

Claim No: 8T-00168

**Neutral Citation Number: [2010] EWHC 1398 (TCC)**  
**IN THE HIGH COURTS OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**TECHNOLOGY AND CONSTRUCTION COURT**

Royal Courts of Justice  
Strand  
London WC2A 2LL

Friday, 8<sup>th</sup> January 2010

BEFORE:

**MR JUSTICE RAMSEY**

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BETWEEN:

**MR AND MRS HARRISON AND OTHERS**

Claimants

**- and -**

**(1) SHEPHERD HOMES LIMITED**

Defendants

**(2) NATIONAL HOUSE BUILDING SCHEMES**

**(3) NHBCBUILDING CONTROL SERVICES**

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MR ANDREW BARTLETT QC and MR ROBERT STOKE (Instructed by Tilly Bailey & Irvine) appeared on behalf of the Claimants

MS SARAH HANNAFORD QC (Instructed by Pinsent Masons) appeared on behalf of the Defendants

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**Approved Judgment**

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(Official Shorthand Writers to the Court)

MR JUSTICE RAMSEY:

**Introduction**

1. This is an application by the Second Defendant (“NHBC”) against the Claimants to strike out the claims made against it under CPR Part 3.4 and for summary judgment under CPR Part 24.

**Background**

2. The Claimants are the owners of some 71 properties on a housing development at the Eden Park Estate in Hartlepool. They allege that there are defects in the foundations, drainage and other aspects of the development. They commenced proceedings by a claim form dated 29 February 2008 against the First Defendant (“SHL”), a builder and developer, against NHBC and against the Third Defendant (“NHBC BCS”) who carried out supervision services on the development. Encia Remediation Limited (“Encia”) gave advice to SHL and were sub-contractors to SHL in respect of the installation of piles and preparation of the site for development. SHL issued proceedings in 2005 against Encia, which were heard and determined by Jackson J. I will refer to that as the Encia Litigation.
3. The development had Buildmark cover, which imposed obligations on SHL and the NHBC, details of which are set out in the Buildmark document appended to the Particulars of Claim in these proceedings. The Buildmark cover relevant to this application is that set out in sections 2 and 3 of the Buildmark document. In summary:
  - (1) Section 2 provides obligations on SHL if the owner gives written notice of defects or damage in their house. Essentially, SHL has to put right any defect and damage at their own expense, if it is notified to them within the period of cover, which is two years from the insurance certificate.
  - (2) Section 3 provides obligations on NHBC to pay for or arrange for work to be carried out at their expense to put right damage caused by a relevant defect. It states that the owner must tell NHBC of their claim as soon as possible within the period of cover, which starts two years after the date shown on the insurance certificate and ends ten years after that date. Under this cover it states that NHBC will not pay for “anything which was or could have been reported [SHL] under section 2.”
4. In these proceedings the Claimants bring claims against SHL under section 2 of the Buildmark document and against NHBC under section 3 of that document. They also bring other claims against SHL for breach of the sales agreement, for breach of common law duties and for breach of duties under the Defective Premises Act 1972 and they also make claims against NHBC BCS. As a result of this application the Claimants have stated that they are no longer pursuing claims in negligence or under the Defective Premises Act 1972 against NHBC. The hearing of this application was therefore limited to the consideration of claims under section 3 of the Buildmark document.

**These proceedings**

5. The claims against SHL concern foundations, drainage and various other matters. These claims against SHL are proceeding to a trial in June 2010 based on the basis of ten lead cases. By an order sealed on 1 August 2008, the claims against NHBC and NHBC BCS were stayed by consent pending compliance with the pre-action protocol for construction and engineering disputes and the time for service of any defences was to be the subject of

further directions. Prior to that date there had been exchanges of correspondence between the Claimant's solicitors ("TBI"), NHBC and NHBC's solicitors, Pinsent Masons.

