at [54] that "*there is a need for a test which the courts can apply in practice in order to preserve the fundamental principle that general damages are not recoverable for anxiety and aggravation and similar states of mind caused by a breach of contract and to prevent the exception expanding to swallow up, or to diminish unjustifiably, the principle itself.*" He then said:

> "*I consider that as a general approach it would be appropriate to treat as cases falling within the exception and calling for an award of damages those where: (1) the matter in respect of which the individual claimant seeks damages is of importance to him, and (2) the individual claimant has made clear to the other party that the matter is of importance to him, and (3) the action to be taken in relation to the matter is made a specific term of the contract. If these three conditions are satisfied, as they are in the present case, then I consider that the claim for damages should not be rejected on the ground that the fulfilment of that obligation is not the principal object of the contract or on the ground that the other party does not receive special and specific remuneration in respect of the performance of that obligation.*"

259. Thirdly, Lord Scott of Foscote said at [79] to [81] that:

> "*79. Ruxley's case establishes, in my opinion, that if a party's contractual performance has failed to provide to the other contracting party something to which that other was, under the contract, entitled, and which, if provided, would have been of value to that party, then, if there is no other way of compensating the injured party, the injured party should be compensated in damages to the extent of that value.*
> ...
> *80. In Ruxley's case the breach of contract by the builders had not caused any consequential loss to the pool owner. He had simply been deprived of the benefit of a pool built to the depth specified in the contract. It was not a case where the recovery of damages for consequential loss consisting of vexation, anxiety or other species of mental distress had to be considered.*
> *81. In Watts v Morrow [1991] 1 WLR 1421, however, that matter did have to be considered.*"

260. Lord Scott dealt with the basis of an award of damages in Watts v Morrow and at [85] said:

> *"Second, the adjective "physical", in the phrase "physical inconvenience and discomfort", requires, I think, some explanation or definition. The distinction between the "physical" and the "non-physical" is not always clear and may depend on the context. Is being awoken at night by aircraft noise "physical"? If it is, is being unable to sleep because of worry and anxiety "physical"? What about a reduction in light caused by the erection of a building under a planning permission that an errant surveyor ought to have warned his purchaser-client about but had failed to do so? In my opinion, the critical distinction to be drawn is not a distinction between the different types of inconvenience or discomfort of which complaint may be made but a distinction based on the cause of the inconvenience or discomfort. If the cause is no more than disappointment that the contractual obligation has been broken, damages are not recoverable even if the disappointment has led to a complete mental breakdown. But, if the cause of the inconvenience or discomfort is a sensory (sight, touch, hearing, smell etc) experience, damages can, subject to the remoteness rules, be recovered.*"

261. At [86] he summarised the position as follows:

> "*In summary, the principle expressed in Ruxley Electronics and Construction Ltd v Forsyth [1996] AC 344 should be used to provide damages for deprivation of a contractual benefit where it is apparent that the injured party has been deprived of something of value but the ordinary means of measuring the recoverable damages are inapplicable. The principle expressed in Watts v Morrow [1991] 1 WLR 1421 should be used to determine whether and when contractual damages for inconvenience or discomfort can be recovered.*"

262. At [109] Lord Scott said this:

> "*I would add that if there had been an appreciable reduction in the market value of the property caused by the aircraft noise, Mr Farley could not have*

recovered both that difference in value and damages for discomfort. To allow both would allow double recovery for the same item."

Conclusion on the law

263. Those cases seem to me to lead to the following general principles when considering an award of damages for defective premises:

(1) There will generally be an award of the cost of reinstatement provided that reinstatement is reasonable: East Ham v Bernard Sunley at 434, 445; Ruxley at 358D, 360E, 367B.

(2) Reinstatement will be unreasonable if the cost of reinstatement would be out of all proportion to the benefit to be obtained: Ruxley at 367B.

(3) The question of reasonableness has to be answered in relation to the particular contract: Ruxley at 358D.

(4) It is not necessary for recovery of the cost of reinstatement to show that the claimant will reinstate the property but the intention to reinstate may be relevant to reasonableness: Ruxley at 359C to D and 372A to 373E.

(5) If reinstatement is unreasonable then the measure will generally be diminution in value: East Ham v Bernard Sunley at 434, 445; Ruxley at 360E, 367B.

(6) Where reinstatement is unreasonable and there is no diminution in value, then the court may award damages for loss of amenity: Ruxley at 354D, 360H, 374.

(7) There is a general rule, subject to exceptions, established in Addis v Gramophone, that a claimant cannot recover damages for injured feelings for breach of contract: Watts v Morrow at 1445; Ruxley 374 A to B; Farley v Skinner 747D.

(8) One of the exceptions, explained in Watts v Morrow and Farley v Skinner and applied or adapted in Ruxley and applied in Farley v Skinner is that where the object of the contract is to afford pleasure, relaxation, peace of mind or freedom from molestation such damages are recoverable: Ruxley 374B to D; Farley v Skinner 747D.

(9) In cases not falling within that exception, damages may be recovered for physical inconvenience and discomfort caused by the breach and mental suffering directly related to physical inconvenience and discomfort: Watts v Morrow at 1445F.

(10) That for physical inconvenience or discomfort, the cause of that inconvenience or discomfort must be a sensory (sight, touch, hearing, smell etc) experience: Farley v Skinner at 768D to E.

(11) That any damages under either of the heads are modest: Ruxley at 374C to D; Watts v Morrow at 1443, 1445; Farley v Skinner at 751.

264. Whilst in those cases the courts have treated the various heads of damage as distinct and alternatives and whilst I accept that in many circumstances that will be so, there will be circumstances where, for instance, there may be remedial works which will still give rise to diminution in value and there might be some reasonable minor remedial works whilst the loss is properly compensated by diminution in value. In each of those cases both the costs of remedial works and diminution in value may be required properly to compensate a party. In addition whilst usually either the cost or remedial works or diminution in value will be sufficient, there might be a case where lesser remedial works still leave an element of loss of amenity. Whilst in Farley v Skinner at 109 Lord Scott indicated that diminution in value and damages for discomfort would not be recoverable that was on the basis that there would otherwise

be double recovery. I consider that this forms the basis of the principle for not allowing recovery under one or more heads, not some principle that divides the heads of damages so that there is not proper recovery once.

Reinstatement or diminution in value

265. The first question in this case is whether reinstatement by carrying out piling to each of the lead properties is reasonable.

Submissions

266. The Claimants submit that, as broadly accepted by the SHL witnesses, they were entitled to receive houses which were properly designed and constructed; which had a certain future in the sense that they were not so uncertain that they still needed to be monitored and investigated many years after completion; which had a normal appearance and performance, not with cracks and other defects; which had a normal value to ordinary residential purchasers; which were safe and convenient to occupy without external peculiarities such as steps tipping away from doors or undulating driveways and which were ready to occupy without inconvenience, distress and loss of amenity.

267. They submitted that had the properties been constructed with piles which had factors of safety of 2.5 they would have received what they contracted for and that it is reasonable to have work carried out to reinstate the properties to that condition. Whilst they accept that the engineering experts agree that the repiling is not necessary from a purely structural performance point of view for any of the lead properties, the Claimants rely on Mr Taylor's view that it is necessary as being the only way to remove the uncertainty in respect of future performance.

268. In relation to uncertainties the Claimants point to uncertainties regarding the condition and future of the properties. They rely on uncertainty in calculating future settlements caused by uncertainty relating to the ground model; uncertainties in respect of the factors of safety of the piles in relation to the way in which the piles were constructed and the characteristics of the soil; uncertainty due to limitations on the investigations which can be and have been carried out since construction; uncertainty as to the behaviour of the ground beams in terms of workmanship and movement of the piles.

269. In terms of the reasonableness of spending the sums of money on remedial work they point to the fact that SHL and NHBC have repiled a large number of properties even though the cost was high and more than the benefit in terms of the value of the property after remedial work.

270. SHL submit that the cost of repiling the lead properties is unreasonable and the Claimants' claim to be entitled to recover the costs of repiling is wholly inconsistent with the ordinary principles of recovery for damages of being entitled to be placed in the position, so far as money can do it, that they would have been in but for any relevant breaches. That they say requires an assessment of the position they would have been in and the position they are now in. SHL say that had the contract been performed according to its terms, the Claimants would have had a more valuable house with a value which has been agreed by the valuers. Instead the houses have a less substantial value. SHL point out that if the Claimants are awarded the costs of

repiling, that cost will exceed the value that the house would have had. They submit that the unreasonableness of the damages is demonstrated by the fact that it is exceedingly unlikely that any of the Claimants would actually use the damages awarded on account of the costs of repiling, to re-pile their properties but will sell their properties at a discounted price so that the Claimants would be overcompensated by the cost of repiling.

271. SHL say that the Claimants do not claim to have suffered any physical inconvenience as a result of the very small cracks in their buildings. None of them allege that they were, for example, unable to use rooms or were presented with any physical difficulties.

272. In such circumstances, the diminution in value of the properties would provide full compensation for any physical defects which actually exist in the properties and thereby compensate for any risk which the Claimants take with their properties.

Decision

273. There can be no question that the Claimants have each suffered from the fact that the houses which they bought have had defective piles. It has caused them worry and concern and prevented them from moving home when they wanted to or from fully enjoying the houses which they have purchased. In such circumstances, there is great sympathy with the position in which the Claimants have found themselves and an obvious wish to provide the Claimants with proper damages.

274. However the question is whether it is reasonable for the Claimants to be compensated by damages which represent the full cost of repiling the properties and the necessary costs associated with vacating the house whilst it is partly demolished and rebuilt. I have come to the conclusion that it is not reasonable to do so and that, for the reasons set out below, the cost of reinstatement does not represent the measure of damages in this case.

275. First, the engineering experts agree that from a structural engineering point of view the cracking and movement would not warrant those works. I have seen the cracking on each of the lead properties and, with a few exceptions, the cracks are so fine that they are difficult to see and those which are larger are well below any feature which engineers would normally be concerned about. They can be categorised on the basis of the recognised categories of damage in Building Research Digest 251 as being of Damage Category 1 which are aesthetic in nature or, as referred to in the Encia litigation and here, as “cosmetic”.

276. Secondly, even for the property which the experts consider to be the worst of the lead properties, Plot 15, on the basis of Mr Johnson’s evidence which I accept there is only a low probability of significant movements of the foundations in the future. Plot 20 has a remote probability of such movements and for all the other plots the probability is extremely remote. Such low to remote probabilities do not in my judgment make it reasonable to provide entirely new foundations. On the expert evidence, the overwhelming likelihood is that the properties will suffer, at most, some continued small movement over future years which will require cosmetic repair by way of some pointing of the brickwork and redecoration internally.

277. Thirdly, as many of the Claimants stated, they wish to sell their houses. Further, whilst in evidence some of the witnesses indicated that they might have the remedial work carried out, I consider that, as was submitted on behalf of SHL, the reality of the situation is that the Claimants would sell their existing houses and use the money to move elsewhere. This, I consider reflects as Lord Lloyd said in Ruxley on the reasonableness of reinstatement damages when the reality is that the main problem is that the investment in the house as the main asset for most of the Claimants has become less valuable than the asset in which they invested.

278. Fourthly, in the cases where properties have been repiled, the justification for that was, so far as the evidence shows, on the basis of an assessment of those properties in terms of either existing damage or the risk of future damage. But even if it was not and there was no such ground for carrying out the remedial work, I do not consider that decisions made on other properties can justify remedial work which on the basis of the evidence before me is not a reasonable measure of damages for the breaches which I have found.

279. Fifthly, given the current state of the damage to the lead properties and the overwhelming likelihood of their future performance, I consider that to spend the costs of repiling and associated costs would be out of all proportion to the loss suffered. The current external and internal damage can be made good at small cost of the order of £10,000, external areas can be remedied at similar cost and any risk as to future performance is properly compensated by the diminution in value which the market reflects in that way. That does not justify the expenditure of the large sums for repiling.

280. Sixthly, I accept that there are uncertainties in the position which the Claimants identify. However these properties have now been built for some 8 years and the investigations which have been carried out have given a much clearer picture than would usually be the case. Calculations have been made, ground models have been prepared and predictions have been made based on the known performance of the properties. To that extent the uncertainties are now less than they were at the beginning. Those uncertainties are properly compensated, in my judgment, not by carrying out work which is not otherwise justified, but are properly dealt with by the assessment of diminution in value.

281. In those circumstances whilst on grounds of sympathy for the Claimants they might be thought to deserve large sums by way of compensation, I have come to the conclusion that it would not be reasonable to carry out the major remedial works proposed on the Claimants' primary case but that the proper compensation in this case is provided by an award based on diminution in value.

The claim for diminution in value

282. The Claimants rely on the evidence of Mr Watson and SHL rely on the evidence of Mr Lewis. Each party has criticised the other party's expert but essentially the main difference between the experts has been on the applicability of their respective approaches to assess diminution in value in this case. In the end, I have come to the conclusion that the approach of each of the experts is applicable and can appropriately be used. Of the two experts, Mr Lewis had more experience of the particular locality

of the Estate and experience of valuing defective properties. Mr Watson, on the other hand has less experience of the locality but had a great deal of valuation experience. Both experts had changed their views on certain matters during the course of the evidence and Mr Watson's approach to his Investment method of valuation was amended in the light of the late auction information. I have therefore to some extent accepted the evidence of both experts.

283. The experts produced a joint expert report dated 28 May 2010 ("the First Joint Expert Report") in which they were able to agree the market values of each of the ten lead properties on the following assumptions:

(1) The market value when purchased, assuming there were no issues with the properties.
(2) The market value on the basis of the condition in the engineering experts' Joint Statement but assuming that the properties had been underpinned and had the benefit of an ASUC guarantee and engineer's certificate.
(3) The market value but for the allegations now made (subject to some differences between the valuations for Plots 15, 20, 34 and 43).

284. The experts were not able to agree the market values for each of the lead properties in their current condition. They set out in the First Joint Expert Report their respective values for each of those properties. The experts then exchanged expert reports in which they set out their opinions on value. Mr Watson confirmed his values in the First Joint Expert Report. Mr Lewis generally confirmed his values but he altered his values for Plots 15, 20 and 34, taking account of a revised view on the treatment of conservatories.

285. Shortly before the end of the hearing a property at 47 Meadowgate Drive was sold at auction for £128,000. The expert valuers provided a further joint report ("the Second Joint Expert Report"). The experts agreed that the property should be treated as unmortgageable. They therefore produced a table which set out their revised valuations in the context of the properties not being ordinarily mortgageable.

286. In December 2010 I then heard a further application by SHL to adduce further evidence from Mr Lewis in relation to the property at 47 Meadowgate Drive which had by then been put on the market by the auction purchasers at a price of £174,950. There was a report from Billinghurst George and Partners ("BGP") dated 17 August 2010 which had been commissioned by the auction purchasers. The basis of the survey was "*a visual inspection of the property to determine if there is any indication of structural movement*". They inspected on 11 August 2010 and stated that the report, its conclusions and recommendations were based upon a purely visual inspection and, after the usual disclaimer concerning covered, unexposed or inaccessible parts, stated they were "*unable to report that any such part of the property is free from defect*". They said they were "*unable to identify any particular damage that could be attributed to structural movement.*" They concluded that "*the property appears to be structurally sound with no indication of any foundation or other structural movement.*" They also stated "*We understand that those properties on the Eden Park Estate that were affected by structural movement and more especially the failure of*

their piled foundations, were located in a particular area of the Estate. This house was constructed outside of the affected area."

287. At that stage Mr Lewis had been told by the estate agent at Robinsons acting for the auction purchasers that an offer of £167,500 by a cash investor in September 2010 had fallen through and he had made an offer in November for £162,500. In November a purchaser who required a mortgage of about £150,000 had offered £174,950. Mr Lewis said that a sale at £174,950 would support his valuation for a Langdale of £230,000 less 25%, that is £172,500 and similarly a cash sale on the basis that it was unmortgageable at £162,500 would be above his figure of £140,000. He thought that this valuation would be on the basis that it was mortgageable given the engineer's report from BGP.

288. Following that application I gave directions for Mr Watson to serve a report, for SHL to serve submissions and a further report and for the Claimants to serve submissions in response. Mr Watson in his report also gave evidence which he had obtained from the estate agent at Robinsons. The property was put on the market on 31 July 2010 and two offers, both subject to mortgage, at £174,950 and £170,000 had been made. There had been 51 viewings. The Halifax had made a mortgage offer to the person offering £170,000 and the buyer at £174,950 was said to require a mortgage of £150,000. He provided evidence which he had obtained of the only other activity being related to Mr Simpson's continued unsuccessful attempts to sell Plot 39 (15 Clover Drive). Mr Watson commented on the BGP report that, with his knowledge, it would not allow him to conclude that the property was suitable security for a mortgage and he said he had not seen the mortgage valuer's report. He said the number of viewings indicated the difficulty of selling and he referred to the fact that on the basis of Mr Taylor's report on 47 Meadowgate Drive the property was not suitable for a mortgage. Mr Watson said that even if the property was sold it did not mean that the lead properties were mortgageable. He raised concerns over pre-contract disclosure based on the fact that the vendor of 47 Meadowgate Drive had not lived in the property whereas the lead properties had been occupied by those who would be selling them. He did not alter his view on whether the ten lead properties were mortgageable.

289. Mr Lewis produced a further report and the parties made submissions on the position as disclosed by the evidence and on the impact of that evidence on the opinions of the experts.

290. In March 2011 SHL sought to rely on a further report from Mr Lewis which he had produced on 25 February 2011 on the basis that 47 Meadowgate Drive had been sold for £170,000 with the purchaser obtaining a mortgage of £150,000. It was agreed that I would deal with the application without a hearing. It seemed to me that it was undesirable for this further evidence to be admitted. I have to decide whether the lead properties are mortgageable and on that basis what value those properties had at the date of trial.

291. A number of matters may have developed since trial which might affect that position and if I were to open up the position on this evidence then I would need to allow further evidence which, as Mr Watson had stated in his December 2010 report would support the unmortgageability of the lead properties. As an example, in order properly

to investigate the position, I would need evidence of what other engineering advice had been given to the purchaser and the Halifax who had given the mortgage and whether that was consistent with my view of the expert evidence. Equally, there may have been contact with insurers or the NHBC which might have affected the position. I concluded that I should not order any further evidence to deal with the sale.

292. I now turn to the views of the expert valuers on issues on which they disagree. I start from the position that a central question is whether the lead properties are mortgageable. On the evidence I am satisfied that if they are mortgageable then a calculation based on Mr Lewis' capital comparison method would be more appropriate whereas a calculation based on Mr Watson's method would be more appropriate if the properties are not mortgageable. I propose to come to conclusions first on the value of each property on the two alternative bases: that they are either mortgagable or not mortgageable.

Mortgageable: Capital Comparison Method

293. I start by considering Mr Lewis' evidence which is based on the value of 31 Clover Drive, a Langdale house which was sold with a mortgage in April 2009 for £190,000. The experts' view is that the value of this property unaffected by problems would be £245,000 (Mr Lewis) or £255,000 (Mr Watson). On this basis the sale represented a 25% or a 27.5% reduction on the value of the property. Mr Lewis then applies that 25% value to each of the lead properties to come to a market value.

294. There are essentially two criticisms of the use of the comparable method. First, there is the question of whether one property is a proper basis for the capital comparison method. Secondly, there is the question whether sufficient demand has been shown to justify applying the method generally.

295. In relation to the use of one property, the Claimants say that, as Mr Lewis accepted, it was important to know that the sale price of a comparable had been reached in accordance with the RICS definition of market value. They say that while Mr Lewis agreed that it was very important to know the facts of the sale of 31 Clover Drive, he accepted that he knew nothing about what the seller knew or disclosed about the problems on the estate; he knew nothing about what the purchaser knew; he had not seen the survey reports and he did not know what they said. He therefore could not say whether the purchaser acted knowledgeably and prudently.

