IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
BUSINESS LIST (ChD)

Neutral Citation: [2024] EWHC 1926 (Ch)

Case No. BL-2023-LDS-000012

Leeds Combined Court Centre
Oxford Row

LEEDS LS1 3BG

Date: 13 June 2024

Before District Judge Royle

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Between:

TANDEM PROPERTIES LIMITED **Claimant**

– and –

SHEFFIELD CITY COUNCIL **Defendant**

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Mr Simon Paul of **Fountain Court Chambers** (instructed by **Hay and Kilner**) for the **Claimant**
Mr Christopher Jacobs of **Landmark Chambers** (instructed by **Gowling WLG (UK) LLP**) for the **Defendant**

Hearing dates: 14, 15 March 2024

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Approved Judgment

I direct that pursuant to CPR r.39.9(1) no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

District Judge Royle:

1. This is my judgment on the Defendant's application, dated 8 September 2023, for strike out and/or summary judgment of most, but not all, of the Claimant's claim issued in late 2022 in the Newcastle District Registry. The claim was transferred to Leeds by order of DJ Temple made on 1 April 2023. A costs and case management conference was listed, but vacated when the Defendant made the application with which I am now dealing.

2. I shall refer to the Claimant as "**Tandem**", and the Defendant as **"SCC**". I am grateful to both counsel identified above, and their respective solicitors, for the quality of preparation and advocacy from which the Court has benefitted in this application. I refer to pagination in the hearing bundle [thus].

Background

3. The following is a broad summary of the relevant history only. Insofar as further detail is required, I shall turn to that later.

4. The claim centres on arrangements which were made by SCC with Tandem and others in or around 2007/8 for the redevelopment of an area of Sheffield City Centre. In particular, an agreement made between the parties dated 5 October 2007 ("**the October 2007 Agreement**") by which Tandem agreed to withdraw its opposition to a Compulsory Purchase Order ("**CPO**") in circumstances to which I shall return.

5. The redevelopment area in question was in the region of Barker's Pool to the North West, bordered by Pinstone Street to the North East, with the border continuing around various roads which can be identified from the plan at [**279**]. The development was commonly referred to as the New Retail Quarter ("**NRQ**").

6. Tandem is the owner of a substantial former Salvation Army Citadel ("**the Citadel**") which was within the area of the proposed redevelopment. It is of significance that:

   a) The Citadel was to have been, had the development proceeded as originally planned, at one entrance (on the Eastern side) of a major new shopping area. It would, therefore, have had a 'prime position' in relation to the new development, and

   b) There was a John Lewis & Partners ("**JLP**") department store on the Western flank of the proposed NRQ, and that the original plan was for that store to be compulsorily purchased, and demolished after JLP had relocated to become an 'anchor tenant' in the newly developed NRQ. (The store closed during the pandemic and a decision was taken that it would not re-open.)

7. In order to facilitate the development, it was necessary for SCC to have control of all of the necessary land. It therefore sought CPOs over certain land over which it could not gain control some other way. Two such pieces of land for which CPOs were considered necessary were the existing JLP store and the Citadel.

8. The proposed developer of the NRQ was Hammerson Sheffield (NRQ) Limited ("**Hammerson NRQ**"). Insofar as leases of property within the NRQ were concerned, it appears the landlord would be Hammerson UK Properties PLC ("**Hammerson UK**").

9. The process of obtaining the CPOs involved a Public Inquiry ("**the Inquiry**"). The Inquiry sat on 25—28 September and 9—12 October 2007. The orders were ultimately granted. At least part of the consideration was that the scheme was financially viable.

10. In the run-up to the Inquiry, JLP put in a statement of case dated 9 July 2007 objecting to the CPO. Their objection essentially made it clear that it in fact supported the development of the NRQ but considered it would be wrong to grant a CPO over its premises until it had a 'deal' with SCC to be the anchor tenant in the NRQ [**364—365**].

11. Tandem had also put in a statement of case [**357**] in circa June/July objecting to the CPO over the Citadel. Its case was that acquisition of the Citadel was unnecessary in connection with the scheme, not least because it was Tandem's intention to refurbish the building for retail purposes within a reasonable time scale in line with the rest of the NRQ development ([**359**] ¶4.1).

12. On 31 August 2007, shortly before the Inquiry sat, two agreements were entered into with JLP:

    a) First, a conditional agreement for lease ("**Agreement for Lease**"), between Hammerson NRQ, Hammerson UK and JLP, of the premises in the (yet to be developed) NRQ. In substance, the conditions were such as to ensure that the NRQ was actually capable of occupation by JLP, necessarily including that it had been constructed. That, however, is no substitute for the detail of the provisions in the agreement: see cl. 4.1 [**564**] and schedules 1—5 to the agreement, and

    b) Secondly, an agreement, effectively, to transfer the existing JLP store to SCC in certain circumstances (including by exercise of an option by SCC), notably when the Agreement for Lease became unconditional. Central to Tandem's claims are clauses 19.1—19.6 at [**392**] by which SCC agreed not to implement the CPO against the existing JLP store save in a number of circumstances, and JLP agreed not to object to the CPO.

13. When JLP had largely concluded matters as to the anchor tenancy, its solicitors, Lovells, wrote to Mrs Helen Wilson, the Programme Officer, announcing the withdrawal of its objection ("**the Lovells Letter**") [**366**]. Various parties involved in the Inquiry had made it clear that they wished to be notified if JLP withdrew its objection to the CPO. Accordingly, shortly after receiving the Lovells Letter, DLA Piper (then acting for SCC) wrote to Tandem's solicitors on 20 August 2007 about a number of issues including that withdrawal ("**the DLA Letter**") [**367**]. That letter enclosed a copy of the Lovells Letter. There was argument about the precise import of the wording of the DLA Letter, to which I shall return as necessary.

14. On 5 October 2007, in between the two sittings of the Inquiry in September and October, Tandem withdrew its objection to the CPO and entered into the 2007 Agreement [**689**]. That agreement provided for the withdrawal of Tandem's objection to the CPO, the grant of an option and a right of pre-emption in favour of SCC over the Citadel, and a right of pre-emption in favour of Hammerson UK likewise. There was an obligation on Tandem to undertake certain works to the Citadel, essentially to develop it consistently with the NRQ. The works are described at Schedule 5 [**716**]. The agreement also put certain restrictions on Tandem's dealings with the Citadel, to which I will refer as necessary.

15. In 2013, the master development agreement with Hammerson UK was determined.

16. After a long history over several years, the NRQ *as originally conceived* did not proceed and JLP did not relocate. A different scheme – which SCC has variously characterised either as an iteration of the NRQ or a replacement scheme – known as 'Heart of the City II' was implemented instead. That decision appears to have been taken in 2018. SCC then granted JLP a lease of its original premises in 2020 shortly before JLP decided that the store would not re-open.

