THE HIGH COURT

[2012 No.129 32P]

BETWEEN

FIONA O'DONNELL

PLAINTIFF

AND

MICHAEL RYAN

Trading as The Rybo Partnership

SALTAN PROPERTIES LIMITED

ELK HOUSE COMPANY IRELAND LIMITED

ELK-FERTIGHAUS AG

Trading as ELK Building Systems

MCHUGH O'COFAIGH

MARK O'REILLY

Trading as Mark O'Reilly and Associates

AND

MARK O'REILLY AND ASSOCIATES LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 20th day of October, 2017.

1. The first defendant has sought by motion to have the proceedings against him struck out on the grounds that the action is bound to fail and/or is vexatious and frivolous. It is accepted by the parties that the jurisdiction exists to strike out some or all of the claim.

2. The first defendant seeks in the alternative that the proceedings against him be struck out on the grounds that same constitute a recovery action maintained by the underwriters of a buildings defects guarantee scheme motivated by his claim to be entitled to the benefit of that scheme.

Background facts

3. Mr. Ryan was, until the occurrence of matters later explained in this judgment, the registered owner of the lands comprised in Folio 33624F and Folio 1637 of the Co. Meath Register, situate at Fairyhouse Road, Ratoath, Co. Meath, upon which a development of 26 apartments, known as Riverwalk, was constructed by Saltan Properties Limited, the second defendant ("Saltan"). The apartments were sold with the benefit of a defects liability scheme, the Premier Guarantee for Ireland Scheme ("the Guarantee").

4. The apartment scheme was part of a larger development containing other types of residential units, sold in fee simple, and commercial units, which are not relevant to the present proceedings.

5. The plaintiff is one of 26 plaintiffs who have commenced proceedings to recover monies paid by the insurers on foot of the Guarantee following complaints by the owners of the apartments regarding water ingress alleged to have been caused by defects in the structural elements of the development, most especially defects in the balcony rainwater outlets, the waterproof balcony membranes, the seals of the windows and doors, the external drainage system and defects in the external walls.

6. The plaintiff pleads that, by reason of the ingress of moisture the structural fabric of the apartment and the surrounding development has been compromised to such a degree that the plaintiff has been deprived of, *inter alia*, the subjacent and lateral support, shelter and protection from the common areas, other apartments within the development and the sub-soil there under.

7. These proceedings are being maintained by the plaintiff primarily as a recovery action in respect of expenditure already incurred by the insurers under the Guarantee but the claim also seeks damages in respect of other alleged fire safety and acoustic defects not covered by the Guarantee.

8. In all, 26 sets of proceedings were instituted. They were all issued on 19th December, 2012, and, in each case, the relevant plaintiff is the owner of an apartment or duplex within the development.

The parties to the proceedings

9. The plaintiff is the owner and the original purchaser of apartment no. 1 in the development.

10. The first defendant trades as a partnership, RYBO, but Michael Ryan is now the sole owner of the business operated by the partnership. He was the owner of the lands on which Riverwalk was constructed.

11. The second defendant, Saltan, is a limited liability company and was the developer of the Riverwalk complex.

12. The third defendant is a limited liability company and was contracted by Saltan to supply and install prefabricated structures known as the "ELK" system. Briefly, the ELK system is a single skin external wall made complete in a factory. It includes windows, doors, internal plasterboard and external weather and insulation systems. The system also included the balcony of the apartment.

13. The fourth defendant is a company registered in Austria and was the body which constructed and supplied the ELK system.

14. The fifth defendant is a firm of architects engaged to supply architect services in respect of the development.

15. The sixth defendant is an engineer engaged to supply engineering services in respect of the development.

16. The seventh defendant is a limited liability company engaged to supply engineering services in respect of the development.

17. The defendants are Saltan, the members of the design team, the manufacturers and installers of the building system and the architects and engineers employed in regard to the development and the structure.

18. The first defendant argues that he is incorrectly joined as a defendant and that he had an insufficient engagement with the building of Riverwalk to now be the subject of litigation concerning the alleged defects.

The licence to enter and build
19. By licence agreement made on 5th March, 2004 ("the Licence"), titled a "building lease agreement" and made between Mr Ryan and John Bourke, ("RYBO") the partners at the time, of the one part and Saltan of the other part, the freehold owners granted a licence to Saltan to enter and build Riverwalk on the lands. The developer thereby took a non-proprietary interest in the development site and avoided stamp duty, which would be levied on an outright sale. The stamp duty was paid by the purchasers of the finished units on the assurance to them.

20. The Licence recited that the partnership had obtained planning permission in 2002 and 2003 to construct, *inter alia*, 26 apartments on part of the folio lands. The Licence gave leave to Saltan to enter the lands for the stated purpose of the works of construction, contained an obligation on the part of RYBO, as owner of the lands, to execute an assurance of the finished units to the purchasers nominated by the developer and, following the sale of the last unit, to assure the common areas and the reversion in the leases to the management company of the estate.

21. Certain features of the Licence are of note: the licensor (the partnership) is recited as being the owner of the lands. The Licence gave liberty to Saltan to enter upon the lands for the stated purpose of carrying out the works permitted by, and complying with, the obligations arising from the planning permission and Saltan agreed to erect and complete at its own expense the apartments in accordance with the planning permissions. The Licence granted exclusive licence and authority to be on the lands during the licence period of 5 years commencing on 1st January, 2003, which was expressly granted for the benefit of the licensee, its employees, subcontractors and agents. It was expressly agreed and acknowledged that the Licence conferred no estate or interest in the lands and was permissive and limited for the stated purpose of carrying out the works.

22. Payment was in the form of a "site fine" totalling €50,000 per site plus VAT at the prevailing rate, to be paid on the sale to the purchasers of the individual apartment units, in consideration of which the licensor was, at the request of the licensee, to execute an assurance of each apartment unit to the nominated purchaser.

23. The Licence was part of the title offered to purchasers of the apartments. The draft of the form of deed to the purchasers was contained in schedule 4 to the Licence.

The contract for sale of the apartments
24. Each of the apartment sales was made between the intending purchaser and Saltan in accordance with the Law Society 2001 standard Building Agreement and Contract for Sale. That contract contained an agreement on the part of Saltan to complete the works and make same "fit for habitation and use" within 18 months from the date thereof. Special condition 21.2 recited the Licence granted by RYBO and provided that, on completion of the construction, Saltan would procure from RYBO a deed of assurance in the agreed form contained in the booklet of title. The Licence was part of the title documents furnished in the contract for sale.

