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Cite as: [2001] 2 WLR 72, [2000] UKHL 65, [2001] BCC 820, [2001] 1 All ER 481, [2002] 2 AC 1, [2001] 1 BCLC 313, [2001] PNLR 18, [2001] CPLR 49

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Johnson v. Gore Wood & Co. [2000] UKHL 65; [2001] 1 All ER 481; [2001] 2 WLR 72 (14th December, 2000)

HOUSE OF LORDS

Lord Bingham of Cornhill Lord Goff of Chieveley Lord Cooke of Thorndon Lord Hutton Lord Millett

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

JOHNSON (A.P.)

(ORIGINAL APPELLANT AND CROSS-RESPONDENT)

v.

GORE WOOD & CO. (A FIRM)

(ORIGINAL RESPONDENTS AND CROSS-APPELLANTS)

ON 14 DECEMBER 2000

LORD BINGHAM OF CORNHILL

My Lords,

There are two parties before the House. The first is Mr. Johnson, the plaintiff in the action, who appeals against a decision of the Court of Appeal dismissing the action as an abuse of the process of the court. The other is Gore Wood & Co., a firm of solicitors, who cross-appeal against a decision of the Court of Appeal, on a preliminary issue of law, that certain heads of damage pleaded by Mr. Johnson should not be struck out as irrecoverable. Both appeal and cross-appeal raise questions of legal principle which your Lordships' House has not, in recent years, had occasion to consider.

The facts

Mr. Johnson is a business man who conducted his business affairs through a number of companies. One of his businesses was property development, which he carried on through a company, Westway

Homes Limited (WWH), of which he was managing director and holder of all but two of the issued shares. For all practical purposes WWH was the corporate embodiment of Mr. Johnson.

Acting on behalf of WWH, Mr. Johnson instructed Gore Wood & Co. (GW), through a partner in the firm named Robert Wood, to act as solicitors for WWH in connection with a proposed purchase of land at Burlesdon in Hampshire from a Mr. Moores. WWH planned to develop the land, but the project was one of some complexity, since the title of Mr. Moores was to some extent doubtful and access to the land was dependent on acquisition of a strip of land owned by a third party. WWH had an option to purchase Mr. Moores' land, and WWH instructed GW to serve a notice exercising this option.

Mr. Johnson contends that from early April 1987, even before GW was formally instructed to act as solicitor for WWH, Mr. Johnson engaged the firm, usually acting through Mr. Wood, to advise him personally and act on behalf of certain of his companies in addition to WWH, as a result of which GW and in particular Mr. Wood gained a detailed knowledge of his financial affairs and those of the companies concerned. He further contends that GW through Mr. Wood knew and intended that advice given to him in connection with any business matter would or might be acted upon by him in relation to the conduct of his business affairs generally, including his personal financial affairs. Since the present proceedings have not progressed beyond determination of the preliminary issues giving rise to this appeal and cross-appeal there has been no detailed investigation of the facts, some of which are in dispute between the parties. But GW accepts that from time to time the firm acted on behalf of Mr. Johnson personally and some of his companies other than WWH.

In February 1988 GW served notice exercising WWH's option on Mr. Moores' solicitors. Mr. Moores and the solicitors acting for him asserted that the notice had not been validly served since it had not been served upon Mr. Moores personally. Having obtained the advice of counsel WWH instructed GW to issue proceedings against Mr. Moores for specific performance of the contract created by the exercise of the option. This was done in March 1988. An alternative claim was made against Mr. Moores' solicitors alleging breach of warranty of authority. GW continued to act for WWH in those proceedings until the end of November 1989. The proceedings came on for trial in the Chancery Division in January 1990, when an order for specific performance was made against Mr. Moores and an inquiry into damages ordered. The alternative claim against Mr. Moores' solicitors was dismissed. Mr. Moores had been legally aided from an early stage of the litigation and now, because of his mental condition, was acting through a guardian ad litem. He appealed against the judge's decision, but his appeal was dismissed by the Court of Appeal on 20 February 1991, although on different grounds.

