Neutral Citation Number: [2021] EWHC 516 (QB)

Case No: QB-2019-004230
And Case No. F01CL461

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2021

Before :

MASTER DAGNALL

- -

Between :

QB-2019-004230 ("the High Court Claim")

MR PAUL JOHN TONER **Claimant**

- and -

(1) TELFORD HOMES LIMITED

(2) BISHOPSGATE APARTMENTS LLP

(3) AVANTGARDE – BGR MANAGEMENT LIMITED

(4) RENDALL AND RITTNER LIMITED

(5) ESTATES AND MANAGEMENT LIMITED

(6) BRIGANTE PROPERTIES LIMITED

Defendants

And F01CL461 ("the County Court Claim")

Between:

PAUL JOHN TONER **Claimant**

- **And -**

(1) KYRIACOS PRODROMOU

(2) RENDALL & RITTNER LIMITED **Defendants**

Mr Paul Toner appeared in person representing himself (the **Claimant in both Claims**)
Ms Amy Proferes (instructed by **Reynolds Porter Chamberlain**) for the **First and Second Defendants in the High Court Claim**
Mr Christopher Moss (instructed by **Rradar Limited**) for the **Third Defendant in the High Court Claim**
Mr John Beresford (instructed by **DAC Beachcroft LLP**) for the **Fourth Defendants in the High Court Claim and for the First and Second Defendants in the County Court Claim**
Mr James Hamerton-Stove (instructed by **J B Leitch Limited**) for the **Fifth and Sixth Defendants in the High Court Claim**

Hearing dates: 21 and 22 October and 5 November 2020

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JUDGMENT

MASTER DAGNALL :

A - Introduction

1. This is my Judgment in relation to various Applications to strike-out or for reverse summary judgment, made in: Claim QB-2019-004230 ("the High Court Claim") by the First Defendant Telford Homes Limited ("THL") and the Second Defendant Bishopsgate Apartments Limited ("Bishopsgate") by Notice of Application dated 20 February 2020, and by the Third Defendant Avantgarde-BGR Management Limited ("Avantgarde") by Notice of Application dated 23 March 2020, and by the Fourth Defendant Rendall & Rittner Limited ("R&R") by Notice of Application dated 5 February 2020; and in Claim F01CL461 ("the County Court Claim") by its First Defendant Kyricoas Prodromou ("Mr Prodromou") and its Second Defendant R&R by Notice of Application dated 8 November 2019. Those Defendants ("the Applying Defendants") seek, by way of strike-out of the Particulars of Claim or reverse summary judgment, to summarily determine claims made against them by the Claimant in both Claims, Mr Paul Toner ("Mr Toner").

2. The Claims arise from Mr. Toner's purchasing and being granted and subsequently holding a long lease ("the Lease") of Flat No. 57 (formerly Plot No. 229), Courtyard Apartments, 3 Avantgarde Place, London E1 6GU ("the Flat") which is on the fifth floor of a substantial block of flats ("the Building"). The Lease was dated and granted on 29 November 2013 and is made between Bishopsgate as Landlord, Avantgarde as Management Company and Mr Toner as Tenant, and followed on from an "off-plan" contract ("the Contract") dated 21 December 2012 between them for Bishopsgate to build out the Building (including the Flat) and then for the Lease to be granted. THL is a high-level company (or at least an associated company at a higher corporate structure level) within the "Telford" group of companies which include Bishopsgate and, at least in the past, Avantgarde. The Contract itself followed a reservation agreement ("the Reservation Agreement") dated 24 November 2012 between Mr Toner and (probably) THL, and negotiations between employees of THL and Mr Toner. Avantgarde appointed R&R as its Managing Agents of the estate ("the Estate") which includes the Building from 2012 onwards and they employed Mr Prodromou as day concierge of the Building from 2013 to mid-2015 and

then as Estates Manager, including of the Building, until September 2018. On 29 February 2016 Bishopsgate sold the freehold reversion to the Lease to the Sixth Defendant in the First Claim, Brigante Properties Limited ("Brigante"), whose parent company is the Fifth Defendant in the First Claim, Estates and Management Limited ("Estates").

3. The High Court Claim was issued in the High Court (Queen's Bench Division) on 27 November 2019. The County Court Claim was issued, first in time, on 13 May 2019 (but see below) in the County Court at Central London. However, by Order of 28 October 2020 I transferred it to the High Court (Queen's Bench Division) under the statutory power conferred by section 41 of the County Courts Act 1984, it being clearly desirable (as was the position of all the parties) that these applications be dealt with altogether at this particular point.

4. Mr. Toner's claims, as set out in his Particulars of Claim in the two Claims are, in effect, that:
   (a) He was induced to enter into the Contract and then the Lease by misrepresentations, made by THL, Bishopsgate and Avantgarde, and which were themselves fraudulent regarding (i) the balcony to the Flat ("the Balcony") (ii) the service charges ("Service Charges") which would it was anticipated would be levied under the Lease
   (b) THL, Bishopsgate and Avantgarde, were each in breach of contract, and possibly duty of care, regarding the Balcony and numerous items of defective construction ("the Defects") in the Building and the Flat, and then failures and delays regarding their remedying
   (c) THL, Bishopsgate and Avantgarde have acted in breach of contract, and possibly duty of care, in relation to the amounts of Service Charge which have been demanded
   (d) THL, Bishopsgate, Avantgarde and R&R each harassed Mr Toner through in particular (i) failing to remedy Defects (ii) failing to allow alteration of the Balcony) (iii) refusing to deal with his complaints and "stringing him along" (iv) the operating of a noisy Airconditioning Unit ("the Air Conditioning Unit") (v) the conduct of Mr Prodromou
   (e) R&R and Mr Prodromou have harassed Mr Toner in numerous ways including through (i) positive acts (ii) failing to deal with his complaints (iii) operating the Air Conditioning Unit
   (f) R&R and Mr Prodromou are also liable in breach of duty of care regarding those (i) positive acts (ii) failing to deal with his complaints (iii) operating the Air Conditioning Unit
   (g) R&R and Mr Prodromou have also actionably defamed Mr Toner to others by various verbal statements ("the Defamation Claims")
   (h) Accordingly, Mr Toner is entitled to recission of the Contract and the Lease and return of the purchase price (although I think that this remedy is no longer pursued by him) and to damages.

5. It is the existing claims which the Applying Defendants have sought to strike-out on various grounds or to contend for reverse summary judgment

by asserting that they have no real prospect of success (or other compelling reason to go to trial). The other Defendants (Estates and Brigante) have not made any relevant applications and have simply observed).

6. Mr Toner has intimated some, in fact many, other claims during the course of the hearing, but it seems to me that they would require amendment of the relevant Particulars of Claim, and that this Judgment should deal with what is actually contained within Mr Toner's present statements of case. Any question of amendments can be left to the post-Judgment hearing.

<u>B - The Hearing</u>

7. Mr Toner has been acting in person throughout (with some assistance from a lay McKenzie friend) and has been faced with three opposing counsel (and a fourth counsel observing). I have therefore been concerned that he should have had a full opportunity to put his case; and I have had full regard to Civil Procedure Rule ("CPR") 3.1A and the fact that he has not had legal representation. Nevertheless, and as made clear by the Supreme Court in Barton v Wright Hassall 2018 UKSC 12 at paragraph 18, Mr Toner is subject to the CPR and their Practice Directions ("PD") as is any other litigant whether legally represented or acting in person.

8. In those circumstances, and in major part to assist Mr Toner, I conducted the hearing, as he had requested and notwithstanding the COVID-19 pandemic and consequent statutory restrictions, on a hybrid partly "face-to-face" (with Mr Toner and various counsel physically present in a courtroom) basis on 21 and 22 October 2020 and then 5 November 2020. This followed all parties having adduced substantial witness statements and exhibits (running to some four lever arch files, albeit with substantial duplication) and opening written submissions (counsel by Skeleton Arguments and Mr Toner by a Position Statement). During those days, I allowed in certain further written material including a substantial further witness statement from Mr Toner (and which effectively included various further written submissions).

9. As by the end of 5 November 2020 Mr Toner had not had quite the time for his oral submissions which I had intended, I gave him permission and time to put in further written submissions with counsel to respond in writing. Notwithstanding my granting him at his request a number of extensions of time, I ended up (notwithstanding opposition from the applying Defendants) making an "unless" direction that Mr Toner's permission to adduce further written submissions would cease (that being a lesser sanction than the dismissal sanction which Mr Toner had himself suggested that I should make) should he not provide his further written submissions by 4.30pm on Friday 4 December 2020. However, notwithstanding my having made clear that this was a time-limit with a specific sanction and that something would be much better than nothing, Mr Toner only sent his material over the week-end and on the following Monday (7th December). That material comprised a very substantial further document described as a "witness statement" (and which was a mixture of evidence and submissions) and substantial exhibit.

10. I provisionally concluded that considering the overriding objective, CPR3.9 and applying a Denton v White 2014 1 WLR 3926 ("Denton") analysis to what appeared to be an informal application from relief from my "unless order" sanction, I should permit, but only permit, Mr Toner to rely upon certain case-law and legal submissions contained within his documents; and I set out my provisional decision in a fully reasoned email to the parties of 8 December 2020. I gave all parties an opportunity to seek to disturb those provisional conclusions and directions. Only Mr Toner sought to persuade me to do so by a number of lengthy emails explaining his mental state and the various pressures which he said he was under and what he said he was being subjected to by the Defendants.

11. I reconsidered the matter but concluded as set out in my emails of 14 December 2020 that my provisional conclusions were the correct answer, being such as to enable justice to be properly done in all the circumstances of the case (the third stage of the Denton analysis); and principally because I am concerned with the existing Particulars of Claim (which is the case that the Applying Defendants are seeking to attack) and with legal (rather than factual) submissions on applications seeking to attack them on strike-out and summary judgment bases (and as I set out below), and I consider that it is the material which I have permitted which is that which is relevant to my being able to determine the legal attacks which are being made on those Particulars of Claim. New matters are (if at all) for subsequent attempts to amend, and much of what Mr Toner sought to advance was new material or either repetitious or not such as to impact upon what are the "legal" questions which I have to decide. I also had to bear in mind and give weight to the "unless" order which I had made in the above circumstances, and the importance of avoiding undue pressure being exerted on the Applying Defendants or the Court by way of the adducing of new material at a very late stage.

12. Thereafter, I have received further responsive submissions (with some additional authorities) from the Applying Defendants lastly on 30 December 2020. I have borne these and the submissions and material from each of the parties (including Mr Toner) in mind in considering and reaching this Judgment. If I do not mention any matter specifically that is due to considerations of time and space and not because I have not considered it.

13. I would add that as Mr Toner is not legally qualified, I have tried to be astute to raise with counsel, and him, matters of law and certain authorities which appeared to me to have possible relevance to the issues which I have had to decide. Counsel have also sought to comply with their professional duties to the court to draw material authorities (even if against their own propositions of law) to my attention. It does seem to me that this has assisted and enabled me to consider the legal issues on a fully informed basis.

14. I also add that an issue arose with regard to whether certain "without prejudice" correspondence was admissible in evidence. Little time was taken up with this and I am unclear as to what was the parties' final

positions. However, and while I have grave doubts as to whether it could possibly be admissible, it was essentially irrelevant (as it did not contain any relevant admissions) and I have put it out of my mind in coming to this judgment.

C - The Applications

15. The Applications are made both under CPR3.4(2) and CPR24.2.

16. CPR3.4(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... the claim;
(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
(c) that there has been a failure to comply with a rule, practice direction or court order"

17. CPR24.2 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"

18. The Applications are brought under CPR3.4(2) under a number of bases, being that it is said that:
    (a) The matters pleaded do not give rise to reasonable grounds for bringing the relevant underlying claim (i.e. establishing the relevant underlying asserted cause of action) - CPR3.4(2)(a)
    (b) The matters pleaded are an abuse of process – CPR3.4(2)(b). This is said by R&R, and to an extent by other Applying Defendants, to be the case in relation to material which appears in both the First Claim and the Second Claim. It is also said by THL and Bishopsgate in relation to various of the misrepresentation and breach of contract/duty claims made against them on the basis that they assert that those claims are clearly limitation barred and thus bound to fail, an assertion which, if made out, is likely to render those claims an abuse. It is also said by THL and Bishopsgate that it is an abuse for Mr Toner to have pursued various complaints which have been rejected during a National House Building Council ("NHBC") "Buildmark" dispute resolution process
    (c) The pleading is "otherwise likely to obstruct the just disposal of the proceedings" - CPR3.4(2)(b). This may be the case where primary facts cannot justify an inference which is said to arise from them, but can also be the case where it is simply unclear what exactly is being alleged
    (d) There has been a failure to comply with a rule, practice direction or court order – CPR3.4(2)(c).

19. The Rule which is said to be potentially relevant is CPR16.4(1)(a) which provides that Particulars of Claim must include "a concise statement of the

facts on which the claimant relies." together with certain other specific matters including those set out in the Practice Direction to CPR Part 16 ("PD16"). It is submitted, and I agree, that Particulars of Claim are to set out the facts upon which a Claimant relies in order to establish their cause(s) of action upon which they rely and the remedy (including as to quantum) which they seek. However, they are not to set out the evidence upon which they will rely to seek to prove those facts (although they can set out secondary facts from which certain primary facts may be inferred) or a general history (see e.g. White Book notes 16.4.1 and Hague Plant v Hague [2014] EWCA Civ 1609 and paragraph 30 of Portland Stone v Barclays Bank Plc [2018] EWHC 2341 and which I set out in full below), although there is often a tension between assertions that a statement of case is both over-long in terms of including evidential material and over-short in not stating enough to amount to reasonable grounds for the causes of action advanced and remedies sought, and where the Court will afford some latitude to prevent potentially meritorious cases being struck-out on technical pleading grounds.

20. Paragraph 8.2 of PD16 provides that "a Claimant must specifically set out the following matters in his particulars of claim where he seeks to rely on them in support of his claim: (1) any allegation of fraud... (3) details of any misrepresentation... (5) notice or knowledge of a fact."

21. However, there remain various other (and which might be said to common-law) rules of pleading, contravention of which will make the relevant elements of a statement of case vulnerable under one or more elements of CPR 3.4(2) (as meaning that reasonable grounds for a cause of action are not identified or that the statement of case is an abuse or otherwise likely to obstruct the just disposal of the proceedings). In particular, allegations of certain serious matters, including fraud (and dishonesty), must be clearly pleaded with adequate particularity and allegations of relevant subjective elements (i.e. states of mind) must be supported by allegations of primary facts from which (without anything else) it is more likely than not that an inference of the relevant matter would be drawn. This latter point also applies in a sense to allegations of dishonesty, although, since that is now an objective matter (see Ivey v Genting [2017] UKSC 67), it is the facts from which a reasonable person would consider as to amounting to dishonesty which must be pleaded.

22. The Applying Defendants also seek reverse summary judgment under CPR24.2. Unlike under CPR3.4, evidence can be and has been adduced by both side. The Applying Defendants accept that they need to show that the Claimant has no real prospect of success (and there is no compelling reason for a trial) on one or more claims or issues. There is a potential overlap with abuse of process although, rather than merely considering the pleadings, the Court will also consider the evidence before it. However, the Court will generally not engage in any mini-trial, although it may ask whether the Claimant lacks a real prospect of establishing a contended fact or whether a document can be construed safely (and without reference to any genuine disputes as to its factual matrix).

23. Thus, while the Applying Defendants contest that various matters are not properly pleaded at all, and while it may be open to the Applying Defendants to seek to challenge what the Claimant says and pleads are the material facts upon which the Claims are based (and I do consider this at points below), much of the essence of the Applications under both CPR3.4 and CPR24.2 are submissions from the Applying Defendants that, even assuming that those facts are established, they do not give rise to claims in law or, at least, claims which have a real prospect of success. Thus, subject to my having to consider various specific attacks upon the Claimant's pleadings and assertions of fact, I proceed on the basis that those facts will be proved if the matter goes to trial and ask myself then as to whether, in such circumstances, the Claimant would (or would not) succeed (or has a realistic prospect of success) in law in relation to his various claims and particular issues.

24. Those propositions, which I do not think that anyone sought to dispute, are justified by various authorities and in particular by the following citations.

25. In Media Entertainment v Karagyydev 2020 EWHC 1138 (which was cited to me) at paragraphs 50-56 I said:

"The CPR

50. CPR3.4(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; (b) that the statement of case is an abuse of the court's process or otherwise likely to obstruct the just disposal of the proceedings; or (c) that there has been a failure to comply with a rule, practice direction or order."

51. In principle, on the wording of the rule, the question of whether there is jurisdiction to strike-out under sub-paragraph (a) in circumstances of the nature of those before me involves simply a determination as to whether the wording of the statement of case, assuming the facts stated to be proved, discloses a cause of action in law, being a genuine and serious dispute, which could justify the relief sought – see White Book 3.4.2. Mr Burton has also drawn my attention to a passage in Altimo Holdings v Kyrgyz Mobil 2012 1 WLR 1804 where at paragraph 84 Lord Collins stated that "it is not normally appropriate to strike out (or grant summary judgment) so as to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts…"

52. CPR3.4(2) is, however, itself discretionary, being introduced by the word "may", and which brings into play the overriding objective in CPR1.1. Thus, for example, if a statement of case does not disclose reasonable grounds, the court may often allow an opportunity for amendment, and the court will consider what is the proportionate response in relation to all aspects once one of the jurisdictional conditionals in the three sub-paragraphs of CPR3.4(2) is established.

53. CPR16.4(a) provides that Particulars of Claim must include "a concise statement of the facts on which the claimant relies".

54. The Practice Direction to CPR Part 16 ("PD16") in paragraph 8.2 provides that "a claimant must specifically set out the following matters in his particulars of claim where he wishes to rely upon them in support of his claim: (1) any allegation of fraud… (5) notice or knowledge of a fact."

55. CPR24.2 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) the 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."

56. It is common ground that in approaching the CPR24.2(i) test of "no real prospect" the court applies the principles summarised in NCC Skills Ltd v Ascentis [2016] EWHC 206 at paragraphs 5-8 being

> **"The Test**
> 5. Applications for summary judgment are governed by CPR 24 . CPR 24.2 provides 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) that defendant has no real prospect of successfully defending the claim or issue; and
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."
> 6. There is no dispute between the parties as to the principles to be applied on an application for summary judgment. As was pointed out by Mr. Andrew Latimer, those principles were conveniently summarised by Simon J (as he then was) in JSC VTB Bank v Skurikhin [2014] EWHC 271 at paragraph 15.
> "The principles which apply have been set out in many cases, are summarised in the editorial comment in the White Book Part 1 at 24.2.3 and have been stated by Lewison J in *Easyair Limited v. Opal Telecom Limited [2009] EWHC 339 (Ch)* at [15], approved subsequently (among others) by Etherton LJ in *A C Ward & Son v. Caitlin (Five) limited [2009] EWCA Civ 1098* at [24]. For the purposes of the present application it is sufficient to enumerate 10 points.
> (1) The Court must consider whether the defendant has a 'realistic' as opposed to a 'fanciful' prospect of success, see Swain v Hillman [2001] 2 All ER 91 , 92. A claim is 'fanciful' if it is entirely without substance, see Lord Hope in *Three Rivers District Council v Bank of England [2001] UKHL 16* at [95].
> (2) A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products v. Patel [2003] EWCA Civ 472* .

(3) The court must avoid conducting a 'mini-trial' without disclosure and oral evidence: Swain v Hillman (above) at p.95. As Lord Hope observed in the Three Rivers case, the object of the rule is to deal with cases that are not fit for trial at all.
(4) This does not mean that the Court must take everything that a party says in his witness statement at face value and without analysis. In some cases it may be clear that there is no real substance in factual assertions which are made, particularly if they are contradicted by contemporaneous documents, see ED & F Man Liquid Products v. Patel (above) at [10]. Contemporary activity or lack of activity may similarly cast doubt on the substance of factual assertions.
(5) However, the Court should avoid being drawn into an attempt to resolve those conflicts of fact which are normally resolved by a trial process, see *Doncaster Pharmaceuticals Group Ltd v. Bolton Pharmaceutical Co 100 Ltd [2006] EWCA Civ 661* , Mummery LJ at [17].
(6) 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 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* , [19].
(7) Allegations of fraud may pose particular problems in summary disposal, since they often depend, not simply on facts, but inferences which can properly drawn from the relevant facts, the surrounding circumstances and a view of the state of mind of the participants, see for example JD Wetherspoon v Harris [2013] EWHC 1088 , Sir Terence Etherton Ch at [14].
(8) Some disputes on the law or the construction of a document are suitable for summary determination, since (if it is bad in law) the sooner it is determined the better, see the Easyair case. On the other hand the Court should heed the warning of Lord Collins in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd [2012] 1 WLR 1804* at [84] that it may not be appropriate to decide difficult questions of law on an interlocutory application where the facts may determine how those legal issues will present themselves for determination and/or the legal issues are in an area that requires detailed argument and mature consideration, see also at [116].
(9) The overall burden of proof remains on the claimant, …to establish, if it can, the negative proposition that the defendant has no real prospect of success (in the sense mentioned above) and that there is no other reason for a trial, see Henderson J in *Apovodedo v Collins [2008] EWHC 775 (Ch)* , at [32].
(10) So far as Part 24,2(b) is concerned, there will be a compelling reason for trial where 'there are circumstances that ought to be investigated', see *Miles v Bull [1969] 1 QB 258* at 266A. In that case Megarry J was satisfied that there were reasons for scrutinising what appeared on its face to be a legitimate transaction; see also *Global Marine Drillships Limited v Landmark Solicitors LLP [2011] EWHC 2685 (Ch)* , Henderson J at [55]-[56]."

26. I also at Paragraph 136 of that judgment made clear that the relevant facts, being those which are said to give rise to the causes of action upon which

the Claimant seeks his claimed remedies, have to be "pleaded" i.e. appear in the statement of case, and not simply in a witness statement. The function of statements of case (or pleadings as they were previously called) is to set out the facts relied upon as giving rise to a claim in law (or from which such facts are to be inferred); while witness statements adduce the evidence from which those facts are to be proved, and which evidence should not appear in the statement of case itself. It is important that the facts are "pleaded" in the statement of case both in order to test whether the relevant party is advancing a claim which can exist in law so as to give rise to the remedies sought and so that the other party (and the court) can assess it and respond to it by their own statement of case and generally. However, the court does have to bear in mind that the line between what is "fact" and what is "evidence" may be a narrow one and one which it is difficult for litigants, especially if acting in person, to appreciate.

27. Even more recently, in Rollingson v Hollingsworth 2020 EWHC 3568 (which was not cited to me but which is to similar effect) I cited Portland Stone Firms Limited v Barclays Bank Plc [2018] EWHC 2341 where at paragraphs 23 to 30 (and which deal with the court's approach both to CPR3.4 and CPR24 applications and to pleading fraud and other serious matters) it was held that:

"23. The applicable principles set out in and flowing from CPR 3.4 and 24 are also extremely well known. The summary by Lewison J in Easyair Ltd v Opal telecom Ltd [2009] EWHC 339 (Ch) at [15] was relied upon by all parties as a convenient summary:

"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) On the other hand 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 grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 7252".

24. I adopt and will apply those principles in the present case. I would only add that, where a claim is defective and therefore susceptible to be struck out or subject to summary judgment, the Court should consider whether the defect in question might be cured by amendment and, if it might, should consider whether it is right to give the party in default an opportunity to make the defect good: see Hockin and Ors v RBS [2016] EWHC 92 (Ch) per Asplin J. This is another facet of the Royal Brompton Hospital principle that the Court should not merely look at the materials before it but should take account of what can reasonably be expected to be available at trial. I have borne this approach in mind in reaching my conclusions in the present case.

