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| **Neutral Citation No: [2024] NIKB 15** | *Ref:* **HUD12038** |
| | *ICOS No:* **2020/33473**<br>**2020/40388**<br>**(See Schedule attached)** |
| *Judgment: approved by the court for handing down (subject to editorial corrections)** | *Delivered:* **13/03/2024** |

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**KING'S BENCH DIVISION - (COMMERCIAL DIVISION)**

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**ULSTER GARDEN VILLAGES LIMITED; MAEVE NORA McDONALD and OTHERS LISTED ON THE SCHEDULE ATTACHED**

**Plaintiffs**

**and**

**1. FARRANS (CONSTRUCTION) LIMITED**

**First Defendant**

**2. GILBERT-ASH LIMITED**

**Second Defendant**

**3. BUILDING DESIGN PARTNERSHIP LIMITED**

**Third Defendant**

**4. CGI VICTORIA SQUARE PARTNERSHIP**

**Fourth Defendant**

**5. CGI VICTORIA SQUARE LIMITED**

**Fifth Defendant**

**6. CGI VICTORIA SQUARE NOMINEES LIMITED**

**Sixth Defendant**

**7. VICTORIA SQUARE (CHICHESTER STREET) RESIDENTIAL MANAGEMENT LIMITED**

**Seventh Defendant**

**8. VICTORIA SQUARE (WILLIAM STREET SOUTH) RESIDENTIAL MANAGEMENT LIMITED**

**Eighth Defendant**

**9. GUARANTEE PROTECTION INSURANCE LTD**

**Ninth Defendant**

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**Mr G Simpson KC with Ms A Rowan (instructed by O'Reilly Stewart Solicitors) for the Plaintiff**
**Mr D Dunlop KC with Mr P Hopkins (instructed by Tughans Solicitors) for the First Defendant**
**Mr R Coghlin KC with Mr D Stevenson (instructed by Carson McDowell Solicitors) for the Second Defendant**

**Mr R C McCausland (instructed by Cleaver Fulton Rankin Solicitors) for the Third Defendant**
**Mr A Colmer KC with Mr K Gibson (instructed by Pinsent Mason Solicitors) for the 4th, 5th, and 6th Defendants**

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**HUDDLESTON J**

***Introduction***

[1] The first to sixth defendants to this action pursue applications to strike out the plaintiff's claim either in whole or in part under Order 18 Rule 19 of the Rules of the Court of Judicature (NI) 1980 on the grounds that the plaintiffs' claims:

(a) disclose no reasonable cause of action;

(b) are scandalous, frivolous and/or vexatious; and/or

(c) [not relevant here];

(d) are otherwise an abuse of process of the court.

By virtue both of rule 19(2) and relevant authority it is accepted by the parties that applications made under sub-rule (a) be considered solely on the pleadings. The seventh, eighth and ninth defendants did not take any role in the proceedings.

[2] Whilst detailed more particularly below the plaintiff's claim is that extensive defects have caused significant damage to a residential development that forms part of the Victoria Square Development, Belfast, as a result of which the plaintiff has suffered or will suffer substantial loss and damage. The plaintiffs assert (inter alia) that that loss and damage has been caused by breach of statutory duty and/or negligence as regards the first to third defendants; breach of contract and/or covenant on the part of the fourth to sixth defendants and breach of contract and/or covenant on the part of the seventh and eighth defendants in/around management and maintenance of the Residential Development within Victoria Square. They argue that the Residential Development cannot be repaired and so argue that it is a total loss scenario.

***Background***

[3] Victoria Square, is a well-known residential, commercial and retail development in Belfast City Centre. The residential portion ("the Residential Development") upon which this action is primarily focused fronts Chichester Street and comprises a multi-storey building with nine levels of residential flats (from level 2 to level 10) constructed above a maintenance office and retail/internal service yard (at ground floor level) and two subterranean levels of basement car parking. From

the pleadings it would appear that the super-structure of Victoria Square (ie from level 4 upwards) was formed of reinforced concrete slabs supported on rectangular reinforced columns of different sizes. These columns extend through the basement levels and are in turn supported upon foundations lying beneath level B2 (ie Basement -2) (ie the car parking area).

[4] Ulster Garden Villages (and principal moving party) is the owner of 54 (out of the available 91) apartments within the Residential Development which it acquired on or about 28 September 2011. The plaintiff is a registered charity whose principal objective "is the provision of good quality housing and associated amenities for the disadvantaged and aged." The other plaintiffs named in the schedule are individuals who have bought apartments within the Residential Development. Ulster Garden Villages, however, is the party that has taken the lead in these proceedings and is, therefore, referred to in this judgment as "the plaintiff." It follows that references to the factual circumstances referred to relates to its case but the principles read across to the other writs. The strike out application and this determination, therefore, applies to all of the proceedings listed in the appended schedule.

[5] In terms of the relevant construction milestones the certificate of partial possession in respect of the Residential Development was issued on 3 December 2007 with the certificate of practical completion being then issued on 5 March 2008. The latter is an important date as the argument is made that it defines the latest date from which the limitation period applicable to the issues which are contested between the parties begins.

[6] Turning to the various defendants, their respective roles can shortly be summarised as follows:

- The first and second defendants were retained as building contractors. They joined together in a joint venture known as "FGA" the aim of which was to construct and complete the Residential Development (and, indeed, the adjacent commercial development). The affidavit evidence suggests that the first defendant undertook the main construction obligations under that arrangement insofar as it related to the Residential Development and the second defendant undertook the "fit out";

- The third defendant was the architect and civil and structural engineer for the Residential Development (and, indeed, the adjacent commercial development);

- The fourth, fifth and sixth defendants (collectively referred to as "CGI") were respectively:

    (a) The owner of the commercial development within Victoria Square upon which it is suggested the Residential Development relies for support;

(b) The head landlord under the lease (the "Head Lease") dated 16 April 2009 between CGI(1) and Multi-Residential Developments UK Ltd ("Multi")(2);

(c) An entity which oversaw, directed, and controlled remedial works to Victoria Square, including the Residential Development;

- The seventh and eighth defendants are the management companies which were incorporated specifically to manage and maintain the residential areas within Victoria Square including the Residential Development.

I should highlight, at this stage, that since the hearing the plaintiff has discontinued the action against the CGI defendants, ie the fourth, fifth and sixth defendants.

[7] It is the plaintiff's case that on or about 1 February 2019 the occupants of two apartments within the Residential Development reported sudden damage to a party wall. It is common case that the cause of that damage was the failure of a reinforced concrete structural column (that column lying on gridlines E/2 ("Column E2") embedded within the blockwork partition between flat numbers 406 and 407. The occupants of those apartments were immediately evacuated from the building.

[8] Thereafter, the entirety of the Residential Development was evacuated on 10 April 2019 pursuant to the direction of the seventh and eighth defendants who warned of potential further movement in the building due to the damaged structural column.

[9] According to the statement of claim the seventh and eighth defendants installed temporary propping to support the failed column in or around July 2019.

[10] The seventh and eighth defendants then undertook further investigations and instructed the consulting firm, Design ID, in September 2019 who identified that a number of columns (including Column E2) were, in their view, under capacity.

[11] The plaintiff then instructed Sandberg LLP and William J Marshall and Partners (Consulting Engineers and Architects) to undertake further investigations. That investigation work (or phase 1 site investigation work as it is referred to at para 26 of the statement of claim) was completed in July 2021 and, broadly, concluded (and here I use the wording of the Statement of Claim):

> "27. … serious, and significant, structural and design defects … within the Residential Development.
>
> 28. … Column E2 failed on or about 1 February 2019 … As to the nature and extent of that failure:

(a) Column E2 burst with splinters of concrete, plaster and reinforcement from within the section being displaced outwards;

(b) Cracking is present in the floor slabs in the areas surrounding Column E2;

(c) Cracks were recorded in the structure, partitions and finishes of the flats above and below level 04;

(d) There was a serious and substantial structural failure of Column E2."

[12] The report concluded that the column section and reinforcement specified by the third defendant was unable to resist the required design force of the Residential Development by about 7% so that the concrete columns are therefore unable to carry the design loads with the requisite safety factor, thus, requiring further reinforcement.

[13] As to the construction of Column E2 itself (again, referring to the statement of claim) it is claimed that:

"(a) The reinforcement does not comply with the third Defendant's drawings;

…

(d) There is high water content and/or low cement content in the concrete;

(e) The columns were constructed using low strength concrete;

(d) There is defective repair in the column face which substantially weakens the column."

***The Causes of Action***

[14] The cause attributed in the statement of claim is to a "combination of the third defendant's failures in relation to the design load capacity of Column E2 and the first and/or second defendant's workmanship failures, associated with low strength concrete, errors in reinforcement placing and the removal of concrete in part of the section (and in its place a plaster filled repair formed)."