For reasons outside the control of Mr. Johnson or WWH there was further delay before the land was conveyed to WWH. It was April 1992, more than four years after the exercise of the option, before the conveyance was completed. By this time WWH had suffered substantial loss because of the cost of the Chancery proceedings, the inability of WWH to recover damages and costs from Mr. Moores, who had no assets save for the balance of the purchase price of the Burlesdon land, the collapse of the property market and the high interest charges borne by WWH. On 8 January 1991 WWH started proceedings for professional negligence against GW. In those proceedings GW admitted that it owed WWH a duty to exercise reasonable care in connection with the exercise of the option, but denied that that duty had been broken or that the damages claimed were recoverable. WWH applied for summary judgment. This application succeeded at first instance but failed on appeal. WWH was now in serious financial difficulty.

WWH's action against GW came to trial before a deputy judge on 26 October 1992. The hearing was estimated to last 10-12 days. This estimate was greatly exceeded. In the sixth week of trial, the company's evidence on liability had been completed and Mr. Wood was in the course of giving evidence for GW when the action was compromised upon payment by GW to WWH of £1,480,000, which represented a very substantial proportion of the sum claimed by WWH, and costs in the agreed sum of £320,000.

Mr. Johnson claims that because he had retained GW to advise and act for him personally as well as for WWH, the firm owed him as well as WWH a duty of care in contract and tort in relation to the exercise of the option, the advice which Mr. Johnson contends was given to him personally as well as to WWH concerning the prospects of success in and the likely duration of the Chancery proceedings and the conduct of the Chancery proceedings. He claims that GW breached that duty and so caused him substantial loss. Whether GW owed Mr. Johnson personally such a duty and whether (if so) it breached

that duty will be live issues in this action if it proceeds. But for purposes of the issues now before the House, GW accepts that the facts pleaded by Mr. Johnson are capable of supporting his case on these issues if established at trial.

Mr. Johnson did not initiate proceedings to enforce any personal claims against GW at the time when WWH began its action against the firm. In an affidavit sworn on 6 March 1998 he deposed to his reasons for not doing so at that stage. His reasons were:

1)

that he was in no position to bring a personal claim against GW until he was granted full legal aid in October 1992, his previous certificate having been limited;

2)

that advancing his personal claims would have substantially delayed the progress and ultimate resolution of WWH's action against GW, which would have led to WWH going into liquidation before the trial of its action;

3)

that the financial resources of both Mr. Johnson and WWH had been exhausted by this litigation, said to have been caused by GW's negligence;

4)

that joining the personal claim to WWH's claims would have led to an adjournment of the October 1992 trial date fixed for WWH's action;

5)

that the more complicated nature of Mr. Johnson's personal claims would have had an adverse effect on the costly and time-consuming work required to prepare WWH's case for trial; and

6)

that the time which Mr. Johnson could devote to the conduct of litigation was restricted by his need, from June 1991, to find new employment.

GW does not deny that these were the reasons which led Mr. Johnson not to proceed personally at that time, but does not accept that they provided valid or reasonable grounds for not doing so.

On 17 January 1991, well before WWH's action came to trial, solicitors representing that company notified the solicitors for GW that Mr. Johnson had a personal claim against the firm which he would pursue in due course. No details of the claim were given. On 6 December 1991 solicitors representing Mr. Johnson informed GW that he had received a Legal Aid certificate to take proceedings against the firm for damages for negligence. The letter, couched in general terms, contended that GW had owed a duty to Mr. Johnson personally as well as to WWH. While making no admission, GW's insurers in January 1992 invited Mr. Johnson's solicitors to give full details of the quantum of his personal claim. Mr. Johnson's solicitors replied in February 1992, outlining certain heads of claim and giving estimates in round figures of claims approaching £2 million. In October 1992, on the eve of trial of WWH's action against GW, Mr. Johnson's solicitors wrote to GW's solicitors, referring to his Legal Aid certificate and giving notice that his personal claim would be pursued whether the company's claim culminated in judgment or settlement. Since a substantial payment into court had been made on behalf of GW, Mr. Johnson and WWH expected a favourable outcome of the company's action. On 19 November 1992, when trial of the company's action against GW was well advanced, Mr. Pugh (a solicitor representing Mr. Johnson) spoke to Mrs. MacLennan (the solicitor representing GW) on the telephone and discussed Mr. Johnson's personal claim: Mr. Pugh said that it had been thought better to wait until the company's claim had been concluded before dealing with the personal claim; Mrs. MacLennan asked whether Mr. Pugh would object to an overall

settlement of the company's claim and Mr. Johnson's personal claim; he said that he would have to take instructions but could not himself see any objections "provided the figures were all right." He gave her a rough idea of the heads of claim and the figures. Mr. Johnson instructed Mr. Pugh that he would not be adverse to an overall settlement provided it was reasonably satisfactory. Mrs. MacLennan indicated that GW (or its insurers) also were not adverse to an overall settlement if the figures could be agreed. On 1 December 1992 Mr. Pugh met Mrs. MacLennan at court to try to negotiate a settlement of his personal claim. His attendance note of this meeting read:

> "She mentioned an overall cap and said that she could not settle for more. I said that John Johnson's claim was a separate one and she said that so far as it was not related to the actual company's claim it might well be different. After some discussion it was agreed that so far as his claim as shareholder and only relating to a loss of dividends income and capital distribution there would be a cap at a figure to be agreed. This would not affect all the other claims on the list as previously discussed. Mrs. McClenan [sic] reiterated her previous view but said it would be a separate claim and it would really be a matter for separate negotiation in due course. A cap was agreed at £250,000 excluding interest and costs."

The settlement agreement made between WWH and GW on 2 December 1992 was signed by solicitors for both sides; the solicitors representing WWH also, for this purpose, represented Mr. Johnson.

By the settlement agreement GW agreed to pay the sums already mentioned with no admission of liability, in full and final satisfaction of all claims of WWH against GW and vice versa. The sum of £1 million which GW had paid into court was to be paid out to WWH's solicitors. WWH undertook that any of its liabilities personally guaranteed by Mr. Johnson would be discharged out of the sums received under the settlement agreement, the object plainly being to limit the quantum of any claim which Mr. Johnson might thereafter make personally. Clause 3 of the settlement agreement provided:

> "Mr. Johnson undertakes that the amount of any claim made by him personally in any action against [GW] in respect of any losses suffered by him by reason of loss of income, dividends or capital distribution in respect of his position as a shareholder of [WWH] will not exceed £250,000 not including interest accruing in respect of any period after the date of this agreement nor costs. This undertaking does not limit any other of Mr. Johnson's rights against [GW]."

A confidentiality clause in the agreement contained an exception "In connection with any action which Mr. Johnson may bring against [GW]."

Mr. Johnson issued his writ in the present proceedings against GW on 7 April 1993. Over the next four-and-a-half years the parties pleaded and re-pleaded their respective cases. A payment into court was made by GW. Witness statements were exchanged. Mr. Johnson served his accountancy evidence. On 20 November 1997 the action was fixed for trial in January 1999. On 3 December 1997 GW's solicitors intimated, for the first time, that it intended to apply to strike out the action as an abuse of the process of the court. Notice was also given that GW would seek the determination of preliminary issues whether it had owed Mr. Johnson a duty of care and whether the damages which he claimed were in principle recoverable on the facts pleaded. On 25 February 1998 it was ordered that preliminary issues be tried, the second of which was:

> "to what extent (if at all) on the basis of and assuming the truth of the facts pleaded as set out above are any of the heads of damage pleaded in paragraphs 23 and 24 of the Re-Amended Statement of Claim irrecoverable as a matter of law by [Mr. Johnson] by way of damages for the pleaded breaches of the duties owed to him."

In paragraph 6 of his re-amended statement of claim Mr. Johnson pleaded an implied term of his personal retainer of GW that it would exercise all due skill and care in execution of that retainer, and a like duty of care in tort. In paragraph 9 it was pleaded:

> "Without prejudice to the generality of paragraph 6 above it was the duty of [GW], in carrying out its retainer on behalf of [Mr. Johnson] in accordance with the implied term pleaded in the said paragraph, or alternatively in discharging its duty of care in tort owed to [Mr. Johnson], to

> (a) exercise all due skill and care in connection with the exercise of the said option to purchase land and/or any further steps which were necessary to obtain possession of the land;
>
> (b) advise [Mr. Johnson] fully and accurately of all developments in connection with the exercise of the said option which might affect the financial requirements and prospects of [WWH];
>
> (c) advise [Mr. Johnson] of the implications of such developments for his personal financial situation and other business projects, including his existing liabilities and new financial commitments contemplated;
>
> (d) advise and/or warn [Mr. Johnson] fully and accurately of any delay or difficulty in exercising the said option to purchase land, which might adversely affect [Mr. Johnson's] personal financial situation and other business projects, including his existing liabilities and new financial commitments contemplated;
>
> (e) advise and/or warn [Mr. Johnson] fully and accurately of the implications of any advice given or steps taken by [GW] on behalf of [WWH] which might adversely affect [Mr. Johnson's] personal financial situation and other business projects."

