

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN MANCHESTER**  
**TECHNOLOGY AND CONSTRUCTION COURT (QBD)**

Manchester Civil Justice Centre  
1 Bridge Street West  
Manchester M60 9DJ

Date: 17<sup>th</sup> June 2020

**Before:**

**His Honour Judge Eyre QC**

**Between:**

1) SPORTCITY 4 MANAGEMENT LIMITED	<b><u>Claimants</u></b>
2) SPORTCITY 2AB MANAGEMENT LIMITED	
3) SPORTCITY 2C MANAGEMENT LIMITED	
- and -	
COUNTRYSIDE PROPERTIES (UK) LIMITED	<b><u>Defendant</u></b>

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**Andrew Singer QC** (instructed by **Linder Myers Solicitors**) for the **Claimants**  
**Toby Watkin** (instructed by **Mills & Reeve LLP**) for the **Defendant**

Hearing date: 9<sup>th</sup> June 2020  
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**JUDGMENT**

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time of hand-down was 10.30am on 17<sup>th</sup> June 2020.

**HH Judge Eyre QC:**

1. This is the Defendant's application for summary judgment and/or striking out of the claim. The hearing was conducted remotely by way of the MS Teams platform hosted by the Chambers of Mr. Singer QC.
2. The claim arises out of the development of the Sportcity Living complex. This consists of 350 apartments in a number of blocks. The Defendant is a property developer and built that complex. The works began in 2002 and there is a dispute which as explained below is immaterial for present purposes as to whether it is to be regarded as having been completed in 2007 or 2010.
3. The Manchester City Council is the freehold owner of the land on which the complex is built. It demised the land by three leases each of 250 years to AMEC Developments Ltd ("AMEC"). The Claimants are the management companies of the blocks forming the development. In due course AMEC subdemised the individual apartments by a series of underleases ("the Leases") to which the Defendant and the relevant management company were parties in addition to the proposed sub-lessees of the apartment in question. It is common ground that the terms of the Leases are identical for all material purposes. In October 2008 AMEC assigned each of the headleases to the relevant management company and so the Claimants acquired the rights of AMEC in relation to their respective blocks of apartments.
4. The last residential sub-lease was granted in December 2007 and the Defendant initially contended that should be regarded as the last date by when the Claimants' potential causes of action in negligence and under the Defective Premises Act 1972 can have accrued for limitation purposes. The Claimants said that the relevant date was the completion of the estate in 2010. The Defendant sensibly accepted that for the purposes of the current application I should proceed on the basis of the later date which is in any event more than six years before the commencement of the proceedings.
5. In late 2013 the agents managing the properties for the Claimants asserted that there were problems with the cladding on the blocks of apartments. The Defendant does not accept that there were in fact problems but it is accepted that the Defendant attended the complex in March and April 2014 and undertook some works. There was a further attendance in August 2017. I will consider the relevance of those further actions below.
6. The claim form appears to have undergone a number of changes and the court file contains claim forms stamped as issued on 1<sup>st</sup> May 2019, 2<sup>nd</sup> August 2019, and 31<sup>st</sup> January 2020. Again for current purposes there is no need to explore the consequences of that in any detail because all the dates in question are more than six years after 2010 but less than six years after April 2014.

**The Pledged Cases.**

7. In the Particulars of Claim the Claimants assert three separate causes of action: a claim under the Leases; a claim under the Defective Premises Act 1972; and a claim that there was a breach of a duty of care in tort owed to the Claimants. Each claim is in respect of what are said to have been "life-threatening defects

in the design and/or construction of the cavity barriers and fire-stopping measures in the properties”. The claim under the Leases is put on the footing that on a proper construction the Defendant was the Landlord under the Leases and as such owed the obligations imposed by clauses 6.1 and 6.3. Alternatively the Defendant is said to be responsible for ensuring that there was compliance with those obligations by reason of having been a party to the Leases and/or the Landlord’s agent. The claim under the 1972 Act is put on the basis that as a person undertaking work for or in connexion with the provision of a dwelling the Defendant owed a duty under section 1 of that Act. Finally it is asserted that the Defendant owed a duty of care to construct the apartments and the estate with reasonable care and skill and so as to ensure that the same complied with Building Regulations. The Claimants seek damages of just over £15m as the estimated cost of recladding all the properties together with sums totalling approximately £840,000 in respect of cavity barrier and fire stopping works and related items.

