Neutral Citation Number: [2022] EWHC 1881 (TCC)

Case No: HT-2021-000076

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

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4Y 1NL

Date: 19/07/2022

Before:
MRS JUSTICE O'FARRELL DBE

- -

Between:

NATIONAL HOUSE-BUILDING COUNCIL

Claimant

- and -

VASCROFT CONTRACTORS LIMITED

Defendant

- -
- -

David Sawtell (instructed by **BP Collins LLP**) for the **Claimant**
Abdul Jinadu (instructed by **Hickman Construction Law**) for the **First Defendant**

Hearing date: 28th June 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archive. The date and time for hand-down is deemed to be Tuesday 19th July 2022 at 10.30am

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. The matter before the court is the application by the claimant ("NHBC"), to strike out parts of the Defence and/or for summary judgment in respect of those parts, on the basis that they disclose no reasonable grounds for defending the claim because they are misconceived in law and/or they have no real prospect of success.

Background facts

2. This claim is brought by NHBC under its 'Buildmark Cover' insurance scheme for newly built and newly refurbished residential properties and arises out of extension works to an existing basement at Treetops, Crompton Avenue, Hampstead, London N6 4LH.

3. In 2007 the Defendant ("Vascroft") was engaged by the owner of the property, Saterix Trading Incorporated ("Saterix"), to carry out shell and core work at the property.

4. Buildmark Cover is provided by way of a tripartite agreement between NHBC, the home-owners and registered builders or developers. In 2007 Vascroft was a construction company registered with NHBC; it applied to register the property for Buildmark Cover and NHBC agreed to offer Buildmark Cover in respect of the same.

5. The terms of the Buildmark Cover imposed on Vascroft obligations to ensure that the property was designed and built in accordance with the applicable NHBC 'Requirements', including the 'Technical Requirements', the 'Performance Standards' and the 'Guidance'.

6. On about 15 July 2011 Vascroft was engaged by Saterix to carry out basement extension and other works at the property. A dispute arose, as a result of which Vascroft's employment under the contract was terminated and it left site, but the works were completed in about January 2013.

7. NHBC's case is that on 26 March 2014 the property was sold by Saterix to Ethiel Assets Limited ("Ethiel").

8. A Buildmark Cover Insurance Certificate was issued in respect of the property under policy number AG163987, effective from 12 June 2014 and valid for a period of 10 years.

9. In 2013 and 2014, Saterix alleged that there were defects in the works, causing water ingress in the basement pool and leisure area, and sent emails to Vascroft, notifying it of the defects.

10. On 15 March 2017, following investigation of the defects, NHBC's investigator produced a 'Resolution Report', identifying remedial works that were required to be carried out by Vascroft pursuant to the 'Rules' under the Buildmark scheme. The remedial works were not carried out. By letter dated 30 August 2018 NHBC notified Vascroft that it would carry out the necessary remedial

works and would require Vascroft to reimburse it for the costs incurred, including the costs incurred in connection with settling Ethiel's claim, administration charges and interest.

11. On 27 March 2019 NHBC entered into a settlement agreement with Ethiel, pursuant to which £1,003,343.03 was paid in respect of the defects.

Proceedings

12. On 2 March 2021 NHBC commenced proceedings against Vascroft.

13. On 28 October 2021 NHBC served particulars of claim, alleging defective design and workmanship in respect of the basement extension works, in breach of the Technical Requirements and the Performance Standards, causing 'Damage' within the meaning of the Buildmark Cover. NHBC seeks to recover the sum of £1,003,343.03 by way of indemnity under the terms of the Buildmark Cover scheme.

14. On 24 January 2022 Vascroft served its defence, denying that NHBC was entitled to recover the sums claimed, including the following grounds:

    i) NHBC, Saterix or Ethiel failed to make a claim under section 2 of the Buildmark Cover within the two-year period of cover, or afford reasonable access to the property to carry out remedial works;

    ii) Saterix, through its architect, Capital Interiors Limited ("Capital") and structural engineer, AE Butler & Partners Limited ("Butler"), was responsible for the design of the interface between the existing basement and the extension, including the design of the waterproofing;

    iii) NHBC approved the design of the basement and waterproofing;

    iv) Vascroft's subcontractor, Oliver Connell & Son Limited ("OCL"), was responsible for any defective workmanship; and

    v) the settlement payment was made to a third party, Mr Anand, rather than to Saterix or Ethiel, and did not reflect the reasonable costs of the required remedial works, any reduction in the sale price of the property for the known defects, betterment or damage caused by unrelated issues.

15. On 23 February 2022 NHBC served its reply.

The application

16. On 12 April 2022, NHBC issued an application, seeking an order that:

    i) Paragraphs 2.2(i) & (iii);

    ii) Paragraphs 2.3(i), (ii) & (iii);

    iii) Paragraph 2.4;

iv) Paragraphs 2.6(i) & (ii);

v) Paragraph 4.3;

vi) Paragraphs 4.6(b) & (c);

vii) Paragraphs 4.7 (ii), (iii) & (iv);

viii) Paragraph 4.8(iii);

ix) Paragraphs 5.2(iv), (v), (vi), (vii), (viii);

x) Paragraphs 6.3 (ii) & (iii);

xi) Paragraphs 7.1(ii) & (iii);

xii) Paragraph 8.1;

xiii) Paragraph 8.2; and

xiv) Paragraph 10.2(ii) of the Defence

be struck out pursuant to CPR 3.4(2)(a) and/or summary judgment be given on those issues pursuant to CPR 24.1 on the grounds that Vascroft has no real prospect of successfully defending on those issues and there is no other compelling reason why the issues should be disposed of at a trial.