296. The Claimants say that Mr Lewis accepted that non-compliance with the RICS definitions would affect the weight to be attached to a comparable and that a valuer should ideally consider at least three comparables. In these circumstances the Claimants say that a valuation based on a single comparable, where the circumstances of sales are not known and it is not known that the single transaction complied with the RICS definition of market value is unsound.

297. SHL say that Mr Lewis adopted the normal or orthodox approach to valuation by using the sale in April 2009 of 31 Clover Drive as a comparable and whilst he accepted that evidence from more sales would have been better, he used this comparable in combination with comparables from elsewhere. They also refer to two previous sales as well as Plot 31 (31 Clover Drive) and Plot 92 (47 Meadowgate Drive). They say, first, that in February 2006 Plot 45 (3 Clover Drive) was sold for

£199,000. This was a 'Newbury' type property. The price reflected a discount to 74% of where it would have been relative to the Hartlepool house price index, based on its new price and purchase date. Secondly, that in August 2006 Plot 22 (24 Clover Drive) sold for £195,000. This was an 'Ashbrook' type property which had been classified in the Encia litigation as a "yellow". The price reflected a discount to 73% of the Hartlepool house price index.

298. The second aspect is market demand. The Claimants say that Mr Lewis accepted that to establish the necessary demand what was required was not sufficient interest to generate enquiries but to generate purchasers who were prepared to overcome any obstacles and make purchases at the appropriate price. The Claimants say that Mr Lewis accepted that Plot 4 was reasonably competitively marketed with a good local agent yet did not sell; that Plot 6 received an offer of £190,000, subject to external works being carried out, but this did not proceed due to advice from the bank; that Plot 35 was marketed at a price that generated interest in the form of 26 viewings but there was no sale because it appeared that as soon as prospective purchasers became knowledgeable they ceased to be interested; that Plot 94 was also marketed with a good agent and attracted 11 viewings and an offer that was rejected; that Plot 62 had an offer accepted but the buyer pulled out as he was unable to obtain insurance and that Plot 16 had 23 viewings and two offers, but both were withdrawn due to subsidence problems. The Claimants say that this evidence indicates that there is no demand from owner-occupiers to purchase, as opposed to making pre-knowledgeable offers on, properties at Eden Park except for 31 Clover Drive.

299. SHL dispute the Claimants' assertions that they have made prolonged attempts to sell their properties but failed. They say that these assertions should be treated with caution where the evidence shows that many Claimants have not conventionally marketed their properties or pitched them at appropriate prices or marketed them at all. SHL say that Mr Watson accepted if a home owner on the Eden Park estate wished to sell, he would advise them to market the property with a local agent at a substantial discount; to obtain an engineer's report; to tell the engineer what had happened and that a three or four page report with a summary of their recommendations was needed. SHL say that the fact that the Claimants have not taken these simple steps indicates that the desire to sell was not strong. SHL submit that this shows that the Claimants were unwilling to sell for prices which would have been obtainable in the market and, whilst this is understandable, it does not demonstrate the true market for the properties.

300. I accept the criticism that can be made of using the capital comparison method for the properties on the Estate. In relation to the use of 31 Clover Drive as a comparable to be applied to the capital comparison method, the first problem is the use of one property as the only comparable. Without detailed knowledge of the one transaction there are clearly uncertainties as to whether the transaction fell within the necessary RICS criteria for the use of that property as a comparable. SHL say that there is now the information about the sale at 47 Meadowgate Drive which is relied on by Mr Lewis to support his view that a comparable method based on a 25% discount can be used. He says that based on this Langdale house the value without the problems would be £230,000 and that a 25% discount would give a value of £172,500. Even accepting that, there is in my judgment a danger in using the capital comparison method where there are only two comparables. Further, while I accept that other

properties elsewhere can be used in forming a judgment, the specific nature of the discount applicable for a house on the Estate is a matter which depends on particular comparables on the Estate. Equally, there are difficulties in using the sales in 2006 as comparables. As Mr Lewis accepted it is evident that a limitation on the number of comparables limits the weight to be given to the comparables when applying that value to other properties. The range of possible values will be wider. I consider that this applies whether there is one comparable or two comparables.

301. In relation to demand, it is evident that there is not yet a normal market in properties on the Estate, even accepting the more recent evidence of a sale of 47 Meadowcroft Drive in February 2011. The evidence up to the date of the trial was that other attempts to sell houses had not met with success, whatever the criticisms of the manner in which they had been marketed. In addition, even on the assumption I am making that the properties are mortgageable, this is a case where the existence of piling defects in the properties would necessarily mean that a structural engineer's report would be required and the market will be limited to purchasers who want to buy a property at a lower price but who know that, whatever assurances the structural engineer gives, there are defects and some degree of uncertainty because of that. Whilst there will be purchasers who are prepared to purchase, on the assumption that a mortgage is available, the limited market is a factor to take into account.

302. This leads me to the conclusion that, on the assumption that the ten lead properties were mortgageable, there would have to be a discount to the value established from using 31 Clover Drive even if support were provided to that valuation from the facts of 47 Meadowgate Drive. The lack of comparables and the limited market lead me to assess a discount which is higher than Mr Lewis' 25% or Mr Watson's 27.5% which could be derived from the one comparable in such a limited market. The figure I choose is 32.5% which I consider at the date of trial represented the appropriate reduction from the market value of each property as it would have been without the problems. On this basis the values would be:

(1)	Plot 15, 15 Barley Close:	£133,650
(2)	Plot 20, 16 Clover Drive:	£158,625
(3)	Plot 34, 25 Clover Drive:	£124,875
(4)	Plot 39, 15 Clover Drive:	£130,275
(5)	Plot 43, 7 Clover Drive:	£151,875
(6)	Plot 50, 26 Meadowgate Drive:	£131,625
(7)	Plot 59, 15 Hayfield Close:	£155,250
(8)	Plot 87, 57 Meadowgate Drive:	£156,600
(9)	Plot 89, 53 Meadowgate Drive:	£121,837
(10)	Plot 90, 51 Meadowgate Drive:	£132,637

303. In arriving at these valuations, there were two issues between the valuation experts which I have had to resolve. Whilst Mr Lewis in his Expert Report was able to agree on the valuation of Plots 15 and 34, where there had been differences in the First Joint Expert Report, there remained differences on the market value "but for the problems" of Plots 20 and 43.

304. On Plot 20 Mr Lewis originally made a £2500 deduction to the value because of the state of the conservatory but Mr Watson added £5000. Mr Lewis on reconsideration in

his Expert Report reinstated the deduction but made no addition. The basis for Mr Watson's addition of £5000 is the fact that there is a conservatory, as with Plots 15 and 34. I accept that there is more significant damage to the conservatory at Plot 20 and in my judgment the full addition of £5000 should not be made but an addition of £2500 should be made, making a value of £235,000 to which the discount is applied.

305. The other issue concerns the property at Plot 43 which is let by Mr and Mrs Manners. Mr Watson considers that it should be valued on the basis of vacant possession whilst Mr Lewis considers that it should have a deduction of £5000 on the basis that it is on an Assured Shorthold Tenancy to take account of delay, risk, cost and inconvenience of terminating that arrangement. In my judgment, the market value without the problems should, like the other properties be based on there being vacant possession. The value I use is therefore £225,000, to which I apply the discount.

Unmortgageable: The Investment method

306. I now turn to consider the valuation of the properties on the assumption that the properties are unmortgageable. On that basis I adopt the two investment methods which have been used by Mr Watson: an Income approach and a Term and Reversion to Market Value approach. The valuation experts agree that this is the correct approach for unmortgageable properties but they differ on the inputs into the approaches.

307. In relation to the Income approach the question is the Years Purchase (YP in perpetuity) to be applied to the Net Rent. Mr Watson originally took a value of 9% but on the basis of the information from the sale by auction of 47 Meadowgate Drive, he revised that to 8%. Mr Lewis, on the other hand, says that the figure should be 5.5% but he allows an additional 1.5% for risk, giving 7%. This means that the difference between the experts is small but I consider that for these properties, on the assumption that they are unmortgageable the figure of 8% put forward by Mr Watson is to be preferred.

308. On this basis, the Income approach would lead to these values:

(1)	Ashbrook	£78,000
(2)	Langdale	£90,000
(3)	Newbury	£75,000

309. For the Term and Reversion to Market Value approach, there were differences between the valuation experts on two aspects: the number of years before the properties revert to being saleable and the residual blight after that period.

310. Mr Watson had allowed 12 years before the properties revert to being saleable whilst Mr Lewis considered that, on the basis of a further 5 years of monitoring being needed on Mr Taylor's evidence, the period should be 5 years. Mr Watson has now amended his view to 10 years on the basis of the information of the sale by auction of the property at 47 Meadowgate Drive. His view of 12 years had been based on the fact that it would be 10 years before the purchaser could sell the property but that an extra 2 years should be allowed because of the further remedial works that are to be carried out to five further houses. I consider that the period of 10 years provides a

better basis on which an investor would approach the transaction, particularly given the work to be carried out to further houses.

311. Mr Watson initially took a 20% discount at the end of the period but in the light of the evidence of the auction sale at 47 Meadowgate Drive he has now used a figure of 10% which is the figure used by Mr Lewis at the end of the 5 year period. In my judgment, the appropriate discount would be 10% at the end of that 10 year period. I would expect the residual value of the property as viewed by an investor to have a discount of the order of 10% at the end of the period.

312. On this basis, the Term and Reversion to Market Value approach would lead to these values:

(1)	Ashbrook	£122,000	(£121,900)
(2)	Langdale	£144,000	(£143,932)
(3)	Newbury	£114,000	(£114,158)

313. Originally there was a difference between the expert valuers as to whether the value should be in the middle of the two bands as Mr Lewis thought or whether, as Mr Watson thought, it should be 25% towards the lower end. However, when Mr Watson reconsidered the position after the auction result at 47 Meadowgate Drive he accepted that the middle of the two bands was appropriate. On this basis the values of the properties, on the assumption that they are unmortgageable, would be derived from the following values:

(1)	Ashbrook	£100,000
(2)	Langdale	£117,000
(3)	Newbury	£94,500

314. This gives rise to the individual values of the properties as follows:

		Unmortgageable	Mortgageable
(1)	Plot 15, 15 Barley Close:	£102,000	£133,650
(2)	Plot 20, 16 Clover Drive:	£119,000	£158,625
(3)	Plot 34, 25 Clover Drive:	£99,000	£124,875
(4)	Plot 39, 15 Clover Drive:	£100,000	£130,275
(5)	Plot 43, 7 Clover Drive:	£117,000	£151,875
(6)	Plot 50, 26 Meadowgate Drive:	£102,000	£131,625
(7)	Plot 59, 15 Hayfield Close:	£117,000	£155,250
(8)	Plot 87, 57 Meadowgate Drive:	£119,000	£156,600
(9)	Plot 89, 53 Meadowgate Drive:	£97,000	£121,837
(10)	Plot 90, 51 Meadowgate Drive:	£103,000	£132,637

315. In arriving at the unmortgageable values, I have taken account of the revised valuations in the Second Joint Expert Report. Those show that the experts are agreed on the adjustment to be made for the individual properties, except for Plots 15, 20 and 43. As stated before in relation to the mortgageable values, I have resolved the issue on Plot 20 by making an addition of £2500 for the conservatory. I consider that for the unmortgageable values there should be an addition of £2000 for the structurally damaged conservatory, in accordance with Mr Watson's general allowance, giving a

value of £119,000. For Plot 43 there should be no deduction for the Assured Shorthold Tenancy so the value should be £117,000.

316. On Plot 15 Mr Lewis has made an addition of £3000 to his valuation whilst Mr Watson has made an addition of £2000 to his valuation for the damaged conservatory. The mortgageable value of Plot 15 was agreed by the experts on the basis of a £5000 allowance for the conservatory. In the circumstances, I consider that there should be only the £2000 addition for the damaged conservatory in accordance with Mr Watson's general allowance, giving a value of £102,000.

Mortgageability

317. The valuation experts agree that a property will not be mortgageable if a satisfactory engineer's report is not provided to the mortgage lender. Essentially, the experts difference on the question of mortgageability depends on whether I accept Mr Taylor's view of matters or Mr Johnson's view of matters. The experts agreed in the First Joint Expert Report that on the basis of Mr Taylor's opinion on Plot 39 they would consider the property unmortgageable. Mr Watson initially appeared to agree that Mr Johnson's comment that the "probability of any significant movement of this structure is extremely remote" would be sufficient for the property to be treated as mortgageable if by "probability" Mr Johnson meant the "likelihood". In cross-examination he said that he would refuse it for a mortgage as a valuer if the report said the "possibility" of any significant movement of this structure is extremely remote".

318. For the reasons set out above I have come to the conclusion that the position on the expert evidence is properly expressed by Mr Johnson's view of probability in terms of risk and the consequences of risk. Whilst there is a significant risk of further movement, the consequences of that risk are that the damage to that property will continue to be in the form of further movement and cracking of the house of a similar type to that seen today. The risk of any significant movement is low to extremely remote.

319. The original report for 47 Meadowgate Drive from Mr Taylor can be contrasted with the report from BGP. This indicates that the question of mortgageability depends on the reports which are written by the engineers instructed for any particular property. Towards one end of the spectrum would be a report like Mr Taylor's which would set out his views and refer to the Encia litigation and this case. Towards the other end of the spectrum is a report by BGP which mentions none of the litigation or the position in relation to the piling on 47 Meadowgate Drive. It is evident that this judgment will not dictate the engineering advice which is given any more than the judgment in the Encia litigation appears to have done, by reference to the BGP report.

320. However, in my judgment, I should base my assessment of the likely position on an engineer's report which is more like Mr Taylor's report for 47 Meadowgate Drive than the BGP report. In other words one which reports on the position fully and refers to the Encia litigation and this case. On that basis, I do not consider that obtaining a mortgage will be straightforward and I would expect that would apply to all the lead properties. For the worst of the ten lead properties I would expect that the most probable outcome would be that either the property would be unmortgageable or that the value put on it would reflect that fact even if in the end a lender is found who is

prepared to lend. For the best of the ten properties I would expect that the most probable outcome will be that the property, with some difficulty, is mortgageable or that the value put on it would reflect that value. I have therefore approached the diminution in value on a gradated basis. The worst properties I have valued at the unmortgageable value and the best at the mortgageable value, with the properties in between being valued between those two values. This, in my judgment, is the best way to reflect the situation for these properties in terms of the evaluation of damages to compensate them for their loss.

The claim for damages for loss of amenity, distress and inconvenience

321. The Claimants seek damages under this head on two grounds. First they seek damages for loss of amenity on the basis that the sales contracts for eight of the lead claimants were contracts the very object of which was to provide pleasure, relaxation, peace of mind or freedom from molestation, to use the phrase of Bingham LJ in Watts v Morrow at 1445. Secondly, they seek damages for the physical inconvenience and discomfort caused by the breach of contract as also explained by Lord Bingham in Watts v Morrow.

322. SHL submit that this is not a contract such as that in Farley v Skinner where the "very object" as that phrase was explained in Farley v Skinner was to provide pleasure, relaxation, peace of mind or freedom from molestation but even if it were then the award of diminution in value would provide proper compensation and to give these damages would provide double recovery as Lord Scott indicated in Farley v Skinner.

323. SHL accept that an award might in principle be made for physical inconvenience and discomfort but they say that this is not a case where there has been the necessary loss of a room or other "physical" inconvenience of the type explained by Lord Scott in Farley v Skinner.

324. In relation to the first head of loss I consider that SHL are correct. This is a case of a sales contract for the purchase of a house. As Lord Scott said in Farley v Skinner it is sufficient if a major or important object of the contract is to give pleasure, relaxation or peace of mind. There is no express term to that effect and I do not consider that one should be implied. Whilst the fulfilment of the obligation to provide a properly designed and constructed property and to remedy any defects may give "*pleasure, relaxation, peace of mind*" that is not the object. I do not consider that a major or important object was to avoid the worry arising from defects in the property or the failure to make good those defects. In those circumstances I do not consider that there is any room for an award of that type of damages. This is not a contract of the exceptional type mentioned by Lord Bingham in Watts v Morrow.

325. Even if that head of damages were available, it is difficult to see how, once full compensation is given for diminution in value of the property so that the Claimants have a property with its full market value there would not be double recovery for this aspect of loss.

326. In relation to the second head of loss, that for physical inconvenience and distress, I consider that this is recoverable and that there has been physical inconvenience and distress because of the visible defects, the problems with the levels to the paths and

driveways, the need for investigations and surveys and monitoring and the other sensory aspects arising from the defects in the property.

327. That is not something which would be covered by an award of damages for diminution in value. As a matter of policy the damages for this loss are modest and the physical aspects must be differentiated from the considerable worry, anxiety and other problems which the Claimants have undoubtedly suffered because of SHL's breaches but for which there is no recovery of damages in law. I have therefore based my award generally on a figure of some £150 per person per year for the very limited aspect where the law permits recovery.

328. I have made an award also for future loss for this head and for future minor remedial works. The Claimants may decide to move or stay and I consider that I should provide sums under these heads which compensate for future loss on that basis, even if, as appears likely a number of the Claimants will move.

The claims for the minor remedial work

329. The Claimants each claim for the cost of making good the defects which are apparent in the inside or outside of the properties. There are two issues in relation to these claims. First, there is a difference between the engineering experts as to the cause of certain defects. Secondly, there is a difference between the quantity surveying experts as to the value of work to remedy the defects. I have had to consider the disputed items but the parties agreed in closing that where there was a difference between the quantum experts I should "split the difference".

330. In closing submissions SHL provided an updated schedule of defects with Mr Miller's valuation of the defects in the properties, with those marked in blue being the defects where Mr Taylor and Mr Johnson disagreed on the cause and therefore the recoverability of the defects. I have been through those schedules and for each property I have set out what defects I would exclude from Mr Taylor's list. I have not set out my reasons for each disputed crack or item. Instead I have adopted the following general approach, consistent with Mr Taylor's evidence:

    (1) Where cracks have appeared internally in walls, ceiling or cornices or where plasterboard nails have become apparent I consider that, on the balance of probabilities, unless there is some other obvious explanation, the crack will have occurred because of movement of the structure. The movement of the piles and ground beams causes a redistribution of stresses which will cause cracks to the more sensitive areas.
    (2) Externally many of the houses have suffered from cracking where the lead flashing is bedded in the mortar joint on the Ashbrook and Newbury houses. I consider that whilst this is partly caused by thermal expansion of the different materials, that joint provides a weak point which will crack due to any movement of the structure. The cracked mortar is therefore substantially contributed to by movement of the piles and ground beams.
    (3) Where there has been putlog damage which has been repaired then, again, on the balance of probabilities I consider that unless there is clear evidence that the defect is caused by inadequate repair of the putlog damage, any crack or other defect is likely to have been caused by stress re-distribution arising from movement of the piles and ground beams.

331. There are two difficulties though in dealing with quantum as suggested. First, on analysis, Mr Pearson's valuation differs considerably from that produced by Mr Miller and direct comparison is not easy. It would therefore be better for those experts to carry out the exercise of splitting the difference. Secondly, the schedule includes work to external areas and it is not clear whether there is a need to remove items from this list of defects and, if so, what effect it has. On that basis, I leave the matter of quantum for further consideration by the quantity surveying experts who, on past experience, have been able to agree matters. If they cannot be agreed then I will deal with them.

332. In relation to remedial works I consider that I should proceed on the basis that further remedial work will be necessary in the future and I allow, generally, for the expenditure of two further similar sums to be expended over the next 20 years, with a discount for early receipt of the damages.