[15] There are also further allegations of brick spalling on the street facades of the Residential Development (and the related residential development fronting Montgomery Street) in that:

(a) "Brickwork is breaking and, in certain locations, falling … there is evidence of movement in both the Chichester Street and Montgomery Street elevations";

(b) "There is a significant risk of the falling brickwork injuring a passer-by on either Montgomery Street and Chichester Street."

All of this the plaintiff asserts is further evidence of significant structural failings within the Residential Development.

[16] As alluded to above there are allegations made that there have been repair works. These allegations are set out in paragraph 34 of the Statement of Claim which I set out in full [emphasis added]:

> "34. In an attempt to address the above structural defects, to include the spalling, it would appear that remedial works were **carried out by various parties**, including, inter alia, under the direction and/or instruction and/or arranged by CGI. In particular, in many locations the brickwork has been renewed/patched and repointed by way of remedial works. Further there is defective repair in the E/2 column face which substantially weakens the column.
>
> 35. Those remedial works were a result of and/or exacerbated and/or failed to rectify the serious structural defects …"

[17] In that regard the plaintiff describes its action in summary at para 39 of the statement of claim:

> "39. In summary the plaintiff says that the significant defects were caused as follows:
>
> (a) The first and/or second defendants' execution of the works, construction of the Residential Development in Victoria Square, and works undertaken were deficient and/or defective;
>
> (b) The third defendant's design of the Residential Development in Victoria Square, services carried out, and works undertaken were defective and/or deficient;
>
> (c) The fourth, fifth and sixth defendant breached, and continues to breach, its obligations as head landlord, its obligations and/or duties of care as owner of the

adjoining premises to the Residential Development and/or its obligations in respect of its involvement in any remedial works;

(d) The seventh and eighth defendant breached, and continue to breach, their leasehold obligations, including their covenants to repair."

[18] As regards the particulars of breach the plaintiff claims that:

"(a) that as regards the first and second defendants there are:

(i) a breach of statutory duty and/or negligence; and

(ii) in particular, a breach of article 3 of the Defective Premises (NI) Order 1975 (the DPO) and/or negligence;

(b) As regards the third defendant there has been a breach of those same statutory duties and/or negligence in or about the provision of engineering and architectural services;

(c) As regards the fourth, fifth and sixth defendants that there has been:

(i) a breach of contract and/or covenant - essentially by its failure to keep the centre structure in good and/or substantial repair, which has impacted upon and/or damaged the Residential Development; and/or

(ii) that by virtue of article 3(4) of the DPO that CGI was an entity which oversaw and/or instructed, and/or arranged the carrying out of remedial works which it failed to do in a proper workmanlike manner; and/or

(d) further or alternatively that the seventh and/or eighth defendants are liable by reason of breach of contract and/or covenant in its/their failure to maintain and keep in good repair all parts of the Residential Development to which its/their obligations extend including the common areas and

> in relation to which it also seeks specific performance of particular leasehold covenants which arise out of the nature of the title under which the flats are held."

[19] In respect of its claim for loss and damages, the plaintiff suggests that any rectification of the damage would be "logistically and practically unachievable" and that given the nature and scope of the defects that "the works to put right the defects/damage would require demolishing and rebuilding the Residential Development." In its claim it seeks those damages and/or specific performance of the leasehold obligations together with any other relief which the court thinks fits.

***Leasehold Structure***

[20] Although the action is not being continued against the CGI defendants for completeness it is probably convenient at this stage to provide some narrative regarding the leasehold structure relating to the Residential Development and the claims made by the plaintiff based upon it. I have already referred to the headlease. It was granted on 16 April 2009 to Multi (as the developer) for a term of 250 years. Post completion and disposal of the development (by way of subleases of the individual flats) the Head Lease was then assigned to the seventh and eighth defendants (as management companies) on 2 August 2015. The areas demised ("the Premises") are defined by the text of the Head Lease as "the property described in the particulars" but also then by reference to sectional plans which the plaintiff says are not entirely clear. I am not sure I share their reservations but, for reasons that I set out below, the point they make is academic. The "Premises Structure" is defined separately as "the **structural** and external **parts of the Premises** consisting of the roofs, walls, foundations, columns, floor slabs, retaining walls and **other structural parts** …" [emphasis added]

[21] Those definitions are significant because within the Head Lease Multi (as tenant) covenanted to keep the Premises and the Premises Structure "in good and substantial repair" whilst CGI (as the landlord) (having retained from the demise the Centre and Centre Structure) covenanted, in turn, to keep the Centre Structure in good repair. Given the nature of the development that scheme in the division of responsibility is not unusual – indeed, I would say it is entirely normal.

[22] To give that division further context and, indeed emphasis, within the Head Lease the "Centre" is defined as "the mixed use retail, office, leisure and residential centre known as Victoria Square, Belfast, Northern Ireland (**excluding [the Premises/Residential Development**]) [emphasis added] and the "Centre Structure" is defined as "the structural parts of the Centre consisting of the roofs, floors, foundations, columns, floor slabs, retaining walls and other structural parts including all parts of the centre of which the tenant (meaning [Multi]) is granted rights by this lease whether structural or not." It seems entirely clear to me what was intended in

terms of the respective responsibilities of the parties in relation to the building. Any suggested ambiguity in the plans gives way to the express wording of the documents.

[23] After development of the apartments (and obviously the interest created by the grant of the Head Lease) Multi sold off the individual apartments to a mixture of private individuals and to the plaintiff by way of sub-lease(s). Each apartment lease is for a term just short of the 250 years originally demised by the Head Lease. The plaintiff and the other apartment owners are, in that context, quite clearly sublessees in what is, overall, a pyramid structure.

[24] As I have indicated, and as is common in developments of this type, after all the apartments were sold Multi (on 3 August 2015), assigned its interest in the Head Lease (and therefore, the retained parts of the Residential Development) (ie those sections not sub-demised to apartment owners). In particular, this included the Premises Structure (as defined above) which was assigned to the two management companies which are respectively the seventh and eighth defendants in this action. They retain that interest subject to but with the benefit of the various subleases that have been granted in respect of the flats. They are also subject to the repairing covenants set out (a) in the Head Lease and (b) in each individual sublease. It would seem to me that a proper reading of those documents clearly imposes upon them the repairing obligation in respect of the Premises Structure subject to a right to demand and collect service charge.

[25] Unsurprisingly, the definitions of Centre and Centre Structure are replicated within each of the residential sub-leases and, within each, Multi (or now the management companies as its successor in title) covenants with the purchasers/sub-tenants, firstly, to maintain the Premises Structure and, secondly, to enforce the covenants in the Head Lease imposed upon the Landlord which, importantly, "[includes] its covenants to repair the Centre Structure." That is how the drafting deals with the issue of carving out the respective obligations of landlord and tenant.

[26] The plaintiff's original claim insofar as it related to the leasehold structure suggested that the head landlord (ie CGI) continues to owe repairing obligations to Multi and (simultaneously) its successors in title – a term it argues (by extension) includes the plaintiff and all other residential owners (in their capacity as sublessees). Suffice at this stage to say that CGI contested, firstly, that the plaintiff (who is a sublessee) is properly a successor in title to Multi in landlord/tenant terms, and by extension, argued that there is neither privity of estate nor privity of contract as between the plaintiff and CGI within the pyramid structure that has been created and that, accordingly, CGI has no continuing obligation to maintain the Premises or, indeed, the Premises Structure in the manner pleaded in the Statement of Claim.

[27] As I have indicated, the action brought by the plaintiff in that regard has been discontinued against the CGI defendants, but I, nonetheless, have dealt with the arguments below.

*The Strike Out Applications*

[28] Having set the background, I now turn to the arguments by the respective parties on the strike out applications themselves from their respective positions.

*Relevant Evidence*

[29] Although not relevant to Ground 19(1)(a) the court has had the benefit of detailed affidavits from Michael McCord, solicitor, and Denise Geddis, on behalf of the first defendant, Raymond Gilroy (x2) on behalf of the second defendant, Jonathan Forrester, solicitor (x2) on behalf of the third defendant, David Kirkpatrick, solicitor, on behalf of the fourth, fifth and sixth defendants, and James Turner, solicitor (x2) on behalf of the plaintiff.

[30] In broad terms the first defendant, within its affidavit evidence, admits that it undertook the construction work for the Residential Development. Denise Geddis confirms that the works were completed in December 2007. As indicated above, that fact is confirmed by the certificates dated December 2007 and March 2008 (respectively) included as exhibits to Ms Geddis' affidavit.

[31] The affidavits on behalf of the second defendant confirm that the Residential Development (within what was called Zone 20 of the overall scheme) was "allocated" to the first defendant under the joint venture arrangements and assert that the first defendant carried out all of the construction works to that zone whilst the second defendant was "separately engaged to carry out fit-out works" "to the Residential Development" (ie the non-structural works) and on the back of their limited role deny liability for the present defects.

