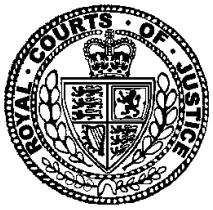

Neutral Citation Number: [2019] EWHC 1229 (TCC)

Case No: HT-2018-000333

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

Rolls Building
Fetter Lane, London EC4A 1NL

Date: 15 May 2019

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- - - - - - - - - - - - - - - - - - - -

Between :

(1) MANSING MOORJANI
(2) SAMIR YOUSF
(3) LENA YOUSF
(4) NADIA SEIFELDIN

Claimants

- and -

(1) DURBAN ESTATES LIMITED
(2) IVOR COURT FREEHOLD LIMITED

Defendants

- - - - - - - - - - - - - - - - - - - -

Antonia Halker (instructed by **Benchmark Solicitors LLP**) for the **First Claimant**
Adam Rosenthal (instructed by **Charles Russell Speechlys LLP**) for the **First Defendant**

Hearing date: 2 April 2019

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APPROVED JUDGMENT

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

MR JUSTICE PEPPERALL:

1. The claimants, Mansing Moorjani, Samir Yousf, Lena Yousf and Nadia Seifeldin, own long leasehold interests in flats in Ivor Court, Gloucester Place, London NW1. Until 11 March 2011, Durban Estates Limited was the freehold owner of Ivor Court and the lessor under the claimants' various leases. Since that date, the freeholder and lessor has been Ivor Court Freehold Limited. By this action, the claimants claim damages from both Durban and Ivor Court Freehold for alleged breaches of their repairing obligations under the leases.

2. Durban seeks to strike out Mr Moorjani's claim on the ground that it is an abuse of process. In short, Durban complains that it has already been sued by Mr Moorjani in the County Court in respect of alleged breaches of its repairing obligations. It argues that it is an abuse of process to re-litigate the same issue and that the parties are bound by the judgment in the first action. In so far as this second claim pursues a new cause of action, Durban seeks to strike it out in reliance on the principle in Henderson v. Henderson (1843) 3 Hare 100.

RES JUDICATA

3. In Virgin Atlantic Airways Ltd v. Zodiac Seats Ltd [2014] A.C. 160, Lord Sumption analysed the defence of res judicata. He said, at [17]:

> "Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle.
>
> The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is 'cause of action estoppel'. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings.
>
> Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v. Boot [1928] 2 K.B. 336.
>
> Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as 'of higher nature' and therefore as superseding the underlying cause of action: see King v. Hoare (1844) 13 M & W 494, 504 (Parke B) …
>
> Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 State Tr 355.

> 'Issue estoppel' was the expression devised to describe this principle by Higgins J in Hoysted v. Federal Commissioner of Taxation (1921) 29 CLR 537, 561 and adopted by Diplock LJ in Thoday v. Thoday [1964] P 181, 197-198.
>
> Fifth, there is the principle first formulated by Wigram V-C in Henderson v. Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.
>
> Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

4. This application requires a closer analysis of the second, third and fifth principles.

CAUSE OF ACTION ESTOPPEL

5. In Brunsden v. Humphrey (1884) 14 Q.B.D. 141, Bowen LJ said, at page 147:

> "It is a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all."

6. To like effect, Lord Halsbury observed in Darley Main Colliery Co. v. Mitchell (1886) 11 App. Cas. 127, at page 132:

> "No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever."

7. In Conquer v. Boot [1928] 2 K.B. 336, a householder recovered damages in the county court in an action against a builder for breach of a building contract to complete the works in a good and workmanlike manner. He then brought a second action upon the same contract. In the second action, he again alleged a failure to complete the works in a good and workmanlike manner but in addition pleaded that there was a failure to carry out the building works with proper materials. At first instance, the judge in the second action held that householder could not pursue a claim for defects that were obvious at the time of the first action, but that res judicata was no bar to claims in respect of further defects that were not then apparent.

8. In allowing the builder's appeal, Sankey LJ cited the decision in Brunsden. He observed, at page 341:

> "In the present case, adopting the same analogy, it seems to be quite impossible to say that in the first month of the year the plaintiff could have brought his action for failure to complete the dining room in a proper and workmanlike manner and next month for failure to complete the drawing room and so forth."