The claims for the external areas

333. During the course of the evidence of the engineering experts Mr Bartlett QC asked some questions concerning the remedial work to the external areas at the properties. These external areas consist, in particular, of the paths and drives. During closing submissions the parties indicated that the engineering and quantity surveyor experts would be discussing the issue of the appropriate remedial work and the cost of that work. It had been anticipated that it would be provided shortly after the hearing but, in the event, the experts were only able to provide the necessary documentation some months later.

334. As a result of that documentation, I received two alternative schemes for dealing with the external areas, one from each engineering expert, together with a schedule by the expert quantity surveyors for each of the proposed schemes and expert reports.

335. I have considered those two schemes but, as I set out below, the main differences are in the views of the quantity surveyors on the cost of each of the schemes, whichever is chosen.

336. There are essentially two differences between the schemes. First, Mr Taylor's edge detail wraps the geogrid, geocomposite membrane up to the top of the path or drive and around the concrete edge detail whereas Mr Johnson's stops at the edge of the path or drive and continues under the concrete edge detail but is not wrapped up the side. Secondly that Mr Taylor's scheme has a thickened edge detail for the drive whereas Mr Johnson's does not.

337. I have read and considered the comments on the scheme and have come to the conclusion that the wrapping of the geogrid membrane up the edges and across the top of the path or drive and around the side of the edge detail is unnecessary and adds complication to the work. The geogrid provides the necessary mechanical interlock at the base of the construction to bind the construction together and I do not consider that wrapping the membrane up a slip membrane or the edge of the construction or the concrete edge detail adds any significant benefit but complicates the construction. In relation to the thickening of the edge detail, I consider that this will add to the overall strength and robustness of the composite construction and I am not persuaded that

there will be differential movement because of the change of sections. The geogrid reinforces the change of section which is made gradually by there being a sloped section.

338. On the basis of those conclusions I have then to consider how this affects the views of the quantity surveyors. On the basis of Mr Taylor's scheme, Mr Pearson the Claimants' expert quantity surveyor values the total work at all lead properties at £130,523.25 and Mr Miller, SHL's expert quantity surveyor, values the work at £67,097.53. For Mr Johnson's scheme, Mr Pearson values the total work at £126,991.03 and Mr Miller values it at £64,466.93. There are three areas where there are differences between the experts. First there are differences in quantities where Mr Pearson has stated a quantity but Mr Miller has set out his dimensions which come to a different figure. I do not consider that I can resolve the difference without some evidence of the figures. Equally, there are some differences in rates. Again I do not consider that I can resolve those differences without some evidence. Finally there is a question of what additional costs should be added on for preliminaries and other "on costs". I consider that the cost should be based on there being proper management and supervision of the contract rather than some informal arrangement.

339. It follows that I cannot come to any further conclusion on this aspect and I propose that the quantity surveyors meet to discuss the cost of the modified scheme which I have indicated on the basis of proper management and supervision of the contract. I would hope that they might be able to agree rates and quantities, if necessary with appropriate instructions from the parties, so that the cost can be established without any further hearing. If that does not prove possible then I will give the necessary directions.

The other quantum claims

340. There are two claims which are made generally by the Claimants for the increased costs of insurance or increased mortgage costs.

341. The mortgage claim has been made on behalf of all of the Claimants on the basis of figures which have been provided by Mrs Dobson. SHL, properly in my view, say that this head of damages which will depend on the individual mortgage position of each claimant cannot be established as special damages in this way. I accept that submission. I also take account of the evidence which was given on the question of attempts to remortgage set out in paragraph 119 of SHL's Closing Submissions. Any claim for special damages must be proved on the basis of the individual facts of the particular claimants and I do not consider it appropriate or possible to award damages on the basis of the evidence referred to by SHL. I deal with Mrs Dobson's claim below.

342. Equally, the Claimants seek to claim increased insurance cost on the basis of evidence which has been given by Mr Ford who is not a lead claimant and whose house has been remediated by SHL. SHL submit that this cannot be the basis for a claim by other people. I accept that and in doing so take account of the evidence which was given on the question of attempts to insure set out in paragraph 122 of SHL's Closing Submissions. I do not consider that, any more than the claim in respect of increased mortgage payments, Mr Ford's position can establish a claim by the other Claimants and on the evidence referred to by SHL I do not consider that an award is justified.

343. Otherwise I have dealt with the claims which have been made by individual claimants as set out in the documents within the individual plot documents.

The claims for each lead property

344. On that basis I now deal with the claim for each lead property.

Mr and Mrs Knight Plot 15 (15 Barley Close)

Background

345. This Ashbrook house was originally purchased by Mr and Mrs Charlton with completion on 28 June 2002. They had a conservatory erected at the back of the property in July 2002. In about March 2004 Mr and Mrs Knight decided to purchase the house from the Charltons. Completion took place and on 10 June 2004 their solicitors enclosed the NHBC Buildmark cover documents for the Knights.

346. The Knights heard of subsidence problems about a month after they had moved into the property, from a neighbour in Barley Close. Mr Knight, who gave evidence, said that he was very surprised by this as the question of subsidence had been raised with the vendors and the response had been negative. They also had a structural survey carried out on the property as requested by their mortgagee and again no issues were raised. He says that he had not noticed any adverse cracking but having been alerted to the problems he noticed minor cracking but thought that this was due to minor shrinkage cracks.

347. In or about April 2005 he noticed rucking of the tape that surrounds the joint between the ceilings and the wall when he was decorating but did not think that this was anything to worry about. By April 2005 he says that he knew that the problems on the Estate were quite serious. His evidence was confirmed by his wife, Vivienne Knight, who was not called.

348. On 21 June 2005 BSCP produced a report on the property in which they said "*Minor cracking was recorded in the external brick work. Horizontal cracking on the course below the DPC towards the rear of the right hand gable is indicative of settlement.*" They referred to cracking between the conservatory and the house which they attributed to settlement, as the conservatory was not founded on piles. They added "*All internal cracking of the ceilings was considered to be the result of shrinkage movements and not settlement related.*" Their recommendation was that the property should be re-inspected in 6 months time.

349. It was re-inspected by BSCP on 13 September 2005 and they commented "*recent cracking was recorded in some first floor ceilings including a slight ridge in the ensuite to bedroom one and a vertical crack up the side of the window in the same room.*" Otherwise they said that external cracking was generally as their previous inspection and that in view of the recent internal cracking they recommended the property should be re-inspected in 4 months time. It was then re-inspected by BSCP on 15 February 2006. They commented "*There appears to be no worsening of cracks in external masonry. These are very minor and are generally considered to be shrinkage related.*" They said the exception was the gap between the conservatory and the house. They also said "*Cracking in internal ceiling boards is slightly more extensive although still relatively minor*". In view of that they recommended that the property should be inspected in 4 months' time.

350. The property was re-inspected on the 5 July 2006 when no change was found in the minor cracking to the external brick work. It was stated "*Inside the property, a fine crack has appeared in the kitchen ceiling. Upstairs, the fine crack in the bathroom ceiling has extended slightly and a new, fine, crack can now be seen in the kitchen ceiling. However, I do not consider these cracks to be significant.*" Accordingly, BSCP recommended that all of the reported cracks should be repaired and that no further action should then be necessary.

351. NHBC wrote to SHL on 29 March 2007 to say that Mr and Mrs Knight had notified NHBC of a claim relating to possible foundation failure.

The Encia litigation

352. In the Encia judgment at paragraphs 521 to 523 Jackson J said:

"*521. ...It stands in an area of negative skin friction. It has 15 piles, of which seven have factors of safety below 1, and a further six piles have factors of safety below 1.5.*
522. There are 17 millimetres of horizontal tilt. The damage sustained by this property, however, is very slight. Mr Newman classifies this property as purple. Mr Johnson classifies the property as a "low risk blue" or "blue tending to purple". Mr Johnson accepted in cross-examination that any future damage to this house would be cosmetic (see Day 7, pages 89 to 90).
523. I have come to the conclusion that the foundations of plot 15 are inadequate, but only by a small degree. Having regard to the state of the property and the expert evidence, the factors of safety are probably somewhat higher than calculated. The minor damage which has occurred to date is in part attributable to foundation settlement. The remedial action for this property will comprise cosmetic repairs to the superstructure if and when necessary."

Engineering expert evidence

353. In the Joint Statement of the engineering experts in these proceedings the experts summarised the damage observed in this property by saying: "*The cracking is generally fine and of a minor nature. There are only two fine stepped cracks externally within the brickwork and one internally in the finishes beneath the bathroom window on the rear elevation.*" In terms of levels at the property they stated: "*The maximum recorded difference between the high point and the low point on the damp-proof course is 19mm. The levels of the corners of the property have been monitored since Jan 2007 and the variation in tilt has been generally +/- 2mm. There has been a settlement of 3 mm recorded along the LHS gable wall in the period April to October 2009.*"

354. In terms of present remediation, in the Joint Statement the engineering experts agreed that "*an acceptable level of remediation in order to rectify damage to the fabric of the building would be repointing of the external brickwork and sealing and redecoration of the internal observed features.*" So far as future remediation was concerned the experts agreed that "*if the property continues to behave as it has in the past then the level of the damage incurred in the future will be no more than that seen up to the present date*". They also agreed that "*it is likely any such future damage can be repaired in a similar manner to the repair work that we recommend now*". Mr Johnson "*considered it is likely that the structure will continue to behave as it has in*

the past". They agreed that "*there has been movement in the past 6 months and that further monitoring is required to confirm any trends in the movement*".

355. The Summary Sheet produced by the engineering experts shows that the estimated ground movement at this property was 11mm between 2002 and 2010 and is predicted to be 20mm between 2010 and 2032, making a total overall movement of 31 mm. This house is located next to 14 Barley Close which is a property which has been repiled. At this property the experts agree that there is poorer ground adjacent to 14 Barley Close whilst there is better ground at the other side of the property. The piles founded in the better ground (the right hand side looking from the front of the property) have low factors of safety: FOS(A)/FOS(B) being 1.02/0.63, 0.75/0.55 and 1.52/0.94. That contrasts with the figures for the piles founded in the poorer ground where the values of FOS(A)/FOS(B) are 3.16/1.58, 1.45/1.06 and 1.70/1.09.

356. The experts have predicted future settlement of the piles due to "spring stiffness" and also due to negative skin friction between 2010 and 2032. This indicates generally low values of settlement of the piles in the poorer ground. The piles in the better ground give rise to settlements due to spring stiffness of about 15 mm and settlements due to negative skin friction of some 20mm. The engineering experts agree that it would be wrong to cumulate those two figures for settlement. Mr Johnson concludes that the settlement of the pile might be between 10 and 20 mm. Mr Taylor raises concerns that if there is ground movement it will remove support currently being given to the ground beams from the surrounding soil which will cause greater movement. As Mr Taylor pointed out, given that the piles with the higher factors of safety are in the worst ground there will be some redistribution of loads and stresses through the building to the piles with lower factors of safety in the better ground. Mr Johnson's conclusion was that the property would suffer movement of 10 to 20 mm; that there would be no risk of significant structural damage; that there would be no safety issues but there would be a risk of minor cracking.

357. The experts were agreed that on this property the difference in movement between the individual corners was very, very small. Mr Taylor had concerns as to the magnitude of movement in relation to the connections between the ground beams and the piles. He said he could not be as conclusive as Mr Johnson as to the value of total movement and total tilt of the structure but he accepted that the settlement should be slowing logarithmically. Mr Taylor accepted that the way the structure was behaving meant that the order of damage in the future would be likely to be what it was today.

358. Both experts agreed that they would rate this property as being the worst property of the ten lead properties in terms of performance. In relation to damage to the property the experts agreed that there were a number of perpend cracks in the mortar, a step crack to the front elevation and a cracked individual brick to the right hand side elevation. Otherwise the cracking showed no features worse than other properties.

Conclusion on the Property

359. The piles at this property have low factors of safety and the ground is likely to settle a further 20mm with pile settlements of about 10 to 20mm. There had been recent movement and there was a need to monitor the property to confirm any trends in movement. The future pile settlements will cause further movement of the ground

beams and redistribution of the stresses within the structure. This will give rise to further future cracking. Mr Johnson's view was that there was a low probability of significant movements in the future.

360. This is a property where there is a significant risk of future pile settlement which will cause movement of the structure. There is a low risk or probability of significant movements in the future. It is likely that the level of damage in the future will be no more than seen at present but the property has to be monitored.

361. The experts are agreed that this property is the worst of the lead properties.

Diminution in value

362. This property should be treated so far as diminution in value as being an unmortgageable property. On that basis, the value of the property without the problems would be £198,000 as agreed by the valuation experts. The current value is £102,000. The diminution in value is £96,000.

Cost of minor remedial work

363. I find that all the defects in the property as set out by Mr Taylor were caused or contributed to by the pile settlement and movement of the structure.

364. I consider that I should make allowance for this level of work to be carried out twice in the next 20 years, although it may in fact be carried out gradually over that period. I consider that this will be in addition to any redecoration or repair which may be carried out and will not affect the diminution of value. I allow an additional 1.3 times the current cost of carrying out the defects identified above.

365. As set out above I cannot at present put a value on this head of quantum.

Distress inconvenience and loss of amenity

366. By April 2005 the Knights knew that there were defects in their property and that the problems on the Estate were quite serious. Reports were made initially by BSCP in June 2005, September 2005, February 2006 and July 2006. Monitoring has been carried out. Up to the date of trial I propose to allow the modest sum of £1,500 for the five years of the distress, inconvenience and loss of amenity caused by cracks in the house, inspections and monitoring and the inconvenience of the defects in the external areas.

367. There will be future distress, inconvenience and loss of amenity because of the need for the internal and external remedial work and future monitoring. I propose to allow £3,000 to represent a sum to compensate for that, making allowance for the present receipt of the sum without any discounting.

Increased costs or wasted expenditure

368. These claimants claim the cost of masking defects, relaying the garden due to waterlogging, a broken lawnmower due to a reinforcing bar from work at 14 Barley Close and wasted plant and shrubs. I do not consider that any of these items arise because of the claims being considered except the cost of masking defects after redecoration for which £600 is claimed. I am satisfied that the Knights did incur

expenditure on that but there is a lack of documents to establish what cost was incurred. I allow £300.

VAT and Interest

369. To the extent that VAT and interest are claimed, I have not allowed for them and invite further submissions.

Work to external areas

370. For the reasons set out above I have not made any award of damages pending further submissions.

Damages

371. In the light of the matters set out above, the damages that I award are as follows:

(1)	Special Damages		
	(a)	Increased costs or wasted expenditure:	£300.00
	(b)	Additional mortgage payments:	£ nil
	(c)	Increased insurance cost:	£ nil
(2)	General damages for distress, inconvenience and loss of amenity to date of trial:		£1,500.00
(3)	Cost of minor remedial works on property:		To be determined
(4)	Diminution in value:		£96,000.00
(5)	Future loss:		
	(a)	Repairs and redecoration:	To be determined
	(b)	Maintenance due to ground movement	£ nil
	(c)	General damages for future distress, inconvenience and loss of amenity:	£3,000.00
	(d)	Additional mortgage payments:	£ nil
	(e)	Increased insurance cost:	£ nil
	Total:		£100,800.00

Mr and Mrs Dobson Plot 20 (16 Clover Drive)
Background

372. This is a Langdale house. Mrs Joanne Dobson, who gave evidence, said that in 2002 she and her husband were looking for a new house. They had a plot reserved on Elwick Rise but when they became aware of the Eden Park Estate they were interested in purchasing a house on the smaller estate, with no through roads but still within the catchment area for the children's school at High Tunstall. They said that they met an SHL sales person Sandra, who told them that because the land had been piled prior to construction of the houses it was now stable enough to build high-rise flats on. The Dobsons purchased the property off-plan and exchanged contracts on 15 February 2002 and the purchase was completed on 21 June 2002. When they moved in on 22 June 2002 there were a few minor problems and whilst on holiday in 2004 their garage was flooded during very heavy rain fall causing water to flow into their hallway and kitchen. Their claim was settled by the insurance company.

373. In December 2004 they built a conservatory and in early 2005 they noticed the conservatory had come away from the property. In October 2004 they received correspondence from SHL stating that some of the houses on the estate had developed problems which were isolated to one area and could be repaired by decoration. They reported the position to their insurance company who started monitoring the conservatory and front elevation of the property after they had reported the problems to them. In due course in June 2008 they accepted a settlement from the insurers in respect of the conservatory rather than have remedial works carried out because they were concerned that the work, for which they obtained a quote from Roger Bullivant, might cause damage to their property or the property next door. Mrs Dobson says that as part of the settlement their insurers, Legal and General initially removed buildings cover from their policy but this was reinstated although subsidence cover has been excluded. They also have to pay an excess of £1,000.

374. In early 2005 they received further correspondence from SHL which stated that all the houses on the Estate would be the subject of an inspection and structural survey to provide owners with peace of mind. On 20 May 2005 BSCP carried out a visual inspection of the property and stated "*a few minor cracks in the brickwork were recorded, none of them was considered to be serious. All of the ceilings were free from defects and any unusual cracking.*" They said that in view of those comments they considered that no further action was necessary.

375. On 27 September 2005 BSCP carried out a further inspection which was requested by Mrs Dobson following the discovery of a new crack at the front of the house. They commented as follows: "*the crack reported by Mrs Dobson is a vertical crack through one brick and a perpend joint below DPC level on the left-hand gable near the front corner. Otherwise, cracking does not appear to have worsened since our last visit. Some minor cracking was recorded between the front door and the kitchen window. Internally a slight ridge was recorded in the kitchen ceiling and a crack in the bathroom ceiling. Minor cracking was also recorded around the bathroom and ensuite windows*."

376. On this basis BSCP recommended that the property be re-inspected in 4 months time. Mr and Mrs Dobson were not satisfied with what they had obtained and wrote to Mr Murray at SHL. When they had received letters from him dated 24 and 26 January 2006 they wrote to say this:

> "*You state in your letter that we have been provided with updates on numerous occasions. These updates are merely snippets of information that you deem fit to share with us and despite requests through your helpline for additional information, such as a written guarantee for our insurance company that our house is structurally sound you didn't feel able to provide this information, only referring to the "scant" report we received from you following one of the two visual inspections carried out by BSCP.*"

377. On 23 February 2006 BSCP carried out a review inspection of the property. They reported "*cracking in the external brickwork is very minor and does not appear to have worsened since our last visit. The cracking at the junction of the conservatory and the main house does appear to have increased slightly, particularly at the left hand corner of the main house.*" They said that this was because of differential

settlement of the conservatory foundation which was not piled. They also stated: "a number of very fine cracks and ridges have developed in both ground and first floor ceilings since our previous visit. Whilst these are very minor at present they may be the result of some settlement."

378. In view of the slight increase in internal cracking they recommended that the property should be re-inspected in 4 months' time. On 28 February 2006 Mr Picken wrote to Mr Hare to say that Mrs Dobson wanted to put her house up for sale and was asking if the 4 month review was vital and whether BSCP can say that their house was "ok". There was no recorded response. On 26 May 2006 loss adjusters on behalf of insurers wrote to Nabarro Nathanson confirming that their principals were building insurers but stated that the policy excluded from cover any loss or damage arising from defective design, defective materials or faulty workmanship.

379. On 4 July 2006 BSCP carried out a further inspection and commented in paragraph 1: "*Cracking has now developed in the front elevation since our last inspection. Fine stepped cracking was recorded to the right of the kitchen window which is now being monitored by the owners insurers using DEMEC studs.*" They referred in paragraphs 2 to 8 and 10 to further cracks and concluded: "*in view of the above we now consider this property should be monitored using DEMEC studs over cracks and measured using callipers on a two monthly basis for up to 12 months*."

380. On 29 March 2007 NHBC confirmed that they had received a claim relating to possible foundation failure. On 15 July 2007, following the judgment in the ENCIA litigation, Mr and Mrs Dobson wrote to Mr Murray at SHL raising their concerns.

