IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY & CONSTRUCTION COURT (QBD)

No. HT-2019-000008

[2020] EWHC 948 (TCC)

Rolls Building
Fetter Lane
London, EC4A 1NL

Monday, 16 March 2020

Before:

HIS HONOUR JUDGE PELLING QC

(Sitting as a Judge of the High Court)

B E T W E E N :

MR AND MRS GRIFFITHS — Claimants

- and -

LIBERTY SYNDICATE 4472 — Defendant

MR B. PATTEN QC appeared on behalf of the Claimants.

MR S. TOWNEND (instructed by CMS) appeared on behalf of the Defendant.

J U D G M E N T

HHJ Pelling QC:

1 This is the defendant's application for summary judgment or an order that the claim be struck out on the basis that the claim is statute barred. There is another issue which arises concerning whether the claimant is entitled to act in a representative capacity under CPR rule 19.6. It has been agreed that this issue should be considered after judgment on the summary judgment application, since if the defendant succeeds, the CPR rule 19.6 issue will cease to be relevant. The claimant wishes to amend the particulars of claim in relation to part of the claim to which I refer in more detail later in this judgment.

2 Although not the subject of submissions from either party, it is as well to start by identifying the principles applicable to a summary judgment application of this sort. These principles are well known and I respectfully adopt the summary of them set out in Easyair v Opal Telecom [2009] EWHC 339 (Ch) as being:

> "i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success ...
>
> "ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable ...
>
> "iii) In reaching its conclusion the court must not conduct a 'mini-trial ...
>
> "iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents ...
>
> "v) However, in reaching its conclusion the court must take into account not only the evidence actually plac7ed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial ...
>
> "vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case ...
>
> "vii) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's

> case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that, although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

The principles relating to strike out applications are again well-established and I respectfully adopt the summary of the principles applicable set out in Oysterware Ltd v Intentor Ltd [2018] EWHC 611 at para.40. Those relevant for present purposes are:
(1) the court should strike out parts of a pleading only in clear and obvious cases;
(2) whether some or all of the pleading is to be struck out should generally be decided by reference to what is pleaded in the pleadings under challenge and not by reference to evidence; and
(3) as with summary judgment applications, the court should not conduct a mini trial even if evidence has been served in support of or in answer to the application.

3 This application turns at least in part on the true construction of some insurance documentation underwritten by the defendant. The principles relevant to the construction of a written contract to which English law applies are also now well established. In summary:
(1) the court construes the relevant words of the contract in its documentary, factual and commercial context, assessed in the light of (a) the natural and ordinary meaning of the provision being construed; (b) any other relevant provisions of the contract being construed; (c) the overall purpose of the provision being construed and the contract in which it is contained; (d) the facts and circumstances known or assumed by the parties at the time that the document was executed and (e) commercial common sense but (f) disregarding the previous negotiations and subjective evidence of any party's intentions - see Arnold v Britton [2015] UKSC 36, [2015] AC 1619 per Lord Neuberger PSC, at para.15 and the earlier cases he refers to in that paragraph;
(2) the court can only consider facts and circumstances known or reasonably available to both parties that existed at the time that the contract or order was made - see Arnold v Britton ibid at para.18;
(3) in arriving at the true meaning and effect of a contract, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract and (b) the parties must have been specifically focusing on the issue covered by any disputed clause or clauses when agreeing the wording of that provision - see Arnold v Britton ibid at para.17;
(4) where the parties have used unambiguous language the court must give effect to it - see Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 WLR 2900 per Lord Clarke at para.23;
(5) where the language used by the parties is unclear the court can properly depart from its natural meaning where the contract suggests that an alternative meaning more accurately reflects what a reasonable person with the parties actual and perceived knowledge would conclude that the parties had meant by the language they used but that does not justify the

