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Case No: HT-2019-000455

Neutral Citation Number: [2020] EWHC 1646 (TCC)

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

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 24 June 2020

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

RG Securities (No.2) Limited **Claimant**
- and -
(1) Allianz Global Corporate and Specialty CE
(2) Building Lifeplans Limited
(3) R Maskell Limited
Defendants

- -

Judgment

- -

Alan Tunkel (instructed by Foskett Marr Gadsby & Head LLP) for the **Third Defendant**
Catherine Piercy (instructed by Stewarts Law) for the **Claimant**

Hearing date: 18 June 2020

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Mr Justice Fraser:

Introduction

1. This judgment is the decision on an application by the Third Defendant, R Maskell Ltd ("Maskell") for summary judgment on its defence against the Claimant. The central basis of the application is that the claim against Maskell is statute barred. There is an alternative application, should this one fail, whereby Maskell seeks permission to bring a counterclaim against the Claimant, together with an associated company (not yet a party to these proceedings), R Maskell Loughton Ltd ("Maskell Loughton"), seeking to bring a Part 20 claim against the Claimant too. I shall return to that latter alternative application having decided whether Maskell is entitled to summary judgment. Maskell Loughton is a wholly owned subsidiary of Maskell.

2. The substantive claim concerns what might be termed post-Grenfell Tower cladding flammability issues. It is widely known that on 14 June 2017 Grenfell Tower in London suffered a catastrophic fire in which 72 people lost their lives. A public inquiry was initiated which is still underway. The cladding at the tower caused the extraordinary spread of fire up the 24 storeys of the building. As a result of these very shocking events, cladding at many similar buildings across the country was examined and other types of cladding, in addition to the type installed at Grenfell, were reviewed. The Claimant is the freeholder of St Francis Tower, Ipswich Central, Franciscan Way, Ipswich IP11 1LS ("the Property"). The Claimant purchased the freehold of the Property in 2015, acquiring that property by way of transfer of title from Central House Investments Limited, a wholly owned subsidiary of Maskell. The Form TR1 for this transfer is dated 2 April 2015. Central House Investments Ltd is now known as Maskell Loughton.

3. The Property is the tallest residential block in Suffolk. It consists of 16 storeys with 116 flats and a café at ground floor level. It has a concrete frame construction built in the 1960s. The Property is located in the middle of Ipswich and only about 300m from the main fire station. The Property was substantially refurbished between about 2006 and 2009 ("the Refurbishment Works"). The Refurbishment Works were carried out by Maskell. During these Refurbishment Works, the Property was over-clad with a Trespa cladding system, largely using Polyisocyanurate ("PIR") insulation underneath. Small sections utilised plain aluminium panel sections and there are also some small amounts of Aluminium Composite Material ("ACM") cladding at high level. The windows were all replaced with uPVC double glazed units.

4. Essentially, and this is the Claimant's case so this broad summary should not be taken as the court making any findings in this respect, the Trespa cladding system is said to be highly inflammable. There are said to have been defects identified at the Property relating to the cladding panels used on the exterior of the Property, to the internal fire compartmentation integrity, and also to the windows and safety measures which should have been provided at the Property to prevent the occupants of the Property from falling out of it. The defects are said to be such that there was an imminent risk to the health and safety of the occupants of the Property, particularly in the event of a fire. The Claimant also avers that the completed Refurbishment Works do not comply with Building Regulations, and do not have a Building Regulations Completion

Certificate. The Claimant pleads, as a schedule to its Particulars of Claim, a lengthy Schedule of Defects which identifies that the defects amount to works which were in breach of the relevant Building Regulations which applied at the time. There are also breaches alleged in respect of other more isolated failures to the fire protection measures at the Property, such as places where fire stopping and fire compartmentalisation are said to be missing. The defects include allegations in respect of design, materials and workmanship. The Claimant has brought proceedings against the First Defendant in reliance on a policy of insurance issued in respect of the Refurbishment Works. Proceedings against the Second Defendant have been discontinued by the Claimant and do not need to be explained further.

