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Case No: HT-2019-MAN-000021

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ
Date handed down: 5 February 2020
Circulated in draft: 24 January 2020

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

Between:

MRS BEVERLEY GOLDMAN & others **Claimants**

- and –

(1) ZURICH INSURANCE PLC
(2) EAST WEST INSURANCE COMPANY LIMITED

Defendants

Thomas Grant QC & Ryan James Turner
(instructed by Walker Morris LLP, Solicitors, Leeds LS1) for the Claimants

Jeffrey Chapman QC & Tom Asquith
(instructed by DAC Beachcroft, Solicitors, London EC4N) for the Defendants

- -

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A paragraph 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.

……..

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

Introduction and summary of decision

1. On 10 April 2019 the claimants ("the current claimants") issued the current proceedings ("the current action") in which they claim damages and declaratory relief arising out of alleged deceit on the part of the first defendant, Zurich Insurance plc ("ZIP"), and/or conspiracy involving ZIP and others in connection with the issue of cover notes ("the cover notes") relating to "new home" building warranty insurance policies ("the policies") issued by ZIP to the claimants and to others in connection with their purchase of flats ("the flats") in a development in Manchester known as New Lawrence House ("the development"). The development as proposed involved the construction of 139 flats in 3 blocks together with common parts. On 2 August 2019 the current claimants produced their Particulars of Claim which set out the detail of their claims, as summarised below.

2. On 1 October 2019 the defendants applied to strike out the current claimants' claims as an abuse of process on the basis that they could and should have been litigated in earlier proceedings ("the original action") between the current claimants (and others) and the current defendants (and another). They did so without having first filed a Defence on the basis that, should their application fail, they would apply for an extension of time to do so.

3. I should explain that the second defendant ("EWIC") is made a defendant, as it was on its own application in the original action, solely on the basis that ZIP has transferred to EWIC certain of its rights and duties in respect of its business pursuant to a scheme of arrangement sanctioned by the High Court of the Republic of Ireland, where ZIP is incorporated. No separate issue arises as between the claimants and EWIC on this application, which makes the application on the same basis as does ZIP.

4. In those proceedings ("the original action"): (a) all of the current claimants brought claims against ZIP and EWIC under the policies as regards defects in their flats and the common parts of the development; (b) some of the current claimants also brough claims against a related company of ZIP, Zurich Building Control Services Ltd ("ZBC"), alleging deceit by ZBC as regards the issue of final certificates issued by a building inspector employed by ZBC under the Building Regulations ("Building Regulations final certificates") in relation to their flats.

5. The trial of the original action came on before me in autumn 2018. As between the original claimants and ZIP I held that the claimants succeeded in their policy claims but that their claims were capped at the purchase price of their flats: *Zagora Management Ltd & others v Zurich Insurance plc & others* [2019] EWHC 140 (TCC). On appeal and cross-appeal the Court of Appeal in November 2019 upheld the decision on the policy claims but also overturned my decision that the claims were limited to the purchase price of the flats: *Manchikalapati & others v Zurich Insurance plc* [2019] EWCA Civ 2163. Thus, the original claimants achieved effectively a complete success in their policy claims. EWIC has, however, sought permission to appeal to the Supreme Court and a decision is awaited in that regard.

6. As between the original claimants and ZBC I held that, although the claimants had established that the Building Regulations final certificates had been issued deceitfully, the claimants had not established that they (whether directly or through their conveyancing solicitors) had relied upon the final certificates in purchasing the flats, so that their claims failed. A limited application for permission was sought by some of the original claimants to appeal against the dismissal of these claims but was refused.

7. The current claimants' case is that until evidence was heard in that trial neither they nor their legal advisers considered, or had reasonable grounds for considering, that they could advance a claim in deceit or conspiracy against ZIP in relation to the issue of the cover notes. They also contend that in any event there is no basis, upon a proper consideration of all of the relevant circumstances, for striking out the current action as an abuse of process even if it be found that they could have advanced the current claims in the original action.

8. The defendants' case is that there is no fundamental difference between the deceit claim which was advanced against ZBC in the original action and the deceit and conspiracy claims which are now sought to be advanced in the current action, so that there is no good reason why the current claims could not and should not have been advanced in the original action.

9. Both parties have filed lengthy and detailed witness statements in support of their respective cases: from Mr Ludlam of DAC Beachcroft (the defendants' solicitors in this action, and ZBC's solicitors in the original action); from Mr Hargreaves of Walker Morris (the claimants' solicitors in this and the original action). Mr Selby QC (the claimants' leading counsel in the original action) has also provided a witness statement. I have had regard to these statements together with the voluminous evidence exhibited and provided, including some of the trial bundles from the earlier action. In assimilating this considerable quantity of material I have, of course, the considerable advantage of having case managed and tried the original action.

10. I had also had the benefit of detailed and impressive written submissions from leading and junior counsel for the claimants and for the defendants and equally detailed and impressive oral submissions over 1 ½ days on 16 & 17 January 2020.

11. In summary, I am satisfied that the current proceedings are not an abuse of process and that the claimants are entitled to proceed with them against both defendants, so that the application will be dismissed. My reasons appear below under the following section headings and in the following paragraphs.

A. The relevant legal principles

12. In *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 the House of Lords set out the modern approach to what is commonly referred to as *Henderson* abuse, after the decision in *Henderson v Henderson* (1843) 3 Hare 100 in which it is said that Wigram V-C first articulated the principle. Lord Bingham summarised the position in a frequently cited passage which has subsequently been accepted as being authoritative:

> "The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all circumstances, a party is misusing or abusing the process of the court in seeking to raise before it the issue which could have been raised before. […] While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

13 This speech makes clear that the crucial question is not whether the claimant could have raised the claim in the earlier proceedings but whether he should have done so. Of course, it is a necessary pre-condition of a finding that a claimant should have done that he could have done. To that extent it is often sensible to consider that question first. The second question, whether or not he should have done so, involves a consideration of all relevant factors and requires a decision to be made which is based on an assessment of the weight to be attached to each of those factors and a balancing exercise undertaken.

14. In *Stuart v Goldberg Linde* [2008] EWCA Civ 2 the Court of Appeal considered the relevance of a claimant's failure to use reasonable diligence. At [59] Lloyd LJ (with whom Sedley LJ agreed and in respect of which Sir Anthony Clarke MR did not disagree in his qualified assenting judgment) accepted that the claimant's failure to use reasonable diligence to find out facts relevant to his claim could be relevant to the enquiry which the court has to conduct in a Henderson abuse application. However, he did not accept that there was any general principle that a claimant was under a duty to exercise reasonable diligence to find out the facts relevant to whether he has or may have such a claim.

15. In *Stuart* the Court of Appeal also held that the court should not, when considering a *Henderson* abuse application, have regard to the merits of the second action other than in the most extreme cases: see [57]. Subsequently, in *Walbrook Trustees (Jersey) Ltd v Fattall* [2009] EWCA Civ 297, the Court of Appeal endorsed this approach but also said at [28] that it may be relevant to consider whether, on the facts known at the time of the first action, the claimant would have been able to bring the claim now brought in the second action without it having been struck out as disclosing no cause of action:

> "In our judgment, a party cannot be criticised for not pleading something that would have been struck out, and so it cannot be an abuse of process for a party not to enforce his rights until he has the information that will prevent his case from being struck out."

16. In that respect the claimants remind me that a claim alleging fraud may not be made unless:

    1. There must have been some material fact that "*tilts the balance and justifies an inference of dishonesty*" and not merely negligence: *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm), [20] (Flaux J).
    2. The claimant must have given clear instructions to plead a claim in fraud and there must have been "*reasonably credible material*" to support the allegation: see *Medcalf v Mardell* [2003] 1 AC 120, 134E-F [22] (Lord Bingham).
    3. The claimant must be able to plead primary facts ("particulars") from which a claim involving dishonesty may be proven, as the court will not allow a party to prove a claim in fraud other than on the basis of those primary facts: see *Three Rivers District Council v The Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 at [55], [160] and [186].

17. I was also referred by Mr Hargreaves in his first witness statement to the relevant provisions of the Bar Standards Board Handbook and the Solicitors Regulation Authority Code of Conduct 2011, which substantially reproduce the guidance given in *Medcalf* as summarised in sub-paragraph (2) above.

18. I was also referred to the decision of the Court of Appeal in *Playboy Club London Limited v Banca Nazionale Del Lavoro SpA* [2018] EWCA Civ 2025. In that case, the Court of Appeal held that a (second) claim of fraudulent misrepresentation by the claimant club against the defendant bank was not an abuse of process despite a previous (first) claim of negligent misrepresentation having failed against the defendant in relation to the same representation. The claimant accepted that it could properly have brought a claim in deceit in the first action, but contended as summarised at [3] that it was not an abuse because: (a) on the material available in advance of the trial in that action it would

have been a speculative and weak claim in deceit (albeit one which could properly have been advanced); (b) given the particular responsibility on counsel and a party in relation to pleading fraud, it could not be said that it was incumbent on the club to include a deceit claim in that action; and (c) after trial commenced in that action, significant new evidence had become available to it which materially strengthened its case in deceit.