17. The application is supported by the witness statements of Steven Baker, senior litigation counsel at NHBC, dated 12 April 2022 and 22 June 2022 respectively.

18. The application is opposed by Vascroft and reliance is placed on the witness statements of:

i) Andrew Hickman, solicitor and partner in Hickman Construction Law, dated 15 June 2022;

ii) Mitesh Vekaria, Managing Director of Vascroft, dated 15 June 2022;

iii) Raymond Crabbe, of RJC Consultants, dated 15 June 2022.

The applicable test

19. CPR 3.4(2) provides that:

> "The court may strike out a statement of case if it appears to the court:
>
> …
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim …"

20. The principles to be applied are as follows:

i) If the pleaded facts do not disclose any legally recognisable claim against a defendant, it is liable to be struck out. However, the application must assume that the facts alleged in the pleaded case are true.

ii) It is not appropriate to strike out a claim in an area of developing jurisprudence, since in such areas, decisions as to novel points of law should be based on actual findings of fact: *Barratt v Enfield BC* [2001] 2 AC 550 per Lord Browne-Wilkinson at p.557.

iii) The court must have regard to the overriding objective and should be slow to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event and/or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action: *Partco v Wragg* [2002] EWCA Civ 594 per Potter LJ at [27]-[28].

iv) The court must be certain that the claim is bound to fail; unless it is certain, the case is inappropriate for striking out: *Hughes v Colin Richards & Co* [2004] EWCA Civ 266 per Peter Gibson LJ [22]-[23]; *Rushbond v JS Design Partnership* [2021] EWCA Civ 1889 per Coulson LJ at [41]-[42].

21. CPR 24.2 provides that:

> "The court may give summary judgment against a claimant … 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; … and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

22. The principles to be applied on such applications are well-established and are summarised conveniently in *Philipp v Barclays Bank UK plc* [2022] EWCA Civ 318 per Birss LJ at [20] as follows:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success.

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable.

iii) 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.

iv) 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.

v) It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should decide it.

vi) If the respondent's case is bad in law, he will in truth have no real prospect of successfully defending the claim against him.

The issues

23. There has been some movement on the issues raised in the application. Mr Hickman has confirmed in his witness statement that Vascroft does not maintain its defence based on a release from its obligations by an application under rule 18. On that basis, paragraphs 5.2(v) and 5.2(vi) have no real prospect of success and should be struck out.

24. Mr Jinadu, counsel for Vascroft, has confirmed that Vascroft seeks to pass on, by way of contribution, design and/or workmanship defects to Capital, Butler and/or OCL but does not rely on those matters as a defence to NHBC's claim. References to those matters are set out in the pleading as part of the factual narrative and will be relied on in the part 20 claims. Following clarification that they are not relied on as grounds for defending the claim, there is no need for the court to consider further paragraphs 2.3(i), 2.3(ii), 2.4, 4.3, 5.2(vii) or 7.1(iii) of the defence.

25. The key areas of dispute arise out of Vascroft's pleaded defence that:

i) NHBC is estopped from denying that the designs submitted to it for appraisal and approval satisfied the Technical Requirements and/or Performance Standards;

ii) the sale of the property by Saterix to Ethiel was a sham sale, affecting the validity of the Buildmark Cover and/or date of cover and Vascroft was not given notification of any defects within the Section 2 Cover period;

iii) Vascroft was not given access to the property to carry out remedial works;

iv) the payment made by NHBC in settlement of the claims under the Buildmark Cover was not made to Saterix nor Ethiel but to Mr Anand, who did not suffer any loss; alternatively, the payment did not make any allowance for the reduction in sale price of the property.

Estoppel

26. Vascroft's defence includes an assertion that NHBC is estopped from denying that the design of the basement and waterproofing, submitted to it for appraisal and approval, satisfied the Technical Requirements and/or Performance Standards.

27. The relevant parts of the pleading are as follows:

2.3(iii) The design of the basement and waterproofing was submitted by VCL to NHBC's engineering department [for] its appraisal and approval which was granted. VCL was entitled to rely upon this approval and NHBC is estopped [from] denying that the designs submitted to it for appraisal and approval satisfied the Technical Requirements and or Performance Standards.

5.2(iv) In discharging its obligation to comply with NHBC's Requirements VCL was entitled to rely upon appraisals and approvals by NHBC of designs submitted by VCL to NHBC for its appraisal and approval.

5.2(viii) VCL is entitled to rely upon the appraisal and approval of the design for the extension by NHBC. Such appraisal and approval gave rise to an estoppel which prevents NHBC from denying that the design complied with the Technical Requirements and/or Performance Standards.