[32] Mr Turner, as the solicitor for the plaintiff, in his affidavits avers:

(a) That column E2 failed in or around February 2019 – leading to the evacuation of the entire Residential Development;

(b) That certain remedial works had been carried out to column E2 and to the brickwork.

[33] From the affidavit evidence taken as a whole, however, none of the defendants accept that remedial works were undertaken on column E2 or to the relevant spalling brickwork by any of the named defendants, or in turn, by their relevant servants or agents.

[34] Equally, and consistent with the statement of claim (cited above at para [16]), there are no specific allegations within the pleadings as to (a) whom it is alleged undertook the remedial works, or, indeed, (b) when they were undertaken.

[35] On the affidavit evidence it is clear that the plaintiff purchased the apartments from Multi in September 2011 and that they have never had a contractual arrangement with either the first, second or third defendants, nor have they attempted to assert any such linkage. The contractual linkage which they assert as regards the fourth to eighth defendants is rested purely in the pyramid leasehold structure under which the apartments are held (as described above).

***The Strike Out Jurisdiction***

[36] The parties each acknowledge that the strike out jurisdiction which is invoked is well-trammelled. Order 18 Rule 19 of the Rules of the Court of Judicature (NI) 1980 provides:

> "**Striking out pleadings and endorsements**
>
> 19. The court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action or anything in any pleading or in the endorsement, on the ground that:
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous, or vexatious;
>
> (c) it may prejudice, embarrass, or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of process of the court,
>
> and may order the action to be stayed or dismissed or judgment to entered accordingly as the case may be."

Reliance is also placed on the court's inherent jurisdiction.

[37] It is accepted by the parties that ground (a) falls to be determined on the face of the pleadings without the adduction of evidence and for the cause pleaded to be struck out it must reach the threshold of being one which is "unarguable or almost uncontestably bad" – based on an assumption that all the averments in the pleadings are true – see Gillen J in *Rush v PSNI* [2011] NIJB 28. In other words, one must take the case as it is pleaded at its height and then assess if it is unarguable. It is acknowledged by the parties and this court that this is inevitably a high hurdle.

[38] For a strike out application under the court's inherent jurisdiction and/or grounds (b)-(d) evidence by affidavit or otherwise is admissible. In this context the court can explore the facts - although in doing so, it must act with caution – see

*Mulgrew v O'Brien* [1953] NI 10 which cautions that such an assessment should not become a "mini trial" of the case. Where there is doubt then the authorities are clear that that should be resolved by allowing the case to proceed to full trial.

[39] In the leading case of *Three Rivers District Council v Bank of England* (No.3) [2001] UKHL 16 the House of Lords approved the following principles and guidance applicable to strike out applications:

> "(i) Strike out is only appropriate for plain and obvious cases;
>
> (ii) Judges should not rush to make findings of fact on contested evidence at a summary stage;
>
> (iii) If any application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, is also satisfied that striking out will remove the necessity for a trial or will substantially reduce the burden of preparing for, or the burden of the trial itself;
>
> (iv) Judges hearing strike out applications should not conduct mini trials involving protracted examination of the documents and facts (although sometimes a detailed analysis is appropriate);
>
> (v) A judge may refuse to hear a strike out application if the application (a) is unlikely to succeed or (b) will not be decisive or appreciably simplify the eventual trial."

[40] Whilst the parties have reached a consensus on these principles there is clearly substantial divergence in terms of the application of those principles to the present case as between the parties and it is to that divergence that we now turn.

***(a) The case made under the Defective Premises (NI) Order 1975 ("the DPO")***

[41] A good part of the plaintiff's action is based on the provisions of the DPO and Article 3, in particular, which imposes a statutory duty of care in the following circumstances:

> "**Duty to build dwellings properly**

> 3.—(1) A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty—
>
> (a) if the dwelling is provided to the order of any person, to that person; and
>
> (b) without prejudice to sub-paragraph (a), to every person who acquires an estate in the dwelling;
>
> to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed."

That clearly applies in the instant case and given the scheme of the development, and those involved in it, Article 3(4) is also engaged :

> "(4) A person who—
>
> (a) in the course of a business which consists of or includes providing or arranging for the provision of dwellings or installations in dwellings; or
>
> (b) in the exercise of a power of making such provision or arrangements conferred by or by virtue of any statutory provision;
>
> arranges for another to take on work for or in connection with the provision of a dwelling shall be treated for the purposes of this Article as included among the persons who have taken on the work."

As a statutory provision it is widely cast and clearly would have the ability to cover professional advisers etc, such as the third defendant.

Article 3(5) then sets out the applicable limitation period. This is one of the main areas of contention between the parties:

> "(5) Any cause of action in respect of a breach of the duty imposed by this article shall be deemed, for the purposes of the Limitation (Northern Ireland) Order 1989 **to have accrued at the time when the dwelling was completed**, but if after that time **a person who has done work for or in connection with the provision of the**

> **dwelling does further work** to rectify the work he has already done, any **such cause of action** in respect of that further work **shall be deemed for those purposes to have accrued at the time when the further work was finished**." [Emphasis added]

[42] It is trite law that the basic rule is that a claim brought under the DPO for breach of this statutory duty by virtue of Article 4(d) of the Limitation (NI) Order 1989 ("the Limitation Order") may not be brought more than six years after the cause of action has accrued - save in certain exceptional circumstances. It is those circumstances that are brought into consideration on the facts of this case by the arguments advanced by/on behalf of the plaintiff.

[43] Before turning to those it is useful, however, to provide some context. The statutory provisions in the DPO arise out of a review of the law by the Law Commission in 1970 [that review being entitled the "Civil Liability of Vendors and Lessors for Defective Premises"]. That review, in turn, led to the Defective Premises Act 1972 (for England & Wales) and the DPO for this jurisdiction. On the issue of limitation that report (at para 32) concluded:

> "32. Those persons on whom the obligations are to be imposed should not, however, be left at risk for an indefinite period. There should be a limit of time within which an action could be brought, running from the date when the work was completed."

[44] That, therefore, is an expression of the policy rationale behind both the legislation and, indeed, the limitation period which is in contention in the present case.

[45] Setting that policy context to one side, a number of preliminary points should also be noted. Firstly, the statutory duty in the DPO is not to build dwellings to a certain or a particular quality but, rather, to build them sufficient that they are "fit for habitation." In *Rendlesham Estates Plc v Bar Limited* [2014] EWHC 3968 (in relation to the equivalent English provision) the court held, firstly, that the duty extended to common parts and, secondly, that "fit for habitation" meant that (broadly) the dwelling must be capable of occupation for a reasonable time without risk to health or safety. Adopting that rendition, the plaintiff here says that these obligations have been clearly breached in the present case because the residents have, as an indisputable fact, had to be decanted and, therefore, it flows that the statutory duty has been breached because the dwellings are clearly not "fit for habitation." Given the chronology of events they are then, however, inevitably faced with the statutory limitation period.

[46] To avoid the six-year limitation period, the plaintiff places emphasis on the repair works – done, as their pleadings acknowledge, at an unknown point in time and by an unknown party. The plaintiff relies on *Alderson and Another v Betham*

*Organisation Ltd* [2003] EWCA a case involving persistent dampness which arose in relation to the conversion of a property into two flats.

The plaintiff cites Longmore LJ (at para 39) as support for its argument that the limitation period is extended:

> "If that failure still exists after the further work done to rectify the work already done, it is a failure for which the statute gives a remedy and the cause of action in respect of that failure is a cause of action in respect of that further work and accrues when the further work is finished."

[47] To further strengthen the argument, the plaintiff also cites *Cave v Robinson Jarvis and Rolf* [2002] UKHL 18 where Millett J (at para [70]) remarked that:

> "In common justice a plaintiff ought not to find that his action is statute-barred before he has had a reasonable opportunity to bring it."

[48] On the basis of those authorities the plaintiff essentially argues that the time period within which to bring a claim has been restarted by virtue of the remedial work that has been undertaken to the Residential Development.

[49] As a second strand to their argument for an extension of the limitation period, the plaintiff also submits, post the Grenfell tragedy, that more recent authorities have accepted the position that where contractors are guilty of concealment (in that case by not saying what the cladding was) the relevant limitation period only starts to run after concealment has been discovered – for which they cite *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] and the Court of Appeal in *Canada Square Operations Ltd v Potter* [2021] EWCA civ 339.

[50] Taking both strands, therefore, to summarise the plaintiff's case, in relation to the limitation period it contends that:

(i) a cause of action for breach of statutory duty under Article 3(1) accrues when the dwelling is completed **unless** remedial works have been carried out in which case the cause of action accrues from that later date;

(ii) That a later limitation period arises in a case where there has been concealment.