25. RYBO was not a party to the Building Agreement and Contract for Sale.

26. The sales of the individual apartments and duplex units closed between November, 2004 and March, 2006 and were made in each case by way of a purchase lease for 950 years, subject to a nominal rent.

The sale by long lease
27. The apartments were sold, as was then common, by way of long lease for 950 years ("the Lease"), by which certain assured easements were demised and certain rights and easements were reserved to the benefit of the common areas. The rent reserved was one euro per annum, subject to a rent review inserted to prevent a right to acquire the fee simple arising by virtue of the Ground Rents (No. 2) Act 1978 (as amended).

28. The easements assured were set out in Part 4 of the first schedule and were in standard form. They included a right of access and ingress in common with the lessor, the developer and the Management Company, the right to use the common areas, rights in the form of wayleaves and the right to subjacent and lateral support and shelter from the building and the sub-soil thereunder. The benefit of covenants entered into by the lessees of other units, the developer and the Management Company was also assured, insofar as these were intended to benefit the demised premises or the lessees.

29. None of these clauses is unusual in the context of a development scheme.

30. The Lease identified RYBO as the lessor and Saltan as the developer. The Management Company, Riverwalk Court Management Company Limited, joined in the lease as the party of the second part. The title of the lessor is recited, as are the facts that Saltan had constructed the apartment complex on foot of a non-proprietary licence, and that the lessor had agreed, at the request of the developer, to grant the Lease on the terms therein contained. The Lease contained the usual management scheme covenants.

31. It is important at this juncture to note that the scheme of disposal by way of licence and long lease was fully recited. The second recital at C.2 is as follows:

> "The Lessor has granted to the Developer a Licence to enter unto the Estate for the purpose of the development of the Estate as a residential estate with some commercial units and has further agreed that the Lessor shall, at the request of the developer grant to the Lessee a Lease of the Demised Premises on the terms hereinafter appearing"

32. The various terms appearing with capital letters had already been defined in the deed.

33. It was then recited that the sale of the other apartment units was to be made "at the request of Saltan" by way of lease in

substantially the same form, and that the leases would, in each case, contain the easements, rights and privileges therein set out in the schedules.

34. There was recited the agreement by RYBO to assure the reversion in the estate and the common areas to the Management Company as soon as all of the units had been sold.

35. The operative demise was expressly made by RYBO "at the request of the Developer", Saltan.

36. Certain covenants were made with Saltan and the Management Company, including covenants to repair the structures and fixtures, plant and machinery in the estate, the common areas and the reserved property. Again, these clauses were in standard form.

37. The only covenant made with the Lessor, RYBO, was the covenant for quiet enjoyment, made also with Saltan and the Management Company. That covenant forms part of the basis of the claim in these proceedings.

38. For reasons that will be discussed below, the 950 year Lease was, for all relevant purposes, a purchase lease. The scheme of disposal was fully recited. The role of RYBO was expressly to act and be engaged at the request of Saltan and to hold the legal title pending the sale of the last unit, upon which the reversion in the leases and the title to the common areas would be assured to the Management Company.

39. The last of the apartments was sold in or around March, 2006. The common areas were conveyed to the Management Company by deed of conveyance made on 23rd December, 2015.

The claims and progress to date

40. It is alleged that, some time after the last of the apartments was sold, the purchasers experienced problems arising out of alleged defects, some or most of which were covered by the Guarantee, and the insurers did deal with these claims under the Guarantee.

41. The insurers then instructed solicitors to bring these recovery actions.

42. The claims have been case managed and a statement of claim has been delivered in three of the 26 actions, those three having been selected as being representative of the issues that will arise in the others.

43. The first defendant then brought the present motion to strike out the claims against him.

The legal test

44. The first defendant argues that the only contractual connection between the purchasers of the apartments and himself is that he was the lessor in the purchase leases. It is argued that the role played by the first defendant was, at all material times, express and clear and that, as a matter of contract law, no cause of action exists against the first defendant in respect of any of the defects of which the plaintiff complains. He argues that at no time was he engaged in any activity of the type that would normally be engaged in by a builder or building contractor, as he had handed over legal and *de facto* possession of the lands in pursuance of the obligation under the Licence before construction commenced.

45. The parties are agreed that the test to be applied by the Court in determining an application to strike out proceedings as being unstateable and bound to fail is that identified by the Supreme Court in *Barry v. Buckley* [1981] I.R. 306, and is a jurisdiction that should be "exercised sparingly and only in clear cases". No factual dispute may be determined in such an application, as explained by Clarke J. in *Salthill Properties Limited & Anor. v. Royal Bank of Scotland plc & Ors.* [2009] IEHC 207, wherein he stated that, if there was "at least some potential for material factual dispute between the parties capable of resolution only on oral evidence", an application to dismiss as bound to fail would be unlikely to succeed.

46. In its recent judgment in *Moylist Construction Limited v. Doheny & Ors.* [2016] IESC 9, the Supreme Court reviewed these principles and accepted that the jurisdiction was to be "sparingly exercised", was not to be founded on an argument that a plaintiff's case is "very weak" and is not akin to the trial of a preliminary issue of fact or law.

47. I propose adopting that approach in considering the present application and I note that the parties are agreed that the burden is on the applicant to establish that the case will indubitably fail: *Lawlor v. Ross & Ors*. [2001] IESC 110.

The legal effect of the development scheme

48. Before I deal with the detail of the claims made against the first defendant, it is convenient to examine the legal relations created by the scheme under which the apartments were sold.

49. The first defendant ceded possession of the lands on which the development was constructed in performance of the Licence. He agreed to effect an assurance when called upon to do so and on payment of the site fine. He held the title to the reversion and the common areas as a bare trustee following the sale of the last unit in 2006. The judgment of Laffoy J. in *Re Heidelstone and Company Limited* [2007] 4 I.R. 175 is an authoritative statement of that proposition of law.

50. The first defendant was immediately obliged, upon being called upon to do so, to execute a deed of assurance to the Management Company of the common areas and the reversion in the leases and he could not, as a matter of law, refuse to do so. He held his interest on trust, pending the execution of that deed of assurance. He was a bare trustee and had no beneficial interest in the common area and the reversion from 2006, when the last apartment was sold.