19. The Court of Appeal (Sales LJ, giving a judgment with which Gloster LJ agreed) disagreed with the first instance judge that it was an abuse of process to pursue the deceit claim. He said at [46] that: "although a deceit claim could have been introduced by the Club alongside the negligence claim before the trial of that claim, it cannot properly be said that such a deceit claim *should* have been so introduced – i.e. on pain of losing any later opportunity to plead a case in deceit, no matter what further evidence pertaining to fraud might emerge". He reasoned that: "the pleading of fraud or deceit is a serious step, with significance and reputational ramifications going well beyond the pleading of a claim in negligence. Courts regard it as improper, and can react very adversely, where speculative claims in fraud are bandied about by a party to litigation without a solid foundation in the evidence. A party risks the loss of its fund of goodwill and confidence on the part of the court if it makes an allegation of fraud which the court regards as unjustified, and this may affect the court's reaction to other parts of its case". He held that: "Although the Club could have pleaded deceit before trial of the negligence claim, in my view it behaved reasonably and entirely properly in deciding not to do so on the speculative and inferential basis which would have been necessary at that stage".

20. At [51] he held that: "This is not a case in which a party has deliberately decided for tactical reasons to keep material up its sleeve in relation to a deceit claim until after it sees what happens with its negligence claim, and then institutes later proceedings in deceit relying on material which was already available to it at the earlier stage. To proceed in that way might well be an abuse of process: see *Johnson v Gore-Wood* at p. 31B per Lord Bingham, quoted above; and *Stuart v Goldberg Linde* [2008] EWCA Civ 2; [2008] 1 WLR 823, [77] (Sedley LJ) and [79] (Sir Anthony Clarke MR). But in this case, the fair inference is that the Club has proceeded to bring the deceit claim by reason of new evidence becoming available which is highly material and strongly supportive of that claim". He explained at [52] that: "I say this is the fair inference, because the Club has not waived legal professional privilege in respect of the legal advice it received before and after the trial of the negligence claim. The Club is not obliged to waive privilege and it is appropriate to determine the strike out application by BNL on the basis of such inferences as can fairly be drawn from the objective and known facts of the case regarding the Club's conduct". The same approach must apply here, where the current claimants have not waived privilege (even assuming they were able to do so, since they were not the only claimants in the original action) in respect of the legal advice received in relation to the original action.

21. As Mr Grant QC submitted, it is apparent from the approach taken in the *Stuart* and the *Playboy Club* cases that the court needs to consider whether or not the claim advanced in the second action could and should have been advanced in the earlier action, not in the abstract, but by reference to what the claimant knew (or, if relevant, should have known) at such time as would have enabled him to advance that claim in the earlier action to enable it to have been determined in that action. Simply to say that in

the run-up to trial the claimant became (or should have become) aware of the claim is not enough if, in reality, there was no reasonable prospect of the claimant being able to amend to include that claim in the action so as to enable it to be resolved in that action. As Mr Grant reminds me, the modern approach of the courts to allowing amendments where that would have the effect of vacating fixed trial dates is far more stringent than may previously have been the position. However, it is also true that in *Stuart* Sir Anthony Clarke MR observed that even so the claimant in such a case may have options reasonably available to him, such as applying to amend and then inviting the court to order a split trial. Sedley LJ and Clarke MR also referred to the decision of the Court of Appeal in *Aldi Stores Limited v WSP Group Plc* [2007] EWCA Civ 1260 to the effect, as summarised by Sedley at [77], that "a claimant who keeps a second claim against the same defendant up his sleeve while prosecuting the first is at high risk of being held to have abused the court's process. Moreover, putting his cards on the table does not simply mean warning the defendant that another action is or may be in the pipeline. It means making it possible for the court to manage the issues so as to be fair to both sides".

22. I was also referred to a recent decision of the Supreme Court in *Takhar v Gracefield Developments Ltd* [2019] 2 WLR 984 upon which Mr Grant placed considerable reliance, whereas Mr Chapman QC submitted that it had no relevance to the instant case. In that case the Supreme Court held that a claimant could bring an action to set aside a previous judgment allegedly obtained by fraud regardless of whether or not she could, exercising reasonable diligence, have raised the matter in the earlier proceedings.

23. Lord Kerr, who gave the first speech with which Lords Hodge, Lloyd-Jones and Kitchin JJSC agreed, noted at [20] that one of the issues raised in that case was "the question whether the rule in *Henderson* requires modification or disapplication where the new issue raises an allegation of fraud by which, it is claimed, the original judgment was obtained". Having considered the authorities, his conclusion at [54] was as follows:

> "In my view, it ought now to be recognised that where it can be shown that a judgment has been obtained by fraud, and where no allegation of fraud had been raised at the trial which led to that judgment, a requirement of reasonable diligence should not be imposed on the party seeking to set aside the judgment."

24. To that conclusion he added two qualifications at [55], namely:

> "Where fraud has been raised at the original trial and new evidence as to the existence of the fraud is prayed in aid to advance a case for setting aside the judgment, it seems to me that it can be argued that the court having to deal with that application should have a discretion as to whether to entertain the application. Since that question does not arise in the present appeal, I do not express any final view on it. The second relates to the possibility that, in some circumstances, a deliberate decision may have been taken not to investigate the possibility of fraud in advance of the first trial, even if that had been suspected. If that could be established, again, I believe that a discretion whether to allow an application to set aside the judgment would be appropriate but, once more, I express no final view on the question."

25. It is, I think, apparent that nothing in that speech can be said to be directly relevant to the *Henderson* abuse principle.

26. However Lord Sumption JSC, with whom Lords Hodge, Lloyd-Jones and Kitchin JJSC also agreed, having noted that a claim to set aside a judgment obtained by fraud was a claim separate and distinct from the claims in the original litigation, recorded that the defendant had submitted that nonetheless and by analogy the "should have" test stated by Lord Bingham in *Johnson v Gore Wood* should apply, with the result that the claimant was required to show that she could not with reasonable diligence have discovered the facts relevant to the fraud. He said this at [63]:

> "The "should" in this formulation refers to something which the law would expect a reasonable person to do in his own interest and in that of the efficient conduct of litigation. However, the basis on which the law unmakes transactions, including judgments, which have been procured by fraud is that a reasonable person is entitled to assume honesty in those with whom he deals. He is not expected to conduct himself or his affairs on the footing that other persons are dishonest unless he knows that they are. That is why it is not a defence to an action in deceit to say that the victim of the deceit was foolish or negligent to allow himself to be taken in …. It follows that unless on the earlier occasion the claimant deliberately decided not to investigate a suspected fraud or rely on a known one, it cannot be said that he "should" have raised it."

27. Mr Grant accepted that this observation was made in the context of a case about setting aside a judgment obtained by fraud rather than a case directly involving the application of the *Henderson* abuse principle. However, he submitted that nonetheless it clearly established that in a *Henderson* abuse case where fraud is alleged in the second action there is no place for the application of any consideration as to whether or not the claimant could or should, with reasonable diligence, have discovered the facts material to the fraud in time to make the allegation in the original action if, in fact, he had not done so. Mr Chapman on the other hand submitted that this passage was of no relevance to *Henderson* abuse and was only of application to the particular case of an action to set aside a judgment obtained by fraud.

28. I agree with Mr Grant that Lord Sumption was clearly considering the question as not being limited only to actions to set aside a judgment obtained by fraud. He was explaining in the context of an argument about *Henderson* abuse why, in relation to any claim made in deceit, a defence based on an alleged failure to exercise reasonable diligence to discover the fraud earlier would not succeed solely on that ground. As Mr Grant submits, there is no difference in principle or in substance between a claim to set aside a transaction procured by fraud and a claim for damages for deceit; indeed the two claims are often made in the alternative where a claimant seeks to set aside a transaction but claims damages if for any reason that claim fails. It follows, in my judgment, that Lord Sumption's analysis applies to all *Henderson* abuse cases where fraud is alleged in the new action. However, that conclusion is subject to the important qualification referred to below after I refer to the speeches of Lord Briggs and Lady Arden in the same case.

29. Lord Briggs considered at [68] that the case turned "on the outcome of a bare-knuckle fight between two important and long-established principles of public policy. The first is that fraud unravels all. The

second is that there must come an end to litigation". He stated at [68] that he "would have preferred a more flexible basis upon which, recognising that many cases will straddle any bright line, the court can apply a fact-intensive evaluative approach to the question whether lack of diligence in pursuing a case in fraud during the first proceedings ought to render a particular claim to set aside the judgment in those proceedings for fraud an abuse of process. This approach would in particular seek to weigh the gravity of the alleged fraud against the seriousness of the lack of due diligence, always mindful of the principle that victims of a fraud should not be deprived of a remedy merely because they are careless".