[51] On its pleaded case the plaintiff says that it first became aware of the structural defects in or around February 2019 and that it was only during the subsequent "opening up" investigations that the defective repair on the column face was discovered and that its proceedings on that basis are "in time."

[52] Its overall position is concisely set out in paragraph 1.4 of its supplemental submissions:

> "As set out in the statement of claim, the plaintiff is unaware of who carried out the remedial works to the column (which weakened the column further), or indeed, when those works were carried out. A defective repair was carried out which – as per the plaintiffs' submissions – 'starts the clock running' again, in relation to the defendants' breach of statutory duty – to build a dwelling fit for habitation. The author of those works and the date they were carried out will be borne out in the course of discovery … The plaintiff made it clear in the submissions, the defective repair further amounted to concealment (the works done to "repair" and, therefore, conceal a problem with the column) such that further or alternatively time in any event did not begin to run until the plaintiffs' discovered the repair during the opening up works."

[53] It is on that basis the plaintiff says that its claim is not statute barred – firstly, on the basis that its knowledge should be taken from 2019, and, secondly, that even if that is not the case, the "repairs" restarted the time clock on the limitation period and, thirdly, that "concealment" applies to extend the period on the specific facts of this case.

[54] As one might expect, there is a degree of unanimity amongst the defendants on the question of limitation - all of it based upon a total rejection of the plaintiff's view.

[55] On the question of simple chronology (a) the defendants assert that the Residential Development was completed (at the latest) in March 2008 (as evidenced by the Certificate of Practical Completion); and (b) that the plaintiff's writs were issued in April 2020 – ostensibly 12 years after completion of the works and are, therefore, well outside the six year time period provided for in Article 4(d) of the Limitation Order on ordinary principles.

[56] As for the remedial works, for the claim to be "in time" it is argued that the plaintiff must show that the remedial works were undertaken at some point within six years of the issue of the writs themselves (meaning in this case, therefore, in/after April 2014). It is pointed out that, on the facts as pleaded, the plaintiff was in occupation of its premises from September 2011 (ie when the apartments were bought) and that therefore the remedial works could not physically have happened after that date without the plaintiff's direct knowledge. For the plaintiff to have been unaware of them, remedial works, they say, must, therefore, at the very latest have been carried out prior to the completion date in 2011, and so, even taking the plaintiff's case at its height, must, again, taking that factual knowledge fall outside the limitation period.

[57] In addition, the defendants say that the plaintiff has offered no evidence to substantiate the allegations that it was, in fact, the defendants (or, more particularly, which of them either solely or jointly) that undertook the relevant repair works and that the pleadings (even when taken at their height) as set out in the statement of claim simply assert the bare facts:

(a) That there was a defective repair in column E2;

(b) That it would appear that remedial works were carried out by "various parties"; and

(c) that CGI oversaw remedial work,

which they say renders the case "uncontestably bad" and subject to strike out on the pleadings alone.

[58] Applying the factual scenario (as pleaded) the defendants argue that any time extension can only apply to the remedial works themselves citing *Alderson v Betham Organisation Ltd* [2003] EWCA Civ 408. The defendants say that notwithstanding the gloss advanced by the plaintiff that case makes it clear that where further work is done then a fresh course of action arises **but** only (applying the literal wording of article 3(5)) where the "person who has done work … does [that] **further work** to rectify the work he has already done." In short, that there must not only be (a) remedial work undertaken, but that (b) it must be undertaken by the person who was initially responsible or liable for the defective work. That, the defendants say, is not part of the plaintiff's stated case and that given that (a) neither the date upon which the works are carried out; nor (b) the identity of the party carrying them out has been identified the plaintiff's action should be struck out as "incontestably bad." The debate around the question of "concealment" and its effect I shall deal with below.

***Consideration***

[59] Taking this case as pleaded at its height it is clear that there is a convincing argument that the DPO applies to the alleged defects. That being the case, the question, in my view, comes down to one of limitation – ie is the claim itself statute barred. In that I am mindful of the policy considerations upon which the DPO was based – see above at paras [43]-[45] but those provide no more than useful contextual background.

[60] The provisions of Article 3(5) which followed from those considerations are, however, in my view, clear when broken down as follows:

> "(a) Any cause of limitation is … deemed … to have accrued at the time when the dwelling was **completed …" unless**

(b) If after that time **a person who has done work … does further work to rectify …**

(c) **any such cause of action** in respect of **that further work …**

(d) **to have accrued** at the time when the **further work was finished."**

[Emphasis added]

[61] On the principal claim, again taking things at their height, it seems clear that the Residential Development was completed, at the latest, in 2008. The parties seem to agree on the fact that the Certificate of Practical Completion confirms that fact but, irrespective, that is the date upon which I am satisfied that completion was then achieved – as evidenced by the Certificate of Practical Completion. The plaintiff's writs were issued in the period April 2020 to March 2021, ie 12 years after practical completion of the works and clearly, in my view, outside the six-year time limit provided for in Article 4(d) of the Limitation Order.

[62] This reality has forced the plaintiff to make its two alternative claims.

[63] The first is to argue that because remedial works have been undertaken to both the brick façade and Column E2 time becomes at large until the completion of those works, ie that, on their interpretation of Article 3(5) the DPO extends their claim.

[64] That, in my view, is simply too bold an assertion. In the first place, even if it were the case, it would mean that for the remedial works themselves to fall within the six-year limitation period they would need to have been undertaken in or after April 2014 – in the context where the plaintiff, at the latest, took possession on their acquisition of the premises in September 2011. The fact of their occupation, therefore, would seem to count against them on that score as any work to E2 must have been done before that date otherwise they clearly would have known about it.

[65] Secondly, even taking the plaintiff's case at its height, that position is not actually pleaded. The statement of claim simply asserts (a) that remedial works were undertaken; (b) by various (unnamed) parties; and (c) suggests that CGI oversaw the remedial works.

[66] In my view, the contentions made in the pleadings are so vague in themselves as to be strikable per se. In my view, the relationship between the alleged remedial works and the alleged total loss (as claimed) has not been explained. Other than the vague and imprecise allegations which have been made, there is, frankly, nothing in the pleadings before me to disclose a direct cause of action under the DPO against any of the proposed defendants to this action which survives the limitation point and that, in my view, is therefore fatal from the plaintiff's perspective.

[67] Beyond that, however, even more fundamentally I disagree with the plaintiff's assertion on the law that the limitation period is "reset" as a result of the remedial works themselves. That is not what the Court of Appeal in *Alderson v Betham* said. In that decision the court, in my view, was quite clear:

> "… there are two separate causes of action, the first relating to the quality of the original building work, and the second to the quality of the remedial work. **For the purposes of the first cause of action, time starts to run when the dwelling is completed, and, for the second, when the remedial work is finished**."

[68] That is the only construction of Article 3(5) that makes sense – both in terms of legislative interpretation but also commercially.

[69] This specific point has also been considered more recently in *Sportcity 4 Management Ltd and others v Countryside Properties (UK) Ltd* [2020] EWHC 1591 (TCL) which addresses the approach more pithily - "neither the performance of further work nor a failure to perform such work operates to revive an existing but statute barred cause of action."

[70] At no point did the plaintiff address or challenge the bald position set out in *Sportcity* and with which I whole heartedly concur.

[71] The third argument advanced to avoid the consequences of limitation (simpliciter) focuses on the question of possible concealment. The plaintiff's suggestion is that the relevant limitation period under the DPO only starts to run after concealment has been uncovered – citing *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] AC 102 and *RG Securities (No.2) Ltd v Allianz Global Corporate and Speciality CE* and others [2020] EWHC 1646. I was also referred to the Court of Appeal decision in *Canada Square Operations Ltd v Potter* [2021] EWCA Civ 339.

[72] The issue of concealment was, again, addressed to the court following the handing down of the Supreme Court decision in *Canada Square Operations Ltd v Potter* [2023] UKSC 41 on 15 November 2023, upholding the view that Mrs Potter's claim (in that case) was not statute barred. In its letter to the court of 20 November 2023 the solicitors on behalf of the plaintiff acknowledge that the Supreme Court had been asked to clarify the meanings of the words "deliberately" and "concealed" for the purposes of section 32(1)(b) of the Limitation Act 1980 (the equivalent to Article 71(1)(b) in this jurisdiction). In the letter the plaintiff puts it thus:

> "As can be seen from the judgment, the Supreme Court UK held, inter alia, that a fact will have been concealed if the defendant has kept it secret from the claimant, either by taking active steps to hide it or by **failing to disclose it**. Further, and contrary, to previous Court of Appeal

> authority, the claimant does not need to establish that the defendant was under a legal, moral or social duty to disclose the fact, nor does [the claimant] need to show that the defendant knew the fact was relevant to the claimant's right of action. All that is required is that the defendant deliberately ensures that the claimant does not know about the fact in question, and so, cannot bring proceedings within the ordinary time limit, see paragraphs [67], [98]-[105] and [109].
>
> Turning to the meaning of "deliberately", the Supreme Court UK held the defendant's concealment of a relevant fact will be deliberate if the defendant intended to conceal the fact in question. This, in the plaintiff's submission, obviously requires discovery and will properly be a matter of factual and expert evidence to be ventilated at a plenary hearing."

