

IN THE COUNTY COURT

CLAIM. NO.E30LV132

SITTING AT LIVERPOOL

BETWEEN:

MARC ANTON PAUL HORN

Claimant

and

MR CARL WILLIAM MILLS (1)

MR ALLAN FREEMAN (2)

MR TONY FREEMAN (3)

MR ANDREW DIXON (4)

MR DAVID ROBERTS (5)

MR MICHAEL GUBBAY (6)

MR SIMON JOSEPH GUBBAY (7)

SOL LEVI (8)

MR MICHAEL PATTERSON (9)

MR DAVID CHOULES (10)

MR ANDREW JOHN BUCHANAN (11)

MR DECLAN LOWY (12)

MR NICK TELLWRIGHT (13)

Defendants

DEFENCE OF 10th, 11th and 12th DEFENDANTS

1. This Defence is filed on behalf of the 10th, 11th and 12th Defendants (Mr David Choules, Mr Andrew Buchanan and Mr Declan Lowy ("Ds10-12").
2. The Defence is served without prejudice to the fact that the Particulars of Claim dated 27 July 2018 fails to disclose any reasonable cause of action against Ds10-12 and is liable to be struck out.

3. Further, the Defence is confined to responding to the claims made in the Particulars of Claim against Ds10-12 (in so far as they are intelligible). Ds10-12 have no direct knowledge of, and do not plead to, the claims advanced by the Claimant against the other Defendants save as specifically referred to below.

Relevant Factual Background

4. The relevant factual background to the claim against Ds10-12 is as follows.
5. By a written Management Services Agreement dated 23 March 2015 (“**the Management Services Agreement**”), attached hereto at Appendix 1 Harper Brooks (UK) Limited (later known as Hollinberry Estates Limited) (“**Harper Brooks**”) appointed Urban Student Life Limited (“**USL**”) to manage new student accommodation blocks at Asquith House and Austin House, Servia Road, Leeds.
6. This was one of many such agreements USL had with Harper Brooks for the management of student accommodation at various sites in England. It was USL’s understanding at the time that companies associated with Harper Brooks had entered into various agreements with investors (many of whom were overseas) by which the investors were to take underleases of accommodation units within the blocks and then let them to students on Assured Shorthold Tenancies (“**ASTs**”).
7. It appears from the Particulars of Claim that the Claimant alleges an entitlement to one of the units within Austin Hall, namely Unit 609 (“**Unit 609**”).
8. Under the terms of the Management Services Agreement, USL was appointed to carry out various functions in relation to Austin Hall, including the letting services in Section A of Schedule 1 (marketing and letting the units to students (many of whom were overseas students in Asia and the Far East), entering into tenancy agreements (ASTs) with students, and collecting deposits and rents); and the facilities management services in Section B of Schedule 1 (service charge services, contracting and maintenance, employees and budgeting and planning).

9. By Schedule 2 of the Management Services Agreement, USL was entitled to a commission of 5% of the total Net Rents received and 20% of the profit from ancillary income. By paragraph 20 of Schedule 1, USL was contractually obliged to account directly to Harper Brooks for all rent received and to pay the same into a bank account designated by Harper Brooks.
10. As far as Ds10-12 are aware (and USL was aware), Harper Brooks' authority to act on behalf of the investor owners of the various units was derived from Management Agreements entered into between Harper Brooks and the investor owners (or intended owners) of the units. The Claimant has attached to the Particulars of Claim one such agreement between him and Harper Brooks dated 2014, albeit in an unsigned form.
11. Under the terms of the Management Agreements, Harper Brooks agreed to manage the units and to pay any rent into a client account, subject to the right to deduct from that rent the costs and expenses set out at clause 14.4, including a management fee of 15% of the annual rent (clause 13).
12. Clause 8.2 of the Management Agreement contemplated that Harper Brooks could appoint sub-agents for the purpose of carrying out management services. For the avoidance of doubt, however, USL was not appointed by Harper Brooks to hold or operate any fiduciary account under clause 8.2. USL's obligations in relation to the rent were contained in paragraphs 15 to 21 of Schedule 1 of the Management Services Agreement by which the rent was to be paid monthly by USL to a designated account held by Harper Brooks. USL bore no responsibility for any payment of rent (or Assured Rent) by Harper Brooks to any of the investor owners.
13. Pursuant to the Management Services Agreement, USL acting in good faith marketed the units at Austin Hall (including Unit 609), found tenants for many of them; drew up tenancy agreements; took deposits; collected rent and carried out the other services required of it under the Management Services Agreement. USL devoted considerable time and expense in doing so. Further, in finding student tenants, collecting rents and carrying out management services, USL acted in the best interests of the investor owners, who directly or indirectly received the benefit of USL's services.

