Neutral Citation Number: [2006] EWHC 582 (QB)

Case No: 5CL12115

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2006

Before :

THE HON. MR JUSTICE EADY

Between :

1. Alan Perkins **2. Pauline Perkins** **- and -** **1. Devoran Joinery Company Ltd** **2. Kirby and Cove Ltd** **3. Kirby Adair Partnership Ltd**	**Appellants/ Claimants** **Respondents/ Defendants**

Simon Lofthouse (instructed by **Donald Pugh**) for the **Appellants/Claimants**
Peter Brunner (instructed by **Stephens & Scown**) for the **First Respondent/Defendant**

Hearing date: 27th February 2006

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE EADY

The Hon. Mr Justice Eady :

1. On 27 February 2006, I heard an appeal from an order of Ms Marion Simmons QC, sitting as a Recorder in the Central London County Court, which was dated 28 September 2005. The learned Recorder handed down a lengthy reserved judgment following a hearing which had taken place on 4 and 5 August 2005. She decided that the proceedings against Devoran were an abuse of process and struck them out accordingly. In accordance with modern practice, the appeal is by way of review rather than rehearing. It is agreed on all sides that the relevant principles are those to be found in the decision of the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1. At the conclusion of the hearing I informed counsel that I would allow the appeal and give my reasons later, which I now do.

2. There was an earlier trial in May 2002 before His Honour Judge Peter Cowell, during which it is said that all the Claimants' complaints raised in these proceedings should have been addressed and disposed of at the same time.

3. I shall not set out the background in the exhaustive detail to be found in the judgment of the Recorder. It is unnecessary to repeat it or to give more than a brief summary. In any event, this is a case in which it is appropriate to concentrate on the wood, or so it seems to me, rather than getting lost among the trees. The Claimants, whose appeal I allowed, are Mr Alan Perkins and Mrs Pauline Perkins. They built a home at South Mimms in Hertfordshire some years ago, for which the first Defendant, Devoran Joinery Company Ltd ("Devoran"), contracted to supply windows and doors of a high quality. Delivery took place in June 2000 for fitting by the main contractor. Unfortunately, it soon became apparent that there were joinery defects in two bay windows. Mr and Mrs Perkins required that they should be remedied. Nothing was done, and it was decided to withhold the final payment of £9,500 plus VAT. The balance of the agreed sum (£26,000) had been paid before delivery.

4. It is perhaps of some significance that Devoran chose not to inspect the alleged defects: it simply issued proceedings for the outstanding balance on 27 November 2000. This was despite (or perhaps because of) the fact that the extensive defects now complained of would have been obvious in the process of assembly.

5. As time went by, further defects became apparent, which were also drawn to Devoran's attention. It was noticed that draughts were coming through the wooden panels in the front door, as well as through the heads of the window and door casements. At last, on 23 March 2001 (four months after the commencement of proceedings), an inspection took place by Mr Richard Orsman, Devoran's managing director. Nothing was said in the light of this inspection about the fundamental defects of which Mr and Mrs Perkins now complain. They argue that this is somewhat surprising if, as Devoran suggests, they were so apparent that Mr and Mrs Perkins should have spotted them in time to ventilate them at the original trial.

6. Devoran's glazing sub-contractor was Cornwall Glass & Glazing ("Cornwall"). It had originally been suggested that a representative of Cornwall would also attend the inspection, but in the event it was carried out by Mr Orsman alone. At all events, it is the current stance of Cornwall that Devoran had instructed a particular "make up", the design of the frames being "unusual/unsatisfactory/ unwise/ not recommended, indeed not fit for the purpose required and inevitable to result in sealing related problems".

That is what was said by Cornwall's managing director, Mr Mark Mitchell, in a letter of 17 September 2003. It may be thought a little ironic, therefore, that Mr Mitchell had given evidence before Judge Cowell on behalf of Devoran – without mentioning any of these fundamental reservations. I understand the explanation to be that Mr and Mrs Perkins had not complained, in those earlier proceedings, of questions of design, but only of poor workmanship. Thus, it is suggested, Mr Mitchell's criticisms would not have been relevant to the pleaded issues!