[73] Following that submission, I allowed the remaining parties seven days to comment on the plaintiff's position. The remaining parties who replied, did so with a degree of consensus.

[74] With respect to the plaintiff, I think their view does not, in fact, aid their position. Lord Reed in the *Potter* case at para [109] expresses the view that we should "return to the clarity and simplicity of Lord Scott's authoritative explanation in *Cave* (para [60])":

> "A claimant who proposes to invoke section 32(1)(b) in order to defeat a limitation act defence must prove the facts necessary to bring the case within the paragraph. He can do so if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by withholding of relevant information, but, in either case with the intention of concealing the facts or fact in question."

[75] In para [109] the Supreme Court continues to set out exactly what that means:

> "what is required is (i) a fact relevant to the claimant's right of action; (ii) the concealment of that fact from [a claimant] by the defendant, either by a positive act of concealment or by a withholding of relevant information; and (iii) an intention on the part of the defendant to conceal the fact or facts in question."

[76] In my view, in neither the pleadings nor in the affidavit evidence, which is before this court, have any of those three essential requirements been made out. Whilst the decision in *Potter* is very useful guidance on this point it does not, in my view, assist the plaintiff in rebutting the present strike out application. At best the plaintiff has made generalised assertions but has not advanced the elements referred to by Lord Reed against the defendants. In my view, none of these requirements are supported by either the evidence or the pleadings and where they are made (for example against the CGI defendants) they have been compromised.

[77] For all those reasons, I will strike out the claims brought under the DPO against all of the defendants. In my view, even taking the pleadings at their height, they disclose no reasonable cause of action, and in all of the circumstances, I consider that it would be unfair to the defendants to allow the case to proceed because, based on the limitation points, and for the reasons I have given, I simply do not consider it to be arguable.

***(b) The Claims in Negligence***

[78] Moving on then from the DPO, the plaintiff accepts that there is no form of contract between any of the defendants to this case (other than pursuant to the title which I deal with below) but has raised, in the alternative, a claim in tort arguing that the alternative limitation period provided for Article 11 of the 1989 Order (ie in this case three years from the date when the plaintiff knew or ought to have known of the claim) applies. On the plaintiff's case the requisite degree of knowledge, it says, arose in 2019 when the structural defect very obviously became apparent and that the writs, therefore, have been issued within that three-year timeline (they having been issued in April 2020 (and afterwards)) but within the three year cut off.

[79] In its statement of claim the plaintiff has particularised the duty of care which it says has been breached by each of the defendants and in particular has focussed on:

(a) the traumatic failure of the Column E2 – which it says has led to the further investigations which in turn identified that a number of columns are under capacity;

(b) the allegation that the Residential Development is unstable;

(c) the argument that part of the structural instability, on the plaintiff's case, arises from workmanship failures associated with concrete fabrication and errors in the placement of concrete reinforcements together with the removal of concrete in the part of the section that has failed (ie Column E2) (and that in its place a plaster filled repair has been formed);

(d) brickwork spalling which the plaintiff submits is a further structural defect and evidence of the structural failings of the Residential Development;

all of which they have particularised in detail within the statement of claim.

[80] To these allegations the defendants (and each of them) argue that the plaintiff's case is one of pure economic loss and therefore bound to fail irrespective of questions of limitation.

[81] Looking first at that issue the court was taken to Charlesworth and Percy on Negligence (14th Edition) where the authors (at chapter 2-265) capture the fundamental principle:

> "Since *Murphy v Brentwood DC* [1991] 1 AC 398 and sometimes before that, claims in respect of economic loss suffered by owners of defective buildings not in contractual privity with the defendant being sued have been held to fail."

[82] This statement is largely based on the House of Lords in *Murphy v Brentwood* [1991] 1 AC 398 which determined that the earlier decision in *Anns v Merton District Council* [1978] AC 728 was wrongly decided and that courts should not seek to create a new area of liability for builders and/or local authorities particularly given the implementation of the Defective Premises Act 1972 which in itself provided the statutory remedy (considered in more detail above).

[83] The plaintiff argues that the present case can be distinguished from that general principle and that the defects in question fall within one of the exceptions to the "pure economic loss principles" in that "the columns and/or brickwork are distinct items which have positively malfunctioned, so as to inflict damage on the structure of the Residential Development in which they are incorporated and/or so as to inflict damage on the plaintiff's apartments so that the 'complex structure theory' is engaged."

[84] The "complex structure theory" for which the plaintiff advocates is based upon the comments of Lord Bridge in *Murphy v Brentwood* in which he suggested (obiter) that potentially there were incidences which would take cases of tortious loss outside of the strictures of being "pure economic loss" (and so irrecoverable). In particular he said two things upon which the plaintiff relies. The first is:

> "A critical distinction must be drawn as between some part of a complex structure which is said to be a `danger' only because it does not perform its proper function in sustaining the other parts and some defect incorporated in the structure would positively malfunction so as to inflict positive damage on the structure in which it is incorporated."

[85] The second point which Lord Bridge raised (at para 475) and upon which the plaintiff also relies, was as follows:

> "The only qualification I would make to this is that, if a building stands so close to the boundary of the building owner's land that after discovery of the dangerous defect it remains a potential source of injury to persons or property on neighbouring land or on the highway, the building owner ought, in principle, to be entitled to recover in tort from the negligent builder the cost of obviating the danger, whether by repair or demolition so far as the cost is necessarily incurred in order to protect himself from liability to third parties."

[86] The plaintiff argues that, albeit accepting that these comments were made obiter, these principles were adopted and endorsed in the subsequent case of *Morse v Barratt (Leeds) Ltd* [1993] 9 Const LJ 158 and so provide authority for its case in negligence against the defendants and, secondly, that their argument should not lightly be ruled out in the context of a strike-out application applying the test that the defendants must be able to prove at this stage that such an approach is "unarguable" or "incontestably bad." In aid of their argument, they also point to the effect on the other apartment owners who remain in exactly the same position as the plaintiff.

[87] Ignoring the question of the limitation point in relation to the negligence claimed for a moment in order to consider the plaintiff's claim at its height, I must consider the extent of the alleged exclusions to the "pure economic loss" limitations as raised by the plaintiff. In that, firstly, I accept that the case of *Murphy* does have parallels with the present case. The facts of that particular case were that a defective foundation led to (amongst other things):

(a) serious cracks in the internal walls of a house;

(b) the fracturing of a gas pipeline; and

(c) the fracturing of a soil pipe.

[88] On the factual analysis, it can easily be seen that there are parallels to the present case but, that being said, in *Murphy*, the House of Lords (by a unanimous decision) confirmed that the damage in question was purely economic and therefore unrecoverable. Lord Bridge's comments were obiter and, indeed, contrary to the majority view in that case. That weighs against the plaintiff's contention.

[89] Setting that issue to one side for the moment, and again, in an effort to take the arguments advanced at their height, it is feasible that the two mooted exceptions raised by Lord Bridge (as above) could arguably apply in the present case and, indeed, the plaintiff's case is that:

(a) the damage highlighted has the potential of causing personal injury to a passer-by; and

(b) in the case of a complex structure, such as is indisputably the case in the context of the Residential Development, one element of the structure might well be regarded as distinct from another and so capable of inflicting damage to the wider structure.

[90] Whilst, overall, I accept those possible arguments they must, I feel, be put in context and considered against the policy arguments that led to the DPO, and the wider comments that were made in *Murphy*. In this regard, the defendants specifically highlight the comments in *Murphy* at para [474] namely:

> "The precise extent and limits of the liabilities which in the public interest should be imposed upon builders and local authorities are best left to the legislature."

As a starting point, that is a position with which I wholeheartedly agree.