8. The Defendant accepts that it carried out the development and that it owed a duty in respect thereof under the 1972 Act. It denies any breach of that duty and says that any claim became statute-barred before the commencement of these proceedings. The Defendant denies that it is the Landlord for the purpose of the Leases or that any actions taken as an agent of the landlord gave rise to an obligation to the Claimants. It also denies that there has been any breach of clauses 6.1 or 6.3 of the Leases. Finally, the Defendant denies that it owed the alleged common law duty of care; denies any breach of such a duty; and says that the losses alleged are pure economic loss with the consequence that any duty which the Defendant did have did not extend to such losses.
9. The Claimants take issue with those points in the Reply. For present purposes it is to be noted that in the Reply the Claimants invoke section 1(5) of the 1972 Act. They contend that works undertaken in 2014 meant that “the cause of action in respect of the Defendant’s work has recommenced as at April 2014”. They also say that the Defendant’s attendance at the properties in August 2017 and its subsequent failure to undertake necessary remedial work amounted to defective work in respect of which the cause of action accrued as at August 2017.

### **The Application.**

10. The Defendant’s application sought striking out of the claim pursuant to CPR Pt.3.4(2)(a) as disclosing no reasonable grounds for bringing the claim alternatively summary judgment under CPR Pt 24. In practice the contention was that striking out was appropriate in respect of the tort claim with summary judgment being sought on the claims under the Leases and the 1972 Act.
11. The approach to be taken to a summary judgment application is well-established and although they differed as to their operation here the parties did not disagree as to the principles. In short the test is whether there is a claim which has a real rather than fanciful prospect of success. The court is not to conduct a mini-trial and is to be alert to the scope for expansion of a case at trial and for matters to appear rather different after cross-examination and oral explanation. However, the court must also guard against “Micawberism” and

it is not sufficient for a party simply to assert that something will turn up to bolster its case. Although not conducting a mini-trial the court does not have to accept a party's assertions at face value if they are incompatible with contemporaneous documents or with inherent likelihood. Where the issue between the parties turns on a question of law or of construction then summary judgment may well be more apt than in cases turning on factual disputes but even in the former category the court must remember that the hearing of a summary judgment application is not a trial and that the question is whether the claim has a real prospect of success. A claim which is potentially statute-barred is not liable to be struck out if the claim otherwise discloses reasonable grounds for bringing the claim. However, a limitation defence can be a proper basis for an award of summary judgment if there is no real prospect of that limitation defence being defeated at trial.

### **The Claim under the Leases.**

12. This element of the claim alleges breaches of clauses 6.1 and 6.3 of the Leases. Clause 6 begins with the words "Covenants by the Landlord with the Management Company and the Tenant" and the immediately following operative words are to the same effect. Clause 6.1 is a covenant by the Landlord that the Estate and the Development will be completed and the curtilage laid out in accordance with the plans and specifications approved by the local planning authority. Clause 6.3 is a covenant for quiet enjoyment expressed in conventional terms.
13. The Claimants' case is that "the Defendant is the Landlord under the Leases on a proper construction of the Leases." In my judgement that argument is simply untenable and has no real prospect of success.
14. The Claimants say that they will rely in particular on clauses 2.9, 2.10, 3, and 4 of the Leases. Clauses 2.9 and 2.10 provide as follows:

"Rights reserved to the Landlord Countryside and the Management Company.

"2.9 Rights and easements excepted and reserved to the Landlord Countryside and the Management Company are excepted and reserved also (where appropriate) in favour of the owner or owners for the time being of the Development and the Estate ... and all persons authorised by it or them ..."

"Regulations

"2.10 The Landlord Countryside and the Management Company shall have the right to impose and amend reasonable regulations regarding the use and enjoyment of properties on the Estate from time to time in accordance with the Lease"
15. Clause 3 is a demise so far as is material for present purposes in the following terms:

"In consideration of the Premium paid at the direction of the Landlord to Countryside ... the Landlord with the authority [of] and at the direction of Countryside hereby demises with full title guarantee to the Tenant the Property

TOGETHER WITH the rights specified in Part III of the First Schedule ... EXCEPTING AND RESERVING unto the Landlord Countryside the Management Company and the owners and occupiers of the properties within the Estate the rights specified in the Second Schedule ...”