17. Mr Paul made a number of overarching points about the NRQ scheme, some of which frame his approach to the application and which I summarise below without necessarily accepting them at this stage:

    a) The NRQ was a unique and important project involving significant time and money, was of regional and national significance and intended to reverse a 20 year severe physical decline – being, as it was, the single largest development project to which SCC had been a contracting party;

    b) It was in that context that he argues Tandem objected to the CPO and was to be compensated for going along with it;

    c) Further, that context, he argued, makes it unsurprising that Tandem would have scrutinized carefully what SCC had said – for example, its correspondence and what SCC had said in terms of viability;

    d) JLP had been central to the project as anchor tenant, and were a linchpin through which the balance of the NRQ scheme was intended to work, and

    e) From there, he argued that Tandem could not realistically have expected the abandonment of the NRQ scheme in 2018, not least, he submitted, because what SCC had said directly to Tandem was at variance with what had been published in the press.

The claim, defence and reply

18. By its Particulars of Claim dated 6 February 2023, Tandem makes the following broad claims:

    a) The Tandem Agreement, in part giving up its objection to the CPO, was induced by misrepresentations, which has caused Tandem loss. The claim is squarely put under the Misrepresentation Act 1967 ("**the 1967 Act**"). The relevant representations are alleged at ¶31 of the Particulars of Claim [**44**], which I summarise thus:

        i) First, that a key feature of the NRQ scheme was the demolition of the existing JLP store and/or relocation of JLP to the new store in the NRQ;

        ii) Second, that a binding agreement had been entered into which required JLP to proceed to become anchor tenant in the NRQ (i.e. that JLP's participation had been secured);

        iii) Third, that there were no foreseeable obstacles to completion of the NRQ with JLP as anchor tenant and that JLP did not have the ability to "walk away" from the NRQ scheme if it wished, and

        iv) Lastly that JLP had withdrawn its objection to the CPO because it was bound to proceed with the NRQ scheme as anchor tenant.

    b) Under the same agreement, SCC had assumed obligations of a fiduciary nature towards Tandem in relation to the NRQ scheme which it breached in various

respects including by failing properly and fairly to disclose to Tandem material information about the NRQ scheme, or modifying the scheme without consultation with, or notification of, Tandem, or having any regard to its interests;

c) SCC's conduct in relation to the NRQ scheme amounted to an infringement of Tandem's rights under Article 1 Protocol 1 ("**A1P1**") of the European Convention on Human Rights ("**ECHR**"), such that it is entitled to damages under ss.7 and 8 of the Human Rights Act 1998 ("**HRA**"), and/or

d) SCC's conduct in relation to the NRQ scheme constitutes a private and/or public nuisance for which Tandem is entitled to damages.

19. The Amended Claim Form [**25**] states the amount claimed as £3,500,000.

20. Tandem had argued that the misrepresentation claim was also brought as negligent misstatement at common law. However, that suggestion only appears for the first time in the Reply. It is common ground that I should nonetheless deal with that cause of action in this judgment because the parties have (sensibly) agreed that insofar as the Particulars of Claim require amendment to bring such a claim, SCC will not object. That is obviously expeditious and I will do so.

21. It suffices for present purposes to say that SCC defends the claim vigorously and, in particular on limitation grounds to which I shall return. Tandem argues that insofar as any claim is out of time, it should benefit from a postponement of limitation under s.32 Limitation Act 1980 ("**1980 Act**"): see the Reply at ¶29 [**101**] in relation to misrepresentation, and ¶33.2(d) at [**107**] in relation to the contractual claim. SCC argues that either there was no relevant deliberate concealment or, if there was, Tandem could with reasonable diligence have found out the real position more than 6 years before the claim was issued and so is still out of time. There are other nuances to the limitation arguments which I will deal with below, including arguments about when the misrepresentation cause of action accrued, the one year limitation on HRA claims, and continuing circumstances in relation to nuisance.

The Application

22. SCC applies to strike out all of the claim, or for summary judgment on (at least) limitation grounds, save in respect of the claim for breach of fiduciary obligations. The latter, it is common ground, raises issues which require trial.

23. There was initially a dispute between the parties as to whether SCC's application sought summary judgment on the misrepresentation claim on grounds wider than limitation. That dispute was resolved at the start of the hearing before me. Mr Jacobs recognized that the relevant evidence on such wider grounds had been given in SCC's evidence in reply, to which Tandem had had no opportunity to respond. He therefore conceded that the application was limited to limitation in relation to summary judgment on the misrepresentation claim.

24. It is common ground that, in relation to the A1P1 and nuisance claims, SCC's summary judgment application is on broader ground than simply limitation.

25. I have read the following evidence by witness statement on the application:

a) For SCC:

i) [**111**] Sean McClean, Director of Regeneration and Development since December 2022, having been employed since by SCC 2002, dated 7 September 2023. Mr McClean deals with the history of the NRQ, and the correspondence, publicly available materials, and press articles which, SCC argues, show that there is no real prospect of Tandem establishing deliberate concealment, or resisting the proposition that with reasonable diligence it could have discovered matters more than 6 years before issue;

ii) [**910**] John Mothersole, who had been Executive Director of Development, Environment and Leisure at SCC between January 1998 and 2008. He counters Mr Hill's evidence in the following ways:

(1) The JLP agreements were not disclosed to the 100 or so objectors to the CPO or the Inquiry, which (he says) is normal because they are commercial agreements, and that that non-disclosure was on advice of SCC's lawyers;

(2) That the JLP land was not *excluded* from the CPO as suggested by Mr Hill at ¶23 of his evidence. In fact the JLP land was *included* in the CPO but SCC had agreed with JLP not to *implement* the CPO, and

(3) Gives evidence which is essentially targeted at an argument that there were either no representations as alleged, or if there were then they were true. For the reasons at ¶22 I need not elaborate on the content of that part of his evidence.

b) For Tandem:

i) [**253**] Robert Hill, Director of Tandem, dated 21 November 2023. Mr Hill deals with the background to the NRQ and subsequent events, and explains why he disagrees with Mr McClean's analysis on limitation;

ii) [**908**] Nalin Seneviratne, undated. Mr Seneviratne joined SCC in 2009 as Director of Property and Facilities Management, but was not involved with the NRQ until 2013. In 2013, his role changed to Director of Capital & Major Projects, assuming responsibility for the NRQ in April that year. He narrates the termination of the Hammerson UK agreement, and gives evidence to the effect that, among other things:

(1) Until 2018 the public plans for the NRQ included JLP as anchor tenant, and that between 2013 and 2018, whilst that had been the hope there had been other options considered including the retention of JLP's existing store;

(2) In his view the agreement with JLP gave it a "degree of flexibility";

(3) None of the agreements with JLP were shared with Tandem or anyone else for confidentiality reasons;

(4) In 2017 SCC and JLP agreed that retention of the existing store was the best way forward and JLP would look at refurbishment options, and that during the same year a "new plan" was drawn up based on a much smaller retail content than originally envisaged with the public sector underwriting development costs and recovering them over 40 years.