[91] Looking, however, at the merits of what the plaintiff has advanced, I am very mindful that, as regards the first "exception" to the question of economic loss, Lord Bridge in *D & F Estates Ltd v Church Commissioners for England* [1989] had initially postulated his "theory" on complex buildings. In *Murphy* he did then try to explain his thoughts in clearer context (see page 745) putting his position thus:

> "If a builder erects a structure containing a latent defect which renders it dangerous to persons or property, he will be liable in tort for injury to persons or damage to property resulting from that dangerous defect. **But if the defect becomes apparent before any injury or damage has been caused, the loss sustained by the building owner is purely economic. If the defect can be repaired at economic cost, that is the measure of the loss**. **If the building cannot be repaired, it may have to be abandoned as unfit for occupation and therefore valueless**. These economic losses are recoverable if they flow from breach of a relevant contractual duty, but, here again, **in the absence of a special relationship of proximity they are not recoverable in tort**." [Emphasis added]

[92] Lord Bridge also commented at para [476] of *Murphy* that he was himself questioning the extent of such considerations:

> "In my speech in *D & F Estates* … I mooted the possibility that in complex structures or complex chattels one part of a structure or chattel might, when it caused damage to another part of the same structure chattel, be regarded in the law of tort as having caused damage to 'other property' for the purpose of the application of *Donoghue v Stevenson* principles. **I express no opinion as to the validity of this theory but put it forward for consideration as a possible ground on which the facts considered in *Anns* [*v Merton*] might be distinguishable from the facts which had to be considered in *D & F Estates* itself**."

And concluded at para [478]:

> "The reality is that **the structural elements in any building form a single individual unit of which the different parts are essentially inter-dependent**. To the extent that there is any defect in one part of the structure it must to a greater or lesser degree necessarily affect all other parts of the structure. Therefore, any defect in the structure is a defect in the quality of the whole and **it is quite artificial, in order to impose a legal liability which the law would not otherwise impose, to treat a defect in an integral structure, so far as it weakens the structure, as a dangerous defect liable to cause damage to 'other property**.'"

[93] On this basis the defendants argue that the "complex structure" theory is not only largely hypothetical but that it has been clarified and, indeed, weakened by Lord Bridge himself in his subsequent comments (as above) and further has been challenged by subsequent later authorities.

[94] On that point, the court was also referred to the case of *Broster v Galliard Docklands Ltd* [2011] EWHC 1722 in which a builder designed and constructed a row of six houses. After a period of approximately 8 years, as a result of high winds, the roof of the entire terrace lifted up before then falling back into place causing damage to each of the dwellings. In, again, a strike-out application, Akenhead J reviewed this aspect of the law and set out certain parameters looking at a number of cases starting with:

(a) *Linklaters Business Services Ltd v Sir Robert McAlpine* [2010] EWHC 114 at para [25] viz:

> "The purchaser of a ginger beer bottle which contains a snail **may recover for personal injuries caused as she drinks the ginger beer but not for the cost of the bottle**."

(b) *Payne v John Setchell Ltd* [2002] PNLR 7 at para [36]:

> "It was submitted that there was a liability to indemnify on the grounds that the other half of the cottages represented 'other property' or work covered by the 'complex structure' theory. The two cottages share a common foundation which serves both halves. The building was built as a single entity. **In my judgment it would be artificial to regard the other half as 'other property**.' That refers both to property that belongs to another property which is materially separate from the building in question."

[95] Before concluding:

> **"I draw from this judgment in particular the conclusion that one needs to consider the structure in question as a whole and to avoid any artificiality in practically considering the structure."**

[96] Looking at the comments of the trial judge in *Payne* (as above) (HHJ Humphreys-Lloyd QC) is also helpful. In that case the judge comments specifically on the "complex structure" "exception" in the following way and, again, highlighted the danger in too artificial an analysis:

> "In light of these speeches not only is the complex structure exception no longer tenable but it is also clear that in approaching the question of `another part of the property' it is **necessary to avoid any artificiality and to be realistic**."

[97] Applying those observations to the facts of the present case the defendants argue that Column E2 must be treated as an integral part of the structure of the Residential Development and that to argue that either it or the brick façade should be treated in any other way is simply unsustainable. That being the case, the loss claimed for they say is purely economic and so irrecoverable.

[98] As regards the alternative proposition advanced by the plaintiff ie that the Residential Development insofar as it adjoins Chichester Street is a risk of causing injury or damage to persons or adjoining property again the defendants say that is developed from the observations of Lord Bridge in *Murphy* and in the absence of a claimant who has actually suffered any personal damage is not of any assistance to the plaintiff in this case.

[99] The overall approach adopted by the plaintiff, they say, has also been considered and rejected by the courts. Citing, in particular, Judge Hicks QC in the case of *George Fischer Holdings Ltd v Multi Design Consultants Ltd* [1998] 61 Con LR 85, where he rejected the approach on the following basis:

> "[89] In my understanding the passage quoted is **properly to be regarded as minority obiter dictum, contrary to the ratio of the decision of the House.**"

[100] The defendants also cite the case of *Thomas & Anor v Taylor Wimpey Developments Ltd & Ors* [2019] EWHC 1134 and the very comprehensive comments of Judge Keyser QC who also considered the approach to the "complex structure argument" and agreed with Judge Hicks. At paragraph 33 of his judgment, he indeed concluded that Lord Bridge's qualification in *Murphy* did not represent the law for the following enumerated reasons:

> "(1) It was propounded in a single obiter dictum in *Murphy;*
>
> (2) It is unsupported by authority, other than the first instance decision in *Morse,* where reliance on Lord Bridge's dictum was not supported by any persuasive analysis;
>
> (3) While not in direct contradiction to the ratio decidendi of *Murphy*, it is not supported by that ratio or by the reasoning of the other law lords. Indeed, it is not supported by any specific reasoning on the part of Lord Bridge;
>
> (4) In as much as it would create a non-contractual common law basis for tortious liability for economic loss on grounds other than assumption of responsibility and so is contrary to the analysis in *Robinson;*
>
> (5) The argument that recovery ought to be permitted because expenditure would be required to obviate the risk to third parties would logically imply that, where the risk of injury was only to persons on the premises, the owner ought to be able to recover the cost of moving from the premises. However, such recovery does not appear to be permitted on the current state of the law and in accordance with the analysis in *Murphy* and in *Robinson;*

> (6) Builders have potential liability under contract and by virtue of existing duties under the Defective Premises Act 1972 [and here the DPO] coupled with the tort of negligence concerning injury to persons and property, and so, in the absence of an articulated principle for liability, there is no compelling policy justification for recognising the existence of Lord Bridge's qualification."

On that basis he declined to follow the case of *Morse* – which (as he also pointed out) predated *Robinson* in any event.

[101] The case of *Robinson* to which reference is made is the case of *Robinson v P E Jones (Contractors) Ltd* [2012] QB 44 (particularly at paragraph 92) where Stanley-Burton J also stridently adopted the view:

> "If the defect is discovered before any damage is done, the loss sustained by the owner of the structure who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic."

which further emphases the point.

[102] Finally, the defendants rely on the more recent case of *Sportcity 4 Management Ltd and others v Countryside Properties (UK) Ltd* 192 Con LR 131 which involved the cladding on blocks of apartments.

[103] Lord Keith within his judgment makes two helpful observations.

[104] At para [472] he says:

> "the precise extent and limits of the liabilities which in the public interest should be imposed upon builders and local authorities are best left to the legislature" (supra) which reinforces the policy backing.

[105] And, (at para [470]) on the question of "other property" (for which read complex structure) said:

> "I think it would be unrealistic to take this view as regards a building the whole of which has been erected and equipped by the same contractor."

***Consideration***

[106] In my view, those questions of policy and/or practicality (or artificiality) coupled with a compelling line of authority (as outlined above) are sufficient to deny the plaintiff an action in the present case on the grounds that such a claim is squarely one of economic loss.

[107] To deal specifically with the plaintiff's contentions as detailed in the pleadings:

(i) They purport to rely on obiter dicta from which, as I have said, even Lord Bridge himself as the originator of the comments has sought to resile;

(ii) They do not reflect much less respect the actual ratio decidendi in *Murphy* itself; and

(iii) The propositions upon which the plaintiff relies have been considered unreliable by a number of subsequent decisions and comprehensively been rejected – none more so comprehensively than as expressed by Keyser J in the *Taylor Wimpy* case (above) and the very recent case of *Sportcity* which, as I have said, the plaintiff has not sought to challenge.

[108] The reality, in simple terms, is that it is artificial to suggest that the facia and/or Column E2 can be treated other than as an integral and fundamental part of the structure of the Residential Development. The position which applies to this case is, in my view, best captured by the dictum of Stanley Burton J in *Robinson*:

> "The loss sustained by the owner of [a] structure who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic."

[109] That would seem to apply to the situation here.

[110] On the statement of claim filed by the plaintiff the remedy sought is for the demolition and rebuilding of the residential premises. To this the defendants say that the loss claimed falls squarely within the category of economic loss and so irrecoverable. The contrary argument that is advanced by the plaintiff is not, in my view, and for the reasons given sustainable, and so should be struck out.