51. The device by which the apartments were sold by way of long lease arose from the difficulty in relation to the enforcement of freehold positive covenants as between successors-in-title of the original covenanting parties. The purchasers acquired the individual apartment units by purchase lease and the sale so effected is tantamount to what counsel for the first defendant described as an "outright sale". The sale was by purchase lease. The lessor retained title in the reversion for legal reasons and not because he desired or was intended to exercise any of the rights of a lessor.

52. Therefore, the first defendant did not, as a matter of law, have an interest beyond that of bare trustee and he was obliged to act at the direction of the beneficial owner. Further, all actions of the first defendant were expressly stated in the contract for sale and the purchase lease to be made at the request or direction of Saltan.

53. The first defendant also retained title to the common areas until the last apartment was sold because the easements, rights and

privileges granted and reserved by the lease required a dominant and servient owner in order to be created and the Management Company did not have the right to call for the reversion and title to the common areas until the last apartment was sold in 2006.

54. The plaintiff argues that the sale to the plaintiff by long lease created a landlord and tenant relationship. For the reasons just outlined, I am of the view that the first defendant was not a landlord in the true sense, but was a lessor holding a bare legal title to the reversion in a long purchase lease. As trustee, he could act only at the direction of his principal and had no legal right to refuse to do what was directed. He held title subject to an absolute requirement that he assure said title when called upon to do so. This was clear and express in the Lease and the contract for sale, and formed the legal and contractual basis upon which the units were sold.

55. The right of a bare trustee is constrained by the direction of his principal and by the obligation to assure the reversion and common area on request. The first defendant ceded the right to occupy the common areas to Saltan by the Licence, and, from 2006 onwards, held the title and right to occupy for the Management Company. All actions by RYBO were made, acknowledged and agreed to be made at the request of Saltan.

56. The combined effects of the granting of a long lease of the apartment, the agreement to convey the common areas and reversion in the leases to the Management Company upon request, and the creation of an exclusive licence to Saltan meant that, as a matter of law, the first defendant was not beneficially entitled to possession of the common areas at any time material to the matters complained of.

57. In those circumstances, I consider any liability which might arguably be found against the first defendant would have to arise from acts of possession or acts of ownership exercised by him as a matter of fact, and not by reason of the fact that he was a lessor holding a nominal reversion as bare trustee.

58. I will return later to deal with the argument of the plaintiff that the first defendant *de facto* retained occupation of the common areas and assumed obligations in respect of their maintenance and upkeep.

59. I turn now to examine the claims made against the first defendant.

The claims made against the first defendant
60. The statement of claim pleads the general scheme by which title to the apartments and the common areas was made, and the building agreement made with Saltan, and expressly pleads that the first defendant was the "developer" of the apartment scheme, and engaged Saltan to build. As will appear later, I do not agree with that description.

61. The statement of claim is careful, specific, detailed and runs to 59 pages. Full particulars of the defects, the causes of action and the relevant party or parties alleged to be responsible are carefully set out in numbered paragraphs. The claims are made in a number of causes of action. It is useful to consider each separately and to identify the factual bases on which each is made.

62. I will first deal with the claim in contract.

The terms of the purchase lease
63. The claim for damages for breach of the express covenants to keep the common areas, reserved property and all structures and fixtures thereon in good repair is pleaded against Saltan but not against RYBO. This is prudent, as the obligations of maintenance and upkeep of the common areas were expressly imposed upon the Management Company and Saltan by the Lease.

64. It is not pleaded that RYBO designed or constructed the common areas.

65. The contractual claim against RYBO is alleged to derive from the Purchase Lease, the express covenant for quiet enjoyment, the principle of non-derogation from grant, the grant of the assured easements, and from certain pleaded implied covenants, terms and conditions.

The express covenant for quiet enjoyment
66. The plaintiff claims that the defects in the premises are such that they amount to a breach of the express covenant for quiet enjoyment on the part of RYBO contained in the Lease.

67. The relevant part of the covenant at Clause 4 is as follows:

> "The Lessor and the Developer and the Management Company hereby further covenant that the lessee paying the Rent hereby reserved … shall and may peaceably and quietly hold and enjoy the Demised Premises during the term hereby created without any lawful interruption or disturbance from or by the Lessor or the Developer and the Management Company or any person or persons rightfully claiming under or in trust for the Lessor or the Developer or the Management Company" (within that quote the reference to "lawful interruption" must be read as "unlawful).

68. This is a standard covenant for quiet enjoyment. It is one found in all leases and implied by statue under s. 41 of Deasy's Act.

69. The first defendant argues that, as a matter of law, the covenant regulates the conduct of a lessor during the tenancy and does not import a warranty as to the condition of the demised premises at the commencement thereof.

70. In *Southwark London Borough Council v. Tanner & Ors*. [2001] 1 A.C. 1, Lord Hoffmann addressed precisely this point and stated as follows:

> "The covenant cannot be elevated into a warranty that the land is fit to be used for some special purpose …. On the other hand, it is a question of fact and degree whether the tenant's ordinary use of the premises has been substantially interfered with."

71. The first defendant therefore argues that the claim arising from alleged defects in the quality and structure of the building, even if established as a matter of fact, could not amount to a breach of the covenant.

72. I consider that to be correct and that the covenant does not import a positive duty to repair, but rather an obligation to refrain from actions which might interfere with possession, enjoyment or the subject matter of a demise, as understood at law.

73. In *Kenny v. Preen* [1963] 1 Q.B. 499, the plaintiff sued, *inter alia*, for breach of the implied covenant for quiet enjoyment in respect of a residential letting of two rooms arising from the service by the landlord of a series of letters threatening to evict the tenant and put her property on the street, while at the same time ignoring letters from her solicitor raising a legal defence to the notice to quit served before the stream of correspondence commenced.

74. In the course of his judgment, Pearson L.J. said at p. 511:

> "The implied covenant for quiet enjoyment is not an absolute covenant protecting a tenant against eviction or interference by anybody, but is a qualified covenant protecting the tenant against interference with the tenant's quiet and peaceful possession and enjoyment of the premises by the landlord or persons claiming through or under the landlord. The basis of it is that the landlord, by letting the premises, confers on the tenant the right of possession during the term and impliedly promises not to interfere with the tenant's exercise and use of the right of possession during the term. I think the word 'enjoy' used in this connection is a translation of the Latin word 'fouor' and refers to the exercise and use of the right and having the full benefit of it, rather than to deriving pleasure from it."