Proof of fraud and the approach to striking out allegations of fraud

25. Where, as here, a Claimant wishes to amend to plead fraud and the application is opposed, it is material to bear in mind the approach that the Court routinely takes to proving fraud in civil litigation. A sufficient summary for present purposes is provided by Fiona Trust & Holding Corp v Privalov [2010] EWHC 3199 (Comm) at [1438]-[1439] per Andrew Smith J:

It is well established that "cogent evidence is required to justify a finding of fraud or other discreditable conduct": per Moore-Bick LJ in Jafari-Fini v Skillglass Ltd., [2007] EWCA Civ 261 at para.73. This principle reflects the court's conventional perception that it is generally not likely that people will engage in such conduct: "where a claimant seeks to prove a case of dishonesty, its inherent improbability means that, even on the civil

burden of proof, the evidence needed to prove it must be all the stronger", per Rix LJ in Markel v Higgins, [2009] EWCA 790 at para 50. The question remains one of the balance of probability, although typically, as Ungoed-Thomas J put it in In re Dellow's Will Trusts, [1964] 1 WLR 415,455 (cited by Lord Nicholls in In re H, [1996] AC 563 at p.586H), "The more serious the allegation the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it"…
…Thus in the Jafari-Fini case at para 49, Carnwath LJ recognised an obvious qualification to the application of the principle, and said, "Unless it is dealing with known fraudsters, the court should start from a strong presumption that the innocent explanation is more likely to be correct."

26. This summary is consistent with many other decisions of high authority which establish that pleadings of fraud should be subjected to close scrutiny and that it is not possible to infer dishonesty from facts that are equally consistent with honesty: see, for example, Mukhtar v Saleem [2018] EWHC 1729 (QB); Elite Property Holdings Ltd v Barclays Bank [2017] EWHC 2030 (QB); Three Rivers DC v The Governor and Company of Barclays of England (No 3) [2003] 2 AC 1 at [186] per Lord Millett – see below.

27. One of the features of claims involving fraud or deceit is the prospect that the Defendant will, if the underlying allegation is true, have tried to shroud his conduct in secrecy. This has routinely been addressed in cases involving allegations that a defendant has engaged in anti-competitive arrangements. In such cases, the Court adopts what is called a generous approach to pleadings. The approach was summarised by Flaux J in Bord Na Mona Horticultural Ltd & Anr v British Polythene Industries Plc [2012] EWHC 3346 (Comm) at [29] ff. Flaux J set out the principles in play as described by Sales J in Nokia Corporation v AU Optronics Corporation [2012] EWHC 731 (Ch) at [62]-[67], which included the existence of a tension between (a) the impulse to ensure that claims are fully and clearly pleaded, and (b) the impulse to ensure that justice is done and a claimant is not prevented by overly strict and demanding rules of pleading from introducing a claim which may prove to be properly made out at trial but may be shut out by the law of limitation if the claimant is to be forced to wait until he has full particulars before launching a claim. Sales J indicated that this tension was to be resolved by "allowing a measure of generosity in favour of a claimant." Flaux J continued at [31]:
"[31] This generous approach to the pleadings in cartel claims has been endorsed by the Court of Appeal, not only in Cooper Tire & Rubber Company Europe Ltd v Dow Deutschland [2010] EWCA Civ 864 but most recently by Etherton LJ in KME Yorkshire Ltd v Toshiba Carrier UK Ltd [2012] EWCA Civ 1190 at [32]: "As was stated by the Court of Appeal in Cooper Tire & Rubber Company Europe Ltd v Dow Deutschland Inc [2010] EWCA Civ 864 at paragraph [43], however, it is in the nature of anti-competitive arrangements that they are shrouded in secrecy and so it is difficult until after disclosure of documents fairly to assess the strength or otherwise of an allegation that a defendant was a party to, or aware of, the proven anti-competitive conduct of members of

the same group of companies. That same generous approach was for the same reason taken by Sales J in Nokia Corporation v AU Optronics Corporation [2012] EWHC 731 in dismissing an application to strike out or to grant summary judgment against the claimant in proceedings for damages for infringement of Article 101. That approach is appropriate in the present case prior to disclosure of documents."

[32] In the case of applications for summary judgment, it is well established that the court should not engage in a mini-trial where there is any conflict of evidence. The dangers of too wide a use of the summary judgment procedure were emphasised by Mummery LJ at [4-18] of his judgment in Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical [2006] EWCA Civ 661. [5] and [18] of that judgment seem to me particularly apposite to the present case:
"5. Although the test [whether the claim has a real prospect of success] can be stated simply, its application in practice can be difficult. In my experience there can be more difficulties in applying the "no real prospect of success" test on an application for summary judgment (or on an application for permission to appeal, where a similar test is applicable) than in trying the case in its entirety (or, in the case of an appeal, hearing the substantive appeal). The decision-maker at trial will usually have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions and of having more time in which to digest and reflect on the materials.…
18. In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, 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."

[33] The same point was made by Lewison J (as he then was) in Federal Republic of Nigeria v Santolina Investment Corporation [2007] EWHC 437 (Ch), at [4(vi)] citing the Doncaster Pharmaceuticals case: "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.""

28. These are salutary warnings and necessary protections for the Claimants, which I bear in mind. It is, however, to be remembered that the Court’s concern in these passages was in large measure based upon a lack of knowledge on the part of the Claimant before disclosure had been given. In the present case, the Defendants have given disclosure based upon wide-ranging search terms relating to multiple custodians. Although the Claimants submit that the Defendants’ disclosure is not complete, they

have not identified any specific omissions or areas of default that would justify the Court in treating the Claimants as if they were still materially excluded from access to relevant disclosure for present purposes.

29. In any event, if a case alleging fraud or deceit (or other intention) rests upon the drawing of inferences about a Defendant's state of mind from other facts, those other facts must be clearly pleaded and must be such as could support the finding for which the Claimant contends. This is clear from numerous authorities: see Three Rivers District Council v The Governor and Company of Barclays of England (No 3) [2003] 2 AC 1 at [55] per Lord Hope and [186] per Lord Millett. I endorse and adopt the statement of Flaux J in JSC Bank of Moscow v Kekhman [2015] EWHC 3073 (Comm) at [20] that:
"The Claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty." At the interlocutory stage … the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge"

The proper function of pleadings
30. It should not need repeating that Particulars of Claim must include a concise statement of the facts on which the Claimant relies: CPR 16.4(1)(a). The "facts on which the Claimant relies" should be no less and no more than the facts which the Claimant must prove in order to succeed in her or his claim. Practice Direction 16PD8.2 mandates that the Claimant must specifically set out any allegation of fraud, details of any misrepresentation, and notice or knowledge of a fact where he wishes to rely upon them in support of his claim. The Queen's Bench Guide provides guidelines which should be followed: they reflect good and proper practice that has been universally known by competent practitioners for decades. They include that "a statement of case must be as brief and concise as possible and confined to setting out the bald facts and not the evidence of them": see 6.7.4(1). A statement of case exceeding 25 pages is regarded as exceptional: experience shows that most cases can be accommodated in well under 25 pages even where the most serious allegations are made. Experience also shows that prolix pleadings normally tend to obfuscate rather than to serve their proper purpose of identifying the material facts and issues that the parties have to address and the Court has to decide.

31. Where statements of case do not comply with these basic principles, the Court may require the Claimant to achieve compliance by striking out the offending document and requiring service of a compliant one: see Tchenquiz v Grant Thornton [2015] EWHC 405(Comm) and Brown v AB [2018] EWHC 623 (QB). It has always been within the power of the Court

to strike out either all or part of a pleading on the basis that it is vague, irrelevant, embarrassing or vexatious."

28. It is also made clear in those citations that:
    (a) The Court will consider, where disclosure has not yet taken place, whether a pleading is sufficient at this point in the light of whether there is a real prospect that it may be "improved" following disclosure, and especially where the defendants are alleged to have engaged in conduct which they have sought to conceal from the claimant. However, (i) the existing pleading still has to meet a measure of sufficiency including by way of particularised facts which of themselves would justify on the balance of probabilities an inference of fraud and (ii) the prospect of disclosure "improving" matters has to be a real one with a basis, and not a simple hope that something might turn up (i.e. "Micawberism"), whether on disclosure or exchange of witness statements;

    (b) The Court will also usually give a respondent party whose pleading is defective or deficient an opportunity to apply to correct its defects and deficiencies. On the other hand, the Court first has to form a view with regard to the pleading which is actually before it.

29. I also bear in mind that in Partco v Wragg 2020 EWCA Civ 594 at paragraph 27 there is a warning from the Court of Appeal against seeking to summarily dispose of single issues in a Claim (at least where they are not distinct, and certain are not distinct here), where the result may be to lead to overall delay due to appeals etc. in a Claim which is going to go to trial in any event on many matters, and where justice may, in any event, be best served by a fully investigated and informed decision. However, it was also stressed that if a Claim is bound to fail then it is best that that is determined at an early stage. The paragraph reads:

    "27. It seems to me that the following principles are well established, at least as articulated in relation to summary disposal under Pt 24 of the CPR. (1) The purpose of resolving issues on a summary basis and at an early stage is to save time and costs and courts are encouraged to consider an issue or issues at an early stage which will either resolve or help to resolve the litigation as an important aspect of active case management: see Kent v Griffiths (No. 3) [2001] QB 36 at p. 51B–C. This is particularly so where a decision will put an end to an action. (2) In deciding whether to exercise powers of summary disposal, the court must have regard to the overriding objective. (3) The court 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. (4) The court should always consider whether the objective of dealing with cases justly is better served by summary disposal of the particular issue or by letting all matters go to trial so that they can be fully investigated, and a properly informed decision reached. The authority for principles (2)–(4) is to be found in: Three Rivers District Council v Bank of England (No. 3)

[2003] 2 AC 1 per Lord Hope at paras 92–93, considering Swain v Hillman [2001] 1 All ER 91 at pp.94–95; Green v Hancocks (a Firm) [2001] Ll Rep PN 212, per Chadwick LJ at para.53, p.219, col. 1; and Killick v PricewaterhouseCoopers (No. 1) [2001] Ll Rep PN 17 per Neuberger J at p.23, col. 2, 2–27.2"

30. I add that various of these principles have been very recently restated in Qatar Airways Group v Middle East News [2020] EWHC 2975 at paragraphs 147-160 and 214, albeit in the context of a jurisdiction challenge. Although this decision was published after I had heard various submissions from the parties, I do not regard it as taking matters further than what was already common-ground, and so I have not sought further submissions on it.

31. I have applied these various principles and authorities in and in making my determinations below.

D- The Factual History

32. The parties' witness statements and their exhibits set out the history as follows. I have considered them carefully in coming to this judgment. Significant elements of this history are not disputed, but, subject to particular attacks made on it by the Applying Defendants, in the light of the principles set out above, I take Mr Toner's version.

D1 - Initial Negotiations

33. THL was part of a group of companies (the holding company of which may be Telford Homes Plc ("THP")) which were engaged in constructing the Building, which is a tall edifice comprising a number of Blocks near Central London. THL was marketing long leases of various flats (called "Plots") for contacts for sale "off-plan" with completion of the relevant lease to take place following completion of the relevant flat. Mr Toner went to a marketing presentation on 18 October 2012 at which there was a model of the proposed Building ("the Model").

34. Mr Toner says that the Model showed the exterior of the Building with the fifth floor flats (which have floor-to-ceiling windows) having balconies which were symmetric in form, appeared to be open to the sky and to have something like average waist height (say 3 foot) high clear transparent external panel guards and so that from inside each flat it would be possible, even when seated inside, to look out and both through and over the flat's Balcony to whatever view available in the relevant direction beyond the Building. This was to be contrasted with lower floors where flats were shown with some opaque panels. He says that he had emphasised to him by sales staff subsequently the attractiveness of floor to ceiling windows and unobstructed external views from inside the Flat externally to the city skyline. He has produced an email exchange over 11-13 November 2012 ("the November 2012 Emails") in which he talked about Plot 229 having "unobstructed views of the City " which is consistent with his having that understanding and having gained it from some source.

35. Mr Toner has produced a copy brochure ("the Brochure") which he accepts he was not provided with at the time but only obtained later at some point which he cannot recall. It shows both a picture of the Model and internal (looking out) and external mock-ups of the Building to the above effect and contains various references to the views and vistas to be enjoyed from the Flats.

36. The picture of the Model in the Brochure appears to have also on it a statement "Information on this model is indicative only and should not be relied upon as accurately showing the layout… and is subject to change from time to time in accordance with planning permissions yet to be obtained during the course of construction. The information on this model is for guidance only and should not be relied upon as accurately describing any of the specific matters proscribed by any other under the Property Misdescriptions Act 1991. This information does not constitute a contract, part of a contract, or warranty." A somewhat similar wording appears at one point in the Brochure in small print although seemingly directed to particulars of specific design elements (with no mention of balconies).

37. Mr Toner also says that there must have been a planning permission to such above effect, as (1) that is in accordance with plans of the exterior which he has obtained from the local authority's planning department which appear to form part of the then planning permission (2) that was indicated by the Model and the Brochure and the conversations and (3) because there was a subsequent planning variation (see below) to depart from this. Mr Toner also says that there must have been plans and specifications of THL and Bishopsgate to such above effect in view of what had been lodged with the planning department.

38. I am unclear as to the extent to which THL and Bishopsgate (and Avantgarde and the other Defendants) actually disagree with the above. They appear to accept that there was a later planning variation to legitimise the Balcony as actually built (with a high opaque barrier); and Ms Proferes, counsel for THL and Bishopsgate, said on instructions that they do not (presently) know at what point it was decided to depart from what has previously had planning approval. In any event, Mr Toner's factual case as to these factual matters, including that until after the grant of the Lease the then planning permission provided for a clear etc. Balcony (and not a Balcony in the form constructed), appears to have a real prospect of success on the evidence; and the relevant challenges to his case are mainly matters of law and interpretation.

39. Mr Toner says and has produced an email to him of 23rd November 2012 confirming that, while he had originally been interested in a different Plot (Plot 30), he was then told that Plot 229 had become available but that a Reservation Agreement had to be entered into the next day if he was to secure it. Mr Toner appears now to read something sinister into this event, but I am unable, on the present evidence, to see that as anything other than mere speculation in circumstances where particular (especially "off-plan") buyers may well come in and out of play as marketing proceeds, and sellers

may well seek to emphasise deadlines in an effort to persuade buyers to make legal commitments (but where buyers may always choose to seek more time or to refuse).

40. Mr Toner says that he was also provided with a document regarding anticipated Service Charges ("the Service Charge Document") setting out levels of charge which it was thought would be demanded under the intended leases of different sizes of flat. The document gives a figure which for Plot 229 would result in an annual service charge of £3,179.52.

41. Mr Toner also says that the marketing material emphasised that the Building and the Flats (including air conditioning) would be of a very high standard, and with a "10-year NHBC Warranty". At this point, these assertions do not seem to me to be particularly disputed and, in any event, they are well arguable.

42. Mr Toner says that at this point he did not know about Bishopsgate or Avantgarde but only about THL, which appeared to him to be marketing for its own benefit. The other companies are not mentioned on the documentation at this point, and his factual case as to this seems well arguable.

43. Mr Toner also says, and I accept, that the marketing material suggested that he instruct a particular firm of solicitors Alexander JLO Solicitors ("Alexanders") to act for him on his purchase of the Lease and that he did so. Mr Toner says that those solicitors failed him in various ways, and that they were, in effect, creatures of THL (and Bishopsgate and Avantgarde) or at least likely not to question what they proposed. He has, however, not advanced any claim based upon this, and if he was to do so then I think that that would have to be distinctly pleaded out in order that it could be seen precisely what was being said and so that that could be responded to, assessed and tested. Mr Toner has not brought any claim against those solicitors (and who he suggested had inappropriately destroyed his file) and any such claim would now be likely to be limitation barred. That does not, of course, relieve the Defendants from any claims which may exist against them, but it does mean, I think, that I should approach matters on the basis that (at least from the Contract to the grant of the Lease) Mr Toner had solicitors acting for him who would have owed him the usual duties.

D2 - The Reservation Agreement

44. Mr Toner then entered into the Reservation Agreement on 24 November 2012. Although this was said to be with "Telford Homes" it is accepted by THL (at least) for the purposes of this hearing that that meant THL. The Reservation Agreement provided that:
    (a) Mr Toner paid a "reservation fee" of £2,000 ("the £2,000") which was to be applied to and deducted from any Deposit which he paid on an eventual exchange of Contracts relating to the Plot (there called Apartment 229)
    (b) The matter regarding the Plot remained "subject to contract"

(c) There would be a lock-out period until 21 days after the draft contract ("the Draft Contract") was sent to Alexanders during which THL would not seek to market the Plot to anyone apart from to Mr Toner

(d) If Telford Homes withdrew from negotiations then the £2,000 would be returned to Mr Toner

(e) If Mr Toner withdrew from negotiations then £1,000 (the rest being an "administration fee" to be retained by THL) would be returned to Mr Toner.

45. On 28 November 2012, there was sent to Alexanders the Draft Contract and a draft Lease ("the Draft Lease") together with written "Notes for Buyer's Solicitors and Development Information" ("the Development Notes"). These contained provisions that the Contract was to be entered into by Mr Toner with Bishopsgate as Builder and Landlord and Avantgarde as Management Company. Mr Toner says that he realised this and was concerned that Bishopsgate was a subsidiary single purpose vehicle ("SPV") company but did not dispute this in any way. Mr Toner also says that Alexanders only sent him these documents on 17 December 2012. At first sight, it seems to me that if Mr Toner wished to require THL to in some way be itself involved, or for the entry into the Contract to be delayed, then it was for him to negotiate such to be the case (and if THL refused then for Mr Toner to cease to proceed, possibly seeking return of the Reservation Agreement £2,000).

<u>D3 - The Management Agreement</u>

46. At some point previously in 2012 there had been entered into between Bishopsgate, Avantgarde and R&R (there called "the Managing Agent") an undated (except that it says 2012) document "the Management Agreement") by which it was provided that:

(a) By Recital (B) that Bishopsgate (described as "the Company") and Avantgarde and by clause 2 that Avantgarde had instructed R&R to act as Managing Agent in relation to the Building and to three other blocks of flats on the relevant estate ("the Estate"), for one year and thereafter until a determination notice was served

(b) By clause 3.1 that: "The Managing Agent shall manage and operate the Property on behalf of the Company and shall take all reasonable steps to ensure that the obligations of the Company under the Leases are implemented fully and effectively and shall carry out their duties under this Agreement with all due care and attention and to the reasonable satisfaction of the Company and shall at all times comply with all relevant professional standards"

(c) By the rest of clause 3 that such obligations on the Managing Agent would include collecting rent, calculating and collecting Service Charges, and

i. "3.4.1 To advise on and effect day to day items of repair and maintenance and cleaning including repairs decorations maintenance improvements and alterations of all areas other than individual apartments or Commercial Units together with, wherever appropriate, routine maintenance and testing

of the lighting ventilation plant, lifting equipment, abseiling points, building management systems and items of plant and machinery." And

ii. "3.5.1 To, on behalf of the Company, recruit engage employ dismiss train supervise and pay the salaries or wages of such staff or contractors as the Managing Agent reasonably considers necessary and at such rates of remuneration as appear to them to be proper and which have been agreed from time to time in writing with the Company in order to maintain sufficient staff to meet the obligations of this Agreement. And

iii. "3.8.1 To visit the site on a frequent and regular basis, to inspect the common parts of the Property as can be inspected safely and without undue difficulty, to ascertain for the purposes of day to day management only the general condition of those common parts; to supervise any routine repair works on the Property and make reports to the Company where necessary."

iv. "3.9 To keep the Lessees informed of matters relevant to the management of their Property and to keep the Company informed of matters relating to the Leases and Lessees." And

v. "3.10 To deal with all proper enquiries reports complaints and other correspondence from Lessees tenants Statutory Undertakers Local Authorities Solicitors and other professional representatives and all other authorities and persons in connection with matters arising from the day to day management of the Property within two weeks of the date of the enquiry being made (or sooner if circumstances reasonably require or such longer period as the Company may agree, subject to the Managing Agent providing reasons)." And

vi. "3.11 To use Its reasonable endeavours to ensure the Company complies with the Leases and any statutory requirements and to notify the Company in good time if any statutory notices need to be served in respect of any of the Leases."

vii. "3.14.1 To ensure that the Property is safe for use by the residents, general public and employees alike by using all reasonable endeavours and through implementation of periodic Health and Safety Inspections and subsequent reporting and actioning of issues arising therefrom."

(d) By clause 7 there were various indemnity and exclusion provisions

(e) By clause 12 it was provided that "No term of this Agreement is enforceable under the Contracts (Rights of Third Parties) Act 199 ["the 1999 Act"] by a person who is not a party to this Agreement."

47. Mr Toner says that he was not told about the Management Agreement until he eventually managed to extract it from the First to Third Defendants during this litigation. He says that this was part of a management structure which was kept secret from him. However, as Mr Toner was not a party to

this document, and entered into specific agreements with specific entities (see above and below), I am unclear as to what he seeks to or can draw from it, although it does form part of his case that various entities are responsible for the eventual actions of Mr Prodromou.

D4 - The Contract

48. On 21 December 2012 the Contract was formally exchanged between Bishopsgate (described as "the Seller"), Avantgarde (described as "the Management Company") and Mr Toner (described as "the Buyer"). It provided in particular that:
    (a) By clauses 1 to 3 that Mr Toner would purchase from the Company the grant of the Lease (in the form of the Draft Lease) of the Flat (described as "the Property") for £550,000 with a Deposit of £50,000 (against which the Reservation Agreement £2,000 was to be allowed) being paid
    (b) By clause 5 that "THIS Agreement shall be completed on the tenth working day after the Seller's Solicitors shall have notified the Buyer's solicitors in writing that the construction of the Property has been completed in accordance with the requirements of Condition 7 of this contract Provided That the Seller has first provided to the Buyer's Solicitor: (a) a copy of the NHBC Buildmark Cover Note for the Property…"
    (c) By clause 6 that "THE Property will have the benefit of the NHBC Buildmark form of cover by the National House Building Council ("NHBC") in the name of the Seller and the documentation relating thereto will be sent to the Buyer's solicitor on exchange of this Agreement"

    (d) By clause/Condition 7 that
        i. "7.1 FOR the purposes of this agreement the "Requisite Consents" means all permissions consents approvals licences certificates and permits in legally effectual form as may be necessary to commence carry out maintain and complete the Property and the Block (as defined in the Lease) and to use and enjoy the Property as a residential flat"
        ii. "7.2 THE Seller will at its own cost construct the Property and the Block (as defined in the Lease) with due expedition in a good and workmanlike manner in accordance with the Requisite Consents (as defined above) including but not limited to the requirements of the NHBC and any relevant planning permission and building regulations approvals relating thereto and in accordance with the plans and elevations thereof (a copy of which may be inspected at the site office of the Seller at any time during office hours) and in accordance with the specification attached hereto subject to such amendments which may be required during the course of development PROVIDED that the substitution of

any materials fittings or plans shall be as nearly as possible to the same standard as those contained or referred to in the said plans elevation and specification and that any substitution shall not in any event materially reduce the value or size of the Property"

iii. "7.3 THE Seller will at its own cost procure that the Property and Block are completed: (a) in accordance with the Requisite Consents; (b) in compliance with planning and other obligations, whether under Section 106 of the Town and Country Planning Act 1990 or other statutory provisions applicable to the Estate and/or the Property; (c) in compliance with all statutory orders and regulations made under or deriving validity from them and any requirements and codes of practice of local authorities and competent authorities affecting the Estate and/or the Property"

(e) By clause 9 that: "THE Buyer HEREBY ADMITS that he enters into this Agreement as a result of his own investigations and not in reliance upon any representation or statement purported to be a statement of fact made to him by any person claiming to have authority of the Seller other than in replies to preliminary or additional enquiries or the Notes for Buyers solicitors and Development Information supplied to the Buyer or his solicitors by the Seller's Solicitor and correspondence relating thereto"

(f) By clause 11 that "THE Property is sold subject to the Standard Conditions of Sale (Fifth Edition) so far as they are not inconsistent with the express provisions of this Agreement and so far as they are applicable to a sale by private treaty…"

(g) By clause 14 that "THE Property shall be deemed to have been completed for the purposes of Clause 7 despite any minor defects omissions or imperfections and even if all requisite works to any of the common parts of the Block shall not have been finally completed Provided that such issues are not of such magnitude that it is impossible for the Buyer or the Buyer's successor to obtain mortgage finance for the purchase of the Property and provided further that the Property is capable of use and enjoyment as a residential property with all necessary services and rights of access and provided further that the Seller's obligations under Clause 7 shall remain in full force and effect following completion and the Seller undertakes to complete all such matters including those over which the Buyer has rights in the Lease as soon as practicable following completion and will not charge any costs associated with such works to the Buyer"

(h) By clause 17(b) that Bishopsgate could make minor amendments to the form of the Draft Lease when granting the Lease

(i) By clause 20 that Avantgarde would join in the Lease when granted and by clause 21 that Mr Toner would become a member of it.