[111] There are some additional considerations made by the plaintiff as regards the third defendant. On the question of negligence the plaintiff asserts a duty that the third defendant would "exercise all reasonable care and skill as a structural engineer and/or architect would in/about the design and supervision of the Residential Development" which it has breached. In its submission it asserts an assumption of responsibility, but there is, however, no specific pleading within any of its pleadings in respect of the assumption of a particular responsibility, nor does the affidavit evidence support any such conclusion. In broad terms, there is no contractual nexus pleaded as between the plaintiff and the third defendant (ie on the simple basis that

there was no engagement or contract between them) that leaves only the question of a tortious claim but that in considering that issue there is no evidence of the assumption of a particular responsibility nor is that pleaded. In the absence of that, and for the sake of completeness, I do not consider the plaintiff's claims in this specific regard as against the third defendant are worthy of being taken forward to trial.

[112] Therefore, whilst I recognise the potential existence of an exposure, I have concluded that it has been raised here as a concept but not fully pleaded nor, indeed, does it appear to have any sustainable basis on the facts of this case.

[113] Taking all these matters in the round, I am decidedly of the view that the plaintiff's claims in negligence primarily raise questions of pure economic loss and alternatively disclose no good cause of action and so accede to the application that they should be struck out. Equally, to the extent a breach of duty is alleged against the third defendant, I conclude it has not been particularised or fully pleaded and has no basis. On this view the question of limitation does not arise.

***(c) Claims arising in nuisance and/or based on the lease***

***(i) Under the Head Lease***

[114] Although discontinued, the plaintiff originally made the case in its skeleton argument that the fourth, fifth and sixth defendants (collectively "CGI") are and remain the owners of the commercial development within Victoria Square upon which the Residential Development indisputably relies for support and from which certain obligations then flow. The plaintiff makes the argument that (i) CGI as the head landlord pursuant to the lease dated 16 April 2009 (ie the Head Lease) between CGI and Multi-Residential Developments (UK) Ltd (ie Multi) has responsibilities in its capacity as lessor that are enforceable by the plaintiff directly; (ii) further it was originally pleaded that CGI were an entity "which oversaw, directed and controlled the remedial works to Victoria Square" done to the Residential Development. Indeed, on that basis the plaintiff originally sought to amend its statement of claim to include a breach by CGI of the DPO. That point, I no longer need to consider.

[115] The more material point that I feel I must deal with (for completeness) is that the plaintiff originally argued that under the Head Lease CGI (as Head Landlord), owed a continuing repairing obligation in respect of the whole of Victoria Square – ie including the Residential Development - not just to the original tenant as the party in relation to which privity of estate existed, but also to Multi's successors in title on the basis that they are included within that broad definition in the Head Lease. The argument advanced suggests that the lessor's repairing obligations extend to the benefit of the plaintiff as Multi's "successor in title" as distinct from their position as Multi's sublessees.

[116] In the present case, they argue that given the nature of the Head Lease it is "manifestly unclear" that the phrase "successors in title" is confined purely to a

horizontal assignment of title such that would exclude those who would derive title by receiving a lesser interest (such as (in this case) the apartment owners as sublessees).

[117] The plaintiff says that it is clearly the case that the plaintiff (and other occupiers) were **intended** to have the benefit of the repairing covenant in the Head Lease and that the plaintiff owners should be entitled to enforce the repairing of the covenant (to which they were not strictly party) such that they should not be denied a remedy. The plaintiff cites *Linden Garden Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 to suggest that as the right of assignment under the lease is unrestricted and that "in the present case, the owners would be entitled to enforce those contractual rights which were not theirs."

***The reply of the CGI defendants***

[118] Before the discontinuance of this aspect of the action, the case made by the CGI defendants was relatively straightforward. Firstly, in context, they say that CGI was not included in the funding or development of the Residential Development and that of Multi was the party who took over that aspect of the development and was the only one who stood to gain financially from it. It logically follows, they say, that Multi as the developer would be the party that primarily owed obligations in contract and via direct covenant.

[119] Secondly, the defendants say that the title claims by the plaintiff against CGI arise from a fundamental misunderstanding of the leasehold structure and that (properly understood):

- The Premises (ie the Residential Development) and the "Premises Structure" were essentially "carved out" of the overall Development and that by clause 3.5.1 of Head Lease Multi (as a tenant) covenanted with CGI (as the landlord) to keep the Premises and the Premises Structure "in good and substantial repair" so that the relevant repairing obligations in this case fall squarely upon Multi (and now its successors in title ie in the present case, the management companies); and

- They say that GCI retained the Centre and the Centre Structure (each as respectively defined) (and importantly excluding the Premises) and consistent with that approach covenanted (at clause 4.2.1) with Multi (as its tenant) to keep the Centre and Centre Structure (but because of that exclusion not the Premises) in "good and substantial repair" on the basis that it was clearly only those parts that formed part of the retained structure thus, leaving only the question of the mutual rights of support which each demise respectively required and enjoyed.

[120] On that basis, it is advanced that the defective column (E2) and the spalling brickwork (to the Chichester Street elevation) falls squarely within the responsibility

of Multi (or its successors, ie the management companies in this case) under a correct interpretation of the leasehold structure.

[121] In completing its analysis of the leasehold structure and turning to the individual apartments, CGI says that the plaintiff (together with all other apartment owners) on completion of the development were granted apartment leases in respect of those individual demises and that they thus became sub-lessees of Multi. Turning to those sub-leases CGI says that the only relevant consideration is that Multi "as the tenant of the Head Lease and sub-landlord of the apartment leases covenanted to enforce the covenants in the Head Lease (including [CGI's] covenants) to repair the Centre Structure."

[122] CGI argues that consistent with the entire leasehold structure Multi (or rather now the management companies who replaced it by assignment and transfer with effect from 3 August 2015) are the only parties that were and are subject to the repairing covenants owed to the plaintiff (and the other apartment owners) to keep the Premises Structure (thus including the Columns within the Premises Structure) (and so Column E2) in good and substantial repair subject to the payment of a service charge.

[123] To summarise the point CGI says that the plaintiff's claim as originally framed:

> "displays a misunderstanding of the distinction between the Centre Structure and Premises Structure. The plaintiff's claim pertains to the Premises Structure and so allegations of failing to keep the Centre Structure in good and/or substantial repair are fundamentally inconsistent with the plaintiff's case (the plaintiff has a very limited interest in the Centre Structure, if at all – limited to forcing the management company to enforce the terms of the Head Lease)."

[124] CGI further argues that the reality of this position has forced the plaintiff to argue that it is a "successor in title" to Multi. The CGI defendants say that this argument is fundamentally flawed and that the case falls squarely within the *Snape v Snape* ([1959] 173 Estates Gazette 679) line of authorities.

[125] In simple terms they say that the plaintiff is not a party to the Head Lease but rather is a sub-tenant of Multi and therefore enjoys no privity between the CGI defendants and, as a consequence there can be no allegation of a breach of contract (or covenant) – even if the assertions made by the plaintiff in the statement of claim are taken to be true (as per Gillen J in *Rush*).

***Consideration***

[126] As this aspect of the case is not being pursued, I do not need to take long to deal with it. Fundamentally, I agree entirely with all that the CGI defendants have argued. Given the nature of the leasehold structure the only continuing rights the plaintiff has are against the management companies as Multi's successors in title and then to (a) to enforce the express covenants for repair set out in the Head Lease in respect of the Premises/Premises Structure; and (b) through the lease to enforce CGI's covenants to repair the Centre's Structure insofar as it provides support – which, in my view, on a point of interpretation clearly excludes the Premises Structure (to which (a) above applies). To that extent, the case against the CGI defendants (as pleaded) was fundamentally flawed and, so, strikable but, in any event, has now been compromised. The analysis, however, is relevant to the claims brought against the seventh and eighth defendants (see below).

***(b) In Nuisance***

[127] It is also argued by the plaintiff that given that CGI is a neighbouring owner that the law of private of nuisance comes into play insofar as it may allow a plaintiff in occupation of lands to recover damages where a neighbour does something on or adjoining a nearby land which constitutes unreasonable interference with the plaintiff's use of the land. The plaintiff cites *Tennant Radiant Heat v Warrington Development Corporation* [1988] 1 EGLR 41 where a landlord was in possession of part of a communal roof, which due to blocked drains, flooded and caused water ingress to property occupied by his tenant with the result that the landlord was found to be liable in nuisance on the basis that the resultant damage was reasonably foreseeable.

[128] Taking the plaintiff's case at its height, therefore, it is argued that CGI's failure to engage in their own repairs and/or identify or address problems as regards the column (which is communal to both the resident and commercial premises) has led to damage to the plaintiff's land and that while CGI have allowed temporary propping up, they have denied responsibility and carried out no further repairs which has caused or exacerbated the plaintiff's claim in damages subject to further investigative work and expert evidence.