30. Lady Arden noted at [94] that: "Greater difficulty lies in situations where at the time of the original action a party suspects a fraud but does not investigate it or decides not to investigate it. The justice in this situation may not be so easily answered by allowing an unfettered right to bring a rescission action. I would treat this as a case where the *Ashingdane* principles found in the jurisprudence of the European Court of Human Rights apply (see *Ashingdane v United Kingdom* (1985) 7 EHRR 528). Any restriction would have to be derived from a rule which serves the legitimate aim of proving a just solution, thus striking a fair balance between the relevant considerations and going no further than necessary, and which does not defeat the core right of access to court".

31. Thus, it would appear that Lord Briggs and Lady Arden favoured a more flexible approach to the question, and Lord Kerr with whom 3 other members agreed reserved his position as to whether that might be appropriate in certain cases. Lord Sumption did not expressly address this point. In my view it cannot be concluded that the observations of Lord Sumption in relation to *Henderson* abuse cases were intended to state that where fraud was alleged in the second action the question of reasonable diligence could never be relevant. Such an absolute rule would, it appears to me, be inconsistent with the statement of Lord Bingham in *Johnson v Gore-Wood* that *Henderson* abuse requires a "broad, merits-based judgment" to be made. It cannot be thought in my view that Lord Sumption was seeking to depart from that approach, even in fraud cases. In my judgment what can be taken from *Takhar* is that even in fraud cases the question of reasonable diligence may still be relevant, but that it is unlikely in such cases to weigh very heavily in the balance if the other relevant factors weigh against the case being held to be an abuse.

32. Mr Chapman referred me to the recent decision of the Privy Council in *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2019] AC 271. In that case the Court of Appeal of Guernsey had disagreed with the first instance judge, holding that what was relevant was not the degree of overlap on the pleaded case but the substance of the respective claims. Lord Hodge recorded at [180] that they had said this:

> "Upon such an analysis it can be seen that, although there is not a precise identity between the two, the claims in both actions involve (i) essentially the same parties (ii) acting in essentially the same capacities (iii) in relation to events occurring in essentially the same time period (iv) and in relation to essentially the same series of transactions (v) raising essentially the same cause of action (breach of trust) (vi) whose disposal would turn on essentially the same documentary evidence and (vii) essentially the same witnesses. That is the accumulation of reasons why, having decided that the allegations in the Cause could have been brought in Guernsey 1, the

court below ought then to have come to the conclusion that, absent any special reason, those allegations should have been brought in Guernsey 1."

33. Mr Chapman, observing that at [190] the Privy Council agreed with the approach of the Court of Appeal, submitted that I should adopt the same approach in this case. I accept that I should indeed focus on the substance of the original action and the current action rather than limiting myself to a consideration of the pleaded cases alone.

B. The original action

34. I have already summarised the background in the introduction. More detail may be found in my judgment in the original action and in the judgment of the Court of Appeal, both referred to above, to which anyone who is interested may refer. I do not intend to lengthen this judgment by attempting a general summary. I do however need to refer to the features of the original action which are relevant to understanding the degree of overlap between the original and the current action.

35. I should begin with the distinction between ZIP and ZBC. As I said in the original judgment at [1.3], although ZIP and ZBC are separate limited companies, that separation was solely for regulatory compliance reasons and did not reflect any substantive separation between the two businesses. The building warranty and building control teams worked closely together in one department under the Zurich Building Guarantee ("ZBG") name, the employees of both businesses were employed by ZIP and the administrative and other support functions were also provided by ZIP. However, as I also said this at [4.2] and [4.3]:

"4.2 Nonetheless there was a separation as between the building warranty function and the building control function, both organisationally and functionally. Organisationally, as an organogram to which I was referred illustrates, ZBC sat alongside and apart from the key ZBG building warranty function. ZBC had its own national manager, a Mr Van Schalkwyk, who reported directly to the overall head of ZBC, Mr Horsler. Reporting to Mr Van Schalkwyk were the two building control surveyors, Mr Mather and a Ms Allery. Separately reporting to Mr Horsler on the building warranty side were Mr Cairns as the ZBG regional manager for the southern area and Ms Armstrong as the ZBG regional manager for the northern area. Reporting to the regional managers were regional surveyors and reporting to the regional surveyors were senior surveyors including Mr Nicholls and, finally, reporting to them were site surveyors including, from 2009 onwards, Mr Eadsforth. Functionally, only building control qualified surveyors were authorised to undertake the specific building control function which was the subject of prescription under the Building Act 1984, the Building Regulations 2000 and 2010, the Building (Approved Inspectors etc.) Regulations 2000 and the Approved Documents – to which I shall refer in more detail later.

4.3 However, it was also recognised that in reality there was a close connection between the building warranty functions and the building control functions. That is because the cover provided by the building warranty policies was very substantially aligned with the requirements of the Building Regulations, both because: (a) the cover in respect of present or imminent danger to health and safety applied where the danger resulted from the developer's failure to comply with the Building Regulations; (b) the major physical damage cover applied where the damage resulted from the developer's failure to comply with ZBG's requirements as contained within its technical manual ("the technical requirements") which itself was in many respects closely aligned with the requirements contained in the Approved Documents issued under the Building Regulations. It followed that the inspections undertaken by the building warranty inspectors were either identical to or at least very similar in terms of their purpose, scope and performance as the inspections which would be undertaken by a building control inspector for building control purposes. It also followed, particularly after the organisational changes which occurred in late 2008, that a building warranty inspector was able to undertake much of the work which a building control inspector might otherwise have to do, and vice versa, thus allowing time and cost savings to be made."

36 Mr Chapman emphasises this close connection between the two companies and he is right to do so. However, it is important nonetheless to bear in mind that:

(1) Zurich chose to incorporate ZBC to undertake a separate and distinct part of its business, the provision of Building Regulations inspection and certification services and cannot now seek to disregard entirely that separation of its business, which was both legal and functional, albeit that there was a close connection in practice between the insurance surveying function and the Building Regulations surveying function.

(2) Not only were there two separate defendants but entirely separate claims were made against each. The claim against ZIP was made by 26 individual flat owners in relation to 30 individual flats solely under the new home insurance policies (with a limited company known as Zagora Management Limited as freehold owner of the whole development also making (unsuccessful) claims against ZIP on the basis that it was, or was to be treated as, an insured and under what was referred to as an agreement to rectify). The claim against ZBC was made by 12 of the individual flat owners as well as by Zagora and solely in deceit. There was no overlap between the two causes of action. Whilst both claims arose out of the same development, and the existence of the serious unremedied defects in the construction was of course relevant both to the claims under the policy made against ZIP and the allegations of deceit made against ZBC, nonetheless the claims were legally and factually distinct.

(3) Whilst the claimants were of course obliged to sue ZIP and ZBC as separate defendants on the basis that the claims against each were separate, Zurich chose to instruct separate solicitors and counsel to conduct the defence of each company. The statements of case were separate, as was the provision of disclosure and witness statements and expert evidence (save possibly for the quantity surveyors). Both companies were separately represented at each interlocutory hearing

and at trial. So far as I have been made aware there was no conflict of interest between ZIP and ZBC which obliged them to be separately represented. To do so was, as I have said, entirely Zurich's choice. Whilst there is no reason to criticise this approach, nonetheless it did mean that the overall costs incurred by the defendants and faced by the original claimants must have been very significantly higher than would otherwise have been the case.

37. The claim against ZBC was pleaded in deceit on the basis that the relevant inspector – Mr David Mather – knew that the statements made in the Building Regulations final certificates issued separately in relation to each separate flat were not true or knew that there were no reasonable grounds for believing the truth of the statements or was reckless as to their truth. The claim against ZBC had to be pursued on the basis of deceit if it was to be pursued at all, since under the existing and well-established law negligence or negligent misrepresentation alone would not ground a claim.

38. The Building Regulations final certificates were issued in three tranches. The vast majority, relating to 115 flats (although in fact, as was common ground, that was an error and only 79 of those 115 flats actually existed at that time) were issued on 15 December 2009. A further 18 were issued within a week on 21 December 2009. The final 7 were not issued until 8 November 2010 due, as I found at [4.65], to oversight on the part of ZBC.

39. It is worthwhile setting out what I said as regards the claim against ZBC in paragraphs 11.1 to 11.10 of my judgment in the original action:

> "11.1 As I have said the claim is brought in deceit (otherwise known as fraudulent misrepresentation). To succeed the ZBC claimants must prove the following elements of the tort:
>
> a. That Mr Mather (because it is not alleged that anyone else was dishonest) made misrepresentations to them.
> b. That Mr Mather intended them to rely on those misrepresentations.
> c. That Mr Mather knew the representations were false or was reckless as to whether they were true.
> d. That they relied on those misrepresentations.
> e. That they have suffered loss as a result.
>
> 11.2 The burden of proof of course rests on the claimants. The standard of proof is also of course the balance of probabilities, although it is well established by the authorities to which Mr Asquith referred me (and I must bear firmly in mind that) this test is applied in a fraud case in a more exacting way, recognising that it is inherently less likely that a person acted dishonestly rather than negligently, such that the stronger the misconduct alleged, the less likely it will be that it occurred. Accordingly, to the extent that it is inherently improbable that a particular person was dishonest, the evidence needed to rebut that inherent improbability on the balance of probabilities will have to be more cogent than would be needed to prove that he was negligent (see paragraph 85 of ZBC's opening).