6. In relation to foundation defects, NHBC classified the properties in three categories, in a letter dated 16 June 2008. First, there were properties which were accepted by NHBC as having valid claims under section 3 of the Buildmark cover. Secondly, there were properties which were currently being monitored by SHL and on which a judgment could then be made in the future by NHBC in respect of any repairs required under section 3 of the Buildmark document. Thirdly, there were properties where no monitoring was taking place as the judgment in the Encia litigation had concluded that the foundations were adequate, but where monitoring was to take place to see whether there were in fact claims under section 3 of the Buildmark document. Subsequent to the letter, NHBC proceeded to carry out remedial works to the properties in the first category and monitor the other properties.
7. On 9 July 2008, the Claimants served a letter of claim which was responded to by NHBC on 10 October 2008. In the response NHBC confirmed that it accepted responsibility for the costs of such rectification as may be proved necessary and said they would undertake appropriate repairs to certain properties, at their expense in accordance with section 3 of the Buildmark document. The relevant properties were referred to as the Section 3 Plots.
8. NHBC said they first received notification from some Claimants on 5 February 2007 and that others notified them on 30 August 2007. They said that the Claimants chose to issue proceedings in February 2008 without notification to NHBC, at a time when NHBC had not finalised its position in relation to the claims. They said they failed to see the basis for the Claimants' pleaded breach of any obligations under the Buildmark cover. They then said this at paragraph 2.8:

*"In the light of the confirmation provided by our client in respect of the Section 3 Plots and the actions taken by NHBC to date in pursuance of its obligations in respect of those properties, therefore, we should be grateful for your confirmation of the following:*

*2.8.1 That the owners of properties other than the Section 3 Plots neither have nor make any claims against NHBC under or for any alleged breach of the Buildmark policy (such properties being dealt with by Shepherd);*

*2.8.2 That the owners of the Section 3 Plots do not currently allege or advance any claims in respect of breach of the relevant Buildmark policy on the part of NHBC.*

*2.8.3 If any owner of the Section 3 Plots does allege a breach on the part of NHBC of its obligations under the Buildmark policy:*

*(a) The names of the Claimant(s) wishing to pursue such a claim;*

*(b) The details of the property to which that claim relates;*

*(c) Full particulars of any alleged breach(es) on the part of NHBC and its obligations under the relevant Buildmark policy.*

*(d) The grounds relied upon in support of any such claim."*

9. On 28 November 2008 TBI wrote saying that they had evidence of defects in the drainage to the properties. They gave notice to NHBC of a defect with the drainage under the Buildmark policy.
10. On 14 May 2009, TBI wrote to Pinsent Masons to say that 13 claims had settled against SHL and that, "all outstanding claims had been settled in respect of them." They said:

“In the circumstances we would suggest that the following Claimants discontinue their claims against your clients on the basis that there is no order as to costs.”

11. On 11 June 2009 Pinsent Masons wrote following a without prejudice meeting, to say, by reference to a list of Claimants, that in relation to those claims:

*“NHBC is willing to accept your proposal on the claims made under section 2 of the Buildmark policy which have been settled with [SHL]. Therefore, we are willing to accept your proposal that the following Claimants discontinue their claims against both our clients on the basis that there is no order as to costs.”*

12. They also proposed the withdrawal of certain Section 3 Claims and said:

*“In the meantime we must reserve all of our clients’ rights including the right to apply to strike out all or part of your clients’ proceedings pursuant to CPR Rule 3.4 on the grounds that your clients’ statement of case discloses no reasonable grounds for bringing those claims. We also reserve our clients’ right to apply for summary judgment on all or part of your clients’ claims under CPR Part 24.”*

13. No response was received from TBI and Pinsent Masons wrote on 16 July 2009, 6 August 2009, 19 August 2009 and 2 October 2009 requesting a response. On 15 October 2009, NHBC issued the current application which was considered at the case management conference on 23 October 2009. Directions were then given for the stay of proceedings to be lifted in relation to this application and for an exchange of submissions. In addition, it was ordered that if the Claimants proposed to narrow or retract any claims they should write to NHBC by 4pm on 16 November 2009.

14. TBI did write on 16 November 2009 and set out their position, as follows, at paragraphs 12 and 13 of that letter:

*“12. The Claimant’s primary claims are against SHL. SHL has so far failed or refused to compensate the Claimants for their loss save in respect of the following plots...”*

which it referred to as “the Settled SHL Plots”. They continued:

*“13. Accordingly:*

*(1) The Claimants will not pursue Section 3 claims against NHBC in relation to the Settled SHL Plots unless they are affected by defects which were not remediated by SHL.”*

It should be noted that the Settled SHL Plots included both Section 2 Plots and Section 3 Plots as they have been described. The letter continued:

*“(2) In relation to the remediated section 3 plots:*

*a. The Claimants will not pursue claims against NHBC for remedial works already completed satisfactorily, and section 3 costs already paid, but*