6.3(ii) VCL was entitled to rely upon the appraisal and approval by NHBC of the designs submitted to it as demonstrating that the Technical Requirements and/or Performance Standards had been satisfied.

6.3(iii) Furthermore, NHBC's appraisal and approval of the designs gave rise to an estoppel pursuant to which NHBC is not entitled to deny that the designs submitted to it for appraisal and approval satisfied the Technical Requirements and/or Performance Standards.

7.1(ii) Insofar as it is alleged that any purported breach of the Technical Requirements and/or Performance Standards resulted from the design of the works, VCL relies upon the fact that NHBC required, as a condition of granting cover, that its engineering department had to undertake an appraisal of the design of basement and tanking works. In particular VCL refers to and relies upon:

(a) NHBC letter dated 9 October 2007 and in particular conditions 2 and 3 thereof which require VCL to submit foundation and basement design calculations and drawings as well as details of basement tanking system and working drawings showing inclusion of the same. NHBC stipulated, inter alia, the minimum level of protection to be provided by the tanking system.

(b) VCL letters dated 29 November 2007 and 18 December 2007 pursuant to which VCL submitted the calculations and drawings sought.

(c) NHBC letter dated 21 February 2008 requesting foundation and basement design calculations.

(d) NHBC letter dated 18 March 2008 requesting foundation and basement design calculations.

(e) NHBC letter dated 15 July 2008 requesting foundation and basement design calculations.

(f) VCL letter dated 18 May 2011 notifying NHBC of VCL being awarded the Phase 2 works which includes design drawings and refers to information being provided directly to NHBC by the Architect.

28. Mr Sawtell, counsel for the NHBC, submits that these parts of the defence do not raise an arguable defence:

i) Vascroft does not plead the nature of estoppel relied on. If it is estoppel by representation, Vascroft has not pleaded any reliance on such representation to its detriment, so as to render it unconscionable for NHBC to resile from such representation.

ii) NHBC is a separate entity to NHBC Building Control Services Limited ("NHBC BCS"). NHBC provides Buildmark Cover and it is concerned with ascertaining whether the works satisfy the Technical Requirements for the purpose of deciding whether to assume risk through the NHBC Building policy. NHBC BCS provides services in respect of building control matters and is concerned with whether the works satisfy the building regulations for the purpose of the Building Act 1984.

iii) The Buildmark Cover Rules expressly exclude the possibility of any approval of any part of the design of the works amounting to a warranty or representation that they satisfy the NHBC Requirements.

iv) The letters relied on do not disclose any realistically arguable grounds for the estoppel alleged; in particular, none of the correspondence indicates a representation by NHBC to Vascroft that the designs satisfied the Technical Requirements or were approved, so as to relieve Vascroft of its obligations to ensure that the work satisfied such requirements.

29. Mr Jinadu submits that Vascroft has an arguable case on estoppel:

i) The pleading identifies estoppel and, although not stated in terms, Vascroft relies on estoppel by representation.

ii) Vascroft does not rely on any approval by NHBC BCS for building control purposes; the letter relied on, dated 9 October 2007, was sent directly by NHBC, not NHBC BCS, and concerned appraisal of the design by its engineering department.

iii) The Buildmark Cover Rules are not disputed but do not preclude an estoppel by representation. Vascroft does not rely on the issue of the

Buildmark Cover as a representation but rather, on the letter of 9 October 2007, and subsequent appraisal and approval of the design by NHBC.

iv) The letter of 9 October 2007 is capable of giving rise to an estoppel by representation and Vascroft should have the opportunity to test the conflicting evidence as to the submitted and approved designs, and any reliance thereon, at trial.

30. The Buildmark Cover Rules include the following provisions:

> Rule 10) a):
>
> "You must ensure that every Home for which you submit a Site Notification or an Application for NHBC Cover is designed and built in accordance with the applicable NHBC Requirements."
>
> Rule 15) a):
>
> "NHBC may inspect and carry out technical investigations of any Home in a manner and at a frequency to be determined by NHBC. For the purposes of such inspections and investigations, you must carry out any work or tests that NHBC may require you to carry out and provide any facilities, documents or information that NHBC may require you to provide. NHBC's inspections and technical investigations are for the purpose of enabling NHBC to decide whether to provide NHBC Cover for a Home. Any information shared with you arising from NHBC's inspections and technical investigations in no way relieves you of your obligations under rule 10)a) to design and build each Home in accordance with the applicable NHBC requirements."
>
> Rule 24) a):
>
> "Following its inspections and any technical investigations of a Home under Rule 15) NHBC may in its sole discretion (without being obliged to do so) issue a notice of Cover in respect of the Home."
>
> Rule 24) b):
>
> "The issue of a Notice of Cover for a Home is not a warranty, representation or guarantee to you, the Owner or any other person that construction of the Home was completed fully in accordance with applicable NHBC requirements and does not in any way relieve you of your obligations under Rule 10)a) to complete the construction of the Home in accordance with applicable NHBC Requirements."

31. The letter dated 9 October 2007 was sent from NHBC to Vascroft and stated:

> "NHBC Engineering routinely undertake, on each site, an initial appraisal of the engineering, land quality and contamination issues as part of our risk management process and in order to assess compliance with parts A and C of the Building Regulations.