11.3 The claimants remind me that the classic test for dishonesty in deceit is to be found in the speech of Lord Herschell in *Derry v Peek* (1889) 14 App. Cas. 337 at 376:

> "First, in order to sustain an action of deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (i) knowingly, (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement from being fraudulent, there must, I think, always be an honest belief in its truth."

11.4 It is accepted that as a matter of law it is not necessary to prove that Mr Mather had an intention to deceive the claimants: as Lord Herschell said "…if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made." (p. 376).

11.5 However, as I said in the course of submissions whilst it is not necessary to show a motive, as a matter of common sense the court is likely, when considering the issue of dishonesty, to ask itself why Mr Mather should knowingly or recklessly have made a false representation. If it is difficult to answer the question: what motivated someone such as Mr Mather, a man with an unblemished reputation, to write something which was untrue, either knowing that it was untrue or not caring a toss whether or not it was true, then it is difficult to conclude in a case where there is genuine scope for doubt that it is not simply an innocent or careless mistake.

The misrepresentations made by Mr Mather

11.6 Each of the Building Regulations final certificates stated that it related to the work of the construction of the new build flats specified in the certificates and further stated that: "the work described above has been completed and Zurich Building Control Services Ltd have performed the functions assigned by regulation 11 of the 2000 Regulations (as amended)".

11.7 Regulation 11 of the Building (Approved Inspectors etc.) Regulations 2000 (as amended) is headed "Functions of approved inspectors" and provides so far as relevant that: "an approved inspector by whom an initial notice has been given shall, so long as the notice continues in force, take such steps as are reasonable to enable him to be satisfied within the limits of professional skill that…(a) regulations 4 and 6 of the Principal Regulations are complied with…". Regulation 4(1) of the principal regulations referred to, being the Building Regulations 2000, provided so far as relevant that: "Building work shall be carried out so that it complies with the applicable requirements contained in Schedule 1". It is Schedule 1 which contains the detail of the requirements in Parts A through to N.

11.8 It is common ground and I am satisfied that by issuing the Building Regulations final certificates in the terms which he did and in the context of the regulatory regime referred to Mr Mather represented that ZBC had taken such steps as were reasonable to enable it to be satisfied within the limits of professional skill and care that the works referred to had been completed in accordance with the Building Regulations.

11.9 ZBC accepts that on an objective reading of the Building Regulations final certificates they related to the relevant access and egress routes for the relevant flats, as well as the flats themselves. This was common ground between the experts.

11.10 ZBC also accepts that, as was common ground between the experts, it had not taken reasonable steps to satisfy itself that Building Regulations had been complied with. Thus, it admits that Mr Mather made misrepresentations in issuing the Building Regulations final certificates."

40. It is also necessary and important to refer to the case as it was pleaded against ZBC in the original Particulars of Claim when served on 28 June 2017. As relevant, it was structured and expressed as follows:

(1) The existence of serious defects in the development was pleaded by reference to columns A and B in 7 separate Scott Schedules served with the Particulars of Claim. These schedules asserted the presence of serious defects to the roof, external walls, main structure, balconies, fire safety, mechanical and electrical defects and lifts. The majority related to the structure and exterior and other common parts, including the staircases which were the means of escape in case of fire (no lifts ever having been installed) rather than to the interior of the individual flats. In particular it was said that the nature and extent of the fire safety defects were such that the flats could not safely be occupied.

(2) After having pleaded in considerable but necessary detail the claims against ZIP under the policies and the agreement to rectify the Particulars of Claim turned at paragraph 71 to the case as pleaded as against ZBC. It pleaded the existence of misrepresentations on the basis that the flats were not complete and that ZBC had not taken such steps as were reasonable to enable it to be satisfied within the limits of professional skill and care that the Building Regulations had been complied with. It pleaded a failure to undertake reasonable inspections by reference to "the site inspection records provided by ZIP and ZBC" (which have been referred to as the Live 27 records, although it appears that there was also a system known as EOS which was used on site and from which information was uploaded onto Live 27) and a failure to identify or to record what was said ought to have been obvious omissions and defects.

(3) Deceit was pleaded on the basis of reliance on particulars alleging, in summary, that: (a) the nature and extent of the defects as pleaded in the schedules were so obvious to ZBC, by reference to the detail pleaded in column C of those schedules, that it must have been obvious to ZBC that what was represented in the certificates was untrue; (b) there was no consultation

between ZBC and the fire authority; (c) the certificates referred to far more flats than had actually been constructed; (d) there was no record of the plans having been assessed by ZBC and some flats were certified in successive certificates; (e) the December 2009 certificates were signed off when there were still defects in the common parts, identified by "ZBC's and/or ZIP's inspectors", which had not been remedied or recorded as remedied at that time by the surveyors whose reference codes were identified in the Live 27 records.

(4) It was further pleaded that: (a) the individual claimants had completed the purchase of their flats in reliance upon the representations in the Building Regulations final certificates; (b) the nature and extent of the defects were such that the flats were unsellable and worthless; (c) if the management company was required to rectify the defects the individual claimants who have to pay their share of those costs; (d) claims were made for the purchase prices and associate costs incurred both in relation to the purchase and subsequently and for any liability to the management company.

(5) Finally, it was pleaded that the claims were not statute barred because s.32 of the Limitation Act 1980 applied, since they did not discover, and could not with reasonable diligence have discovered, the fraud until less than 6 years before the claims were issued.

41. It is also necessary and important to understand the evidence which was available to the claimants at that time.

42. It is common ground that as a result of an application for advance disclosure made in March 2017 the claimants received relevant documentary information from the defendants. In particular they were provided with screen shots of the Live 27 site inspection records referred to above as well as insurance certificates. These provided information as to: (a) the inspections recorded by the surveyors in relation to each flat, including the date when each flat is recorded as having been subject to a final inspection); (b) the defects recorded by the surveyors in relation to each flat; and (c) the completion date recorded by the surveyors in relation to each flat. They were also provided with other documents, including the contract between ZIP and the developer, JCS Homes Ltd ("JCS") and some drawings produced by JCS' consultants. During the course of the application it was said by the defendants that they believed that there were no further records within Live 27 which had not been disclosed and it was also explained that a box of documents containing information relevant to the defendants' role in relation to the development (referred to as "box 54") had been lost or misplaced. The claimants already had some cover notes and monthly reports prepared by a firm of surveyors known as Watts for the Bank of Ireland, which had been involved in the development as funder for JCS and which had subsequently agreed to finance the pursuit by the claimants of this litigation, which attached various cover notes and contemporaneous photographs. The current defendants make the point that it was apparent for example from the February 2009 Watts report that cover notes had been issued by ZIP even though construction of the roof, stairs, external walls, windows and external doors, internal walls and partitions had been commenced but were not yet completed. The claimants also had at least some, if not all, of the conveyancing documents as between the individual claimants and JCS, including the sale agreements for the individual flats.

43. In short, it is clear that the claimants had a reasonable amount of documentary information and that they undoubtedly had sufficient information to enable them to plead a case in deceit as against ZBC, which I permitted them to plead notwithstanding objections from ZBC. However, it is also the case that they were aware that there was documentary information which they had asked for and which had not been provided, primarily because box 54 could not be located.

44. The defendants also observe that the claimants had already instructed a building control expert by the time the Particulars of Claim was pleaded. Mr Conlon was initially instructed by letter dated 21 June 2017, he having already visited the development and met with Walker Morris on 8 June 2017. These instructions set out in some detail the information available to the claimants, from which it is clear that the Live 27 records had been reviewed in some detail and that Walker Morris were aware for example that Mr Mather the approved inspector who had produced the Building Regulations final certificates had also produced some cover notes and that there might be a difference between the role of an approved inspector and the role of a surveyor signing off the building in order that a new home policy might be issued. He was asked to provide his first draft report by 21 July 2017. Although the claimants have not disclosed his first draft report the defendants observe that his formal report, produced some 14 months later in August 2018, included the following at [12.20.2]:

> "In relation to the apartments, these were inspected by Gez Nicholls who attended on 5 dates between 6th March 2009 and 27th November 2009. All of the apartments, save for apartments 2, 3, 47 to 56, 59 to 74, 80, 84 and 88 were inspected for a stage 07 inspection. Although I note that by this time, cover notes for apartments 47 to 50, 52 to 54, 57, 61 to 63 had been issued by Gez Nicholls (see Watts Report dated 27th February 2009) had been issued by ZIP at this time (sic). Having reviewed the inspection records I note however, that the Final 08 inspections for apartments 47 to 49, 54, 57, 61 and 63 were not actually carried out until 23rd November 2009 and therefore, I am at a loss to understand how Cover Notes for these apartments were issued in February 2009 when the Development at that stage was only part complete (photograph 3 of the Watts Report dated 27th February 2009 shows that the external walls to apartments 48 to 50 and 57 were not yet complete)."