In paragraph 12 it was pleaded that GW had acted in breach of the terms pleaded in paragraphs 6 and 9 in connection with the exercise of WWH's option to purchase the Burlesdon land, and in paragraph 16 it was pleaded that between February 1988 and November 1989 GW had acted negligently or in breach of the implied terms of its retainer pleaded in paragraphs 6 and 9 in advising Mr. Johnson from time to time as to the likely duration and outcome of the earlier proceedings against Mr. Moores. The claims for damages made by Mr. Johnson in paragraphs 23 and 24 of his re-amended statement of claim are the subject of detailed consideration below.

The preliminary issues came for hearing at first instance before Pumfrey J. who, in a careful judgment delivered on 21 May 1998, resolved them in favour of Mr. Johnson. On the abuse issue he found that GW was estopped by convention from contending that the action was an abuse. Applying *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.* [1982] Q.B. 84 he concluded:

> "that in reaching the settlement, [GW] and Mr. Johnson did act on the common assumption that the personal claim would be made, and would be entertained by the court. I think that it is now unconscionable for [GW] to allege that the personal claim is an abuse of process in the light of *Henderson v. Henderson*."

He resolved the duty issue in favour of Mr. Johnson. He concluded that the heads of damage claimed by Mr. Johnson were not irrecoverable as a matter of law as damages for the breaches alleged by Mr. Johnson.

GW appealed. In a judgment of the court (Nourse, Ward and Mantell L.JJ.) given on 12 November 1998, the Court of Appeal agreed with the judge that on the facts pleaded a duty of care had arguably been owed by GW to Mr. Johnson. The Court of Appeal shared the judge's view on the difficulty of the damage issue but agreed with his conclusion that the pleaded heads of damage were arguably recoverable, save as to one head of damage which it would have struck out.

The Court of Appeal held, differing from the judge, that there had been no estoppel by convention. But it also held that there had been an abuse under the rule in *Henderson v. Henderson* (1843) 3 Hare 100. It said (at page 40 of the transcript of the judgment):

> "Mr. ter Haar submits that the rule has no application because different issues arise in the two sets of proceedings. In this action there are entirely new questions about the extent of the duty owed to the plaintiff personally and the losses he has suffered. On the other hand, there was in our view a substantial similarity, particularly as to whether or not [GW's] conduct as solicitors fell below the required standard in connection with the exercise of the option and the conduct of the Chancery litigation [against Mr. Moores] as well as the overlapping loss suffered by the company. This encompasses practically the whole of the ground traversed for six weeks in the company action. In

> our judgment, narrowly to circumscribe the application of the rule would defeat its purpose. Mr Johnson was the *alter ego* of the company: he controlled the company's decisions and through him the company's claim was brought. Within days after that writ was issued, he was intimating his personal claim. He could have brought it then. Although his Legal Aid was then limited in some way which is not clear to us, no explanation has been given for the delay in removing whatever limitations had been imposed and he had full cover by October, long before the trial. For reasons which appeared good to him, he preferred not to delay the company action but to pursue it vigorously before the company was forced into liquidation. That does not, in our judgment, excuse him from failing to launch his own claims. If he could have done so, he should have done so."

Abuse of process

The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court (*Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581 at 590 *per* Lord Kilbrandon, giving the advice of the Judicial Committee; *Brisbane City Council v. Attorney-General for Queensland* [1979] AC 411 at 425 *per* Lord Wilberforce, giving the advice of the Judicial Committee). This does not however mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward. For there is, as Lord Diplock said at the outset of his speech in *Hunter v. Chief Constable of the West Midlands Police* [1982] AC 529 at 536, an

> "inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

One manifestation of this power was to be found in RSC Order 18 rule 19 which empowered the court, at any stage of the proceedings, to strike out any pleading which disclosed no reasonable cause of action or defence, or which was scandalous, frivolous or vexatious, or which was otherwise an abuse of the process of the court. A similar power is now to be found in rule 3.4 of Part 3 of the Civil Procedure Rules.