- b. *the Claimants will pursue claims for legal cost;*
- c. *The Claimants reserve the right to claim in respect to any of the Remediated Section 3 Plots which are the subject of New Section 3 Claims.*
- d. *all Claimants unreasonably affected by NHBC's remediation works reserve the right to claim for nuisance.*

*(3) The Claimants will not pursue Section 3 claims against NHBC in relation to SHL Plots for matters for which SHL has in principle accepted responsibility under Section 2. However, they will pursue Section 3 claims against NHBC in relation to SHL Plots, which are the subject of New Section 3 Claims.*

*(4) In regard to all unremediated Section 3 Plots the Claimants will continue to pursue against NHBC their claims under Section 3 of the Buildmark policy as per paragraph 23 of the Particulars of Claim (broken as alleged in paragraph 53) on the basis that it is liable to pay the full cost of remedial works (or to carry them out) and to pay for removals, storage, appropriate alternative accommodation and legal costs. At present NHBC has not done so."*

15. It was in that letter that they then stated that they were not pursuing claims against NHBC in negligence or under the Defective Premises Act 1979.
16. On 30 November 2009 Pinsent Masons sought clarification of the Claimant's position in respect of the Settled SHL Plots, the remediated section 3 plots, the SHL plots and unremediated section 3 plots. In respect of the first two categories TBI said this in a letter dated 7 December 2009:

"Your request for final confirmation from the claimants in respect to defects in Settled SHL Plots and Remediated Section 3 Plots cannot be answered conclusively until engineering investigations (including NHBC's ongoing drainage investigations), engineering consideration and indeed works by NHBC have been completed. This delay is the unavoidable consequence of the serious defects and damages in the homes and on the plots. Any strike-out application in relation to such issues would be premature. Further particulars will be provided as soon as possible."

17. In relation to the last two categories they did not respond to Pinsent Mason's letter.

### **The Application**

18. Miss Sarah Hannaford QC, who appears for NHBC, submitted that on analysis the Claimants only made claims in these proceedings against the NHBC in relation to foundation defects. In respect of those foundation defects she submitted that:
- (1) In relation to the claims made against SHL then SHL has accepted responsibility for certain plots, the section 2 plots, by appendix 1 to the defence, in respect of properties which the Claimants plead at appended H to the Particulars of Claim as being plots for which they gave notice to SHL. In such circumstances NHBC contend that the Claimants are not entitled to sue the NHBC for breach of section 3 of the Buildmark cover as section 3 excludes liability for anything which was or could have been reported to SHL under section 2.

- (2) In relation to 11 of the section 2 properties, SHL has carried out remedial works and in relation to 9 of those properties the Claimants have settled with SHL. This is a further reason, she submitted, why the Claimant's proceedings against the NHBC should be struck out or summary judgment given for the NHBC.
  - (3) In relation to certain properties, claims said to have been made under section 3 of the Buildmark document were notified by some Claimants on 5 February 2007 and others on 30 August 2007. The NHBC investigated the claims and agreed with SHL a division between properties in May 2008. The NHBC proposed on 16 June 2008 to deal with the section 3 properties as follows:
    - (a) It proposed to carry out remedial works to six properties.
    - (b) It proposed taking over the monitoring of 11 other properties from SHL.
    - (c) It proposed carrying out monitoring of 21 further properties, in relation to which Jackson J had concluded in Encia litigation that the foundations were adequate.
  - (4) The NHBC has carried out remedial work to 7 properties as proposed in its letter of 16 June 2008 and one further plot, which they refer to as the remediated section 3 properties. In relation to those properties the work was completed and handed over to the relevant Claimants between 13 May 2009 and 7 October 2009. There was therefore, Miss Hannaford submitted, no breach of section 3 of the Buildmark document and the Claimants cannot hold proceedings over until such time as they decide whether the remedial works are satisfactory. Further, NHBC contend that the Claimants cannot reserve their rights to bring claims for nuisance or for drainage. In relation to the balance of the properties being dealt with under section 3 of the Buildmark document, she submitted that NHBC is monitoring those properties and there has been no breach of section 3. The joint statement of the experts instructed by the Claimants and SHL does not indicate that remedial work is necessary as a result of the monitoring.
19. Mr Andrew Bartlett QC, who appears with Mr Robert Stokell on behalf of the Claimants, submitted that this is not an appropriate case to strike out the claims against NHBC or give summary judgment. First he submitted that section 2 and section 3 are not mutually exclusive. Secondly, he said that the effect of the agreement between the NHBC and SHL is uncertain and as against the Claimants the agreement has no effect.
20. Mr Bartlett also submitted that the provisions in section 3, which purport to exclude liability for anything which was or could have been reported to the builder under section 2 is not enforceable, as it is unfair under the Unfair Terms in Consumer Contracts Regulations 1999, which I will refer to as the 1999 Regulations and, for the purpose of this application the point is, at the least, reasonably arguable. In any event Mr Bartlett submitted that the fact that notice has been given under Section 2 does not mean that no claim may be made under section 3.
21. In relation to the section 2 properties where there has been a settlement between the Claimants and SHL then the settlements are not specifically pursuant to section 2 and do not rule out a claim under section 3, although Mr Bartlett accepted that any recovery falls to be deducted from any section 3 claims in relation to the same matters. Even if there are no further matters of complaint, then the Claimants were entitled to bring proceedings and recover costs against the NHBC insofar as they are not recovered against SHL.