26. The above is a summary only. If I have not mentioned some element of the evidence, it does not mean that I have not considered it.

The law

27. Happily, there was no real disagreement at the Bar as to the relevant authorities, though there was a vibrant dispute as to their meaning and effect. I was provided with a comprehensive bundle of authorities to which I shall refer as [ABnnn]. I now turn to the overarching principles as to strike out, summary judgment and limitation – since the latter is relevant to each of the causes of action.

Strike out – the law

28. SCC's strike out application is premised on the claims not being brought on any reasonable ground pursuant to CPR r.3.4(2)(a). Such an application is generally tested without the need for any evidence: the Court assumes the truth of the matters stated in the Particulars of Claim and considers whether, as a matter of law, the allegations within the four corners of that document amount to a cause of action known to the law. For this reason, where the statement of case is found to be defective, the Court is likely to consider whether the defect may be cured by amendment, and whether it is appropriate to give the party an opportunity to apply to do so.

Summary judgment – the law

29. The test for summary judgment under CPR r.24.2 is different. The Court may enter summary judgment if it considers that the Claimant has no real prospect of succeeding on the claim or issue and there is no other compelling reason why the case or issue should be disposed of at a trial.

30. The approach to that test is rooted in principle. Those principles were summarised in Daniels v Lloyds Bank [2018] EWHC 660 (Comm) at [49]:

> *"(i) The burden of proof is on the applicant for summary judgment;*
>
> *(ii) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: Swain v Hillman [2000] P.I.Q.R. P51;*

> *(iii) The criterion 'real' within CPR 24.2 (a) is not one of probability, it is the absence of reality: Lord Hobhouse in Three Rivers DC v Bank of England (No.3) [2003] 2 A.C. 1 [158];*
>
> *(iv) At the same time, a 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 [8];*
>
> *(v) The court must be astute to avoid the perils of a mini-trial but is not precluded from analysing the statements made by the party resisting the application for summary judgment and weighing them against contemporaneous documents (ibid);*
>
> *(vi) However disputed facts must generally be assumed in the claimant's favour: James-Bowen v Commissioner of Police for the Metropolis [2015] EWHC 1249 [3];*
>
> *(vii) An application for summary judgment is not appropriate to resolve a complex question of law and fact, the determination of which necessitates a trial of the issue having regard to all the evidence: Apovdedo NV v Collins [2008] EWHC 775 (Ch);*
>
> *(viii) If there is a short point of law or construction and, the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725;*
>
> *(ix) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial. The court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Royal Brompton Hospital NHS Trust v Hammond (No.5) [2001] EWCA Civ 550; Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] F.S.R. 3;*
>
> *(x) The same point applies to an extent to difficult questions of law, particularly those in developing areas, which tend to be better decided against actual rather than assumed facts: TFL Management Services v Lloyds TSB Bank [2014] 1 W.L.R. 2006 [27].”*

31. Whilst the burden of proof is on SCC, if SCC establishes a prima facie case against Tandem that there are no real prospects of success, then Tandem will have an evidential burden to show a case in answer: see Director of Assets Recovery Agency v Woodstock

[2006] EWCA Civ 741, per Tuckey LJ. If, in turn, Tandem achieves that goal, it should ordinarily be allowed to take the matter to trial.

Limitation – the law

32. Misrepresentation under the 1967 Act has a six year limitation defence. There is a sterile question whether that is under s.2 or s.9 of the 1980 Act and it is unnecessary to decide which is correct. The better view appears to be s.2: see Green v Eadie [2012] Ch.363 per Mark Cawson QC, as he then was, sitting as a Deputy High Court Judge. The cause of action accrues when the loss or damage is suffered: Green at [30].

33. There is no need to consider the law on limitation for negligent misstatement aside from the postponement under s.32 (as to which see below) because Tandem concedes that the 15 year "long stop" under s.14B of the 1980 Act will bar its claim, albeit by 2 days.

34. A claim under the HRA has a 1 year limitation period from the date of the act complained of: s.7(5)(a) HRA. An extension of limitation may be available pursuant to s.7(5)(b) if the Court considers it equitable having regard to all the circumstances. Section 32 of the 1980 Act, it was common ground, has no application to the HRA.

35. A claim in nuisance is subject to a six year limitation defence: s.2 of the 1980 Act. Section 32 does not appear to be relied upon because the statements of case rely on a continuing nuisance.

36. As regards the misrepresentation and (putative) negligent misstatement claims, limitation may be postponed by operation of s.32 of the 1980 Act, the operation of which is as follows.

a) Section 32 provides, so far as is material, as follows:

*"**Postponement of limitation period in case of fraud, concealment or mistake***

(1) … where in the case of any action for which a period of limitation is prescribed by this Act, either –

(a) …

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant;

(c) …

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

…

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it

> *is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.";*

b) The burden in all of these matters is on the claimant;

c) A "fact relevant to the cause of action" in s.32(1)(b) is one without which the cause of action is incomplete: Arcadia Group Brands Ltd v Visa Inc [2015] Bus LR 1362, cited in Canada Square Operations Ltd v Potter [2023] 3 W.L.R. 963 at [96];

d) Facts which merely *improve* the prospects of the cause of action are not relevant facts for these purposes: Goldrail Travel Ltd (in liquidation) v Grumbridge [2020] EWHC 1757 (Ch);

e) Nor is a claimant entitled to delay limitation until they have certainty of success, or everything needed to succeed. All that is required is to be able to avoid striking out. Such a test is satisfied when the claimant has sufficient confidence to justify embarking on the preliminaries to the issue of a writ. A common sense application is required, rather than turning on a complex balance of the prospects of success: see Gemalto Holding BV v Infineon Technologies AG [2022] 3 WLR 1141, applied by Fancourt J in Duke of Sussex v MGN Ltd [2023] EWHC 3271 (Ch).