5. The Claimant's case is that the Refurbishment Works were not done in a workmanlike or professional manner or with proper materials, with the consequence that the Property is not fit for habitation in breach of section 1(1) of the Defective Premises Act 1972. It is pleaded that the cladding system used at the Property is more flammable even than that used on Grenfell Tower, and that no reasonably competent developer would have used such cladding on a building such as the Property. The claim is for the cost of remedial works necessary to ensure that the Property is fit for habitation, which are estimated to cost £3,589,373.70, although the bulk of those costs appears to relate, at this stage in the action, to the cladding system. The Claim Form is dated 10 December 2019.

6. Maskell served its defence, including within it what was said to be a counterclaim (although it appears to be framed more as a defence than a counterclaim), and also within the pleading sets out what is said to be a Part 20 claim against the Claimant on the part of Maskell Loughton. For present purposes that does not matter, although I return to that point at the end of this judgment. The main thrust of the defence in so far as it relates to this application is that the claim against Maskell is statute barred by virtue of the Limitation Act 1980. It is pleaded that any claim based on breaches of contract, or damage, that occurred prior to 16 December 2013 is time-barred, that date being calculated as 6 years prior to the issue of the claim form itself. It is also pleaded that any claim based on breach of duty under the Defective Premises Act 1972 is also time-barred.

7. The Claimant, in its Reply, pleads that it was not informed that the works did not have Building Regulation approval; that it was led to believe that Building Regulation approval had been obtained for the Refurbishment Works; that Maskell concealed the lack of Buildings Regulation approval of the completed Refurbishment Works; and that accordingly the Claimant is entitled to rely upon s.32 of the Limitation Act 1980, and time does not begin to run for limitation purposes until the Claimant discovered the concealment in May 2018.

8. There are some other more detailed aspects to the case advanced by the Claimant but the summary at [7] above sets out the broad thrust. It must be remembered that the application is made by Maskell to have the claim dismissed summarily, and so not all of the evidence both to substantiate the concealment argument, and also to defend against it, is available or before the court.

9. Oversight in terms of compliance with Building Regulations can be provided by the local authority, in this case Ipswich Borough Council ("Ipswich BC"), or an

"approved inspector", something permitted by the Building (Approved Inspectors etc) Regulations 2000. NHBC Building Control Services Ltd ("NHBC") was engaged by Galliard Home Ltd ("Galliard") in 2005 to act as the approved inspector for the Refurbishment Works. Maskell took over from Galliard as the developer after Galliard sold the Property. The oversight or approval for Building Regulations by the approved inspector is required at different stages of the work, namely in respect of the plans, the works as they are carried out, and the works as completed. The NHBC provides such approved inspector services where it is engaged to do so. Here, NHBC was in that position in respect of the development, and part of the Claimant's case on concealment arises from communications from NHBC to Maskell which sought payment from Maskell so that the scheme could be prepared by NHBC for final Building Regulation approval, or wherein NHBC sought information from Maskell so that certain conditions could be discharged. Maskell did not provide the payment which NHBC required, and did not provide the information sought. Accordingly, NHBC never applied for Building Regulations approval of the completed works, which would have been required if a Completion Certificate was to have been issued. NHBC had approval for the plans, and had served what is called an Initial Notice on 25 July 2005, following the grant of planning permission by Ipswich BC. Maskell identifies that service of such a notice leads to what is called "deemed acceptance", but it is wrong to equate that with Building Regulations approval of the completed works. That approval of the works as performed and completed is given by means of a Buildings Regulation Completion Certificate. No such certificate was issued by NHBC, or by Ipswich BC, and Maskell is not in a position to contend that it was. Certainly on the state of the evidence before the court for this application no such certificate has been produced on Maskell's behalf.