75. One of the leading Irish authorities on the covenant is the decision of Kenny J. in *Whelan v. Madigan* [1978] I.L.R.M. 136, where, by express reference to the judgment in *Kenny v. Preen*, he said that "there must be some physical interference with the enjoyment of the premises in order to sustain an action for breach of covenant for quiet enjoyment...".

76. The 3rd edition of Wylie's Landlord and Tenant Law states at para. 14.10 that he is in agreement with that proposition.

77. The covenant was recently considered by the Court of Appeal in *The Square Management Ltd. & Ors. v. Dunnes Stores Dublin Company* [2017] IECA 256, a decision which mostly upheld the decision of Barrett J., which I consider more fully below.

78. As Parker J. said in *Browne v. Flower* [1911] 1 Ch 219, at p. 228:

> "…to constitute a breach of such a covenant there must be some physical interference with the enjoyment of the demised premises, and that a mere interference with the comfort of persons using the demised premises by the creation of a personal annoyance such as might arise from noise, invasion of privacy, or otherwise is not enough."

79. The plaintiff relies on the judgment of Davitt P. in *Brown v. Norton* [1954] I.R. 34, wherein he states that there is no rule of law "on the mere sale or letting of an unfurnished but completely built house" that precludes the implication of a warranty of fitness for habitation. That case involved an agreement for sale of a building in the course of construction. The contract was between the plaintiff and the defendants and the sale was to be effected by way of sub-purchase. The purchase agreement contained a clause that the purchasers had inspected the building in the state in which it was, and were satisfied therewith. Davitt P. found that a covenant by which the purchaser accepted that he was satisfied with the works negatived the implied warranty with regard to the quality of the works and materials and held that, absent such covenant, a builder would implicitly be understood to have agreed that he had the necessary skill to do the building works and would execute those in a good and workman-like manner with sound and suitable material.

80. A contract of this nature was entered into between the purchasers of the apartment units and Saltan, but no contract containing any of the indices of a building contract was entered into with RYBO. The judgment in *Brown v. Norton* therefore offers no assistance to the plaintiff with regard to any terms that are to be implied into the contract with RYBO.

81. Similarly, I am of the view that another judgment on which the plaintiff relies to establish the indices of the relationship of landlord and tenant that might import an obligation on the part of a landlord is not on point. *Victor Weston (Eire) Limited v. Kenny* [1951] I.R. 191 concerned the relationship of landlord and tenant in an occupational lease. The statement of Davitt P. at p. 197 of the judgment is based on what I consider to be an incorrect view of the substance of the transaction entered into by RYBO, and, while it was the owner of the reversion and a lessor in the Lease until such time as the Management Company took on that role, it could not, as a matter of law, be said to be in possession of the common areas as beneficial owner. The judgment in that case is considered further below.

82. The essential argument of the first defendant is that the covenant for quiet enjoyment is the covenant enjoyed by a tenant during his tenancy and I agree with that proposition. It is not a covenant which imports a warranty as to the suitability or condition of the premises at the time that the tenancy was created. Such a warranty is inconsistent with the principle of *caveat emptor*, and with the scheme of disposal.

83. Further, having reviewed the statement of claim, I am of the view that the first defendant is correct that there is no factual allegation made in the statement of claim which could support a claim that the first defendant substantially interfered with the title of the plaintiff to her apartment or to the possession that she enjoys. It is true that there are pleas that the premises was not fit for purpose at the time of sale, but the case law seems to me to be clear that the covenant for quiet enjoyment does not import a warranty as to fitness for purpose, or even a warranty as to the state or condition of a building, and a breach of the covenant is established from facts arising in the currency of the tenancy, or from actions or omissions of a lessor by which he interferes with the title of a tenant, or with the ordinary and lawful enjoyment of the demised premises.

84. The case law points to a number of examples of flooding from neighbouring land occupied by another tenant of the same landlord: *Sanderson v. Berwick-Upon-Tweed Corporation* [1884] 13 Q.B.D. 547. Certain kinds of actions that might also amount to nuisance, e.g. the permitting of the happening of certain matters which make it impossible or difficult for the tenant to continue to enjoy the premises, may amount in a suitable case to a breach of the condition. There is no plea and no fact asserted that might bring the plaintiff's claim within these authorities.

85. The alleged breach of the covenant for quiet enjoyment is connected closely with the argument of the plaintiff that the first defendant retained ownership and control of the premises. As I have already held, the ownership of the first defendant was nominal, as he held a bare legal title in the reversion. Insofar as he might have exercised any acts of dominion or possession, he did not do so as owner of the reversion. The actions of the first defendant, as a matter of law and the contractual nexus established by the scheme of disposal, were done at the direction of, or on behalf of, his principal. He had no right to possession, and no right to exercise any of the indices of possession, save at their direction.

86. Thus, I consider that the claim, insofar as it is founded on a plea that the poor condition of the premises constitutes a breach of the covenant for quiet enjoyment, cannot succeed as a matter of law on the facts pleaded or asserted.

Non-derogation from grant
87. A plea is also made that the first defendant derogated from his grant. It is pleaded that the principle has the legal effect that the first defendant derogated from the grant effected by the Lease by constructing an unsuitable or defective apartment structure. The plaintiff fairly admits that the claim arising from an alleged derogation from grant by the first defendant is an aspect of the claim for breach of contract.

88. No plea is made that the use made by the first defendant of the common areas during the time when he retained legal title thereto was such as to render the apartment unfit or materially less fit for use.

89. Millett L.J. in *Southwark London Borough Council v. Tanner & Ors*. suggested that there was "little if any difference between the scope of the covenant" for quiet enjoyment and the obligation which lies upon any grantor not to derogate from his grant, and he explained the principle as meaning that "A man may not give with one hand and take away with the other".

90. Barron J. in *Connell v. O'Malley* (Unreported, High Court, Barron J., 28th July, 1983) quoted from Parker J. in *Browne v. Flower* [a *dictum* which explains the principle]:

> "Under certain circumstances there will be implied on the part of the grantor or lessee obligations which restrict the user of the land retained by him further than can be explained by the implications of an easement known to the law. Thus, if the grant or demise be made for a particular purpose, the grantor or lessor comes under an obligation not to use the land retained by him in such a way as to render the land granted or demised, unfit or materially less fit for the particular purpose for which the grant or demise was made …".