The Encia Litigation

381. In the Encia judgment at paragraphs 534 to 537 Jackson J said:

> "*534 This is a Langdale house. It stands in an area of negative skin friction. It has 13 piles, of which ten have factors of safety below 1.*
> *535 The property has suffered only minor damage. The horizontal tilt is 10 millimetres and the vertical tilt is 5 millimetres.*
> *536 Mr Johnson classifies this property as blue. Mr Newman classifies this property as purple, but would reclassify it blue if (as has happened) SHL succeeds on the CAPWAP issue. On that basis both experts recommend further monitoring. However, the only remedial works that may be required are cosmetic (see the evidence of Mr Johnson at Day 7, page 91).*
> *537 In the course of his closing speech Mr Cavender reminded me that monitoring is an expensive process. He submitted that there is no point in monitoring simply for the purpose of future cosmetic works. I see force in that submission. My decision in respect of plot 20 is that the foundations are inadequate, but only to a slight degree. The only remedial works are cosmetic repairs, to be undertaken if and when necessary.*"

Engineering expert evidence

382. In the Joint Statement of the engineering experts in these proceedings the experts set out the damage observed in this property and in terms of levels at the property they stated: "*The maximum recorded difference between the high point and the low point on the damp proof course is 11mm.The levels of the corners of the property have been*

regularly monitored since May 2008 and the variation in tilt has been generally +/- 2 mm."

383. In terms of present remediation, in the Joint Statement the engineering experts agreed that "*an acceptable level of remediation in order to rectify damage to the fabric of the building would be repointing of the external brickwork and sealing and redecoration of the internal observed features with some masonry replacement where the cracking has extended through brick units.*" So far as future remediation was concerned the experts agreed that "*if the property continues to behave as it has in the past then the level of the damage incurred in the future will be no more than that seen up to the present date*". Mr Taylor considered that "*if the structure behaves as it has in the past, the level of future damage will be of the same order as that which Mr Taylor considers has been caused by foundation movement to date*". They agreed that "*we anticipate that the structure will continue to behave as it has in the past*" and that "*it is likely any future damage can be repaired in a similar manner to the repair work that we recommend now*".

384. For this house the Summary Sheet showed estimated ground movement between 2002 and 2010 of 5 mm with predicted further movement between 2010 and 2032 of 10 mm. This gives a total movement of 15 mm. The FOS (A) and FOS (B) figures for the majority of the piles at this property were near to or below 1.0. At the front right hand corner of the property there are four or five piles with higher factors of safety, otherwise the values of FOS(A)/FOS(B) for the piles vary from 1.36/0.95 to 0.71/0.42. The predicted future movement of the piles at this property varies from some 3 mm to some 15 mm due to spring stiffness and generally some 10 mm for settlement due to negative skin friction.

385. It was common ground that with piles with such a low factor of safety some of the support would be being provided by the ground beams. Those ground beams would be affected by any future settlement of the ground which would cause load to go onto the piles which would then settle and redistribute loads and stresses.

386. Mr Johnson thought that there would be 5 to 10 mm of further settlement with minor cracking and there was no safety issue and no risk of a major failure. Mr Taylor considered that any future movement was likely to be small and over a long period of time but he considered that there would be cracking. He thought stability of the structure might not be a problem but there would be further ongoing cracking greater than had been seen to date.

387. The property had shown a number of perpend cracks and stepped cracks and there were two Demec gauges fitted. There were cracks around lintels and keystones. Whilst Mr Johnson thought that most of the features were caused by things other than foundation movement he considered that the evidence showed small increases in damage consistent with pile foundations with a factor of safety of one or thereabouts which are settling, taking up the load and doing so very slowly.

388. When asked about the worst properties, the experts thought that, in addition to the property on plot 15, this was a near competitor.

Conclusion on the Property

389. The piles at this property have low factors of safety and the ground is likely to settle a further 10mm with pile settlements of some 15 to 20mm. The future pile settlements will cause further movement of the ground beams and redistribution of the stresses within the structure. This will give rise to further future cracking. Mr Johnson's view was that there was only a remote probability of significant movements in the future.

390. This is a property where there is a significant risk of future pile settlement which will cause movement of the structure. There is a remote risk or probability of significant movements in the future. It is likely that the level of damage in the future will be no more than seen at present.

391. The experts are agreed that this property comes close to Plot 15 for being the worst of the lead properties.

Limitation

392. At paragraph 52A of the Re-Amended Defence SHL pleads a limitation defence, including one in respect of Plot 20.

393. The Claimants say that, for Plot 20, exchange of contracts took place on 15 February 2002, construction was completed in June 2002 (as evidenced by BSCP's report dated 23 June 2005) and conveyancing completion occurred on 21 June 2002. The Claim Form was issued on 29 February 2008.

394. I accept that and I accept SHL was in continuing breach of clause 7.1 of the agreement up to and on the date of completion of the works in June 2002 which was also the time of legal completion of the transaction. On that basis, the 6 year period under section 5 of the Limitation Act 1980 did not expire until June 2008 and the Claim Form was issued within that period. Accordingly, there is no limitation defence to the contractual claim.

Diminution in value

395. This property should be treated so far as diminution in value as being an unmortgageable property. On that basis, the value of the property without the problems would be £235,000 as set out above based on the evidence of the valuation experts. The current value is £119,000. The diminution in value is £116,000.

Cost of minor remedial work

396. I find that except for refixing the stringer bead all the defects in the property on Mr Taylor's list were caused or contributed to by the pile settlement and movement of the structure.

397. I consider that I should make allowance for this level of work to be carried out twice in the next 20 years, although it may in fact be carried out gradually over that period. I consider that this will be in addition to any redecoration or repair which may be carried out and will not affect the diminution of value. I allow an additional 1.3 times the current cost of carrying out the defects identified above.

398. As set out above I cannot at present put a value on this head of quantum.

Distress inconvenience and loss of amenity

399. By September 2005 the Dobsons knew that there were defects in their property and that the problems on the Estate were quite serious. Reports were made initially by BSCP in September 2005, February 2006 and July 2006. Monitoring has been carried out. Up to the date of trial I propose to allow the modest sum of £1,400 for nearly five years of the distress, inconvenience and loss of amenity caused by cracks in the house, inspections and monitoring and the inconvenience of the defects in the external areas.

400. There will be future distress, inconvenience and loss of amenity because of the need for the internal and external remedial work and future monitoring. I propose to allow £3,000 to represent a sum to compensate for that, making allowance for the present receipt of the sum without any discounting.

Increased costs or wasted expenditure

401. These claimants claim the cost of repairing defects in the ensuite bathroom, redecoration and repairs. They claim £50 and £1500. I am satisfied that the Dobsons did incur expenditure on that but there is a lack of documents to establish what cost was incurred. I allow £775.

402. In relation to the claim for increased mortgage costs, I am satisfied that there was an unsuccessful attempt to remortgage and do not consider that there was an obligation on Mrs Dobson to obtain a structural survey to remortgage as SHL submit she should. However, I accept the position as summarised by SHL at paragraph 118(b) of their Closing Submissions. The available documentation indicates a 0.5% difference in rates, which on an approximate mortgage loan amount of £140,000 amounts to an annual saving of £700, or a total of £2,800 over four years, reduced to £800 after deduction of the £2,000 arrangement fee which would have been necessary. I therefore allow £800.

403. As to any future loss, I consider that I should allow for another four years at £2400 as being a reasonable assessment of the loss going forward.

VAT and Interest

404. To the extent that VAT and interest are claimed, I have not allowed for them and invite further submissions.

Work to external areas

405. For the reasons set out above I have not made any award of damages pending further submissions.

Damages

406. In the light of the matters set out above, the damages that I award are as follows:

(1) Special Damages

(a)	Increased costs or wasted expenditure:	£775.00
(b)	Additional mortgage payments:	£800.00
(c)	Increased insurance cost:	£ nil

(2) General damages for distress, inconvenience and loss

	of amenity to date of trial:		£1,400.00
(3)	Cost of minor remedial works on property:		To be determined
(4)	Diminution in value:		£116,000.00
(5)	Future loss:		
	(a)	Repairs and redecoration:	To be determined
	(b)	Maintenance due to ground movement	£ nil
	(c)	General damages for future distress, inconvenience and loss of amenity:	£3,000.00
	(d)	Additional mortgage payments:	£2,400.00
	(e)	Increased insurance cost:	£ nil
	Total:		£124,375

Mr and Mrs Frostwick Plot 34 (25 Clover Drive)
Background

407. Mr and Mrs Frostwick bought the property from Mr Donnelly on 9 June 2003, Mr Donnelly having purchased it from SHL. The Frostwicks had a conservatory constructed at the rear of the premises. After moving in Mrs Frostwick explained that she and her husband undertook in 2004 and 2005 a fairly extensive process of redecoration in the house.

408. On 1 June 2005 BSCP carried out a visual inspection and stated that "*whilst minor isolated cracking was noted in external brickwork it is not considered to be settlement related*". They noted cracking in the conservatory which was not part of the original SHL work. In view of those comments they considered no further action was necessary.

409. Mr and Mrs Frostwick became concerned about a vertical crack in their gable wall and asked for it to be inspected. In about October 2005 BSCP inspected the property and stated as follows:

> "*(1) a fine vertical crack through bricks and perpends has recently occurred in the left hand gable, half a brick in from the front corner. The crack starts about 6 courses above ground level and continues for about 2 metres. This crack may be settlement related. All other external cracking was recorded during our first inspection and does not appear to have worsened. (2) Cracking in the kitchen ceiling has worsened slightly.*"

410. They recommended a further inspection in 4 months' time. On 13 February 2006 BSCP carried out a further inspection and stated that the cracks noted during their inspection on 27 September 2005 had not worsened. They said "*a fine crack has developed in the ceiling of the ensuite to bedroom one. The householder is also complaining about creaking floorboards in bedrooms one and two. A fine crack is visible at DPC level on the right hand side of the garage door. This crack continues round in the right hand elevation for a short distance. The vertical crack in the left-hand gable described in our letter/report dated 6 October 2005, could be due to settlement or due to the disposition of the wall ties.*" In view of those comments they

recommended that a boroscope survey should be carried out close to the front corner of the left hand gable.

411. In April 2006 BSCP carried out that boroscope survey but said that they did not consider that fine vertical cracks through bricks and mortar close to the corner in the left hand elevation were due to any problems with the wall ties. They said that the crack did not appear to have worsened since their last visit.

412. Mrs Frostwick said that in November 2006 her husband was made redundant and had they been living in a normal estate they would have sold their property and downsized as it was difficult during that time to make the mortgage payments. She said that they had invested all their savings into the property because they thought that was a sensible move at the time. She says that they had hoped to retire abroad and buy a house in Spain and use the proceeds left over to give their children some help through University. She said that now that selling the property was becoming a real issue the stress was difficult for her and her husband to take but luckily her husband was able to find work again reasonably quickly.

The Encia litigation

413. In the Encia judgment at paragraphs 534 to 537 Jackson J said:

"*569. ...It stands in an area of negative skin friction. It has 16 piles. They all have factors of safety above 1.5, except for pile C3, which has a factor of safety of 1.42.*

570 This house has suffered minimal damage and very little tilt. Mr Johnson classifies the house blue. Mr Newman classifies the house purple.

571 On the factual and expert evidence before the court, SHL has failed to prove its case in respect of plot 34. I hold that the foundations are adequate."

Engineering expert evidence

414. In the Joint Statement of the engineering experts in these proceedings the experts summarised the damage observed in this property as: "*The cracking is generally fine and of a minor nature. There are only two fine stepped cracks but in different locations on the front elevation.*" In terms of levels at the property they stated: "*The maximum recorded difference between the high point and the low point on the damp proof course is 13 mm. The levels of the corners of the property have been regularly monitored since February 2008 and the variation in tilt has been generally +/- 1mm.*"

415. In terms of present remediation, in the Joint Statement the engineering experts agreed that "*an acceptable level of remediation in order to rectify damage to the fabric of the building would be repointing of the external brickwork and sealing and redecoration of the internal observed features with some masonry replacement where the cracking has extended through brick units.*" So far as future remediation was concerned the experts agreed that "*if the property continues to behave as it has in the past then the level of the damage incurred in the future will be no more than seen up to the present date*". Mr Taylor considered that "*if the structure behaves as it has in the past, the level of future damage will be of the same order as that which Mr Taylor considers has been caused by foundation movement to date*". Mr Johnson said that "*it is likely*

that the structure will continue to behave as it has in the past". They agreed that "*it is likely any future damage can be repaired in a similar manner to the repair work that we recommend now.*"

416. The Summary Sheet shows that so far as estimated ground movement is concerned there has been ground movement between 2002 and 2010 of 12mm and there is predicted further ground movement of 21mm, giving a total of 33mm. The factors of safety on the piles are generally high, the minimum value of FOS(A) being 1.99 and of FOS(B) being 1.42. The predicted movements of the piles are up to 6mm due to spring stiffness.

417. On this Property there was a vertical crack in the gable wall which was identified by BSCP in 2005 as being possibly settlement related. It had not worsened between that inspection and an inspection in March 2006. Mr Johnson did not think that it was likely to be settlement related whereas Mr Taylor thought it was. There had been a boroscope survey carried out to identify whether the cracking and settlement could be caused by the disposition of the wall ties but the investigation had found this not to be the case.

418. Mr Johnson said that the evidence showed that the ground movements were very small which suggested that negative skin friction loads had not yet developed but would develop in the future, in the next 10 to 20 years. He thought this would create some small movements of the foundations but the piles all had relatively high factors of safety so that there would only be small changes and small differences in movement. Mr Taylor agreed that the full effect of negative skin friction had not been developed to date but that it would develop. He considered that it would cause further redistribution of loads between the piles and some more cracking. Mr Taylor considered that the cracking in the property was again inconsistent with the factors of safety predicted for the piles. Mr Johnson thought that any damage on the rear elevation was not settlement related and so there was no inconsistency.

419. In relation to the piles, Mr Taylor raised an issue about the slenderness ratio of the piles but considered that if there had been a problem with the slenderness ratio it would probably have been shown up when the piles were driven.

420. The property showed a number of perpend cracks together with fine or finer cracking in addition to the crack in the gable wall.

Conclusion on the Property

421. The piles at this property have generally high factors of safety. The ground is likely to settle a further 21mm with pile settlements of up to 6mm due to spring stiffness. The further ground movement is likely to induce negative skin friction which could lead to further small movements. Mr Taylor has concerns that the cracking to the gable wall may be due to foundation movement and on balance I consider that to be justified, given that the boroscope survey showed no defect in workmanship. The future pile settlements will cause further small movement of the ground beams and redistribution of the stresses within the structure. This will give rise to further future cracking. Mr Johnson's view was that the probability of any future significant movement is extremely remote.

422. This is a property where there is a significant risk of future pile settlement which will cause small movement of the structure. There is an extremely remote risk or probability of significant movements in the future. It is likely that the level of damage in the future will be no more than seen at present. The gable wall defect is a matter of concern but there is no current movement.

423. I would place this property in the middle of the lead properties in terms of the seriousness of the movements and the damage.

Diminution in value

424. This property should be treated so far as diminution in value as being half way between an unmortgageable and mortgageable property. Much will depend on the view of the mortgage lender's engineer on the gable wall crack when there is a sale. On that basis, the value of the property without the problems would be £185,000 as agreed by the valuation experts. The current value would be £99,000 if unmortgageable and £124,875 if mortgageable and I assess the value at mid way between those values at £111,937.50. The diminution in value is therefore £73,062.50

Cost of minor remedial work

425. I find that all the defects in the property on Mr Taylor's list were caused or contributed to by the pile settlement and movement of the structure. The need for remedial work to the floor to Bedroom 1 which I saw on the view is likely to be because of movement of the structure.

426. I consider that I should make allowance for this level of work to be carried out twice in the next 20 years, although it may in fact be carried out gradually over that period. I consider that this will be in addition to any redecoration or repair which may be carried out and will not affect the diminution of value. I allow an additional 1.3 times the current cost of carrying out the defects identified above.

427. As set out above I cannot at present put a value on this head of quantum.

Distress inconvenience and loss of amenity

428. By October 2005 the Frostwicks had become concerned about the crack in the gable wall. Reports were made initially by BSCP in October 2005, February 2006 and April 2006. Monitoring has been carried out. Up to the date of trial I propose to allow the modest sum of £1,450 for nearly five years of the distress, inconvenience and loss of amenity caused by cracks in the house, inspections and monitoring and the inconvenience of the defects in the external areas.

429. There will be future distress, inconvenience and loss of amenity because of the need for the internal and external remedial work. I propose to allow £2,500 to represent a sum to compensate for that, making allowance for the present receipt of the sum without any discounting.

Increased costs or wasted expenditure

430. These Claimants claim the cost of bathroom flooring, decorating costs, additional decorating costs, repairs to patio, landscaping including patio, decking, driveway costs and flooring in hallway. I consider that the bathroom flooring additional decorating costs and driveway costs are costs which arise because of the claims for

the defective foundations. The others do not because they are not related to foundation movement or are costs incurred as Mrs Frostwick said in her statement to decorate the house to their taste in 2004/2005. I am satisfied that the Frostwicks did incur expenditure on those items and I accept the sum of £547 for the redecorating costs for which there is documentary evidence. For the other items given the lack of documents I allow £410. Overall I allow £957.

VAT and Interest

431. To the extent that VAT and interest are claimed, I have not allowed for them and invite further submissions.

Work to external areas

432. For the reasons set out above I have not made any award of damages pending further submissions.

Damages

433. In the light of the matters set out above, the damages that I award are as follows:

(1)	Special Damages		
	(a)	Increased costs or wasted expenditure:	£957.00
	(b)	Additional mortgage payments:	£ nil
	(c)	Increased insurance cost:	£ nil
(2)	General damages for distress, inconvenience and loss of amenity to date of trial:		£1,450.00
(3)	Cost of minor remedial works on property:		To be determined
(4)	Diminution in value:		£73,062.50
(5)	Future loss:		
	(a)	Repairs and redecoration:	To be determined
	(b)	Maintenance due to ground movement	£ nil
	(c)	General damages for future distress, inconvenience and loss of amenity:	£2,500.00
	(d)	Additional mortgage payments:	£ nil
	(e)	Increased insurance cost:	£ nil
	Total:		£77,969.50

Mr and Mrs Simpson Plot 39 (15 Clover Drive)
Background

434. This is an Ashbrook house. Mr Michael Simpson, who gave evidence, said that he and his wife became aware of Eden Park around late 2001. He said that they were originally attracted for a number of reasons, primarily, it was the investment potential of buying a property on the Estate as it was in the up-market area of Park Ward. He said that it was in the catchment area for Westpark Junior School and High Tunstall which are the best schools in the area. He also said that he wanted to buy on the Estate because the houses were all 4 or 5 bedroom executive houses and there was only one

entrance road which limited the number of houses that could be built on the estate as well as the incoming traffic. He said that it made the Estate more exclusive and safer for children.

435. Mr Simpson said that his wife and he had a long-term plan that if they were going to buy a property such as one of those on the Estate and if it made a good return they would sell it and buy another smaller house in England with no mortgage and a holiday home in France. He said that he envisaged at the time that if they received £196,000 for the property then they would be able to realise their dreams. He said they sold their existing house for £79,000 and paid SHL £120,000.

436. They moved into the property in May 2002 and except for a few snagging issues were happy with the house. In about September 2002 they landscaped their garden including re-turfing the garden and building a retaining wall and patio. In October 2002 they decided to add a conservatory at the rear of the property and were in the process of instructing a local builder to begin work when they discovered that a number of people on the Estate were having problems with their conservatories cracking and subsiding. He said that they had not noticed any real problem with their property except that some cracks had appeared internally in the ceiling and stairs. He said that there had also been some rucking of the ceiling tapes. He reported this to the site office and they gave him some more paint to cover up the cracking and glue down the tape.