49. The Standard Conditions of Sale (Fifth Edition) do contain provisions for compensation of a buyer where a property has been sold subject to a mis-representation, but no-one has sought to rely upon them specifically, and they are, of course, subject to the provisions of the Contract.

D5 - The building and Notification of Completion process

50. The Building was then built out over the next year. It is common-ground that the Balcony as constructed with an external structure was (at least in part) asymmetric, substantially higher than waist high and opaque. Mr Toner says that it substantially obstructs the external views from inside the Flat (and, at least if sitting down or of limited height, from the Balcony itself) towards the City of London and towards other notable landmarks such as the Olympic Stadium. That may be disputed but is a question of fact which I cannot resolve on a summary judgment application. There is no suggestion that Mr Toner was informed of during the period between the Contract and its completion, and Ms Proferes told me, on instructions, that it is not known as to when it was decided that this form of construction should take place. I note that there was correspondence (including a letter from "Telford Homes Plc") to Mr Toner of 8th August 2012 regarding his being updated on the progress of the "development" but which did not make any reference to the Balcony.

51. Mr Toner then had working commitments abroad. On 1 October 2013 he sent an email to Suzanne Owens at Telford stating that they had agreed that the Notification of Completion (under clause 5 of the Contract) would be sent on 8 November 2013 for completion by 25 November 2013 but that he would be abroad (by implication until after then) from 30 October 2013, and he says that he was thereafter so abroad.

52. On 21 October 2013 Simon Cullen of Telford Homes Plc wrote to Mr Toner to say that it was intended to serve the Notification of Completion on 15 November 2013 and that the Flat would be available for inspection on or after 1 November 2013 by Mr Toner or his agent. On 15 November 2013 Telford sent Alexanders a Notification of Completion document with other documents including NHBC Buildmark certificates and policy ("the Buildmark Policy"), which had been provided on behalf of the NHBC to Telford, dated 1 November 2013). Mr Toner, being abroad, did not then inspect. Mr Toner also says that he asked if his mortgage surveyor could inspect and that that request was refused; and which may be disputed but is a question of fact which I cannot resolve on a summary judgment application.

D6 - The completion of the Contract and the Lease

53. The Contract was completed by payment of the balance of the purchase price and grant of the Lease and provision of the NHBC Buildmark Document ("Buildmark") on 29 November 2013, and Mr Toner took up occupation shortly thereafter. The Lease had had some alterations made by agreement from the Draft Lease and including as to what was covered by the

Service Charges, and Mr Toner says, in effect, that he was being told that the anticipated annual level would still be £3,179.52.

54. The Lease provided that:
    (a) It was entered into between Bishopsgate (defined with its successors in title as "the Landlord"), Avantgarde (defined as "the Management Company") and Mr Toner (defined with his successors in title as "the Tenant") and granted a leasehold term of 999 years from 1 January 2011 of the Flat (defined as "the property") for a premium of £550,000 with provisions for Ground Rents and Service Charge
    (b) The Service Charge was to be a fair and reasonable proportion of costs expended by the Management Company on matters set out in clause 6 of the Lease
    (c) By clause 5(12) the Tenant was not to make any structural alterations to the Flat (defined as "the property")
    (d) By clause 5(13) the Tenant was not to make certain external alterations to the property without the consent of the Landlord. This may be subject to a statutory "not to be unreasonably withheld" in the case of "improvements" and may extend to the Balcony, although I have heard no detailed argument as to its true construction
    (e) By clause 6 of the Lease, Avantgarde entered into various obligations including to keep the Building in repair and to provide various services
    (f) By clause 6(6) it was provided that:
    "6.6(i) The Management Company [i.e. Avantgarde] will do or cause to be done all such works installations acts matters and things as may in compliance with the principles of good estate management and in the Management Company's reasonable discretion be necessary or advisable for the proper maintenance safety and administration of the Estate including in particular (but without prejudice to the generality of the foregoing) the borrowing of funds the employment of gardeners cleaners caretakers concierge and hall porters and the appointment of managing or other agents a manager or warden surveyors accountants and solicitors and the payment of their reasonable and proper salaries and fees in connection with the supervision and performance of the Management Company's covenants and the enforcement of the Tenant's covenants and the employment and payment of such employees contractors or agents as the Management Company shall think necessary in and about the performance of the covenants and provisions of this Lease PROVIDED ALWAYS that the Management Company shall not be liable for any act or omission of any such employees contractors or agents in and about the performance of the said covenants and provisions or for failure to perform all or any of the said covenants if the Management Company shall forthwith have taken and shall continue to take all reasonable steps to secure the performance of the same"
    (g) By clause 7(1) it was provided that:
    "7 THE Landlord covenants with the Tenant:- (I) That the Tenant observing and performing the covenants conditions and agreements

contained in this Lease and on his part to be observed and performed the Tenant shall and may quietly enjoy the Property during the Term without any interruption by the Landlord or any person claiming through or in trust for the Landlord".

D7 - The Buildmark Policy

55. The Buildmark Policy provided that:
   (a) It was a NHBC document which on the cover page stated "Your warranty and insurance cover"
   (b) "Buildmark" meant "The document containing the cover provided by NHBC and the Builder [Bishopsgate]"
   (c) The definition of "Common Parts" extended the cover (subject to various provisions) to the Building and some other elements of the Estate
   (d) "Completion" was defined as the later of legal completion of the sale and when NHBC agreed that the Home complied with its requirements – here it is the grant of the Lease on 29 November 2013
   (e) The Introduction stated to the Owner [Mr Toner] that "This booklet describes the insurance cover given by NHBC and the Builder's obligations under Buildmark for your newly built of converted Home."
   (f) Section 1 deals with Cover before Completion
   (g) Section 2 refers to "The Builder's obligations" and stated that the Builder must deal with various Defects if notified to it within 2 years of Completion and that NHBC would pay for various mattes including "Any arbitration award or court judgment which [the Owner] obtain against the Builder" and "The Cost of any work contained in a Resolution Service report which is accepted by [the Owner] and which the Builder does not complete…"
   (h) Section 2 went on to refer to the Resolution Service being a process which the NHBC would "usually" offer and which would result in NHBC investigating and issuing a report. It was stated that "If you disagree with our Resolution Service report there are other ways of resolving your dispute with the Builder. These are explained in the complaints and disputes procedures on page 22." It then stated that "We have no liability under this Section unless we have issued a Resolution Service report which you have accepted, or unless the Builder is insolvent or has failed to honour an arbitration award or a court judgment."
   (i) Sections 3 to 5 referred to NHBC providing cover for the cost of remedying various Defects in the years 3-10 following Completion
   (j) Under "Governing Law" it was provided "The rights of you, the Builder and NHBC, under Buildmark are governed by the law of the country in which the Home is situated"
   (k) Under "Complaints and Disputes Procedures" (on pages 22 onwards) it is stated:
      i. (on page 22) "If you disagree with our Resolution Service report, the Financial Ombudsman Service will not be able to consider the matter, as this does not form part of our

insurance obligations to you. Ways of resolving your dispute with the Builder are detailed on the next page."

ii. (On page 23) "Disputes with the Builder" and then "NHBC's Resolution Service is valuable for resolving straightforward disputes about standards of workmanship… It is free to Owners and is generally quicker than other options."

iii. (Also on page 23) "Other options for resolving disputes with NHBC or the Builder" and then follows notes as to these including the use of Arbitration, the Small Claims Court and "Other Courts… The courts may be suitable for resolving different types of claims including contractual… disputes, as well as disputes about standards of workmanship…"

D8 - Mr Prodromou

56. Mr Prodromou was and employee of R&R. In 2013 Mr Prodromou was the day concierge of the Building. In May 2015, the Fourth Defendant appointed Mr Prodromou as its Estate Manager (he also continuing as day concierge until June 2015), until his employment ended on 21 September 2018.

D9 - The Assignment of the Reversion

57. The freehold of the Building including the reversion to the Lease was assigned by Bishopsgate to Brigante on 29 February 2016. Mr Toner says, and I accept for the purposes of these applications, that Estates is the holding company of Brigante and deals with the collection of rents under the Lease while Avantgarde collects the Service Charge.

D10 - Mr Toner's Complaints and the Subsequent History

58. From shortly after the grant of the Lease, and to date, Mr Toner made and continues to make a series of complaints, which he says are and were fully justified, about

(a) The Balcony which he contended should have its external structures replaced with a symmetric waist-high transparent panel guard, although he also said that the actual structure had its own defects. He says that it ruins the advertised enjoyment of views and is highly detrimental to the amenity (and value) of the Flat

(b) Numerous elements of the construction and physical state of the Building and of the Flat which he says involved poor and defective design, materials and works ("the Defects"). He says that this necessitated (and still does necessitate) the carry out of remedial works ("the Remedial Works"), and none of the expense of which should fall on the tenants of the Building (including himself), and consequent disruption and expense of time and cost

(c) The level of the Service Charge including as to the inclusion of certain costs regarding a gym within the Building ("the Gym Costs"), costs regarding Remedial Works ("the Remedial Works

Costs") and its general level which he says (and I think is presently agreed to be) about £5,500 per annum.

59. In relation to the Balcony, Mr Toner says that Bishopsgate were initially apparently sympathetic to his requests. However, it is common-ground (and in any event reasonably arguable) that:
    (a) Bishopsgate in 2015 obtained a variation to the planning permission ("the Planning Variation") which legitimised, in planning terms, the Balcony as constructed, and
    (b) On 22 and 23 January 2014 Bishopsgate indicated in emails that they would not be altering the Balcony to make it clear etc. Thereafter they adopted an attitude which indicated some openness to an alteration being permitted but by email of 28 July 2017 Brigante, which had now purchased the reversion, asserted that it would involve a structural alteration which they simply (and without explanation) refused to permit and so that "this matters now remains between you and Telford Homes". I am not asked to determine and say nothing about whether the Balcony is "structural" but this stance is still being maintained.

60. In relation to the Defects, Mr Toner says that (and which seems to me to be reasonably arguable):
    (a) He has had a very substantial amount of correspondence with both NHBC and Bishopsgate and THL regarding his assertions of the existence of Defects
    (b) Some of his asserted Defects were remedied
    (c) Some of his asserted Defects were found by NHBC to exist and were remedied
    (d) Some of his asserted Defects were found by NHBC not to exist and were not remedied although he has continued to assert them and to seek their remedy.

61. Mr Toner has also asserted that THL, Bishopsgate and Avantgarde (at least by THL) have adopted a strategy ("the Strategy"), and deliberately, of a mixture of refusing to engage with his complaints, dismissing them out of hand, appearing to consider them but then rejecting them or doing nothing, and generally seeking to delay, to "string him along" (and to fob him off), and otherwise place hurdles in his path of seeking to have them resolved, as well as from time to time insulting him and belittling him, all with an aim of evading what he regards as being their obligations to remedy the Defects and carry out the Remedial Works at their own expense. Mr Toner also complains that R&R have not dealt with his complaints about the Defects.

62. Mr Toner also complains about Mr Prodromou. He says in summary (I come to more of the detail later) that Mr Prodromou harassed, defamed and belittled him in numerous ways until Mr Prodromou was eventually dismissed. He says that R&R and also Bishopsgate and Avantgarde would not deal with his complaint about Mr Prodromou.

63. Mr Toner makes specific complaints regarding the Air Conditioning Unit, and says that:
    (a) It is located near and in the corridor outside the Flat
    (b) It was always one of the Defects being purely designed, poorly located and defective
    (c) It was not switched on for a substantial period of time but at the end of 2017 Mr Prodromou switched it on (or caused a sub-contractor of R&R to do so) and, being defective, it caused a noise which was audible within the Flat and keep Mr Toner continually awake at night
    (d) Mr Toner complained with the result that it was switched off eventually on 10 January 2018 but then, at the behest of another tenant, he switched it back on so that Mr Toner's sleep was again disrupted and he had to complain before it was again switched off in about February 2018
    (e) R&R then caused it to be repaired, but not sufficiently, and it was switched back on again in January 2019, and so as to disrupt Mr Toner's sleep again, and was only switched off in February 2019 after numerous complaints from Mr Toner. Mr Toner says that R&R was acting on the instruction of Avantgarde, at least at this point.

E - The High Court Claim and its Particulars of Claim

64. The Claim Form in the High Court Claim was issued on 27 November 2019 being slightly less than six years after the completion of the Contract and the grant of the Lease. The Particulars of Claim run to 113 paragraphs and which I describe and which contain particular paragraphs as follows.

65. Paragraphs 1-7 describe the Flat and the various defendants including their corporate and business inter-relationships. Mr Toner, correctly, described the defendants as being separate legal entities even if, in the case of the First, Second and Third Defendants, with common directors and their being part of the same corporate group.

66. Paragraphs 8-28 deal with what Mr Toner describes as "the Representations" made to him prior to and in order to induce the Contract (and in relation to the adjustments regarding Service Charges, to the Lease) in relation to (1) the Balcony (2) the high-quality of the Building and (3) the Service Charges.

67. Paragraphs 29 to 34 refer to Mr Toner being induced to enter into the Contract by the Representations and quotes clause 7.2 of the Contract.

68. Paragraphs 35 and 36 state that Mr Toner paid the Deposit and the Premium for the Contract and the Lease and would not have purchased had the Representations not been made.

69. Paragraphs 37 to 38 are both headed and plead "Misrepresentation and Breach of Contract" on the part of THL, Bishopsgate and Avantgarde. Under "PARTICULARS" they allege that there was a failure to notify the Claimant that the design of the Balcony had changed so that its western side

had an opaque screen so as to amount to a misrepresentation and also to a failure to construct in accordance with clause 7.2 of the Contract, and also that there was a misrepresentation of the Service Charges and "incorrectly charged the leaseholders for repairing defects caused by faulty and substandard workmanship during the initial construction".

70. Paragraphs 42 to 45 are headed "Deceit" and allege that the Representations were made fraudulently or recklessly by THL, Bishopsgate and Avantgarde with "PARTICULARS OF FRAUD" being (1) that they recklessly failed to notify Mr Toner of the changes to the proposed Balcony (2) operate by a web of companies designed to shift responsibility away from decision-makers and (3) THL was disingenuous and obtained the Planning Variation notwithstanding that it was contrary to the provisions of the Contract.

71. Paragraph 46 claimed Recission and repayment of the Premium (although I think that is no longer pursued in which case it should be deleted) and Paragraph 47 claimed in the alternative damages under the Misrepresentation Act 1967 ("the 1967 Act).

72. There then follows a heading of "PARTICULARS OF BREACH". Paragraph 48 repeats earlier paragraphs about the Balcony not having been constructed as agreed. Paragraph 49 says that Flat was not built in accordance with the Contract and that Mr Toner notified Defects. Paragraphs 50 to 52 say that the Estate, the Building and the Flat all suffered from a long list of Defects. Paragraph 53 says that some Defects were remedied by the Claimant, and Paragraph 54 says that some Defects were remedied but only eventually. Paragraphs 55 onwards assert that THL continually and deliberately failed to remedy Defects and dishonestly disregarded obligations to do so. Paragraph 58 refers to Mr Toner having engaged with NHBC but NHBC only upholding some of his complaints. Paragraph 59 refers to continuing Defects and Paragraph 60 to Brigante and Estates not having remedied them.

73. Paragraphs 61 and 62 complain that Service Charges have been increased by THL, Avantgarde and R&R to pay for remedying Defects and that R&R has not sought to claim from THL in relation to them.

74. Paragraph 63 refers to what are said to be continuing Defects regarding the communal areas giving a list of some sixteen.

75. Paragraph 64 to 96 allege "Harassment" by THL, Bishopsgate, Avantgarde and R&R. Paragraph 66 alleges that THL influenced R&R into promoting Mr Prodromou to Estates Manager and "who went on to" harass the Mr Toner; and Paragraph 88 refers to the County Court Claim. The various Paragraphs refer to THL refusing to treat Mr Toner's complaints seriously, dismissing them and Mr Toner, and continually delaying, dragging matters out, and questioning Mr Toner, his assertions and motives, and seeking thereby to bully him into giving up.

76. Paragraph 81 refers to vexatious and very lengthy emails being sent; although the emails appear to be in the form of long schedules refusing to accept various complaints ("the Complaints") regarding assertions of particular Defects.

77. Paragraph 82 refers to "intimidation" being an instruction not to circulate a particular "Video" regarding Defects, having "Knocking" take place on Mr Toners's door with the relevant person not being still there when Mr Toner opened the door, sub-contractors teasing Mr Toner, and unnecessary requests regarding where Mr Toner's car was parked. Paragraph 83 states that on 10 October 2019 a Mr Campbell refused to deal with the Complaints further.

78. Paragraph 84 complains that THL refused to engage with NHBC properly or to comply with NHBC ordered deadlines or requirements.

79. Paragraph 85 says that Mr Toner had to spend a massive amount of time and effort to try to resolve the Complaints which THL, NHBC and R&R were determined to submerge in (unnecessary) correspondence.

80. Paragraphs 86-95 complain about the AirCon Unit and its effects in depriving him of sleep by the alleged switchings on of it and refusals and failures to switch it off to which I refer above.

81. Paragraph 96 repeats that THL constantly delayed and gave Mr Toner false hope about and then dismissed his (valid) Complaints and forcing him unnecessarily to repeat and seek to prove matters.

82. Paragraphs 97 to 111 are headed and allege "Loss & Damage" including (1) increased Service Charges (2) time spent, and loss of enjoyment and amenity (3) victimisation (4) impact on personal health and wellding (5) distress and inconvenience. Paragraph 112 claims interest.

83. Paragraphs 113 to 118 are headed "Particulars of claim for Negligence". Paragraph 113 repeats paragraphs 1 to 106. Paragraphs 114 to 118 say that THL owed a duty of care regarding the Representations as a result of its involvement in the negotiation process.

84. The Prayer for Relief seeks Rescission (which I think is no longer pursued) and various categories of damages "including aggravated damages for inconvenience, serious distress, stress, upset, humiliation, injury to feelings to be assessed, damages for harassment, damages for deceit and breach of contract", as well as interest and costs.

85. The Applying Defendants have filed and served substantial Defences and which include defences being advanced of limitation under the Limitation Act 1980 ("the 1980 Act"). However, Mr Toner has not yet had to file any Reply (CPR15.8 - the Directions Questionnaires stage having not yet taken place) and has not done so.

86. However, during the Hearing I did ask Mr Toner to file a document setting out further his case on Fraud and on Deliberate Concealment in relation to limitation. I will refer to those matters when I come to deal with those aspects below.

F- The County Court Claim

87. The Claim Form in the County Court Claim was issued on 13 May 2019 although Mr Toner says that the documentation and court fee was supplied to the County Court some days earlier, and so that the earlier date is to be treated as the issue date for the purposes of limitation and the 1980 Act.

88. The Particulars of Claim run to some 52 paragraphs, and which I describe and which contain particular paragraphs as follows:
   (a) Paragraphs 1 to 3 refer to the Buildings; R&R being the employer of Mr Prodromou as concierge and then estate manager; and to Avantgarde being the Management Company (and said to be run on a day to day basis by R&R)
   (b) Paragraphs 4 to 6 refer to Mr Toner's acquisition of the Flat (with Defects), the Contract, and the Lease
   (c) Paragraph 7 asserts that R&R has breached the Contract and the Lease
   (d) Paragraphs 8 to 11 assert that R&R and Mr Prodromou had duties of care to Mr Toner arising out of the circumstances, and with R&R being vicariously liable for Mr Prodromou as its employee, and that Mr Toner paid Service Charges to R&R and therefore R&R was bound to Mr Toner to comply with the Lease
   (e) Paragraphs 12 to 44 assert that Mr Prodromou harassed Mr Toner in numerous ways, including by switching on the Air Conditioning Unit
   (f) Paragraphs 45 to 49 assert that Mr Prodromou defamed Mr Toner
   (g) Paragraphs 50 and 52 assert that Mr Toner has suffered loss and damage including financial loss and distress, and also seek interest.

G – The Applications

89. The Applications attack Mr Toner's Claims in a number of distinct ways, although certain of them overlap. In view of the number of Applying Defendants, and the submissions made to me, it seems to me to be desirable to analyse them under various categories of types of claim.

G1- Misrepresentation

G1A - General

90. In considering the attacks on the Misrepresentation Claims, and which appear to be made against each and all of THL, Bishopsgate and Avantgarde, I remind myself first of certain basic principles as to the constituent elements of a claim in misrepresentation and which I do not think were in dispute but which appear from such cases as: Vald Neilsen v Baldorino 2019 EWHC 1296, Glossop v Contact 2019 EWHC 2314, 2020 EWHC 1377 and Smith New Court v Citibank 1997 AC 254.

91. A claim under the 1967 Act (and in particular section 2(1)) can give rise to a damages remedy where:
    (a) A Representation has been made by a party (D) in order to induce another person (V) to enter into a contract with D (whether or not with others, but the contract must be with at least D)
    (b) The Representation must be of fact but can be, by implication, that there are reasonable grounds for an expressed opinion or that a particular expressed intention for the future is genuinely held, and can be continuing (up to the time of a relevant contract) in nature
    (c) The Representation is false
    (d) D cannot show an honest belief in and reasonable grounds for the making of the Representation
    (e) The Representation materially induced V to enter into the relevant contract
    (f) The entry into the relevant contract has caused V relevant loss to be assessed on a relevant tort measure.

92. A claim in Deceit can give rise to a damages remedy where:
    (a) A statement has been made by a person (D) in circumstances where the person to whom it was made (V) might act upon it
    (b) The statement, being the Representation, must be of fact but can be, by implication, that there are reasonable grounds for an expressed opinion or that a particular expressed intention for the future is genuinely held, and can be continuing (up to the time of a relevant contract) in nature
    (c) The Representation is false
    (d) D either knew the Representation was false when made (or continued) or was reckless (not caring) as to its truth or falsity
    (e) The Representation materially induced V to enter into the relevant contract
    (f) The entry into the relevant contract has caused V relevant loss to be assessed on a relevant tort measure.

93. A claim for other negligent misrepresentation can give rise to a damages remedy where:
    (a) A statement has been made by a person (D) in circumstances where the person to whom it was made (V) might act upon it
    (b) The statement, being the Representation, must be of fact but can be, by implication, that there are reasonable grounds for an expressed opinion or that a particular expressed intention for the future is genuinely held, and can be continuing (up to the time of a relevant contract) in nature
    (c) The relationship and circumstances of the making of the Representation are such as to impose a "duty of care" on D with regard to the Representation. Such will generally involve a sufficient "assumption of responsibility" by D to V
    (d) The Representation is false
    (e) The Representation was made without the exercise of reasonable care

(f) The Representation materially induced V to enter into the relevant contract
(g) The entry into the relevant contract has caused V relevant loss to be assessed on a relevant tort measure.