7. Although solicitors had originally been instructed on the Perkins' behalf, by the time it came to trial Mr Perkins was acting in person. The parties had served expert reports some six months before the trial, which were based on allegations of defective workmanship resulting in draughts at the tops of windows and doors. Mr Perkins complains that he was refused the opportunity for a meeting of experts to view the defects. This was a suggestion made by him which Devoran declined.

8. At the trial in May 2002, for the first time, admissions were made on a limited basis by Devoran as to the defective workmanship which was at that time the subject of Mr Perkins' complaint. Nevertheless, following a three day trial, Judge Cowell found on the evidence before him that the defects could be remedied at a relatively modest cost. He awarded Mr Perkins £1,450 for work to be done on the bedroom bay window and £4,500 for remedial glazing work which he perceived was required on the windows. Obviously, the balance lay at that point in Devoran's favour and it recovered most of its costs.

9. An appeal was heard in July 2003, as a result of which it was found that the balance lay in favour of Mr and Mrs Perkins in relation to the modest damages awarded. It was also ordered that a re-trial take place on the issue of whether or not defects in the master bedroom bay window could be repaired or would require replacement. Three years on, however, no such re-trial has taken place. Assessing the position as it stands, therefore, Mr Lofthouse, who appeared for Mr and Mrs Perkins in the appeal before me, has naturally emphasised that Devoran is still to be confronted with a further hearing in any event. This is an unusual feature of applications based on abuse of process. It is plain that any suggestion that Devoran would suffer undue prejudice, or unjust harassment, by the continuation of the present proceedings has to be assessed against the background that the remitted hearing is yet to take place.

10. It is to be noted also that the Court of Appeal set aside the costs order following the 2002 trial and it is, as I understand, likely that the balance in respect of costs will lie in Mr and Mrs Perkins' favour.

11. Mr Perkins has been criticised by Mr Brunner, appearing on behalf of Devoran, because in the Court of Appeal he sought to introduce the complaints of bad design which form the subject-matter of the present proceedings. He was not permitted to do so, since they related to allegations which had not been pleaded before Judge Cowell and which would, if they were to be pursued, have to be raised in separate proceedings. Hence the present claim.

12. Later, His Honour Judge Crawford Lindsay QC anticipated that there would be a challenge to the new claim, based on an abuse argument, and he ordered that this should be determined prior to any re-trial of the issues remitted by the Court of

Appeal. That is how it came about that the abuse of process issue was determined separately by the learned Recorder.

13. It is a sorry tale from all parties' points of view, since matters are still to be resolved more than five years after Devoran's original claim was commenced.

14. I have already referred to the decision in *Johnson v Gore Wood & Co*, in which Lord Millett made the important observation at 59C-E:

> "It is one thing to refuse a party to re-litigate a question which has already been decided: it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter, though not the former, is *prima facie* a denial of the citizen's right of access to the court conferred by the common law and guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953)".

It is fundamental to Mr Lofthouse's submissions that the claims now made by Mr and Mrs Perkins based on deceit and defective design have "not previously been adjudicated upon". He submits that these serious allegations require to be fully addressed and determined and that, when all the circumstances are considered, it would be unjust to deprive them of that opportunity.

15. In the same case, at 31D, Lord Bingham indicated the right approach:

> "A broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of a case, focussing attention on the crucial question of whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issues which could have been raised before".

Not surprisingly, in the light of the history of this case, I was invited by the parties to consider a substantial volume of material, in order to enable me to make an assessment of all the circumstances relevant to this application. I referred earlier to the seriousness of the claims made in these proceedings by Mr and Mrs Perkins. They rely not only on breach of contract but upon the tort of deceit. The factual background upon which both claims are based is, if they are well founded, very remarkable.