10. Maskell joined NHBC to the proceedings as Part 20 Defendants and as a result of this NHBC provided initial disclosure of letters from it to Maskell dated 20 August 2009, 13 December 2013, 13 June 2014 and 25 September 2014. In these letters, NHBC sought either payment from Maskell in order that NHBC could prepare the scheme for final completion in respect of Buildings Regulation approval, or sought information in order for certain conditions to be discharged. I shall only quote from one of those letters. In the letter of 20 August 2009 NHBC asked Maskell to contact it "for a revised quotation and [to] return the application form with payment <u>in order to prepare the scheme for final completion</u>" (emphasis added). That letter was not answered by Maskell, no quotation was issued and, logically, NHBC did not "prepare the scheme for final completion", which can only mean final completion for Building Regulations purposes. The Claimant relies upon these letters to demonstrate that Maskell knew that the Property did not have final Building Regulations approval.

11. The Claimant was informed by Ipswich BC on 14 May 2018 that "there is currently not a Building Regulation application in place for this project" and therefore that the works as completed had not received Building Regulation approval. The Claimant avers that this is the date when it became aware of the concealment upon which it relies. This statement by Ipswich BC followed a formal notice of cancellation by NHBC of its Initial Notice by way of notification from NHBC to Ipswich BC dated 20 April 2016. This followed an e mail from Maskell to NHBC dated 17 March 2016, wherein Maskell informed NHBC that "we no longer require building control or cover on these premises, as the premises have now been sold to a third party."

12. The effect of this cancellation was explained to the Claimant by Ipswich BC as I have identified at [11] above. Accordingly, the Claimant's case is that Maskell knew that full Building Regulations approval had not been obtained (because it had been advised of this by NHBC in the letters referred to above). The Claimant avers that Maskell took steps after the sale of the Property had completed which meant that there was no building regulation application in place for the Property. The NHBC had cancelled its Initial Notice following a request from Maskell to do so.

13. After NHBC had served its Defence in the Part 20 proceedings, but before this hearing, Maskell discontinued those proceedings against NHBC. NHBC is therefore no longer a party to this action. However, in its defence, NHBC pleaded that "no final certificate as understood in section 51(1) of the Building Act 1984 in relation to the Refurbishment Works or any of the plots at the property was either sought from [NHBC] by Maskell or was provided by [NHBC]. [NHBC] was accordingly not satisfied that any work to which the Initial Notice relates was completed or that its prescribed functions had discharged." NHBC's pleaded position is therefore that the works as completed did not have Buildings Regulation approval. Those completed works did not have the approval of the approved inspector, which was NHBC until the notification of 20 April 2016. At least for the purposes of this application, that appears to support the Claimant's case in this respect insofar as approval of the works as completed is concerned.

14. The other matters upon which the Claimant relies, so far as concealment at this stage of the proceedings is concerned, are those relating to its pre-purchase enquiries. One entry is also relevant to one of the points raised by Maskell on this application regarding concealment, which is that any concealment (which is denied by Maskell) is said by Maskell to have been by Maskell Loughton, its subsidiary, not by Maskell. Maskell relies upon this to justify a submission that s.32(1)(b) of the Limitation Act is not available to the Claimant, as that requires deliberate concealment by the defendant. On 30 January 2015 the solicitors acting for the Claimant stated (in a numbered list) in the additional enquiries that:
1. "2. The heads of terms refer to [Maskell the Third Defendant] as the vendors, however the register shows the proprietor to be [Maskell Loughton] please clarify."
2. At numbered item 8, "please provide evidence the finished development of the property complies with the Building Regulations. If the Building Regulations approval was dealt with by the local authority we require a copy of the Notice of Passing of Plans and Building Regulations Completion Certificate. If the Building Regulations approval was dealt with by NHBC we require a copy of the letter confirming acceptance or deemed acceptance of the Initial Notice."

15. The answer to this came from solicitors acting for the vendor. On 4 March 2015, the solicitors stated:
"Maskell is the holding company of [Maskell Loughton]…..
We understand that the NHBC sent an Initial Notice, and if there is no objection that is deemed acceptance."

16. On 20 March 2015, the further answer from the same solicitors was:
"We have sold 116 flats in this block, and <u>there has never been a problem with the building regulation approval,</u> so we are not doing anything further on that.