9. The Divisional Court rejected the suggestion that every breach of the obligation to complete the building works in a good and workmanlike manner gave rise to a separate cause of action. Rather the householder was seeking to argue additional particulars of the same cause of action in his second action.

10. In his own judgment in Conquer, Talbot J distinguished between cases where there is one promise which it is said that a defendant failed to perform in a number of ways and those in which the contract contained two or more promises. He said, at pages 344-345:

> "Here there is but one promise, to complete the bungalow; and the question whether or not it has been performed is to be decided by the state in which the bungalow was when it was handed over by the defendant to the plaintiff as complete. From that moment the Statute of Limitations began to run as to the whole. The plaintiff could not alter the fact that he was recovering damages for the breach of this single promise by failing to specify in his action all the particulars of the breach and all the damages to which he was entitled. The test whether a previous action is a bar is not whether the damages sought to be recovered are different, but whether cause of action is the same …
>
> … the question is not whether, as the action was actually brought, the plaintiff could or could not go into certain matters, but whether he could if he had given the proper particulars have proved the whole of what he claims in the second action under the cause of action for which he sued in the first …
>
> He could not justify an action for the loss of an eye by the defendant's negligence when he had already recovered for the loss of a foot by the same negligence, by saying that in the first action he only gave particulars of the loss of his foot. No more can he recover in one action for breach of a single promise in ten respects and in another for breach in ten other respects of the same promise. The giving of such particulars as are necessary to enable the defendant to know what case he has to meet is merely incidental to the bringing of the action, and a plaintiff cannot give himself a right to bring an action which otherwise he could not bring by failing to specify all the matters which go to make up his one cause of action, or to claim all the relief to which he is entitled in respect of it."

11. Addressing directly the basis on which the judge below had allowed the action to proceed, Talbot J held that a plea of res judicata generally bars a second claim on the same cause of action even where the claimant did not know the facts then relied upon when bringing the first action. This view was authoritatively restated by Lord Keith of Kinkel in Arnold v. National Westminster Bank plc [1991] 2 A.C. 93, at page 104D-E:

> "Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have

been found by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened."

12. Citing Conquer, Lord Goff of Chieveley observed in Republic of India v. India Steamship Co. Ltd [1993] A.C. 410, at 420:

> "… it is necessary to identify the relevant breach of contract; and if it transpires that the cause of action in the first action is a breach of contract which is the same breach of contract which constitutes the cause of action in the second, then the principle of res judicata applies, and the plaintiff cannot escape from the conclusion by pleading in the second action particulars of damage which were not pleaded in the first."

MERGER

13. In King v. Hoare (1844) 13 M & W 494, Parke B said at page 504:

> "If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, 'transit in rem judicatam,' – the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher."

14. As Lord Sumption observed, the principle of merger produces the same effect as cause of action estoppel but is a discrete rule of law in its own right.

HENDERSON v. HENDERSON ABUSE

15. In the landmark case of Henderson v. Henderson (1843) 3 Hare 100, Wigram V-C said, at page 114:

> "… where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time …"

16. In Johnson v. Gore-Wood & Co. [2002] 2 A.C. 1, Lord Bingham of Cornhill restated the rule, at page 31:

> "Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

CONCLUSIONS

17. Accordingly, the proper approach to this case is as follows:

17.1 The starting point is to consider whether the second claim is brought upon the same cause of action as the first.

17.2 The focus is upon comparing the causes of action relied upon in each case and not the particulars of breach or loss and damage. New particulars are not particulars of a new cause of action if they seek to plead further particulars of breach of the same promise or tort or further particulars of loss and damage.

17.3 Both cause of action estoppel and merger operate to prevent a second action based on the same cause of action. Such bar is absolute and applies even if the claimant was not aware of the grounds for seeking further relief, unless the judgment in the first case can be set aside.