court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used - see Arnold v Britton ibid at para.18;
(6) if there are two possible constructions the court is entitled to prefer the construction which is consistent with business common sense and reject the others - see Rainy Sky v Kookmin Bank ibid at para.21, but commercial common sense is relevant only to the extent of how matters would be perceived by reasonable people in the position of the parties at the date when the contract is made - see Arnold v Britton ibid at para.19;
(7) In striking a balance between the indications given by the language and those arising contextually, the court can consider the drafting of the clause and the agreement in which it appears - see Wood v Capita Insurance Services [2017] UKSC 24 per Lord Hodge GSC at para.11. Sophisticated complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless the provision lacks clarity or is apparently illogical or incoherent - see Wood v Capita Insurance Services ibid at para.13 and National Bank of Kazakhstan v Bank of New York Mellon [2018] EWCA civ at 1390 per Hamblyn LJ (as he then was) at para.39 to 40, and
(8) the court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of the wisdom of hindsight because it is not the function of a court in interpreting an agreement to relieve a party from a bad bargain - see Arnold v Britton ibid at para.20 and Wood v Capita Insurance Services Ltd ibid at para.11.

4 I now turn to the background facts. The claim concerns a development called Airpoint, West Street, Bedminster ("the development"). It was a former factory that was converted to residential use in 2007 and includes two newly built blocks. It comprises 255 leasehold units which are a mix of 1, 2 and 3 bedroomed apartments. The development's common parts include (a) an atrium with a glass roof and (b) a rooftop outdoor space surrounding the atrium that includes a running track and a barbeque area.

5 The claimant is the owner, together with his wife, of Apartment 210 which they hold under a long lease between West Street Development Ltd (the developer which is now in liquidation), the management company (now Airport RTM Co Ltd) which is responsible for maintaining the common parts, plant and equipment at the development funded by a service charge payable under the lease and the claimant and his wife.

6 The claimant in common with at least some of the other long leaseholders is insured under a housing insurance policy underwritten by the defendant ("the policy"). Broadly, the policy makes provision for (a) a defects insurance period, the scope of which is set out in section 3.2 of the policy and (b) a structural insurance period, the scope of which is set out in section 3.3 of the policy. It is common ground that the defects insurance period was from 28 May 2008 to 28 May 2010 and the structural insurance period was from 29 May 2010 to 28 May 2018. The common parts defect insurance period was different to that which applies to the claimants' housing unit and expired on 3 October 2010.

7 I now turn to the detailed terms of the policy. Firstly, various terms used in the policy were defined and these definitions include at para.1E the definition of common parts which was:

> "Those parts of the multi-ownership building of which each housing unit is part for common or general use for which the policy holder has joint ownership and/or legal responsibility."

The defects insurance period is defined but I need not take up time setting out the relevant definitions given the common ground recited earlier. The phrase "*housing unit*" is defined as meaning:

> "The property described in the final certificate comprising
>
> - The Structure;
> - All non-load bearing elements and fixtures and fittings for which the policy holder is responsible;
> - All Common Parts retaining or boundary walls forming part of or providing support to the structure;
> - Any path or roadway providing access for the disabled:
> - The drainage system within the parameter of each property for which the policy holder is responsible;
> - Any garage or other permanent outbuilding;
>
> "The housing unit does not include any swimming pool, temporary structure, free-standing household appliance, fence, retaining or boundary wall not forming part of or providing support for the structure, any path or roadway not providing access for the disabled."

The phrase "*minimum claim value*" is defined as meaning:

> "The amount relating to each and every loss in respect of each housing unit below which the underwriter has no liability under this policy. If the loss is greater than the minimum claim value, the underwriter will be responsible for the full amount of the policy holder's claim covered by this policy. A separate minimum claim value shall apply to each separately identifiable cause of loss or damage for which a claim is made under the policy."

The phrase "*major damage*" is defined as meaning:

> "(a) destruction of or physical damage to any portion of the housing unit for which a certificate of approval has been received by the underwriter;
>
> "(b) a condition requiring immediate remedial action to prevent actual destruction of or physical damage to any portion of the housing unit for which a certificate of approval has been received by the underwriter, in either case, caused by defect in the design, workmanship, materials or components of the structure which is first discovered by the structural insurance period ..."