> The outcome of this initial appraisal is that the information shown in the attached table is required to allow us to continue our assessment of your proposals for the site.
>
> The table shows which conditions have been applied to this project relating to engineering and land quality matters and these will be cleared as the requested information is received and assessed as satisfactory.
>
> Please be aware that any outstanding or unresolved conditions may prevent the issue of Building Regulations Plans and Final Certificates and/or the Buildmark Warranty cover note that could delay the sale of affected properties.
>
> Following this initial letter from NHBC Engineering, all future correspondence on this project will normally be issued as a Technical Report letter sent by NHBC Building Control. The TR letter will include all current and subsequent engineering and/or land quality conditions in addition to any surveying conditions set by the BC surveyor.
>
> We would be grateful for your continued assistance in ensuring that all requested information is sent in good time and before construction to allow sufficient time for the assessment and clearance of conditions that would prevent the finalling [sic] of properties and issue of the Buildmark Warranty cover note or the Plans and Final Certificates for the project…"

32. The schedule of outstanding conditions attached to the letter included the following:

> "Foundation and basement design calculations and drawings (including reinforcement drawings) required. Should a Specialist Sub-contractor (for example, piling) be involved in the foundation basement design, then a full design and test proposals/results package must be submitted for their works in accordance with the relevant Chapter of the NHBC Standards.
>
> Basement tanking system details and working drawings showing inclusion of the same required. The tanking system must provide min. Grade 2 level of protection (min. Grade 3 level of protection where Basement contains habitable accommodation) as defined by BS 8102:1990 and the Approved Document 'Basements for Dwellings' in accordance with Clause D16 of NHBC Standards Chapter 5.1. Also, systems must have Third Party Accreditation, for example BBA Certification…"

33. The letter was signed by the NHBC Senior Engineer and copied to the NHBC Building Inspector. Subsequently, design information in respect of the development was sent by Vascroft and appraised by NHBC BCS.

34. It is common ground that for an estoppel by representation to arise in this case the following factors must be established:

    i) NHBC made an unambiguous and unequivocal representation of fact to Vascroft.

    ii) In making the representation, NHBC intended or knew that it was likely to be acted upon.

    iii) Vascroft, believing the representation, acted to its detriment in reliance on the representation.

    iv) NHBC seeks to deny the truth of the representation.

    v) No defence to the estoppel can be raised by NHBC.

    See: *Greenwood v Martins Bank* [1933] AC 51 HL per Lord Tomlin at [57]; *Mears Ltd v Shoreline Housing Partnership Limited* [2015] EWHC 1396 (TCC) per Akenhead J at [50]; *PM Project Services Limited v Dairy Crest Limited* [2016] EWHC 1235 (TCC) per Edwards-Stuart J at [40].

35. Although NHBC's submissions have some force on the material before the court, Vascroft's defence is arguable and not fanciful.

36. Firstly, it is arguable as a matter of construction that the letter of 9 October 2007 amounted to a representation that, as a pre-condition to the grant of Buildmark Cover, NHBC's engineering department would undertake an appraisal and approval of (i) the foundations and basement design calculations and drawings; and (ii) the basement tanking details and drawings, against the Technical Requirements and/or Performance Standards. Whether that would be sufficient to give rise to an estoppel is a matter for submission by reference not just to the letter in isolation but also to the relevant contemporaneous documents.

37. Secondly, although Mr Baker explains in his witness evidence the separation of functions as between NHBC and NHBC BCS, and it is clear that the NHBC BCS terms excluded any responsibility for approval of the design in its building control role, the letter of 9 October 2007 refers to both building control and Buildmark warranty issues. Without the benefit of all relevant factual and documentary evidence on this issue, the court is not in a position to discount the possibility that the appraisal and approval of the designs went beyond mere building control matters.

38. Thirdly, the documents indicate that the relevant design information was submitted to NHBC, assessed and approved. The fact that the subsequent correspondence was between Vascroft and NHBC BCS is not conclusive because that line of communication was stipulated by NHBC in the letter of 9 October 2007, which referred to assessment for the purposes of both building control and Buildmark Cover.

39. Fourthly, the Buildmark Cover Rules provide that NHBC's inspections and technical investigations of the property would not relieve Vascroft of its obligations to design and build the same in accordance with the applicable

NHBC Requirements. However, the representation relied on by Vascroft goes beyond inspection or investigation of the property, or issue of the Buildmark Cover; it is based on alleged approval of the designs and calculations for the basement waterproof system prior to execution of the works.

40. Fifthly, although not pleaded, Mr Hickman's evidence is that Vascroft relied on the design approvals in carrying out the works in accordance with the same. The submission and approval of the relevant design information needs to be considered against the full factual matrix for the court to assess whether Vascroft placed any reliance on it, or whether it was reasonable for it to do so.

41. NHBC's case is that the design of the waterproofing system to the basement was inadequate. The issue for the court is whether Vascroft can establish any estoppel by representation, rendering it unconscionable for NHBC resile from any earlier approval of the design. I accept Mr Jinadu's submission that this is a matter for trial so that the material evidence can be tested by cross-examination and against the relevant documents.