The building regulation approval we cannot find on the portal, but we are writing to the Council for that."
(emphasis added)

17. In terms of evidence on the application, each side submitted a witness statement, for Maskell from Mr Ralph Rachel, who was the project manager for the Refurbishment Works and who still works for Maskell. His evidence is that the works were completed at the end of 2007, and he says that the officers from the fire station would often visit and also offered advice. He does however elide approval of the plans, completion of the Property for Council Tax purposes, and NHBC Buildmark Cover (a type of insurance cover for purchasers) on the one hand, with Building Regulations approval of the completed works on the other. He was not involved in the sale process and therefore his evidence is of limited assistance, at best, in terms of the alleged concealment. He explains how upset he is at the allegation regarding the combustibility of the Trespa panels, and makes various points to explain either how they came to be used, or why they were approved or suitable at the time. He also makes the point that the use of these panels was expressly provided for in the plans for the Refurbishment Works, which were approved.

18. The evidence from the Claimant is provided by Mr Harrison, who is the Managing Director of Pier Management Ltd, the appointed representative of the Claimant. He was involved in the purchasing of the Property. His evidence deals with the case advanced by the Claimant on concealment, which I have summarised above.

The principles to be applied

19. CPR Part 24.2 states that:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
>
> (a) it considers that -
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) …; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

20. The approach to summary judgment applications by defendants rather than claimants is usefully summarised by Lewison J (as he then was) in the case of ***Wetherspoon v Van de Berg & Co [2007] EWHC 1044 (Ch)*** in the following terms:

> "[4] Both the application to strike out and the application for summary judgment are summary applications. The application for summary judgment is made by defendants against a claimant, which is less usual than an application by a claimant for judgment against a defendant. The authorities deal mainly with applications by claimants. The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: ***Swain v Hillman*** [2001] 2 All ER 91;

ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ***ED & F Man Liquid Products v Patel*** [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a 'mini-trial': ***Swain v Hillman***

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ***ED & F Man Liquid Products v Patel*** at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: ***Royal Brompton Hospital NHS Trust v Hammond (No 5)*** [2001] EWCA Civ 550 ;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: ***Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd*** [2007] FSR 63 ;

vii) The court should be especially cautious of striking out a claim in an area of developing jurisprudence, because in such areas decisions on novel points of law should be decided on real rather than assumed facts."

21. I adopt that approach to this application. In relation to granting summary determination in relation to limitation allegations, which was the basis of the defendant's application for summary judgment in that case too, Lewison J. stated:

"[30] However, I am asked to determine this issue against JD Wetherspoon summarily, without a full investigation of the facts. I remind myself that I should be cautious about making a summary determination where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."

22. The relevant considerations in respect of limitation are as follows. Section 1(5) of the Defective Premises Act 1972 provides that:

> " 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…"

23. The Limitation Act 1980 Act is an act consolidating the Limitation Acts 1939 to 1980; ***Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd*** [1996] A.C. 102, 142. Section 1 of the Limitation Act 1980 provides that the ordinary time limits provided in Part I are subject to extension or exclusion in accordance with the provisions of Part II. Section 9 of the Limitation Act 1980, which forms part of Part I, provides that:

> "(1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued."

24. Section 32 of the 1980 Act is part of Part II and deals, inter alia, with concealment. It provides:

> "32.— Postponement of limitation period in case of fraud, concealment or mistake.
>
> (1) Subject to [subsections (3) and (4A)] below, where in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> (c) the action is for relief from the consequences of a mistake;
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
>
> References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent".
>
> (emphasis added)

25. Accordingly, the effect of this latter provision is that if there has been any deliberate concealment by Maskell of any fact relevant to the Claimant's cause of action, then section 32(1)(b) of the 1980 Act postpones the time period in terms of limitation. The 6 year period relied upon by Maskell, working back from the date of issue of the claim form, originates in section 9 of the 1980 Act.

Analysis

26. Mr Tunkel advanced an argument that the limitation period under the Defective Premises Act 1972 must have expired by the time of the sale, and therefore the clock "does not start running again", even if there were any concealment. This was met by Ms Piercy on two fronts. One was a submission that it is not clear, for the purposes of this application, that any 6 year limitation period had expired as of the sale date in April 2015. In this respect she relied upon a "Certificate of Approval" in respect of the works dated 15 May 2009 from Building LifePlans Ltd which certified the Property having been "subjected to durability assessments, design checks and workmanship checks as prescribed by the technical risk management system" operated by that company (which was originally the Second Defendant, but against whom proceedings were discontinued).