16. What is said is that the width of the window and door casements manufactured by Devoran were too narrow to accommodate the sealed glazed units provided by Cornwall. There was thus insufficient space to allow for the installation of a glazing system which was effective. What is more, Devoran's error was replicated in no less than 96 separate casements. To compensate for the error, it is alleged that essential weather proofing was deliberately omitted so as to permit the units to fit into the casements and door frames. To the casual observer, and indeed to Mr and Mrs Perkins' current expert, it would seem obvious that this short cut would render the finished products wholly unsuitable. As I have already recorded, the symptoms of ineffective weather proofing became apparent within a short time of installation.

17. The likely reasons for these defects, however, only emerged when Mr Blower, of the Glass and Glazing Federation, carried out an investigation of what lay beneath the surface. Since Mr Perkins had pressed for joint examination by the experts prior to the trial before Judge Cowell, and Mr Orsman of Devoran had counselled against the removal of a glazed unit from the window frame at that stage, it hardly seems reasonable to criticise Mr Perkins for not having picked up the true nature and scale of the problem earlier.

18. Moreover, assuming for the moment Mr Blower's factual analysis to be correct, since Devoran "bodged" the casements in the first place, and successfully concealed the matter up to the time of the trial in May 2002, it has only itself to blame.

19. One of the criticisms made of the learned Recorder's judgment is that she characterised some of Mr Blower's evidence as usurping the function of the trial judge. I think that was perhaps unfair, since what he was doing was describing the nature of the defects and putting forward a possible (indeed compelling) hypothesis as to how they might have come about. That is a legitimate function for an expert to perform. What Mr Blower said in his statement of 14 May 2003 was this:

> "There is no doubt in my mind that the inherent defects were known to Devoran and to Cornwall Glass & Glazing prior to delivery of the goods to Mr and Mrs Perkins. The defects include the fundamental acts and omissions such that it was clearly a wilful decision by the supplier to proceed with the fabrication and delivery of the windows and doors, after those defects had become obvious during manufacture".

Of course, so expressed, that evidence might appear to be usurping the role of the court – but what he was plainly intending to say (and say permissibly in the role of an expert) was that these defects were not only obvious, but so obvious that they must have been deliberately brought about.

20. He went on to conclude that:

> "A decision was apparently made to 'force' the glazed units in to the undersized casements despite the known and predictable consequences of that action. To achieve this, the weather proof seal was reduced from its minimum requirement of 3mm on each side of the glass to just 0.8mm on each side of the glass. No weatherproof seal was inserted into the head of the casements and glazing blocks were omitted. To any experienced glazier, each of these acts and omissions would be known to be negligent leading to the inevitable failure of the windows and doors in the short term".

21. The idea that Mr Perkins should be deprived of the opportunity of advancing these serious allegations of deceit and misconduct (and having them properly tested at trial) is in my judgment untenable.

22. Another important aspect of "all the circumstances" is the letter from Mr Mitchell of 17 September 2003, from which I have already quoted. He also observed, despite having supported Devoran in the earlier trial with his evidence, that:

> "... the inherent fault/flaw in design and manufacturing parameters (width of casement etc) resulted in the 'unachievable'. The glazed unit with its specification and head casement design not being able to rectify faults flowing to cause blame being placed on the desk of [Cornwall]. Whilst we accept certain issues which are predominantly [aesthetic], we feel aggrieved to be held responsible for [Devoran's] bulk of the claim".

Mr Mitchell may have some questions to answer as to why he did not reveal this earlier. Given this state of affairs, and particularly the true extent of the knowledge of at least one of the witnesses who gave evidence before Judge Cowell, it is hardly surprising that the court at that time was unable to arrive at an accurate picture of what had taken place. This was not the fault of Mr and Mrs Perkins.