22. In relation to the section 3 properties, Mr Bartlett submitted that the ensuring clause of section 3 of the Buildmark cover requires “NHBC to pay for the items ... or at [NHBC’s] option arrange for the necessary work to be carried out at our expense.” He said that the NHBC is not correct in stating that it has no obligations under clause until it has taken a decision on how to deal with the claim. He submitted that section 3 provided insurance cover and that, as a general rule in relation to property insurance, the insurance cause of action arises as soon as the insured peril occurs. He referred me to Macgillivray on Insurance Law (11th Edition) at paragraph 19-053; Colinvaux’s Law of Insurance (8th Edition 2006) at paragraphs 9-32 to 9-33 and to Callaghan v Dominion Insurance Company Limited [1997] 2 Lloyd’s Reports 541.

23. In Callaghan at 544, Sir Peter Webster said this:

*“...It may be helpful to define as precisely as may be the nature of indemnity insurance. Expressions such as “to insure against” or to “save harmless from” loss may be capable of misleading. It seems to me that the best way to define an indemnity insurance is that it is an agreement by the insurer to confer on the insured a contractual right which, prima facie, comes into existence immediately when loss is suffered by the happening of an event insured against, to be put by the insurer into the same position in which the insured would have been had the event not occurred, but in no better position.”*

24. In Callaghan the policy provided as follows:

*“During the period of insurance the insurers will pay to the insured the value of the property at the time of the happening of its destruction or the amount of such damage or at their option, reinstate or replace such property or any part thereof.”*

25. Sir Peter Webster said this: *“I cannot conclude that those words have the effect of postponing the insurer’s primary liability; They merely indicate the alternative ways in which that liability may be satisfied.”*

26. In this case, Mr Bartlett submitted that there are no words expressly postponing the accrual of the cause of action and therefore, the cause of action accrues at the time of the relevant damage or at the latest, when NHBC received notice of the claim. In relation to drainage defects, Mr Bartlett submitted that the Particulars of Claim include a claim for drainage and that the letter of 28 November 2008, to which I have referred, does not affect that position. In relation to the section 3 properties, which have been remediated, then even if the remediation has been sufficient to deal with the matters of complaint, he submitted that the Claimants are still entitled to claim the costs of the proceedings.

### **Decision**

27. This is a case where matters have been proceeding on the basis that the claims by certain Claimants against SHL for 10 lead properties would be determined first. Therefore detailed particulars have not been ordered to be served. In addition, the proceedings against NHBC had been stayed until they were lifted for the purpose of this application. As Mr Bartlett submitted, if NHBC had wanted the case against it to be spelt out and progressed in these proceedings it could have done so. However, the purpose of the stay was so that matters could proceed in accordance with the Pre-Action Protocol for Construction and Engineering Disputes. The purpose of that protocol is, amongst other things, for a party to be provided with sufficient information to know the nature of the other party’s case so that proceedings can be conducted efficiently.