45. The defendants submit that the conclusions drawn by Mr Conlon were derived from documentary information available to the claimants in June 2017 and that there is no reason to think that Mr Conlon did not reach similar conclusions when he produced his first draft report at around the same time. There is no direct evidence about this, but I am prepared to accept that it is a reasonable inference that he would have done so. However, it is also fair to observe that, although Mr Conlon did express his surprise, he did not suggest that this could only be explained by something more sinister than mere incompetence. Nor was what had happened in relation to the cover notes issued by Mr Nicholls in February 2009 obviously relevant to the case which was being considered and advanced at that stage in relation to the Building Regulations final certificates issued by Mr Mather in December 2009 and November 2010.

46. I should refer to ZBC's Defence. It contained a robust denial of liability. It asserted that at its highest the particulars of deceit alleged were as consistent with negligence as with dishonesty. It picked up that the Particulars of Claim had not identified any one person within ZBC as having been dishonest. This was later remedied when, in the Amended Particulars of Claim which I ordered that the claimants should serve to address this point, Mr Mather was identified as that person. Whilst it is unsurprising that Mr Mather was identified, given that he was the only person who signed the Building Regulations final certificates, the point made by the defendants, with which I have some sympathy, is that the failure to do so earlier tends to indicate that the claimants were seeking to keep all their balls up in the air so as, potentially, to keep open the possibility of criticising the other surveyors who made entries on Live 27. Reliance was also denied by ZBC. It was alleged amongst other things that the claimants relied on the new homes policy as opposed to relying upon the Building Regulations final certificate. It was noted that in all bar one case the Building Regulations final certificates post-dated entry into the sale agreements.

47. However, importantly, ZBC did not positively plead the argument which in my judgment in the original action I found the most compelling as regards reliance, which is that in relation to all of the sale agreements which preceded the issue of the cover notes it was the production of the cover notes which triggered the obligation on the purchaser to complete, with the insurance policy final certificate to be provided post-completion and no express obligation as regards the issue of any Building Regulations final certificate. Indeed, I note that nor did ZBC refer to that feature of the sale agreements in their detailed case on reliance which they produced in April 2018 upon review of the claimants' disclosure. Whether that was because ZBC consciously did not wish to alert the claimants to a point which might have caused them to consider the cover note fraud or simply because the significance of that point had not occurred to it either at these stages I am not in a position to reach any conclusion about.

48. Disclosure took place in February 2018. Mr Hargreaves explained in his first witness statement the further documentation received on disclosure, including the further specific disclosure application made by the claimants in April 2018 and determined in June 2018. He particularly refers to disclosure by ZBC of a draft internal ZBG surveying procedure which appears to have provided the only explanation as to how the surveying function was to be undertaken in relation to the issue of the insurance documentation, namely cover notes, insurance final certificates and Building Regulations final certificates, and how such documents were to be physically produced. The guidance referred to the eight stage inspection process to be undertaken by the insurance surveyors and made clear that these documents should not be issued unless and until a final inspection was satisfactory and any defects remained outstanding were remedied. It also stated that normally cover notes should be produced using the EOS / Live 27 system, but that there was the option to produce cover notes manually. Mr Hargreaves also makes the point that virtually no internal contemporaneous documentation was disclosed in relation to the inspection and certification processes undertaken on the development, whether for insurance policy or for Building Regulations purposes, including documentation relevant to the decision to issue cover notes so as to permit partial occupation of certain flats within the development at a time when the development overall was not yet completed.

49. Witness statements were exchanged in May 2018. In addition to Mr Mather, ZBC served witness statements from Mr Alan Cairns, Mr Gez Nicholls and Mr Gareth Eadsforth, none of whom were authorised to undertake building control inspections or issue building control certificates, although as became clear Mr Mather relied heavily in that respect upon the inspections and entries onto Live 27 made by Mr Nicholls and Mr Eadsforth when performing their role as insurance surveyors. As Mr Hargreaves explains, Mr Cairns gave an explanation as to the procedures adopted by the insurance surveyors which was broadly consistent with what was stated in the surveying procedure document. He summarises the limited evidence given by Mr Nicholls and Mr Eadsforth. He also summarises the evidence given by Mr Mather which included evidence that he would rely on being informed by email by the insurance surveyors that they had completed final inspections of individual flats which enabled him to issue Building Regulations final certificates and evidence that he believed that he had attended site more frequently than shown on the Live 27 entries.

50. In his witness evidence Mr Ludlam states that on his reading of the witness statements it was made clear that the surveyors could either issue cover notes automatically through updating the Live 27 system or manually without reference to the Live 27 system. Mr Hargreaves takes issue with this. It seems to me that Mr Ludlam is making this statement on the basis of hindsight through what became known at trial itself when read with the surveying procedures previously disclosed. What is very clear is that at no time did any of the material provided by the defendants pre-trial make explicit what emerged at trial, particularly from the cross-examination of Mr Cairns, which was that: (a) the EOS / Live 27 system would only permit cover notes and insurance certificates to be issued through that system once the surveyor had entered onto Live 27 that the final inspection had been satisfactorily carried out and all open defects had been recorded as having being satisfactorily attended to; and (b) it was possible, although not encouraged, for a surveyor to bypass this restriction by using word format versions of the cover notes which were in circulation to create and then to manually print out and give to the developer a cover note, in circumstances where the fact that this had been done would not necessarily become known to head office.

51. Furthermore, I am also satisfied that it was not until trial that it became clear, through the combined effect of cross-examination of Mr Cairns, Mr Nicholls, Mr Eadsforth and Mr Mather by reference to a detailed analysis of what was recorded on Live 27 and a consideration of the appropriate surveying procedures, that despite their protestations to the contrary both Mr Nicholls and Mr Mather had issued cover notes manually at a time when the Live 27 system would not have permitted the issue of a cover note automatically due either to the absence of a recorded final inspection or to an unremedied defect, and at times when they knew or ought to have known that there were serious and significant incomplete or defective works such as ought to have prevented the issue of a cover note.

52. I will of course return to these matters when I come to consider the application of the *Henderson* abuse principle below, but first I must say something about the current claims.

C. The current action

53. There are 22 separate claims made in respect of 22 separate flats. As with the claims in the original action, in some cases the claimant is the sole owner of the flat whereas in other cases the flats are jointly owned and, hence, there are joint claimants.

54. The claimants' case as pleaded in the Particulars of Claim may be summarised as relevant for present purposes as follows:

    (1) ZIP agreed with JCS to issue new homes policies to those purchasing flats in the development pursuant to the terms of a new home insurance policy and JCS marketed the flats on the basis that they would have the benefit of such a policy.

    (2) The inspections for the purposes of issuing the insurance policies and the inspection process for the purpose of issuing the Building Regulations final certificates were the same and were undertaken by Mr Mather, Mr Nicholls and Mr Eadsforth as employees of ZIP.

    (3) From early 2009 the developer, JCS, needed to obtain funds from sales of completed flats in order to complete the development. To do so they needed to persuade ZIP's insurance surveyors to issue cover notes for the completed flats, so as to enable legal completion to take place where an "off plan" sale agreement had already been entered into, or so as to enable a sale agreement to be entered into where no such off-plan sale had already been achieved (and, in each case, for the purchaser to obtain mortgage finance where necessary). The difficulty was that under the surveyor guidelines partial occupation was only permitted where fire protection measures were in place for the common parts as well as emergency lighting. However JCS pressured the insurance surveyors to issue cover notes for the completed flats and the insurance surveyors did so, notwithstanding that the surveyor guidelines provided that cover notes should only be issued where a final inspection was satisfactory and where all plots, including the common parts, were completed.

    (4) Whilst cover notes ought only to have been generated and issued automatically, using the Live 27 system, once the final inspection had been entered on the Live 27 system as being undertaken and any recorded defects had been entered on the Live 27 system as being remedied, in fact it was possible to create cover notes manually, using a pro forma word document available to the surveyors, which would enable the system to be bypassed so that cover notes could be issued even though final inspection had not been entered on the Live 27 system and even where recorded defects had not been identified as remedied.

    (5) Manual cover notes were created and issued in relation to 19 of the 22 flats by Mr Mather, Mr Nicholls and Mr Eadsforth, in circumstances where the claimants contend that the surveyors knew that they ought not to have been issued due to there being no final inspection or identification of remediation of recorded defects on the Live 27 system. Unlike cover notes, insurance certificates could not be created manually and could only be generated and issued

automatically once the final inspection and identification of remediation of recorded defects had been entered onto the Live 27 system.