23. Although, as I have said, the learned Recorder had the evidence before her from Mr Blower, Devoran for reasons of its own chose to serve no evidence in response. To pursue a strike-out application in the teeth of such evidence, without seeking in any way to deny or explain it, would appear to have been a high risk strategy. Devoran was complaining that a trial of such issues would vex or prejudice it unduly, and indeed was seeking to avoid having to answer allegations of deceit, while at the same time criticising its former customer for not having drawn the defects to the attention of the learned Judge on a previous occasion. It was a bold course of action, of which Devoran must now take the consequences.

24. There are now outstanding no less than eleven grounds of appeal (some more digestible than others) against the order of 28 September 2005, contained in a notice dated 10 October 2005, to which I now turn:

> "The judgment of the Recorder was wrong in the following respects:
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> 1. In finding as a matter of fact that the Defendant would be unjustly harassed in the second action in circumstances when in the course of opening submissions the First Defendant made the following concessions:
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> (i) that the allegations of defective work advanced in the second action could be advanced in the original action remitted for retrial by the Court of Appeal, and that
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> (ii) although the retrial just concerned defects to one window, the defects were identical in each and every window (96 in total) and no further evidence would be required to deal with all windows on the basis now pursued in the second action and where (subject to Ground 2 below) the Recorder correctly held that it

would be an *absurd result* if the second action was not allowed to proceed (emphasis added).

2. In finding that unjust harassment was established the Recorder took into account that, to avoid the consequences of the concessions referred to at Ground 1 above, the First Defendant then conceded liability on the issue of replacement of the 1 window remitted by the Court of Appeal thereby leaving only the issue of quantum to be retried. In viewing such a concession as removing the consequences referred to at head 1 above the Recorder based her finding of unjust harassment as a consequence of the First Defendant's own voluntary act namely conceding liability for 1 window and thereby seeking to avoid consideration of this issue in the retrial. It is wrong in law to allow a party to rely on unjust harassment which he himself voluntary created. But for that concession of liability, the Recorder herself correctly viewed the striking out of the second action as an 'absurd result'.

3. The Recorder appeared to have misapprehended that the case was one of fraudulent concealment although this point was clarified on a number of occasions. As such, in erroneously considering whether the Particulars of Claim supported such a claim and striking it out on the basis that such a claim was not disclosed, the Recorder therefore fell into an error of law.

4. Further to Ground 3, the case was one of fraudulent representation, the test for which was agreed between the parties. Each relevant element was pleaded. In striking out the claim the Recorder fell into an error of law in that she did not take the facts alleged in the Particulars of Claim as established for the purposes of considering reasonable grounds for bringing the claim were disclosed.

5. Further, or in the alternative to 4, the Recorder made an error of fact in failing to take any or proper account of the independent evidence of an expert, which was the only evidence before her on this issue, that the First Defendant caused and would have known that defects existed in the windows prior to delivery to the Claimant's home. That evidence was clear and compelling and reflected the fact that each of the 96 casements were made by hand with individual pieces necessarily omitted from each window to facilitate the glazing, apparently due to a design error. The Recorder further failed to take any proper account or improperly construed a letter from the First Defendant's own sub-contractor (dated 17 September 2003 and therefore 2.5 years after the original trial) which, contrary to the evidence given by the sub-contractor at the original trial, stated that the design of the window frame was unusual/unsatisfactory/unwise/not recommended/not fit for

the purpose and would inevitably result in sealing related problems but that the inherent fault/flaw in design was as a result of having to comply with the requirements of the First Defendant. This is particularly remarkable because at the original trial the sub-contractor gave evidence (albeit not to this effect and therefore a further matter relied on by the Claimants) and held himself out to be an expert glazier. These are errors of fact, and to the extent there was no evidence supporting the Recorder's conclusions, an error of law.

6. In rejecting that evidence the Recorder erred in law in wrongly characterising the same as relating to fraudulent concealment when it did not. It follows that she was similarly wrong to view such circumstances to "exist in most defective supply cases".

