

In the County Court at Liverpool

Claim No.

E30LV132

Between

MARC ANTON PAUL HORN

Claimant

And

- (1) CARL WILLIAM MILLS
- (2) ALLAN FREEMAN
- (3) TONY FREEMAN
- (4) ANDREW DIXON
- (5) DAVID ROBERTS
- (6) MICHAEL GUBBAY
- (7) SIMON JOSEPH GUBBAY
- (8) SOL LEVI
- (9) MICHAEL PATTERSON
- (10) DAVID CHOULES
- (11) ANDREW JOHN BUCHANAN
- (12) DECLAN LOWEY
- (13) NICK TELLWRIGHT

Defendants

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**FIRST DEFENDANT'S WITNESS STATEMENT**

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1. I am Carl William Mills, accountant and company director, of Suite 410, Courthill House, 60 Water Lane, Wilmslow, Cheshire, England, SK9 5AJ. The matters contained in this statement come from my own knowledge and belief, save where otherwise stated. Where the matters within this statement come from my own knowledge they are true, otherwise they are true to the best of my knowledge and belief.

2. I make this statement in support of the application by me and by the Fourth Defendant, Mr Dixon, to have the Claimant's Amended Particulars of Claim struck out or summary judgment granted in relation to them. I am authorised by Mr Dixon to make this statement on his behalf also. The purpose of this witness statement is to set out a summary of the factual background to the matter so as to assist in the court's consideration of the Amended Particulars. The reasons why the Amended Particulars ought to be struck out or summarily dismissed are matters of law or practice rather than matters of fact. They are therefore outside the scope of this witness statement and will be developed by counsel at the hearing of this application, though I understand a skeleton argument will be served in early course to enable the Claimant to understand the case he has to meet. I limit this witness statement to matters of fact.
3. Throughout this witness statement I refer to the documents exhibited hereto at CWM1 by reference to their page number (and paragraph number where applicable) in square brackets.
4. I am a director of a number of companies, including Pinnacle Student Developments (Leeds) Limited ("Developments"), MVG Holdings Limited and Mason & Vaughan Group Limited and have been so at all times material to these proceedings. From time to time I have been a shareholder in all three companies however those shareholdings have changed during the course of the development referred to below and since the sale contract referred to below was executed.
5. Between 11 January 2013 and 19 March 2018 Andrew Dixon was a director of Mason & Vaughan Group Limited but he has never been a shareholder in that company.

6. Neither I nor Mr Dixon have ever been directors of a company named Pinnacle Student Buyers (Leeds) Limited (“Buyers”). Buyers is a company limited by guarantee such that it has no shareholders.
7. During the course of 2013 Developments began negotiating sales for the proposed development of two blocks of student accommodation at Servia Road, Leeds, LS7 1NJ (“the Site”). Those two blocks were to be named Austin Hall and Asquith Hall and the intention was that each room or unit within the blocks would be sold to an investor who would be entitled to the rent generated by the rooms in the ordinary way. Further the investors would be entitled to a guaranteed rent for the 5 years from practical completion of the development.
8. As part of the process of selling the units to investors Developments set up a suite of contracts which it was intended to execute at the appropriate moment or as and when necessary. The contracts were:
  - a. A sale contract, by which an individual investor would agree to purchase a 999 year leasehold interest in the unit **[An unsigned copy of the Claimant’s agreement can be found at pages 1 - 25];**
  - b. A draft of the 999 year lease to be granted over the unit, which was to be incorporated into the sale contract **[26 – 47];**
  - c. A draft management agreement pursuant to which, subject to the investor’s right to opt out, the units would be marketed to tenants and managed **[48-58];**