94. The relevant tort measure of loss is at most (in non-fraud cases there are limiting principles of scope of loss which also come into play, but I do not have to deal with them here specifically):
    (a) The loss caused by reason of V having entered into the relevant contract and transaction. That is conventionally measured as being the difference between the price paid (being £550,000) and the value (at the relevant time, being usually the date of the relevant transaction) of the asset (here the Lease) acquired. It is not the difference between the values of the asset actually acquired and what that asset would have been worth had the Representation been true (which is the contractual measure – see below). However, there still has to be relevant causation
    (b) Losses (reasonably incurred) consequential upon the entry into the transaction and which may include expenditures relating to the relevant asset (but with accounts to be taken of benefits derived from it) and distress
    (c) Potentially, expenditures and losses resulting from attempts to reasonably mitigate the losses.

G1B – The Representations

95. The Representations in this case as set out in the Particulars of Claim are with regard to the Balcony, the construction of the Building and the Service Charges.

96. However, the section of the Particulars of Claim dealing with what are asserted to be Misrepresentations only refer to misrepresentations regarding the Balcony and the Service Charges.

97. However, Paragraph 41 of the Particulars of Claim does conclude with the words "… and incorrectly charged the leaseholders for repairing defects caused by faulty and substandard workmanship during the initial construction."

98. I do not think that that contention amounts to an allegation of a misrepresentation inducing the entry into of the Lease (or the Contract) or, if I am wrong about that and it does, that it either states reasonable grounds for such contention or that Mr Toner has reasonable grounds for success in relation to it. The words refer to conduct of relevant defendants (here in particular Avantgarde in relation to its demands for service charge) which post-dates the grant of the Lease, and which conduct cannot have induced the entry into of the Lease (or the Contract) which had happened earlier. The only relevant pleaded representations are that the Building would not have faults and would have a high-standard of workmanship. However, a representation

has to be of existing fact and the Building had not been constructed at the time of the representations. There is no allegation that the pleaded representations were of intentions or opinions which were either not then actually and genuinely held or were then without reasonable grounds. If the statements amounted to contractual promises then any claim would be for breach of contract, and if there has been an overcharge of Service Charge (to which I return below) then that may give rise to specific claims including in contract or restitution in relation to the relevant payments but not the inducing of the grant and taking of the Lease.

G1C – The Balcony Misrepresentations

G1Ci – The Balcony Representations

99. The first misrepresentation which is pleaded is with regard to the Balcony and being that it was to be constructed in the clear etc. form. I did not find the Particulars of Claim very clear as to whether Mr Toner was alleging that (i) when the alleged representations were made to him the relevant defendants had already decided that the Balcony would take a different form from that represented or (ii) the decision was taken later and whether before or after the Contract (although obviously before the grant of the Lease). However, Mr Toner clarified this during the hearing to say that he did not know, and that this had been concealed from him, and he wished to advance both alternatives. It then turned out that Ms Proferes for THL and Bishopsgate could not tell me when the decision had been taken and which lends support to Mr Toner's contention that he should not have to commit himself one way or another.

100. It seems to me that this is a classic instance where (i) a party is entitled to advance alternative cases saying that it must be one of the two possibilities but pleading and relying upon both (see White Book 16.4.6 and Binks v Securicor 2003 1 WLR 2557) and (ii) the Court should wait until at least disclosure before (possibly) requiring any clarification (and see case-law cited above). In circumstances where a decision must have been taken as to the Balcony's form at some point, it is those Defendants (who took the decision) and not Mr Toner who have the relevant information and documents. It would be entirely unfair (and contrary to the overriding objective) to bar Mr Toner from advancing alternatives at this point.

101. It also seems to me that Mr Toner has not understood that a misrepresentation must be in relation to an existing fact. At least some of his pleading gives the impression that he is contending that after the alleged representations regarding what was going to be constructed in relation to the Balcony had been made the relevant defendants deliberately decided to construct something different from what had been represented (and thereafter to seek retrospective planning approval) and that that itself is fraudulent. However, that does not make the original representation either false or fraudulent, in fact the opposite. A party is perfectly entitled to change its mind

unless it has contracted (or is otherwise under a duty, which usually requires a contractual promise supported by consideration) not to do so.

102. On the other hand, someone in the position of Mr Toner is entitled to contend:

(a) That a statement of what someone is going to do in the future is a statement of their then actual intention and/or that there are reasonable grounds to believe that it is their then actual intention, and which may be false and fraudulent, and/or

(b) That the statement, with its above meaning(s), is then expressly or impliedly (by conduct which can include silence in some circumstances) repeated and thus is "continuing", and so that as continued it may become false and fraudulent once the intention changes.

103. At first sight, the evidential material advanced by Mr Toner would seem to afford support for his case for misrepresentation in relation to the Balcony that:

(a) He was told by the Brochure, the Model of the Building and by implication from the November 2012 Emails and the subsequent email regarding Plot 229 but which did not mention any difference from Plot 30, and possibly also by the wording of the Contract (with its reference to building in accordance with planning permissions and then existing plans and elevations) that it was the intention to construct the Balcony guards and panels in a symmetric low-level clear and transparent form ("the Clear etc. Balcony")

(b) This was a statement of continuing intention which was repeated by the negotiations and marketing (including by the November 2012 Emails) continuing apparently on the basis that nothing had changed (especially with regard to view)

(c) By the date(s) of the original representations, or (on the basis of the representations being continuing) by the date of the Contract that intention had changed to an intention to construct the Balcony as it was in fact constructed ("the Opaque etc. Balcony") so that either or both of the original of continuing representations were false; as it the intention must have so changed at some point for the Balcony to be constructed as it was, and where the relevant entities have not been able to point to any other date. At first sight Mr Toner can say with force that a lack of reasonable care was taken and (although the burden is not on him under the 1967 Act) that there was a lack of reasonable grounds

(d) Mr Toner had plainly been concerned as to the Balcony and unobstructed views as appears from the emails in November 2012, and which THL and Bishopsgate appear from those emails to have seen as being a positive marketing point (and from which some inference might be drawn that they regarded it as having a potential

effect on value), and so that the representations were a material inducement for him to enter into the Contract.

104. However, Ms Proferes for THL and Bishopsgate (supported by Mr Moss for Avantgarde, and I will return to whether it was or might have been a misrepresentor below) makes three (or four) specific attacks on the misrepresentation case based on (i) the wording on the Model and which was repeated with it in the Brochure, together with the rest of the Brochure (ii) what is said to be the lack of importance of the construction and the change to construction of the Balcony (iii) clause 9 of the Contract ("Clause 9") and (iv) limitation.

<u>G1Cii – The wordings and Clause 9 of the Contract and the Balcony</u>

105. The wording on the Model provides that:

(a) "Information on this model is indicative only"
(b) "and should not be relied upon as accurately showing the layout"
(c) "is subject to change from time to time in accordance with planning permissions yet to be obtained during the course of construction"
(d) "The information on this model is for guidance only and should not be relied upon as accurately [describing matters governed by the Property Misdescriptions Act]…"
(e) "does not constitute a contract, part of a contract or a warranty".

106. Ms Proferes submits that these wordings, combined with the contents of the Brochure, mean that there was no representation as to the Balcony at all or at least not one which Mr Toner could rely upon. It seems to me that the non-reliance aspects are similar to those to which I refer in relation to Clause 9 below.

107. However, it seems to me that the Model and Brochure wording is not enough to prevent there being (or at least a real prospect of there being) an existing statement of intention contained within them to the effect that it was then intended (or at least anticipated) that the Balcony would take the form which shown in the Model and in the Brochure and in the planning documents. The wording provides that that intention might change in the future in certain circumstances, but (i) Mr Toner points out that there was no new planning permission obtained during the course of construction but only afterwards once he had complained about the change to the Balcony, and so the wording did not provide for the change which actually occurred (but rather implied that the construction should be of the Clear etc. Balcony shown in the then planning documents) (ii) does not say that the Model or the other pictures in the Brochure (or the supplied planning drawing) did not represent the then intention. The wording talks of the Model being for "guidance only" but that does not mean that the information is simply worthless and does not show what was said to be then intended; and if it did then the word "guidance" does not have its ordinary meaning (at least if the

change to the Balcony's form of construction was significant and which I conclude below is arguable). Mr Toner's case as to there being relevant Representations being made is reinforced by the November 2012 Emails and their references to the anticipated views from the fifth floor Flats.

108. However, Ms Proferes relies on both the wording on the Model and Clause 9 to contend that both there never was any representation at all and also that, if there was anything which could have (in other circumstances) amounted to a representation, Mr Toner is barred from contending that it did amount to a representation or that he relied upon it. Clause 9 (which I have set out above) provided that Mr Toner accepted that he had not relied on any representation made otherwise than "in replies to preliminary or additional enquiries or the Notes for Buyers solicitors and Development Information supplied to the Buyer or his solicitors by the Seller's Solicitor and correspondence relating thereto."

109. Mr Toner's responses are (1) There was a relevant Representation(s) (2) Clause 9 does not apply as the Representation(s) were made in relevant replies to preliminary enquiries or correspondence (3) he can rely upon section 3 of the Misrepresentation Act 1967 (the Unfair Contract Terms Act 1977 not being directly applicable as this is a contract for the sale of an interest in land) which provides that as misrepresentor can only rely on a provision of this nature where they can prove that it is reasonable for them to do so and (4) he is alleging fraudulent misrepresentation.

110. There is substantial case-law as to the effect of non-reliance clauses in terms of creating contractual or estoppel bars to an alleged misrepresentee being able to assert either or both of (a) there was a representation or (b) that they have relied upon it. At common-law that is the effect, but it is common-ground that the court construes such provisions strictly so that (i) they have to apply clearly to the relevant matter and (ii) (even if such is possible at all, and which it is at least arguably not) any extension of the clause so as to apply to matters of fraud has to be express.

111. Ms Proferes submitted that Mr Toner clearly fails as a matter of law in relation to his points (1) and (2) and that there is no real prospect of his establishing fraud and where he has failed to properly plead a case in fraud.

112. She referred me initially to Lloyd v Browning 2014 1 P&CR 11 but then, at my suggestion, to the more recent decision in First Tower v CDS 2019 1 WLR 637 which has overtaken it and sets out the modern position. There the misrepresentation was contained within an answer given in writing by solicitors to a preliminary enquiry but the eventual lease contained a provision that the misrepresentee had not relied on any representation at all.

113. At paragraph 40, there was set out section 3 of the 1967 Act:

"If a contract contains a term which would exclude or restrict— (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or (b) any remedy available to another party to the contract by reason of such a misrepresentation, that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977 ; and it is for those claiming that the term satisfies that requirement to show that it does."

114. It was then held that a non-reliance clause even if it was what might be termed a "basis clause", and provided either that there was no representation or no reliance rather than simply seeking to exclude liability, was subject to section 3 of the 1967 Act and concluded in paragraph 67:
"67. I would hold, therefore, that a clause which simply states (as clause 12.1 of the agreement for lease and clause 5.8 of the lease do) "that this lease has not been entered into in reliance wholly or partly on any statement or representation made by or on behalf of the landlord" is a contract term which would have the effect of excluding liability for misrepresentation; and consequently is subject to the test of reasonableness. Accordingly, in my judgment the judge in our case was right to conclude as he did. I do not consider that a conclusion to this effect should cause consternation. It will always be open to a contracting party seeking to rely on such a clause to establish that it was reasonable; and in cases involving the sale of complex financial products to sophisticated investors it may well be."

115. Lewison LJ then when on to consider whether the clause was reasonable, setting out in Paragraph 68 the relevant statutory provision:
"68. That leads on to the next question: were the clauses in this case reasonable? The test of reasonableness is contained in
section 11(1) of the Unfair Contract Terms Act 1977 :
"In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act, section 3 of the Misrepresentation Act 1967 … is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made."

116. Lewison LJ then cited from previous authority with approval as follows:
"69. In FoodCo UK llp (trading as Muffin Break) v Henry Boot Developments Ltd [2010] EWHC 358 (Ch) I had to consider a clause in the form of clause 12.1 of the agreement for lease in the present case. I held that such a clause was reasonable. I gave my reasons at para 177:
"(i) The aspiration of certainty is a reasonable one for the parties to adopt. In most cases it will have the effect of avoiding a 12-day trial such as this one.

“(ii) There was no substantial imbalance of bargaining power between the parties. Each of the tenants was a commercial and substantial concern …
“(iii) Each of the tenants was advised by solicitors …
“(iv) The term itself was open to negotiation …
“(v) Perhaps most importantly, the clause expressly permitted reliance on any reply given by the Henry Boot's solicitors to the tenant's solicitors. If, therefore, something of importance had been stated in the course of negotiations upon which the intending tenant wished to rely, its solicitors had only to ask Henry Boot's solicitors for an answer to a question. That would have revealed whether Henry Boot was prepared to formalise the statement so that the tenant could rely on it or whether the tenant would have to undertake its own due diligence.”
70. That approach was expressly approved by this court in Lloyd v Browning [2014] 1 P & CR 11 . In the course of his judgment Davis LJ said, at para 34:
“There are, as I see it, other matters also strongly indicating that this condition was a reasonable and fair one to be introduced into this particular contract: (1) First, each side had, and as they each knew, legal advisers. That was, as the judge duly found, plainly material as to the reasonableness of including this particular condition into the contract. Moreover, it was the case, as was known to all concerned, that the claimants had in addition instructed architects and planning consultants. That was a relevant factor, too. (2) Second, the contract was one for the sale of land. It is generally well known that such contracts do indeed, as the judge put it, have a status of ‘formality’ about them. Contracts relating to the disposition of property are designed by law to require that all the agreed terms are set out in one contractual document signed by each party. (3) Third, this condition was not a ‘take it or leave it’ condition of the kind sometimes imposed in small print on consumers, acting without legal advice, in consumer transactions. It was a special condition agreed by the parties’ lawyers in circumstances where the parties had equal and corresponding negotiating positions. Moreover, such condition had the general imprimatur of the Eastbourne Law Society and was, it is to be inferred, in common use. That, too, is a further factor indicating reasonableness. (4) Fourth, and I think this is a particular striking feature in the present case, the condition, expressly by its terms, permitted the claimants to rely on written statements made by the defendants’ solicitors in replying to pre-contract enquiries or otherwise in correspondence. Thus, if the claimants wished to rely on what had been said to them orally the means for giving legal effect to that were readily available: that is, by an appropriate written pre-contract enquiry or solicitor's letter. Such a request would reveal just what the defendant vendors were prepared formally to commit themselves to.”

71. In Hardy v Griffiths [2015] Ch 417 Ms Amanda Tipples QC, sitting as a deputy judge of the Chancery Division, took the same approach. In each of these cases the court stressed the fact that the clause in question expressly

preserved liability for misrepresentations contained in formal enquiries before contract."

117. Lewison LJ then held that the Judge below in that case had been entitled to find that a clause which had the effect of excluding liability for statements made by the misrepresentor's solicitors in answer to enquiries had not been shown to be reasonable, stating at Paragraph 75 that:
"75. Whether a clause passes the test of reasonableness is an evaluative judgment for the trial judge. An appeal court should be slow to interfere: George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 2 AC 803 . The judge recognised the four factors on which the landlords relied (and set them out at para 34). He directed himself by reference to the three cases to which I have referred. It cannot be said either that he misdirected himself in law, or that he took into account irrelevant factors or ignored relevant ones. Although there is some force in the landlords' argument, I do not consider that there is any ground in this case for interfering with the judge's overall assessment of the application of the test of reasonableness. Indeed, in my judgment, he was right to stress the importance of pre-contract enquiries in the field of conveyancing; and right in the conclusion to which he came. As the judge said, if clause 5.8 governs the landlords' liability the important function of replies to enquiries before contract becomes worthless. Although there might be a case where, on exceptional facts, a clause which precludes reliance on replies to enquiries before contract might be held to satisfy the test of reasonableness even where those replies have in fact been relied on, I find it very hard to imagine what those facts might be. Of course, the existence of the non-reliance clause may itself be evidence of non-reliance; as was indeed the case in one of the claims that I considered in the FoodCo UK llp case [2010] EWHC 358 : see paras 116–118."

118. Mr Toner submits that these alleged Representations do not fall within Clause 9 as they were made in writing in the Brochure and the November 2012 Emails and are to be treated as either in response to preliminary enquiries or in correspondence.

119. However, I agree with Ms Proferes that these Representations do fall within Clause 9, and in particular as:
   (a) Although there were various earlier communications from or with Mr Toner, it seems to me that those were not "preliminary enquiries" which is a usual expression in the property selling conveyancing process which refers to set enquiries which have a measure of formality (and are generally made by use of standard-forms and documents headed with terms which at least incorporate the word "Enquiries"). The communications upon which Mr Toner relies were not of that form

(b) The November 2012 Emails are mainly about Plot 30. Although the correspondence carries on to Plot 229, it is difficult to describe there as having been anything in the nature of "enquiries" by Mr Toner, and I also regard the word "correspondence" in clause 9 as applying to communications following on from "enquiries" and the "Development Notes" which these do not
(c) The "Development Notes to Buyers Solicitors" do not say anything about the Balcony
(d) The Brochure (and the Model and the supply of the planning drawing) was marketing material and clearly so. That does not prevent it containing representations but it is very different from "enquiries".

120. Mr Toner further submits that Clause 9 has not been shown to be reasonable, and in particular that:
(a) The fact that the Development Notes do not mention the Balcony is something which is hidden away in them and it should have been there
(b) Alexanders had been recommended to Mr Toner by THL and the relevant defendants would have known that they were not going to carry out an in-depth investigation of the material which they were provided with or make extensive enquiries
(c) Mr Toner was in a position of unequal bargaining power being effectively given a "take it or leave it" offer to which he had to respond within a very short time where the seller was a substantial developer and he an individual.

121. I do not think that Mr Toner has a real prospect of the relevant defendants being unable to show that reliance on Clause 9 is reasonable, in the light of the above cited case-law, and in particular as (and which incorporates various of Ms Proferes' and Mr Moss' submissions):
(a) Each side had legal advisers
(b) Although there can be said to have been something of an imbalance of bargaining power this was redressed by Mr Toner having solicitors (and he also had experience in property acquisitions having purchased a number of properties previously from THL companies)
(c) This was an entirely usual property transaction, being an "off-plan" purchase and where non-reliance clauses of this nature are usual
(d) Clause 9 was in no way "hidden away" in small print, and it would be reasonably expected that Alexanders would have advised Mr Toner about it
(e) While Mr Toner was being given little time, he could always had sought more, and all matters were open to negotiation
(f) If Mr Toner had particular concerns about what was to be built and provided then it was for him to study the Development Notes and seek guarantees of particular matters

(g) The clause did permit reliance on replies to his solicitors; a matter said to be of particular importance in the case-law and which was Mr Toner's protection where all he had to do was to ask them to enquire for a confirmation of what was important to him but not mentioned in the Development Notes
(h) It was for Mr Toner to seek to have Alexanders carry out their role effectively in accordance with his requirements (and to convey to them those requirements), and he had potential remedies against them if they did not
(i) Mr Toner has substantial protections within the Contract itself which sets out in Clause 7 what he was to be provided with
(j) If it was to be said (as it is) that a representation was made fraudulently then Clause 9 will not apply in any event.

122. I would add that Mr Toner asserts misrepresentation against THL which is not a party to the Contract. However, it seems to me that, where Mr Toner has entered into a contractual term that he has not relied upon statements other than those made in a particular form, he cannot say that that term only operates to exclude remedies against the principal (Bishopsgate and possibly Avantgarde) and not the agent (THL). To hold otherwise would be to deprive the term of much of its intended force and especially where if Mr Toner succeeded against THL then THL might have rights of indemnity against Bishopsgate.

123. It therefore seems to me that, whether or not something which could amount to a Balcony Representation was made (which I deal with further below), Mr Toner is barred by Clause 9 of the Contract from relying upon it to bring a claim of either negligent or statutory misrepresentation (and the same applies to the other claims in negligent or statutory misrepresentation although I deal with the Service Charge aspect specifically below).

G1Ciii – Balcony Fraudulent Misrepresentation

124. However, Mr Toner's third argument is to assert that Clause 9 does not apply to fraudulent misrepresentations and which is common-ground (in my view rightly, both because in general an exemption or limitation clause is not to be construed as applying to fraudulent misrepresentations and because to exclude liability for fraudulent misrepresentations would not be reasonable within the meaning of section 3 of the 1967 Act). Ms Proferes (and Mr Moss) respond to submit that Mr Toner (1) is still not able to show a sufficient Representation (2) has not properly pleaded fraud, and, in any event, (3) has not shown a real prospect of establishing fraud.

125. In relation to whether Mr Toner has complied with the CPR and the common-law regarding pleading fraud, I have set out relevant provisions of the Rules and principles from the case-law as to Mr Toner having to plead facts from which the relevant states of mind (being the misrepresentor

knowing of or being reckless as to both the making of the relevant representation and of its falsity – see Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm); [2011] 1 C.L.C. 701, at [221], per Hamblen J, citing Goose v Wilson Sandford & Co [2001] Lloyd's Rep. PN 189, at [41], per Morritt LJ.

126. I was concerned with regard to this, even though the general thrust of Mr Toner's case is clearly with its first set of alternatives being that the relevant defendants had decided to construct an opaque etc. Balcony by the date of the marketing to him and if not then by the Contract, and, if so, then:

(a) They had created the Model and the Brochure and original planning documents, all of which showed a transparent etc. Balcony, and had marketed that and the resultant views as an advantage

(b) If they decided to change that, then it would obviously be, and would also be obviously seen by potential buyers to be, a qualitative change which would be potentially detrimental to the Flat and any purchaser or occupier of it

(c) They did not tell Mr Toner at any point of the fact of the change whether before or after the Contract

(d) It should therefore be inferred that they actually subjectively knew during the entire process both that they were (from the Model and the Brochure, and the original planning documents, and also the November Emails) creating an impression in the potential buyer's mind as to a clear etc. Balcony and, once they had taken the decision to change to an opaque etc. Balcony, that that impression would be false

(e) Although Mr Toner adds to support such inferences that the relevant defendants:

i. had a history of seeking to deceive buyers and
ii. had a "web of companies" rather than just one single entity and which was desired to insulate particular companies from others' debts and
iii. disregarded their obligations to him to rectify the situation by agreeing to have the Balcony or allow the Balcony to be replaced and
iv. wrongly then sought an amendment to the planning permission to permit the opaque etc. when they .

127. It seemed to me that while this was being advanced in the Particulars of Claim (in particular by paragraphs 38, 39, 43, 44 and 44) Mr Toner:

(a) Had not distinguished his alternative factual cases of the defendants having decided upon the change (i) before the Contract and (ii) after the Contract; and

(b) Had not made as clear as was desirable the facts and matters upon which he was desiring to have a court infer actual subjective knowledge or recklessness on the part of the relevant defendants (by themselves or THL was their agent).

128. Therefore, during the hearing I required Mr Toner to produce a document which set out the facts from which he was saying that fraud was to be inferred. Mr Toner's fourth witness statement did not really comply with my direction. He listed (in particular from paragraphs 112-126 to a number of matters but fell (as he has done repeatedly and as often occurs with litigants in person (and some lawyers)) into the traps of:

(a) Seeking to argue his case rather than simply setting out what fraud (and its factual elements) was being alleged and from what facts relevant actual subjective states of mind and knowledge should be inferred
(b) Setting out evidence (material from which facts are to be proved) rather than facts, although this distinction is particularly different in cases where facts justifying an inference are required to be set out.
(c) Not simply stating facts. He uses expressions such as "I understand that" (when his understanding is immaterial, it is a question of what actually did or did not happen) and vague allegations such as "appalling and deceitful behaviour" which themselves require to be particularised as actual specific facts which can then be the subject of specific contest and eventual findings at a trial
(d) Not realising that the fraudulent misrepresentation must have induced the Contract and thus that the fraudulent state of mind must have existed at that time and so that post-Contract events are only relevant if they enable inferences to be drawn as to that earlier state of mind.