437. In May 2003 they decided they wanted to sell up and buy a house in France. It was his wife, Madeleine's lifelong dream to live in France as her family were French. They put their property on the market in May 2003 with Whitegates. He then switched to Dennis Dowens who originally valued the property at £210,000. However, in an effort to sell the property quickly, they put it on the market for £196,000 and they had a few viewings and some interest. However he says that only a few weeks after putting the property on the market newspaper articles began to appear about problems with some of the houses. He said he was concerned that nothing was happening at all and started to get concerned. He went back to Whitegates in 2004 and then finally to Robinsons in April 2005. He said that Robinsons advised him to drop the price but this did not seem to work. He said they ended up marketing the property for nearly £45,000 less than its original valuation but no one was interested.

438. Mr Simpson said that by November 2005 SHL had begun working on the properties they had bought back and they had no viewings for their house, let alone offers. He said that in March 2006 after the property had been on the market nearly 3 years they again contacted Whitegates to ask whether it was worth having another go at a sale. He said they told them that they were unlikely to get any viewings as they were finding it very difficult to persuade potential buyers to even view properties on Eden Park. He said he was advised by the valuer at Whitegates that the property was only likely to sell if it was considered a bargain to potential buyers and was placed on the market for between £160,000 and £180,000. He said that, given that house prices had risen elsewhere, they could not afford to sell the property for such a low amount as they would not have been able to buy anywhere else.

439. He said that during the period the property was on the open market they tried to part exchange with other builders who were in the local area. He said he contacted

Persimmon Homes but having met the sales agent on a number of occasions during Summer 2005 he was eventually told that Persimmon would not consider part exchanging any Eden Park properties. He then approached Bellway Homes who instantly refused to part-exchange. He approached Bryant Homes and on 29 August 2005 it was agreed that Bryant Homes would part exchange their property for their show home that was priced at £279,000. He disclosed that there were faults with some of the properties on the Estate which were being dealt with by SHL but pointed out that his property was not one of the properties currently being repaired or involved in any remedial works. He was given the green light to proceed with part exchange and paid a deposit. He proceeded through the house evaluation stage and the property was valued on 1 September 2005. He said that at approximately 4pm on 1 September 2005 Bryant Homes telephoned him and cancelled the purchase/part exchange agreement. He says that the valuation report said that Bryant Homes should not touch his property as its value is estimated at below £175,000.

440. Mr Simpson said he made another attempt to part exchange the property with Alexander Homes but was told they would not proceed with the part exchange. He also tried to carry out further part exchanges but was verbally informed by sales agents that they would not consider part exchanging with properties on Eden Park because of the problems with them. He said that by this stage they were becoming desperate to sell and they approached National House Buyers who offered £190,000 for the property. He said that they were so desperate they were seriously considering accepting this offer however National House Buyers withdrew it when they discovered the problems on the Estate. He said he then began to realise that they were not going to be able to sell their property and realise their dream to buy a property in France because the housing market in France was rising dramatically. He said that he was still attempting to part exchange the property and in April 2007 considered taking on a very expensive mortgage to part exchange with a large Bellway Homes house but they refused to proceed with it.

441. Then he contacted companies specialising in buying difficult properties who valued the property at £155,000 in July 2007 and in November 2008 at £150,000 for the property as it was and £195,000 maximum if the foundations were fixed. He said that the property was still on the market and the asking price was being reduced every week. By December 2008 it was on the market for £150,000 but there were no viewings or offers made. He decided to see if he could persuade someone to buy it and he reduced the asking price by £20,000 every few weeks over the course of a few months. It was not until the asking price reached £100,000 that he had any interest at all. He then had two interested parties but quickly realised that they were offering sums on the basis that the property had been remediated.

442. On 20 May 2005 the property was visually inspected by BSCP who stated "*a few minor cracks in the brickwork were recorded, none of them was considered to be serious. Thermal movement and/or shrinkage were considered to be the likely cause. Minor cracking of the ceiling was noted in the main bedroom and second bedroom but not considered to be serious.*" In view of those comments they considered that no further action was necessary.

443. BSCP carried out a further inspection on 13 April 2006 when informed of problems. BSCP confirmed that there was a noticeable slope on the bathroom floor underneath the bath.

444. On 29 March 2007 NHBC informed Mr Simpson that they had been notified of a claim relating to possible foundation failure. On 17 June 2008 NHBC appointed Clancy Consulting, a firm of structural engineers, to investigate the property.

The Encia litigation

445. In the Encia judgment at paragraphs 577 and 578 Jackson J said:

> "*577. ... It stands in an area where negative skin friction probably does not apply. All piles have adequate factors of safety. Both experts classify this house as purple. They agree that the very minor settlement related damage at this house could be within the normal range of foundation settlement.*
> *578. I hold that the foundations of plot 39 are adequate.*"

Engineering expert evidence

446. In the Joint Statement of the engineering experts in these proceedings the experts summarised the damage observed in this property as: "*The cracking is generally fine and of a minor nature*". In terms of levels at the property they stated: "*The maximum recorded difference between the high point and the low point on the damp-proof course is 4mm. The levels of the corners of the property have been regularly monitored since July 2008 and the variation in tilt has been generally +/-1mm*".

447. In terms of present remediation, in the Joint Statement the engineering experts agreed that "*an acceptable level of remediation in order to rectify damage to the fabric of the building would be the repointing of the external brickwork and sealing and redecoration of the internal observed features and the replacement of cracked bricks. The brick with a fine crack on the right hand elevation associated with a spall could be replaced but this may cause greater levels of damage*". So far as future remediation was concerned the experts agreed that "*if the property continues to behave as it has in the past then the level of the damage incurred in the future will be no more than seen up to the present date*". Mr Taylor considered that "*if the structure behaves as it has in the past, the level of future damage will be of the same order as that which Mr Taylor considers has been caused by foundation movement to date*". They agreed that "*we anticipate that the structure will continue to behave as it has in the past*". They agreed that "*it is likely any future damage can be repaired in a similar manner to the repair work that we recommend now*".

448. For this property the Summary Sheet shows estimated ground movement between 2002 and 2010 of 7mm with 13mm of predicted further movement between 2010 and 2032. The overall movement therefore being 20mm. The piles at this property generally have factors of safety of above 1.4, with a number of exceptions, in particular certain internal piles. In terms of movement of the piles, movements of the order of 1mm to 5mm are predicted due to spring stiffness but with no further movement due to negative skin friction.

449. Mr Taylor considered that the ground beams may or may not be settling but he was in doubt in terms of what may happen in the future. He thought it was probable that any

latent defects would have identified themselves by now, but there was always the possibility that they might be revealed at a later date. He thought there would be continuing ground movement with greater distribution of load between piles and ground beams and a risk of slightly greater cracking than has been observed to date. He would put it in a low category in terms of risk.

450. Mr Johnson said he did not have any real concerns for the long term future of the property. He said the overall factor of safety of the piles was just short of 2.0 with a few piles with smaller factors of safety. He said this suggested to him that if there were some negative skin friction load in future there would be a small amount of redistribution of loads and some potential cracking. He thought that one or two piles may have settled slightly more than usual but there was no significant risk going forwards.

451. In terms of cracking there was some fine cracking. There was a crack in a perpend to the right elevation at the rear of the house which had a Demec gauge. Across the rear elevation there was a degree of fine horizontal cracking.

452. Mr Taylor thought that this property was similar to that on Plot 43 which he thought was the least bad and Mr Johnson agreed.

Conclusion on the Property

453. The piles at this property have generally high factors of safety. The ground is likely to settle a further 13mm with pile settlements of up to 5mm due to spring stiffness. Some small further ground movement due to negative skin friction could lead to further small movements. The future pile settlements will cause further small movement of the ground beams and redistribution of the stresses within the structure. This will give rise to further future cracking. Mr Johnson's view was that the probability of any future significant movement is extremely remote.

454. This is a property where there is a significant risk of future pile settlement which will cause small movement of the structure. There is an extremely remote risk or probability of significant movements in the future. It is likely that the level of damage in the future will be no more than seen at present.

455. The experts placed this property with Plot 43 as of the least bad of the lead properties in terms of the seriousness of the movements and the damage.

Diminution in value

456. This property should be treated so far as diminution in value as being a mortgageable property. On that basis, the value of the property without the problems would be £193,000 as agreed by the valuation experts. The current value as a mortgageable property is £130,275. The diminution in value is therefore £62,725.

Cost of minor remedial work

457. I find that all the defects in the property on Mr Taylor's list were caused or contributed to by the pile settlement and movement of the structure.

458. I consider that I should make allowance for this level of work to be carried out twice in the next 20 years, although it may in fact be carried out gradually over that period. I

consider that this will be in addition to any redecoration or repair which may be carried out and will not affect the diminution of value. I allow an additional 1.3 times the current cost of carrying out the defects identified above.

459. As set out above I cannot at present put a value on this head of quantum.

Distress inconvenience and loss of amenity

460. By April 2006 the Simpsons had become concerned about the slope in the bathroom floors. Reports were made by BSCP in April 2006. Monitoring has been carried out. Up to the date of trial I propose to allow the modest sum of £1,200 for some four years of the distress, inconvenience and loss of amenity caused by cracks in the house, inspections and monitoring and the inconvenience of the defects in the external areas.

461. There will be future distress, inconvenience and loss of amenity because of the need for the internal and external remedial work. I propose to allow £2,000 to represent a sum to compensate for that, making allowance for the present receipt of the sum without any discounting.

Increased costs or wasted expenditure

462. These claimants claim the cost of landscaping and wasted plants and shrubs. I do not consider that these are costs which arise because of the claims for the defective foundations. Nor do I consider that the claim for 4 weeks' loss of earnings is recoverable under this head.

VAT and Interest

463. To the extent that VAT and interest are claimed, I have not allowed for them and invite further submissions.

Work to external areas

464. For the reasons set out above I have not made any award of damages pending further submissions.

Damages

465. In the light of the matters set out above, the damages that I award are as follows:

(1)	Special Damages		
	(a)	Increased costs or wasted expenditure:	£ nil
	(b)	Additional mortgage payments:	£ nil
	(c)	Increased insurance cost:	£ nil
(2)	General damages for distress, inconvenience and loss of amenity to date of trial:		£1,200.00
(3)	Cost of minor remedial works on property:		To be determined
(4)	Diminution in value:		£62,725.00
(5)	Future loss:		
	(a)	Repairs and redecoration:	To be determined
	(b)	Maintenance due to ground movement	£ nil

(c)	General damages for future distress, inconvenience and loss of amenity:	£2,000.00
(d)	Additional mortgage payments:	£ nil
(e)	Increased insurance cost:	£ nil
Total:		£65,925.00

Mr and Mrs Manners Plot 43 (7 Clover Drive)
Background

466. Mr David Manners, who gave evidence, said that in Spring of 2003 he was offered a job in Dubai. At the time his family were living in Welwyn, Hertfordshire. He and his wife, Susan Manners, decided to relocate their family to the North East where she was originally from. He said that because house prices were much lower in the North East than where they currently lived this meant they could sell their current family home and have sufficient capital to purchase two properties in Hartlepool with the help of a mortgage. He said this would enable them to rent out one of the properties and make a small income from that as well as securing two capital assets for their long term future. The other house, which was 7 Clover Drive, would act as a family home for when they returned from Dubai on holidays and eventually would become their family home for a period when his contract in Dubai was completed. He said that they eventually ended up buying two houses on the Eden Park Estate, one built by SHL and one built by Tay Homes.

467. He said he completed the purchase of the property at 7 Clover Drive in November 2003 for £209,950 and moved into the property in December 2003 when they returned from Dubai. He said they did experience some initial cracks and signs of movement however as the property was one of the last to be completed on the Estate he did not consider this was unusual and thought it was normal. However even on their first trip home they realised that there were people who were experiencing problems.

468. In 2005 he noticed more serious cracks in some of their rooms and in the garage. This was when the property was approximately 2 to 3 years old. He said they had reported some of the earlier problems to SHL who passed these to the contractors. In the summer of 2004 they decided to purchase a property at St Bega's Gate being constructed by Kibbell Homes Limited. In June 2004 they received an offer for part exchange on a property there and their own property was valued at an average of £275,000.

469. In July 2004 his contract in Dubai was extended until August 2005 and he said they decided to consider purchasing a house in Dubai. They therefore put both their properties on the market, putting 7 Clover Drive on the market in August/September 2004 with Robinsons for £275,000. He said they had no viewings on the property and eventually they lost the plot at St Bega's Gate which they had reserved. They received an offer on the Tay property and completed the sale of that house in March/April 2005. He said that they hoped still to buy one of Kibbell's properties but Kibbell stated that they would not part exchange for any house on the Eden Park Estate. He said that the property at 7 Clover Drive was on the market until 2007 when they decided to rent the property out as they could not afford to keep it empty for any longer.

470. The property was inspected on 19 May 2005 by BSCP. In their report it was stated that "*A few minor cracks in the brickwork were visible at a few points around the property but none of them was considered to be serious. Unusual cracking was evident in the ceilings of the property*". In view of those comments it was considered that no further action was necessary.

471. A further visit was carried out on 14 September 2005 as a result of the discovery of cracking in the left hand gable. BSCP commented "*the recent cracking referred to above was recorded in the left hand gable in an isolated area about two metres above ground level over a length of about 800 mm and is present in three courses of brickwork. The cracks are very fine and there is no apparent reason for the cracking.*" They commented that whilst the cracking did not appear to be settlement related they recommended the property be re-inspected in 4 months' time.

472. On 9 January 2006 BSCP carried out a further inspection. They stated that "…*the fine cracking in the left hand gable does not appear to have changed since our last inspection. Furthermore, we do not consider it to be settlement related.*" They recommended that apart from remedial work to the crack no further action was required.

The Encia litigation

473. In the Encia judgment at paragraph 579 Jackson J dealt with Plots 40 to 45 together and said:

> "*579. The experts have agreed that all these properties are yellow. Accordingly, I hold that the foundations are adequate.*"

Engineering expert evidence

474. In the Joint Statement of the engineering experts in these proceedings the experts summarised the damage observed in this property as: "*The cracking is generally fine and of a minor nature*". In terms of levels at the property they stated: "*The maximum recorded difference between the high point and the low point on the damp-proof course is 12mm. The levels of the corners of the property have been regularly monitored since July 2008 and the variation in tilt has been generally +/-1mm*".

475. In terms of present remediation, in the Joint Statement the engineering experts agreed that "*the level of remediation required now is re-pointing of the external brickwork and sealing and redecoration of the internal observed features*". So far as future remediation was concerned the experts agreed that "*if the property continues to behave as it has in the past then the level of the damage incurred in the future will be no more than seen up to the present date*". Mr Taylor considered that *if the structure behaves as it has in the past, the level of future damage will be of the same order as that which he considers has been caused by foundation movement to date*". They agreed that "*we anticipate that the structure will continue to behave as it has in the past*". They agreed that "*it is likely any future damage can be repaired in a similar manner to the repair work that we recommend now*".

476. For this property the Summary Sheet showed that the ground movement from 2002 to 2010 was 3mm with further movement predicted between 2010 and 2032 of 5mm, making a total of 8mm. The factors of safety, FOS(A) and FOS(B), were all above

1.0, with only two piles having factors of safety of less than 1.5. So far as future pile movements were concerned they were in the range of 1mm to 5mm due to spring stiffness without any contribution from negative skin friction.

477. The experts agree that this property was the least bad of the 10 properties. Mr Johnson thought there was no ongoing settlement at this property and it was highly unlikely there would be problems. He said the factors of safety of all the piles were, apart from two to three, good. The ground beams would be able to deal with the few piles with slightly lower factors of safety although there might be some slight movement of the structure to accommodate it. Mr Taylor thought that there were some piles which would probably settle a little bit more than they had done but, in his view, this was probably the most stable of the properties. This property had a number of fine cracks with some fine horizontal cracks on the rear elevation.

Conclusion on the Property

478. The piles at this property have generally high factors of safety. The ground is likely to settle a further 5mm with pile settlements of up to 5mm due to spring stiffness. The future pile settlements will cause further small movement of the ground beams and redistribution of the stresses within the structure. This will give rise to further future cracking. Mr Johnson's view was that the probability of any future significant movement is extremely remote.

479. This is a property where there is a significant risk of some future pile settlement which will cause small movement of the structure. There is an extremely remote risk or probability of significant movements in the future. It is likely that the level of damage in the future will be no more than seen at present.

480. The experts placed this property with Plot 39 as of the least bad of the lead properties in terms of the seriousness of the movements and the damage.

Diminution in value

481. This property should be treated so far as diminution in value as being a mortgageable property. On that basis, the value of the property without the problems would be £225,000 as agreed by the valuation experts. The current value as a mortgageable property is £151,875. The diminution in value is therefore £73,125.

Cost of minor remedial work

482. I find that all the defects in the property on Mr Taylor's list were caused or contributed to by the pile settlement and movement of the structure.

483. I consider that I should make allowance for this level of work to be carried out twice in the next 20 years, although it may in fact be carried out gradually over that period. I consider that this will be in addition to any redecoration or repair which may be carried out and will not affect the diminution of value. I allow an additional 1.3 times the current cost of carrying out the defects identified above.

484. As set out above I cannot at present put a value on this head of quantum.

Distress inconvenience and loss of amenity

485. By September 2005 the Manners had become concerned about defects in the property. Reports were made by BSCP in September 2005 and January 2006. Monitoring has been carried out. However, Mr Manners has been working in Dubai and his family have been there and the property was let in 2007. Up to the date of trial I propose to allow the very modest sum of £250 for over four years when there will have been some distress, inconvenience and loss of amenity caused by cracks in the house, inspections and monitoring and the inconvenience of the defects in the external areas.

486. On the basis that the property will be let I do not consider that there will be future distress, inconvenience and loss of amenity.

Increased costs or wasted expenditure

487. These Claimants claim the cost of wasted mortgage payments, wasted rental in Dubai, wasted payments to manage property because of flights and loss of earnings for both Mr and Mrs Manners. With the exception of the airfares to the UK to manage the property I do not consider that these are costs which arise because of the claims for the defective foundations. In his second witness statement Mr Manners re-assesses the sum for airfares as £7,450 for him and his wife to return to the UK. I consider that in the period between 2007 and 2009 there would need to be one or two visits in total which could be said to be caused by the matters claimed here. In the absence of any available records for the cost, but being satisfied that there were two such trips, I allow £1,000.

VAT and Interest

488. To the extent that VAT and interest are claimed, I have not allowed for them and invite further submissions.

Work to external areas

489. For the reasons set out above I have not made any award of damages pending further submissions.

Damages

490. In the light of the matters set out above, the damages that I award are as follows:

(1)	Special Damages		
	(a)	Increased costs or wasted expenditure:	£1,000.00
	(b)	Additional mortgage payments:	£ nil
	(c)	Increased insurance cost:	£ nil
(2)	General damages for distress, inconvenience and loss of amenity to date of trial:		£250.00
(3)	Cost of minor remedial works on property:		To be determined
(4)	Diminution in value:		£73,125.00
(5)	Future loss:		
	(a)	Repairs and redecoration:	To be determined
	(b)	Maintenance due to ground movement	£ nil
	(c)	General damages for future distress,	

	inconvenience and loss of amenity:	£ nil
(d)	Additional mortgage payments:	£ nil
(e)	Increased insurance cost:	£ nil
	Total:	£ 74,375.00

Mr and Mrs Willis Plot 50 (26 Meadowgate Drive)
Background

491. This is an Ashbrook house. Mrs Susan Willis, who gave evidence, stated that in or around August 2002 she and her husband became aware of the development at Eden Park and, having made the decision that they would like to move house, went to look at the properties. She said that they wished to set up a family home for the future. After viewing an Ashbrook House in Sunderland, they reserved the house at plot 50 on 1 September 2002. They completed the purchase on 21 February 2003 for £125,950. Shortly after moving into the property they decided to landscape the garden and laid a patio area and re-turfed the lawn. The Willis' first child was born in February 2004.