17.4 Even if the cause of action is different, the second action may nevertheless be struck out as an abuse under the rule in Henderson v. Henderson where the claim in the second action should have been raised in the earlier proceedings if it was to be raised at all. In considering such an application:

a) The onus is upon the applicant to establish abuse.

b) The mere fact that the claimant could with reasonable diligence have taken the new point in the first action does not necessarily mean that the second action is abusive.

c) The court is required to undertake a broad, merits-based assessment taking account of the public and private interests involved and all of the facts of the case.

d) The court's focus must be on whether, in all the circumstances, the claimant is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.

e) The court will rarely find abuse unless the second action involves "unjust harassment" of the defendant.

THE FACTS

18. By a lease dated 24 June 1977, Durban leased flat 67 to Mr Moorjani for a term of 150 years. Various common parts of the building were defined by clause 1(E) of the lease as the "Reserved Parts of the Building." They included the entrance, foyers, passages, lifts, lift shafts, fire escapes, staff rooms, boiler rooms, refuse and dustbin and other stores of the block.

19. By clause 5 of the lease, Durban entered into a number of repairing covenants. Those relevant on this application provided as follows:

> "(1) To paint with two coats at least of good quality paint and decorate the external parts of the Building (including the surfaces of the doors door frames and the window frames thereof) and the surfaces (which face upon the Reserved Parts of the Building) of the doors door frames and window frames of the flats in the Building including [flat 67] as often as may reasonably be necessary.
>
> (2) To maintain repair redecorate renew and (where necessary) replace
>
> (i) the structures and in particular the main walls drains roofs foundations chimney stacks fire escapes gutters rainwater pipes and balcony railings of the Building
>
> (ii) the water tanks and gas and water and soil pipes drains and electric cables and wires in under and upon the Building and enjoyed or used by the Lessee in common with the owners and the lessees for the other flats and
>
> (iii) the Reserved Parts of the Building.
>
> (3) … to keep the lifts and the lift shafts plant and machinery ancillary thereto in good repair and in good working order and condition and to arrange for the same to be regularly serviced and inspected as necessary.
>
> (4) So far as practicable to keep carpeted clean and reasonably lighted and in good repair and condition the entrance halls foyers passages landings staircases and other parts of the Building so enjoyed or used by the Lessee in common as aforesaid."

THE COUNTY COURT PROCEEDINGS

20. On 26 April 2011, Mr Moorjani issued proceedings against Durban in the West London County Court under claim number 1WL00306. By his Particulars of Claim, he sought damages for alleged breaches of Durban's repairing obligations in respect of the common parts of the block (paragraph 7), water damage suffered in April 2005 (paragraphs 8-12) and further water damage suffered in June 2006 (paragraphs 13-16).

21. Mr Moorjani's disrepair claim was pleaded on the basis of clauses 5(1), 5(2)(iii) and 5(4) of the lease. The following particulars were then pleaded at paragraph 7 in respect of the claim for lack of repair to the common parts:

> "In breach of the express covenants, the Defendant failed to expeditiously effect appropriate repairs of the common parts of the Block:
>
> (1) The last occasion on which the common parts situated on the third floor of the Block were repaired was in about 1994/1995;
>
> (2) Generally, the common parts have been in bad order since about 2001/2002, because of sustained neglect by the Defendant (it is admitted that the reception area was redecorated in 2005);
>
> (3) The common parts of the third floor of the Block, and the Block generally, are in poor condition, including:
>
> (i) the paintwork finishes to all surfaces are generally soiled and are damaged or defective in a large number of places;
>
> (ii) there are areas of damage to the plasterwork to the walls and to the timber skirtings;
>
> (iii) there are areas of damage / poor making good to the surrounds to the entrance doors to the flats and to the doors themselves;
>
> (iv) there are large areas of damage to both faces of the two pairs of timber framed, wired glass panelled, fire doors;
>
> (v) the metal frames to the windows are in poor condition;
>
> (vi) a section of trim is missing to the nosing to one of the treads to the staircase between the third and fourth levels;
>
> (vii) the floor boarding, beneath the carpeting, is generally loose, uneven and creaks in many places when walked on; and
>
> (viii) the lighting levels within the main section of the corridor serving Flats 63-67 are unacceptably poor.
>
> (4) Without prejudice to the foregoing, the Claimant will rely on the report of Martin Wolmark dated 27 October 2010 …"

22. The County Court action was tried by Her Honour Judge May QC, as she then was. Judge May found for Mr Moorjani and awarded him damages of £1,500. The Court of Appeal allowed Mr Moorjani's appeal and substituted an award of £7,380.