91. The 3rd edition of Wylie's Irish Land Law explained the law at para. 6.059:

> "As regards the rule that a man may not derogate from his grant, the philosophy here is that, when a man transfers his land to another person, knowing that it is going to be used for a particular purpose, he may not do anything which is going to defeat that purpose and thereby frustrate the intention of both parties when the transfer is made. Usually application of this principle creates property rights in favour of the grantee which take the form of restrictions enforceable against the grantors land."

92. That *dicta* was approved by Laffoy J. in *Conneran & Anor. v. Corbett & Sons Limited & Anor*. [2004] IEHC 389 (at p. 15).

93. Whelan J., giving the judgment for the Court of Appeal in *The Square Management Ltd. & Ors. v. Dunnes Stores Dublin Company (supra),* approved the approach of Barrett J. in the High Court [2017] IEHC 146, where he had considered in detail the judgment of Neuberger J. in *Platt v. London Underground Ltd.* [2001] 2 E.G.L.R. 121, at 122.

94. Neuberger J. had identified eleven principles, some of which are relevant to the argument in the present case. The starting point identified by Neuberger J. was to identify the nature and extent of the grant. I have already identified the nature, extent and purpose of the scheme of disposal of the apartment units in the present case.

95. The third and fourth principles were outlined by Neuberger J. as follows:

> "3. The exercise of determining the extent of the implied obligation not to derogate from grant] involves identifying what obligations, if any, on the part of the grantor can fairly be regarded as necessarily implicit, having regard to the particular purpose of the transaction when considered in the light of the circumstances subsisting at the time the transaction was entered into' per Sir Donald Nicholls V.C in Johnston & Sons Ltd v. Holland [1988] 1 EGLR 264 at 268A."
>
> 4. There is a close connection, indeed a very substantial degree of overlap, between the obligation not to derogate from grant, the covenant for quiet enjoyment and a normal implied term in a contract…."

96. Finally, Neuberger J. identified as his eleventh principle:

> "11. When assessing what the parties to a contract actually or must have contemplated, one should focus upon facts known to both parties and statements and communications between them. A fact that could only have been known to one party could not, save in very unusual circumstances, be a legitimate part of the factual matrix. A thought locked away in the mind of the parties, or even perhaps of both parties, cannot normally be a relevant factor when assessing the parties' understanding. In English law, at any rate, contract is concerned with communication as well as mutuality."

97. Barrett J. considered that the proposal to develop the parking arrangements in the shopping centre did not amount to a derogation from grant and, applying the judgment of Laffoy J. in *Conneran & Anor. v. Corbett & Sons Limited & Anor. (supra),* "a real and substantial interference with the express and implied rights under the lease" was required to establish such derogation.

98. The purchase lease was made for a purpose and, in its express terms, it contains one covenant on the part of the lessor: the covenant for quite enjoyment. Having regard to the overlap between that covenant and the principle of non-derogation from grant, my analysis above and to the principles outlined in *Platt v*. and accepted in *The Square Management Ltd. & Ors. v. Dunnes Stores Dublin Company*, there cannot be imported into the lease an obligation on the part of the lessor to maintain the common area. As Neuberger J. says (his point 5) "the express terms of the lease provided otherwise" and those obligations were assumed by the Management Company under the express terms of the Lease, and by Saltan under the building agreement.

99. I consider for these reasons that this part of the claim is bound to fail.

The alleged implied terms
100. The claim in contract is made also on the basis that certain obligations are to be implied into the Lease.

101. The context in which the purchase lease was made was identified in the contractual documents, and the Lease sounds in contract pursuant to s. 3 of Deasy's Act, and the normal principles of contractual interpretation and application operate.

102. At para. 24 of the statement of claim, it is pleaded that there is to be implied into the Lease certain covenants, terms and conditions, which are as follows:

> (a) That the apartment would be constructed in such a manner that its constructional integrity, performance and safety

would not be compromised or that same would not cause or represent a danger to a purchaser.

(b) That the apartment and each element thereof would be constructed in compliance with the Building Regulations 1997 and associated Technical Guidance Documentation.

(c) The development as a whole would be constructed "consistently with the above terms".

(d) That the apartment would be of merchantable quality, as defined by the Sale of Goods and Supply of Services Act 1893 to 1980, would be fit for purpose, and would be constructed with reasonable skill, care and diligence, using suitable material.

103. It is not asserted that the first defendant negotiated the purchases price, or that he made an agreement for lease with any of the individual purchasers of the units.

104. The express contractual terms of the disposal scheme do not support the argument that the parties intended for the first defendant to assume an obligation to ensure that the buildings were structurally sound. However, a term may be implied to give "business efficacy" to an agreement, and, if it is necessary to do so, imply that term.

105. The law is well established in recent and authoritative judgments.

106. The first defendant relies on the tests set out by O'Higgins J. in *Meridian Communications Ltd. & Anor. v. Eircell Ltd*. [2002] 1 I.R. 17 at p. 40:

> "The following principles emerge:
>
> • before a term will be implied in a contract it must be necessary to do so, and not merely reasonable;
>
> • the term must be necessary to give business efficacy to the agreement;
>
> • it must be a term which both parties intended, that is, a term based on the presumed common intention of the parties;
>
> • the court will approach the implication of terms into a contract with caution;
>
> • there is a presumption against importing terms into a contract in writing and the more detailed the terms agreed in writing the stronger is the presumption against the implication of terms;
>
> • if the term sought to be implied cannot be stated with reasonable precision, it will not be implied."

107. I adopt that test for the purposes of the analysis, as it is consistent with the jurisprudence, including the leading cases of *Rohan Construction Ltd. & Anor. v. Insurance Corporation of Ireland plc* [1988] I.L.R.M. 373, and *Analogue Devices B.V. & Ors. v. Zurich Insurance Co*. [2005] 1 I.R. 274.

108. In the present case, the relevant factors are that the first defendant, to the knowledge of the plaintiff purchaser, divested himself of the right to possession and of the beneficial interest and, objectively tested, he would not, and probably could not, have agreed to a term imposing on him an obligation to ensure that the buildings were structurally sound when he retained no right to enter upon the lands to inspect same. The omission of the first defendant from the building contract is central in this regard.

109. The agreement for sale and the building agreement were negotiated between Saltan and the purchaser. RYBO played no part in this. That contract did not reasonably require another contractual relationship for its effective performance.

110. The entire substance and form of the sale, when objectively ascertained, is inconsistent with the implication of the terms for which the plaintiff contends.