492. Mrs Willis was concerned at rumours about the problems on the Estate and on 9 May and 23 June 2004 wrote to SHL. On 15 June 2004 they instructed Robinsons to value the property with the intention of putting it up for sale. It was valued at £220,000. She said they were starting to feel very uncomfortable living on the Estate and even talked about renting it or part exchange options. In March/April 2004 the house at 9 Barley Close was bought back by SHL and in the summer of 2004 the house at 10 Barley Close was also bought back by SHL. Mrs Willis said that now that both properties to the rear of their property had been bought back by SHL due to cracking and settlement problems, the biggest investment of their lives was turning into a nightmare.

493. Mrs Willis said that it had never been their intention to live in the property for the rest of their lives but their plan was that they would move to the property and have a family so that the value in the property would give them options at a later date. Their second child was born in January 2005. She referred to an article in February 2005 in the Hartlepool Mail and Northern Echo which stated that SHL had bought back houses and that there were problems with the Estate.

494. On 11 February 2005 they decided to commission their own independent structural survey and appointed ASP Services. The report dated 16 February 2005 concluded as follows: "*Although there are concerns by those property owners in close proximity to the houses built and repurchased by Shepherd Homes, a two year period has elapsed on this property with no signs of foundation failure or major structural movement. The only defects noted were internally which one would inspect under a normal maintenance period of up to two years. These should cost no more than £750 to rectify. My final comments are that this report be placed with your legal documentation for the purchase of the property and three monthly checks should be carried out by the property owners internally and externally over the next 12 months. If during that period there is any cause for concern please contact ASP Services when we will re-inspect.*"

495. Mrs Willis said that in March 2005 they inspected their property and found cracking around the damp-proof course level and a number of other cracks in the brickwork at various locations throughout the property.

496. On 25 May 2005 BSCP inspected the house. They commented: "*On the front elevation, step cracking in the brickwork has occurred close to eaves level at the corner to the right hand side of the window of bedroom 1. The ridge tiles immediately above have been displaced upwards. These faults may have been caused by defective roof construction. An internal inspection should reveal the cause(s) of the problem. On the rear of the property cracking has occurred in the brickwork under the patio window, under the ensuite window and at the left hand side of the window of bedroom 1. A pattern of vertical cracks was also seen in the brickwork under the kitchen window. Fine horizontal cracks were recorded on the left-hand side elevation at DPC level and level with the top of the fire flue. No internal defects were noted other than the kitchen door being out of square.*" They said that in view of the comments made they considered that the property should be re-inspected in six months' time.

497. The property was re-inspected on the 13 September 2005 by BSCP who commented as follows: "*Some additional cracks were noted internally, particularly rucking at the walls/ceiling junctions in bedrooms 2, 3, and 4. Movement was recorded around the kitchen/hall door opening and it was noted that this door sticks. A very slight crack was noted along the DPC of the right hand gable. External cracking generally as previous visit it was noted that the cracking in the rear elevation below the first floor windows coincides with re-pointed scaffold putlog holes. The displaced roof tiles referred to in our previous report and the roof construction below have not yet been inspected. This should be done as a matter of urgency.*" They concluded that in view of the additional cracking recorded the property should be re-inspected in 4 months' time.

498. It was re-inspected on 14 February 2006 and BSCP stated "*on the front elevation, the displaced roof tiles and cracking in the wall below have been repaired. The repairs are not particularly good. The cracking is still visible in parts.*" It was stated that the cracks noted in the last report had been re-examined and it was found that there was little change except for the horizontal crack along the DPC on the right hand gable. It was stated "*this crack appears to have widened towards the centre of the elevation and could be the result of differential settlement of the piles underneath.*" In view of this development they recommended that the property should be re-inspected again in 4 months' time.

499. The property was re-inspected on 16 August 2006 by BSCP who commented "*the cracks recorded during our previous visit do not appear to have developed. Whilst the crack along the DPC and the right hand gable does not appear to have worsened, we consider a further inspection should be carried out in 4 months' time.*"

500. On 10 January 2007 BSCP visited the property again and said that, since none of the cracking appeared to be progressive, they recommended that the cracks should be repaired and that no further action should be necessary after the repairs had been carried out.

501. Mrs Willis said that by the end of November 2008 they had had enough and considered renting the property and moving elsewhere. However they could not re-mortgage the property to enable them to do this. By early 2008 they decided to look into the likely costs and work involved in converting the loft space and garage to give them the extra room that they needed. She said that they came out of their fixed deal with the Nationwide Building Society in February 2008 and after speaking to neighbours decided that there was no point in incurring time and expense in trying to find another provider and so stayed with the Nationwide.

502. She said that in February 2009 they tried to obtain new house insurance but each time they approached a provider they were told that it was not possible to obtain a quote.

The Encia litigation

503. In the Encia judgment at paragraphs 594 to 597 Jackson J said:

> "*594 ... It stands in an area where negative skin friction applies. It has 15 piles. Pile A3 has a factor of safety of 0.98. Seven other piles have factors of safety below 1.5.*
> *595 The house has 20 millimetres of horizontal tilt and 5 to 7 millimetres of vertical tilt. The house has sustained damage category 1 to 2 on the BRE scale comprising cracks and doors sticking. Some internal damage is in the vicinity of pile C2, which has a factor of safety of 1.19.*
> *596 Mr Johnson categorises this house as blue; so does Mr Newman in the event that Mr Johnson's factors of safety are accepted.*
> *597 My conclusion in respect of this property is that the foundations are inadequate. I put this property in the category "monitor and decide later".*"

Engineering expert evidence

504. In the Joint Statement of the engineering experts in these proceedings the experts summarised the damage observed in this property as: "*The cracking is generally fine and of a minor nature*". In terms of levels at the property they stated: "*The maximum recorded difference between the high point and the low point on the damp proof course is 19 mm. The levels of the corners of the property have been regularly monitored since April 2007 and the variation in tilt has generally been +/- 1mm*".

505. In terms of present remediation, in the Joint Statement the engineering experts agreed that "*the level of remediation required now is re-pointing of the external brickwork and sealing and redecoration of the internal observed features*". So far as future remediation was concerned the experts agreed that "*if the property continues to behave as it has in the past then the level of the damage incurred in the future will be no more than seen up to the present date*". Mr Taylor considered that "*if the structure behaves as it has in the past, the level of future damage will be of the same order as that which he considers has been caused by foundation movement to date*". They agreed that "*we anticipate that the structure will continue to behave as it has in the past*". They agreed that "*it is likely any future damage can be repaired in a similar manner to the repair work that we recommend now*".

506. At this property the Summary Sheet shows that there has been estimated ground movement of 66 mm between 2002 and 2010 and it was predicted that there would be further ground movement between 2010 and 2032 of 53 mm, making a total of 119

mm. So far as Factors of Safety were concerned FOS(A) varied between 1.38 and 6.03 with only one pile at 1.38, the next lowest being 1.66. In terms of FOS(B) this varied between 0.98 and 2.82, there being 8 piles with a factor of safety of less than 1.43. In terms of further individual pile movement due to spring stiffness the predicted movement was between 1 and 9.6 mm with possibly some further movement of 17 mm on the pile with the lowest factor of safety.

507. In his report for the Encia litigation Mr Johnson had said in relation to this property that there was a "*Low Factor of Safety of C2 and A3 and C3 with respect to surrounding piles. It may explain a lot of cracking internally in the hallway and doors out of level. This seems to be confirmed by dimensional survey, which shows very little movement with respect to corners of the property.*" Mr Johnson confirmed that in the case of A3 the FOS(B) was a little less than 1.0 and in the case of C2 and C3 FOS(B) was 1.19 and 1.24 respectively and so was lower than the adjoining piles.

508. The experts referred to the BSCP report of the inspection in June 2005 which noted cracking in the brickwork under the patio window, under the ensuite window and the left-hand side of the window of bedroom 1. Mr Taylor thought that all that cracking was associated with foundation movement. Mr Johnson confirmed that the cracking under the patio window, which was a stepped crack, was in an area where that type of crack would be expected if the central pile had gone down a little relative to the other piles and that pile was one with a low factor of safety. He could not say what the cause of the other cracking was. In a later survey in February 2007 there was a crack reported along the DPC. Mr Taylor thought it was associated with settlement of the foundations. Mr Johnson said that there appeared to have been some settlement leading to movement of the superstructure of the building. In relation to the statement that the horizontal crack along the DPC appeared to have widened towards the centre of the elevation, Mr Johnson thought that this could be as a result of differential settlement of the piles underneath.

509. Mr Johnson said that, whilst the emphasis had been on the pile with the lowest factor of safety, he thought there were two or three piles with low factors of safety so that it was possible that movements were not limited to that one pile but to a few other piles with a similar potential for long term movements. He said that if the factor of safety turned out to be lower than predicted there could be some long-term creep under negative skin friction loads which would have some very small redistribution of loading leading to very minor cracking or movements of the sort that had been noted on the internal structure. In terms of internal damage after February 2007 the experts accepted that there was no evidence of anything changing internally after the period of movement when the negative skin friction loads were being applied. They agreed that this house had been affected by negative skin friction but there was no evidence of any continuing movement afterwards.

Conclusion on the Property

510. There are a number of piles at this property which have factors of safety which are low. The ground is likely to settle a further 53mm with pile settlements of up to 17mm due to spring stiffness. Movement due to negative skin friction had already occurred. The future pile settlements will cause further small movement of the ground beams and redistribution of the stresses within the structure. This will give rise to

further future cracking. Mr Johnson's view was that the probability of any future significant movement is extremely remote.

511. This is a property where there is a significant risk of future pile settlement which will cause movement of the structure. There is an extremely remote risk or probability of significant movements in the future. It is likely that the level of damage in the future will be no more than seen at present and there was no evidence of continuing movement.

.

512. I would place this property in the same category as Plot 34, in the middle of the lead properties in terms of the seriousness of the movements and the damage.

Diminution in value

513. This property should be treated so far as diminution in value as being half way between an unmortgageable and mortgageable property. Much will depend on the view of the mortgage lender's engineer when there is a sale and the further movement has taken place. On that basis, the value of the property without the problems would be £195,000 as agreed by the valuation experts. The current value would be £102,000 if unmortgageable and £131,625 if mortgageable and I assess the value at mid way between those values at £116,812.50. The diminution in value is therefore £78,187.50

Cost of minor remedial work

514. I find that all the defects in the property on Mr Taylor's list were caused or contributed to by the pile settlement and movement of the structure with the exception of refixing the skirting in the kitchen, replacing the door to the ensuite bathroom to Bedroom 1 and refixing the timber string bead.

515. I consider that I should make allowance for this level of work to be carried out twice in the next 20 years, although it may in fact be carried out gradually over that period. I consider that this will be in addition to any redecoration or repair which may be carried out and will not affect the diminution of value. I allow an additional 1.3 times the current cost of carrying out the defects identified above.

516. As set out above I cannot at present put a value on this head of quantum.

Distress inconvenience and loss of amenity

517. By May 2005 the Willises had become concerned at defects in the property. Reports were made by BSCP in May 2005, September 2005, February 2006, August 2006 and January 2007. Monitoring has been carried out. Up to the date of trial I propose to allow the modest sum of £1,500 for some five years of the distress, inconvenience and loss of amenity caused by cracks in the house, inspections and monitoring and the inconvenience of the defects in the external areas.

518. There will be future distress, inconvenience and loss of amenity because of the need for the internal and external remedial work. I propose to allow £2,500 to represent a sum to compensate for that, making allowance for the present receipt of the sum without any discounting.

Increased costs or wasted expenditure

519. These claimants claim the cost of landscaping and wasted surveyor's fees and legal fees. I do not consider that these are costs which arise because of the claims for the defective foundations. Nor do I consider that the claim for 4 weeks' loss of earnings is recoverable under this head.

VAT and Interest

520. To the extent that VAT and interest are claimed, I have not allowed for them and invite further submissions.

Work to external areas

521. For the reasons set out above I have not made any award of damages pending further submissions.

Damages

522. In the light of the matters set out above, the damages that I award are as follows:

(1)	Special Damages		
	(a)	Increased costs or wasted expenditure:	£ nil
	(b)	Additional mortgage payments:	£ nil
	(c)	Increased insurance cost:	£ nil
(2)	General damages for distress, inconvenience and loss of amenity to date of trial:		£1,500.00
(3)	Cost of minor remedial works on property:		To be determined
(4)	Diminution in value:		£78,187.50
(5)	Future loss:		
	(a)	Repairs and redecoration:	To be determined
	(b)	Maintenance due to ground movement	£ nil
	(c)	General damages for future distress, inconvenience and loss of amenity:	£2,500.00
	(d)	Additional mortgage payments:	£ nil
	(e)	Increased insurance cost:	£ nil
	Total:		£82,187.50

Mr and Mrs Henderson Plot 59 (15 Hayfield Close)
Background

523. This is a Langdale house. Mr David Henderson, who gave evidence, stated that in around August 2002 he became aware of the Eden Park Development. Having decided that he and his wife would like to move home with their 12 month old daughter they decided to visit the development. They were looking for a house which could be their family home for the foreseeable future. They completed the purchase on 29 April 2003 at a price of £153,950, with a mortgage of £125,000. When they moved in they spent approximately £5,000 on landscaping the garden, installing decking, paved areas and a water feature and carrying out work to turf the garden and plant beds.

524. He said that in around June 2004 they became aware that a number of properties on the Estate were suffering structural problems and water logging. In a letter dated 3 February 2005 from Encia to SHL there were twelve properties identified by Knowles Technical Services as having problems that required remedial works. Mr Henderson says that given the problems that were identified with their property, the uncertainty of fully enjoying the house or making any return on further investment in the property and the fact that it appeared that little would be done by SHL to resolve the problems, they felt they should try and sell the property and make a new start elsewhere.

525. In around October 2005 they tried to part exchange the property with another house builder in the area, Charles Church. In a form completed for Charles Church by Mr Gregg, a local estate agent, the following was stated about their existing property: "*a very nice property but with sale prospects unfortunately likely to be blighted similarly to what other properties have experienced in the same development. Although there are no defects apparent and it is understood that the owners have a report to that effect from Shepherd Homes, confirmation of which should be obtained prior to any purchase*." Mr Henderson said that, on the basis of the valuations carried out, Charles Church refused to make an offer for their house. He said that all they wanted to do was to leave the Estate and move on with their lives but they felt trapped and extremely concerned that all of their life savings were locked into the property.

526. On 23 June 2005 BSCP inspected the property and reported "*one or two very minor cracks were observed in this property which are considered to be due to shrinkage and are not related to settlement.*" In view of this they considered that no further action was necessary.

527. BSCP again inspected the property on 23 June 2006 and found defects as listed in a letter dated 4 July 2006 at items (a) and (h). They said that the defects must have developed or become visible since their first inspection and in view of those developments they recommended the property be inspected again in 4 months' time. In response to further questions BSCP stated on 2 August 2006:

> "*(1) the cracking at DPC level which has appeared during July 2005 to June 2006 may be due to differential settlement of the piled foundations. This can take a long time to show visible signs of distress in the superstructure due to load shedding between the piles.*
> *(2) the next inspection is intended to see if there have been any visible signs of widening of the fine cracks at DPC level. Depending on what we see we may recommend that a Demec survey be undertaken at two monthly intervals to determine whether or not the cracking is progressive.*"

528. A further inspection was carried out on 17 November 2006 by BSCP who stated that the cracking referred to in their previous report did not appear to have worsened. However the report stated "*in the right-hand side gable fine vertical cracks were recorded in two perpend joints above DPC, near the front corner. There appears to be some rotation of the masonry below DPC at this corner.*" In view of this they recommended the property be re-inspected in 4 months' time.

529. Mr Henderson said that he notified the insurance company of the situation with the property and the investigations taking place. As set out on an endorsement dated the 7

March 2008 Bell Household made an endorsement on the certificate of insurance "subsidence cover has been excluded from this policy." He said that despite trying to change insurers as recently as May 2010 they received further confirmation from Sureplan Insurance that subsidence would never be covered for their property. He says that the house was remortgaged on 30 April 2008 and they stayed with their existing lender as they already had the risk associated with the property and they knew of a number of people who had experienced difficulty in remortgaging.

The Encia litigation

530. In the Encia judgment at paragraphs 615 to 617 Jackson J said this:

> "*615 ... It stands in an area of negative skin friction. It has 13 piles, one of which has a factor of safety of 0.95. Most other piles have factors of safety below 1.5. The tilt and damage sustained by this house are very slight. The experts have agreed that plot 59 is purple.*
> *616 In cross-examination Mr Johnson said it was difficult to conclude that the state of plot 59 was due to incompetent piling because the level of damage was so slight. Mr Newman reached the same conclusion more confidently.*
> *617 In my view the foundations of plot 59 are adequate.*"

Engineering expert evidence

531. In the Joint Statement of the engineering experts in these proceedings the experts summarised the damage observed in this property as: "*The cracking is generally fine and of a minor nature. There is only one fine stepped crack.*" In terms of levels at the property they stated: "*The maximum recorded difference between the high point and the low point on the damp-proof course is 10 mm. The levels of the corners of the property have been regularly monitored since July 2008 the variation in tilt has generally been +/- 1mm*".

532. In terms of present remediation, in the Joint Statement the engineering experts agreed that "*the level of remediation required now is re-pointing of the external brickwork, some masonry replacement where the cracking has extended through brick units and sealing and redecoration of the internal observed features.*" So far as future remediation was concerned the experts agreed that "*if the property continues to behave as it has in the past then the level of the damage incurred in the future will be no more than seen up to the present date*". Mr Taylor considered that "*if the structure behaves as it has in the past, the level of future damage will be of the same order as that which he considers has been caused by foundation movement to date*". They agreed that "*we anticipate that the structure will continue to behave as it has in the past*". They agreed that "*it is likely any future damage can be repaired in a similar manner to the repair work that we recommend now*".

533. The Summary Sheet shows that the estimated ground movement at this property was 63 mm between 2002 and 2010, with a further predicted movement between 2010 and 2032 of 45 mm, making a total movement of 108 mm. The factors of safety for the piles at this property have values of FOS(A) between 1.7 and 4.28 and of FOS(B) between 0.95 to 1.50, with many of the piles having factors of safety at or around 1 to 1.2. So far as the predicted future settlement of the piles is concerned, settlement due to spring stiffness varies between 6 and 17 mm with no additional movement due to further negative skin friction.

534. Mr Johnson thought that some of the cracking related to thermal effects but some could be related to small foundation movements associated with loads developed on the piles and some load shedding at the stage when the ground movement had passed the notional 25mm and negative skin friction loads had started. Mr Johnson thought there was a small possibility of some very small ongoing movements due to redistribution of loads but there was nothing that would cause significant structural damage or safety problems although it might cause some minor cracking.

535. The experts agreed that there had been sufficient ground movement to generate maximum skin friction and they also agreed that if there was any real cause for concern there would be much more substantial effects than those seen in the property. The experts agreed that on the current evidence there was no reason to suppose the property was not stable with its foundations performing as expected for any stable property. Mr Taylor agreed but said that it would be interesting to identify how sensitive the foundations are to any work which was to be carried out to plot 58 which was to be remediated. Mr Johnson's view was that, as with other properties, there would be movement of 1 or 2mm as had been noticed during remediation of adjacent properties.

Conclusion on the Property

536. There are many piles at this property which have factors of safety which are low. The ground is likely to settle a further 45mm with pile settlements of up to 17mm due to spring stiffness. Movement due to negative skin friction had already occurred. The future pile settlements will cause further small movement of the ground beams and redistribution of the stresses within the structure. This will give rise to further future cracking. Mr Johnson's view was that the probability of any future significant movement is extremely remote.