16. Clause 4 sets out the Tenant’s covenants which are expressed as being made “separately with each of the Landlord Countryside and the Management Company”.
17. Even if those terms stood alone they could not in my judgement lead to the Leases being construed to the effect that the covenants at 6.1 and 6.3 were being made by the Defendant as Landlord. They do not, however, stand alone but are to be read with the other terms of the Leases and in that regard the following are of note.
18. The Leases begin with the clauses prescribed by HM Land Registry. These include the parties to each lease. Four parties are identified and defined. The Landlord is defined as AMEC. The Tenant is the residential occupier of the particular apartment. Then two “other parties” are identified namely the “management company” which is defined as the relevant one of the Claimants and “Countryside” – namely the Defendant.
19. The Leases are said to be made between:

“the Landlord who is the estate owner of the first part and Countryside of the second part and the Management Company of the third part and the Tenant of the fourth part”.
20. Recital (2) records that the Landlord has agreed to grant leases of all the properties on the Estate. Then recital (3) records that Countryside is developing the Estate pursuant to a Development Agreement between it and AMEC and related companies. That recital states that Countryside is entitled to the proceeds of sale of the Property less a proportion to be paid to the Landlord.
21. Clause 6 contains covenants made by the Landlord which are expressed to be made with the Tenant and the Management Company.
22. Mr. Singer says that the fact that the Defendant has a right under clause 2.10 to impose regulations regarding the use and enjoyment of the properties is of particular significance. He says that this shows the Defendant exercising the rights which are typical of a landlord and when read with the other clauses shows that the Defendant was the Landlord. This argument has no real prospect of success. The fact that the Leases gave the Defendant rights which would typically be rights exercised by a landlord does not without more mean that the Defendant is to be seen as being the landlord in circumstances where the Leases define the parties and identify the landlord. Similarly the fact that the Defendant was to receive the premium and that the individual leases were granted on its authority and at its direction did not make it the landlord but instead indicate that there was a mechanism whereby Countryside was protecting its right to receive payment for the development. Moreover, in construing those provisions it is to be noted that the premium was to be paid to

Countryside “at the direction of the Landlord”. The relevant question is whether the Defendant can be said to have liability under the covenants at 6.1 and 6.3. Those covenants are expressed as being made by the “Landlord” that is a defined term under the Leases. “Countryside” is a separate and differently defined term. The Defendant was party to the Leases but not a party to those covenants. There is no tenable approach to construction of the Leases which could result in the conclusion that those covenants were made by the Defendant.

23. The Claimants’ alternative contention is that the Defendant was liable as “a party to the Leases and/or the Landlord’s agent and was responsible for carrying out the work and responsible for performing itself”. The fact that the Defendant was a party to the Leases does not advance matters. The question is not whether the Defendant was a party to the Leases but whether under the terms of the Leases it made the covenants in question. The mere fact that a person is a party to an instrument or agreement does not give rise to particular liabilities unless those liabilities are imposed on that person by the provisions of the instrument or agreement. As just explained clauses 6.1 and 6.3 do not purport to impose an obligation on the Defendant.
24. The parties were agreed that as a matter of law it is possible for persons to contract in such a manner that an agent can be a party to a contract in addition to its principal and can obtain rights or be subject to liabilities in its own right. The decision of the Privy Council in *International Railway Co v Niagara Parks Commission* [1941] AC 328 was an instance where an agent was itself liable to perform the contract as well as its principal albeit one where the agent had expressly entered the contract on its own behalf. The question is one of interpretation of the particular contract. Here the recitals to the Leases record that the Defendant was developing the estate pursuant to a Development Agreement with AMEC and other related companies. Even if that is properly to be regarded as making the Defendant the agent of AMEC for the purpose of developing the estate it does not mean that it was on its own behalf taking obligations under the Leases to the other parties to the Leases. Something more than the mere fact of agency is needed before an agent can be said to have personal liability under a contract where the principal accepts obligations. There is nothing in the Leases which could be said to give rise to such liability in this case. The Claimants point to the provisions for the Defendant to receive the premium and for the individual leases to be granted at its direction but that cannot be construed as an assumption of personal responsibility for the covenants which were said by the Leases to have been made by another party. Mr. Singer referred to the principle summarised in *Woodfall on Landlord and Tenant* at 1.034 that a person who purports to grant a lease is estopped by that act and cannot subsequently deny that he has thereby created the relationship of landlord and tenant even if he did not in fact have any right to create a tenancy of the land in question. Mr. Singer sought to argue that the provision stating that the demise was made with the authority of and at the direction of the Defendant amounted to the Defendant purporting to have power to grant the Leases. That argument has no real prospect of success. The provision must be seen in the context of the Leases

and when read as a whole the terms of the Leases make it abundantly clear that the Leases are being granted by AMEC and not by the Defendant.