129. Ms Proferes (and Mr Moss) submit that Mr Toner has not advanced a proper pleading of fraud even at this early stage. I do, however, not consider that this allegation should be struck out on this ground, although I do consider that it should be re-pleaded in order to make clear that the first sets of factual alternatives (i.e. the change of intention regarding the Balcony took place either before any representations were made to Mr Toner or during the marketing and negotiation with him period but before the Contract) are being advanced and on the basis of the facts which properly can then be argued to support it. It seems to me that:

(a) The thrust of the case is clear
(b) The underlying facts which might properly support the contention of fraud have been identified
(c) The problem is more that Mr Toner has managed to obscure his case by the way in which he has advanced it, being a litigant in person
(d) It would be disproportionate if the claim has real prospects of success to strike it out in these circumstances. The pleading rules exist so that the defendants know the case which they have to meet and so that it can be tested as to whether it has a real prospect of success (including as to the inferences of a fraudulent state of mind in relation to making of misrepresentations and their falsity being

more likely than not to be inferred if the relevant pleaded facts are proved), not in order to enable parties to evade properly arguable allegations of fraud where a proper basis has been advanced even if in a confusing manner

(e) The matter has also been complicated by the inability of THL to inform either Mr Toner or the court as to the precise date when it contends that the decision to change the Balcony was made (the only reference in its witness evidence being as to during the course of construction but which construction seemingly took place during 2012 and 2013).

130. Ms Proferes (and Mr Moss), however, further submit that there is no real prospect of Mr Toner either proving the facts upon which he relies or having the relevant inferences drawn from them and in particular as:

(a) The alleged representations only appear in marketing material and not in the material supplied to Alexanders and therefore should not be seen as being of any weight or specificity
(b) The writing under the Model made clear that it was only representative and was liable to change
(c) The Contract also made clear that there could be changes
(d) This was a minor change of little importance, and the views would remain even if it was more necessary to stand to see them
(e) The corporate structure was both standard and legitimate
(f) In consequence there was neither any real (or at least material) representation at all, alternatively insufficient material from which necessary subjective knowledge of a relevant person(s) that the representation was being made or of its falsity should be inferred on a balance of probabilities basis
(g) No representations were being made by Avantgarde (and which only became involved with Mr Toner from the provision of the Draft Contract onwards and then only as Management Company).

131. I have to consider this on the basis of whether it has been shown that Mr Toner has no real prospects of success. I do not think that that has been demonstrated, and in particular in the light of what I have said about the allegation of there being a Balcony Representation(s) (and the Model, the Brochure and the other documents) above, and as:

(a) The marketing material and the original planning documents seem to show a “glassed-in” concept of transparent Balconies. That would seem at first sight to be potentially and obviously attractive to purchasers, and the material appears to be designed to give potential purchasers that impression
(b) The November Emails emphasised the views from the Building even if in relation to a different fifth floor flat

(c) It is difficult to see why it would be thought that a purchaser would not be at least interested, and probably very interested, in a change to the exterior of the nature of the change to the Balcony

(d) The wording underneath the picture of the Model is double-edged. It is not inconsistent with, and in fact supports, the Model representing the then intentions regarding construction and that the intention is to construct in accordance with then planning permissions or any variation to them by the time of construction. While it may be merely protective in order to avoid a perceived need to mention every possible minor change, it can also be argued that it is being used to hide a major change without saying that such was actually envisaged. The same can be said of what was provided to Alexanders and it can be argued that nothing was said there about the Balcony because it was desired not to tell the prospective purchaser of the change. The same can also be said of the variation provision in the Contract and which also appears to be aimed towards future decisions to make changes rather than decisions which had already been reached (which, on this hypothesis, was the case with regard to the Balcony)

(e) The details of the decision to make the change, including its date, are still unknown. If it was made before the creation of the Model and/or the Brochure then the form of the Model and/or the Brochure is somewhat inexplicable. If it was made after the creation of the Model then it can well be argued that the decision-makers would have known of its incompatibility with the Model and/or the Brochure

(f) There seems to me to be real likelihood that disclosure from the defendants will provide relevant material which may impact on the points and matters above

(g) The degree and qualitative nature and extent of the change and its consequent effects are all matters of fact which would depend on the evidence at trial. It may be that some would see this as merely being a minor matter and of little importance. However, it was clearly of major importance to Mr Toner himself (in that he speedily sought to complain about it after completion), was (arguably) made to be a marketing point by THL, and I cannot see it as being obvious (or even particularly likely) that this is simply a trivial matter which could not affect perception of the Flat, the Flat's amenity or the Flat's value or its desirability. These are all matters of fact in the light of all the evidence for the trial judge and I do not think it is possible or right to reject Mr Toner's factual case on a summary basis

(h) While Ms Proferes has contended that the staff at the relevant Defendants may well have thought that they were entitled to make the change to the Balcony that does not explain (i) why Mr Toner was not informed of it or (ii) why it would then necessarily follow

that they did not know that the representation was false or were reckless as to such (dishonesty not being a necessary or a sufficient ingredient of fraud for these purposes).

131. In consequence, and looked at in the round, it seems to me that:
    a. It can be well argued that: the Balcony Representation was being made (and that that was precisely what the relevant marketeers, being the defendants' personnel or agents, wanted someone in the Mr Toner's position to believe) i.e. that it was intended and anticipated that the construction would be in the Clear etc. Balcony form and in accordance with what was shown on the then planning documents (which showed such a form), that
    b. It could be inferred from the main asserted facts (and which Mr Toner has a real prospect of proving) on the balance of probabilities that (at least) a relevant person at THL knew or was reckless as to the fact of Mr Toner being told one thing about the intentions and anticipations regarding the Balcony whereas it had in fact been decided to construct something qualitatively different.

132. However, I do not think that three particular matters advanced by Mr Toner are (as advanced) proper in support of this case, being:
    a. The fact that THL set up a situation of a "web of companies" including itself as marketer and Bishopsgate as a single purpose vehicle Landlord and Avantgarde as a Management Company. This seems to me to be entirely standard, legitimate (in terms of a corporate group structure even if it is to take advantage of limited liability – which is a statutory benefit and an open one, and of advantage to Tenants who are protected against problems arising from a partial group insolvency) and not something from which the asserted inferences can be drawn
    b. The fact that relevant defendants then sought a planning approval only after completion and Mr Toner pointing out the planning position. If anything that suggests that they did not know of the problem beforehand and were now desiring to correct matters. Mr Toner can rely on the fact that it was required, as showing both that the change was a major one and for his breach of contract claim, but it does not show fraud at an earlier stage. If he asserted that the relevant defendants knew earlier that further planning approval was required but had deliberately not sought it, then that might be relevant to fraud (as it might show that they were deliberately disregarding a known problem), but that is not (presently) asserted by him
    c. His general statements that the relevant defendants were deceitful in their development and sale practices with regard to him and to others. If that is to be advanced then Mr Toner must identify specific factual situations of deceit which must not be generalised, and say why they should lead to inferences that there was a fraudulent state of mind by the time of the Contract in relation to the Balcony.

133. I am also not convinced that the NHBC Consumer Code for House Builders relied upon in submissions by Mr Toner takes matters much further. It is a voluntary code and does not give rise to and is not incorporated in any contract or, of itself, duty of care (which is not relied upon). Insofar as it contains good practice guidance, it is more important as to what is obviously good practice in the sense of matters which would obviously (to a seller/marketer) be of relevance to a potential purchaser.

134. Nevertheless, for the reasons set out above, I think that Mr Toner has advanced reasonable grounds for arguing his fraudulent misrepresentation alternative, where he has a real prospect of success (subject to limitation) and where any breaches of the rules or the common-law as to pleading should not result in his claim being struck-out. However, I will (subject to the next point regarding limitation) require a limited degree of re-pleading by way of Further Information from Mr Toner.

G1Civ – Limitation and the Balcony Misrepresentation

135. However, Ms Proferes (and Mr Moss) submit that even if that is right, the claim in fraud is limitation barred, although they also say the same in relation to the claims for negligent and statutory misrepresentation. They rely on the general six-year period for the bringing of tort claims provided for by section 2 of the Limitation Act 1980 ("the 1980 Act") "An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued." They point to the fact that the High Court Claim Form was issued in November 2019 being well after 6 years from the date of Mr Toner's entry into the Contract.

136. Mr Toner makes three replies to this being:
   a. Tort requires the occurring of damage and none had occurred until the Contract was completed and the Lease was granted which was (just) less than six years before the issue of the High Court Claim Form
   b. He can rely on section 32(1)(a) of the 1980 Act in relation to his fraud case
   c. He can rely on section 32(1)(b) of the 1980 Act in relation to there having been deliberate concealment.

137. With regard to the first argument, the relevant defendants rely upon the decision in Green v Eadie (ChD 18/11/2011) where a claims were made that the claimant had been induced by negligent or statutory misrepresentation regarding boundaries into entering into a contract to purchase land, and where she had had solicitors acting for her whom she also sued in both contract and the tort of negligence. The relevant claim form was issued more than six years after the contract but less than six years after the completion. The claimant asserted both that statutory misrepresentation had a twelve year limitation period (as a claim on a speciality under section 8 of the 1980 Act)

and that the various wrongs only resulted in damage or gave right to bring a claim as at the completion.

138. Mr Mark Cawson QC (sitting as a judge of the High Court) held that:
    a. (paragraph 21) it was trite law that a claim in negligence (including negligent misrepresentation) accrued when damage was first suffered, and a claim for breach of contract accrued when the breach took place
    b. (paragraph 42) that a claim in statutory misrepresentation under the 1967 Act had a 6 year limitation period from accrual of the cause of action (because either or both of section 2 and section 9(1) of the 1980 Act applied)
    c. (paragraph 57) that the cause of action accrued when the claimant entered into the "flawed" contract even if it would have been possible to have rescinded the contract for misrepresentation
    d. (paragraphs 61 to 63) that the claim against the solicitor accrued at or by the time of entry into the contract even though (or if) the solicitor had a continuing retainer and a duty to seek to remedy the breach prior to completion.

139. I am not sure that all of the reasoning with regard to the claims against the solicitor would necessarily stand in the light of subsequent case-law in circumstances where (1) the duty on the solicitor was a truly continuing one to exercise reasonable skill and care and (2) the claim was for a loss of a right to rescind due the solicitors' subsequent to contract negligent inaction at least if (3) there had been some event (e.g. a supply of Land Registry material) in the interim which would have meant that a reasonable solicitor would have looked at the boundaries in a relevant way. However, at the least, the authority makes clear that there must be something which constitutes a fresh misrepresentation (or breach of contract), and it is not sufficient to assert that there was a duty to remedy a previous misrepresentation (or breach of contract).

140. The decision in Green v Eadie is one which I should follow as a matter of precedent. It seems to me that in the circumstances of this case, it requires me to conclude that the misrepresentation causes of action accrued on entry into the Contract (at the latest), and thus are in principle limitation barred (subject to the fraud and deliberate concealment arguments).

141. I have asked myself, Mr Toner being a litigant in person, as to whether Mr Toner could contend that there were fresh events which took place between Contract and the grant of the Lease (with the resultant damage only accruing on completion) which amounted to relevant misrepresentations, to the effect of the Balcony having been constructed (at least by implication) as had previously been shown in clear etc. form where it had actually been constructed in opaque form or that it was intended to construct it in clear etc. form when in fact the intention was to construct in opaque etc. form. Such

misrepresentations could be said to be new and to give rise to new causes of action both because:

a. They arose from “new” events and
b. If there had not been previous misrepresentations (e.g. because the intention had only changed after the date of the Contract) then there would have been no existing cause of action.

The relevant loss would then be asserted to be the taking place of completion where it could have been argued that Mr Toner could have rescinded the Contract and have refused to complete.

142. However, while this might be a theoretically possible case, and in paragraph 35 of the Particulars of Claim Mr Toner does assert that he “subsequently paid the remaining balance of the consideration of £550,000 upon completion and entered into the lease pursuant to the agreement on 29th November 2013”, I do not think that Mr Toner has pleaded such a case in the Particulars of Claim, and therefore I do not think that I should be concerned with it. This Hearing concerns the existing Particulars of Claim. The only representations which are alleged are those in paragraphs 8-27 of the Particulars of Claim which are all pre-Contract (as also appears from the wording of paragraph 35).

143. Mr Toner has in final written submissions sought to assert that there were continuing (and even new) misrepresentations before the grant of the Lease, but to advance such a case would require a true amendment. Even if Mr Toner was to seek to amend then the relevant amendments would have to be formulated and questions would arise as to whether that could be done outside the limitation period (since now is over six years after completion and the grant of the Lease).

144. Therefore in principle the misrepresentation claims are limitation barred. I would add that insofar as Mr Toner suggests that he might rely on section 14A of the 1980, I consider that such an argument would be bound to fail as, on any basis, Mr Toner must have had the “relevant knowledge” (of the facts constituting the wrong etc.) well before three years prior to the issue of the Claim.

145. However, Mr Toner relies on both fraud and deliberate concealment under section 32 of the 1980 Act:

“32(1) … 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…

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment… (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 or to any person through whom the defendant claims and his agent.
(2) For the purposes of subsection (1) above, deliberate concealment of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

146. I have been taken to Sheldon v RHM Outhwaite 1995 2 AER 558 and to RG Securities v Allianz 191 ConLR 1, and (in Ms Proferes' closing written submissions) to Hussain v Mukhtar 2016 EWHC 424, from which (and also from the cases noted in the White Book at 8-85.1) I draw the following principles (which I do not think were really in contest) being:

a. The fraud or the deliberately concealed facts must be part of the basis of the relevant claim i.e. unless they were pleaded the relevant cause of action which was the subject-matter of the Claim would not be held to exist
b. The effect of deliberate concealment is to reset the limitation clock to start again with a new 6 year period (as opposed to a suspension of an existing running period), and even if the limitation period had already expired or the concealment took place after the events constituting the relevant tort or other wrong
c. The "deliberate" element of the concealment is a subjective requirement of the concealer actually appreciating that there is something, which may be a breach of duty, which is being concealed, and which involves both an appreciation of the existence of the fact(s) (in the case of a breach of duty, an appreciation of the fact that there is such a breach) and of the concealing of such fact(s)
d. "concealment" can take the form of non-disclosure (at least where disclosure had been sought or would have been expected) rather than a positive act
e. The question of what amounts to reasonable diligence is fact sensitive, with the burden of proof being on the Claimant and with an objective test as to whether the relevant facts "could" have been discovered "with the exercise of reasonable diligent". This imports some requirement to investigate where things seems to have gone wrong, although it is also necessary to show that such investigation would have revealed the relevant facts. A relevant summary appears in the often cited passage from the judgment of Millett LJ in Paragon v Thakerar 1999 1 AER 400 at 418:
"'The question is not whether the Plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable period of limitation is irrelevant. In

the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree.'

f. The Court should be careful and caution before concluding on a summary basis on limited evidence and prior to disclosure [as here] that a claimant did not have a real prospect of showing at trial either that deliberate concealment had occurred or that reasonable diligence would have revealed the relevant facts as such matters are particularly fact sensitive and may very well be affected by material appearing on disclosure (see RG Securities @ paragraphs 43-45).

147. In relation to fraudulent misrepresentation, in order to discover the alleged misrepresentation (being that the representations were false) and the alleged fraud (and thus to be able to plead it and bring an action based upon it) Mr Toner would have had to have known that the Balcony had been constructed in the opaque etc. form. However, he would also have had to have known when the intention regarding the Balcony had changed (as otherwise he would have been guessing was to whether the representations would have been true or false when made). Mr Toner asserts that he could not have discovered any of this until after completion when he took up residence in the Flat.

148. Mr Toner also asserts that there has been deliberate concealment. Again, I required him to produce a statement of the facts upon which he relies both to amount to concealment and from which it should be inferred that the concealment was "deliberate" i.e. intentional and with actual subjective knowledge of a concealment. Mr Toner dealt with this in paragraphs 127-140 of his fourth witness statement but which has many of the same problems as I have identified above with regard to the section on fraudulent intent, as it contains argument, irrelevant material and does not focus on the "facts" of (a) what was concealed and how (b) why it should be inferred that the relevant defendants knew what they were doing and were seeking to hide it from Mr Toner. Nevertheless, it does seem to me to be possible to extract from his material (although again I think that this should be specifically re-pleaded) that he is asserting that:

a. The relevant defendants (i) took a deliberate decision to change the design of the Balcony and (ii) constructed it in its opaque etc. changed form and knowing both (I) that this was not had been represented to Mr Toner and (II) it was contrary to clause 7.2 of the Contract
b. The relevant defendants must have realised that they owed a duty to the Mr Toner to reveal all such matters to him under (i) the Contract to which they were a party (ii) the NHBC consumer code ("the Code")

for house-builders which states that builders will keep their purchasers up to date (iii) a moral approach to keeping their buyer informed

c. The relevant defendants took no steps to inform Mr Toner of what they had done

d. This non-disclosure is to be inferred as being deliberate as:

    i. The importance to Mr Toner was obvious as being a major and detrimental change

    ii. It was obvious that if Mr Toner had been told then he would have complained which would have been to the disadvantage of Mr Toner

    iii. The change was also not notified to the planning authority in obvious breach of planning requirements either when it happened or even once Mr Toner had started to complain, but only when he pressed the point

    iv. The relevant defendants have a history of being deceitful

    v. The relevant defendants thus clearly had a culture and practice of concealing important matters of this nature and effect.

149. The relevant defendants dispute this. They say that the change was for good reason of giving privacy to others and that they believed that they were entitled to carry it out under the provisions of clause 7.2 of the Contract where they contend that it made no material difference to the amenity of the Flat or to its value.

150. I, however, think that Mr Toner does have real prospects of success as to the question of deliberate concealment (as well as fraud), in the light of his contentions above and also because:

a. While I have grave doubts that the NHBC consumer code can create any relevant "duty" (it not being a contact in any way), its contents represent both a known standard of behaviour and obvious expectation (i.e. that the builders will keep their purchasers informed of changes)

b. It is obviously arguable that the change in the Balcony is one of real difference and effect (and indeed Brigante is refusing to allow a change back)

c. The relevant defendants are unable to say when the change was determined upon or by whom, and there are likely to be relevant documents in relation to the decision-making process and which may well extend to a consideration of why Mr Toner was not told

d. This seems to be a potential instance of concealment by non-disclosure where Mr Toner would have had no reason to enquire.

151. However, the relevant defendants say that this does not matter because Mr Toner, if he had exercised reasonable diligence, would have taken up the invitation from THL's email of 21 October 2013 to inspect by himself or his agent and that, if he had done this, then he would have discovered that the Balcony had been constructed in the opaque version.

152. I do not accept that this matter means that Mr Toner does not have real prospects of success as:

   a. I am not sure that a mere invitation to inspect in this context without explaining or giving any indication that there have been changes which should be examined is sufficient for a failure to inspect to amount to a non-exercise of reasonable diligence. It can be argued that a purchaser can perfectly reasonably simply assume that the Flat has been constructed properly and they do not have to spend time arranging an inspection
   b. Mr Toner had already notified THL that he was going to be abroad (as he was) during the relevant period. The invitation for him to inspect himself can be said to be somewhat meaningless. While off-plan purchasers of properties are often located abroad that does not mean that they should have to come to this country to inspect rather than relying upon the seller to tell them of anything "new" which has occurred (and where no mention was made to Mr Toner of the change to the Balcony)
   c. While Mr Toner was told that he could send an agent, it is difficult to see why a purchaser is not exercising reasonable diligence if they decide not to spend the time and money in employing an agent to inspect. A reasonable purchaser might or might not take such a step. In any event, Mr Toner's evidence is that he asked for his mortgage broker (his agent) to be able to inspect and the request was refused, and that evidence has not been controverted by the relevant defendants
   d. Questions would also arise as to whether even if there had been an inspection such would have led to Mr Toner to learn about the misrepresentation and/or fraud (which would have required investigation and disclosure of when decisions took place) within the relatively short time before Completion.
   e. This again seems to be the case where the warnings against awarding summary judgment in a fact-sensitive area set out in RG Securities apply.

153. It therefore again seems to me that Mr Toner has real prospects of success on these issues and that it is not appropriate to grant summary judgment against him on the bases that a limitation defence is bound to succeed. I also do not regard the deficiencies in his pleading to be sufficient for it to be proportionate to order a strike-out although I will direct a (short) repleading by way of Further Information of these important allegations.

<u>G1Cv – Conclusion on the Balcony Misrepresentation</u>

154. The consequence of this is that I will grant reverse summary judgment against Mr Toner on the negligent and statutory misrepresentation claims relating to the Balcony (although on the basis of clause 9 of the Contract and not limitation) but not on the fraudulent misrepresentation claims relating to the

Balcony. I will require a limited repleading by way of Part 18 Further Information.

G1D- Service Charges Misrepresentation

155. Mr Toner also contends that there was a Service Charges Representation in the Service Charges Documents as to what would be the levels of Service Charge, being of about £3,180 per annum, which was false (and negligent and without reasonably grounds and fraudulent) as it was known, or should have been known, that the level would be more in the region of £5,000 or more per annum.

156. Again, for the reasons given above as to representations having to be as to matters of existing fact, it seems to me that Mr Toner's case has to be on this that the Service Charges Documents falsely implied that it was actually intended and anticipated that the Service Charges were going to be at the levels quoted in the Service Charges Document, when that was not the then intention or anticipation, or did not have reasonable grounds for so believing.

157. For the reasons give above, it seems to me that Clause 9 is an absolute answer to claims based on negligent or statutory misrepresentation regarding Service Charges. Again, the Service Charges Document is not part of the Notes to Buyers and Development Information, and Mr Toner has not pointed towards it or its contents being within anything which would ordinarily be categorised as a preliminary enquiry or an additional enquiry.

158. However, Mr Toner still seeks to advance a claim of fraudulent misrepresentation on the basis of contending that:
    a. (although this would require repleading) it was represented both that it was anticipated subjectively that the Service Charges would be in the region of £3,180, and, by implication, that there were objective reasonable grounds for doing so, when the representors or their principals knew that the likely (and intended) levels would be more like £5,000+ per annum
    b. This is to be inferred from:
        i. the extent to which the Service Charges have risen
        ii. there being a general underlying plan to foist the cost of remedying Defects in the Building, which it was known would occur from an absence of sufficient monies being spent on its construction, on the tenants of Flats through the Service Charges even though the financial responsibility for remedying defects should have fallen on Bishopsgate
        iii. the relevant defendants having engaged in fraud in relation to the Balcony; and also other (unspecified) developments and instances

iv. the relevant defendants having "deceitfully" refused to accept Mr Toner's various complaints and having sought to spin those complaints out and hope that he will give up regarding them.

159. I can see that the contention that such Representations were made is reasonably arguable as it is difficult to see what else can flow from the deliberate provision of the Services Charges Document other than its being a statement of intention and anticipation (rather than some vague expression of hope) as to what would occur.

160. However, I have grave doubts as to whether there is a real prospect of proving the matters from which an inference of fraudulent intention (knowledge or recklessness as to the falsity of the Representations) could be inferred. Mr Toner has not given any particulars of any other development where the same has occurred, and these are serious allegations. The mere fact that a builder/developer decides (even if obviously wrongly) following completion to refuse to remedy defects, and to do everything they can to try to delay and obfuscate, does not mean that they always anticipated that such defects would exist and that the cost of remedying them should be funded through Service Charges. Refusing deliberately to accept a breach of an obligation, even were it to be plain and obvious, is not proof that it was always intended to breach it. I bear in mind also that Mr Toner would, in any event, have to replead his fraud case along the lines which I have set out above.

161. The relevant defendants have to show that Mr Toner has no real prospects of success, and, of course, Mr Toner can contend that it is the defendants who will have the relevant documentary material which will only be made available to him on disclosure and that this is a case where disclosure is required in order to see whether or not there is anything else which could give rise to a real prospect of success.