f) "Concealment" means to keep something secret: Canada Square at [65];

g) "Deliberate concealment" does not require the concealed fact to be one the defendant was obliged to disclose: Canada Square at [104]. All that is required is (i) a fact relevant to the cause of action; (ii) concealment of that fact from the defendant (either by positive act or withholding of relevant information) and (iii) an intention on the part of the defendant to conceal the fact or facts in question. See Canada Square at [109];

h) "Deliberate commission of a breach of duty" does not include a reckless breach, or awareness on the part of the defendant that it is exposed to a claim. All that is required is that the defendant knows he is committing a breach of duty: Canada Square at [153];

i) As to "reasonable diligence", see Lawrence v Associated Newspapers Ltd [2024] E.M.L.R. 3 at [86]:

   i) The test is how a person carrying on a business of the relevant kind would act if they had adequate but not unlimited staff and resources and were motivated by "a reasonable but not excessive" sense of urgency;

   ii) The question of what reasonable diligence requires may have to be asked at two stages even though there is a single statutory test: (1) whether there is anything to put the claimant on notice of a need to investigate and (2) what a reasonably diligent investigation would then reveal. These are questions of fact, determined to an objective standard informed by the circumstances (as distinct from characteristics such as naivety, lack of curiosity and so on) of the claimant. This, in my judgement, is what Males LJ was referring to when he said, in OT Computers Limited (in liquidation) v Infineon Technologies AG &

Micron Europe Limited [2021] EWCA Civ 501 at [47], that the requirement of reasonable diligence applies throughout, and that the claimant must first be reasonably attentive so that he becomes aware (or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn. Once there is such a "trigger" he is taken to know those things which a reasonably diligent investigation would then reveal. None of this requires a claimant to take exceptional measures which they could not reasonably be expected to take.

iii) Where there is no trigger, no obligation to investigate with reasonable diligence arises;

iv) A conclusion to the same effect as to discovery of the trigger and what happens thereafter was reached in Duke of Sussex;

37. I can deal with one of Mr Paul's arguments in resistance to summary judgment at this stage and quite shortly. Mr Paul argued that the law of deliberate concealment in relation to limitation was one which was developing and thus not suitable for summary judgment. Whilst he accepts that the Supreme Court has given a recent decision on the subject in Canada Square, he argues that the principles have not been applied in many first instance cases. I disagree. In my judgement, especially in light of the Supreme Court's decision, the law in that area has now *developed*.

The issues

38. The questions I have to answer, which I adopt from the list provided by the parties in the case summary [**11**] are these:

Misrepresentation under the 1967 Act

a) Do the Particulars of Claim disclose a cause of action known to the law in misrepresentation under the 1967 Act?

b) If so, when did that cause of action accrue? Tandem argues that it has real prospects of showing that that did not occur until 2018 and so the claim would be in time pursuant to ss. 2 or 9 of the 1980 Act;

c) If Tandem is wrong about that, is there a prima facie case that there are no real prospects of it establishing (i) deliberate concealment of a fact needed to plead a cause of action in misrepresentation within the meaning of s.32(1)(b) of the 1980 Act and (ii) that it could not, with reasonable diligence, have discovered the fact more than six years prior to issue (i.e. by 7 October 2016)? If so, can Tandem meet the evidential burden to the contrary?

Negligent misstatement at common law

d) Assuming an amendment to rely on the misrepresentations as negligent misstatements, and given the (sensible) concession by Mr Paul that s.14B of the 1980 Act would in principle bar such a claim, does Tandem have real prospects of postponing limitation for this claim by reference to the same arguments under s.32 of the 1980 Act as are made for misrepresentation under the 1967 Act?

Article 1 Protocol 1

e) Do the Particulars of Claim set out a case which would engage Article 1 Protocol 1?

f) Does Tandem have real prospects of showing that its rights under the article have been interfered with?

g) Does Tandem have real prospects of showing that such interference was disproportionate?

h) If so, does Tandem have real prospects of showing that such a claim is within time because the Court will consider it equitable in all the circumstances to extend time under s.7(5)(b))?

Private nuisance

i) Do the Particulars of Claim disclose a cause of action in private nuisance?

j) If so, does Tandem have real prospects of establishing at trial that there has been such a nuisance?

k) If so, does Tandem have real prospects of establishing at trial that the action is not time barred by s.2 of the 1980 Act?

Public nuisance

l) Do the Particulars of Claim disclose a cause of action in public nuisance?

m) If so, does Tandem have real prospects of establishing at trial that there has been such a nuisance?

n) If so, does Tandem have real prospects of establishing at trial that the action is not time barred by s.2 of the 1980 Act?

Other reasons for trial

o) In each case, is there some other compelling reason why such a claim should nonetheless proceed to trial if the Court finds it has no real prospects of success?

Discussion

39. I have all of the above issues and principles well in mind. I also have well in mind that, as I mentioned previously, the claim in respect of fiduciary obligations is inevitably going to trial unless it settles. That contractual case therefore forms no direct part of my consideration on the application.

40. With that, I turn to the substance of the application.

Misrepresentation under the 1967 Act

41. **Striking out.** I consider that there is sufficient pleading of a claim under the 1967 Act that it cannot be said that that claim is not brought on any reasonable ground. The submissions

made by Mr Jacobs on behalf of SCC were effectively that there could be no representation based on the Lovells and DLA Letters. In other words, that the claim as pleaded cannot be made out. In my judgement that is a question of summary judgment rather than strike out. In any event, Tandem's claim is based on wider ground than just the letters: see ¶31 of the Particulars of Claim at [**44**].

42. **Summary judgment**. It is no part of the decision I have to make to work out whether there were any representations or, if there were, they were false, still less what if any damage may have been caused if all those things were true. Those questions are outside the scope of the application with which I am concerned.

43. *Primary limitation.* Mr Jacobs submitted that primary limitation has expired for all such claims, by reference to the Particulars of Claim at ¶45, since all such matters were in or around 2007. He further argued that the loss and damage claimed, likewise, were matters arising around the same time. Nowhere, submitted Mr Jacobs, does Tandem allege losses after 2016. Mr Paul submitted that the cause of action did not accrue until around 2018 or 2020, as pleaded in the Reply at ¶25 [100].