25. In his oral submissions Mr. Singer sought to advance a further estoppel argument contending that the terms of the Leases combined with the Defendant's actions in developing the estate estopped the Defendant from denying that it was bound by the covenants at clause 6. The Defendant did indeed develop the estate but such action was envisaged by the Leases and so that can add nothing to the interpretation of the Leases. Similarly the contention that the terms of the Leases prevented the Defendant from denying that it was bound by clause 6 is just another way of saying that properly interpreted the Leases are to be read as imposing the clause 6 obligations on the Defendant and I have already explained that such an interpretation is untenable.
26. In the light of those conclusions I need not dwell at length on Mr. Watkin's alternative argument that the matters alleged cannot have constituted a breach of the covenant of quiet enjoyment at clause 6.3 of the Leases. In short he said that the effect of the decision in *Southwark LBC v Mills* [2001] 1 AC 1 was that problems resulting from structural defects present at the time of the letting could not amount to a breach of a covenant of quiet enjoyment. Mr. Singer sought to answer this by contending that the actions of the Defendant in 2014 and 2017 could be seen as separate breaches of the covenant of quiet enjoyment. However, this does not assist the Claimants because the breaches pleaded in the Particulars of Claim are said to derive from the original construction. The point made by Mr. Watkin is unanswerable in respect of the case as advanced in the Particulars of Claim. It follows that even if the Claimants' contention that the Defendant had obligations under clauses 6.1 and 6.3 had had a real prospect of success the claim based on clause 6.3 would have had no real prospect of success.
27. Mr. Singer pointed to the fact that the proceedings were still at an early stage so that there had not yet been disclosure and that the Defendant has declined to provide a copy of the Development Agreement or information as to the dealings between the Defendant and AMEC. He said that this could be seen as an indication that there was further material which could lead to the court viewing matters in a different light such that it was not yet possible to say that the claim did not have a real prospect of success. Alternatively it was to be seen as uncooperative and improper conduct amounting to a compelling reason why the matter should be disposed of at trial rather than by way of summary judgment. I reject those contentions. The Development Agreement and the other documentation as to the dealings between the Defendant and AMEC will doubtless indicate the terms of their arrangements inter se but what is important here is the relationship between the Claimants and the Defendant and the obligations which the latter had to the former. There is no realistic prospect that further material as to the rights and obligations of the Defendant and AMEC between themselves will affect the proper interpretation of the Leases or the conclusion as to the presence or absence of obligations owed by the Defendant to the Claimants under them.

### **The Claim under the Defective Premises Act 1972.**

28. As set out in the Particulars of Claim the claim under the 1972 Act is based on the alleged failings in the original construction of the buildings. As already noted those works were completed in 2010 at the latest. The Defendant says that this means that the claim is irredeemably statute-barred and accordingly has no prospect of success. In the Reply reference is made to the works done in March and April 2014 and to the Defendant's attendance at the properties in August 2017. Mr. Singer is right to say that a claimant does not need to set out in the Particulars of Claim matters which are to be relied on to defeat a limitation defence. The Reply is the appropriate place for any response to such a defence. Conversely it is not open to a claimant to put forward a new cause of action in a Reply and a new non-statute-barred cause of action pleaded in a Reply cannot operate to protect a different cause of action in the Particulars of Claim if that is statute-barred. At one point in his submissions Mr. Singer contended that even if the matters set out in the Reply related to different causes of action from those in the Particulars of Claim it was appropriate for them to be in the Reply. I do not accept that contention. CPR 16.4(1)(a) requires that Particulars of Claim contain a concise statement of the facts on which a claimant relies and for that reason if no other the matters said to found any cause of action on which a claim is based must be contained in the Particulars of Claim and not in a Reply.
29. It follows that the question of whether the claim under the 1972 Act has a real prospect of overcoming the limitation defence depends on whether the Claimants' arguments as to the effect either of the events in 2014 or of those in 2017 have a real prospect of success. In the Reply at [20] the Claimants said that the effect of the works done in 2014 was that the cause of action in respect of the Defendant's work "recommenced as at April 2014". At [22] in the Reply the Claimants said the Defendant's attendance at the works in 2017 and the failure to carry out remedial work thereafter amounted to defective work for the purposes of the 1972 Act with the cause of action in that regard accruing at August 2017. Those arguments both turn on the correct interpretation of section 1 (5) of the 1972 Act. This provides that:
- “(5) Any cause of action in respect of a breach of the duty imposed by this section shall be deemed, for the purposes of the Limitation Act 1939, the Law Reform (Limitation of Actions, &c.) Act 1954 and the Limitation Act 1963, to have accrued at the time when the dwelling was completed, but if after that time a person who has done work for or in connection with the provision of the dwelling does further work to rectify the work he has already done, any such cause of action in respect of that further work shall be deemed for those purposes to have accrued at the time when the further work was finished.”
30. It is common ground between the parties that as was explained in *Andrews v Schooling* [1991] 1 WLR 783 non-feasance falls within the scope of the duty under this Act as well as misfeasance. That does not, however, advance matters on this issue. I am satisfied that the approach of the Court of Appeal in *Alderson v Beetham Organisation Ltd* [2003] EWCA Civ 408, [2003] 1 WLR 1686 makes it clear that where further work is done then there is a fresh cause of action in respect of that work in respect of which time runs from when the work was done but that neither the performance of further work nor a failure to perform such work operates to revive an existing but statute-barred cause of