28. The position reached was set out in TBI's letter of 16 November 2009 which summarised the current position in relation to the Claimants' claims. It does not contain detailed particulars of the damage caused by defects, which would be necessary for the matter to proceed to trial. Therefore, the claim as pleaded by the Claimants in paragraphs 22, 23 and 53 of the Particulars of Claim against NHBC is general and unparticularised. Whilst the stay has been in place the matter has been dealt with in correspondence, which has not resulted in any clear statement of what claims the Claimants seek to pursue. There has been no defence and issues which might have been raised in the reply, such as the enforceability of the exclusion of liability clause in section 3 of the Buildmark document have not been properly formulated.
29. In these particular circumstances, is this a case where the claim should be struck out because the Statement of Case discloses no reasonable grounds for bringing the claim or should summary judgment be given because the Claimants have no real prospect of succeeding in their claims and there is no other reason for the case to be disposed of at trial?
30. I start by consideration of the nature of NHBC's liability under section 3 of the Buildmark cover. I accept and it is not contended otherwise, that essentially this is a policy of insurance for Damage caused by a Defect as those terms are defined in the Buildmark document. I also accept Mr Bartlett's submission that liability under such provisions arises when the loss is suffered and that the cause of action is one of breach of contract against NHBC. As stated by Sir Peter Webster in Callaghan at page 543, the position is neatly summarised by Lord Goff in Firma C-Trades SA v Newcastle Protection and Indemnity Association [1990] 2 Lloyd's Reports 191 at 202 as follows:
- "I accept that at common law a contract of indemnity gives rise to an action for unliquidated damages arising from the failure of the indemnifier to prevent the indemnified person from suffering damage, for example, for having to pay a third party. I also accept that, at common law, the cause of action does not (unless the contract provides otherwise) arise until the indemnified person can show actual loss – see Collinge v Heywood [1839] Ad & E 634. This is, as I understand it, because the promise of indemnity is simply a promise to hold the indemnified person harmless against a specified loss or expense. On this basis, no debt can arise before the loss is suffered or the expense incurred; however, once the loss is suffered or the expense incurred, the indemnifier is in breach of contract for having failed to hold the indemnified person harmless against the relevant loss and expense."*
31. That analysis is historically the way in which insurance claims have been viewed in English law: see paragraph 19-053 of Macgillivray on Insurance Law (11th Edition) and the comparison to Scottish and Irish law in this respect in footnote 208.
32. Whilst there is a requirement in section 3 of the Buildmark document that "you must tell the NHBC as soon as possible within the period of cover," I do not consider that this is sufficient to postpone the accrual of the cause of action until that notice is given. The liability arises under the provision which requires that NHBC will pay for certain things. Nor do I consider that NHBC's wish to investigate the claims has any effect on NHBC's liability under section 3 or its date of accrual. The claim may be a good or bad one after investigation but that does not affect the date when a good claim accrues.
33. Here the Claimants assert that they have given notice to SHL under section 2 and have a claim against the NHBC for breach of contract under section 3, as they have suffered loss



because of Damage caused by a Defect for which NHBC have failed to indemnify the Claimant In such circumstances, does such an allegation come within the test to strike out or for summary judgment under the CPR?

34. In relation to the section 3 claims where NHBC's position is that they should be monitoring them, I see no grounds on which the pleaded allegations in relation to foundations could come within those tests. There are arguable claims as pleaded, that Damage has been caused by Defects in the seven year period of section 3 of the Buildmark document. Where NHBC has undertaken remedial work to the Section 3 Plots, then it is clearly arguable, at the very least, that this amounts to an acceptance of liability. I consider the question of whether the Claimants can recover other than nominal damages will depend on whether the remedial works have been satisfactory and, in any event, the Claimants can, in my judgment, still maintain those proceedings, if only to argue for costs. However, if the Claimants are to proceed further with the section 3 claims in respect of these remediated Section 3 Plots, there is clearly a need for particularisation.
35. In relation to the section 2 plots the argument depends on whether there can still be a claim under section 3 of the Buildmark document where the Claimants assert that they have a section 2 claim against SHL and SHL have agreed with the NHBC a division of responsibility in the agreement of May 2008. I consider that there are a number of reasons why the Claimants can pursue section 3 claims in such circumstances.
36. First, there could be Damage caused by a Defect in years three to ten, which is not covered as a Defect or Damage notified to SHL in the initial two year period. Without particularisation of the claims the position is at least arguable.
37. Secondly, the claims made against SHL are made under a number of heads and may succeed under other heads and fail under section 2 and there might therefore still be claims under section 3.
38. Thirdly, the agreement made between SHL and the NHBC in May 2008 by which they sensibly divided claims for different plots on the basis of their views as to potential liability does not bind the Claimants as to that division. The Claimants could, for instance, argue that whilst a Defect was notified to SHL under section 2, there is independent Damage caused by a Defect, for which the NHBC has liability under section 3.
39. Fourthly, for present purposes, I accept that the Claimants have raised sufficiently arguable grounds that the exclusion clause in section 3 is unfair under the 1999 Regulations for that issue not to be summarily determined on this application. If the exclusion clause were unfair and therefore, unenforceable, that would mean that whether or not there was a section 3 claim would depend on the other terms of section 3 and whether it was arguable that Damage covered by a Defect in years three to ten was recoverable, even if the Defects were or could have been notified to SHL in years one to two. I reach the conclusion that the matter is arguable because, if for no other reason, the matter has not been full pleaded, it was raised for the first time in the Claimant's skeleton in response to the application and was then the subject of submissions that developed during the hearing and have been continued in further emails received since the hearing.
40. However, those submissions do indicate arguable grounds that the provision in section 3, which excludes a claim under section 3 if the claim could have been reported to the builder under section 2, might be unfair under the 1999 Regulations, because amongst