44. The analysis of Mr Paul's submission is as follows:

a) A cause of action under the 1967 Act accrues when loss or damage is suffered: see Green at [30];

b) Whilst claimants will often suffer loss or damage on entry into the impugned transaction, that is not necessarily so: see *Cartwright: Misrepresentation, Mistake and Non-Disclosure* (6th ed.) at 6—52;

c) In a "no transaction" case (such as this), the question is "whether, and if so at what point, the transaction into which the claimant entered caused his financial position to be measurably worse off than if he had not entered into it": Maharaj v Johnson [2015] P.N.L.R. 27 (PC) at [19];

d) That is because mere entry into a contract does not inevitably mean that a claimant suffers damage: UBAF Ltd v European American Banking Corp [1984] Q.B. 713;

e) A useful test for whether damage has been suffered is whether a claimant's position has been altered to his immediate, measurable economic disadvantage: Law Society v Sephton & Co [2006] 2 AC 543 at [67];

f) Whilst the entry into a contract will not cause loss if the loss is contingent on future events (so that limitation may start later), that is different from a loss whose *valuation* is contingent on future events. In the latter case, loss has been caused but may not be capable of valuation: see *Cartright* at 6—52 on p.258;

g) Tandem, submitted Mr Paul, was not measurably worse off until 2018 or 2020. Rhetorically, submitted Mr Paul, had Tandem discovered the relevant facts in 2007 and brought its claim at that stage, it may well have been met with an allegation that it had suffered no recoverable loss. That occurred, argued Mr Paul, only when the NRQ scheme was abandoned in 2018;

h) Mr Jacobs submitted that the loss is measurable by reference to the pleaded case which, he argued, was all by reference to the point of entry into the contract in 2007. For example, (i) the £2.96m loss of CPO compensation (¶56.4) is a 2007 value, (ii) the development of the Citadel as a late night bar (¶56.2) would have begun in 2007, (iii) likewise the suggested change of use (¶56.3), and (iv) miscellaneous expenses of £1m – these are not put at any given point in time and in context appear to relate, also, to 2007 or thereabouts.

45. In my judgement (for the purposes of the application and without binding a trial Judge), the losses as presently claimed all appear to have begun in or shortly after 2007. That is how the claim is presently framed. It is also the basis upon which the pre-action letter was written in 2021 (see [**847**]) It is true that the Reply asserts new dates for the events said to cause loss. However, I do not consider that that means there are real prospects of showing that there was no measurable loss before that time. Indeed, the Particulars of Claim appear to measure loss on and from entry into the 2007 Agreement. Those are not losses contingent on a future event. They are losses which are said to have occurred as a result of entry into the contract in circumstances where Tandem's case is that it would not have done so in 2007. On the face of the Particulars of Claim those losses appear quantifiable.

46. Even if I were persuaded that all of that meant that Tandem had no real prospect of establishing that its misrepresentation claim was within primary limitation, for reasons to which I am about to turn, I would nonetheless decline to grant summary judgment.

47. All of that makes it unnecessary to deal with Mr Jacobs's argument that there was an admission in Tandem's pre-action protocol letter that Tandem had known the relevant facts in or around 2013. I would, in any event, have been slow to reach the conclusion Mr Jacobs urged upon me in that regard.

48. *Deliberate concealment of a fact necessary to the cause of action*. Next, it is necessary to see whether Tandem has real prospects of showing that limitation was postponed under s.32 of the 1980 Act. To do that, it is first necessary to identify what fact necessary to the cause of action (so as to avoid striking out) is said to have been concealed.

49. The way the point was argued before me, the relevant fact is this: in circumstances where the development agreement with Hammerson UK did not become unconditional, the terms of the agreements between JLP and SCC meant that SCC still had no CPO power over JLP's premises. That made the scheme unviable because without the JLP existing premises, SCC could not have brought about the development of the NRQ. Whilst expressing no concluded view, for my part I would be slow to conclude that was what Tandem was relying on as the concealed fact: ¶29 of the Reply does not to my mind fairly plead as much. For reasons to which I will now turn, it does not make any difference for present purposes.

50. It is convenient at this point to refer to Mr Paul's submission that there is considerable overlap between the application of the deliberate concealment aspect of s.32 of the 1980 Act and the breach of contract (or breach of fiduciary duty) claim which, it is agreed, is going to trial. He argues that that overlap risks inconsistent findings on the subject of what information was allegedly not given by SCC to Tandem. The 2007 Agreement contained terms involving a duty to disclose information regarding viability of the NRQ scheme and to keep Tandem informed as to progress and significant obstacles and so forth.

51. I agree with Mr Paul. It is instructive to compare the factual questions which (i) will yield the answer to the question of deliberate concealment with (ii) those which will do so for the breach of contract or fiduciary duty allegations. In my judgement, there is sufficient overlap between the two as regards what, if anything, SCC did or did not tell Tandem that I do not consider it would be appropriate for me to grant summary judgment on the s.32 question on this application.

52. Were I to conclude there was no real prospect of Tandem establishing that the prospect of JLP remaining in its existing store because it was not bound in the way described at ¶31.2 of the Particulars of Claim, that risks being contrary to a finding on closely allied facts as to breach of the disclosure obligation in the 2007 Agreement.

53. As a matter of discretion under r.24.2, I accordingly decline to enter summary judgment in relation to limitation on the misrepresentation claim. Alternatively, I consider the above to be a compelling reason for there to be a trial on that question. Tempting though it is to grant summary judgment on the question of primary limitation, that question is in my judgement intrinsically linked to the limitation issue *as a whole* and I therefore decline as a matter of discretion to do so.

54. Although I have reached a conclusion on summary judgment which is in favour of Tandem, I consider that I should nonetheless address the arguments raised about deliberate concealment and reasonable diligence, not least in deference to the significant submissions which were made on those topics. However, I can do so relatively briefly as follows:

    a) Mr Jacobs pointed to a large number of documents – many of which were press articles, but there was also SCC Cabinet minutes – which, he argued, either made it clear that JLP was not bound to move, or from which he argued would at least be a trigger from which Tandem's director would, with reasonable diligence have found out the necessary facts to plead a claim.

    b) Mr Paul submitted that those documents paint an incomplete picture; many of the documents were capable of interpretation as being consistent with the original NRQ scheme, and that in any event there was really nothing prior to 2018 which would reasonably have caused Tandem to understand that anything about the scheme might have changed. He invited me to consider that Tandem's director had been in direct contact with SCC and was entitled to rely on what he had been told by that means rather than inferences, or unattributed comment, in the press.

    c) I disagree with Mr Paul to the extent that he relied on Mr Hill, Tandem's director, not having seen certain press articles as a matter of fact. That is irrelevant. What is relevant is what a reasonably diligent person would have done at any given point in time. I consider it more than arguable that such a person in Mr Hill's shoes, whose company has a significant property interest in a development zone, would be attentive to the local press even if he did not live in the area.

55. Given the evidence of Mr Seneviratne as to SCC's public announcements at the relevant time, contrasted with the arguable actuality that there was a lacuna in the JLP agreement(s), I consider Tandem has real prospects of arguing a deliberate concealment. It

is certainly not fanciful to suggest as much. I also consider that Tandem has real prospects of establishing that it could not, with reasonable diligence, have found out the relevant material. That is because I consider the question of weighing up the relative significance of the press materials against what Tandem's director was being told by an SCC representative is (i) quintessentially a question of fact which (ii) is more than merely arguably in favour of Tandem. My views as to the ultimate merits of the trial positions are irrelevant.