(6) The cover notes, stating as they did that they confirmed that the surveyor had carried out a final inspection on the individual flat and that ZIP agreed to issue the insurance certificate, contained express or implied representations that a final inspection had been carried out by a qualified surveyor and which was satisfactory in that the flats were completed (save for snagging work) and complied with the Building Regulations and had been constructed to a standard satisfactory to ZIP.

(7) The representations in the cover notes were false in that no such satisfactory final inspection had been carried out.

(8) The surveyors were guilty of deceit in relation to the cover notes they issued since they: (a) knew that final inspections had not been carried out; (b) knew what was entered into the Live 27 system in relation to the individual flats and, hence, whether a cover note could properly be issued through Live 27; (c) knew that the flats suffered from obvious and significant defects. Insofar as they did not actually know they were reckless as to whether or not the representations were true or were reckless as to whether there were reasonable grounds for believing that the representations were true.

(9) The surveyors knew and intended that the claimants would rely on the representations and the claimants, directly or through their conveyancing solicitors, did so.

(10) Further particulars of falsity, knowledge and reliance are pleaded in detail in relation to each claimant and each flat in the attached Schedule 1 to the Particulars of Claim. Schedule 2 sets out in tabular format a summary of the key facts and dates relevant to each of the claimants, from which it may be seen that 16 of the cover notes in question are said to have been issued by Mr Nicholls, 4 by Mr Mather and Mr Eadsforth respectively and 2 by someone unknown. Schedule 3 sets out the claimants' case as to the significant and obvious defects said to have been present relevant to each flat as at the date of issue of the cover note.

(11) It is also alleged that Mr Mather and Mr Nicholls (but not Mr Eadsforth) conspired with the representatives of the developer, JCS, to cause the claimants to complete their purchase of their flats without there being a bona fide cover note having been issued, so that they are guilty of an unlawful means conspiracy, on the basis that these two surveyors succumbed to pressure from JCS to do so to enable it to achieve sales.

(12) The loss suffered by each of the claimants is: (a) the difference between the purchase price and the true value of the flats; (b) the actual losses, past and future, suffered or to be incurred by the claimants through becoming the flat owners, including their actual and prospective liability to the management company for service charges; (c) the loss of the opportunity to invest in an

alternative suitable property; (d) the costs of investigating the wrongs committed by ZIP. Schedule 4 provides details of each individual claimant's losses.

55. Although both sides were, understandably perhaps, unable to resist making some passing observations on the strength and weakness of their respective cases, they accepted in the light of the authorities that the merits of the current claimants' claims are not a relevant consideration on this application.

D. Could the current claimants have brought the current claims in the original action?

56. This is the first point for me to consider. It raises a number of separate issues. The first is whether or not the claimants and/or their legal advisers were actually aware of the current claims at any point during the original action. If they were aware of the current claims but decided not to raise them in the original action then that is both dispositive of the "could" question and also, depending on the reason why they did not raise them, highly material to and potentially decisive of the "should" question.

57. As I noted at [20] above, when considering the *Playboy Club* case, the claimants have not waived legal privilege in the advice which they received from their legal advisers. Nor have they given evidence themselves as to their knowledge. However, both Mr Hargreaves and Mr Selby QC provide evidence which is relevant to this issue. Moreover, I have of course also been provided with copious relevant evidence from the original action and with other documentation adduced by the parties. It is my task to draw such inferences as may properly be drawn from that evidence.

58. The defendants contend that it may be seen from the pre-action protocol letter of claim written by Walker Morris on 15 September 2016 that they were aware of the potential to bring a claim against ZIP in relation to the issue of insurance certification, albeit that at that stage they were not acting for any of the current claimants. This letter shows that Walker Morris: (a) was aware of the distinction between ZIP and ZBC and the differing functions they undertook; (b) was aware of the inspection process to be undertaken by the insurance surveyors and the process by which insurance certificates were issued on satisfactory inspection of the individual flats and a common parts certificate ("CPC") issued on satisfactory inspection of the common parts' (c) was aware of the inspection process to be undertaken by the building control surveyor and the issue of the Building Regulations final certificates in December 2009 and November 2010; (d) was asserting, primarily, a claim under the insurance policies; (e) was asserting that a "negligence claim" against ZBC in relation to the issue of the Building Regulations final certificates and against ZIP in relation to the issue of the CPC given the lack of inspections and/or failure to observe the defects had "some merit"; (f) was reserving the right to bring a claim against ZBC and/or ZIP for fraud in relation to the issue of the Building Regulations final certificates and the insurance certificates and/or CPC respectively.

59. It is, I agree, clear from this letter that Walker Morris was aware of the potential to bring a claim for deceit against ZIP in relation to the issue of insurance certification as well as a claim against ZBC in relation to the Building Regulations final certificates.

60. However, it is also true that such a claim finds no expression in any of the subsequent correspondence or other material produced by Walker Morris at this time, notwithstanding that Walker Morris was clearly continuing to advance a claim in fraud against ZBC in relation to the Building Regulations final certificates. Mr Hargreaves stated in his evidence that he believed that a claim in fraud could properly be made against ZBC on the basis that:

> "42.1 The Original Claimants were aware of the statutory function of an approved inspector under the Building Act 1984, the Building Regulations 2000, and the Building (Approved Inspector etc.) Regulations 2000. This primary and secondary legislation was the benchmark for the performance of the duties of an Approved Inspector (which were performed by Mr Mather) and to which the Approved Inspector for the Development was required to adhere;
>
> 42.2 The work signed off in the Final Certificates contained significant defects and fundamentally differed from the works provided for in ZBC's initial notice dated 4 September 2007 (File 1, pages 304-306), and no amendment notice had been filed by ZBC; and
>
> 42.3 The Original Claimants' experts had confirmed that the Final Certificates must have been issued recklessly given the statutory function of an Approved Inspector (for the avoidance of doubt, no privilege is waived in connection with any discussions with the Original Claimants' experts or any reports produced and not served during the course of the Original Proceedings)."

61. Mr Hargreaves did not, however, provide any evidence as to whether or not he expressly considered the merits of a potential claim in deceit against ZIP in relation to the issue of the cover notes at any time prior to or at the time of serving the Particulars of Claim in June 2017. Instead he sought to give reasons as to why it would not have been proper to bring a claim on that basis at any time prior to the evidence given by ZBC's witnesses at trial, without ever actually saying that he considered such matters at the time. In particular, I refer to:

(a) His first witness statement at paragraph 47, where he said that at the time of the Particulars of Claim there was no evidence or proper basis for bringing a claim against ZIP in relation to the cover notes.

(b) His first witness statement at paragraph 60, where he said that before trial there was only "very limited evidence on which the claimants could have founded the allegations of conspiracy and fraudulent misrepresentation that are now included in these proceedings".

(c) His first witness statement at paragraph 167, where he said that the claimants have issued the current claims based on the new evidence elicited at trial and the findings made in the judgment together with a reconsideration of all of the evidence available to the Claimants in light of that evidence and those findings.

62. It is likely that Mr Hargreaves did not deal explicitly with this issue because he was concerned about the risk of waiving privilege in the advice given to the original claimants if he did so. Whatever the reason, I must decide the matter without the benefit of that information. However, I do have the benefit of Mr Selby's evidence in his witness statement. In his witness statement he said that "it did not cross my mind at all that the cover notes had been fraudulently issued until after Day 9 of trial". He said that in September 2018, when preparing his cross-examination of ZBC's witnesses, he "compared the batch of cover notes at the back of the 27 February 2019 Watts Report (relating to Plots 47-54, 57, 58 and 60-63) with the relevant progress photographs and Live 27 records and discovered that something was amiss, in the sense that I could not understand how those cover notes had been issued at that time. At that time, it did not occur to me that those cover notes had been issued fraudulently. Rather I considered that this gave rise to a line of cross-examination that would be worth exploring with Mr Nicholls in the witness box. I did not know what Mr Nicholls might say but it seemed to me that it gave rise to one of those lines of cross-examination which I could deploy with little to lose". He referred to his cross-examination of the ZBC witnesses which he said was not with the pre-planned purpose of "seeking to establish that there was any sort of cover note fraud". He said that it was only "after Mr Cairns' and Mr Nicholls' cross-examination, that I began to appreciate that there may have been a fraud in relation to the issue of the cover notes".