27. Her second submission was a legal one, and is that even if the limitation period would have otherwise expired, any deliberate concealment in respect of the sale means that under s.32(1)(b) of the Limitation Act 1980, the correct limitation period would only start to run from the date the concealment was discovered.

28. Ms Piercy is in the position that this point has been considered at the highest level. In ***Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd [1996] A.C. 102***, the House of Lords considered the situation where section 32(1)(b) was engaged, and the potential operation of that provision to postpone the running of time where there was deliberate concealment by the defendant of facts relevant to the claimant's cause of action. In statements made in the speeches in that case, which considered the point regardless of whether such concealment was contemporaneous with, or subsequent to, the accrual of the cause of action, the following passages are relevant. Lord Keith of Kinkel stated (at 140-141):

> "The terms of paragraph (b), however, are wide enough to cover both the case where the concealment is contemporaneous with the accrual of the cause of action and the case where it occurs at some later time. So it would be natural to expect both cases to be covered by the enactment, and in my opinion they are. … <u>The introduction of a time limit commencing at the discovery or imputed discovery of the concealment necessarily involves that time cannot be treated as having started to run from accrual of the cause of action</u>." (emphasis added)

29. Lord Browne-Wilkinson stated the following (at p142D-F):

> "My Lords, were it not for the acute division of judicial opinion on the matter, I would have little doubt that <u>on its true construction section 32(1)(b) operates to postpone the running of time in every case where there is deliberate concealment by the defendant whether such concealment was contemporaneous with or subsequent to the accrual of the cause of action.</u> Literally construed, section 32(1)(b) applies to any concealment of relevant facts: there is no express provision limiting the time at which such concealment must take place. As my noble and learned friend, Lord Nicholls, points out, there is no common-sense reason why Parliament should have wished to distinguish between cases where the concealment takes place at the

> time of the commission of the wrong and concealment at a later date. In both cases the mischief aimed at would be the same, viz., to ensure that the Act does not operate to bar the claim of a plaintiff whose ignorance of the relevant facts is due to the improper actions of the defendant. If, as I believe, subsequent concealment falls within the literal meaning of section 32(1)(b), the Act spells out the consequences with equal clarity: time does not begin to run until the concealment is or should be discovered."
>
> (emphasis added)

30. The consequences of this construction of the relevant section were then further explained:

> "For myself, I do not find it absurd that the effect of section 32(1) is to afford to the plaintiff a full six-year period of limitation from the date of the discovery of the concealment. In such a case, the plaintiff must have been ignorant of the relevant facts during the period preceding the concealment: if he knew of them, no subsequent act of the defendant can have concealed them from him. If the defendant then deliberately takes a step to conceal the relevant facts (a step which is by ordinary standards morally unconscionable if not necessarily legally fraudulent) it does not seem to me absurd that a plaintiff who has been prevented by the dishonourable conduct of the defendant from learning of the facts on the basis of which to found his action should be afforded the full six-year period from the date of the discovery of such concealment to bring his action. Certainly, that consequence is far less bizarre than the result of the construction favoured by the majority of the Court of Appeal [1994] 3 W.L.R. 999 under which a plaintiff's right of action can become time-barred before he even becomes aware of the relevant facts, his ignorance being due to the deliberate concealment of such facts by the defendant." (emphasis added)

31. Lord Nicholls of Birkenhead agreed with the views expressed by Lord Keith of Kinkel and Lord Browne-Wilkinson. He recognised in his speech that this construction of section 32(1)(b) meant that (at 152):

> "…the limitation clock will only start ticking when the plaintiff discovers the concealment or could with reasonable diligence have done so. In the case of subsequent concealment the clock is turned back to zero**.** It is turned back to zero even if the defendant had already acquired a limitation defence before the concealment took place." (emphasis added)

32. This passage is, in the context of this application, a most important one. This is because of Mr Tunkel's submissions that the 6 year period must already have expired by the time of the sale of the Property to the Claimant, and hence any concealment just prior to, or upon, the sale cannot assist the Claimant in limitation terms as limitation had already expired. However, that point has already been addressed in this House of Lords judgment, and the conclusion expressed by Lord Nichols is that the limitation clock *is* reset to zero in those circumstances.