action. Mr. Singer pointed out that the judgments do not disclose the actual pleadings in that case and he says that the crucial question in that case was the failure of remedial works to rectify defects in the original works. Mr. Singer also says that the judgment of Judge LJ should not be read in isolation. Valiant though this attempt was I am not persuaded by it. I am satisfied that each member of the court in *Alderson v Beetham Organisation* expressly, and with consideration, proceeded on the footing that the effect of section 1 (5) was that the potential consequence of further remedial works was to give rise to a new cause of action with time running from the date of those further works or omission rather than to restart the limitation clock in respect of the original works.

31. Thus at [11] Aldous LJ referred to the cause of action “which arose under the proviso of section 1 (5)”. At [26] and [28] Aldous LJ spoke of a “fresh cause of action”. Mr Singer said that the closing part of [28] provided support for his interpretation but on my reading it is to the contrary effect.
32. The language used by Judge LJ at [2] is in clear terms and is directly contrary to Mr. Singer’s argument thus Judge LJ said (emphasis added):

“The limitation provisions provided by section 1 (5) of the Defective Premises Act 1972 arise at distinct stages, in relation to specific causes of action. The person subject to the obligations created by s1 (1) of the Act is required to see that the work for which he is responsible is done in a workmanlike or professional manner, with proper materials, and so that when completed, the dwelling is fit for habitation. If thereafter he carries out additional work to rectify the work already done, although s1 (5) does not say so expressly, the statutory obligation relating to the standard and quality of workmanship and materials applies equally to the remedial work as it did to the original work. Hence my view that there are two separate causes of action, the first relating to the quality of the original building work, and the second to the quality of the remedial work. For the purposes of the first cause of action, time starts to run when the dwelling is completed, and, for the second, when the remedial work is finished.”
33. That analysis is wholly consistent with the approach taken by Aldous LJ and is echoed in the judgment of Longmore LJ who at [7] spoke of “two causes of action” with the cause of action in respect of one accruing when the dwelling is completed and that in respect of the other accruing at the time of completion of the ineffective remedial work. Then at [8] Longmore LJ spoke of a “second cause of action” repeating that expression in [10].
34. Even without the authority of *Alderson v Beetham Organisation* the same conclusion follows from the words of section 1 (5) the natural reading of which is that it is the cause of action in respect of the further works which accrues on the completion of those works.
35. It follows that there is no prospect of the Claimants succeeding in defeating the limitation defence in respect of the 1972 Act claim contained in the Particulars of Claim relating as that claim did to the original construction of the properties. There may be claims under that Act in respect of the

Defendant's acts or omissions in 2014 and 2017 but those are separate causes of action. Those events did not have the effect of starting time running afresh in respect of the cause of action set out in the Particulars of Claim and there has been no application to amend the Particulars of Claim to assert a claim based on those events.

36. In those circumstances I do not need to address in detail the Defendant's alternative arguments that the works in 2014 were not addressing the relevant alleged defects in the original works and that the inspection undertaken in 2017 did not amount to further work for the purposes of section 1 (5). It suffices to say that I did not find the Defendant's arguments compelling in those respects and that if the Claimants had otherwise had a claim under the 1972 Act with real prospects of success those arguments would not have warranted an award of summary judgment for the Defendant.

### **The Tort Claim.**

37. In the common law tort claim the Claimants seek damages for the alleged breach of duty. The Defendant says that these are damages for the cost of remedying buildings which the Claimants already own and which are said to have been defectively constructed. The Defendant says that this is pure economic loss and as such is irrecoverable in accordance with the approach laid down in *Murphy v Brentwood* [1991] 1 AC 398.
38. In the Reply the Claimants contend without elaboration that the losses claimed are not pure economic loss. In his submissions to me Mr. Singer made no concession as to whether the losses were pure economic loss or as to whether they were recoverable. However, he also made no submissions on those issues accepting that the authorities compel me to conclude both that the losses are pure economic loss and that they are irrecoverable. It follows that this element of the claim is one where the Particulars of Claim fail to disclose reasonable grounds of claim and in respect of which the claim is to be struck out.

### **Conclusion.**

39. It follows that the Defendants are entitled to summary judgment in respect of the claims under the Leases and the 1972 Act and that common law tort claim falls to be struck out.