42. Mr Sawtell correctly identifies deficiencies in the current pleaded case. It is incumbent on Vascroft to plead the elements of estoppel relied on so that NHBC may understand the precise nature and basis of this defence. Where, as here, a statement of case is found to be defective, the court should consider whether the defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend. In this case, proceedings are at a sufficiently early stage so that the pleading could be amended to set out the case relied on by Vascroft without causing injustice to NHBC or undue disruption to the case.

43. Accordingly, the court will permit Vascroft an opportunity to amend its defence to plead a clear and coherent case on estoppel.

Property ownership and Section 2 Cover

44. Vascroft's defence includes an assertion that the purported sale of the property by Saterix to Ethiel was a sham because Saterix had been dissolved prior to the date of such purported sale. Therefore, it is pleaded that there was no basis on which NHBC could issue the Buildmark Cover, identifying Ethiel as the first owner. Further, any claim was not brought within the period of Section 2 cover (the first two years), limiting NHBC's entitlement to its remedies arising out of Section 3 of the Buildmark Cover.

45. The relevant parts of the pleading are as follows:

> 2.2(i) No claim arose within 2 years from the date of the issuance of the Insurance Certificate was made as is required by the Buildmark Cover.
>
> 4.6(a) It is VCL's understanding that Saterix was dissolved on 27 March 2013.

4.6(b) No admission is therefore made as to the fact or validity of the purported sale by Saterix to Ethiel on 26 March 2014 and NHBC is put to proof of the same.

4.6(c) No admission is made as to Ethiel's purported acquisition of title in respect of the Property or as to Ethiel's purported entitlement to cover under the Buildmark Cover and NHBC is put to strict proof of the same and VCL reserves the right to plead further in respect of these issues on completion of disclosure.

4.7(ii) It is denied that NHBC was entitled to delay the issuing of the BCIC for 18 months.

4.7(iii) The Buildmark Cover document defines the BCIC as the "certificate we issue on Completion which brings sections 2, 3, 4 and 5 of this cover into operation". NHBC has failed to plead any or any proper reason for the 18 months delay between the date of completion of the works, on NHBC's pleaded case, in or around January 2013 and the issuing of the BCIC on 12 June 2014.

4.7(iv) The BCIC by NHBC should have been issued on completion of the works on 14 January 2013.

4.8(iii) It is denied that the period of validity of the Buildmark Cover ends on 11 June 2024. The period of validity of the Buildmark Cover would end 10 years from the date on which the BCIC should have been issued which was 14 January 2013. Therefore the period of validity of the Buildmark Cover ends on 13 January 2023.

8.1(i) As a result of the termination of VCL's employment under the Contract prior to the completion of the works to the Property and the fact that it has no knowledge of any works commissioned by Saterix between the date it left site and the date of completion of the works, no admission is made as to the validity of the Buildmark Cover within the Section 2 cover period.

8.1(ii) In any event it is denied that the Section 2 period of cover for the Property commenced on 12 June 2014 and ended on 11 June 2016. Paragraphs 4.7 and 4.8 above are repeated herein. If, which is not admitted, VCL is liable under the Buildmark Cover then the period of the Section 2 cover would run from 14 January 2013 to 14 January 2015.

8.2(i) It is denied that VCL was notified of any defects within the Section 2 Cover Period.

8.2(ii) Further and in any event, none of the communications relied upon by NHBC constitutes a valid notification of Defects within the Section 2 Cover Period as required by Section 2 of the Buildmark Cover:

(a) The e-mail dated 27 August 2013 is an e-mail from Capital (not a notice from the first owner) to VCL which refers to issues related to the operation of the sump pumps which later failed.

(b) The e-mail dated 1 September 2014 is an e-mail from BTP Group to Mr Anand (not a notice from the first owner) and again it refers to ongoing rectification of defects which were not related to the matters which are the subject of the present claim.

(c) The first e-mail dated 3 September 2014 timed at 11:58 is an e-mail from BTP Group to Capital copied to VCL and others. This is not notice from the first owner. Again, whilst it refers to dampness in the pool area, this is linked to the failure of the sump pumps and not the current claim.

(d) The second e-mail dated 3 September 2014 at 19:16 is an e-mail from Capital (not a notice from the first owner). It does not contain any notification of a claim under Buildmark in respect of the current claim as it yet again refers to the damage resulting from the failure of the sump pumps.

46. Mr Sawtell submits that these parts of the defence do not raise an arguable defence:

i) NHBC's case is that the 'First Owner' for the purpose of Buildmark Cover was Ethiel, having been registered as the proprietor of the freehold interest on 26 March 2014. Registration of a person as the proprietor of a legal estate is conclusive: section 58(1) of the Land Registration Act 2002 ("the LRA").

ii) As required by the Buildmark Rules, on about 15 May 2015, a completed form for NHBC Cover, identifying Ethiel as the first owner of the property, was submitted to NHBC via its online portal.

iii) The Buildmark Rules provide that where there is any uncertainty as to the identity of the owner, NHBC in its sole discretion may decide who is the owner for the purpose of Buildmark Cover.

iv) 'Completion' within the meaning given to it by the Buildmark Cover took place on 12 June 2014, when NHBC carried out its final inspection and issued a cover note dated 12 June 2014. From this date the Section 2 period of cover commenced.

v) Vascroft was given notification of the defects within the two year period. Even if, as pleaded by Vascroft, the period of the Section 2 cover ran from 14 January 2013 to 14 January 2015, the notices relied on by NHBC were within that period and therefore, the claim was within Section 2. In any event, NHBC relies on a claim under Section 3 cover in the alternative.