GW contends that Mr Johnson has abused the process of the court by bringing an action against it in his own name and for his own benefit when such an action could and should have been brought, if at all, as part of or at the same time as the action brought against the firm by WWH. The allegations of negligence and breach of duty made against the firm by WWH in that action were, it is argued, essentially those upon which Mr. Johnson now relies. The oral and documentary evidence relating to each action is substantially the same. To litigate these matters in separate actions on different occasions is, GW contends, to duplicate the cost and use of court time involved, to prolong the time before the matter is finally resolved, to subject GW to avoidable harassment and to mount a collateral attack on the outcome of the earlier action, settled by GW on the basis that liability was not admitted.

This form of abuse of process has in recent years been taken to be that described by Sir James Wigram V.-C. in *Henderson v. Henderson* (1843) 3 Hare 100 at 114 where he said:

> "In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of

> litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

Thus the abuse in question need not involve the reopening of a matter already decided in proceedings between the same parties, as where a party is estopped in law from seeking to re-litigate a cause of action or an issue already decided in earlier proceedings, but (as Somervell L.J. put it in *Greenhalgh v. Mallard* [1947] 2 All E.R. 255 at 257) may cover

> "issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

A series of cases, mostly in recent years, has explored this form of abuse. Reference need not be made to all of them. In the *Yat Tung* case abuse was found where a claimant who had unsuccessfully sued a bank on one ground brought a further action against the same bank and another party on a different ground shortly thereafter. Giving the advice of the Judicial Committee of the Privy Council, Lord Kilbrandon said at page 589:

> "The second question depends on the application of a doctrine of estoppel, namely res judicata. Their Lordships agree with the view expressed by McMullin J. that the true doctrine in its narrower sense cannot be discerned in the present series of actions, since there has not been, in the decision in no. 969, any formal repudiation of the pleas raised by the appellant in no. 534. Nor was Choi Kee, a party to no. 534, a party to no. 969. But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings."

In *Brisbane City Council v. Attorney-General for Queensland,* above, the Privy Council expressly endorsed Somervell L.J.'s reference to abuse of process and observed, at page 425:

> "This is the true basis of the doctrine and it ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation."

In *Hunter's* case, above, in which *Henderson v. Henderson* was not cited, the plaintiff sought to challenge in civil proceedings a decision in a criminal case against which he had not appealed on the ground which he sought to raise in the civil proceedings. The proceedings were struck out.

In *Vervaeke v. Smith* [1983] 1 A.C. 145 the appellant, who had failed in English proceedings to annul her marriage, had succeeded in doing so in Belgium on different grounds and sought recognition in England of the Belgian decree. Lord Hailsham of St. Marylebone L.C. at page 157 described the rule in *Henderson v. Henderson* as "both a rule of public policy and an application of the law of res judicata" and said of it:

> ". . . whatever the limits of *Henderson v. Henderson* (1843) 3 Hare 100 (which I regard as a sound rule in ordinary civil litigation) may ultimately turn out to be, I believe that it must apply to a case like the present, where the petitioner in the first proceedings not merely does not rely on the grounds then already in theory available to her, but deliberately conceals the real facts (on which she now relies) from the court in order to put forward a bogus case which is radically inconsistent with them."

Ashmore v. British Coal Corporation [1990] 2 Q.B. 338 involved an attempt to reopen issues which had been decided adversely to the appellant's contentions in rulings which, although not formally binding on her, had been given in sample cases selected from a group of claims of which hers had been one. The Court of Appeal held that it was not in the interests of justice to allow her to pursue her claim. Reliance was placed on *Bragg v. Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1982] 2 Lloyds Rep. 132 in which Kerr L.J. at page 137 said:

> "To take the authorities first, it is clear that an attempt to relitigate in another action issues which have been fully investigated and decided in a former action *may* constitute an abuse of process,

> quite apart from any question of res judicata or issue estoppel on the ground that the parties or their privies are the same. It would be wrong to attempt to categorize the situations in which such a conclusion would be appropriate."