56. Accordingly, even if I were wrong as to the exercise of my discretion and/or the existence of a compelling reason, I would have refused summary judgment on the question of postponement of limitation under s.32 of the 1980 Act.

57. *Deliberate breach of duty.* Strictly, this point is now obiter given my conclusions above. However, I can deal with it shortly.

58. Mr Paul submitted that, given the terms of the 2007 Agreement there were real prospects of demonstrating that SCC was in deliberate breach of duty for the purposes of s.32(2) of the 1980 Act. That was said to be on the basis of a failure to disclose the JLP agreement inconsistently with the duty of good faith. Had those agreements been disclosed as required, he argued, it would have become apparent on scrutiny of them that matters were not as had been represented.

59. I decline to grant summary judgment on the s.32(2) argument also. That is because:

a) The facts are, again, overlapping, to a sufficient extent, with the issues arising in connection with breach of contract or fiduciary duty and, allied to that

b) I consider Tandem has real prospects of success in demonstrating a deliberate breach of duty which was unlikely to be discovered for some time given that it is accepted that the JLP agreements were not disclosed.

60. Given that the questions of whether there *were* representations or not and (if there were) whether they were true or not are outside the scope of the application, it is in my view inappropriate to begin to consider whether the disclosure of those documents would have made any difference in respect of s.32(2).

Negligent misstatement at common law

61. The limitation arguments under s.32 of the 1980 Act as to this cause of action are in substance the same as for negligent misrepresentation. For the same reasons I decline to grant summary judgment on limitation in this regard. To be more accurate, I decline to indicate that such a cause of action would have no real prospects of success if it were successfully amended into the Particulars of Claim and met with the same limitation defence.

Article 1 Protocol 1

62. *Tandem's claim.* The issues can be identified as follows:

a) By ¶52—53 of the Particulars of Claim, Tandem asserts that the Citadel is a possession for the purposes of A1P1, and that the making of the representations by SCC, SCC's failure to give proper disclosure to the Inquiry, failure to keep

Tandem informed as to the progress of the NRQ scheme and the position of JLP, and failure to have any proper regard to Tandem's interests in respect of the NRQ scheme and/or the substantial delay in progressing that scheme before its abandonment, amount to a disproportionate interference with Tandem's A1P1 rights. Damages are claimed.

b) By ¶38 of the Reply, Tandem asserts engagement of A1P1 on the basis of *de facto expropriation* for which Tandem was not compensated.

c) That paragraph of the Reply is clearly a response to SCC's Defence at ¶53(i) [**71**] which alleged that Tandem had not been deprived of its possessions, and nor had SCC acted in a manner to deprive Tandem of its peaceful enjoyment of the same.

d) SCC also pleaded (in its Defence at ¶53 and 53(ii) onwards) that its conduct had not *disproportionately* breached Tandem's A1P1 rights, and that Tandem had alleged nothing which suggested that was so.

e) As to limitation, SCC relied on the one year primary limitation found at s.7(5)(a) of the HRA (Defence ¶49) as barring the claim. Tandem accepted that its claim was *prima facie* time-barred as a result (Reply ¶37) but relied on two matters to obtain an equitable extension under s.7(5)(b) (¶37.1, 37.2), viz:

i) Receipt of the JLP agreements less than a year before issue, and

ii) The deliberate concealment as referred to in the context of s.32 of the 1980 Act.

63. *The law as to the meaning of A1P1 and "de facto expropriation".* Section 6(1) of the HRA requires SCC to act compatibly with rights under the ECHR including A1P1. A1P1 provides, in part, as follows:

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."*

64. As has been said in *Lester, Pannick & Herberg: Human Rights Law and Practice* at 4.19.8, that paragraph provides 3 rules: (i) the principle of peaceful enjoyment of property; (ii) as to deprivation of possessions subject to certain conditions, and (iii) a recognition that states are entitled, among other things, to control the use of property in accordance with the general interest.

65. Tandem focusses on the first two, but it is right to say that the Reply appears to put the case (at least in large part) on the basis of *de facto expropriation* – i.e. a breach of rule (ii).

66. *De facto expropriation* arises where a claimant remains the owner of property (i.e. there has been no transfer of ownership – for example to the state), but for practical and effective purposes the rights attendant on ownership have disappeared. It has been said that the question of whether such expropriation has arisen is notoriously fact sensitive. That can be seen from the authorities and commentary as follows:

a) Sporrong and Lonnroth v Sweden (1983) 5 EHRR 35 was a case concerning town planning. The applicants owned two properties in an area of planned redevelopment in Stockholm. The properties were subject to expropriation permits (apparently an equivalent of a CPO) issued by the government at the request of the local authority. There was a prohibition on construction imposed by the local administrative board. The expropriation permits, and notices prohibiting construction, were all extended in both cases, and lapsed in respect of the first property after 25 years, and 12 years in respect of the second. The applicants were not compensated for their loss during that period. The European Court of Human Rights ("**ECtHR**") found by a majority that there had been a breach of A1P1 because the expropriation permits significantly reduced the possibility of the owners exercising their rights to use and dispose of the properties, and affected the substance of ownership by rendering it precarious and defeasible.

b) The Court in Sporrong at [63] decided that:

"In the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are 'practical and effective', it has to be ascertained whether that situation amounted to a de facto expropriation, as was argued by the applicants."

c) However, the Court in Sporrong held at [63] that the interference with the right to use, sell, device, donate or mortgage the properties was *not* sufficiently serious to amount to a deprivation of possessions or a *de facto expropriation* within the meaning of the first part of A1P1. The headnote indicates that the interference which was found was *not* on the basis of *de facto expropriation* but on other grounds.

d) In contrast, *de facto expropriation* was found in Papamichalopoulos v Greece (1993) 16 EHRR 440. In that case, the applicants were deprived of their use of their land as a result of a Greek law which transferred the land to the Navy Fund. The applicants' application to the Greek Courts for restoration of their land failed. The Greek government later exchanged the applicants' land for other land of equal value. The ECtHR found that the applicants' land had been expropriated because *de facto*, they were no longer in a position to use and dispose of it.

e) Thus *de facto expropriation* arises where an applicant retains ownership but as a matter of fact cannot exercise their rights in that context because they are devoid of all substance.