47. Mr Jinadu submits that Vascroft has an arguable case as to the validity of the Buildmark Cover:

    i) The Buildmark Cover is triggered by sale of the property by Saterix to Ethiel.

    ii) Prior to the purported sale of the property, Saterix had been dissolved. Section 58(1) of the LRA does not apply where other registration requirements remain outstanding as set out in section 58(2). Therefore, the purported sale was a sham or otherwise invalid.

    iii) If there was no sale by Saterix, there was no basis on which to issue the Buildmark Cover.

    iv) Section 2 of the Buildmark Policy requires notice to have been given by the Owner of defects as soon as possible within the period of cover. If no valid notification were made within the period of Section 2 cover, although NHBC might still have a claim under Section 3, it would have a significant impact on Vascroft's potential liability.

48. The Buildmark Cover defines 'Owner' as:

> "The first Owner named on the Buildmark Offer and any later Owner.
>
> You must be (or have contracted to be) the freehold owner of the Home …"

49. The Buildmark Cover defines 'Completion' as:

> "For a Home sold under a Contract with the first Owner – this means the later of:
>
> a. the date of legal completion …; or
>
> b. the date NHBC agrees that the Home substantially complies with NHBC's Requirements.
>
> For a Home built under a building contract or occupied by someone other than the first Owner before the date of legal completion … this means the date NHBC agrees that the Home substantially complies with NHBC's Requirements."

50. The Buildmark Rules define the 'Owner' as follows:

> "The prospective first owner of a Home to whom NHBC and a Builder make an offer of NHBC Cover for that Home. After that it means:
>
> i. the person identified as the owner of the Home on the completed form for acceptance of the NHBC Cover; or
>
> ii. any later owner, mortgagee in possession or heritable creditor in possession of the Home.

> If there is any uncertainty as to the identity of the owner of a Home at any time, NHBC may in its sole discretion decide, for the purposes of the NHBC Cover for the Home and the Rules, who the owner is."

51. On 12 June 2014 NHBC issued the Buildmark Cover Note, which states:

> "This cover note confirms that NHBC has carried out a pre-handover inspection for insurance purposes and agrees to provide the cover described in the Buildmark … policy issued…
>
> …
>
> For … Buildmark policies on Homes/Premises built under a building contract or occupied by someone other than the First Owner before the date of legal completion of the first sale, the insurance will start on the date of this cover note.
>
> The start date will be confirmed on the Insurance Certificate. This will be issued once acceptance form on the Buildmark Offer is completed and returned to NHBC and provided the Builder is on the NHBC register at the date of exchange of contracts with the First Owner…"

52. The Buildmark Insurance Certificate for the property stated that the cover start date was 12 June 2014 and the cover end date was 11 June 2024.

53. Mr Sawtell's submissions as to the first owner and date of cover are manifestly correct. The person identified as the owner of the property on the completed form for acceptance of the Buildmark Cover was Ethiel. 'Owner' includes a prospective owner and therefore its identity does not depend on a valid, completed sale transaction or registration of the property. As pointed out by Mr Sawtell, if there were any uncertainty about the identity of the first owner, NHBC had discretion to decide that it was Ethiel for the purpose of the Buildmark Cover.

54. 'Completion' for the purpose of identifying the start date of cover was not by reference to the date of practical completion of the works, as suggested by Vascroft, but the date NHBC agreed that the property substantially complied with NHBC's Requirements, following the final inspection on 12 June 2014. The Buildmark Cover note was issued by NHBC on 12 June 2014 and the Buildmark insurance certificate identified the start date as 12 June 2014.

55. Based on the documents before the court, it is not arguable that the Buildmark Cover start date was other than 12 June 2014.

56. It follows from the above, that the matters set out in paragraphs 2.2(i), 4.7(ii), 4.7(iii), 4.7(iv), 4.8(iii), 8.1(i) and 8.1(ii) have no real prospect of success and should be struck out.

57. Although Vascroft is not entitled to rely on the above issues in support of its defence as to the start date of the Section 2 cover, it is entitled to rely on the other matters pleaded. At paragraphs 8.2(i) and 8.2(ii), Vascroft pleads specific

facts which, it is said, establish that the notices relied on by NHBC did not amount to valid notification as required by Section 2, including an assertion that the notices concerned dampness arising from failure of the sump pumps, which matters are not relied on by NHBC as the defects for which Vascroft is responsible. The emails identified refer to dampness in the pool area but there is no consensus expressed as to the cause of the same. On their face, those points are arguable and matters for trial.

58. Further, at paragraphs 4.6(a), 4.6(b) and 4.6(c) of its defence, Vascroft raises a discrete challenge to Ethiel's acquisition of title in respect of the property; it is said by Vascroft that the purported transfer of the property by Saterix to Ethiel was a sham or otherwise invalid.