In *House of Spring Gardens Ltd. v. Waite* [1991] 1 Q.B. 241 the plaintiffs sued three defendants in England to enforce a judgment which they had obtained against those defendants in Ireland. The defendants pleaded in defence that the Irish judgment had been obtained by fraud. That was a contention which two of the defendants, but not the third (a Mr. McLeod) had raised in Irish proceedings to set aside the judgment, but the allegation had been dismissed by Egan J. Summary judgment was given against the three defendants in England but Mr. McLeod appealed against that judgment. The Court of Appeal held that Mr. McLeod, like the other defendants, was estopped from mounting what was in effect a collateral challenge to the decision of Egan J. It also held that Mr. McLeod's defence was an abuse of process. At page 255 Stuart-Smith L.J. said:

> "The question is whether it would be in the interests of justice and public policy to allow the issue of fraud to be litigated again in this court, it having been tried and determined by Egan J. in Ireland. In my judgment it would not; indeed, I think it would be a travesty of justice. Not only would the plaintiffs be required to re-litigate matters which have twice been extensively investigated and decided in their favour in the natural forum, but it would run the risk of inconsistent verdicts being reached, not only as between the English and Irish courts, but as between the defendants themselves. The Waites have not appealed Sir Peter Pain's judgment, and they were quite right not to do so. The plaintiffs will no doubt proceed to execute their judgment against them. What could be a greater source of injustice, if in years to come, when the issue is finally decided, a different decision is in Mr. McLeod's case reached? Public policy requires that there should be an end of litigation and that a litigant should not be vexed more than once in the same cause."

Arnold v. National Westminster Bank Plc [1991] 2 A.C. 93 was a case of issue estoppel. Tenants invited the court to construe the terms of a rent review provision in the sub-underlease under which they held premises. The provision had been construed in a sense adverse to them in earlier proceedings before Walton J., but they had been unable to challenge his decision on appeal. Later cases threw doubt on his construction. The question was whether the rules governing issue estoppel were subject to exceptions which would permit the matter to be reopened. The House held that they were. At page 109 Lord Keith of Kinkel said:

> "In my opinion your Lordships should affirm it to be the law that there may an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the *Carl Zeiss* case [1967] 1 A.C. 853, 947."

In the passage referred to Lord Upjohn had said:

> "All estoppels are not odious but must be applied so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind."

Talbot v. Berkshire County Council [1994] Q.B. 290 arose out of a motor accident in which both the driver and his passenger were severely injured. The passenger sued the driver. The driver's insurers, without notice to the driver, made a third party claim against the Berkshire County Council, claiming contribution as between joint tortfeasors but including no claim for the driver's own injuries. Not until after the expiry of the limitation period for bringing a personal claim did the driver learn of the third party claim against the county council. At trial, the passenger succeeded in full, damages being apportioned between the driver and the county council. The driver then sued the county council to recover damages for his own injuries. On the trial of preliminary issues, the judge held that the driver was prima facie estopped from bringing the action but that there were special circumstances which enabled the court to

permit the action to be pursued. The county council successfully challenged that conclusion on appeal. At page 298 Stuart-Smith L.J. said:

> "There can be no doubt that the [driver's] personal injury claim could have been brought at the time of [the passenger's] action. It could have been included in the original third party notice issued against the council (R.S.C., Ord. 16, r. 1(b)(c)); it could have been started by a separate writ and consolidated with or ordered to be tried with [the passenger's] action: Ord. 4, r. 9. The third party proceedings could have been amended at any time before trial and perhaps even during the trial to include such a claim, notwithstanding that it was statute-barred, since it arose out of the same or substantially the same facts as the cause of action in respect of which relief was already claimed, namely, contribution or indemnity in respect of [the passenger's] claim: Ord. 20, r. 5. In my opinion, if it was to be pursued, it should have been so brought."

Stuart-Smith L.J. considered that the insurers' solicitors appeared to have been negligent but that the claim against the county council should be struck out unless there were special circumstances, and concluded that there were not. With his conclusions Mann and Nourse L.JJ. agreed. Since the driver's claim against the county council was held by the judge to be statute-barred, a claim against the solicitors may have offered the driver his only hope of recovery.