63. In paragraph 21 he said this: "Some 14 months later, in order to assist the Court with the present application, I have tried to work out in my own mind why I did not appreciate the potential cover note fraud any sooner. Doing the best I can, I think there are two reasons for this. First, I was focused on establishing fraud in respect of the Building Regulations final certificates; I was not looking for fraud elsewhere and had never previously encountered fraud in the issue of cover notes. Secondly, the cover note fraud requires a number of links to be made in the chain of events before you realise what has happened". He continued at 22 as follows: "To explain that second point, it is helpful to contrast the cover note claim with the Building Regulations certificate claim. There were only three Building Regulations certificates and they relate to the Development as a whole. The first two certificates (which related to most of the flats in the Development) were issued very closely in time. Thus, it was comparatively straightforward to look at the condition of the Development as a whole in December 2009 and consider whether or not the Building Regulations certificates had been fraudulently issued. By contrast, each cover note is a separate document relating to a separate flat. The cover notes were issued on a variety of dates to a variety of people and were generally individually filed in the individual Claimant files. Therefore, if you are not alive to a potential fraud in the issue of the cover notes, you are much less likely to look for it, let alone find it". He concluded at paragraph 23 in these terms: "It was only when Mr Cairns and Mr Mather gave their evidence on Day 9 of trial that "the penny dropped". For me, what caused the penny to drop was Mr Cairns' evidence that cover notes could be issued manually and that, in the past, there had been issues with forged cover notes".

64. There is, and can be, no suggestion that this evidence is anything other than honest and reliable. In submissions Mr Chapman and Mr Asquith sought to sidestep its impact by suggesting that: (a) the witness statement was not a complete account of Mr Selby's consideration of the potential cover note fraud from the beginning of his involvement in the case onwards; (b) there was no evidence from Mr Hargreaves or junior counsel to Mr Selby or from the current claimants themselves as to their views on

the matter; (c) in particular, there was no explanation as to why the claimants and their advisers did not consider the potential cover note fraud case in the context of the forceful points being made by ZBC as to the problems the original claimants would face in establishing reliance in relation to the Building Regulations final certificates deceit claim. Whilst I understand why counsel for the defendants made these submissions, which were reasonable submissions to make, I am unable to accept them. That is because:

(1) It is plain from Mr Selby's evidence, that at no time until day 9 did the cover note fraud cross his mind, that he did not consider it at any time in his involvement in the case, which pre-dated the drafting of the original Particulars of Claim. If made, I reject any submission that he had previously considered it and then somehow forgotten about it until trial.

(2) Mr Selby gives what I consider to be a perfectly reasonable explanation as to why he did not consider the cover note fraud until trial. Of course, with the benefit of hindsight, it is reasonably easy to think that what became apparent at that stage must have been equally apparent previously. But there is, as Mr Selby explains, a world of difference between advancing a case of deceit in relation to the issue by one approved building control inspector of formal Building Regulations final certificates in three tranches in the very unusual circumstances pertaining in relation to the position in this case (including that the Building Regulations final certificates included a number of flats which had not even been built) and considering a claim in deceit based on cover notes issued by three separate insurance surveyors in very different circumstances. It simply does not follow in my judgment that identifying and pleading a deceit case in relation to the Building Regulations final certificates necessarily leads on to identifying a viable deceit case in relation to the cover notes.

(3) Moreover, there are factors which in my judgment support Mr Selby's account. The first is that I have no doubt that, if it had ever crossed the mind of Mr Selby or Mr Hargreaves that there was a potential cover note fraud case, they would have investigated that potential claim and, if reasonably arguable and properly capable of being pleaded, included it in the original action. My assessment of the claimants' legal advisers is, and always has been that they would vigorously advance their clients' claims in every way in which they legitimately could. I refer back to paragraph 9 of my supplemental judgment on interest, where in a similar context I said that "I have no doubt, given my direct knowledge of this case from the first substantive case management conference through all of the numerous contested interlocutory hearings down to the trial itself, that … if the claimants' legal representatives had applied their minds to this issue they would have made it clear that the claimants would indeed be advancing a claim for interest on the [maximum liability] capped amount if the [maximum liability provision] was held to apply in the judgment". It is frankly inconceivable to me that if they had expressly considered the possibility of a cover note fraud it would not have been fully investigated and, if proper to do so, pleaded. The fact that Mr Conlon was not expressly instructed to consider this issue in June 2017 is also powerful evidence in my judgment that neither Mr Hargreaves nor Mr Selby was alert to it as a possible claim at any time until trial.

(4) I have carefully considered the defendants' submission based on the argument that the claimants' legal advisers must surely have identified the possibility of raising the cover note fraud when considering how to get around ZBC's ultimately successful case on reliance. However, as I said in my supplemental judgment on costs at [10], I was of the view that "the original ZBC claimants never really grappled in a convincing way with the difficulties in their case on reliance which were pointed out by ZBC in its detailed case. They failed to appreciate that, with the exception of Zagora, they never personally relied on the final certificates and they also failed to appreciate that, given the particular terms of the sale contracts employed in this case, without evidence from the conveyancing solicitors retained on the flat purchases they had no realistic prospect of establishing that their solicitors had relied on the final certificates issued by ZBC (as opposed to the completion certificates issued by ZIP)". Whilst I was critical of this failure to engage with the difficulties in their case, I had no doubt that it was not until the run-up to trial that they began to appreciate the problems they had with reliance. Even then, it seemed to me, they failed to understand that the terms of the sale contracts naturally pointed towards reliance upon the cover notes rather than upon the Building Regulations final certificates. Even so, I must confess, it never occurred to me as the judge when reading into the case pre-trial or during the course of the trial that the obvious solution to this problem was for the claimants to make a late application to amend to plead an alternative case in deceit against ZIP in relation to the cover notes.

65. In the circumstances I am completely satisfied that there can be no question in this case of the claimants or their advisers having been aware that there was a viable cover note fraud case and consciously deciding to hold it back. I go further and am completely satisfied that it was never given any consideration by the claimants or their advisers until after day 9 of the trial. It seems to me that the reference to the potential of a claim in negligence or fraud in relation to the issue of the insurance certificates and/or CPC was raised in the November 2016 pre-action protocol letter purely for completeness in circumstances where a claim in negligence in that respect had been included on the claim form by the original claimants' previous solicitors and because by November 2016 Walker Morris had appreciated that the Building Regulations final certificates claim could properly be alleged in deceit. I have no doubt, for the reasons given above, that attention was focussed solely on the Building Regulations final certificates claim thereafter, otherwise I have no doubt that it would have been referred to in the subsequent letter of January 2017, even if only to record that it was still under investigation or, at the very least, that the claimants were reserving their right to make such a claim.

66. Of course the defendants submit that this conclusion does not dispose of their argument that actual knowledge is not necessary and that it is sufficient for them to be able to establish that the claimants could, with reasonable diligence, have discovered and then pleaded the cover note fraud claim in the original action.

67. Accepting that in principle the question of reasonable diligence may be a relevant factor, my conclusions in that regard are as follows:

(1) I accept that it would have been possible for the claimants' legal advisers as at June or July 2017, if they had the benefit of the documentation available to them and the benefit of the conclusions expressed in the Conlon report, and if they had been specifically asked or had decided to consider whether there was a potential cover note fraud claim and had investigated the issue, to have appreciated that such a claim was both viable and could properly be pleaded. I am unable to accept the evidence of Mr Hargreaves and the submissions of Mr Grant, vigorously though they were advanced, that the evidence before the claimants' legal advisers at that time was insufficient to establish that the case was viable and could properly have been pleaded. In my view the inferences which were available to the claimants and their legal representatives and which justified the pleading of the case in deceit in relation to the Building Regulations final certificates would also have justified the pleading of a case in relation to the cover note fraud. I do not consider that the risk of further documents or other evidence emerging or the denials of any wrongdoing by ZIP and ZBC could or should have prevented the claimants from pleading an otherwise legitimate claim.

(2) However I do not accept Mr Chapman's submission, attractively though it was put, that such a claim must have been "blindingly obvious" to anyone in the position of the claimants' legal advisers with the benefit of the information they had and the conclusions in the Conlon report. I do not accept that the exercise of due diligence in the particular circumstances prevailing in 2017 would have identified the need to investigate a claim for cover note fraud separate from and additional to the claim for deceit in relation to the Building Regulations final certificates which was identified and pleaded. I accept Mr Selby's evidence and Mr Grant's submission – founded largely on that evidence – that there was no compelling reason why the claimants' legal advisers should have made the leap from one to the other. I can well understand why the claim in relation to the Building Regulations final certificates would have seemed the obvious claim to make, if any claim in deceit was to be made, and why a similar claim in relation to the cover notes would not necessarily have occurred to anyone as an obvious corollary to that claim.

(3) In particular, I accept that the only obvious trigger to investigate the cover note fraud claim as an alternative to the claim under the Building Regulations final certificates would have been the realisation that the Building Regulations claim suffered from the difficulty as regards reliance that the terms of the sale agreements made completion conditional on the production of the cover note rather than a Building Regulations final certificate. Whilst it could be said that this should always have been apparent to the claimants' legal advisers that seems to me to rely unduly on the considerable benefit of hindsight. I have already noted that ZBC did not, whether in its Defence or its detailed case on reliance, expressly identify that under the sale agreements it was the issue of the cover note which was critical. The absence of an express pointer in that direction by ZBC perhaps renders more explicable the failure by the claimants' legal advisers to appreciate the point until trial. I am not satisfied that the point should with reasonable diligence have been apparent to the claimants or their legal advisers from the outset and, thus, that the trigger for investigating the cover note deceit claim as an alternative should have arisen.