111. By reason of the analysis above, and the stated purpose of the disposal scheme, this conclusion accords with what Whelan J. described at para. 155 of her decision in *The Square Management Ltd. & Ors. v. Dunnes Stores Dublin Company (supra)* as "common sense and commercial logic".

112. I consider accordingly, that the claim founded on implied terms of good workmanship and structural soundness is bound to fail.

113. The plea that the contract is one governed by the Sale of Goods and Supply of Services Acts 1893 to 1980 is not capable of being sustained, having regard to the definition of "goods" in the Acts as "chattels personal".

114. The purchase lease was not a contract to supply services.

115. Accordingly, the claims in contract and for breach of covenant are, in my view, bound to fail and are to be struck out.

Interference with assured easement

116. Paragraph 23 of the statement of claim contains the following plea against the first defendant arising from the demise:

> "By way of the said Lease, the Developer granted to the Plaintiff as an easement the right to subjacent and lateral support and to shelter and protection from the building in which the Apartment is situated on the subsoil thereunder, as provided for in Part 4 of the First Schedule thereto."

117. The statement of claim describes the easement as a "contractual provision" but counsel for the plaintiff abandoned that description in the course of argument.

118. There is no plea that the first defendant interfered with any of the easements granted in the apartment leases. However, the plaintiff does argue that the pleadings support a claim that the express easements granted by the demise could import a class of obligation identified by the House of Lords in *Liverpool City Council v. Irwin* [1977] A.C. 239, where Lord Wilberforce, having recognised that, as a matter of general principle, the mere grant of an easement does not carry with it any obligation on the part of

the servient owner to maintain the subject matter of the easement, found that there may well be circumstances where responsibility for maintenance, whether it be a contractual obligation or otherwise, may arise in certain cases which he identified as follows:

> "But there is a difference between that case [where a mere granted easement to a drive leading to a house or to a stairway leading to an office floor of a building] and the case where there is an essential means of access, retained in the landlord's occupation, to units in a building of multi-occupation, for unless the obligation to maintain is, in a defined manner, placed upon the tenants, individually or collectively, the nature of the contract, and the circumstances, require that it be placed on the landlord." (p. 256)

119. The covenant to maintain the common areas is expressly placed upon the Management Company and it expressly covenants for such maintenance in the Lease. There are also covenants on the part of Saltan, including the covenants to repair the reserved property and all structures thereon, to maintain and renew the common areas etc. Having regard to the fact that the covenants were made on the part of Saltan and the Management Company and not with the Lessor, I must conclude that, in his role as lessor, the express terms of the Lease preclude an argument that the Lessor assumed an obligation under the Lease to repair and maintain the servient lands. Such an obligation is not one generally recognised as falling upon a servient owner.

120. A claim for breach might lie in nuisance, but the claim in the present case is not made on that basis.

121. I note also that no factual plea has been made in regard to the soil or the subsoil to which the first defendant retained title.

122. I consider for this reason that the claim deriving from the assured easements is bound to fail.

Is the first defendant a trustee for the plaintiff?
123. I reject the argument by the plaintiff that the first defendant held his interest on trust for the purchasers or lessees. The title that Mr. Ryan held was the interest of the Lessor in the purchase leases, and the Lessor could not be said to be holding as trustees for the lessees in those circumstances.

124. The beneficial owner was the Management Company and it is not a party to the proceedings. A claim based on trust may not be maintained by the apartment owners.

The claim in negligence
125. Paragraph 29 and the following paragraphs plead negligence against the first defendant and Saltan in regard to the maintenance, construction and upkeep of the common areas.

126. Paragraphs 49 to 51 identify the duties of care alleged to be owed by the first defendant to the purchaser.

127. Some argument was had in the course of the hearing as to whether the first defendant is correct that a plaintiff must establish an act or omission on the part of the defendant before asking whether a duty of care is owed by that defendant. I propose to consider the application on the basis of the orthodox analysis set out in the Supreme Court decision of *Glencar Explorations plc & Anor. v. Mayo County Council* [2002] 1 I.R. 84 and to test whether it was reasonably foreseeable that the acts or omissions pleaded against the first defendant might have led to loss or damage, and whether there is a sufficient relationship of proximity to arguably give rise to a duty of care.

128. Mr. Ryan was not, for the reasons outlined, a developer in the true sense, where he may have retained ownership and control of the common areas and could, pending the completion of the Management Company agreement, have exercised dominion as of right arising as one of the indices of ownership. However, there was, to the knowledge of all relevant parties, interposed between Mr. Ryan and the ultimate purchasers the contractual role of Saltan and the Management Company, who entered into the relevant contacts and covenants by the express terms of the Building Agreement and the purchase lease.

129. Furthermore, it is not denied that the Management Company was incorporated, took on the role of managing the common areas and employed an agent to do so for a period of time. It acted, in other words, exactly as it would have, had it taken the title of which it was, at all times since, beneficially entitled.

130. The plaintiff argues that the claim made against the first defendant arises from the relationship of landlord and tenant and that the first defendant is to be treated as a landlord for the purposes of testing the indices of the relationship in the light of the test in negligence. Reliance is placed on the judgment of Davitt P. in *Victor Weston (Eire) Limited v. Kenny (supra),* where the Court held that an "owner or occupier of lands or buildings, might owe to his neighbour a duty arising from the use of adjoining premises". Davitt P. explained the principle as follows at p. 197:

> "Where a landlord lets a building in flats, but retains possession and control he is liable…."

131. In that case, the defendant was a landlord who had let a building in flats but retained the hall door, hall, staircase and lavatories on the first and top floors. Davitt P. held that liability could arise because those parts of the buildings:

> "remained in his possession as owner; and whether or not he in fact exercised any control over them they remained in his control as owner."

132. The breaches alleged against the first defendant arising from what is described as the relationship of landlord and tenant are set out in para. 30 of the statement of claim and state, *inter alia*, that the first defendant, as the owner of occupier of the common areas of the development, owed a duty of care.

133. I consider that the degree of control which Mr. Ryan had over the development, or was capable of having as a matter of right, comes nowhere near the degree of proximity which could even arguably be required to establish a claim in negligence. In that, I am mindful of the judgment of the Supreme Court in *Shinkwin v. Quin-Con Limited & Anor.* [2001] 1 I.R. 514, where Fennelly J., after quoting from the judgment of Lord Wilberforce in *Anns v. Merton London Borough* [1978] A.C. 728, said as follows:

> "The criterion of "control" which is proposed in this case is not an addition to the test for the existence of proximity. The open textured language of Lord Wilberforce leaves wide scope for argument as to the character of 'proximity or neighbourhood'. Clearly it involves more then a mere test of foreseeability of damage. The assessment of the relevance of control as well as its nature and degree will depend on the circumstances."