7. In considering all the public and private interests involved as part of determination of the application to strike out the case as an abuse of process, the Recorder made an error of fact in failing to have sufficient regard to the fact that the first trial related solely to workmanship defects in joinery items and, as was made clear in the first appeal by the Court of Appeal (when the new allegations of design defects were first sought to be introduced), if they were to be advanced they should be done so [*sic*] by way of a separate action. The Recorder further failed to take any or any sufficient regard to the distress caused to the Claimants as individuals. Any harassment that the First Defendant, as a company, may suffer was significantly less than would usually be suffered in that a retrial was already ordered. Further, the First Defendant's deceit was the cause of the matters complained of.

8. The Recorder appeared to take judicial notice of the fact that as a Chartered Surveyor, Mr Perkins, the First Claimant, should have been familiar with drawings and plans and have an awareness of the existence of British Standards. This was an error of law and fact. There was no evidence before the Recorder to that effect. To base finding that such experience meant that Mr Perkins should have raised the issue at the first trial was a wrong conclusion particularly having regard to the fact that neither of the parties' experts, who inspected the windows for the purposes of the original trial, noticed the design defect no complained of. Neither was it noticed by a number of other specialists who inspected the windows with a view to considering remedial schemes.

9. Further, the consequential need of the Recorder to explain the First Defendant's expert's failure to draw this (apparently patent) defect to the attention of the Court as something which 'ignores the adversarial system' was wrong in law.

> Such a conclusion ignores the primary duty of an expert being to the Court not to the party on whose behalf he appears. Further, the finding that the defect was patent was contrary to the Defendant's expert's own report for the trial and his inspection of the windows six months thereafter.
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> 10. The Recorder further failed, in error of fact, to take any or any proper account of the conduct of the First Defendant both before, during and after the original trial including, but not limited to, a failure to comply with Pre-Action Protocol, inadequate disclosure of design drawings by the First Defendant, inconsistent and changing explanations of those drawings and their existence and an apparent refusal to allow the experts to meet on site to view the extent of the defects in the windows. Further, in disregarding this, the Recorder made a finding as to what the correct drawings were.
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> 11. The Recorder failed to have any sufficient regard to the fact that this was not a case of relitigation of an issue already decided but was, and was accepted to be, litigation of a question that had not been decided upon. As such, preventing the Claimants from advancing this claim was, as was argued before the Recorder, a prima facie denial of the citizens' right of access to the court confirmed by common law and guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953)."

25. At this stage it may be convenient for me to address these various grounds of appeal in order. At one stage, Mr Lofthouse was disposed to place all his eggs in two baskets – asking me to rule in his favour and to allow the appeal, solely, on grounds 1 and 2. Being wary of short cuts, however, I encouraged both counsel to make whatever submissions they wished on all the grounds, so that I could rule accordingly. It is to grounds 1 and 2 that I now turn.

26. It is said that there was an inconsistency between the learned Recorder's approach on 4 August and that she adopted on 5 August, after the overnight concession made by Mr Brunner for Devoran. On the first day of the hearing, she saw the absurdity (as she put it) of the Claimants being permitted to pursue the design defects at the prospective hearing (in accordance with the remission by the Court of Appeal) in respect of one window without also being allowed to canvass the same defects *in those proceedings* in respect of the remaining 96. On the other hand, says Mr Lofthouse, she erred in thinking that the overnight concession of liability over the bedroom window (only) precluded the Claimants from pursuing their remedies in respect of the remainder *at all*.

27. It seems that Mr Brunner had accepted that a finding of liability on that one window would entail a corresponding finding as to the rest. Once the concession was made in respect of the one window, however, there would be no need for a trial or finding of liability. Accordingly, so Devoran's argument went, the Claimants would no longer be in a position to draw an inference as to liability on the remainder. Thus, for Devoran still to be pursued in respect of those windows would, in the light of its

concession, constitute unjust harassment. Mr Lofthouse characterised this as a "device" or sleight of hand. Even if that is unfair, I do not see why the concession should have such drastic consequences.