59. The starting point is that the Land Registry documents show that Ethiel was registered as the proprietor of the freehold interest in the property on 26 March 2014.

60. Section 58(1) of the LRA provides:

> If, on the entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result the registration.

61. In *Swift 1st Ltd v Chief Land Registrar* [2015] EWCA Civ 330 Patten LJ at [45] clarified that the conclusive effect of section 58(1) applies to both the legal and beneficial interest in a property.

62. However, section 58(2) of the LRA provides:

> Subsection (1) does not apply where the entry is made in pursuance of a registrable disposition in relation to which some other registration requirement remains to be met.

63. Schedule 2 of the LRA sets out the registration requirements relating to dispositions of registered estates which are required to be completed by registration, including at paragraph 2(1):

> In the case of a transfer of whole or part, the transferee, or his successor in title, must be entered in the register as the proprietor.

64. The application to change the register (AP1) indicates that before completing the registration of a transfer, HM Land Registry requires proof of identification of both the transferor and transferee (by the conveyancer or the companies). Practice Guide 67 provides guidance as to when confirmation of identity or identity evidence is required and how it should be given. The table in paragraph 4 of the Guide states that confirmation of identity evidence, for both the transferor and transferee, is required where the application is to register the transferee as proprietor, save for exceptions (which it is not suggested would apply in this case). Specifically, paragraph 8.7 of the Guide states that satisfactory proof must be provided that a corporate body still exists, especially if it is a foreign corporation.

65. The documentary evidence before the court indicates that Saterix was dissolved on 26 March 2013. If correct, certification and documentary proof of its existence could not have been provided to the Registrar in March 2014. It does not necessarily follow that the application form, certification and supporting documentation must have been incomplete or inaccurate but it does raise questions as to changes in the ownership of the property and validity of the transfer to Ethiel.

66. In *Gelley v Shepherd* [2013] EWCA Civ 1172 the Court of Appeal refused to allow the appellants to rely upon an argument that registration of a company as proprietor of land was conclusive evidence of ownership, in circumstances where the purported transfer in title was made by a company that had been dissolved and the appellants had conceded before the trial judge that section 58(2) of the LRA operated and so section 58(1) did not apply. Sales LJ stated:

> [78] Mrs Gelley did not show the Court the relevant provisions of the LRA or the Land Registration Rules which define "registration requirements" for the purpose of section 58(2), nor did she explain why – even though the Land Registry had required provision of evidence that CILBVI was an extant company before it would register Comvecs as the new proprietor of the Land - nonetheless that was not a relevant "registration requirement" or that, if it was, it was satisfied by the provision of forged evidence to that effect. It is also difficult to know what steps the Respondents might have been able to take to meet an argument based on section 58(1), had the point been taken below. For example, it might have been open to them to seek a stay of the proceedings to allow them to make an application for rectification of the Land Register.
>
> [79] In these circumstances, there is no good ground on which withdrawal of the concession made on behalf of the Appellants (that section 58(2) operated and so section 58(1) did not apply) should be allowed. On the basis of that concession, the Appellants have no argument that by virtue of the operation of section 58(1), Comvecs should be regarded as owner of the Land for the purposes of a claim for possession against the Respondents. On the contrary, on the basis of the factual finding by the judge that the false resolution was forged (which is not challenged), the Appellants accepted that CILBVI was at all times the owner of the Land."

67. No such concession has been made in this case; indeed, Mr Sawtell expressly relies on section 58(1) as confirmation that the registration of Ethiel as the proprietor of the property is conclusive. Further, Mr Sawtell correctly submits that NHBC has no obligation to carry out a full investigation into such matters for the purpose of providing Buildmark Cover. However, Mr Jinadu relies on *Gelley* as an illustration of a case in which purported registration of a transfer of land by a dissolved corporate entity led to the conclusion by a court that it must have been obtained by forged evidence or otherwise tainted by fraud. On the basis of the documents before the court, it is arguable that registration of Ethiel as proprietor of the property is not conclusive in this case.

68. For the reasons set out above, valid registration of ownership is not a necessary precondition to the Buildmark Cover start date. However, it may be relevant to

arguments as to the reasonableness of the settlement by NHBC, as set out below. The court is not in a position to determine the strengths or weaknesses of the arguments at this stage.

69. In those circumstances, it would not be appropriate to strike out paragraphs 4.6(b) or 4.6(c).

Access to carry out remedial works

70. Vascroft's defence includes the following:

> 2.2(iii) VCL was denied reasonable access to the Property [to] carry out any remedial work as is required by Section 2 of the Buildmark Cover.

71. Mr Sawtell submits that there is no detailed pleaded case as to how Vascroft was not given reasonable access to the property. Reliance is placed on Vascroft's letter dated 17 July 2017 as evidence that it did have access to the property and was able to produce a full remediation scheme.

72. Mr Jinadu submits that Section 2 of the Buildmark Cover requires the owner to give notice of defects as soon as possible within the period of cover and obliges the builder to correct any defects within a reasonable time at its own expense. Failure to provide access to correct any defects goes both to liability, preventing Vascroft from discharging its primary obligation under Section 2, and to mitigation. Reliance is placed on the witness evidence of Mr Vekaria and Mr Crabbe, who both state that they were refused access to carry out remedial works at the property, and Vascroft's emails dated 17 July 2017 and 2 May 2018 stating that access to carry out remedial works was refused.