- d. A draft secured deposit deed under which Developments would pay a sum of money on trust to fund any payments on the rent guarantee, should Developments wish to sell the Site **[59-62]**.
9. On 23 June 2014 the Claimant and one Katherine Tee entered into a sale contract (“the Sale Contract”) **[1-25]** in relation to Unit 609, Floor 6, Austin Hall, (“the Unit” and “Austin Hall”). I note Ms Tee is not a party to this claim but I do not know why that is. At the date of the Sale Contract, the site was in the process of being developed.
10. So far as relevant the Sale Contract provided:
- a. That the purchasers’ deposit would be held on trust by Buyers, which had been specifically incorporated for the purpose of managing the investors’ deposits and any rent guarantee deposit should that be necessary **[pages 10 & 12/clauses 2.10, 5.1]**. The Sale Contract specifically provided for the Claimant and Ms Tee’s deposit was to be paid out in specified circumstances, including towards monies due on the Building Contract **[page 12/ clause 5.2.4]**. The Claimant and Ms Tee irrevocably authorised such payments to be made **[page 13/clause 5.5]**.
- b. Completion of the Sale Contract was to take place within 10 days of Certificate of Practical Completion, which was to be issued by the Supervisor named in the Sale Contract **[pages 2, 4 & 10/ clauses 1.10, 1.26 & 3.1]**; Developments was to use all reasonable endeavours to complete the building works by the Intended Building Completion Date, being 31 January 2015 or a later date as certified by the Supervisor to take account of various ‘Non-Fault’ delays to the building works **[pages 5 & 8 /clauses 1.33 & 2.3]**.

c. The Claimant and Ms Tee were given the benefit of a rent guarantee at the rate of £4,770 per year, for 5 years from the Completion Date **[pages 2 & 17/ clauses 1.10-1.12 & 10.3]**.

d. Plainly given the intended use of the buildings Developments was keen to encourage all investors to use the same management company so as to simplify the management of the buildings. Further the rent obtained for each unit would depend on the quality of managing agent for each building and in particular for each unit, and Developments wanted something of a 'head start' to minimise the need to pay out on its rent guarantee. Consequently the Sale Contract provided for the investor to be bound to enter into the management agreement appended to the Sale Contract unless (s)he gave *"not less than 1 month's notice before the Intended Building Completion Date (time of the essence) [that (s)he did] not wish to enter into the Management Agreement"* **[page 16/clause 10.2]**. As set out above the Intended Building Completion Date was ultimately 31 January 2015 (I am not aware of it having been changed to any later date); however no notice was served by the Claimant or Ms Tee under cl.10.2 of the Sale Contract. Further the payment of the rent guarantee was dependent on the Management Agreement remaining in place **[page 17/ clause 10.3]**

11. For the avoidance of doubt I should confirm that the obligations which Developments had and has in relation to the Site, the blocks and the Unit were created by the documents listed at 8 above; they were not obligations previously owed by a different person (real or corporate) which Developments assumed. Similarly so far as I am aware the obligations owed by Buyers as a consequence of the documents listed at 8 above were created by those documents and not assumed from any other person. I understand those facts are relevant to

the application of the legal concept of 'piercing the corporate veil' referred to by the Claimant.

12. The contractor initially appointed by Developments to carry out the development was PHD1 Construction Limited. Although Mr Dixon and I had successfully worked with PHD1 on a number of other developments things did not go to plan on this occasion and eventually on or around 25 February 2016 it was decided that PHD1 should not continue on site and we duly terminated our contract with them on or around 25 February 2016. PHD1 entered administration a little over a month later. Consequently on 25 February 2016 Mr Dixon sent a letter to all investors in the Site informing them of the termination of PHD1's contract, that Developments would take over responsibility for the construction work and that completion would now not be before August 2016 [63]. I note that the Claimant suggests that by this letter Mr Dixon somehow assumed personal liability to all investors in the project because he did not write on behalf of a company. I do not accept that Mr Dixon did not write on behalf of a company and I understand Mr Dixon does not accept it either, though that is not a matter for the summary judgment/strike out application. However I also note that Mr Dixon expressly refers in his letter to Developments taking responsibility for the works.