23. By paragraph 18(a)(i) of the Particulars of Claim in the current action, reference is made to Mr Moorjani's earlier action. It is asserted:

> "The First Claimant has been awarded damages for disrepair of the third-floor common parts only for the period to 2011 in previous proceedings … The First Claimant claims against the First and Second Defendants for other disrepair, poor management, extra cost, extra maintenance cost, extra costs for the boilers, lifts, porters, cleaners and lack of regular cleaning …"

24. The pleader was right to observe that Mr Moorjani was only awarded damages in the County Court action for disrepair to the third-floor common parts. As appears from the extract above, his claim was, however, pleaded more broadly:

    24.1 Paragraph 7(2) concerned the "common parts" generally. The express exclusion of the reception, which was located on the ground floor, supports the inference that the paragraph was not concerned solely with the third floor.

    24.2 Paragraph 7(3) specifically pleaded Mr Moorjani's case by reference to "the Block generally" as well as the third floor.

25. While specific costs were claimed in respect of the repair of damage caused by the water damage, the claim for disrepair was pleaded only for general damages on the basis of Mr Moorjani's loss of enjoyment, distress and inconvenience. Mr Moorjani also pleaded, at paragraph 17(3) of his Particulars of Claim, that the delay in carrying out the repairs would result in additional cost.

26. Mr Moorjani's witness statement in the County Court was largely concerned with the third floor. He gave evidence, however, at paragraphs 5(1), (2) and (4)-(7) of defects in other parts of the block. Durban's expert witness, Gary Blackman, commented on the issue of increased cost by reason of delay. Mr Wolmark did not, however, comment on the issue and it appears to have fallen away by trial.

THIS ACTION

27. The current proceedings were issued on 29 October 2018 by Mr Moorjani and three other long leaseholders at Ivor Court. The claim is pursued against Durban until 11 March 2011 and thereafter against Ivor Court Freehold. The claimants' disrepair case is pleaded against Durban on the basis of clauses 5(1), 5(2)(i), (ii) & (iii), 5(3) and 5(4) of the lease. The particulars of the new case against Durban are pleaded at paragraphs 17(a)-(d) of the Particulars of Claim:

    27.1 Paragraph 17(a): Mr Moorjani alleges that, in breach of clause 5(1), Durban failed:

        a) to paint or decorate the external parts of the building and the door and window frames of the flats; and

        b) to maintain, repair or replace the external paving and steps.

    27.2 Paragraph 17(b): In breach of clause 5(2), it is alleged that Durban failed:

        a) to maintain, repair, redecorate, renew or replace:

            i) the structure, and in particular the roof and windows;

ii) the electrics and wiring; and

iii) the Reserved Parts of the building and, in particular, the corridors, lobby, basement, staircases, steel fire escapes, doors in the common parts, carpets, walls, ceilings, boilers, radiators and heating system; and

b) to remove asbestos from the block.

27.3 Paragraph 17(c): In breach of clause 5(3), Durban is said to have failed to keep the lift, lift shafts and the associated plant and machinery in good repair and good working order. The pleader adds:

> "The lifts were found to be nearing the end of their lives in 1990. The subsequent replacement cost was excessive and the lifts have subsequently been frequently breaking down."

27.4 Paragraph 17(d): Further, in breach of clause 5(4), it is alleged that Durban failed to keep the entrances, halls, foyers, passages, landings, staircases and other common parts of the building adequately carpeted, clean and reasonably lighted.

28. This action is rather more ambitious than the County Court claim. Mr Moorjani seeks additional damages of £32,340 from Durban together with damages of £141,459 against Ivor Court Freehold.