33. There are two consequences to this. It means that the date of completion of the Refurbishment Works does not, for these purposes, make a difference on this application to the arguments on limitation. Even if Mr Tunkel is right, and six years from completion of those works expired before the date of sale (and I accept that the evidence on this is thin; although Mr Rachel says he remembers it is was in late 2007, he could be mistaken, and the 15 May 2009 Certificate of Approval suggests he might be), then application of the principles in ***Sheldon v RHM Outhwaite*** means that any deliberate concealment in relation to the sale would lead to the limitation period being calculated under s.32(1)(b) of the Limitation Act 1980, with six years running from the date on which that concealment was discovered.

34. Mr Tunkel met that point with admirable fortitude and relied upon the following. Firstly, notwithstanding the dicta I have reproduced at [31], he submitted that this was not part of ratio in that case, and that I am only bound by the ratio of that decision. Secondly, he pointed to academic dissatisfaction with the perceived illogic of the result in ***Sheldon*** in any event, and relied in this respect on Professor McGee's views in his textbook ***Limitation Periods*** Sweet & Maxwell 8th ed. (2018) at 20.039 and following. In that passage the author identifies that the decision in ***Sheldon v RHM Outhwaite*** "makes little sense" and doubts that a court would be prepared to go quite as far as applying what he calls the "strict logic" of the decision which suggests that "the clock would be reset". The same passages in the textbook also refer to the majority decision (because the decision was 3:2 in favour of the interpretation I have explained) as being "deeply unconvincing", with "unsustainable reasoning" and states that it "causes more problems than it solves".

35. Dealing first with the ratio point, even if Mr Tunkel is right, the observations by Lord Nicholls would still be obiter, and have highly persuasive (rather than binding) force. I consider such dicta, even if obiter, would be of powerful effect. However, I consider it *is* part of the ratio. The ratio of the case concerns the correct construction of section 32(1)(b) of the Limitation Act 1980. As expressed at the beginning of Lord Keith's speech (at 137) "this appeal involves a short point as to the proper construction of section 32 of the Limitation Act 1980." There were two competing constructions. The House of Lords preferred the construction that meant the limitation period began to run from the date of discovery of the concealment. There were disadvantages in both potential answers to the construction, explained by their Lordships in different terms, but one of the disadvantages of the one ultimately chosen by the majority was that it would, indeed, "reset" the clock, due to the word "begin" in the section, "a discordant word in a statute" (per Lord Nicholls at 154F). Greater logic was potentially available if a limitation period were merely interrupted during the period of concealment. Yet none of the three Law Lords in the majority chose that third way, as it were. Indeed, it was expressly not chosen, even though raised by the House of Lords with counsel for both parties, and expressly considered. That is because, even though it might give a more logical outcome, namely interruption during a period of concealment, it could not stand with the wording of the section. That uses the word "begin".

36. Each of the majority recognised the consequences of the construction they did adopt in their decision in that case. Lord Nicholls did so in the passage at [31] above. Lord Browne Wilkinson (at 143) stated that the running of time is legally an irrelevance "unless and until a period of limitation has expired and an action has been brought". He explained that sections 2 and 5 of the Limitation Act have no relevance if section

32 applied. As he put it, "section 32 is the only relevant section" in terms of limitation where there has been concealment. Lord Keith considered the same point at 141E, but said it was not "a realistic objection" to the construction of the section ultimately chosen, because no potential defendant would set out to conceal facts relevant to a cause of action when more than six years had passed since its accrual. He also, however, stated at 141D that section 2 and section 5 would simply not apply.