13. Once PHD1 had left the Site and we had had a chance to look in detail at the work that had been done it became clear to Developments that significant amounts of work were required to complete the development, much more work than had been anticipated. It rapidly became apparent that Developments did not have the funds to complete the works which were required, having paid out to PHD1 the monies it had done. Consequently Developments took steps to sell the freehold of the Site to generate the funds required to complete the development. Had this step not been taken I firmly believe that the

development would not have been completed and Developments, and the purchasers of units including the Claimant and Ms Tee, would have suffered a significant loss.

14. Consequently on 29 June 2016 the Site was sold to Tuscola (105) Limited and leased back to Developments on the same day in order to permit Developments to complete the development. Prior to the execution of the Sale Contract Developments had charged the Site to Buyers to secure the obligations which Developments intended to undertake by the Sale Contract and other such contracts with other investors **[64-65]**. Clause 10.10 **[18]** of the Sale Contract contemplated that Developments might wish to sell the Site prior to the completion of its obligations under the Sale Contract (eg. the expiry of the guaranteed rent period) and so provided that in the circumstances Developments was obliged to enter into a deed in the Secured Deposit Deed form appended to the Sale Contract. As part of the process of selling the freehold of the Site to Tuscola Developments executed the Secured Deposit Deed on 29 June 2016 and £190,000 was deposited on trust with Buyers **[pages 60-61/clauses 2.1 & 2.2]**.

15. I note that the Claimant complains that the proceeds of the sale of the freehold to the Site have not been accounted for (for example at page 18 of the Amended Particulars of Claim) and suggests that these monies might have been paid away in breach of trust. However for the avoidance of doubt the Site was never the subject of any trust and was never the property of the Claimant; at most the Claimant had rights arising from the Sale Contract in relation to a leasehold interest in his unit alone. I therefore do not consider that the Claimant had any interest in the proceeds of sale of the freehold to the Site; these proceeds were used by Developments to further its business interests, particularly the completion of development of the Site.

16. I also note while dealing with the question of trusts that the Claimant complains that his deposit monies have been paid away in breach of trust. I do not believe that is correct but in any event the trustee of the deposit monies was Buyers and not Developers. As set out above I am not a director of Buyers and neither is Mr Dixon; nor do we (nor can we) have any shares in it. Even if there has been a breach of trust in relation to Buyers' holding trust monies for the Claimant I simply do not understand how Developments, still less Mr Dixon or I, can be said to be liable for that breach of trust.

17. Subsequent to the sale of the Site to Tuscola construction work continued and Practical Completion was certified by the Supervisor on 31 August 2017 [66-70]. Unfortunately the relationship between Developments and Tuscola has become somewhat difficult and so Developments has as yet been unable to complete the Sale Contract, and it is currently in liquidation. In the meantime rather than have the Development stand empty for the 2018/19 academic year the rooms in the blocks have been let, either by Urban Student Life Limited or by any agent brought in by Tuscola's managing agents to replace them. The Claimant suggests this letting is a fraud (page 47 of the Amended Particulars, paragraph 6 d)) but the simple fact is that (through no fault of Developments) it has not yet been possible to convey the Unit to the Claimant and so he does not have title to it. I am informed by those advising Developments that the Sale Contract and the general law make provision for what should happen in this situation; however I simply do not understand the basis upon which it can be said that Mr Dixon or I are liable.

1<sup>st</sup> and 4<sup>th</sup> Defendants  
CW Mills 1<sup>st</sup>  
CWM1  
10 September 2018

I believe the facts stated in this witness statement are true.

Signed: 

Name: Carl William Mills'

Dated: 10 September 2018

1<sup>st</sup> and 4<sup>th</sup> Defendants  
CW Mills 1<sup>st</sup>  
CWM1  
10 September 2018

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Claimant

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(1) CARL WILLIAM MILLS

(4) ANDREW DIXON

& others

Defendants

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FIRST DEFENDANT'S WITNESS STATEMENT

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