537. This is a property where there is a significant risk of future pile settlement which will cause movement of the structure. There is an extremely remote risk or probability of significant movements in the future. It is likely that the level of damage in the future will be no more than seen at present and there was no evidence of continuing movement.

.

538. I would place this property in the same category as Plots 34 and 50, in the middle of the lead properties in terms of the seriousness of the movements and the damage.

Diminution in value

539. This property should be treated so far as diminution in value as being half way between an unmortgageable and mortgageable property. Much will depend on the view of the mortgage lender's engineer when there is a sale and the further movement has taken place. On that basis, the value of the property without the problems would be £230,000 as agreed by the valuation experts. The current value would be £117,000 if unmortgageable and £155,250 if mortgageable and I assess the value at mid way between those values at £136,125. The diminution in value is therefore £93,875.

Cost of minor remedial work

540. I find that all the defects in the property on Mr Taylor's list were caused or contributed to by the pile settlement and movement of the structure.

541. I consider that I should make allowance for this level of work to be carried out twice in the next 20 years, although it may in fact be carried out gradually over that period. I consider that this will be in addition to any redecoration or repair which may be carried out and will not affect the diminution of value. I allow an additional 1.3 times the current cost of carrying out the defects identified above.

542. As set out above I cannot at present put a value on this head of quantum.

Distress inconvenience and loss of amenity

543. By June 2006 the Hendersons had become concerned about the slope in the bathroom floors. Reports were made by BSCP in June 2006 and November 2006. Monitoring has been carried out. Up to the date of trial I propose to allow the modest sum of £1,200 for some four years of the distress, inconvenience and loss of amenity caused by cracks in the house, inspections and monitoring and the inconvenience of the defects in the external areas.

544. There will be future distress, inconvenience and loss of amenity because of the need for the internal and external remedial work. I propose to allow £2,500 to represent a sum to compensate for that, making allowance for the present receipt of the sum without any discounting.

Increased costs or wasted expenditure

545. These claimants claim the cost of landscaping costs. I do not consider that these are costs which arise because of the claims for the defective foundations. Nor do I consider that the claim for 4 weeks' loss of earnings is recoverable under this head.

VAT and Interest

546. To the extent that VAT and interest are claimed, I have not allowed for them and invite further submissions.

Work to external areas

547. For the reasons set out above I have not made any award of damages pending further submissions.

Damages

548. In the light of the matters set out above, the damages that I award are as follows:

(1)	Special Damages		
	(a)	Increased costs or wasted expenditure:	£ nil
	(b)	Additional mortgage payments:	£ nil
	(c)	Increased insurance cost:	£ nil
(2)	General damages for distress, inconvenience and loss of amenity to date of trial:		£1,200.00
(3)	Cost of minor remedial works on property:		To be determined
(4)	Diminution in value:		£93, 875.00

(5) Future loss:

(a)	Repairs and redecoration:	To be determined
(b)	Maintenance due to ground movement	£ nil
(c)	General damages for future distress, inconvenience and loss of amenity:	£2,500.00
(d)	Additional mortgage payments:	£ nil
(e)	Increased insurance cost:	£ nil
	Total:	£97,575.00

Mr and Mrs Adamson Plot 87 (57 Meadowgate Drive)
Background

549. This is a Langdale house. Mrs Kelly Adamson, who gave evidence, said that with her husband Stephen, she moved into the property on 6 February 2004. They have since had two children and they moved from the Bishop Cuthbert Estate because they wanted to be in the catchment area for Westpark Primary school which her husband had attended and was near where his parents lived. They became aware that a property in Meadowgate Drive was available and after returning with her husband's parents for a second opinion they decided to make an offer of the full asking price. She says that the property had all of the items on their wish list and more. She said that when they moved into the property they were not aware of any problems either with their property or with the Estate as a whole.

550. After the birth of their elder son in May 2004 Mrs Adamson became an Avon representative on the Estate and in the course of posting Avon magazines through letterboxes noticed the empty properties in Barley Close. When she spoke to someone she was advised of the problems with the properties. She said that she recalls walking home with her new baby feeling an immense sense of worry. That evening, as soon as her husband returned home, she mentioned the conversation to him. He is a qualified civil engineer and he went to have a look at the property. When he returned he explained that the problem seemed to be something to do with the foundations. Mrs Adamson says that having recently moved into the property they were still making numerous improvements but they decided at that point to cease all of the work until they knew what was happening with the properties.

551. Mrs Adamson said that when they became aware of the issues with the Estate they instructed their insurance company to do a survey on their home but were told that the property was stable at that time but they were unable to guarantee if there would be issues in the future or the future stability of the property. She says that at this stage they decided to put their house on the market. In July 2005 she said she received valuations from Robinsons, Michael Poole and Whitegates and was advised by Robinsons that the property should be valued at £300,000 but due to issues with the estate he would not be prepared to value the property at more than £285,000. Whitegates valued the property at £284,000 and Michael Poole advised that the full market value would be £310,000 but suggested that they market the property for £269,950. Mrs Adamson says that despite the reduced price they received no viewings and later removed the property from the market in February 2006.

552. As she accepted in evidence the property was marketed at £269,950 on the 18 July 2005 but was increased on 27 September 2005 to £294,995. In a marketing progress

report provided in December 2005 Michael Poole estate agents said "The market has slowed now in the run up to Christmas, we would suggest an advert in the paper in the New Year to stimulate viewings." Mrs Adamson says that their hearts sank at the reduced value of the property and they felt that they could see their financial security slipping away from them. She said they could not sell the property at a reduced price as it was their primary investment for the future and they knew they would not be able to buy a house elsewhere if they lost money on the property. She referred to an offer from National Home Buyers of £165,000 which was then reduced to a cash offer of £25,000 when they objected to it.

553. In June 2006 she was made redundant and decided to start up her own business which she did from August 2006. She decided to work from home as a self employed recruiter but because of the building works being carried out to remediate other homes she moved into separate offices elsewhere. She said that when they purchased the property they did not consider the property to be a long term home. They intended to stay there until their younger son went to school and then intended to look for a plot of land where they could build their own home or secure a restoration/modernisation project within Westpark close to the school and her husband's parents or find a semi-rural or rural home in or around Elwick or Hart Village area.

554. BSCP carried out an inspection on 3 June 2005 and reported as follows "*Minor cracking of the brickwork was noted but was not considered to be serious. No defects were evident in any of the ceilings.*" As a result they thought no further action was necessary. In July 2005 Mr Adamson noted that a brick had cracked and contacted SHL.

The Encia litigation

555. In the Encia judgment at paragraphs 680 to 684 Jackson J said:

> "*680. ... It stands in an area of negative skin friction. It has 13 piles, 11 of which have factors of safety below 1. The two remaining piles have factors of safety slightly above 1.*
> *681. Mr Johnson classifies this property as blue. Mr Newman classifies it yellow, but would change to blue if Mr Johnson's factors of safety prevail.*
> *682. The horizontal tilt across the house is 21 millimetres and the vertical tilt is up to 12 millimetres. The cross-examination of the experts in relation to plot 87 does not greatly affect the position. Mr Newman commented on the different ground models used by the two experts in their assessment. Mr Johnson made it plain that any remedial work would probably be cosmetic but he could not rule out other possibilities.*
> *683. I am satisfied that the foundations of plot 87 are inadequate, although it is not clear to what degree. It is also unclear what form of remedial work, if any, will be required.*
> *684. I put this house into the category "monitor and decide later".*"

Engineering expert evidence

556. In the Joint Statement of the engineering experts in these proceedings the experts summarised the damage observed in this property as: "*The cracking is fine and of a minor nature. There is only one fine stepped crack. There is cracking along the dpc.*" In terms of levels at the property they stated: "*The maximum recorded difference*

between the high point and the low point on the damp-proof course is 18mm. The internal slopes on floors taken with a spirit level correlates with tilt data. The movements on the property in the period April 2007 to October 2009 indicate a maximum variation of +/- 1mm."

557. In terms of present remediation, in the Joint Statement the engineering experts agreed that "*an acceptable level of remediation in order to rectify the damage to the fabric of the building would be re-pointing of the external brickwork with some masonry replacement of spalled and cracked brickwork and sealing and redecoration of the internal observed features*" So far as future remediation was concerned the experts agreed that "*if the property continues to behave as it has in the past then the level of the damage incurred will be no more than that seen up to the present date*". Mr Taylor considered that "*if the structure behaves as it has in the past the level of future damage will be of the same order as that which he considers has been caused by foundation movement to date*". They agreed that "*we anticipate that the structure will continue to behave as it has in the past*". They agreed that "*it is likely any future damage can be repaired in a similar manner to the repair work that we recommend now*".

558. The Summary Sheet shows the estimated ground movement at this property between 2002 and 2010 was 73mm and the predicted future ground movement is 58mm, making a total of 131 mm. The factors of safety on the piles have values of FOS(A) of 1.24 to 3.46 and FOS(B) of 0.63 to 1.45. The predicted future movement on the piles is some 3 to 17mm.

559. Mr Johnson was taken to his report for the ENCIA litigation where he observed that the front right hand corner of the property was 21 mm lower than the back right hand corner with some 11 mm difference between the back left and back right-hand corners. He said that this pattern of differences was consistent with the observations made regarding the lower factors of safety on the piles in the right hand corner of the property. At that time he observed that some settlement had been experienced and some negative skin friction was probably acting on the piles towards the front of the house. He said that given his opinion that the difference in levels was settlement related and driven by negative skin friction, he considered there was a small risk of further movements of small magnitude in the future.

560. In this litigation, Mr Johnson and Mr Taylor agreed that the negative skin friction load had already been imposed to its maximum and that any future significant structural movement was extremely unlikely. It would be caused by such things as variation in groundwater table levels. Mr Johnson thought that given that there had been more than 70 mm of movement of the ground there was a possibility of some very small movement or differential movements associated with such things as ground water movements.

561. It was agreed that some cracking was probably due to differential movement caused by settlement of foundations. There were a number of perpend mortar cracks and fine cracking to all elevations, particularly to the front and right hand side elevations.

Conclusion on the Property

562. There are piles at this property which have factors of safety which are low. The ground is likely to settle a further 58mm with pile settlements of up to 17mm due to spring stiffness. Movement due to negative skin friction has already occurred. The future pile settlements will cause further small movement of the ground beams and redistribution of the stresses within the structure. This will give rise to further future cracking. Mr Johnson's view was that the probability of any future significant movement is extremely remote.

563. This is a property where there is a significant risk of future pile settlement which will cause movement of the structure. There is an extremely remote risk or probability of significant movements in the future. It is likely that the level of damage in the future will be no more than seen at present.

564. I would place this property in the same category as Plots 34, 50 and 59, in the middle of the lead properties in terms of the seriousness of the movements and the damage.

Diminution in value

565. This property should be treated so far as diminution in value as being half way between an unmortgageable and mortgageable property. Much will depend on the view of the mortgage lender's engineer when there is a sale and the further movement has taken place. On that basis, the value of the property without the problems would be £232,000 as agreed by the valuation experts. The current value would be £119,000 if unmortgageable and £156,600 if mortgageable and I assess the value at mid way between those values at £137,800. The diminution in value is therefore £94,200.

Cost of minor remedial work

566. I find that all the defects in the property on Mr Taylor's list were caused or contributed to by the pile settlement and movement of the structure.

567. I consider that I should make allowance for this level of work to be carried out twice in the next 20 years, although it may in fact be carried out gradually over that period. I consider that this will be in addition to any redecoration or repair which may be carried out and will not affect the diminution of value. I allow an additional 1.3 times the current cost of carrying out the defects identified above.

568. As set out above I cannot at present put a value on this head of quantum.

Distress inconvenience and loss of amenity

569. By July 2005 the Adamsons had become concerned about defects in the property. A report was made by BSCP in June 2005. Monitoring has been carried out. Up to the date of trial I propose to allow the modest sum of £1,500 for some five years of the distress, inconvenience and loss of amenity caused by cracks in the house, inspections and monitoring and the inconvenience of the defects in the external areas.

570. There will be future distress, inconvenience and loss of amenity because of the need for the internal and external remedial work. I propose to allow £2,500 to represent a sum to compensate for that, making allowance for the present receipt of the sum without any discounting.

Increased costs or wasted expenditure

571. These Claimants claim the cost of landscaping and installing drains and repairing a toilet. They also claim the cost of redecoration of £75 which I allow on the basis of Mrs Adamson's second witness statement. Claims are also made for wasted costs of rent and other expenses of Mrs Adamson's business and loss of earnings. Again, I do not consider that these are costs which arise or are recoverable because of the claims for the defective foundations.

VAT and Interest

572. To the extent that VAT and interest are claimed, I have not allowed for them and invite further submissions.

Work to external areas

573. For the reasons set out above I have not made any award of damages pending further submissions.

Damages

574. In the light of the matters set out above, the damages that I award are as follows:

(1)	Special Damages		
	(a)	Increased costs or wasted expenditure:	£75.00
	(b)	Additional mortgage payments:	£ nil
	(c)	Increased insurance cost:	£ nil
(2)	General damages for distress, inconvenience and loss of amenity to date of trial:		£1,500.00
(3)	Cost of minor remedial works on property:		To be determined
(4)	Diminution in value:		£94,200.00
(5)	Future loss:		
	(a)	Repairs and redecoration:	To be determined
	(b)	Maintenance due to ground movement	£ nil
	(c)	General damages for future distress, inconvenience and loss of amenity:	£2,500.00
	(d)	Additional mortgage payments:	£ nil
	(e)	Increased insurance cost:	£ nil
	Total:		£98,275.00

Mr Jeffery and Ms McDermott Plot 89 (53 Meadowgate Drive)
Background

575. Both Peter Jeffery and Nicola McDermott gave evidence. Mr Jeffery says that in March 2003 he and his then partner Nicola McDermott began looking for a house together in the Hartlepool area. They exchanged contracts on the property on 16 July 2003 and completed on 21 November 2003. They paid £157,950 for the property with a mortgage of approximately £70,000 from Darlington Building Society. In January 2004 there were rumours of problems on the Estate which began to get worse. In June 2004 Mr Jeffery began to notice problems with his property.

576. In the summer of 2006 he and Nicola McDermott split up. They both wanted to leave the estate but were told that properties were not selling. He said that neither of them could afford to sell the property cheaply just to attract a buyer as they both needed to be able to purchase other homes. In the end he stayed at the property and Nicola McDermott moved out. He said he was able to remortgage the property with Darlington Building Society who reused the valuation that they had prepared when they purchased.

577. Nicola McDermott confirmed the matters set out in Mr Jeffrey's witness statement. She said that at the time she moved out she decided she would like to stay on in the property so that the children would not have to move again but she was unable to secure enough money to do so. She tried to find a mortgage company that would remortgage the property to enable her to buy Peter Jeffery's share in the property but was advised that because of the problems associated with the property and the Estate she would be unable to borrow sufficient money to acquire his share.

578. On 24 May 2005 BSCP carried out a visual inspection of the property and stated "*Whilst there are a small number of minor cracks in external masonry there are no indications that this is settlement related.*" They said that in view of those comments no further action was necessary. They inspected again on 31 May 2006.

579. On 10 September 2007 NHBC wrote SHL to say that they had been notified of a claim relating to possible foundation failure.

The Encia litigation

580. In the Encia judgment at paragraphs 680 to 684 Jackson J said:

> "*688 ...It stands in an area of negative skin friction. It has 12 piles, of which three have factors of safety below 1. Of the remaining piles, eight have factors of safety below 1.5. The house has 26 millimetres of horizontal tilt and up to 12 millimetres of vertical tilt.*
> *689 Mr Johnson classifies this property as blue. Mr Newman classifies it yellow, but would upgrade to blue if Mr Johnson's factors of safety prevail. Mr Johnson considers that any remedial works required after monitoring would probably only be cosmetic but he cannot exclude the possibility of underpinning.*
> *690 I have come to the conclusion that the foundations of plot 89 are inadequate, but it is not clear by what degree. It is also unclear what remedial works, if any, will be required.*
> *691 I put this house into the category "monitor and decide later".*"

Engineering expert evidence

581. In the Joint Statement of the engineering experts in these proceedings the experts summarised the damage observed in this property as: "*The cracking is generally fine and of a minor nature.*" In terms of levels at the property they stated: "*The maximum recorded difference between the high point and the low point of the damp-proof course is 26 mm. The internal slopes on floors taken with a spirit level correlate with the tilt data. The movements on the property in the period April 2007 to October 2009 indicate a maximum movement of +/- 1mm and recent monitoring March 2009 to October 2009 indicates that the property is stable.*"

582. In terms of present remediation, in the Joint Statement the engineering experts agreed that "*We agree that an acceptable level of remediation in order to rectify damage to the fabric of the building would be some minor rebuilding of the rear corner at eaves level, repointing of the external brickwork and sealing and redecoration of the internal observed features and replacement of any cracked or spalled bricks.*"

583. So far as future remediation was concerned the experts agreed that "*if the property continues to behave as it has in the past then the level of the damage incurred will be no more than that seen up to the present date*". Mr Taylor considered that "*if the structure behaves as it has in the past the level of future damage will be of the same order as that which he considers has been caused by foundation movement to date*". They agreed that "*we anticipate that the structure will continue to behave as it has in the past*". They agreed that "*it is likely any future damage can be repaired in a similar manner to the repair work that we recommend now*".

584. On this property the Summary Sheet showed estimated ground movement from 2002 to 2010 of 38 mm with future predicted movement between 2010 and 2032 of 27mm, giving a total of 65 mm. In terms of factors of safety, the piles have FOS(A) of between 1.62 and 3.15 and FOS(B) varies from 0.94 to 1.62, with three piles having FOS(B) below 1.0 and a further seven having a value below 1.27. In terms of individual pile movements, further settlement due to spring stiffness is estimated to be between 2mm and 18.9mm. It is considered that there might be some further small movement of 3 to 4 mm on some piles due to negative skin friction.

585. Mr Johnson's view was that at this stage, given what the experts know about the ground movements, it would be highly unlikely that anything other than some minor cracking would occur. Mr Taylor said that on the basis that the predictions of movement were accurate, the further damage would be the kind of cracking which had been seen to date. The experts agreed that there had been tilt caused by settlement although they could not be conclusive about that because of construction tolerance. The experts agreed that the evidence of Ms McDermott that doors were not shutting properly and that cracks were getting worse would be indicative of movement occurring. However such complaints related to matters which had occurred early on and could be matters of workmanship. The experts agreed that the compression ridges seen in the dining room and kitchen were consistent with some internal movement, but that, on the basis that redecoration had taken place in 2008, the experts had not seen anything further between 2008 and 2010.

586. The experts agreed that for this property there was some evidence of past movement reflected in elements of external damage and possibly some internal damage, but at the moment there was no evidence of any kind of continuing movement or internal continuing damage. The experts agreed that this is a property where the maximum negative skin friction would have been applied by now. In terms of the future Mr Johnson did not anticipate anything occurring to upset the present position but said that it was not impossible that there could be a little redistribution of load going forwards but the potential for movement was very small. Mr Taylor agreed but said that with low values of FOS(B) in relation to certain piles there would possibly be some ongoing movement but it would be no more than had been seen to date. Mr Johnson said that the potential for movement of the foundations related to the fact that the factor of safety of 3 or 4 piles was just below 1.0 so that some very small

movements would occur as the foundations and loads readjusted there and elsewhere in the property. Mr Taylor said he would expect some minor movements due to redistribution of loads but that would only be of the same order as at the moment and they were of a fairly minor nature. He explained that this might cause minor cracking in various locations on the brickwork and fabric and that the compression ridge internally might develop into a compression crack.