162. Having considered this aspect somewhat anxiously, it seems to me that, at least on the present pleading, this element of the pleading should, in principle, be struck out as the Particulars of Claim do not contain sufficient particulars. If a properly amended pleading as to (i) what were the alleged representations (ii) in what respects they were false and (iii) from what facts fraud or recklessness in relation to their falsity is said to be capable of being inferred; then I will consider further as to whether that amendment and the relevant case should be permitted to be pursued without reverse summary judgment at least until disclosure has been provided, and in accordance with the principles derived from the authorities cited above.

163. Although limitation points are taken, it seems to me that Mr Toner can again seek to rely upon section 32 of the 1980 Act so as to have real prospects of defeating them on both "fraud" and "deliberate concealment" grounds, on the basis that he could not have reasonably discovered the fact of the alleged misrepresentations and fraud until after completion.

G1e- Loss

164. To succeed in any misrepresentation claim, Mr Toner would have to show relevant loss being in principle that at the time he paid more than the market value of the Flat (assuming full correct information had been provided) and/or that he had suffered recoverable consequential losses. Again, the Particulars of Claim are deficient in not setting out details of an over-payment loss although they probably do contain some particulars of consequential losses (at least in terms of both distress and inconvenience, and great time and effort spent in seeking resolution of his various complaints and which would or could follow from his having entered into the relevant transactions, and also in relation to the Air Conditioning Unit).

165. It seems to me that these representations are certainly relevant to the marketing, and hence thought to be relevant to the attractiveness, of the Flat, and thus could well potentially impact on its value. While Mr Toner made some statement in his submissions as to the value of the Flat having increased since the Contract, my recollection is that this was with regard to today's date rather than its value as at the date of completion (as Ms Proferes says) but in any event without expert evidence it would be wrong to hold him to such a comment where his general case is that the effect of the Balcony and the Defects was to substantially diminish the value. I think that, at least at present and prior to expert evidence, there must be real prospects of over-payment loss being established.

166. However, I also think that there are real prospects of a consequential losses claim. I am in no position to carry out an assessment of the proper extent and the reasonableness etc. of Mr Toner's attempts to deal with and resolve his complaints or the extent of the distress and inconvenience which he has (extensively) alleged.

167. I therefore regard there as being real prospects of a loss recoverable in a fraudulent misrepresentation claim being established.

G1f- Avantgarde

168. The claims in misrepresentation are, in my view, also advanced against Avantgarde (as well as against THL and Bishopsgate). Although at some points in the Particulars of Claim Mr Toner only refers to THL, at others (e.g. paragraph 37) Mr Toner seems to make clear that these claims are made against all and each of THL, Bishopsgate and Avantgarde.

169. Mr Moss submits that Avantgarde's involvement was at a very late stage as joining in the Contract as Management Company only and that it is clear that Avantgarde has not made and is not responsible for the relevant representations even if they were false and fraudulent.

170. I do not think that this argument succeeds with regard to the Service Charge misrepresentations. In view of the relevant history, and the timing of the Management Agreement which was in operation at the time of the alleged representations, it seems perfectly possible that it was Avantgarde that was responsible for the Service Charges document and its contents.

171. The position is more difficult with regard to the Balcony as that was a Bishopsgate matter relating to the construction of the Building having nothing to do (at least directly) with Avantgarde which is only concerned with its management. However, Mr Toner's case is that the various companies within the Telford group (and which Avantgarde then, at least, was) were all acting in concert together through the one set of agents THL. While I am not sure that this argument could necessarily work in relation to mere negligent or statutory misrepresentation in the context of this case, I have held that clause 9 of the Contract bars such claims.

172. However, it seems to me that there is a potential difference with regard to fraudulent misrepresentation. If THL was fraudulent, then as THL was, at least reasonably arguably, acting as agent for all the then relevant Telford companies, including Avantgarde, then Avantgarde would be potentially liable for any fraud on the part of its agent (as occurred in Glossop v Contact 2019 EWHC 2314). Further, Mr Toner asserts that there were common directors between the various companies, and thus there are real arguments that Avantgarde is to be imputed knowledge of the alleged fraud from which it was deriving the benefit of the Contract to which it was a party, and it is difficult to see how the mere fact of the utilisation of different companies within the same corporate group in such circumstances can be used necessarily to enable one company to escape from the consequences of a fraudulent misrepresentation from another inducing a contract to which it was a party. Mr Moss submits that Avantgarde's signature to the Contract was a mere formality; but I am not persuaded by that submission as Avantgarde is a genuine (and important) contracting party, and where the Contract provided for the Lease where Avantgarde has a very real role and rights and obligations. It seems to me that Mr Toner has real prospects of success against Avantgarde.

G1g- Conclusion regarding Misrepresentation

173. It therefore seems to me that, subject to the relevant repleading and further consideration etc set out above, the fraudulent misrepresentation claims should not now be struck out and, reverse summary judgments should not be granted. However, repleading will be required so as to set out properly what is being alleged in terms of relevant facts (and not evidence or argument), and I will need to then consider the Service Charges aspect (if it is to be pursued) further.

H- Breaches of the Contract

174.Mr Toner has alleged numerous breaches of the Contract in terms of failures to construct the Flat and the Building properly and to a sufficient standard, and also in relation to the construction of the Balcony itself (as not being in accordance with the then planning permission itself being a "Requisite Consent" or the deposited plans as at the date of the Contract, and where it seems to me that Mr Toner has real prospects of successfully arguing that the change would materially reduce the value of the Flat for the reasons given above).

175. Mr Toner is not clear as to which entity(ies) he says that the breaches of Contract is against as (e.g. in paragraphs 37, 49 and 52) he sometimes refers to just THL and sometimes also to Bishopsgate and Avantgarde. I do not think that he has real prospects of success in establishing a breach of the Contract claim (being under its clause 7) against any entity other than Bishopsgate which, being the defined "Seller" is clearly the relevant entity. Mr Toner pleads that THL was Bishopsgate's "undisclosed principal" but this is not a situation of agency, Bishopsgate owned the freehold and was building and contracting in its own right.

176. Mr Toner pleads that THL is the controlling group company and the only relevant entity with active employees or any substance, and that everything was communicated and done through THL, and that Bishopsgate is a mere shell special purpose vehicle. That may be right but it does not affect the contractual analysis. The relevant Defendant is Bishopsgate, as only it owed the relevant (clause 7) obligation under the Contract. Mr Toner (and Alexanders) knew, when he entered into the contract, that Bishopsgate was the Seller. I cannot see how any of the other companies, even if they were in the same group and acting in concert, can be said to have taken on Bishopsgate's contractual obligations. The general principle of "the corporate veil" applies. Therefore, insofar as claims under the Contract are being advanced against those other companies, I do not see Mr Toner as having real prospects of success, and I will grant reverse summary judgment against him.

177. The position is, however, different as between Mr Toner and Bishopsgate and where I cannot determine the factual arguments as to whether or not there were the alleged breaches of the Contract in terms of the Defects and the Balcony or whether they gave rise to recoverable loss (in principle the difference between the value of the Flat with and without Defects and with the different types of Balcony, and potential consequential losses). I think that it is also common-ground and I find that Mr Toner has real prospects of success with regard to these aspects.

178. However, Bishopsgate asserts that it has a limitation defence asserting that the under section 5 of the 1980 Act, the relevant causes of action accrued once there was "practical completion" of the building works and that this was by early November 2013 (when the NHBC allowed its Cover Note to be issued and the Seller notified Mr Toner that it considered that construction

had been completed) and thus more than 6 years before the issue of the High Court Claim Form on 27 November 2019. Ms Proferes says that this was the case even though completion of the Contract only occurred on 29 November 2013.

179. I note that Mr Toner has not sought to bring any claim under the provisions of the Defective Premises Act 1972. I am therefore not concerned with any such statutory claim and its limitation period, unless and until any application to amend is made. It might raise difficult questions as to what that Act extends and when completion of relevant works etc. took place.

180. I also note that Mr Toner has in his final written submissions sought to assert that Bishopsgate owed a duty of care to him to build the Building and the Flat properly. No such claim is pleaded and so I am not concerned with it unless and until any application to amend is made. It might raise difficult questions as to whether the law of tort could be used in this contractual context to give rise to a longer limitation period.

181. However, the contractual claim raises potentially important questions of building contract law regarding limitation. Ms Proferes relies upon:

a. Keating on Construction Contracts, 10th Edition where at 16-026 it is said "Where a contractor is liable under an entire contract to complete works, the limitation period for defects runs, it is submitted, from the date of completion or purported completion, and not from any earlier date when that part of the works, the subject matter of the defects was carried out." She submits that "purported completion" here means purported completion of the works
b. McGee on Limitation Periods, 8th Edition where at 10.004 there is a discussion as to when causes of action accrue when certificates are granted under certain construction contracts but there is reference to Birse v McCormick 2004 EWHC 3053 "where it was held that the cause of action in relation to construction services accrued on the doing of the work. The answer appears to be that the date of accrual depends upon the exact terms of the contract, though even on that basis it is not immediately apparent how the two cases can be reconciled…"
c. Hudson on Building and Engineering Contracts, 14th Edition where at 1-250(3) it is said that "… A cause of action for defective performance of a building… contract is complete and accrues at somewhat different times depending on the nature of the breach. The basic rule is that the limitation period for defective work by a contractor runs from practical completion. This rule is well settled, so the basis for it does not perhaps matter, but it is submitted that this is not because there is no breach prior to practical completion, but because defective work is a continuing breach right up to practical completion. The defect can be the subject of a claim when it is carried out…. However, the breach constituted by the defective work is a continuing breach by the

Contractor, because the Contractor owes a dual obligation to carry out and complete the works. That continuing breach runs to Practical Completion, and a contractor commits a fresh breach at Practical Completion if he offers a project containing defective work for acceptance at that stage."

182. Ms Proferes then took me to authorities in the areas in relation to building contracts and limitation. She took me first to Tameside MBC v Barlows. The first instance decision was reported, but only as to excerpts, at 1999 CILL 1559. The defendant had agreed to build 106 houses for the claimant and the contract was by deed (thus with a 12 year limitation period) in JCT form providing for a practical completion stage and certification. The relevant defective works were carried out more than 12 years before the issue of the Writ but only 11 years after the practical completion.

183. The first instance judge held that there were two distinct obligations, one which arose when the relevant works were carried out and the other when the certificate of practical completion was provided. He said (under his Issue 4):
"… Equally in my judgment if, as in my judgment it does, the Agreement… creates two distinct obligations, one in relation to carrying out the work properly as it is being done and another in relation to completing a building which has been constructed in accordance with the contractual requirements, the mere fact that any defects may have been suable upon prior to the delivery up or completion of the 106 houses will not in my judgment be fatal to a claim by the plaintiff that time only began to run from practical completion of the works.
In my judgment a distinct and separate cause of action will arise upon failure to complete the houses properly. A breach of the express obligation in the Agreement… to complete the works in conformity with the contract documents will thereupon for the first time occur and it cannot be said in my judgment that time begins to run against the plaintiff before that point has been reached. The obligation to complete the works in accordance with the contract is in my judgment the fundamental obligation of the contractor and it is a distinct obligations from any obligation upon the contractor to carry out the work properly as it is being performed. It is the performance of the obligation to complete the works in accordance with the contract which entitles the contractor to the agreed price for the works and this lies at the basis of the view that a building contract constitutes an entire contract…
… The textwriters to which I have been referred are consistent in stating that time begins to run from practical completion in relation to defects in the work and this can only be on the footing it seems to me that the cause of action arises at that stage. That view is in my judgment correct in principle. The existence of a separate obligation on the contractor in relation to the performance of the work as it is carried out the effect of which is to exclude the notion of temporary disconformity does not in my judgment alter the essential obligation of the contractor to provide a building or works which when completed or finished are in conformity with the contract documents or mean that time has already begun to run against the employer..."

184. However, the judge then went on to say:

"… In the ordinary case, the contractor is entitled to retain possession of the site until practical completion when it is handed over and it would in my judgment be contrary to principle to hold that time had begun to run against the employer in respect of that obligation before the works had bene completed and released to him."

185. Ms Proferes says that this fixes the accrual of the obligation as at practical completion. Mr Toner says that it fixes the accrual in this case as at actual completion when possession was handed over to him (and where he had not been entitled to possession until then).

186. Tameside v Barlows was appealed to the Court of Appeal reported at 75 Const LR 114. It paragraphs 44-45, it was said:

"44…. the judge gave as his reason:

"… the factual position is that the houses… had been completed and possession given to the plaintiff. Significantly, separate certificates of practical completion had been issued. In these circumstances, it seems to me that it should be inferred that the parties had treated those parts of the work as being practically complete for all purposes, and I consider that it would have been open to the plaintiff, if it had discovered defects in the houses which had been released to it, to have brought an action for failing to complete the houses properly and it would not have had to have waited until the last of the works had been completed before suing. Time will have begun to run in respect of any defects… from the dates of practical completion. The defects will have been suable upon from that time."

45. With that conclusion and analysis we agree. The crucial factor is the delivery of possession. Once they had possession, [the employer] could claim. The [employer's] appeal is therefore dismissed…"

187. At first sight, that authority would seem to suggest that (1) Mr Toner could rely upon a failure to have completed the works in accordance with the contract; and (2) his cause of action would only arise on delivery of possession (i.e. 29 November 2013), that being seen as the "crucial factor" even though the Court of Appeal were agreeing with the judge's view that time began to run on the date of "practical completion". Ms Proferes, however, submits that the key is "practical completion" and delivery of possession is not a necessary constituent of that.

188. Ms Proferes also took me to Swansea v Interserve [2018] EWHC 2192. Again this was a JCT contract but here the employer owned the land, and nothing is said about whether the relevant contractor had possession of the relevant land. At paragraph 57, O'Farrell J said:

"57. It is well-established law that a cause of action for breach of a construction contract accrues when the contractor is in breach of its express or implied obligation under the contract. Where, as in this case, there is an

obligation to carry out and complete the works, the cause of action for a failure to complete the works in accordance with the contract accrues at the date of practical complete, Tameside v Barlows…."

189. The court then considered as to when Practical Completion occurred under the terms of the relevant contract, and which depended upon the employer having held such a reasonable opinion at a particular point of time (see @ paragraph 64) but no mention was made of possession, and quite possibly because the employer had had technical legal possession throughout.

190. It is correct that a summary application such as this can be an appropriate place for the court to decide a compartmentalised issue of law (and including with any related issue of construction, itself a matter of law) but it seems to me that this is a case where I should be cautious of doing so. The case-law and textbooks themselves make clear that the authorities cannot all be rationalised into a neat conceptual framework, and that the outcome depends very much on the construction and effect of the individual contract.

191. This is all the more so where, as here, I am dealing with an individual off-plan construct and purchase contract where the purchaser is a consumer and which does not incorporate JCT terms. I have an immediate concern as to whether a JCT contract analysis, and where "practical completion" is a defined term and recognised stage within JCT terms, but no such expression appears in this case. What there is in the Contract is its clause 5 which involves a notification by the Seller "that the construction of the Property has been completed in accordance with [clause 7]" and also a deeming provision in clause 14 that there has been completion for the purposes of clause 7 but which expressly provides that "the Seller's obligations under Clause 7 shall remain in full force and effect following completion and the Seller undertakes to complete all such matters."

192. It seems to me that in all such circumstances and the above authorities there are very real arguments (and even if a cause of action arose when the works were, on Mr Toner's case, wrongly built with Defects etc.) that a further later cause(s) of action arose on, or at least not before, completion of the Contract with its contemporaneous delivery of possession and grant of the Lease as:
   a. The authorities make clear that a cause of action does not merely arise at the point of when the work is actually carried out but also at a later point so as to give rise to a "later cause of action"
   b. The Court of Appeal in Tameside v Barlows regarded the delivery of possession as being the key determinant (absent a specific contractual provision) of when that later point in time and later cause of action arose. That may only be particularly relevant in a case such as Tameside where the contractor (rather than the employer) had possession of the land, but that is also the case here (as the Seller had possession until completion). Ms Proferes submits that what is important is "practical completion" but the Court of Appeal stressed

"delivery of possession", and, while they did not explain their reasoning, it seems reasonable to infer that in those circumstances it is either because the contractual obligation was to deliver possession of the buildings in a completed state in conformity with the contract or because as a matter of construction of the contract the parties could not have intended that the further cause of action would arise before then (and so that the employer would be able, and might have to sue, before obtaining possession). The Court of Appeal judgment seems, if anything, to differentiate the concept of practical completion from delivery of possession and to treat the second cause of action as accruing the latest of such points. In relation to a contract such as the Contract which does not use the concept of "practical completion" (and see below) that reasoning would, nonetheless, support the conclusion that the later cause of action only arose on delivery of possession

c. The textbooks relied upon by Ms Proferes do not deal with the Tameside case or the delivery of possession issue
d. The textbooks and authorities relied upon by Ms Proferes all deal with standard-form JCT contracts which themselves use practical completion as a defined and important term with a specific contractual process where it is an important stage. The Contract does not use the expression at all. It seems to me that it is dangerous to use authority which deals with the effect of contracts which use the expression "practical completion" to determine the date of accrual of a cause of action under the Contract by analogy with when practical completion would have occurred under the Contract had it incorporated JCT terms
e. Clause 14 of the Contract seems to envisage a continuing obligation (in terms of Clause 7) existing upon the Seller following completion to remedy any non-compliance with Clause 7 as soon as practicable following completion. This could, in theory, create a further set of obligations to rectify any breach of Clause 7 within such "as soon as practicable" period (and thus giving rise to a further cause of action once such reasonable time expired without compliance). However, in any event, Clause 14 seems to envisage an obligation to have complied with Clause 7 as at completion, and which, especially in the light of Tameside, would strongly suggest that a later cause of action for non-compliance then arose
f. It also seems to me to be the most natural construction of the Contract that it was agreed that Bishopsgate should have complied with Clause 7 as at the date of completion. Bishopsgate had full possession and control of the Flat until then, and it was supposedly then delivering the Flat in return for the purchase price. Where the builder and the Seller were the same person, there is no reason to suppose that the relevant obligation was not to have been complied with at that particular point in time.
g. As against this has been argued to be Clause 5 of the Contract which provides for completion to occur following a notification from the

Seller "that the construction of the Property has been completed in accordance with the requirements of [Clause 7]…". Ms Proferes says that this is equivalent to "practical completion" and sufficient to give rise to the (only) later cause of action in the case of actual non-compliance in the same way as occurred in the Swansea case. I do not agree, as:

i. This is not a specific deeming provision as was the case in Swansea
ii. It is merely a notification provision as part of the process towards completion. This is all the more so as Clause 14 envisages a continuing obligation to carry out works so as to comply with Clause 7 after completion, but which, on Ms Proferes' case, would not give rise to any cause of action in its own right
iii. Tameside holds that it is delivery of possession which is the key; and the reasoning of Tameside would seem to apply equally well here where it is Bishopsgate which had possession throughout until completion
iv. In the light of the above, to give Clause 5 a meaning that any cause of action for breach of Clause 7 occurred then (and no later) would give it an extraneous meaning and effect which I cannot see could have been reasonably intended or apparent and would be inconsistent with Clause 14.

h. Bishopsgate can also contend that Mr Toner (on his case) could have challenged the Clause 5 notification and have refused to complete on the basis that Clause 7 had not been complied with. That would, of course, have been subject to Clause 14 which envisages that certain failures to have complied with Clause 7 as at completion. However, it does not seem to me that that should result in the later cause of action coming into existence at the point of notification (and not on completion), essentially for the reasons set out above; but also because the argument does not deal with the situation of a defect appearing between construction and completion.

193. My own view is that Mr Toner is right and that a later cause of action did accrue on completion but, in any event, I do not regard the law as being sufficiently clear to the contrary for a strike-out or for Mr Toner not to have real prospects of success,

194. In any event, Mr Toner would be able to rely on deliberate concealment and section 32 of the 1980 for the same reasons as I give above in relation to the Balcony. However, I do not see sufficient material pleaded which could reasonably justify deliberate concealment in relation to the other Defects, as that would involve a case not merely that Bishopsgate "skimped" on the materials and works but that they knew that Defects existed and then concealed then.

195. Both sides have sought to rely before me on the NHBC Buildmark Policy. Ms Proferes contends that the NHBC determination process concluded that many Defects did not exist and that has the effect that it is an abuse (or equivalent to res judicata) for Mr Toner to bring a Claim that those Defects did (and do) exist. I disagree. The Buildmark Policy makes very clear that it is an insurance policy provided by NHBC, where NHBC insists that its Resolution Process is followed in order for a claim to exist against NHBC, and it is difficult to see why Mr Toner's recourse in that way to NHBC should be determinative so as to prevent him bringing claims against Bishopsgate even though the Buildmark Policy may suggest (although only in a roundabout manner) that the "Builder" is in some way party to it. Moreover, the general principle is that if a legal right is to be taken away from somebody by a contract then it should be said so expressly. However, in any event, the Buildmark Policy makes clear in its section 2 and pages 22-23 that if the Buyer disagrees with the outcome of the Resolution Service then the Buyer can seek to have the court determine the matter. Looking at the Buildmark Policy as a whole, it seems to me clear that using the Resolution Service does not prevent the Buyer suing the Builder if the Buyer disagrees with the outcome; but, in any event, Mr Toner has real prospects of success as to this.

196. Mr Toner has, however, sought to use the Buildmark Policy in his submissions as giving rise to a cause of action in him as against Bishopsgate, and which he would contend could not have arisen before the inception of that Policy which he would contend was on completion. That in itself would raise what seems to me to be the rather difficult questions of (1) whether Bishopsgate is such a party to the Buildmark Policy as to have accepted obligations under it (as opposed to NHBC being liable if Bishopsgate did not apply) and (2) whether such obligations on Bishopsgate would be anything other than to comply with any decision of the Resolution Service. I have great doubts as to whether Mr Toner could succeed on either point. However, he has not pleaded any such case in the Particulars of Claim (his only mention ns of the 2 years Buildmark warranty period (but without mentioning the Buildmark Policy itself) are against THL, Avantgarde and R&R in paragraphs 50, 62 and 98) and, absent a properly formulated application to amend, I therefore do not need to and will consider it.

197. I deal with Service Charges separately below, but otherwise I therefore strike-out and grant reverse summary judgment in relation to claims against THL and Avantgarde under the Contract, but not in relation to those made against Bishopsgate.

<u>I- Service Charges</u>

198. Paragraphs 62 (and possibly 98) of the Particulars of Claim contains a direct claim against THL, Avantgarde and R&R in relation to Service Charges having been increased to pay for remedying Defects; and asserting that R&R have failed to seek recourse from THL in relation to Defects.

199. This Paragraph seems to me to betray a number of errors on Mr Toner's part, and in particular that:

a. The entity responsible for the Defects and rectifying them is primarily Bishopsgate under the Contract (and to which THL is not a party)
b. R&R are merely acting as Managing Agents. They have no power to seek redress or monies from Bishopsgate (let alone THL)
c. The entity responsible under the Lease for the setting the level of Service Charges and to whom Service Charges are paid is Avantgarde. Service Charges are governed by the Lease and to which Mr Toner and Avantgarde are the relevant contracting parties (Bishopsgate is also a contracting party but merely as Landlord)
d. Again R&R are merely acting as Managing Agents, employed by Avantgarde and with whom
e. Mr Toner's natural remedy for overcharges of Service Charges is simply to refuse to pay them (but which has various risks) or to challenge them (ordinarily in the County Court or the First Tier Tribunal, and the relevant legislation gives him a choice as to route although the matter can be transferred between the County Court and the Tribunal) where the other party is that which demands and is paid the Service Charge, being Avantgarde.

200. Therefore I cannot see reasonable grounds or a real prospect of success against THL or R&R. With regard to THL and Bishopsgate claims may exist that elements of the Service Charges form part of the losses comprised within the misrepresentation and breaches of the Contract claims, but there is no direct claim with regard to the Service Charges not having been operated according to the provisions of the Lease which can be made against them.