14. To the best of Ds10-12's knowledge, USL entered into only one tenancy agreement for Unit 609 being an AST dated 12 July 2017 by which Mr Xingyu Zhu let the unit for a period of 308 days from 16 September 2017 to 20 July 2018 for a total rent of £5,605.60. A copy of the AST is attached at Appendix 2.
15. In or around late summer of 2017, USL began to be contacted directly by individual investor owners of the units in different buildings, complaining that they had not received any rent from Harper Brooks. Some of them insisted that USL pay all rent directly to them. Some of them claimed to have terminated their own agreements with Harper Brooks. However, under the terms of the Management Services Agreement, USL was obliged to account for that rent on a monthly basis to Harper Brooks. There was no obligation to account to any of the investor owners directly for rent. On the contrary, to do so would have placed USL in breach of contract with Harper Brooks whilst the Management Services Agreement was on foot.
16. Further, Harper Brooks was insisting that all rents collected be paid to Harper Brooks, by way of example, by a letter dated 8 September 2017 attached at Appendix 3. As such USL was placed in difficult position of being subjected to different claims by different parties to the rent that it had collected.
17. In or around November 2017, USL terminated the Management Services Agreement. Shortly thereafter Harper Brooks ceased managing the various buildings. It is understood that Harper Brooks is now in liquidation or some other formal insolvency process.
18. After the termination of the Management Services Agreement, USL nevertheless continued to manage the blocks (including Austin Hall) and collect rental income. USL did this out of necessity so as to ensure that accommodation services were provided to students and so that rent could continue to be collected for whoever might be entitled to it. Unless USL had continued its management functions, utilities and staff would not have been paid and the blocks would have become uninhabitable.

19. At no point prior to (or since) the issue of proceedings did the Claimant instruct USL or Valeo to stop collecting rents or to stop carrying out management services for Unit 609. Nor has the Claimant explained or established whether and, if so, when he terminated his own Management Agreement with Harper Brooks.
20. In January 2018, Valeo USL Limited (“Valeo”) completed an acquisition of the assets and business of USL. That acquisition was an arms’ length transaction for value and was structured in a perfectly legitimate manner, using various intermediary companies (including Valeo USL Holdco Limited).
21. It is denied, in so far as paragraphs (1) and (2) on page 41 of the Particulars of Claim seek to allege the same, that the acquisition of USL’s business by Valeo was in any way related to or for the purpose of defeating claims that USL’s creditors might have had against it. It was an entirely above-board commercial transaction.
22. As part of the said acquisition, the funds previously held by USL representing rent that had been collected from units in Austin Hall were transferred to accounts held in the name of Valeo. By a letter dated 18 May 2018, sent to all the investor owners (and purported owners) of units in Austin Hall (and other blocks) Valeo provided an explanation of how and in what way it was attempting to account for rents and provided a spreadsheet of rents collected between 1 June 2017 and 31 December 2017 on a block basis, including deductions that had been made for facilities management services, expenses and commission payments. A copy of that letter is attached at Appendix 4.
23. As of 1 June 2018, Valeo ceased all facilities management activities for Austin Hall and since end August 2018, Valeo has ceased to have any involvement with the management of Austin Hall or in the collection of rents for that building.
24. Attached at Appendix 5 is Valeo’s current best estimate of the individual rent account for Unit 609, with deductions for monies paid due, or for the benefit of, Harper Brooks, expenses and services provided for the block apportioned pro rata.

25. Neither USL nor Valeo have ever sought to retain rent that is due to the person properly entitled to it (after the deduction of reasonable, proper and necessary costs and expenses). USL and Valeo were not able to do this for various reasons, including the fact they had been met with competing claims for the rent and because it has taken some months to calculate precisely what sums are due in respect of each block and unit (in this regard, it was never USL or Valeo's function to make such apportionments and calculations on a unit by unit basis and Grant Thornton has had to be engaged at considerable cost to assist in this exercise).