37. As support for my finding that it is part of the ratio, the learned author upon whom Mr Tunkel relies does not explain this aspect of the case as being obiter. Indeed, he summarises its effect, logical or not, and explicable or justifiable or not, in the same terms that Lord Nicholls did at the time. The ratio of ***Sheldon*** is that time does not *start* to run if there has been concealment, until the concealment is discovered; this is the meaning of section 32(1)(b) which applies in these circumstances. Academic views are of great assistance, but academics are not bound by the doctrine of stare decisis. First instance courts are. Simply because Professor McGee does not agree with the consequential application of the construction chosen in ***Sheldon*** does not assist Mr Tunkel in seeking to persuade me that I ought not to follow it. I consider I am bound by the decision in that case, and that the effect of deliberate concealment and section 32(1)(b) Limitation Act 1980 is that the applicable limitation period runs from when the concealment is discovered. Part I of the Limitation Act with its different dates for the commencement of a limitation period does not apply; section 32 in Part II of the Act does. This means that Ms Piercy is correct and it does not matter when the works were in fact finished. Whether the works finished in 2007 (as Mr Rachel says) or 2009 (as suggested by the Certificate explained in [26] above) does not matter, if there has been deliberate concealment such that section 32(1)(b) applies.

38. Mr Tunkel also relied upon a sentence in the ***JD Wetherspoon*** case wherein Lewison J explained ***Sheldon*** as dealing with the position where "the concealment may take place at any time during what otherwise have been the running of the period of limitation". In other words, he did not include a statement of like effect, dealing with what would occur if a period of limitation had otherwise expired before the concealment. However, the summary at [40] in that judgment does not involve consideration of the point in this case specifically, as the concealment in that case clearly "took place during the period of limitation" as expressly made clear in the final sentence of [44] of Lewison J's judgment. In other words, although Lewison J did not expressly identify this aspect of the consequences of the decision in ***Sheldon***, there was no reason for him to do so. That does not mean that the consequences do not exist.

39. Accordingly, in so far as Maskell may have deliberately concealed from the Claimant facts relevant to its cause of action, time does not begin to run for limitation purposes until the Claimant discovered such concealment by reason of section 32(1)(b) of the Limitation Act and the construction of that section selected as the correct one by the majority of the House of Lords in ***Sheldon.*** The Supreme Court is free to depart from its own earlier decisions, and those of the House of Lords. Unless and until they do, however, the analysis above is sufficient for the purposes of this application. I consider myself bound by the ratio of that decision as I have explained.

Conclusion

40. In my judgment the following points are in the Claimant's favour on this application and lead to my conclusion that Maskell is not entitled to summary judgment on the claim brought against it.

41. The Claimant has an answer to the plea by Maskell that the action is time-barred. On the documents, it appears – and this is a view at this stage in the action based only on what is before the court on this application – that the fact that the Property did not have Building Regulation approval for the Refurbished Works as completed was not disclosed to the Claimant, and arguably was deliberately concealed from the Claimant. The Claimant's case on concealment has a realistic prospect of success and is more than merely arguable. The court has only an incomplete picture at this stage. However, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case in any event.

42. Nor do I accept the argument advanced by Mr Tunkel that the concealment, which the trial judge could realistically and properly conclude has occurred, could only or must have been concealment on the part of Maskell Loughton, rather than concealment by Maskell, because Maskell Loughton is identified on form TR1. There is sufficient material before the court, even on the incomplete state of the evidence, to conclude that the Claimant's case has a reasonably arguable case on concealment by Maskell, which has a realistic prospect of success. Quite apart from the fact that Maskell Loughton was a wholly owned subsidiary of Maskell, the additional enquiries raised by the Claimant's solicitors identify that the vendor who was specified on the Heads of Terms was Maskell. There is nothing to suggest that the vendor's solicitors were acting solely for Maskell Loughton and not for Maskell as well. If Maskell entered into the Heads of Terms, as the document recites, those solicitors may well have been acting for both. Further, the solicitors must have obtained their information from somewhere. That could just as readily have been from Maskell, if not that being more likely. In my judgment, that is sufficient to demonstrate that the Claimant has a realistic, as opposed to a fanciful, prospect of success on this issue.