ARGUMENT

29. Adam Rosenthal, who appears for Durban, argues that this is a classic case of cause of action estoppel. While he accepts that Judge May only awarded damages in respect of the common parts on the third floor and that the Wolmark report was limited to defects on that floor, he submits that the court should look instead to the statement of case. He submits that paragraphs 7(2) and 7(3) of the Particulars of Claim in the County Court case extended Mr Moorjani's case to the block more generally. In the alternative, this second action is a clear abuse and should be struck out on the basis of the rule in Henderson v. Henderson.

30. Antonia Halker, who appears for Mr Moorjani, argues that the court should focus not on the pleadings in the County Court claim but upon the judgment. She argues that while the case was pleaded more widely, damages were only awarded for disrepair to the third-floor common parts. Accordingly, she submits that there is no duplication and that this second action is not an abuse.

DECISION

CAUSE OF ACTION ESTOPPEL & MERGER

31. I reject Ms Halker's submission that the focus should be upon the County Court judgment. Mr Moorjani's claim was defined by his Particulars of Claim as subsequently fleshed out by any further information and his evidence. Further, I reject the submission that the court should trouble itself with the precise parts of the building alleged to have been in disrepair in two actions. This is a matter of

mere particulars and, as identified above, the critical question is whether this second action is based on the same cause, or causes, of action, and not whether it pleads the same particulars of breach or loss and damage. Just as Mr Conquer could not bring separate actions for failure properly to build his dining and drawing rooms, so too Mr Moorjani cannot bring one action for disrepair to the third-floor common parts and a second action for disrepair during the same period of time to the rest of the building.

32. The essence of the County Court claim was that Durban was alleged to have been in breach of its repairing covenants. Indeed, while the case was pleaded by reference to discrete contractual obligations at clauses 5(1), (2)(iii) and (4) of the lease, Mr Moorjani's disrepair case was encapsulated in a single sentence at paragraph 7 of his Particulars of Claim:

> "In breach of the express covenants, the Defendant failed to expeditiously effect appropriate repairs of the common parts of the Block."

33. In my judgment, such claim was founded on a single cause of action; namely, Durban's alleged breaches of its repairing obligations under the lease. I am fortified in that view by the broad characterisation of the single cause of action in Conquer v. Boot. Mr Moorjani's claim against Durban in these proceedings is a claim upon the same cause of action. It is therefore barred by both cause of action estoppel and merger.

34. Lest, however, I am wrong to define the cause of action so broadly, I shall consider the claims in respect of the individual covenants.

Claims for breach of clauses 5(1),(2)(iii) and 5(4)

35. The County Court action was pleaded in respect of alleged breaches of clauses 5(1), 5(2)(iii) and 5(4) of the lease. Even if his first claim cannot simply be viewed as pleading a single cause of action for breach of Durban's repairing covenants, Mr Moorjani's claims against Durban in the current proceedings for breach of the same clauses during the same period of time are in any event barred by both cause of action estoppel and merger. For the reasons already explained, it is unnecessary to consider the detail of the breaches or damages alleged since these are matters of mere particulars of the same cause, or causes, of action.

Claims for breaches of clauses 5(2)(i) & (ii)

36. Clause 5(2) is a repairing covenant. While it lists separately three specific parts of the building, it is not, in my judgment, properly to be regarded as three separate contractual promises but rather as a single promise to maintain, repair, redecorate and renew a number of separate areas of the building. Accordingly, the claims now pleaded at paragraphs 17(b)(i)-(ii) are further particulars of the cause of action pleaded in the first case, namely alleged further breaches of Durban's obligation to maintain, repair, redecorate and renew the common parts of the building.

Claim for breach of clause 5(3)

37. While there was no previous claim under clause 5(3), the lifts and lift shafts were Reserved Parts of the Building as defined by clause 1(E) of the lease. Thus, there was in substance a single promise to maintain and repair the lifts which was repeated at clauses 5(2)(iii) and 5(3) of the lease. Having already brought a claim for breach of the obligation to maintain and repair the Reserved Parts of the Building, the claim now pleaded pursuant to clause 5(3) of the lease is, in my judgment, barred by both cause of action estoppel and merger.