201., However, the position is different as against Avantgarde as it seem to me that Mr Toner has real prospects of arguing that:

a. Avantgarde is a party to the Contract and therefore to clause 14 and so that it should not have been seeking Service Charge for matters which were properly the responsibility of Bishopsgate
b. In any event, that it is not reasonable (including within section 20 of the Landlord and Tenant Act 1985) for Avantgarde to include these matters in Service Charge where relevant works should be carried out without charge by Bishopsgate
c. Accordingly, there have been over-payments of demanded Service Charge giving rise to restitutionary (and possibly statutory) remedies.

202. As against this, Mr Moss contends that Service Charge disputes are usually within the Tribunal and not taken to Court. As to this:

a. I do not think there is any such rule; both the Court and the Tribunal have jurisdiction

b. This dispute, being bound up with the other claims, seems more suitable for determination in Court.

203. I therefore think there are reasonable grounds and real prospects of success for this direct claim as against Avantgarde and do not strike it out or give reverse summary judgment against it. The claim is not well particularised, as there may need to be identified precisely what amounts within the Service Charges were for matters which should have been the responsibility of Bishopsgate, but that is a matter for future case management.

J- Harassment (High Court and County Court Claims) and (County Court Claim) Breach of Contract, Breach of Duty of Care and Defamation

Ji- Breaches of Contract (County Court Claim)

204. I note that in relation to the carrying out (or not carrying out) of works on the Building and the operation of the Building, and the provision of Services (including repairs), the Lease provides (although subject to the Proviso limiting its possible liabilities) in clause 6 that this is all the responsibility of Avantgarde. However, no claim is made in the High Court Claim against Avantgarde in relation to any alleged breaches of the Lease, and there is no reference in those Particulars of Claim to clause 6 at all. There is reference in the County Court Claim Particulars of Claim to clause 6 but Avantgarde are not a party to those proceedings. It is the statements of case (and not the witness statements) which govern what is being alleged in the Claim, and it does not seem to me that any case is being raised against Avantgarde with regard to what has happened regarding the Building since the grant of the Lease. For any such case to be raised, amendment would be required.

205. In Paragraph 7 of the Particulars of Claim in the County Court Claim, Mr Toner alleges that R&R have breached Clause 14 of the Contract and Clause 6 of the Lease. I am not sure whether Mr Toner is seeking directly to enforcing those contractual provisions against R&R (as opposed to relying upon them as background in relation to his other claims against R&R). However, R&R were not party either to the Contract or to the Lease, and so did not owe any obligations to anyone under either of them. Mr Toner has claimed in written submissions that he should have remedies for breaches of clause 6, but the law is that it is the party to a contract who is responsible to perform their obligations under it. Although the existence of the Proviso is unfortunate for Mr Toner, he entered into the Lease (with the advice of Alexanders) and although there can sometimes be consumer law challenges to such terms, any such claim would be against Avantgarde and no such case is advanced.

206. Therefore, if this is an actual attempt to sue R&R in contract then I find that it both does not plead reasonable grounds and has no real prospects of success.

Jii- Breaches of Duty of Care

207. However, Mr Toner instead asserts in the County Court Particulars of Claim (no relevant breach of a duty of care being alleged in the High Court), that R&R owed him and has breached duties of care (which he contends satisfy what he submits is the correct legal test of being "fair, just and reasonable" for them to be imposed upon R&R) in relation to various of the factual matters set out above.

208. Mr Beresford submits that no relevant duties of care can have existed. He submits that this would be contrary to the contractual scheme which provides for the Clause 6 of the Lease obligations to be those of Avantgarde, for Avantgarde to be able to employ managing agents (being R&R), and for those managing agents to owe obligations to their employer (Avantgarde). While a party to a contract can sometimes owe obligations to non-parties, clause 12 of the Management Agreement excludes the application of the 1999 Act. Thus (subject to the Proviso) any relevant complaint or claim of Mr Toner should be against Avantgarde and which (might be able to) pass on the liability by way of seeking an indemnity, contribution or damages from R&R.

209. In support of these contentions, Mr Beresford relies upon that fact that no authority has suggested that managing agents employed by a landlord or management company owe a direct duty to tenants in relation to the performance of their services, and that in Poole v GN 2020 AC 780 it was stated at paragraph 64 (albeit in the context of duties owed by public authorities, although it may be said that private bodies are likely to owe less duties) that:

"64. *Robinson* did not lay down any new principle of law, but three matters in particular were clarified. First, the decision explained, as *Michael* had previously done, that *Caparo [1990] 2 AC 605* did not impose a universal tripartite test for the existence of a duty of care, but recommended an incremental approach to novel situations, based on the use of established categories of liability as guides, by analogy, to the existence and scope of a duty of care in cases which fall outside them. The question whether the imposition of a duty of care would be fair, just and reasonable forms part of the assessment of whether such an incremental step ought to be taken. It follows that, in the ordinary run of cases, courts should apply established principles of law, rather than basing their decisions on their assessment of the requirements of public policy. Secondly, the decision reaffirmed the significance of the distinction between harming the claimant and failing to protect the claimant from harm (including harm caused by third parties), which was also emphasised in *Mitchell* and *Michael* . Thirdly, the decision confirmed, following *Michael* and numerous older authorities, that public authorities are generally subject to the same general principles of the law of negligence as private individuals and bodies, except to the extent that

legislation requires a departure from those principles. That is the basic premise of the consequent framework for determining the existence or non-existence of a duty of care on the part of a public authority."

210. It seems to me that there is distinction here between the alleged positive actions and the alleged negative failures (at least where unconnected with positive acts) of R&R.

211. I do not see that there is any real prospect of claims being made against R&R in relation to their alleged failures to do particular things, and in particular to (1) carry out works on the Building or (2) to resolve (or even to accept the validity of) Mr Toner's complaints or (3) to pursue THL or (rather) Bishopsgate for the costs of carrying out relevant works.

212. This is essentially for the reasons advanced by Mr Beresford, but in particular that:
    a. There is no contractual relationship between Mr Toner and R&R, and at common-law (absent the 1999 Act) only a party (or their assignee; there is no suggestion of any trust here) to a contract can enforce it
    b. Mr Toner's rights to have works carried out are under the Lease against Avantgarde and under the Contract against Bishopsgate
    c. R&R are employed under the Management Agreement by Avantgarde (and possibly also Bishopsgate) with its provision (permitted under the 1999 Act) that other persons (including Mr Toner) are not able to enforce it against R&R
    d. I can see no reason in principle why R&R should owe any such duties to do positive actions to Mr Toner. The simple answer is that R&R have made an agreement to do certain things with Avantgarde, but not with Mr Toner. There mere fact that Avantgarde has appointed R&R to do some of those things is not sufficient to establish a direct obligation between R&R and Mr Toner to do those things
    e. To create a duty of care to carry out positive acts, at least outside the areas of dangers to safety or health and where any loss is no more what is termed as "economic", requires more than just proximity or reasonableness (although I also have difficulties in seeing why it would be reasonable to impose such a duty to tenants). There is no assumption of responsibility by R&R to Mr Toner and this would represent an unjustified extension of the categories of duties of care (Mr Toner and counsel having advanced no authority supporting the contention that managing agents owe such duties to tenants in the absence of a contract with them).
    f. Moreover, to have such a duty of care would be both inconsistent with and subvert the contractual scheme and the above relationships (and where the Management Agreement includes a number of protections for R&R). It would also place a series of burdens on R&R over and above what they have contracted to do, and where they were engaged

on the basis that others could not enforce the Management Agreement and its duties against them

g. Although Mr Toner has sought to rely upon the Letting Redress regulations which require R&R to be a party to a letting redress scheme, I do not see how that assists him. He is not bringing any complaint under such a scheme (and which would involve the scheme provider, and not the court, resolving the complaint, and where it might have a much more general jurisdiction than the court), and I also do not understand the regulations to provide that such schemes should contain obligations of the nature which Mr Toner wishes to impose upon R&R. I do not see why a duty of care to tenants should be imposed to create such an obligation enforceable by the Court
h. Although Mr Toner sought to rely upon published RICS standards, I agree with Mr Beresford both that they do not suggest that Managing Agents owe duties as a matter of course to tenants with whom they are not in contract and that they would not affect the legal relationships (as opposed to perhaps their content should they otherwise exist) between the various entities (including R&R and Mr Toner) involved.

213. However, the situation seems to me to be different potentially where the alleged duty is asserted to be one not to carry out a positive physical action or is linked to a positive physical action which has been taken or is being continued by R&R. That distinction is reflected in the citation from Poole v GN. If the relevant action is such as to affect Mr Toner in the reasonable enjoyment of his Flat, even if only by the continuance of the underlying cause which is in the control or has been the creation of the actor, then the law of nuisance potentially applies, and if the relevant action is reasonably foreseeably going to harm Mr Toner (and he is sufficiently proximate) then that is a classic situation where a duty to take reasonable care exists (being essentially the "neighbour" Donoghue v Stevenson principle). There is no, or least not necessarily any, impermissible extension of the recognised duties of care. It also seems to me that they may be a different position where there has been a failure to rectify the existence of a known physical or other danger to safety or health resulting in the sustaining of injury or damage to health. Such situations have been held to give rise to duties of care where someone with control of the situation has failed to take reasonable steps to avert the danger, and, while I note that R&R was and is merely a manager rather than having a property interest, I do not think that that it is sufficiently clear for summary judgment that a duty would not exist in such circumstances. However, such claims relate to matters and damage regarding personal safety and health and not simply economic loss.

214. It seems to me that this analysis applies to the various switchings on and continuance of, and alleged failures to rectify, the Air Conditioning Unit, as follows:

a. The Air Conditioning Unit is outside the Flat. Mr Toner has pleaded that it was defective and not switched on for a significant period
b. R&R then switched the Air Conditioning Unit on. In the above circumstances, it seems to me that it is arguable that they owed a duty before doing that to check that it was working properly and would not interfere with nearby occupiers' enjoyment of their Flats or their health
c. Further, Mr Toner pleads that the Air Conditioning Unit was defective and interfered with the enjoyment of his Flat, disrupting his sleep. It seems to me that the switching on by R&R could amount to the creation of an actionable nuisance or breach of a duty to act take reasonable care before doing something which might cause harm to Mr Toner, and that failing thereafter to deal with it would represent both a continuance and a failure to deal with a created or simply existing danger
d. Further, Mr Toner complained, thus putting R&R on clear notice of what he said had happened, but R&R (a) did not simply shut the Air Conditioning Unit down but (b) eventually switched it off and then switched it on again at various points. Matter (a) is a negative failure but is consequent upon the original positive act and can itself said to be a continuance of a nuisance and of a danger; while matter (b) involved positive acts notwithstanding that (on Mr Toner's case) it had been made clear that this was harming him and the Air Conditioning Unit was defective
e. The mere fact that another tenant wanted the Air Conditioning Unit switched on does not (at least necessarily) amount to a defence in the law of either nuisance or negligence. Mr Toner may simply be able to say that he should not have been harmed.

215. I therefore do not think that Mr Toner does not have real prospects of success in a claim in breach of duty (nuisance or negligence) regarding the Air Conditioning Unit, or other positive actions by R&R (or, if such were advanced, failures to deal with dangers to safety or health resulting in personal injury).

216. However, I do not think that this analysis extends to any claim which is (if it is being) made against R&R in relation to the amount of service charge demands. All R&R is doing there is supplying information to Avantgarde as to how much has been spent, and then, perhaps, acting as Avantgarde's postal agent. As long as R&R are supplying the correct figures for whatever has been expended, it is for Avantgarde to decide whether or not those amounts (or only some of them) are to be included in the Service Charge demands. R&R's role is mechanistic, they are not involved in the relevant disputes between Mr Toner and THL/Bishopsgate (or Avantgarde) and it is not pleaded by Mr Toner that they have failed to act properly in that regard. I do not think that Mr Toner has real prospects of success in this regard. While it may be that Avantgarde has claims against R&R in relation to the matters

identified by Mr Toner (including if R&R's alleged failures had made matters worse and resulted in increased cost, and possibly for loss of amenity), and that it might be said that such should be taken into account with regard to Service Charge in some way, those (if they were capable of existing in law and fact) would be claims of Mr Toner against Avantgarde and not R&R.

Jiii- Defamation

217. Mr Toner's claims in relation to Defamation are against R&R and Mr Prodromou (as R&R's employee) on the basis that Mr Prodromou made allegedly defamatory statements to others about him.

218. These statements were all oral i.e. not in writing, and thus any claim is governed by the law of slander (not libel), being from the County Court Particulars of Claim) that:

   a. (Paragraph 47) Mr Prodromou told another tenant "K" in 2015 that Mr Toner was "evil" and "a nutter"
   b. (Paragraph 47) that on 12 May 2018 Mr Prodromou told a concierge "D", in Mr Toner's hearing, that Mr Toner was "evil" and a "tosser" and "fucking mad" and "a nutter" (and made other derogatory comments) and had sought the affections of ("chat-up") K's then girlfriend; and which led to a substantial argument where Mr Prodromou repeatedly insulted Mr Toner and said that he had been rude, malicious and evil over the history of Mr Toner and the Flat
   c. (Paragraph 48) In 2015 Mr Prodromou told a concierge that fans of the football team supported by Mr Toner were "scumbags in bovver boots" and that Mr Toner was a "fucking idiot" and had personal issues with Mr Prodromou
   d. (Paragraph 48) In 2017 and 2018 Mr Prodromou told subcontractors that Mr Toner was rude and unhelpful

219. Paragraph 49 are statements by Mr Toner that in summer 2018 he reported matters to R&R and sought to have Mr Prodromou dismissed but that nothing happened until on 21 September 2018 Mr Prodromou decided to resign.

220. Mr Beresford submits that these claims in defamation must fail, for the following reasons:

   a. The alleged defamatory statements are simply insults, and do not allege anything sufficiently specific to be seen as a statement which is defamatory in law. He relies on:
      i. The old common-law principles as set out in Paragraph 21-16 of Clerk & Lindsell on Torts 23rd Edition:
      "A statement may be defamatory in relation to the claimant's personal character, office or vocation. In the former case the

test usually applied was whether the matter complained of was calculated to hold the claimant up to “hatred, contempt, or ridicule”. This “ancient formula” was, however, insufficient in all cases, for a person’s business reputation may be damaged in ways which nobody would connect with “hatred, ridicule or contempt”, as, for instance, the imputation of a clever fraud which however much to be condemned morally and legally might yet not excite what a member of the jury might understand as hatred or contempt. Lord Atkin in Sim v Stretch applied the test, “would the words tend to lower the claimant in the estimation of right-thinking members of society generally”. Or, in the words of Neill LJ in Gillick v BBC would the words be “likely to affect a person adversely in the estimation of reasonable people generally”. The alternative “or which would cause him to be shunned or avoided” must be added to cover such cases as an imputation of insanity. What is defamatory in one era may not continue to be so in another. The most common direction given to juries in recent times was that a defamatory allegation is one that tends to make reasonable people think the worse of the claimant.”

ii. Section 1 of the Defamation Act 2013 which provides that a statement is not defamatory unless it “has caused or is likely to cause serious harm to the reputation of the claimant”, although he accepts that statements have to be seen in context and it is there overall effect (when combined with other statements) which is material

b. A slander (as opposed to a libel) is only actionable on proof of ”special damage” meaning a financial loss and none, or none sufficient, is alleged in the County Court Claim. He relies on Clerk & Lindsell on Torts 23rd Edition:

i. at paragraph 21-47 which states:

“Slander consists of a defamatory imputation in some non-permanent form by spoken words, or other sounds,[253] or by gestures.[254] The law recognises a distinction between libel and slander for historical reasons though not resting on any satisfactory principle.[255] In *Barkhuysen v Hamilton*[256] Warby J summarised the common law of defamation thus: “the tort of slander is committed by a person who (1) speaks to at least one person other than the claimant, words that (2) refer to the claimant, (3) bear a meaning or meanings defamatory of the claimant, and (4) cause the claimant special damage, or fall within one of the exceptions to the general rule that slander is not actionable without proof of special damage. The onus of proving all these matters lies on the claimant.” Until the passing of the Defamation Act 2013, whereas libel is always actionable without proof of any special damage, slander had, in order to be actionable without proof of special damage

("actionable per se"), to impute: (1) a criminal offence punishable by imprisonment; or (2) certain contagious diseases; or (3) in the case of a woman, unchastity; or (4) be likely to damage the claimant's reputation in relation to any office, profession, calling, trade or business held or carried on by him at the time of publication. However, s.14 of the Act has made two changes to the law of slander. Section 14(1) repeals the Slander of Women Act 1891. Section 14(2) provides that the publication of a statement that conveys the imputation that a person has a contagious or infectious disease does not give rise to a cause of action for slander unless the publication causes the person special damage. The position now is that slander is only actionable on proof of special damage unless the words impute a crime for which the claimant can be made to suffer physically by way of punishment and where the words are calculated to disparage the claimant in any office, profession, calling, trade or business held or carried on by him at the time of publication. It must also be remembered that by the Broadcasting Act 1990, words broadcast by radio or television, and, by s.4 of the Theatres Act 1968,[257] words used in the course of the public performance of a play, are to be treated as published in permanent form, i.e. as libel, and will thus be actionable without proof of special damage."

And

ii. At paragraph 21-54 which states:

"If the defamatory words spoken are not actionable per se they are actionable if they cause "special damage". The term "special damage" is confusing. It is often used to describe a specific and quantifiable financial loss. In that sense it can be contrasted with a general loss of business or profits which is said to be general damage. However, a general loss of profits is considered sufficient damage which would entitle a claimant to bring a slander action, provided such loss was foreseeable. The authorities are not entirely clear on the question of whether in such cases, when the special damage has been proved, damages may be recovered only for the special damage proved or in accordance with general principles. The balance of opinion appears to be that the damages are limited to the proved special damage. The special damage must not be too remote, and in particular must not result from unauthorised repetition."

c. The County Court Claim was issued more than one year after all but the May 2018 statements and is therefore at first sight limitation barred under section 4A of the 1980 Act which provides for such a period after the cause of action accrued. It is accepted that the Court has a discretionary power to extend time where it is just and equitable to do under section 32A of the 1980 Act but submitted that that is only appropriate in rare cases and nothing sufficient has been pleaded here. He relies upon Bewry r Reed 2015 1 WLR 2565 where at paragraph 5 it was said that:

> "5. The discretion to disapply is a wide one, and is largely unfettered: see Steedman v British Broadcasting Corpn [2002] EMLR 318 , para 15. However it is clear that special considerations apply to libel actions which are relevant to the exercise of this discretion. In particular, the purpose of a libel action is vindication of a claimant's reputation. A claimant who wishes to achieve this end by swift remedial action will want his action to be heard as soon as possible. Such claims ought therefore to be pursued with vigour, especially in view of the ephemeral nature of most media publications. These considerations have led to the uniquely short limitation period of one year which applies to such claims and explain why the disapplication of the limitation period in libel actions is often described as exceptional."

221. I think that Mr Beresford's first point that the words are unspecific and simply insults without reference to specific conduct has force, although perhaps less so in relation to the "chatting-up" allegation but where it is questionable as to whether such an allegation is or is not defamatory in modern culture. On the other hand, much might depend upon the precise words and the particular context, and I think that I should be cautious to resolve matters summarily against Mr Toner on that basis.

222. I think also that Mr Beresford's third point has theoretical force but again that it would be problematic to resolve matters against Mr Toner on that basis. The County Court Claim is within time (or at least arguably so as Mr Toner states that the papers were delivered to the County Court for issue within time) and this is an alleged sequence of defamatory statements. The full history is going to have to be considered in any event, both with regard to liability if the harassment claim continues and, in any event, with regard to loss in relation to the other claims. I do not think that it would be right to hold that Mr Toner has no real prospects of obtaining a limitation extension under section 32A.

223. However, I do think that Mr Beresford is right in relation to his second point. Slander requires proof of "special damage" and which has to be financial in nature. The only financial loss pleaded is in Paragraphs 50d and 50e of the County Court Particulars of Claim to the effect that the resultant distress and his work on the legal case has resulted in Mr Toner being unable to earn income and that the matters would have to be declared on a sale of the Flat and would result in diminution of its value. I do not think that this is sufficiently connected so as to amount to "special damage" caused by the slander within the meaning of the authorities, and which generally relates to the behaviour of those to whom the slander is published (or republished) acting so as to cause the victim financial loss. Since Mr Prodromou has left, even if the slander had to be disclosed (which seems dubious), I cannot see how it would affect the value of the Flat.

224. I therefore hold on that ground that reasonable grounds have not been pleaded for the defamation claim and that it has no real prospects of success.

Jiv- Harassment

225. Paragraphs 64 onwards of the Particulars of Claim in the High Court allege that THL, Bishopsgate (alternatively Estates), Avantgarde and R&R have subjected Mr Toner to a campaign of harassment. The Particulars of Claim in the County Court Claim allege harassment, breach of contract and breach of duty of care and defamation by spoken words (i.e. slander) against R&R and Mr Prodromou.

226. The factual matters upon which these various claims are stated to be based are numerous. These being strike-out and reverse summary judgment applications, in the light of the authorities and principles to which I refer above, in general I have to assume that those factual matters will be proved at trial, and no party has sought to suggest to the contrary. I set them out in some more details below.

227. The various harassment claims are brought under the Protection from Harassment Act 1997 ("the 1997 Act").

228. Section 1 of the Protection from Harassment Act 1997 provides that:

"(1) A person must not pursue a course of conduct—

(a)which amounts to harassment of another, and

(b)which he knows or ought to know amounts to harassment of the other…

(2) For the purposes of this section [F2or section 2A(2)(c)], the person whose course of conduct is in question ought to know that it amounts to [F3 or involves] harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other."

229. There is a statutory defence of reasonableness being shown (section 1(3)(c)) but that does not arise in this hearing which is concerned with matters only of potential summary determination.

230. Section 3 of the 1997 Act provides for a civil remedy for harassment as follows:

"(1) An actual or apprehended breach of section 1(1) may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.
(2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment…."

231. Section 7 provides in relation to interpretation of the statute that:

"(1) This section applies for the interpretation of sections 1 to 5A

(2) References to harassing a person include alarming the person or causing the person distress.

(3) A "course of conduct" must involve—

(a) in the case of conduct in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person…

(4) "Conduct" includes speech.

(5) References to a person, in the context of the harassment of a person, are references to a person who is an individual."

232. Mr Toner's pleadings are to the effect that he has been harassed by each of the applying Defendants by way of the various matters stated, and with R&R being vicariously responsible for Mr Prodromou. It is accepted that vicarious liability can exist in this context – see Majrowski v Guy's 2001 1 AC 224. Mr Toner says that he has been caused alarm and distress by numerous acts of conduct (including speech) and which have been designed subjectively, or at least which would have been appreciated by a reasonable person, to cause him such alarm or distress. His pleadings (and also his witness statements) go into great length as to this and the individual instances. The applying Defendants submit that there is simply not sufficient pleaded to amount to reasonable grounds for or real prospects of success in an harassment case at law.

233. Notwithstanding the width of the interpretation section 7(2), but especially in view of basic human rights as to freedom of speech and conduct, the courts have held that not all conduct which causes alarm or distress is sufficient to amount to harassment (which under the statute is both a criminal offence (although only if proved to the criminal standard of proof) as well as a civil wrong).

234. Relevant (then) authorities were comprehensively reviewed in Dowson v Chief Constable [2010] EWHC 2612. Their effect was summarised at paragraph 142 as:

"142. I turn then to a summary of what must be proved as a matter of law in order for the claim in harassment to succeed.
(1) There must be conduct which occurs on at least two occasions,
(2) which is targeted at the claimant,
(3) which is calculated in an objective sense to cause alarm or distress, and
(4) which is objectively judged to be oppressive and unacceptable.
(5) What is oppressive and unacceptable may depend on the social or working context in which the conduct occurs.