The word "*structure*" is defined as meaning:

"The following elements shall comprise the structure of the housing unit:

- Foundations;
- Load bearing parts of floors, staircases and associated guardrails, walls and rooves together with load bearing retaining walls necessary for stability;
- Roof coverings:
- Any external finishing surface including rendering necessary for the water tightness of the external envelope ..."

8 The relevant operative provisions appear under the heading "*The insurance agreement*" at clause 3.2, which provides:

"Defects insurance period;

"The underwriter shall indemnify the policy holder during the defects insurance period and against the cost of repairing, replacing or rectifying any defect in the housing unit for which the developer is responsible and which is discovered and notified to the developer during the defects insurance period and which is notified to the underwriter within six months of the expiry of the defects insurance period.

"The underwriter shall have no liability unless;

"A1, the developer has refused to respond to the claim within a reasonable time period ..."

Clause 3.3 provides:

"Structural insurance period:

"The underwriter will indemnify the policyholder against all claims discovered and notified to the underwriter during the structural insurance period in respect of;

(1) The cost of complete or partial rebuilding or rectifying work to the housing unit which has been affected by major damage, provided always that the liability of the underwriter does not exceed the reasonable cost of rebuilding each housing unit to its original specification ...

"The reasonable costs incurred in repairing, replacing or rectifying any part of the waterproof envelope within each housing unit which was newly constructed by the developer as a result of the ingress of water caused by a defect and the design, workmanship, materials or

components the waterproofing elements of the waterproof envelope of each housing unit ...

"In the event of a claim under this section the underwriter has the option either of paying the cost of repairing or replacing or rectifying any damage resulting from items 1 to 4 above or itself arranging to have such damage corrected."

By section 4 of the policy it is provided:

"Additional extensions ... in addition in the event of a valid claim under sections 3.2, 3.3 or 3.4 only, the underwriter will pay within the limit of indemnity ... (b) alternative accommodation costs;

"Or reasonable additional costs and expenses which are necessarily incurred by the policyholder for a period not exceeding 26 weeks in respect of removal, storage and alternative accommodation whilst the housing unit is uninhabitable;

"(c) Fees; such architects, surveyors, legal consulting engineer and other fees as are necessary and reasonably incurred by the policyholder in relation to the complete or partial rebuilding or rectifying work to the housing unit but shall not include costs or fees incurred by the policyholder in investigating and/or repairing the claim ...."

Section 7 is entitled "*Financial Limits*." It provides for the maximum that the defendants will pay and for any claim under the various sections of the policy. These include for section 3.2:

"(1) £750,000 for any one housing unit;

"(2) £350,000 for any housing unit that has been converted or refurbished or the sum insured for the housing unit whichever is the lesser ..."

For section 3.3 the maximum is:

"(1) £750,000 for any one housing unit:

"(2) £350,000 for any housing unit that has been converted or refurbished or the sum insured for the housing unit whichever is the lesser ..."

At the end of section 7 under the heading "*Common parts*," there appears the following:

"The maximum the underwriter will pay for any claim relating to common parts will be the amount that the policy holder has a legal liability to contribute towards the costs of repairs, rectification or re-building works. Claims are subject to the financial limits for the

> individual sections detailed above and the minimum claim value and/or the excess as detailed in the initial and final certificates."

9 The claims procedure to be adopted in relation to claims under the policy is addressed in section 8 of the policy and it includes a provision at the end of section 8 to this effect:

> "It is a condition precedent to the payment of claims under this section of the policy that concerns must be notified to the developer in writing before the expiry of the defects insurance period and if the developer does not respond, the defects must be notified to the scheme administrator in writing within six months of the expiry of the defects insurance period. The underwriter will have no liability if all matters are not notified within these timeframes."

10 The claimant alleges that the common parts of the development suffers from two types of defect. The first, referred to in these proceedings as "*the atrium defect*" is alleged to have consisted of open louvres in the atrium that let in rainwater that in turn caused damage to the structure both at roof and floor level. The other category of defect referred to in these proceedings as "*the roof parapet and external wall defects*" concerns a membrane beneath the roof top surface surrounding the atrium which it is alleged had been cut in the course of construction and/or installation, thereby allowing water to ingress, and defective capping to the parapet wall that is alleged to have had a similar effect.