HENDERSON v. HENDERSON ABUSE

38. In view of my conclusions at paragraphs 31 to 37 above, it is strictly unnecessary to consider the question of Henderson v. Henderson abuse. If, however, I am wrong to hold that Mr Moorjani's claim against Durban is barred by cause of action estoppel and merger, then I would in any event have struck out such claim as an abuse of process. In short:

    38.1 Contrary to Ms Halker's submissions, Mr Moorjani's pleaded claim in the first action was not limited to the third floor but extended more widely to a claim in respect of defects to the common parts of the building.

    38.2 All of the defects now relied upon come within the general and unparticularised plea at paragraph 7(2) of the Particulars of Claim in the County Court, namely:

> "Generally, the common parts have been in bad order since about 2001/2002, because of sustained neglect by [Durban] …"

    38.3 Even ignoring these wide words, there is considerable duplication between the more specific claims pleaded in the two actions:

Claim	**High Court Particulars of Claim**	**County Court Particulars of Claim**
Failure to paint & decorate	17(a)(i)-(ii): external parts 17(a)(iii): doors & windows 17(b)(iii)(9): walls & ceilings	7(3)(i): all surfaces
Outside paving & slabs	17(a)(iv)	-
Roof	17(b)(i)(1)	-
Windows	17(b)(i)(2)	7(3)(v)
Electrics & wiring	17(b)(ii)	-
Asbestos	17(b)(iii)(1)	-

Corridors	17(b)(iii)(2)	7(3)(i): paintwork, all surfaces 7(3)(ii): plasterwork, timber skirtings 7(3)(iii): doors & door surrounds 7(3)(iv): fire doors 7(3)(vii): floorboards
Lobby	17(b)(iii)(3)	
Basement	17(b)(iii)(4)	
Staircases	17(b)(iii)(5)	As above, plus 7(3)(vi): trim missing from nosing to one tread on stairs between 3rd and 4th floors
Fire escapes	17(b)(iii)(6)	-
Doors	17(b)(iii)(7)	7(3)(i): paintwork, all surfaces 7(3)(iii): doors & door surrounds 7(3)(iv): fire doors
Carpets	17(b)(iii)(8)	-
Boilers, radiators etc.	17(b)(iii)(10) 17(b)(iii)(11)	-

38.4 In so far as, properly analysed, Mr Moorjani's current claims against Durban are fresh claims, they could, with reasonable diligence, have been raised in the first action. Mr Moorjani must have known of wider disrepair. Indeed, correspondence sent to him as long ago as 2008 referred to the need to repair the boilers, roof and lifts. He must have known whether the lifts worked from his own experience of living in the block. If he needed expert assistance to determine his full case then Mr Wolmark should have been instructed to inspect and consider other areas of potential disrepair in order that Mr Moorjani's full case could be brought forward in a single action.

38.5 I reject Mr Rosenthal's argument that the guidance at paragraphs 30-31 of Thomas LJ's judgment in Aldi Stores Ltd v. WSP Group plc [2008] 1 W.L.R. 748 is directly engaged in this case. Mr Moorjani's County Court claim was not complex commercial multi-party litigation. That said, it will always be easier to defend a Henderson v. Henderson abuse argument if the claimant expressly raises his intention to bring a second claim before judgment is given in the first: see Stuart v. Goldberg Linde [2008] EWCA Civ 2; [2008] 1 W.L.R. 823 and Clutterbuck & Paton v. Cleghorn [2017] EWCA Civ 137. Here, no such indication was given.

38.6 Balancing Mr Moorjani's interest in being able to pursue his further claim against Durban's interest in not being vexed a second time in respect of its repairing obligations and the public interests in access to the court and finality, the balance in this case comes down clearly in favour of the defendant. The claims now pursued are further particulars of disrepair by the same landlord and should have been made in the first action. Allowing this second claim to proceed against Durban would, in my judgment, amount to unjust harassment of Durban.

OUTCOME

39. I therefore strike-out Mr Moorjani's claims against Durban pursuant to rule 3.4(2)(b) of the Civil Procedure Rules 1998.