(4) In summary I accept that this is, as Mr Grant put it, a case where although I have found (contrary to his primary submission) that the relevant facts were discoverable by the claimants and their legal advisers in 2017, it cannot be said that with reasonable diligence they ought to have investigated the possibility of this as a separate fraud claim and thus "joined the dots" and appreciated that such a claim could properly be pleaded and advanced.

68. I therefore consider that on the facts of this case it cannot be concluded that the claimants could, even with the exercise of reasonable diligence, have pleaded the cover note deceit claim in the original action from the outset in the particular circumstances of this case.

69. Nor do I consider that anything which emerged from formal disclosure, from the witness statements or from any of the expert evidence, above and beyond Mr Conlon's opinion, changed matters in any significant way. It is therefore unnecessary to consider the argument by the defendants that even if the cover note fraud claim could not have been pleaded from the outset it could have been pleaded by the claimants making an application for permission to amend at the pre-trial review in July 2018. Indeed, as I said in the course of submissions, I do not consider that I would have been prepared to accede to such an application if it had been made, unless it had been justified by the late provision by ZIP or ZBC of material which ought to have been provided by them earlier in the litigation. That is because otherwise it would have been manifestly unfair to ZIP to require it to investigate and defend such a claim at trial, given the short time period between the pre-trial review and trial, unless it could be said that it had brought that difficulty upon its own head. Equally in such circumstances it would have been manifestly unfair to ZBC to expect it to agree to an adjournment of the trial simply to allow the claimants to raise a new allegation against ZIP. I have no doubt that ZBC would have vigorously objected to any such suggestion. There would have had to have been an adjournment of the existing trial because there was insufficient slack in what was already a tight pre-trial and trial timetable to slot in this new case and there was no realistic possibility, given the existing other trial commitments in the Manchester TCC and – I have no doubt – the existing commitments of a large team of solicitors and counsel and of the numerous professional witnesses - to have allowed the trial to be put back for a few weeks. The most that might be said, applying the guidance in the *Aldi* case referred to above, is that if the claimants had raised the possibility of making such a claim at that stage the court would have been able to give these factors proper consideration and have made a decision at that time based on all of the relevant circumstances. However, I am satisfied for the reasons I have given that it would have made no difference in this case since the very most that the claimants might have achieved, assuming it could have shown that ZIP and/or ZBC were at fault for the late discovery, would have been permission to amend but adjourning all further consideration of this new claim until after the trial in the original action. I do not consider that this possibility could make any difference to the decision on *Henderson* abuse.

70. Given that conclusion, it follows that the application to strike out the claim as a *Henderson* abuse fails on the primary "could" basis. However, I should go on to consider the application on the assumption that I am wrong and that the claimants could have brought the claim in the original action.

71. Before I do so I should record for sake of completeness that I was not persuaded by Mr Grant's alternative submission that there is a significant difference between the deceit claim and the conspiracy claim. That is because in my view if the claimants had investigated the deceit claim and concluded, as they could have done as I have said, that the deceit claim was properly arguable and thus properly capable of being pleaded as against ZIP, then I do not consider that the additional facts relevant to the conspiracy claim added anything of significance beyond identifying the motive for the deceit. I am satisfied that if such a claim was to be made it would also have been possible to have identified and pleaded such a conspiracy as between the representatives of ZIP and of JCS at the same time as the original fraud claim. That is because the additional facts relevant to the conspiracy claim are on proper analysis no more than inferences which could properly have been drawn from the evidence available at that time. At best, the claimants might have been able to say that the evidence as to the pressure exerted by JCS only became apparent from Mr Mather's witness statement. I am not impressed by Mr Grant's counter-argument that even then it was denied that he succumbed to such pressure. At that stage they could, if they had already pleaded the cover note fraud, have properly applied to amend to add a plea of conspiracy and I am satisfied that the same objections to an amendment would not have carried anything like the same weight in such circumstances.

E. Should the current claimants have brought the current claims in the original action?

72. This is where I must apply the broad merits-based approach and consider and weigh all of the relevant circumstances.

73. In my view there are a number of powerful factors which militate against this being a case where the claim should be struck out as a *Henderson* abuse.

74. The first is that the previous claim which was made by the individual flat-owning claimants against ZIP was a claim under the policy which did not involve any allegations of deceit or indeed any issues overlapping with the cover note fraud claim. It was also a claim in respect of which, in consequence of my findings at first instance and the Court of Appeal's overturning of my conclusion in relation to the maximum liability cap, those claimants have achieved a virtually complete success on all major issues. Although the final quantum figure is yet to be determined, it will be a sum in excess of £10 million and EWIC has also been ordered to pay 92.5% of the claimants' costs of its claim against it. Insofar as relevant it is also true, as Mr Grant submits, that the approach taken by ZIP and EWIC to the attempts by the claimants as individual flat owners of relatively modest means to invoke their rights under the new home policies was the subject of some trenchant criticism in the Court of Appeal.

75. Whilst the defendants submit that this ignores that the claimants did pursue, unsuccessfully, the deceit claim against ZBC, the force of that point is substantially undermined in my judgment by the fact that this was a separate claim against a separate legal person where ZIP decided, for its own reasons, to elect to defend the claims on the basis that they were unconnected and to instruct a completely separate legal team to defend the separate claims. On any view that had the effect of substantially increasing the total legal costs incurred by the defendants overall and, as Mr Grant submitted, the

claimants have already paid the price for the failure of the deceit claim against ZBC by being penalised in costs. However, it is a point in the defendants' favour, I accept, that this claim has only been issued because the claimants lost their claim against ZBC.

76. Nonetheless there are in my judgment very significant points in favour of the claimants. This is not a case of a claimant who is aware of the alternative claim but consciously decided to hold it back. That is a very significant consideration, especially in a fraud claim. Even if the reasonable diligence test is satisfied in this case, it is not a case where it can be said that the cover note fraud case was so obvious that the claimants and their legal advisers can properly be said to have closed their eyes to an obvious alternative claim. Further, any failure to exercise reasonable diligence must be weighed against the fact that this is a fraud claim which raises very serious allegations in relation to the issue of cover notes under policies which purchasers such as these claimants are plainly entitled to expect should only be issued on the basis that the completed development is believed by the insurance company issuing the policy to have been completed in accordance with its requirements.

77. Referring back to the considerations identified by Lord Bingham in *Johnson v Gore-Wood* this is not a case where there is any additional element such as a collateral attack on a previous decision or some dishonesty.

78. Would allowing this case to proceed involve unjust harassment of ZIP? It would clearly involve ZIP having to investigate and contest (if it thought fit) a second action and thus, I accept, having to re-investigate matters connected to the original action. There can be no serious doubt that the combined costs of two actions would exceed the cost if the current claims had been included in the original action. Nonetheless there are factors militating against the weight to be attached to these considerations in this case. From a financial perspective there is no reason to think that ZIP as a substantial insurance company would be serious prejudiced by this claim. There is no suggestion that it would be at risk of incurring substantial irrecoverable costs if the claim went to trial and it succeeded in its defence. Whilst Mr Cairns, Mr Nicholls, Mr Eadsforth and Mr Mather would probably have to give evidence again, it was only the latter who was subject to serious or sustained cross-examination and so far as that is concerned it must be borne in mind that I have already concluded that he had been guilty of deceit in relation to the issue of the Building Regulations final certificates. Although Mr Chapman submitted that the case might need a 10 day trial, in my view it is a case which could and should be run far more efficiently and speedily before me as the assigned TCC judge in the context that much of the underlying evidence and legal issues have already been marshalled and tested and is very familiar to me as well as to many, if not all, of the lawyers involved. Thus, the extra costs should not be – and as the costs managing judge I would not allow them to be – unreasonable or disproportionate given these considerations.

79. There is no question of the claimants having delayed in asserting and instituting the current claims against ZIP following the trial of the original action and promulgation of the judgment. The events in question were already quite old at the time of the trial in October and November 2018. If ZIP had not made the current application it is perfectly feasible that a case management conference could have

been held towards the end of last year and directions given for a trial towards the end of the current year.

80. In conclusion, as the authorities make clear, it is for the applicants to persuade the court that a case which should otherwise proceed to trial should instead be struck out. For all the reasons I have given I am not persuaded that the defendants have made good their case and I therefore would dismiss the application.

81. Again, and for completeness, if I had been against the claimants in relation to fraud I would not have accepted Mr Grant's submission that the conspiracy claim raises different considerations which would justify a different answer, not least because the effect of such a submission – as he readily acknowledged – is that the fraud claim would still have to be resolved and thus, as indeed he positively submitted, should not be struck out for that very reason. If I had needed to exercise my discretion in such circumstances, I would have exercised it against allowing either claim to be advanced. However, that is a hypothetical conclusion which does not assist the defendants given my actual conclusions.