28. Mr Lofthouse put it in terms of Devoran not being able to create unjust harassment by its own concession. I am not sure that I would express it in this way. I prefer to say, first, that if it was not unjust on 4 August for the Claimants to pursue the design defects over all the windows, it did not become unjust on 5 August merely because a concession had been made in respect of one window. Secondly, in so far as the Recorder decided that the concession precluded their claim over the other windows, she fell into error.

29. Ground 3 is of little significance. Although the Recorder may have unintentionally used the phrase "fraudulent concealment", a term of art, I do not believe that she had misunderstood the nature of the deceit claim.

30. Nevertheless, she did come to the conclusion that the Claimants' statement of case failed to disclose a cause of action in deceit. I do not follow this. It would obviously be inappropriate to conduct a mini-trial. All that was required was for the Recorder to address the pleading and decide whether, if the allegations at paragraphs 40 and 41 of the particulars of claim could be established at trial, a claim in deceit could be made out. Applying that test, I have no doubt that such a cause of action is disclosed. That is Ground 4.

31. As to Ground 5, complaint is made that the learned Recorder left out of account the evidence of Mr Blower as to concealment. Although it is not relevant to a strike-out of the pleading, it was part of the background circumstances. As I have said, it would clearly be inappropriate to permit him to usurp the court's function, but the essence of his evidence was that the design defects would have been obvious. In excluding that evidence, the Recorder threw the baby out with the bath water. That was a highly relevant factor to leave out of consideration when it was necessary to take into account "all the circumstances". In this respect, therefore, she misdirected herself.

32. Ground 6 is another makeweight. The Recorder concluded that the circumstances were such as "exist in most defective supply cases". I cannot accept that characterisation, even if one ignores the evidence of Mr Blower. If it is taken into account, it is even less tenable.

33. Ground 7 is based on the proposition that the Recorder wrongly assessed the public and private interests when she decided to strike out Mr and Mrs Perkins' claim for abuse of process. It comes back to the point that, on the Claimants' pleaded case, the need to bring the second set of proceedings is attributable largely to the fact that Devoran appears deliberately to have concealed the defects in the hope that no one would notice the inadequate weatherproofing. Mr and Mrs Perkins cannot be blamed for not having raised it in the first proceedings. If their factual allegations are correct, which I must assume at this stage, this would enable Devoran to profit from its own deceit. To hold that it would be unjustly harassed by a second set of proceedings in those circumstances is a decision outside the range of reasonable conclusions which would have been open to the judge at first instance.

34. Ground 8 is similar. Mr Perkins is blamed for not having spotted what the experts failed to spot in time for the first trial, and what Mr Orsman discouraged him from finding out in the first place.

35. Ground 9 is based on the erroneous proposition that the expert has some adversarial role. Obviously that is wrong.

36. Ground 10 relates to the mystery and obfuscation about the drawings on which the design was supposed to be based. It adds nothing very much against the background I have described, although it is obviously consistent with the alleged pattern of concealment.

37. Ground 11 is based on the failure of the Recorder to attach due weight to the fundamental point that, inconsistently with the principles enunciated in *Johnson v Gore Wood*, the Claimants were being precluded from having a fresh and serious complaint adjudicated upon. In the circumstances, that was hardly consistent with their Article 6 rights.

38. It follows from the errors which I have found that I must now apply the appropriate tests afresh. In doing so, I have no hesitation in concluding that these proceedings do not represent an abuse of process. The Claimants are entitled to have these serious allegations publicly aired. They are simply seeking access to justice, and to overcome the obstacles earlier placed in their path. That is the basis for my decision, of which I informed the parties at the conclusion of the hearing that the appeal should be allowed and the claim proceed.