134. The second defendant in that case was the owner of a factory premises on which the plaintiff was employed by the first defendant and the Supreme Court held that the second defendant owner had involved himself so closely in the operation and supervision of the factory as to make himself personally liable for acts of negligence which injured the plaintiff.

135. The plaintiff cannot establish that the first defendant had engaged in any acts of control in that sense.

136. I consider for the reasons outlined that, as the first defendant was no more than a bare trustee holding title at the direction of his principal, he did not enjoy a beneficial right to possession sufficient to import a duty of care as alleged.

The Management Company

137. The Management Company became registered as freehold owner of part of Folio 33642F and Folio 1637 Co. Meath on 25th December, 2015, and the new Folio 71282F shows the leasehold interests registered on 24th February, 2016, as a burden thereon.

138. The Management Company has executed a transfer back to the first defendant of the lands described in the new Folio 71282F but this has not been executed by the first defendant.

139. I understand the argument of the plaintiff to be that the Management Company had no obligations to take the assurance of the reversion and the common areas, and had at all material times declined to do so on account of its concern regarding the defects in the building.

140. Some correspondence had been engaged in with the PRA with regard to the dealing, and between the solicitors for the Management Company and the first defendant with regard to the reversal of the application. The current position of the Management Company is set out in a letter of 30th September, 2016 from its solicitors, stating that "it does not want to be registered as owner", as the "previous party registered as owner was simply divesting himself of certain obligations" and that the registration ought not to have occurred until the litigation had finished.

141. In the supplemental affidavit of Máire Ní Aodha, solicitor for the plaintiff, sworn on 11th April 2017, it is averred that the first defendant had been aware in late 2009 and early 2010 of the alleged defective fireproofing in the development and that, in that context, he had taken steps without being called upon to do so to convey the reversion and title to the common areas to the Management Company. The Management Company refused to accept the deed on account of the alleged defective condition of the fireproofing and in the interest of avoiding the cost of any remedial work. It is argued by the plaintiff that the first defendant "unilaterally" executed a deed of transfer of the common areas and the reversion and lodged the application for registration of the Management Company as owner to the PRA without reference to, or concurrence of, the Management Company.

142. The Management Company is not a party to the present proceedings and any claim arising from the conveyance and the attempt to reverse the transaction is not before me.

Was the first defendant *de facto* in occupation?

143. The plaintiff argues that, even if the first defendant is correct and the owner of the reversion in a development scheme might not in all cases have a liability to the ultimate purchasers arising from the ownership of that reversion, this defendant as a matter of fact engaged in a number of actions relevant to the matters directly at issue in the present litigation. In particular, it is argued that this defendant obtained the planning permission, was "centrally involved" in the obtaining a Floor Area Certificate for the Development, lobbied the relevant Minister at the time and that he was aware that the ELK external cladding system was not approved by the National Standards Authority of Ireland. It is argued that this direct engagement and the failure to notify potential purchasers of the risks of using the ELK system in the development were at least arguably negligent.

144. This is a factual dispute that I cannot resolve on affidavit, nor on a construction of the documents of sale.

145. Evidence has been adduced with regard to alleged acts of dominion, or at least acts of occupation, by the first defendant that is argued to be sufficient to deny the application to strike out at this juncture.

146. An affidavit of Patrice Thornton, the wife of an owner of another apartment in respect of which proceedings have been instituted, a former resident at Riverwalk and a current director of the Management Company, avers to instances which it is argued amount to sufficient acts of occupation, possession and/or control of the common areas to be sufficient to ground some or all of the claims of the plaintiff.

147. It is alleged that, in February, 2011, the first defendant gave permission to a tenant of a commercial premises in the development, of which he was landlord, to erect a side gate within the common areas. The Management Company directly pressed the tenant with regard to this and asked that, before he carried out any further "works/installations etc. in common areas" he would refer to the Management Company "as a matter of courtesy". This correspondence was had before the Management Company took the assurance of the legal title.

148. It is averred that, in 2014, the first defendant authorised a different tenant to dig up a portion of the car park in order to lay gas pipes. It is said on affidavit that the Management Company objected to these works.

149. It is averred that, also in the year 2014, Mr. Ryan arranged for a worker to gain access to the roof of the apartment development, which is part of the common area.

150. It is averred that, in October, 2014, the first defendant, together with others, "personally interfered with open works located in the common areas".

151. It is averred that, in 2015, permission was given by the first defendant to a commercial tenant to erect a vent on the external structures of the development without permission from the Management Company.

152. In his affidavit sworn on 26th April, 2017, the first defendant averred that he "handed over possession and control" of the common areas on or about 5th March, 2004, at or near the date of the Licence. He was a director of Saltan at the relevant times and he avers that it alone was in occupation and had exclusive control from that time.

153. He avers that, on or about 13th March, 2006, when the last apartment was sold, he handed over occupation, possession and control of the common areas to the Management Company. The first defendant was a director of the Management Company at the relevant time and says that it appointed a property management agent, James Anderson, to manage the development on its behalf,

transferred the postal address of the Management Company to Mr. Anderson's office and made Mr. Anderson the sole authorised signatory on the bank account. The fees of Mr. Anderson were paid by the Management Company.

154. The first defendant avers that, from the date of handing over possession of the property, neither he nor any other "Saltan personnel" occupied or "were in control of the common areas", and that "the management, grounds' keeping, cleaning, refuse collection, accounts handling and all other matters pertaining to the common areas were handled by the Management Company or its appointed agent". It seems that Mr. Anderson's services have not been not engaged since May, 2009 and that the common areas are now managed directly by the directors of the Management Company. Mr. Ryan resigned as a director of the Management Company in November, 2009.

155. The first defendant avers in his replying affidavit that the gas pipe to which Ms. Thornton refers was installed by Bord Gáis and not by his tenant and that indeed the gas pipe was installed under the commercial car park which serves the shops and offices and is not part of the common areas which serve the apartments. No deeds or maps are exhibited.

156. The first defendant also points to the fact that the Management Company objected to the placing of the gate and objected to the laying of the pipes, and that these objections in themselves show that the Management Company "rightly regarded itself as the beneficial owner of the common areas and that it had taken over control" and asserted the exclusive right to manage the common areas.