73. Vascroft has produced witness and documentary evidence that supports its pleaded case that it was denied access to carry out remedial works. It is recognised that there is a dispute between the parties as to whether that would affect the entitlement of NHBC to recover sums paid by way of settlement from Vascroft but it is a dispute that should be resolved at trial when all relevant evidence is before the court.

74. For that reason, the court declines to strike out paragraph 2.2(iii) of the defence.

Settlement

75. Vascroft's defence is that NHBC paid a settlement sum to Mr Anand, who is not the legal owner of the property, or owner for the purpose of the Buildmark Cover, and has not suffered any demonstrable loss. Further, the property appears to have been sold at a substantial discount, namely, £15 million against a valuation of £24 million, which must have included an allowance for the defects. Accordingly, the settlement was not reasonable and not recoverable by NHBC by way of indemnity under the Buildmark Rules.

76. The relevant parts of the pleading are as follows:

> 2.6(i) NHBC made a cash payment which it now seeks to recover from VCL, as VCL understands the position from inter partes

correspondence including NHBC's letter dated 15 March 2019, to neither Saterix nor Ethiel but to Mr Anand. NHBC has not pleaded any loss suffered by Mr Anand which it was required under the Buildmark Cover to indemnify nor has it pleaded or demonstrated any entitlement to recover such payment from VCL.

2.6(ii) NHBC made the cash payment which it now seeks to recover from VCL without making any allowance for a reduction in the sale price of the Property when it was sold by Saterix which would have compensated Ethiel for any loss allegedly suffered as a consequence of the alleged Defects.

10.2(ii) NHBC made a cash payment which it now seeks to recover from VCL, as VCL understands the position from inter partes correspondence including NHBC's letter dated 15 March 2019, to neither Saterix nor Ethiel but to Mr Anand. NHBC has not pleaded any loss suffered by Mr Anand which it was required under the Buildmark Cover to indemnify nor has it pleaded or demonstrated any entitlement to recover such payment from VCL.

77. NHBC's case is that it agreed to pay £1,044,470.18 pursuant to a settlement agreement with Ethiel dated 27 March 2019. Payment of the settlement sum was made on about 29 May 2019 to R&H Corporate Services (Jersey) Limited, Ethiel's corporate director. NHBC claims its entitlement to an indemnity in respect of the settlement sum pursuant to rules 10, 27 and/or 30 of the Buildmark Rules. Mr Sawtell submits that there is no rule or principle of law that NHBC must establish liability to make the payment to Ethiel, provided that it establishes that the settlement was reasonable: *John Hunt Demolition Ltd v ASME Engineering Ltd* [2007] EWHC 1507 (TCC) per HHJ Coulson QC (as he then was) at [47]-[52].

78. Mr Jinadu submits that if Vascroft established that it had no liability to Ethiel under the Buildmark Rules, that could undermine the reasonableness of the settlement. He also relies on the absence of any explanation for the significant reduction in the purchase price of the property as a basis for arguing that Ethiel suffered no loss as a result of any defects, another argument that could undermine the reasonableness of the settlement.

79. As set out above, I am satisfied that, on the material before the court, there are arguable issues as to: (i) approval of the design by NHBC; (ii) notification of any defects within the section 2 period of cover; (iii) access afforded to Vascroft to carry out remedial works; and (iv) validity of the transfer of the property from Saterix to Ethiel. NHBC's position is that these issues do not affect its entitlement to rely on the settlement for the purpose of seeking an indemnity under the Buildmark Rules. However, it is open to Vascroft to argue that those matters are relevant to the reasonableness of the settlement by NHBC. The court is not in a position to determine the strengths or weaknesses of those arguments in a vacuum. They are matters for trial.

80. In those circumstances, it would not be appropriate to strike out paragraphs 2.6(i), 2.6(ii) or 10.2(ii) of the defence.

Conclusion

81. For the reasons set out above:

i) paragraphs 2.2(i), 4.7(ii), 4.7(iii), 4.7(iv), 4.8(iii), 5.2(v), 5.2(vi), 8.1(i) and 8.1(ii) of the defence have no real prospect of success and will be struck out;

ii) the court will give Vascroft an opportunity to plead its case on estoppel and on that basis will not strike out paragraphs 2.3(iii), 5.2(iv), 5.2(viii), 6.3(ii), 6.3(iii) and 7.1(ii) of the defence;

iii) following clarification by Vascroft that paragraphs 2.3(i), 2.3(ii), 2.4, 4.3, 5.2(vii) or 7.1(iii) of the defence form part of the narrative background and are not relied on as grounds for defending the claim, those parts of the defence will not be struck out;

iv) paragraph 2.2(iii), 2.6(i), 2.6(ii), 4.6(b), 4.6(c), 8.2(i), 8.2(ii) and 10.2(ii) disclose defences that have a real prospect of success and will not be struck out.

82. All consequential or other matters, if not agreed, will be dealt with by the Court at a further hearing to be fixed by the parties.