other things, it could lead to a case where there is neither a claim under section 2 nor a claim under section 3, in relation to Damage caused by a Defect despite the widely publicised view that the cover under the NHBC Buildmark document provides a full ten years cover. This would depend on an assessment of the unfairness, which in accordance with Regulation 6.1 of the 1999 Regulations, has to take account of the nature of the goods or services for which the contract was concluded and by referring at the time of conclusion of the contract to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent. That issue is clearly not suitable for summary disposal.

41. I also accept as arguable the submission by Mr Bartlett that this provision in section 3 of the Buildmark document would come within paragraph N of the non-exclusive list of provisions in schedule 2 of the 1999 Regulations and would not come within Regulation 6(2)(a) which provides: “(2) *In so far as it is in plain intelligible language, the assessment of fairness of the term shall not relate – (a) to the definition of the main subject matter of the contract.*”
42. I was referred to paragraph 15-055 of Chitty on Contracts (13th Edition), which clearly shows that the question of whether the exclusion in Regulation 6(2)(a) applies is arguable. I emphasise that I do not, on this application, make any finding that the provision is unfair. I merely find that Mr Bartlett has raised arguable grounds which cannot and should not be disposed of in these summary proceedings in the circumstances of this case.
43. It follows that I do not consider that on the basis of the matters now argued, the claims for the section 3 plots can be struck out or be the subject of summary judgment under the CPR. It is to be noted that the Claimant’s position argued on this application differed from what was said in relation to the section 3 claims in paragraph 13(3) of TBI’s letter of 16 November 2009, cited above.
44. In relation to the section 2 plots, which have been remediated by SHL and those which have been settled by SHL, then the Claimants have vacillated between withdrawing such claims and now holding out the possibility that there may be section 3 claims in respect of matters not remedied by SHL. That latter position is, I consider, one which given the immature state of particularisation by the Claimants is arguable. Whilst it is difficult to see what further claims the Claimants might have and as I have said, the Claimants were prepared to withdraw such claims against the NHBC on the basis of no order as to costs, I do not consider that given the current status of the claims between the Claimants and NHBC this should lead to the claims being struck out or summary judgment entered.
45. In the circumstances so far as damage caused by Defects in the foundations is concerned, I consider that the Claimants have an arguable case which should not be struck out under CPR Rule 3.4 or be subject to summary judgment under CPR 24. In relation to Damage caused by Defects in the drainage, I do not read paragraphs 23, 24 and 53 of the Particulars of Claim as raising a claim for such Damage. This reading is consistent with the fact that the Claimants only gave notice on 18 November 2008 in respect of drainage defects and the fact that the letter pleaded in paragraph 24 of the Particulars of Claim is limited to foundation defects. I do not consider that the last sentence of paragraph 24 expands upon the scope of the Defects which can be brought within this provision.
46. Accordingly, insofar as the Claimants may seek on the basis of the existing pleadings to rely on what is stated to be new section 3 claims in respect of the drainage, as referred to

in paragraph 9 of TBI's letter of 16 November 2009, then there would need to be an application to amend. Because they are not pleaded, the claims do not fall for consideration on this application.

47. It follows from my analysis of the matters which have been set out above, that I dismiss NHBC's application to strike out the section 3 claims made against it or for summary judgment in respect of those claims. It seems to me that the NHBC must now decide how they wish to proceed in relation to the section 3 claims and, in particular, in the light of the trial of the 10 lead cases by the Claimant against SHL in June 2010. I consider that the position must be resolved earlier than the further case management conference which has been arranged for 19 March 2010.
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