[129] Ultimately, I do not need to consider this debate, but the claim in nuisance was not forcibly made either on the pleadings or at trial. It is a view, in any event, with which I cannot agree. I entirely endorse and adopt the arguments advanced by the defendants on this point and do not consider the alternative to present an arguable case.

***(c) Under the DPO/Statutory Duty***

[130] I should also (for completeness) acknowledge the plaintiff also originally sought to extend its claim against the CGI defendants to include a claim under the DPO against CGI on the grounds that CGI was the entity which oversaw and/or instructed and/or arranged for the carrying out of remedial works to Victoria Square, including the Residential Development and to the Chichester Street façade, repairs

which Professor Don McQuillan, (CGI's expert) has accepted were carried out. They certainly suggest that as regards the "brick spalling" that CGI oversaw those works and that, overall, a strike out application is wholly inappropriate.

[131] To this allegation the CGI defendants point to the nature of the plaintiff's statement of claim particularly at paragraph 17:

> "Further, at a date presently unknown to the plaintiff, CGI oversaw remedial works to the spalling brickwork, the defects relating to same being set out more particularly below."

[132] To this claim the CGI defendants refer to the affidavit provided by Geoffrey Knight on behalf of the managing agents who confirms, firstly, that the repairs undertaken (as regards spalling) was to the William Street South elevation and that it was completed in March 2015.

[133] The CGI defendants argues that the normal limitation of a period of six years applies and, therefore, the plaintiff's claim is statute barred.

[134] More fundamentally the CGI defendants say that they are not subject to the defective premises legislation as their involvement was as landlord under Head Lease and that they themselves were not responsible for developing or the funding of the residential elements and that nor are they involved within the service charge arrangements and that therefore the statutory scope of the obligations owed under the DPO do not extend to them. Their ultimate position is that the only obligation to repair that CGI has are those which are defined by the leasehold structure and that fundamentally the plaintiff's claim now rests with enforcement of the obligations on the part of the management company (as successor to Multi) but that CGI defendants have no obligations as pleaded.

***Consideration***

[135] Given the development of this case, I do not need to consider the plaintiff's claims against the fourth, fifth and sixth defendants in detail, but for the sake of completeness, I entirely agree with the analysis advanced on behalf of the CGI defendants on the following basis:

(a) The plaintiff is not successor in title of Multi – they are, properly considered, sublessees and have recourse through their ability to seek enforcement of superior covenants but only by the enforcement of those obligations as assumed by their direct landlord (ie the present management companies) on assignment;

(b) The attempt to advance the argument that they are "successors in title" from a linear perspective holds no merit whatsoever;

(c) The argument in nuisance was flawed and not seriously addressed;

(d) Although it does not fall for consideration there is no merit in the argument that the statement of claim should be amended to include a breach of statutory duty on the part of the CGI defendants, and even if it were, given what I have said above on limitation, I take the view it would be statute barred, finally;

(d) The plaintiff's position is in all respects governed by the leasehold structure of which they are an integral part.

***Seventh and eighth defendants***

[136] The final aspect of the plaintiff's claim relates to the actions brought by it against the seventh and eighth defendants largely in respect of breach of covenant in/about:

(a) its/their failure to maintain and/or repair the Residential Development under the Lease; and/or

(b) the Common Parts from which damage has ensued.

[137] In broad terms, therefore, the plaintiff's claim as disclosed by the statement of claim as regards this aspect is based on negligence, breach of statutory duty, breach of covenant and/or breach of warranty.

[138] In addition to the claim for damages the plaintiff claims specific performance in respect of the seventh and eighth defendants' obligations under the Lease together with costs and interest.

[139] The seventh, eighth and ninth defendants did not participate in this action and this judgment does not make any finding in respect of the claims against them.

***Conclusion***

[140] As will be apparent, this is a difficult case. It would also be wrong of me not to acknowledge the personal trauma and worry that the underlying factual circumstances will have caused not just for the plaintiff as a housing charity but for the other affected owners and occupiers of the Residential Development. In reality, however, what the claim boils down to is a plea to let it proceed to trial in "common justice" as per the *Robinson* case (see para [47] above). Nonetheless, the problem that the plaintiffs face is that the legislature has both considered (in some detail) the policy considerations around this whole area and has legislated for them – in this jurisdiction through the provisions of the DPO. The limitations imposed by the Limitation Order in terms of the period within which claims must be brought has caused the plaintiff to

advance some innovative arguments but, as I have highlighted, even taking the case advanced at its height – which I am obviously required to do – I do not think that a case has been advanced (either in the pleadings or in the preliminary facts advanced) which is either a good one or one that is ultimately arguable - other than as they relate to the enforcement of leasehold covenants against the seventh and eighth defendants. In coming to this conclusion, I have adopted the guidance provided the House of Lords in the *Three Rivers* case and have assessed that the arguments advanced do not hold sufficient merit to be advanced to trial – notwithstanding the personal impact that such a conclusion will have for all of the plaintiffs for whom I have the utmost sympathy. Save for the enforcement of the leasehold covenants as against the seventh and eighth defendants, I do not consider the arguments advanced to be arguable. Given that is my conclusion I therefore grant the strike out applications against the first, second & third defendants.

[141] In relation to the action brought against the CGI defendants, that is, by consent, dismissed with no order as to costs.

[142] If required, I will hear the remaining parties on the question of costs and/or in respect of any consequential directions or matters arising.

[143] I express my sincere thanks to all counsel for their helpful written and oral submissions.

**O'Reilly Stewart Solicitors for the Plaintiffs**

| | VICTORIA SQUARE | SCHEDULE OF WRITS | | |
|---|---|---|---|---|
| | **Matter** | | **Description** | |
| | 11000582-0001 | Writ Number | Owners Victoria Square (Master File) | Apts |
| 1 | [redacted] | 20/33821 | [redacted] - Marek & Aldona Slomkowski | 1 |
| 2 | [redacted] | 20/33828 | [redacted] - Gerald Martin & Karen Grace Ainsworth | 1 |
| 3 | [redacted] | 20/33822 | [redacted] - Carlo Emmanuel &Nicole Grace Greene Felloni | 1 |
| 4 | [redacted] | 20/33819 | [redacted] - Mark & Maura O'Connor & Mark & Scharlee McElroy | 1 |
| 5 | [redacted] | 20/33817 | [redacted] - Stephen David & Helen Threlfall | 1 |
| 6 | [redacted] | 20/33813 | [redacted] - Paul Reginald & Denise Ann Patrick | 1 |
| 7 | [redacted] | 20/33807 | [redacted] - Simon Mark English | 1 |
| 8 | [redacted] | 20/33796 | [redacted] - Richard Alexander & Heather Elizabeth Milliken | 1 |
| 9 | [redacted] | 20/33812 | [redacted] - Terence & Karen Mitchell | 1 |
| 10 | [redacted] | 20/33682 | [redacted] - Trevor & Gillian McCrory | 1 |
| 11 | [redacted] | 20/33688 | [redacted] Belfast - Martin Scott | 2 |
| 12 | [redacted] | 20/33691 | [redacted] - Nigel Nixon | 1 |
| 13 | [redacted] | 20/33676 | [redacted] - Judith Hilary Rea | 1 |
| 14 | [redacted] | 20/33669 | [redacted] - Patrick McKeague | 1 |
| 15 | [redacted] | 20/33797 | [redacted] - Steven Paul Green | 1 |
| 16 | [redacted] | 20/33834 | [redacted] - Sviatlana Tretsiakova | 1 |
| 17 | [redacted] | 20/33833 | [redacted] - Brian & Oonagh Boyle | 1 |
| 18 | [redacted] | 20/33802 | [redacted] - Eoin Patrick McGuigan | 1 |
| 19 | [redacted] | 20/33663 | [redacted] - Khalid Mohsin Thabeth | 1 |
| 20 | [redacted] | 20/35404 | [redacted] - Luba Nowak | 1 |
| 21 | [redacted] | 20/33656 | [redacted] - Melinda Luchini | 1 |
| 22 | [redacted] | 20/33617 | [redacted] - Stephen & Helen Ann Johnston | 1 |
| 23 | [redacted] | 20/40340 | [redacted], [redacted] - Barry & Margaret O'Neill Macdonald | 2 |
| 24 | [redacted] | 20/40375 | [redacted] - Eoin Macdonald | 1 |
| 25 | [redacted] | 20/40388 | [redacted] - Maeve Nora Macdonald | 1 |
| 26 | [redacted] | 20/40407 | [redacted] - Nora Kate Macdonald | 1 |
| 27 | [redacted] | 20/35408 | [redacted] - June Hill | 1 |
| 28 | [redacted] | 21/24958 | [redacted] - Brian McAuley | 1 |
| 29 | [redacted] | 20/33473 | [redacted] | 54 |
| | | | | 84 |