67. However, as *Lester, Pannick & Herberg* makes clear at 4.19.9, the ECtHR has emphasised that the "three rules" are not distinct and has in some judgments not found it necessary to decide whether an interference falls within the second or the third rule, but has simply examined the interference in light of the first sentence of A1P1. The same work highlights the case of Erkner and Hofauer v Austria (1987) 9 EHRR 464 at [74] which appears to demonstrate that an interference short of *de facto expropriation* can be sufficient to ground an actionable breach of A1P1.

68. *Strike out.* It may be thought that the pleading at ¶38 of the Reply fixes Tandem's case squarely on the basis of *de facto expropriation*. However I am not prepared to go that far. The Particulars of Claim at ¶53 are plainly in a context of a pleaded case where there *has been a CPO*. To that extent, there is some factual similarity with Sporrong which, in my judgement, means that the Particulars of Claim make out a cause of action known to the law. I consider that it would be wrong, then, to limit the ambit of that pleading by reference to ¶38 of the Reply. Mr Paul expressly submitted that the Particulars of Claim at ¶51 relied on the first two "rules", and that establishing *de facto expropriation* was only one route to success. I agree. I consider that the pleaded cases in the Particulars of Claim is arguably within "rules" (i) and/or (iii), and that the Reply introduces an alternative under "rule" (ii). To the extent that Mr Jacobs argued to the contrary, I respectfully disagree with him. Even if I were wrong about that, I would at best make an unless order giving an opportunity to Tandem to apply to amend.

69. I also agree that:

a) Whilst it may be thought that it may weaken Tandem's case to observe that it agreed to the restrictions on the Citadel, that does not necessarily mean there has been no sufficiently arguable interference with Tandem's A1P1 rights, and

b) Whilst the combination of s.8 of the HRA and art. 41 of the ECHR *may* act as a bar to damages, that is not necessarily so: it may depend in part on if, and if so why, any claim under the other causes of action fails.

70. I accordingly decline to strike out the A1P1 claim.

71. *Summary judgment – de facto expropriation.* In light of my conclusion about the ambit of Tandem's claim under A1P1, it follows that I reject the first ground of summary judgment advanced by SCC, which is founded on there being no *de facto expropriation*. Whilst the Court, and indeed Mr Paul, understand SCC's focus on that concept given the Reply, the claim is in fact wider and more than merely arguable given the restrictions on Tandem's use of the Citadel at the relevant time.

72. *Summary judgment – proportionality*. Mr Jacobs's starting point was that proportionality goes nowhere in light of there being no viable argument on *de facto expropriation*. For the reasons I have given, I reject that. He went on to argue that the Inspector at the Inquiry had clearly reached the conclusion that the NRQ scheme was based on a compelling case in the public interest. From there he submitted that it would be difficult for a trial judge to "unpick" the report of the Inspector when, at the time, there would be no reason for the CPO to be considered disproportionate. He submitted that regeneration is generally proportionate if there is a compensation scheme "in play". That, he appeared to suggest, was an argument made all the stronger in light of Tandem's express agreement to the various restrictions complained about.

73. Mr Paul submitted that the proportionality question was impacted by whether Tandem's use of the Citadel was suborned to SCC, and that the agreement was – as described above – alleged to have been made under a misrepresentation.

74. In my judgement:

a) SCC has not shown a *prima facie* case that Tandem has no real prospects of demonstrating that any interference with its rights in the Citadel was disproportionate. The starting point was that of *de facto expropriation* which I have rejected;

b) I disagree that it will be hard for the trial judge to unpick the Inspector's report. The question is a wider one of fact and does not rest exclusively on the conclusions the Inspector reached;

c) The evidence thus far has been targeted at the question of real prospects. Whilst neither advocate submitted as much directly, and since I consider proportionality to be a highly fact-sensitive issue, I do not consider it appropriate to grant summary judgment when it may very well be that further detailed evidence on the subject will become available by the time of any trial.

75. I accordingly decline to grant summary judgment on the substance of the A1P1 claim.

76. *Summary judgment – limitation*. It is conceded on behalf of Tandem that primary limitation for this cause of action under s.7(5)(a) of the HRA has expired. Tandem must therefore demonstrate that it has real prospects of obtaining an extension on equitable grounds under s.7(5)(b), or that there is some other compelling reason for trial.

77. There is little doubt that an extension of a period measurable, probably, in excess of 10 years is a tall order under s.7(5)(b). However, that does not mean it has no real prospects.

78. Mr Paul submitted that if the Court were satisfied as to deliberate concealment of the relevant facts, then given the arguable misrepresentations and the disclosure of the JLP agreements less than a year prior to issue, there are real prospects of success in that regard.

79. Mr Jacobs argued as follows:

a) The 1 year period has been set by Parliament, subject to an equitable extension.

b) The Courts have grappled with the approach to an extension in, for example, Rafiq v Thurrock Borough Council [2022] EWHC 584 (QB). In that case, Collins Rice J identified relevant factors as including: (a) the apparent merits of the claim; (b) the length of delay; (c) the reasons for the delay; (d) evidential prejudice and the prospects of a fair trial; (e) proportionality;

c) As to merits, he relied on his earlier argument, which I have rejected, that the claim relied on *de facto expropriation*. As I pointed out, if that were so, then limitation would become irrelevant. The case is, in my judgement, wider than that. I disagree with Mr Jacobs that the claim is lacking in merit. I consider it reasonably arguable in light of the submissions made before me;

d) The length of the delay is substantial. However, the reasons for that delay are argued to overlap to a great extent with the s.32 deliberate concealment point which I have allowed to go to trial. I consider that that is arguable. Whilst the equitable test under s.7(5)(b) is expressed in different terms to the s.32 test under the 1980 Act, I do not consider them to be sufficiently divorced on a factual level to say that the s.32 factors have no relevance to s.7(5)(b). Mr Jacob's submission

about the lack of good reason again centred on *de facto expropriation* – for which, again, I mean no criticism – but it does not cover the whole picture;

e) As to evidential prejudice and the impact on a fair trial, I agree that there *might* be evidential issues for both sides. However, as Mr Jacobs accepted in argument, there is no actual evidence about the nature or extent of those potential problems. I accordingly do not consider that this factor weighs heavily against Tandem;

f) As to proportionality, it was submitted that the A1P1 claim is not the only claim of Tandem and there are other ways in which it can realise its property through sale or development. That may be true, but for the reasons I explained above, that is really an argument about s.8 and art. 41. Any suggestion of double recovery can be dealt with by the trial judge if and when an assessment of damages is required.

80. I therefore do not consider that Tandem has no real prospects of obtaining an equitable extension under s.7(5)(b) of the HRA. Again, my view of its ultimate prospects, having surmounted that hurdle, are irrelevant and I need say no more.