(6) A line is to be drawn between conduct which is unattractive and unreasonable, and conduct which has been described in various ways: ‘torment’ of the victim, ‘of an order which would sustain criminal liability’.

235. The applying Defendants have pressed upon me the distinction between conduct of which the court might merely disapprove and conduct which is sufficient to cross the line into criminality (as well as civil wrong). Mr Toner submits that this is precisely what has occurred and has amounted to “torment” of him.

236. However, it seems to me that I should also bear in mind some of the previous and subsequent case-law, including:

a. Majrowski (previous) where at paragraph 30 it was stated that “Courts are well able to separate the wheat from the chaff at an early stage in the proceedings. They should be astute to do so… courts will have in mind that irritations, annoyances even a measure of upset, arise at times in everybody’s day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability…”

b. Ferguson v British Gas 2010 1 WLR 785 (previous) where a strike-out application failed (on appeal) in relation to a course of demand letters for payment of allegedly (but actually not) outstanding gas charges. In paragraph 18 the relevant of there also being criminal liability was somewhat played down. In paragraph 22, the emphasis was on the anxiety and stress caused even where the victim knew that the demands were unjustified

c. Iqbal v Dean Manson 2011 EWCA Civ 123 (subsequent) where the Court of Appeal refused to strike-out a harassment claim in relation to letters written by a solicitor to a second solicitor which impugned the latter’s integrity. It was held:

   i. At paragraph 42 that:
   “42. In sum, in my judgment, each of these letters does, when considered side by side, arguably evidence a campaign of harassment against Mr Iqbal. They are arguably capable of causing alarm or distress. They are arguably unreasonable, or oppressive and unreasonable, or oppressive and unacceptable, or genuinely offensive and unacceptable. Arguably, they go beyond annoyances or irritations, and beyond the ordinary banter and badinage of life. Arguably, the conduct alleged is of a gravity which could be characterised as criminal. A professional man's integrity is the lifeblood of his vocation. If it is deliberately and wrongly attacked, whether out of personal self-interest or malice, a potential claim lies under the Act.”

   ii. At paragraphs 45 and 46 that:

> "45. In my judgment, the Act is concerned with courses of conduct which amount to harassment, rather than with individual instances of harassment. Of course, it is the individual instances which will make up the course of conduct, but it still remains the position that it is the course of conduct which has to have the quality of amounting to harassment, rather than individual instances of conduct. That is so both as a matter of the language of the statute, and as a matter of common sense. The Act is written in terms of a course of conduct: see sections 1(1), 1(2), 1(3), 2(1), 3(1), 7(3) . That course of conduct has to amount to harassment, both objectively and in terms of the required mens rea (see section 1(1)(b)). In the case of a single person victim, there have to be "at least two occasions in relation to that person" (section 7(3)(a)), but it is not said that that those two occasions must individually, ie standing each by itself, amount to harassment. The reason why the statute is drafted in this way is not hard to understand. Take the typical case of stalking, or of malicious phone calls. When a defendant, D, walks past a claimant C's door, or calls C's telephone but puts the phone down without speaking, the single act by itself is neutral, or may be. But if that act is repeated on a number of occasions, the course of conduct may well amount to harassment. That conclusion can only be arrived at by looking at the individual acts complained of as a whole. The course of conduct cannot be reduced to or deconstructed into the individual acts, taken solely one by one. So it is with a course of communications such as letters. A first letter, by itself, may appear innocent and may even cause no alarm, or at most a slight unease. However, in the light of subsequent letters, that first letter may be seen as part of a campaign of harassment.
> 46. That, however, was not how the judge looked at the matter. Having found the third letter to be arguably capable of amounting to harassment, he never went back to ask himself how the three letters were to be looked at together as a possible course of conduct. Of course, it is always feasible that a number of disparate instances are not capable of being aggregated into a course of conduct, because, for instance, they are too separated in time or subject-matter. However, that does not apply in this case (although it could have applied to the 2006 letters if Mr Iqbal had persisted in relying upon them). The three letters were close in time, all headed by reference to the Butt litigation, and at any rate arguably, connected with one another."

d. Levi v Bates 2016 QB 91, where at paragraph 28 the importance of the conduct being "targeted" at someone (although it did not need to be the

victim) was stressed. Mr Toner contends that the various conduct was aimed at him (with the intent of the High Court applying Defendants to seek to persuade him to give up his claims; and the intent of Mr Prodromou to cause him harm); but the relevant Defendants say that much of what he claims is simply usual and really an assertion that the Building was not being kept in repair (and assertion which might give rise to breaches of Clause 6 of the Lease but where no claim is being made against Avantgarde in relation to such

e. Gerrard v ENRC 2020 EWHC 3241 where, again, a strike-out was refused and where it was said that the defendant had caused alarm and distress to the claimant by a surveillance operation. As to this recent authority (and which reviewed the previous case-law; and which post-dated the oral hearing but upon which I sought and obtained written submissions):
    i. In paragraph 24 reference was made to a dictum from Benyatov v Credit Suisse 2020 EWHC 85 that "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"
    ii. At paragraphs 78 onwards held that the relevant claim was not suitable for summary determination; and including because the law was unclear as to the extent that the test for whether a person had been "targeted" in the sense that it had been "calculated" that the conduct would affect them was subjective (i.e. the perpetrator intended to cause alarm and distress to that person) or objective (i.e. a reasonable person would regard the likely effect of what was being done would be such as to cause alarm and distress) or as to the extent to which the "target" had to be the claimant or could have been another person
    iii. The judge summed up his view as to the law in paragraphs 85 to 87 as being:
    "85. In accordance with that analysis, harassment is a type of conduct. It is not defined in the PHA, but it constitutes genuinely offensive and unacceptable behaviour of an order of gravity which would sustain criminal liability, and it includes, but is not limited to, alarming or causing distress to another person. The action element of the crime (or tort) consists of carrying out that type of conduct. The mental element of the crime (or tort) is made out if the perpetrator knows that the perpetrator's course of conduct amounts to harassment, or if a reasonable person in possession of the same information as the perpetrator would think that it amounted to harassment. There is no requirement that harm, or even alarm or distress, be actually foreseeable, although in most cases it will be.
    86. That seems to me in any event to be the correct analysis of section 1 of the PHA. I am unable to see how the requirements

for there to be a course of conduct which (1) amounts to harassment of another, and (2) the defendant knows or ought to know amounts to harassment of the other can be given sensible effect if there is contained within the concept of "harassment" a further mental element. Giving the word "calculated" the primary meaning advocated on behalf of ENRC and Diligence (a) would involve requiring the defendant to know that the conduct in question is conduct which the defendant intends to alarm the complainant or cause the claimant distress (or, perhaps, in respect of which the defendant is reckless as to the consequences) and (b) even more problematically, in circumstances where the defendant for some reason lacked that knowledge, would involve requiring that a reasonable person in possession of the same information as the defendant would think that the conduct in question is conduct which the defendant (subjectively) intends to alarm the complainant or cause the claimant distress (or, perhaps, in respect of which the defendant is reckless as to the consequences). This seems to me infelicitous, convoluted and unworkable. It also seems to me unnecessary. In my view, section 1 works perfectly well as I consider it to have been explained by Lord Nicholls and Lady Hale, without adding to the statutory words.

87. If, as I consider right, "calculated" should be understood in the cases where it has been mentioned in the context of discussing harassment not in the subjective sense of "intended to bring about a certain result" but in the objective sense of "likely to produce a result", that gives rise to an issue as to the meaning of the word "likely" in that context. That is an issue which I am reluctant to decide on the applications which are at present before me. However, I am not persuaded that the correct meaning is "more likely than not" as opposed to a lesser or more flexible meaning such as "sufficiently likely in all the circumstances". I say this for the following principal reasons: (1) although in the defamation context it is always necessary to have regard to Article 10 considerations, much of the conduct with which section 1 is concerned will not engage ECHR rights either at all or to any serious extent; (2) accordingly, the same considerations as apply in cases such as *Cruddas* do not apply in the context of many and indeed in all probability the great majority of cases involving section 1; (3) my provisional view is not affected by the consideration that ENRC and Diligence may be able to argue that, in this particular case, the conduct complained of was carried out in pursuit of the Legitimate Aim and accordingly engages, as they say, Article 6 and/or Article 8(2) considerations; (4) nor is it affected by the consideration that section 1 creates a criminal offence; (5) on the contrary, the

> necessary protections are provided by section 1(3), which includes protection where the defendant can show that the defendant's pursuit of the course of conduct was reasonable, and by the burden and standard of proof which apply in the criminal context."

237. Thus the most recent authority, whilst stressing that the conduct needs to fall over the relevant boundary from merely being objectionable, appears to support the proposition that once there is such conduct which causes alarm or distress, it is only necessary that a reasonable person would consider that conduct of such nature could cause alarm or distress to the claimant (or possibly another, but that is not relevant here). The authorities also seem to indicate that:
    a. a course of conduct may stretch over a considerable period of time although there does need to be some measure of connection between the individual instances
    b. harassment can involve letters in relation to legal disputes which, while designed to further one side's case in the dispute, nevertheless cross the relevant boundary.

238. I have some considerable difficulty with Mr Toner's pleadings which seem to me to somewhat unfocussed, and, so some extent, predicated on an assumption that to fail to carry out a contractual responsibility, notwithstanding repeated demands, is itself harassment for the purposes of the 1997 Act if the result is to cause alarm or distress. I do not think that that is correct as a matter of law. It is not really a course of conduct, which requires active steps, and, even if the contractual responsibility is clear, the remedy is a claim for breach of contract against the contract-breaker.

239. Mr Toner also seems to contend that simply refusing to accept that an entity (or an associated corporate group) entity is in breach of contract or duty is harassment (at least where the breach, or the denial of it, causes alarm and distress). Again I do not think that is correct as a matter of law. Denying the existence of a breach, and not doing anything about it, may lead to an increase in the resultant loss and recoverable damages (and which I bear in mind would seem to mean that the material within the harassment claim is going to be in evidence and relevant to any trial on the misrepresentation, contract and breach of duty claims in any event) but I do not see how, however unreasonable or deliberate the relevant stance is, it can be said to be "harassment". If this was simply a case of silence, or a one letter "We do not accept your claims Mr Toner, sue us if you wish." then the CPR3.4 tests for strike-out or reverse summary judgment would very likely have been met.

240. However, it does seem to me Mr Toner's various alleged instance of harassment go beyond the above and can be summarised as:

a. The pursuing of the Strategy designed, he says, by THL, Bishopsgate, Avantgarde and R&R to cause him alarm and distress so that he would give up his claims; this being done by:
    i. Not carrying out works to remedy Defects even though such were clearly required
    ii. The deliberate carrying out of low-quality works to remedy Defects notwithstanding that it was clear that such would simply result in their reappearing
    iii. The deliberate delaying in carrying out works and so that they were then done over holiday periods when Mr Toner would be in the Flat and affected by them
    iv. A course of obstructive and manipulative correspondence designed to, or at least giving rise to, the arising and then dashing of false hopes on Mr Toner's part that his claims, including as to the replacement of the Balcony, were being agreed
    v. A course of appearing to engage with some of Mr Toner's claims whilst deliberately not engaging with others
    vi. A course of seeking unnecessary detail and particularisation when it was obvious what was required, and which was being used to justify delays and to make life difficult for Mr Toner
    vii. A course of insulting and belittling Mr Toner to both others and to him both directly by attacking him and by promoting themselves in comparison
b. Refusals on the part of R&R to deal with legitimate complaints of Mr Toner including regarding:
    i. The Entryphone to the Building and its connection with the Flat
    ii. Smells in the common parts
    iii. Heating in the Building
    iv. The Gym, Security and Doors
    v. Withholding information from Mr Toner
    vi. Sending a large number of incorrect demands to Mr Toner
    vii. The employing of Mr Prodromou notwithstanding that Mr Prodromou was known to have issues with Mr Toner
c. The activation of the Air Conditioning Unit when it had been known to be defective and the deliberate refusal to switch if off permanently (but rather switching it off and then back on at various stages) when he complained and had complained about the serious effects upon him; and (allegedly) motivated by a desire to make life difficult for him
d. In terms of the activities of Mr Prodromou, whom Mr Toner asserts (including by reference to both the activities and the alleged slanders) was motivated against Mr Toner including regarding:
    i. Motivating K against Mr Toner by various means
    ii. Threatening to carry out works unnecessarily in the Flat
    iii. Staring aggressively and acting aggressively towards Mr Toner including when he was on the Balcony and in the Courtyard

iv. Slandering Mr Toner to others
v. Forcing a visitor to Mr Toner to leave the Building after having been admitted
vi. Interfering with Mr Toner's post
vii. Misdirecting a bailiff seeking to execute against Mr Toner to another flat so that that tenant learnt of the relevant liability
viii. Randomly knocking by himself and others at his instance on Mr Toner's door so that no-one was there when he sought answer
ix. Causing D to make a complaint to Mr Toner about a rubbish bag
x. Refusing to allow Mr Toner to use the parcels storage area in the Building.

241. The applying Defendants submit that notwithstanding that Mr Toner has set all this out at great length in his Particulars of Claim, and also in his witness evidence, it is simply not enough to give rise to a harassment case in law, and rather that it is simply material (and evidence) which might be relevant to the contract and other tort claims. I deal with various of their specific submissions below but have borne them all in mind.

242. I have considered this anxiously and including in the light of the dicta in Majrowski to the effect that the Courts should be astute to bring an end to misconceived harassment claims at an early stage. However, it does not seem to me that I can determine that the harassment claims (or any of them) fail to plead reasonable grounds or can be said to have no real prospect of success.

243. I have to approach this on the basis that I should not carry out a mini-trial, and that, in principle, that Mr Toner's factual allegations are assumed to be proved (and I think that it would take a mini-trial to find them disproved). I also have to see the individual allegations of harassment in the context of the whole as I do not see how I can decide at this point that they are sufficiently unrelated to each other, and I am effectively approaching this on a "totality" basis but, of course, with regard to each relevant Defendant individually.

244. I also bear in mind that this is a developing area of the law, and in which individual cases are very "fact-sensitive", and, and which inter-relates with what I say in the next paragraph, the warnings in Partco as to the potential for it to be inappropriate to grant limited summary judgments where the relevant pleaded facts and the associated evidence are all going to be deployed at the trial in any event in relation to other claims. While I have balanced that against the desirability (as also stated in Partco) of summarily determining cases which are bound to fail, it does seem to me that in such circumstances I should approach the question of whether summary determination is appropriate with a degree of caution.

245. I also say that this point that it seems to me that, notwithstanding that various of the factual allegations seem in themselves to be (at least) weak in constituting an harassment case, it does not seem to me that it would serve the overriding objective or be proper to strike-them out for that reason as:
   a. They form part of the "totality" against which the serious allegations have to be seen and upon which they can be built to give them additional strength
   b. They are all going to have to be dealt with in evidence and otherwise at the trial of the other claims, if for no other reason as they will impact upon issues of loss and damage. There seems to be little point in striking out a factual allegation with regard to one claim when it is potentially relevant to another.

246. With regard to the "Strategy" case, it does not seem to me that Mr Toner's case is likely to be particularly strong as the relevant Defendants are likely to say that the underlying allegations of Defects are heavily and reasonably disputed (even if the Defects are established), that they engaged in ways which parties often do, and that a strategy of requiring a complainant to particularise and prove their case in detail, in the hope that they will find it impossible is legitimate, and maybe even that they will find it too much effort to do so, is standard in the commercial world. Even if this is an unreasonable approach, Mr Toner is going to find it hard to show that what has happened crosses the boundary so as to amount to harassment. It may well just involve a difference in legitimate styles and tactics of negotiation.

247. However:
   a. I do not see how without a mini-trial I can conclude that the approach and course of conduct taken by the relevant Defendants was not both manifestly excessive and designed to make life as difficult as possible for Mr Toner in seeking to resolve his complaints and so as to cause him, and to be reasonably likely to potentially cause him, alarm and distress in at least some of the ways which he advances
   b. The Strategy, assuming such to be established, would have to be seen in the context of the Defects themselves and the distress which they were causing. To deliberately seek to communicate in a way which will result in the other side giving up as a matter of exhaustion with hopes being alternatively raised and dashed, thus giving rise to alarm and distress building upon that which the Defects were already causing, may cross the relevant line
   c. This is not a case where the relevant Defendants simply told Mr Toner at an early stage that they were not interested in his complaints. Having decided to engage with him, and at great length, the question will arise as to whether they did so in a legitimate way, and I remind myself that in Ferguson and Iqbal, for differing reasons (and albeit for reasons not present in this case save that Mr Toner does claim that he

was belittled and insulted), wrongful forms of engagement in dispute process were held to be potentially capable as amounting to harassment

d. The Strategy case cannot be seen simply alone and compartmentalised away from the other matters
e. With regard to THL, Bishopsgate and Avantgarde they were all members of the same group with the same directors and staff, Mr Toner alleging that they particularly operated through a Mr Harris (and also a Mr Campbell). Although Mr Moss wishes to differentiate Avantgarde, and may be able to do so once it became controlled through tenants, that would again involve consideration of precisely who was acting in concert and when, and which I cannot resolve at this hearing
f. With regard to R&R, there are disputes as to the extent to which R&R was involved and whether it was acting in concert with others. Disclosure has not yet taken place and I do not regard it as particularly unlikely that it will reveal the extent to which R&R was, or was not involved, in any agreed Strategy as to how Mr Toner and his complaints were to be dealt with. Where R&R was the entity "on the ground" and bound by the Management Contract with Bishopsgate and Avantgarde, it seems to me to be perfectly possible that it had a real involvement in the Strategy (assuming that such is proved to exist). Again I do think that I can determine these disputes at this hearing without a mini-trial.

248. With regard to the failures to remedy Defects, while at first sight that would not seem to be harassment and I would strike it out if it was on its own, it needs to be seen in context with the other matters (including the asserted Strategy to seek to create a situation where they could be ignored or, possibly, charged for through Service Charges), and it seems to me should remain unless I was to conclude that any harassment case would fail; especially as the question of the existence and what has happened regarding the Defects is going to have to be tried out in any event. There mere fact that disputes of this nature (i.e. repairs and maintenance to a shared Building and recovery of costs through Service Charge) are common in the Tribunal or the County Court does not mean, of itself, that they cannot form part of a case in harassment in conjunction with other matters.

249. With regard to the employing of Mr Prodromou, Mr Toner asserts that it was part of harassment that he was employed and then promoted and not (at least after May 2018) speedily dismissed. If this matter stood on its own then I would strike it out as:

a. There is no allegation that R&R or anyone else knew or should have known that Mr Prodromou was motivated against Mr Toner when he was employed
b. There is no allegation that Mr Prodromou was employed in order to attack Mr Toner

c. It was R&R, and not the other relevant Defendants, who employed Mr Prodromou. R&R are vicariously liable for Mr Prodromou. However, the other Defendants did not employ him and therefore they are not.

However, the employment is part of the essential factual background and it seems to me that it would be disproportionate and unnecessary to strike-out individual paragraphs, especially prior to disclosure whereupon they may become more relevant.

250. With regard to the Air Conditioning Unit, it seems to me that this is potentially capable of giving rise to or supporting a harassment case. Mr Toner asserts that it was on two or three (at least) sets of occasions switched on for significant periods notwithstanding that it was, or should have been known to be, defective and such as to severely disrupt his sleep. He asserts that Mr Prodromou, on the instructions of R&R and/or Avantgarde, did this, and that Mr Prodromou (at least) was motivated (at least in part) by a desire to cause distress to Mr Toner or at least by recklessness as to whether or not that would be the case. This would seem to be capable (or at least not obviously incapable) of being a course of conduct within the 1997 Act as interpreted by the authorities above.

251. With regard to Mr Prodromou's other conduct, again this has to be seen within the overall context, but elements of it (at least) seem to me as potentially giving rise to or supporting a harassment case, these being in particular the alleged positive actions which I summarise above and including:

a. Intimidatory stares
b. Insulting statements direct to Mr Toner and to others (K and D) with whom he would interact
c. Interfering by himself or through others with the Flat e.g. by door-knocking
d. Threatening to carry out unnecessary works within the Flat
e. Disrupting the orderly course of Mr Toner's life in the Building.

252. Mr Beresford submits forcefully that even if unpleasant these matters should not cross the boundary. However, they have to be seen in the overall context and will take on a particular light in the course of the evidence given at a trial. I do not think that Mr Toner's case is so obviously unsustainable that reasonable grounds have not been pleaded or that he does not have a real prospect of success.

253. Mr Beresford has also submitted that it is an abuse of process for the harassment allegations to feature against R&R in both the High Court Claim and the County Court Claim. However, even if there was an abuse (and which does not seem to me to be clear in view of the different jurisdictions and jurisdictional limits involved), the court considers its response as a matter of proportionality, and it seems to me that a strike-out would be

disproportionate when the matters can simply be (now) case managed and heard together.

254. I therefore think both that reasonable grounds have been pleaded and that Mr Toner has real prospects of success, but, in any event, this aspect (and each part of it) is so bound up with the other claims that as matter of discretion I would not determine it against Mr Toner at this point or order it to be removed from the pleadings. I am therefore not going to summarily determine this aspect against Mr Toner or seek to cut-down on what is presently pleaded with regard to it.

K- Conclusion

255. The upshot of the above is that:
   a. I will strike-out or grant reverse summary judgment or an equivalent declaration in relation to:
      i. The claims for negligent or statutory misrepresentation
      ii. The claim for rescission of the Contract and the Lease
      iii. The claims for breach of the Contract against THL
      iv. The claims (presently made) for breach of the Contract (other than in relation to Service Charges) against Avantgarde
      v. The claims for breach of contract against R&R
      vi. The claims for breach of a duty of care in relation to purely negative failures (not being a negative failure in consequence of a positive act, or in relation to a danger to safety or health resulting in personal injury, and specifically not including in relation to the Air Conditioning Unit) against R&R and Mr Prodromou
      vii. The claims in defamation
   b. I will not (subject as follows) strike-out or grant reverse summary judgment in relation to the other claims, but I will require Mr Toner to file and serve a proper set of Part 18 Information setting out in numbered paragraphs (i) the alleged (alternative) misrepresentations (of then current fact) and (ii) the facts (and not the argument or the evidence) relied upon by him to state and infer fraud and deliberate concealment; in relation to the Balcony, and also (and without which there will be strike-out, and which may lead to a renewal of the strike-out application) the Service Charges
   c. I will not strike-out individual pleaded allegations of fact unless I have struck out all of the claims in law which rely upon them (including by way of assertions of damage caused).

For the avoidance of doubt, the strike-outs and reverse summary judgments are for the future in the sense that they have not occurred at this point in time but that the Order to be made at (the end of, including after any further adjournments of) the adjourned hearing referred to below will effect them.

This is so that it is clear that all facts remain at this point in time in issue (and so as to avoid the problems identified in Libyan Investment Authority v King 2020 EWCA Civ 1690).

256. I will hear the parties as to what should happen next but I am concerned that (1) these Claims should be managed and heard together, as otherwise there will be duplication and waste (2) I am unclear as to the quantum of these Claims and which may well be most suitable for the County Court (3) this hearing (and the length of this judgment) may well have been disproportionate and the matter needs to be taken to a resolution.

257. This judgment is being handed down at a hearing which will be adjourned to a further date with a 2 hours listing on the basis of all questions of permission to appeal and time for appealing (which will be extended until further order), directions (including as to strike-outs and reverse summary judgments being effected and any amendments) and costs being adjourned to then and at least 14 days before which Mr Toner will have provided his drafts of (1) the Further Information required above and (2) any amendments he seeks to make (although those would have to be presented to the Court in a sensible form which would enable sensible response and it may be that Schedules listing material events in relation to different categories of claim might, if anything, be appropriate).

5.3.2021