11 It is common ground that the atrium defect was notified to the developer and the defendant on behalf of the claimant and other apartment owners on or about 5 July 2009 during the defects insurance period and falls to be considered under section 3.2 of the policy. The developer did not address the defects the subject of the atrium claim properly and the management company lodged a claim on behalf of the apartment owners with the defendant on 29 March 2010. The defendant rejected that claim by an email dated 17 June 2011. The claim form initiating these proceedings was issued on 4 January 2019. It is common ground that if liability under the policy accrued prior to 5 January 2013 the claim is statute barred by operation of section 5 of the Limitation Act 1980.

12 The claimant's currently pleaded case is that the roof parapet and external wall defects were notified to the developer and the defendant during the structural insurance period and falls to be considered under section 3.3 of the policy. By his draft amended particulars of claim, the claimant now maintains an alternative claim that it was notified during the defects insurance period and falls to be considered under section 3.2 of the policy. Since (as is common ground) permission to amend the particulars of claim so to allege is bound to be refused if the claim is unarguable the defendant has sensibly addressed both formulations.

13 The defendant maintains that the roof and parapet defects were first discovered on or before 29 March 2010; alternatively, 5 January 2013. This fact does not appear to be in dispute. It is not disputed in the Reply nor is it addressed in Mr Patten QC's skeleton argument. It is common ground that when a cause of action arises under a contract is primarily a question of construction. It is equally common ground that there is no relevant factual matrix material relevant to the exercise of construction other than the context of the policy read as a whole. The defendant submits that the issue is a straight forward one that can be resolved in an application such as this. The claimant suggests that the issue is more complex than the defendant suggests and maintains that the defendant is wrong or at least realistically arguably wrong in its assertion that the claim is barred and that the issue ought to go to trial.

14 It is common ground that the policy is an insurance policy. The defendant maintains that it is a policy of indemnity insurance. By the time of the hearing it was common ground that this was so. The claimant submits, therefore, that in the absence of clear words to contrary effect, liability arises immediately an insured loss is suffered as a result of the happening of an insured event - see Callaghan v Dominion Insurance Co [1997] 2 Lloyds Rep 541 *per* Sir Peter Webster at 544 (right hand column). As Sir Peter added:

> "Under such a policy ... there is a primary liability, that is to say, to indemnify, and a secondary liability, that is to say to put the insured in his pre-loss position, either by paying him a specific amount or it may be in some other manner. The fact that an insurer has an option as to the way in which he will put the insured into his pre-loss position does not mean that he is not liable to indemnify in one way or another immediately the loss occurs."

In the result, Sir Peter held that the indemnity insurance policy being considered by him was an agreement under which an insurer conferred a contractual right on the insured which came into effect for limitation purposes immediately a loss was suffered caused by the event insured against and the cause of action accrued for limitation purposes on the date that the loss occurred not the subsequent date when the insurer avoided the policy. This principle has been consistently followed and applied - see, by way of example, CEGB v Halifax Corporation [1963) AC 765, Lefevre v White [1990] 1 Lloyds Rep 569 and The University Superannuation Scheme Ltd v Royal Insurance [2000] 1 All ER Comm 266. The outcome is likely to be different only if the express terms of the policy provide that an indemnity is not payable until a date after the date of the loss or can only arise after the date of the loss.

15 The claimant contends that under the terms of this policy the wording of both clauses 3.2 and 3.3 make clear that the trigger for entitlement under the policy is the incurring of costs with the result that unless and until the insured has incurred costs in rectifying the defects concerned, no liability on the part of the defendant to indemnify can arise and so time does not start to run until then for limitation purposes. Mr Patten maintains that this leads to the conclusion that the application should be dismissed. He maintains that the construction for which the defendant contends ignores the fact that the defendant has the option of paying for the cost of repairs or carrying out work itself. He submits that given these provisions, very clear words would be required to achieve the result for which the defendant contends. I reject this submission. My reasons for reaching that conclusion are as follows.