Private nuisance

81. Tandem's claim is found at ¶54 of the Particulars of Claim. It asserts that in seeking and obtaining a CPO in respect of an unviable scheme (arising because of the lack of commitment of JLP), and failing meaningfully to progress that scheme over some 12 years before abandoning it, a significant blight has been caused to the locality of the Citadel. That, it is pleaded, was negligent and interfered with Tandem's enjoyment of the Citadel in a manner amounting to private nuisance resulting in loss and damage.

82. *Strike out*. SCC's submissions can be summarised as follows: there is no claim because what is alleged requires a positive act or omission, and something which *emanates* from a defendant's land. Here, submitted Mr Jacobs, there is no such thing and so there can be no claim in nuisance.

83. It is accordingly necessary to identify whether what is pleaded amounts to a cause of action in nuisance. To do that requires consideration of the law, to which I now turn.

84. In Williams v Network Rail Infrastructure Ltd [2019] QB 601, Etherton MR said this at [40]:

> *"First, a private nuisance is a violation of real property rights. That means that it involves either an interference with the legal rights of an owner of land, including a legal interest in land such as an easement and a profit à prendre, or interference with the amenity of the land, that is to say the right to use and enjoy it, which is an inherent facet of a right of exclusive possession."*

85. He went on at [41] to emphasise that whilst there were typically 3 types of such interference, there could be examples of nuisance which did not fall squarely into one or another of them. The three categories were encroachment, direct physical injury, and interference with quiet enjoyment. At [42] he made it clear that the idea that damage was

an essential requirement of the cause of action should be treated with considerable caution.

86. Mr Paul drew my attention to Fearn v Board of Trustees of the Tate Gallery [2024] AC 1, a decision of the Supreme Court. The editors of *Clerk & Lindsell on Torts,* 24th ed. at 19—08 opine that the Supreme Court has decisively rejected the notion that there is a need for emanation as a part of the cause of action in nuisance. The Court said "*that there is no conceptual or a priori limit to what can constitute a nuisance*". In Fearn, the intrusion was visual, caused by visitors to a gallery looking into the homes of persons living in the vicinity from a balcony at the defendant's premises. The test for private nuisance, submitted Mr Paul, is whether SCC's conduct caused a substantial interference with Tandem's ordinary use and enjoyment of the Citadel.

87. However, Mr Paul also accepted that there is no reported case in which a failure to progress a scheme such as this has been held to be a nuisance. I certainly was not shown any such case.

88. In my judgement, even if the facts pleaded in the Particulars of Claim about private nuisance were made out, they do not establish a cause of action. That is so even though the tort is incapable of exact definition (see *Clerk & Lindsell* at 19—01).

89. The fact that the NRQ scheme *may* be proved to be unviable, and *may* not have been pursued for some years, and *may* therefore have caused a blight (whatever that might be more accurately described as) does not in my judgement mean that Tandem's use and enjoyment of the Citadel has been substantially interfered with. Even if those facts are proved, Tandem continued to own the Citadel and, whilst it had agreed in contract to limit what it would or would not do with the building, I see nothing approaching a sufficient pleading that that caused any such interference.

90. For those reasons, the claim in private nuisance is not brought on any reasonable grounds and I will strike it out.

91. *Summary judgment.* In light of my decision on striking out, it is strictly unnecessary for me to consider whether I would have granted summary judgment in favour of SCC on the private nuisance claim. In deference to Counsel I will indicate my view shortly as follows:

    a) I would reject Mr Jacobs's argument that there was no real prospect of Tandem showing that the NRQ scheme was unviable. I consider such a conclusion would require a fact-sensitive analysis of a type unsuitable for an application such as this. That is notwithstanding the Inspector's conclusions, to which he referred.

    b) I would also have rejected Mr Jacob's submissions so far as they focussed on the existing poor state of the area. I do not consider there was sufficient evidence before me to reach the conclusion that that rendered Tandem's case one with no real prospects. More evidence, cross-examination and argument at trial may well reveal nuances of which I could not sensibly be aware.

    c) Finally, I would not have been persuaded to grant summary judgment to SCC on limitation grounds. Given that it is arguable that, had there been an actionable nuisance based on the facts alleged by Tandem, it would have been a continuing event, such a claim is equally arguably brought within limitation.

92. My view, *de bene esse*, is that the facts relied on in the nuisance claim would not have been suitable for summary judgment had there been a cause of action.

Public nuisance

93. *Strike out.* Tandem's claim in public nuisance is on identical grounds as for private nuisance, save that in the Reply at [42] it clarified this cause of action by pleading "*SCC has acted unlawfully in failing to give proper and fair disclosure at the Public Inquiry, contrary to the 1990 Rules…".*

94. The test for public nuisance was set out by Lord Bingham in R v Rimmington (Anthony) [2005] UKHL 63:

> *"A person is guilty of a public nuisance (also known as a common nuisance) who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects.*"

95. In the (much) earlier case of Attorney-General v Tod Heatley [1897] 1 Ch 560, a *landowner* was liable in public nuisance having failed to abate a deterioration in the condition of his land. Hoarding had been put round the defendant's vacant land, but the hoardings were broken down by the public and refuse thrown onto the land causing the nuisance. The defendant was liable. As I think I observed during argument, that is not the case here – and I can see no suggestion that SCC is being accused of anything of the sort by Tandem.

96. What is required is damage over and above the general inconvenience suffered by the public and where the particular damage suffered is direct and substantial: Vanderpant v Mayfair Hotel Co [1930] 1 Ch 138 at [153].

97. The pleaded allegations are to the effect that SCC did not tell the Inquiry what it should have done, obtained a CPO (which it then did not exercise over the Citadel, by agreement) which it should not have obtained, and delayed a development which it was not compelled to proceed with.

98. Those allegations do not, in my judgement, come close to establishing a cause of action in public nuisance. They do not appear to me to have caused damage of the sort referred to in Vanderpant, nor have they (taken at their height) caused the type of damage described in Rimmington.

99. I will accordingly order that the claim in nuisance be struck out.

100. *Summary judgment*. I express the same view on summary judgment for public nuisance as I did for private nuisance with the same, *obiter*, conclusion.

Conclusion

101. The claims in nuisance will be struck out. Save to that extent, SCC's application will be dismissed.

102. In light of my conclusions, I will direct the listing of a costs and case management conference before me on the first available date after 5 weeks from the circulation of the draft of this judgment. That hearing will be before me, and I will deal at the same time with any consequential matters in consequence of this decision.

103. Since the circulation of the draft of this judgment the parties have agreed to take stock of their positions and I will make an order reflecting the substance of this judgment and the postponement of the hearing to which I referred above.