157. Mr. Ryan explains the incident where he authorised an inspection of the roof as arising in the context of the proceedings, and that he had the roof inspected on the advice of his solicitor, as the Management Company had not dealt with a perceived risk from loose slates on the roof. He argues that that incident does not support any argument that he was exercising rights of ownership.

158. With regard to opening up works, Mr. Ryan explains that these arose in the context of the litigation and that inspection holes had been opened in the supporting walls on the instructions of the Management Company. Again, he says that the fact that the Management Company objected to his attempt at engagement shows that the Management Company acted as owner and the body entitled to occupation and control of the common areas.

159. Mr. Ryan also says that the vent is in the external walls of the commercial part of the development and is not part of the common areas which serve the apartments.

160. The final affidavit in the chain of affidavits is a second affidavit of Patrice Thornton sworn on 3rd June, 2017, where she says that the Management Company did undertake various interventions as the "person best placed to represent the interests of the residents" where Mr. Ryan failed to do so. She says this was incidental and did not arise by virtue of the ownership of the Management Company and that the Management Company did not or could not as a matter of law have relieved Mr. Ryan from any obligation arising from his ownership.

161. By a letter of 11th December, 2012, Mr. Ryan was alerted to the fire safety defects, and it seems that he did engage in some acts of remediation through Saltan thereafter.

162. I consider that the, albeit relevantly minor, alleged acts of dominion or indices of ownership by Mr. Ryan may be sufficient to leave open the possibility that the plaintiff could succeed against him to some extent at trial. These acts on the part of Mr. Ryan may have occurred, not as an incident of his ownership as a bare trustee of the common areas and reversion, but because he actively engaged in certain matters in the estate which might show that he exercised a degree of *de facto* control and not arising from his bare legal title. This is a factual dispute that I cannot resolve on affidavit, nor on a construction of the documents of sale.

163. Therefore, whilst I am of the view that much of the claim made against the first defendant is to be struck out, I cannot safely strike out the entire claim.

The recovery action: is the first defendant entitled to the indemnity?

164. The second basis on which the first defendant seeks to have the action struck out is that he claims to be entitled to the benefit of the Guarantee in respect to which the recovery action is brought.

165. The policy contains an indemnity in favour of the policyholder, as therein defined, during the insurance period in respect of, *inter alia*, water ingress caused by a defect in the design, workmanship, materials or components of the "New Housing Unit" and an indemnity in respect of the cost of repairing, replacing or rectifying in particular any part of the "waterproof envelope" in each unit.

166. The first defendant claims that the maintenance of the recovery claims against him fails to reflect the fact that he is entitled to the benefit of the indemnity in the Guarantee. He claims that he comes within the definition of a "policyholder" in the policy document, which is defined as follows:

> "The owner of the property which is the subject of this insurance acquiring a freehold or leasehold interest in a New Housing Unit within the New Development or their successor in title, or any mortgagee or lessor."

167. The policy document must be interpreted having regard to its plain and ordinary meaning. The policyholder is defined as the owner of a "New Housing Unit" acquired by him or her by way of freehold or leasehold title. The policyholder does not include the prior owner and could not, having regard to the disposal scheme, include RYBO, which, after 2002, held no more than a bare interest in the lands on which the housing unit was constructed. I consider it to be a strained construction to argue that RYBO "acquired" a freehold or leasehold interest in the housing unit. Rather, it seems to me that RYBO sold the land in which that unit was developed by the developer, as defined in the policy document.

168. The first defendant argues in the alternative that he is an "owner" of the housing unit within the definition in the Guarantee.

169. The argument that the first defendant was an owner is not supported by the language of the policy. The policy applies to persons "acquiring" a title in the unit or their successors in title, not their predecessors in title. Also, for the reasons explained above, the first defendant was not in the relevant sense an "owner".

170. I agree with the submission of the plaintiff that the definition of "policy holder" contains the disjunctive "or" and that it intended that the policyholder be one identified person or class of persons, i.e. co-owners or joint owners or single owners, and not several categories of persons. This is also supported by the fact the definition of a policyholder includes the successors in title of the owner, and again the disjunctive "or" is found.

171. The first defendant argues in the alternative that he comes within the definition in Clause H of the policy and that he is a "developer" within that meaning:

> "The builder or any other person, sole trader, partnership or company with whom the Policy Holder as entered into an agreement or contract to purchase the New Housing Unit."

172. The insurers have acknowledged that it has no recourse against Saltan in respect of defects covered by the Guarantee, as Saltan was a "developer" as defined in the policy and has the protection of the non-recourse provision under the scheme.

173. The insurers, however, argue that, as Mr. Ryan is the vendor rather than the developer, he does not have the benefit of the non-recourse provisions under the scheme offered to the developer properly so-called.

174. The plaintiff entered into a building agreement with Saltan and the period of the Guarantee is for a period of five years commencing at the date of completion of the individual unit. Taking the policy document as a whole, it seems clear to me that the policy was intended to cover the quality of the unit and defects arising from the construction, conversion, refurbishment or renovation of the unit. I do not consider that the first defendant may be regard as "developer" in the sense intended.

175. For these reasons, I reject the argument that the first defendant is entitled to indemnity under the Guarantee and accordingly reject his argument that the underwriters may not maintain a recovery action against him in the circumstances.

Summary and decision

176. Accordingly, I am of the view that the claim against the first defendant is largely one which must fail and, in that regard, I conclude as follows:

> (a) The claim for breach of contract is bound to fail, as the contractual obligations pleaded are akin to those arising in a contract between landlord and tenant, which does not fairly or accurately characterise the agreement between the plaintiff and Mr. Ryan;
>
> (b) The claim against the first defendant arising from non-derogation from grant and for breach of the covenant for quiet enjoyment is bound to fail for the reasons outlined;
>
> (c) The claim based on trust is bound to fail for the reasons outlined;
>
> (d) The claim in negligence arising as an incident of ownership or from a beneficial right to possession is bound to fail for the reasons outlined; and,
>
> (e) There may be a residual claim of negligence arising from the assumption of some degree of control by Mr. Ryan, and whether he did this in his capacity as director and shareholder of Saltan or otherwise is not a matter I can resolve on affidavit.

177. In the circumstances, I consider that part of the claim is to be struck out and I will hear counsel as to how this is to be conveniently done.