16 First, the submission that clear words are required to achieve the result for which the claimant contends is the polar opposite of what Sir Peter Webster said in Callaghan ibid and is an attempt to alter the default position identified in that case and others to similar effect to which I have referred.

17 Secondly, the submission that the claimant's construction gains support from the defendant's right to choose whether to pay for repairs or commission works of repair itself ignores entirely the distinction drawn in Callaghan (ibid.) between what Sir Peter Webster called the "primary" and "secondary" liability and his particular comments concerning the effect of an alternative such as is available to the defendants under the policy.

18 Thirdly, the claimant's proposition means in effect that an insured would always be able to control the date at which time starts to run by deciding whether or not to incur the cost of

rectifying the defect that has occurred. This ignores the point of general principle made by Lord Neuberger in LSE v Henthorne [2011] EWCA civ 1415, [2012] 1 WLR 1173 at para.31, namely, that:

> "... clear words would normally be required before a contract should be held to give a potential or actual creditor complete control over when time starts running against him, as it is such an unlikely arrangement for an actual or potential debtor to have agreed."

Fourthly, such an approach would defeat the purpose of such insurance - see in this regard, Manchikalapai v Zurich Insurance [2019] EWCA civ 2163, [2020] 187 Construction Law Reports 62, which concerned a policy of a similar type to the policy in this case in which Zurich Insurance plc had agreed to pay the reasonable costs of repairing physical damage caused by a developer. In that case it was submitted on behalf of the insurer that its liability was triggered only by the claimant incurring the cost of any remedial works - see para.85 of the judgment. That construction was rejected by the Court of Appeal. In the leading judgment on this part of the case, Coulson LJ rejected such construction because it would defeat the purpose of the policy because in a situation in which the work was too expensive for the claimant to carry out, that would mean the work would never be carried out and Zurich Insurance would then have no liability to pay anything under the terms of the policy. As Coulson LJ observed:

> "I consider that that is not how the policy was intended to operate. It would allow the insurers to take advantage of the leaseholders' impecuniosity to avoid liability altogether."

The existence within the policy in this case of an alternative available to insurers of doing the work does not impact on the validity of this point. Bearing in mind each of these strands of authority, I consider that clear words would be required to achieve the result for which the claimant contends and that plainly that is not the effect of either the language used in section 3.2 or 3.3 or of the language of the policy when read as a whole.

19 Turning to the first of these points, there is nothing in the phrase "... *against the cost of repairing* ..." that requires the cost to have been incurred before the obligation to indemnify in respect of that cost arises. Precisely as was the case in Manchikalapai (ibid.) such a construction requires the interpolation of the word "*incurred*" before the word "*cost*." That approach was rejected in that case and I reject it in this case. As was emphasised in Arnold v Britton ibid at para.17, the departure point in any construction exercise is the language used by the parties. That is not an exercise that permits the insertion of additional words. If and to the extent that the language is unclear, then the court can depart from the natural meaning of the words used; however, to adopt the construction for which the claimant contends would be to defeat not deliver business common sense for the reasons I have explained.

20 Turning now to the wider language of the policy, I do not accept that there is anything in the language used that drives me to a different conclusion from that that I have so far expressed. Mr Patten relied on section 4 of the policy on the basis that the payment of, for example, fees could be payable only after they had been incurred. I do not agree that implies that no liability can arise under the policy until any of the costs coming within clauses 3.2 or 3.3 have been incurred. That this is so is emphasised by the opening words of section 4. The fundamental point, however, is that this provision is concerned with delimiting what comes

within the scope of what was called in Callaghan (ibid.) the "*secondary liability*." It is entirely irrelevant to the question of when the primary liability to indemnify arises.

21 Mr Patten also relied on the provision concerning common parts within section 7. He submitted that this provision was not or at any rate was not exclusively, a limitation provision but was also one that defined when the obligation to indemnify arose in relation to common parts claims. I reject that submission for the following reasons.