Conclusion on the Property

587. There are a number of piles at this property which have factors of safety which are low. The ground is likely to settle a further 27mm with pile settlements of up to about 19mm due to spring stiffness. Movement due to negative skin friction has already occurred. The future pile settlements will cause further small movement of the ground beams and redistribution of the stresses within the structure. This will give rise to further future cracking. Mr Johnson's view was that the probability of any future significant movement is extremely remote.

588. This is a property where there is a significant risk of future pile settlement which will cause movement of the structure. There is an extremely remote risk or probability of significant movements in the future. It is likely that the level of damage in the future will be no more than seen at present.

589. I would place this property in the same category as Plots 34, 50, 59 and 87, in the middle of the lead properties in terms of the seriousness of the movements and the damage.

Diminution in value

590. This property should be treated so far as diminution in value as being half way between an unmortgageable and mortgageable property. Much will depend on the view of the mortgage lender's engineer when there is a sale and the further movement has taken place. On that basis, the value of the property without the problems would be £180,500 as agreed by the valuation experts. The current value would be £97,000 if unmortgageable and £121,837 if mortgageable and I assess the value at mid way between those values at £109,418.50. The diminution in value is therefore £71,081.50.

Cost of minor remedial work

591. I find that all the defects in the property on Mr Taylor's list were caused or contributed to by the pile settlement and movement of the structure.

592. I consider that I should make allowance for this level of work to be carried out twice in the next 20 years, although it may in fact be carried out gradually over that period. I consider that this will be in addition to any redecoration or repair which may be carried out and will not affect the diminution of value. I allow an additional 1.3 times the current cost of carrying out the defects identified above.

593. As set out above I cannot at present put a value on this head of quantum.

Distress inconvenience and loss of amenity

594. By 2005 Mr Jeffery and Ms McDermott had become concerned about defects in the property and in Summer 2006 Ms McDermott moved out and Mr Jeffery continued to

live there. A report was made by BSCP in June 2005. Monitoring has been carried out. Up to the date of trial I propose to allow Mr Jeffery the modest sum of £750 and Ms McDermott the sum of £250 for the relevant periods of the distress, inconvenience and loss of amenity caused by cracks in the house, inspections and monitoring and the inconvenience of the defects in the external areas.

595. There will be future distress, inconvenience and loss of amenity because of the need for the internal and external remedial work. I propose to allow Mr Jeffery £1,250 to represent a sum to compensate for that, making allowance for the present receipt of the sum without any discounting.

Increased costs or wasted expenditure

596. These Claimants claim the cost of redecorating and temporary repairs which I accept would arise, in part, from the defects in the foundations. In the absence of documentation I allow £350. I am not satisfied that the cost of relaying the patio and driveway/patio or the application for planning permission arise from or are recoverable for the defects in the foundations. Claims are also made for loss of earnings. Again, I do not consider that these are costs which arise or are recoverable because of the claims for the defective foundations.

VAT and Interest

597. To the extent that VAT and interest are claimed, I have not allowed for them and invite further submissions.

Work to external areas

598. For the reasons set out above I have not made any award of damages pending further submissions.

Damages

599. In the light of the matters set out above, the damages that I award are as follows:

(1)	Special Damages		
	(a)	Increased costs or wasted expenditure:	£350.00
	(b)	Additional mortgage payments:	£ nil
	(c)	Increased insurance cost:	£ nil
(2)	General damages for distress, inconvenience and loss of amenity to date of trial:		£1,000.00
(3)	Cost of minor remedial works on property:		To be determined
(4)	Diminution in value:		£71,081.50
(5)	Future loss:		
	(a)	Repairs and redecoration:	To be determined
	(b)	Maintenance due to ground movement	£ nil
	(c)	General damages for future distress, inconvenience and loss of amenity:	£1,250.00
	(d)	Additional mortgage payments:	£ nil
	(e)	Increased insurance cost:	£ nil

Total: £73,681.50

Mr and Mrs Pettite Plot 90 (51 Meadowgate Drive)
Background

600. Mr Gary Pettite said that in 2003 he, his wife and three children sold their family home and moved in with his wife's family. They then began looking for a new family home. Shortly after putting down a reservation fee on a property at the Bishop Cuthbert Estate they viewed the Eden Park Estate. They were interested in an Ashbrook house and visited Northallerton to see a finished house. They decided to lose the reservation fee they had paid on the Bishop Cuthbert Estate and pay a reservation fee for the property on the Eden Park Estate. They exchanged contracts on 11 July 2003 and completed the purchase on 19 December 2003, moving in during February 2004. They paid a total price, including extras, of £173,893.75 and obtained a mortgage for just over £150,000.

601. Mr Pettite said that not long after they exchanged contracts they heard from a relative's friend who lives in Clover Drive that there were a couple of houses on the Estate which were experiencing problems and damage. He said that they approached SHL and their solicitors to raise this but were told they were tied into the contract and could not pull out of the purchase. He then said that to get to the bottom of this he went back to SHL's sale office where he spoke to Val Davidson and raised his concerns with the piling. He said that she told him there was absolutely nothing to worry about and that the piling had been changed from the Phase 1 houses and that this was "the best piling possible". He said that she also made a reference to her father who was allegedly an expert in this field and he had reassured her that everything was in order. He said that, based on those assurances he did not pursue getting out of the purchase, which is what he really wanted to do.

602. He said that during 2004 and early 2005 he and his wife noticed more cracking and problems, such as defects to the external brickwork to the front of the house. He considered that these were more severe than the original issues they had experienced on moving in.

603. On 20 April 2005 BCSP carried out an inspection of the property. Mr Pettite's main concern was noted to be a joint in the hardwood timber flooring which had opened up around Christmas 2004. In the report it was stated "*There is no evidence of hogging or sagging across the joint, although the structural floor below the boarding does appear to dip locally in one front corner of the dining room.*" They said "*elsewhere internally, there are a number of fine shrinkage cracks, in dry-lined surfaces, over doors, adjacent to stringers etc and these cracks are of little concern to us or to Mr Pettite. However, one such crack, over the door from the ensuite into bedroom one is displayed as a slight ridge, which suggests compressive movement.*" In relation to external defects they noted "*some very fine, mainly horizontal cracking has occurred in each gables part way up the wall. There is however, no evidence of cracking at DPC level which has been experienced in other properties on the estate. There is further evidence of cracking in both front and gable walls around the front right hand corner of the house. The cracks are fine, stepped, in both bed and perpend joints approximately coincident with first floor level. We were told that this cracking*

occurred very recently. There is no evidence of cracking near to ground level at this corner of the house."

604. They concluded that the gap in the flooring had resulted from shrinkage in the natural timber and they did not consider it was the result of movement of the structure. They said that much of the minor internal cracking was considered to be related to shrinkage but added "*of slightly more concern is the minor crack over the door between bedroom one and the ensuite which is displayed as a slight ridge which suggests compressive movement and may be indicative of other, very minor movements within the building structure*". They also said "*the cracking in the external masonry around the front corner of the property is also unusual and of some concern. Whilst there is no evidence of movement at ground level at the present time it is possible that this cracking is related to movement in the structure other than thermal movement*". As a result of the indications that some minor structural movement had occurred within the property they recommended that a plumb and level survey and monitoring regime should be set up so that any future movements could be monitored and addressed should the cracking/movement worsen.

605. On 24 May 2005 a further inspection was carried out which led to a recommendation that the property should be re-inspected in 6 months' time.

606. On 7 June 2005 Mr Pettite called SHL customer care and the following was recorded by Janet: "*3 inspections have been carried out on his property - the last 2 weeks ago, when the engineer again related to Mr Pettite that there is a problem. As the property is up for sale, this will obviously stop the sale going through and Mr Pettite wants updating to what and when some remedial works will be carried out. Also to what extent!!*"

607. SHL were concerned that BSCP had notified Mr Pettite of a problem. On 7 June 2005 Mr Tim Ellis SHL's Technical Director wrote to BSCP and said this "*We are again having claims that you yourselves are advising property owners that there is a problem with their property. Could I have your comments on this and also the claim you have visited his property three times in as many weeks so I can respond accordingly.*"

608. In the response BSCP said "*the recommendation was for the property to be monitored as I felt there was a potential settlement problem. I only saw Mr Pettite on the first occasion and his wife on the second. … Please be assured that we do not tell owners if we feel there is a specific problem.*"

609. On 8 June 2005 Mr Pettite sent an email to Mr Murray of SHL saying that the issues regarding his property were causing concern. He said that he was considering moving property given that both he and his wife now worked a considerable distance from Hartlepool. He said:

> "*as you may be aware my property has visible cracks appearing in the external brickwork, which have been examined twice by the independent surveyor appointed by Shepherd Homes-the awaited report will hopefully identify both the cause and associated remedial action. Considering the above and coupled with the recent press coverage, I am reluctant to put the property*

on the market because I do not believe it will reach its true market value. Therefore, I would request a meeting with you at a mutually convenient time to discuss the possible options for moving forward….."

610. It seems that Mr Pettite's email led to Mr Murray requesting BSCP to visit the property, which they did on 12 July 2005. They commented as follows:

> "*(1)the step cracking around the front right hand corner of the house at high level, running down from the bottom corner of the window of bedroom 1 and around the right-hand gable does not appear to have worsened.*
> *(2) the cracking at DPC level in the wall to the left of the bay window has increased in size.*
> *(3) the fine step cracking at the left hand corner of the bay, two courses below cill level does not appear to have worsened.*
> *(4) a new horizontal crack has appeared at DPC level at the left hand front corner of the house in the garage wall. A vertical crack in one of the vertical joints can also be seen two courses below DPC level close by. This crack was exposed by removing some of the gravel from the front of the gable wall.*"

The recommendation was for the property to be re-examined again in 4 months' time.

611. On 9 January 2006 BSCP again inspected the property. In their report on that inspection they stated that "*the cracking at DPC level in the wall to the left of the bay window has increased in width and is now about 5 mm wide at the external corner.*" Otherwise, it was stated that other cracks had not increased in size and that any cracks or defects pointed out by Mr Pettite were not significant. Some remedial work was recommended together with an inspection in 6 months' time. BSCP added a note that Mr Pettite was very frustrated at what he perceived to be "*no action by Shepherd Homes. Like a number of people on the estate, he is keen to have the faults rectified as soon as possible so that he can put his house on the market. He is very keen to have his property monitored. I explained that this would prevent him from selling his house for a further year because monitoring would have to be carried out across all four seasons. I talked to him about having an alternative line and level survey of the walls and ground floor slab.*"

612. BSCP visited the property again on 17 November 2006 and reported:

> *"(1) A fine horizontal crack was recorded in right hand gable from the rear corner, in the bed-joint 20 courses above DPC. This crack coincides with putlog holes but was not previously recorded, which suggests it has occurred since our last visit.*
> *(2) Other cracking in external masonry does not appear to have worsened.*
> *(3) A fine crack was recorded in ceiling of the bedroom 1 ensuite and in the ceiling of bedroom 1, plasterboard joints are becoming apparent. Mr Pettite confirmed these defects have occurred recently.*"

613. BSCP then said that in order to try and come to a conclusion on this property they would reiterate the recommendations in their letter of 2 February 2006, following the visit on 9 January 2006. These were to instigate a level and verticality survey of the property to try and determine if any rotational movement has occurred; to break out the cracked area in the slab in the garage to determine the cause and extent of the cracking and to excavate a small trial hole near the front corner of the left hand gable

to determine the extent and cause of the cracking in the left hand gable. BSCP recommended a further inspection in 4 months time.

The Encia litigation

614. In the Encia judgment at paragraphs 688 to 691 Jackson J said:

> "*688 Plot 89 is a Newbury house. It stands in an area of negative skin friction. It has 12 piles, of which three have factors of safety below 1. Of the remaining piles, eight have factors of safety below 1.5. The house has 26 millimetres of horizontal tilt and up to 12 millimetres of vertical tilt.*
> *689 Mr Johnson classifies this property as blue. Mr Newman classifies it yellow, but would upgrade to blue if Mr Johnson's factors of safety prevail. Mr Johnson considers that any remedial works required after monitoring would probably only be cosmetic but he cannot exclude the possibility of underpinning.*
> *690 I have come to the conclusion that the foundations of plot 89 are inadequate, but it is not clear by what degree. It is also unclear what remedial works, if any, will be required.*
> *691 I put this house into the category "monitor and decide later".*"

Engineering expert evidence

615. In the Joint Statement of the engineering experts in these proceedings the experts summarised the damage observed in this property as: "*The cracking is generally fine and of a minor nature.*" In terms of levels at the property they stated: "*The maximum recorded difference between the high point and the low point on the damp-proof course is 11mm. The internal slopes on floors taken with a spirit level correlate with the DPC level variation data. The levels of the corners of the property have been monitored regularly since March 2009 and the variation in level has generally been +/- 1mm.*"

616. In terms of present remediation, in the Joint Statement the engineering experts agreed that "*We agree that an acceptable level of remediation in order to rectify damage to the fabric of the building would be repointing of the external brickwork and sealing and redecoration of the internal observed features and replacement of any cracked bricks*". So far as future remediation was concerned the experts agreed that "*if the property continues to behave as it has in the past then the level of the damage incurred will be no more than that seen up to the present date*". Mr Taylor considered that "*if the structure behaves as it has in the past the level of future damage will be of the same order as that which he considers has been caused by foundation movement to date*". They agreed that "*we anticipate that the structure will continue to behave as it has in the past*". They agreed that "*it is likely any future damage can be repaired in a similar manner to the repair work that we recommend now*".

617. On this property the Summary Sheet showed there was estimated ground movement between 2002 and 2010 of 38mm, with further movement of 27mm being predicted between 2010 and 2032, making a total overall movement of 65mm. The factors of safety on the piles were generally high. FOS(A) ranged from 2.5 to about 10. FOS(B) ranged from 1.61 to 4.33. In terms of future settlement, settlement due to spring stiffness ranged from about 1mm up to 5mm. Given the current levels of movement it was not thought by the experts that there would be any further movement due to negative skin friction.

618. Mr Taylor was concerned that there was inconsistency between the settlement of the piles as predicted by the factors of safety and the observed cracking of the property. This was a matter which Mr Johnson had dealt with in his report for the ENCIA trial in relation to the bay window which had since been repaired. Mr Johnson's view was that this was a property with not so much ground movement as plot 87 but still a significant amount of ground movement, and with factors of safety on the high side. He considered that the fact that it had been shown to be stable for three years meant that it was stable. He said that the defect in the bay, repaired since the BSCP report in 2007, had not recurred.

619. In relation to it being a possible candidate, together with plot 43, for being the best of the ten lead properties, Mr Johnson said that notwithstanding the fact that it was in an area where there was significant ground movement, the factors of safety were all high and the property was behaving as would be expected in those circumstances. The reason he said it was possibly but not definitely like the property at Plot 43 was because the values of FOS(B) had a range on them which would lead to a certain amount of different behaviour between piles.

620. The property showed fine, very fine or very, very fine cracking to all elevations. There was a horizontal crack to the right elevation and there is also a vertical crack towards the front of the right elevation. The experts differed on the significance of certain cracks as either being putlog damage or being putlog damage which had been repaired and had since cracked.

Conclusion on the Property

621. The piles at this property have factors of safety which are above 1.6 and generally above 2. The ground is likely to settle a further 27mm with pile settlements of up to about 5mm due to spring stiffness. Movement due to negative skin friction had already occurred. The future pile settlements will cause further small movement of the ground beams and redistribution of the stresses within the structure. This will give rise to further future cracking. Mr Johnson's view was that the probability of any future significant movement is extremely remote.

622. This is a property where there is a significant risk of future pile settlement which will cause small movements of the structure. There is an extremely remote risk or probability of significant movements in the future. It is likely that the level of damage in the future will be no more than seen at present.

623. Whilst the condition of the foundations would suggest that this might be classed with Plot 43, the cracking at this property leads me to place it in the same category as Plots 34, 50, 59, 87 and 89 in the middle of the lead properties in terms of the seriousness of the movements and the damage.

Diminution in value

624. This property should be treated so far as diminution in value as being half way between an unmortgageable and mortgageable property. Much will depend on the view of the mortgage lender's engineer when there is a sale and the further movement has taken place. On that basis, the value of the property without the problems would be £196,500 as agreed by the valuation experts. The current value would be £103,000

if unmortgageable and £132,637 if mortgageable and I assess the value at mid way between those values at £117,818.50. The diminution in value is therefore £78,681.50.

Cost of minor remedial work

625. I find that all the defects in the property on Mr Taylor's list were caused or contributed to by the pile settlement and movement of the structure, with the exception of the staircase stringer.

626. I consider that I should make allowance for this level of work to be carried out twice in the next 20 years, although it may in fact be carried out gradually over that period. I consider that this will be in addition to any redecoration or repair which may be carried out and will not affect the diminution of value. I allow an additional 1.3 times the current cost of carrying out the defects identified above.

627. As set out above I cannot at present put a value on this head of quantum.

Distress inconvenience and loss of amenity

628. By about early 2005 the Pettites had become concerned about defects in the property. Reports were made by BSCP in April 2005, May 2005, July 2005, January 2006 and November 2006. Monitoring has been carried out. Up to the date of trial I propose to allow the modest sum of £1,500 for the relevant periods of the distress, inconvenience and loss of amenity caused by cracks in the house, inspections and monitoring and the inconvenience of the defects in the external areas.

629. There will be future distress, inconvenience and loss of amenity because of the need for the internal and external remedial work. I propose to allow £2,500 to represent a sum to compensate for that, making allowance for the present receipt of the sum without any discounting.

Increased costs or wasted expenditure

630. These Claimants claim various costs which are then set out in Mr Pettite's second witness statement. Of them I consider that only the cost of redecorating of £200 would arise from the defects in the foundations. In the absence of documentation I allow £100. I am not satisfied that the costs of flooring, tiling, paving stones or the patio arise from or are recoverable for the defects in the foundations. Claims are also made for increased mortgage payments and a product switch fee for changing a mortgage. Mr Pettite deals with the question of mortgage in paragraph 31 of his statement. I am not satisfied that the claim has been proved. Whilst mortgage payments are set out, the ability to obtain a lower mortgage rate is not sufficiently established. Finally, I do not consider that loss of earnings are a head of damage which arises or are recoverable because of the claims for the defective foundations.

VAT and Interest

631. To the extent that VAT and interest are claimed, I have not allowed for them and invite further submissions.

Work to external areas

632. For the reasons set out above I have not made any award of damages pending further submissions.

Damages

633. In the light of the matters set out above, the damages that I award are as follows:

(1)	Special Damages		
	(a)	Increased costs or wasted expenditure:	£100.00
	(b)	Additional mortgage payments:	£ nil
	(c)	Increased insurance cost:	£ nil
(2)	General damages for distress, inconvenience and loss of amenity to date of trial:		£1,500.00
(3)	Cost of minor remedial works on property:		To be determined
(4)	Diminution in value:		£78,681.50
(5)	Future loss:		
	(a)	Repairs and redecoration:	To be determined
	(b)	Maintenance due to ground movement	£ nil
	(c)	General damages for future distress, inconvenience and loss of amenity:	£2,500.00
	(d)	Additional mortgage payments:	£ nil
	(e)	Increased insurance cost:	£ nil
	Total:		£82,781.50

Summary

634. For the reasons set out above I find that SHL are liable to each of the Claimants for the breaches of Section 2 of the Buildmark Cover and the Defective Premises Act 1972 and in the case of each of the Claimants, except for Mr and Mrs Knight (Plot 15) and Mr and Mrs Frostwick (Plot 34), SHL is also liable under the relevant sales contracts. I have determined for each of the Claimants the sum payable by way of damages, with the reservations set out above.

635. I would ask the parties to draw up the necessary order and to consider what ancillary and other matters need to be dealt with as a result of this judgment.