43. Mr Tunkel advanced, as a separate head of argument, that the representations made, or answers to enquiries, from the vendor's solicitors can be seen on the evidence before the court and the documents available, to be true. In other words, a conclusion can and should be drawn on the concealment point now, in favour of Maskell. I do not accept that submission. The statement by the solicitors "there has never been a problem with the building regulation approval" and that the local authority will be asked for a copy, because a copy "cannot be found on the portal" is sufficient for the Claimant to demonstrate a realistic prospect of success on the issue of concealment having occurred. Those statements are more consistent with concealment than they are with full disclosure of the true situation on this point. Evidence realistically expected to become available for trial, in addition to the limited evidence before the court on this application, includes that on disclosure. Any claimant advancing a case of this type on concealment will, perhaps inevitably, not be apprised of all the available evidence at this early stage in the proceedings, and that must be taken into account. This is not to speculate. It is simply to identify, as made clear in the ***JD Wetherspoon*** case, that the court can take into account that further relevant evidence

on this issue may become available upon the more full investigation of the facts that will take place at the trial. Nor is this to assume that all or any facts that may emerge will necessarily be in the Claimant's favour. Those other facts may, potentially, be in Maskell's favour, or a mixture of the two. My decision on this is not to the effect that the Claimant's case on concealment will prevail. It is simply to find that at this stage it would be wrong summarily to dismiss the Claimant's case in this respect.

44. Limitation arguments such as these are particularly fact sensitive. The cladding and fire issues such as the ones that arise in this case are very factually complex. The planning application drawings demonstrate that Trespa Meteon cladding was to be used as rainscreen cladding panels, and this was specified at the time. However, the Claimant's case is not limited to the use of these panels. Allegations of defects include failures by Maskell to provide any fire compartmentation (which is pleaded in the schedule as "there is a complete absence of compartmentation between flats and common parts on every floor") and this is an allegation relating to fire safety that has nothing to do with the use of Trespa panels, as are the alleged defects relating to the fire doors. These are just the sort of defects – if they exist, in respect of which I make no findings - that would not be expected to be present in a building that had been given Building Regulations approval for the completed works.

45. I share the caution expressed by Lewison J at [30] in the ***JD Wetherspoon*** case. It must be remembered that to grant a party summary judgment (whether to a claimant or a defendant) is to deal with the claim or defence, by definition, summarily and therefore without resolution on its full substantive merits. Some claims merit such summary judgment; others do not. This case falls into that latter category for the reasons I have identified. There is a great deal more information available as a result of the Defence pleaded by NHBC than there was before, but the state of evidence on concealment is still not at its final stage. For all these reasons, the application by Maskell for summary judgment against the Claimant fails.

46. Finally, it is only necessary to deal briefly with the alternative limb of the application by Maskell in respect of its counterclaim. Procedurally, something seems to be amiss. A defendant does not need the permission of the court to advance a counterclaim if this is pleaded with its defence, under CPR Part 20.2(2)(a), which this one was. In any event, Maskell's "counterclaim" appears to be advanced as though it is a defence to the claim, rather than as a counterclaim. It also appears to be advanced as a joint claim against the Claimant with Maskell Loughton as a separate claiming party to that joint claim, even though Maskell Loughton is not a party to these proceedings at all. The single pleading seeks declarations of indemnity and/or contribution in favour of Maskell Loughton against the Claimant. No additional claim under Part 20 has yet been made by Maskell against Maskell Loughton under CPR Part 20.7. Practice Direction 20 sets out the steps that ought to be followed if the court is to be asked for permission to make an additional claim, including that it must be supported by evidence. No evidence appears in Mr Rachel's witness statement about this. This is not fatal to Maskell Loughton becoming a party at some stage, but it is not a defendant or party already to the proceedings as a result of the way the claim was put by the Claimant. The Claimant brought no proceedings against Maskell Loughton at all. If those who control Maskell wish to join Maskell Loughton as a party, then the requirements of PD 20 have to be complied with, and that includes evidence identifying the matters specified in the Practice Direction. There is no evidence in

support of the alternative application available or before the court presently. These steps can potentially be satisfied in due course. The main aspect of the application was, in any case, that brought by Maskell seeking summary judgment against the Claimant. That application fails for the reasons explained.