22 First, this is not the basis on which the claim has been pleaded in the Particulars of Claim (or the proposed amendment to it), nor has it been pleaded in the Reply as an answer to the limitation defence pleaded by the defendant. In my judgment, that of itself is a complete answer to this point. Indeed the point had not even made it into Mr Patten's skeleton submission ahead of this hearing. It emerged for the first time at the start of Mr Patten's oral submissions.

23 Secondly, in my judgment, the point is simply wrong. In construing the effect of this provision, it is necessary to consider the policy as a whole. The sole and exclusive purpose of section 7 of the policy is as identified in the opening words of section 7, namely, to establish "*the maximum the underwriter will pay for any claim* ..." In the context of the claim for damage to the common parts, it is close to obvious that any repairs would be carried out by the management company, not individual occupiers, unless the defendant opted to do the work itself and that the management company would seek to obtain funding to carry out the work by operation of the service charge mechanism within the leases of the claimant and other householders in the development. Plainly, the insurer would wish to make clear that it would have no greater liability under the policy than the claimant had or would have under the service charge. That is all that this provision is concerned with. The language used on which Mr Patten relies, that is "*legal liability to contribute* ..." is referring to the secondary liability identified in Callaghan (ibid.) not the primary liability that is relevant to limitation and, in any event, it is to be construed as meaning no more than the maximum that the defendant is to pay under any claim under either clause 3.2 or 3.3 concerning the common parts.

24 The limited role of the provision concerning common parts within section 7 is emphasised by the way in which both clause 3.2 and clause 3.3 is structured. Each applies to defects in the "*housing unit*" belonging to the insured. "*Housing unit*" is defined in section 2 as including "*structure*" and "*structure*" is defined as including both roof coverings and external finished surfaces necessary for the water tightness of the external envelope. In reality, the claim is one to which clauses 3.2 and 3.3 alone can apply and any claim in respect of defects to the common parts is to be made exclusively by reference to those provisions. The only common parts not falling within the definition of "*structure*" are picked up by the third bullet point in the definition of "*housing unit*." The policy simply does not respond to defects to the common parts not coming within the scope of the division of definition of "*housing unit*." In my judgment, therefore, no question can arise of a claim in respect of either head of loss otherwise than by reference to section 3.2 and 3.3. Had the contrary been intended, there would be a separate provision to that effect within section 3 entitled "*the insuring agreement*" not a provision within section 7 which is concerned with a different issue, as I have explained.

25 The next provision that Mr Patten relies on is the definition of minimum claim value. In essence, Mr Patten submits that whether a claim is for a sum of in excess of that figure cannot be established until a payment has been made and thus that on a proper construction

of the policy no liability can arise unless and until payment has been made by the insured. I reject that argument. First, it ignores the fact that the defendant can choose either to pay or do the work. Secondly, the submission ignores the bifurcated nature of the defendant's liability as explained in cases such as Callaghan referred to earlier. This provision does not and cannot prevent the primary liability from arising. It is simply a limitation provision.

26 The final point made by Mr Patten is that the obligation to indemnify is a continuing obligation. He submits, therefore, that if a claim for indemnity is made and rejected and the work is then carried out and/or paid for by the insured and another claim is then made for an indemnity, time starts to run again. In my judgment, that submission, too, is mistaken. First, it ignores the fact that liability under section 3.2 of the policy is triggered by notification of the defect of the developer during the defects insurance period and to the defendant within six months of the expiry of that period if the developer has failed to respond to the claim. As I have explained, it is not triggered by payment, thus, in my view, once a claim has been made and rejected, time starts to run. Secondly, such a construction would suffer from all the difficulties I have set out earlier concerning the suggestion that liability arises only following payment by the insured. Thirdly, there is no pleaded suggestion of any such notification in the particulars of claim.

27 I am satisfied that the limitation issue that arises in this case is one that I can properly resolve in the context of a summary judgment application because it involves a short point of construction that does not depend for its outcome on disputed issues of fact. I am entirely satisfied that the claim is statute barred by section 5 of the 1980 Act and, therefore, must be dismissed. The alternative way in which the roof claim is pleaded in the draft amended particulars of claim is not realistically arguable because it, too, is statute barred. That being so, permission to amend in the terms proposed must be refused.