The Claimant's entitlement to rent

26. The Claimant needs to establish that he is entitled to the net rents before any payment can properly be made to him. This is not something that USL, Valeo or Ds10-12 could or can adjudicate on.
27. It is apparent from the Particulars of Claim that the Claimant has not completed the purchase of Unit 609 and there are issues between him and other parties as to whether he is entitled to complete an underlease of Unit 609 and whether he had, or now has, any entitlement to any rent.
28. Further, Pinnacle Students Developments (Leeds) Limited ("**Pinnacle**") was the original freehold owner which entered in various agreements for lease and tenancies of individual units. After making those dispositions, Pinnacle sold the freehold to Tuscola (FC105) Limited ("**Tuscola**") via a sale and leaseback arrangement, under which Tuscola granted an underlease to Pinnacle dated 29 June 2016. By letter dated, 22 March 2018, Pinnacle's solicitors also asserted that all funds collected be paid to Pinnacle. A copy of the letter dated 22 March 2018 is at Appendix 6.
29. Tuscola has recently purported to forfeit the said underlease granted to Pinnacle and has orally demanded (through the 6th Defendant) that Valeo should pay all rent that may have been collected going forward for Asquith House and Austin Hall to Tuscola.
30. In light of the above, there remain significant competing claims for all rent collected for Unit 609.

Response to the claims against Ds10-12

31. As far as it is possible to ascertain, the Particulars of Claim seeks to make Ds10-12 personally liable for an alleged breach of trust in respect of rent collected for Unit 609 by USL, a company of which Ds10-12 were directors at the material time.
32. It appears from paragraphs 9 and 10 of Part A on page 4 of the Particulars of Claim that the Claimant seeks to pierce the corporate veil in order to make Ds10-12 liable for the alleged acts and omissions of USL.
33. USL has not been joined as a party to these proceedings but, for reasons set out above, it is denied that USL (or Valeo) is or was in breach of trust as alleged or guilty of any other wrongdoing in relation to the rent collected for Unit 609.
34. Further, it is denied in any event that Ds10-12 can be, or should be held to be, personally liable for the acts and omissions of USL and for any (denied) breach of trust on the part of USL.
35. In particular, but without prejudice to the generality of the foregoing:
 - 35.1 It is a fundamental principle of company law that the officers of limited liability company are not liable for the acts, omissions and liabilities of the company save in specific carefully defined situations, none of which apply in the present claim;
 - 35.2 At no point did Ds10-12 ever personally have possession of any rent and at no point was any rent ever paid to Ds10-12 personally or into a bank account held in their held names (nor do the Particulars of Claim allege the same);
 - 35.3 Ds10-12 have never personally dealt with any rent or appropriated it or dealt with it themselves (nor do the Particulars of Claim allege the same);

35.4 The Particulars of Claim does not allege or particularise any acts of dishonesty or fraud on the part of Ds10-12, whether in relation to the rent or at all (albeit that the Particulars of Claim does allude to alleged fraud and dishonesty on the part of other Defendants);

35.5 There is no proper basis for the allegation that Ds10-12 are trustee *de son tort* in relation to the rent (alleged at paragraphs 9 and 10 of Part A on page 4 of the Particulars of Claim and throughout thereafter). The case cited by the Claimant in supposed support of this proposition (*Mara v Browne* [1896] 1 Ch 199) is in fact entirely supportive of the defence of Ds10-12. That case establishes that an agent of a trustee (which would include a director of a company) is not liable for a breach of trust “*unless those agents received and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees*” [at 210];

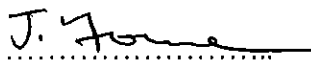
35.6 The Particulars of Claim does not allege, still less does it particularise, any knowing receipt of any rent or dishonest assistance on the part of Ds10-12, nor is there any basis for such an allegation.

36. In the premises, the claim against Ds10-12 is denied, has no proper basis and is liable to be struck out.

STUART HORNETT

STATEMENT OF TRUTH

The 10th, 11th, and 12th Defendants believe that the facts stated in this Defence are true. I am duly authorised by the 10th, 11th, and 12th Defendants to sign this Statement

Signed: 
Name: James Edward Roger Fownes
Position: Associate Partner
Firm: Shakespeare Martineau LLP

Dated: 10 September 2018