The plaintiff in *C (A Minor) v. Hackney London Borough Council* [1996] 1 W.L.R. 789 lived in the house of which her mother was tenant. She suffered from Down's Syndrome and claimed in this action to have suffered personal injury caused by the negligence and breach of statutory duty of the borough council as housing authority. Her mother had previously made a similar claim which had been the subject of a consent order in the county court. The borough council applied to set aside a judgment entered in the plaintiff's favour in default of defence and to strike out the claim on the ground that the plaintiff's action was an abuse of the process of the court. Reliance was placed in particular on the *Yat Tung* case and *Talbot v. Berkshire County Council*. This argument was accepted by the judge, who held that the plaintiff's action should have been advanced at the same time as her mother's, the more so as the plaintiff was dependent on her mother. The plaintiff's appeal against this decision succeeded. Simon Brown L.J. said, at page 794:

> "I therefore reject entirely the submission that *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581 justifies extending the *Talbot v. Berkshire County Council* [1994] Q.B. 290 principle - that an unlitigated monetary claim is barred if it could have been advanced and established in earlier proceedings (itself to my mind an extended application of the res judicata doctrine) - to those not themselves party to the earlier proceedings.
>
> "It follows from all this that in my judgment the doctrine of res judicata even in its widest sense has simply no application to the circumstances of the present case and that the judge erred in ruling to the contrary. One does not, therefore, reach the point of asking here whether special circumstances exist to exclude it; C's erstwhile solicitors' suggested negligence is, frankly, an irrelevance. Nor, in my judgment, does this case come within measurable distance of any other form of abuse of process based on public policy considerations analogous to those underlying the res judicata doctrine: see, for instance, the Court of Appeal's decision in *Ashmore v. British Coal Corporation* [1990] 2 Q.B. 338.
>
> "All that said, this judgment should not be taken as any encouragement to lawyers or their clients to follow the course in fact adopted here. As the judge rightly recognised, in circumstances such as these, it is plainly in the public interest to have a single action in which the claims of all the affected members of the household are included rather than a multiplicity of actions . . ."

Barrow v. Bankside Agency Ltd. [1996] 1 W.L.R. 257 was one of the flood of cases which arose out of losses in the Lloyd's insurance market. Mr. Barrow was a member of an action group which had successfully sued a number of members' agents for negligent underwriting. Having substantially succeeded, but recovered only a proportion of the damages he had claimed, Mr. Barrow issued fresh proceedings against his members' agent on a different ground. It was clear that this claim, even if made earlier, would not have been tried at the same time as the earlier action, since the scheduling of cases was the subject of detailed management by the Commercial Court. The members' agent contended that to

bring this further claim, not raised at the time of the earlier proceedings, was an abuse. In the Court of Appeal it was said, at page 260:

> "The rule in *Henderson v. Henderson* (1843) 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."

At page 263, the rule was described as a salutary one, and the court suggested that its application should not be circumscribed by unnecessarily restrictive rules. On the facts it was held that the procedure adopted by Mr. Barrow was not an abuse. The court also held that if, contrary to its opinion, the case did fall within the mischief at which *Henderson v. Henderson* was directed, there were special circumstances which justified non-application of the rule.

In *Manson v. Vooght and others* [1999] BPIR 376, the plaintiff had sued administrative receivers of a company of which he had been managing director and principal shareholder in a 1990 action which culminated in a judgment adverse to him in 1993. There were other proceedings leading to other judgments, also given in 1993, relating to certain of the same issues: proceedings to disqualify the plaintiff as a director, in which findings adverse to him were made; and summonses issued in the liquidation of the company, when the court refused to allow issues which had been decided in the disqualification proceedings to be re-litigated. In 1994 the plaintiff issued a further writ making claims against the administrative receivers and others. His proceedings against the administrative receivers were struck out on the ground that these claims should have been raised, if at all, in the 1990 action. This decision was upheld by the Court of Appeal. Giving the leading judgment May L.J. said, at page 387:

> "In my view, the use in this context of the phrase 'res judicata' is perhaps unhelpful, and this not only because it is Latin. We are not concerned with cases where a court has decided the matter; but rather cases where the court has not decided the matter, but where in a (usually late) succeeding action someone wants to bring a claim which should have been brought, if at all, in earlier concluded proceedings. If in all the circumstances the bringing of the claim in the succeeding action is an abuse, the court will strike it out unless there are special circumstances. To find that there are special circumstances may, for practical purposes, be the same thing as deciding that there is no abuse, as Sir Thomas Bingham M.R. came close to holding on the facts in *Barrow*. The bringing of a claim which could have been brought in earlier proceedings may not be an abuse. It may in particular cases be sensible to advance cases separately. It depends on all the circumstances of each case. Once the court's consideration is directed clearly towards the question of abuse, it will be seen that the passage from Sir James Wigram V.-C.'s judgment in *Henderson* is a full modern statement of the law so long as it is not picked over semantically as if it were a tax statute.
>
> "The extent of any coincidence of causes of action, facts or even the capacities in which parties are sued, though relevant, will not necessarily determine the outcome . . ."

At page 388, May L.J. continued:

> "[Counsel for Mr. Manson] submits that the kind of abuse of process relied on by the first defendant in this appeal is to be narrowly confined and precisely defined so that legitimate claims are not stifled and so that potential litigants know where they stand. Otherwise they may be driven to include in one proceedings related but distinct claims which might sensibly be left for later consideration. The law should not thus encourage premature litigation which may prove unnecessary. He further submits that delay is the subject of the law of limitation and should not feature additionally as an element of abuse.

> "It is of course axiomatic that the court will only strike out a claim as an abuse after most careful consideration. But the court has to balance a plaintiff's right to bring before the court genuine and legitimate claims with a defendant's right to be protected from being harassed by multiple proceedings where one should have sufficed. Abuse of process is a concept which defies precise definition in the abstract. In particular cases, the court has to decide whether there is abuse sufficiently serious to justify preventing the offending litigant from proceeding. In cases such as the present, the abuse is sufficiently defined in *Henderson* which itself is encapsulated in the proposition that the litigant could and should have raised the matter in question in earlier concluded proceedings. Special circumstances may negative or excuse what would otherwise be an abuse. But there may in particular cases be elements of abuse additional to the mere fact that the matter could and should have been raised in the earlier proceedings."
>
> On page 389 May L.J. added:
>
> "Mr Manson relies on special circumstances to negative or excuse the abuse. He says that the scope of the 1990 action was limited because he had legal expenses insurance for that action which only covered some of his claims and that the insurers were not prepared to support the claims which he now wants to bring. Although this may be an explanation, in my view it does not excuse the abuse nor does it amount to special circumstances. It is commonplace for litigants to have difficulties in affording the cost of litigation. But lack of means cannot stand as an excuse for abuse of process."

Last in this series of cases comes *Bradford & Bingley Building Society v. Seddon* [1999] 1 WLR 1482, a decision later in time than the Court of Appeal's judgment in the present case but given by two of the same Lords Justices. Mr. Seddon had made an investment on the advice of an accountant, Mr. Hancock, which he had financed by taking a mortgage loan from the Bradford & Bingley Building Society. The investment failed. Mr. Seddon claimed damages or an indemnity against Mr. Hancock, who admitted liability to indemnify Mr. Seddon to the extent of about 75 per cent. of Mr. Seddon's claim. Judgment was entered in Mr. Seddon's favour for this admitted sum and Mr. Hancock was given leave to defend as to the balance. Mr. Seddon was unable to enforce his judgment as Mr. Hancock had no money, and the residual claim was not pursued. The building society then proceeded against Mr. Seddon to enforce the debt owed to it under the mortgage loan. Mr. Seddon sought to join as third parties Mr. Hancock, in order to pursue the residual claim, and two of his partners, Mr. Seddon's contention being that the advice tended to him had been given by the firm to which Mr. Hancock and his partners belonged. An application to strike out the third party claim was upheld by the judge and Mr. Seddon appealed. In the course of a judgment with which Nourse and Ward L.JJ. agreed, Auld L.J. said at page 1490:

> "In my judgment, it is important to distinguish clearly between res judicata and abuse of process not qualifying as res judicata, a distinction delayed by the blurring of the two in the courts' subsequent application of the above dictum [of Sir James Wigram V.-C. in *Henderson v. Henderson*]. The former, in its cause of action estoppel form, is an absolute bar to relitigation, and in its issue estoppel form also, save in 'special cases' or 'special circumstances': see *Thoday v. Thoday* [1964] P. 181, 197-198 *per* Diplock L.J. and *Arnold v. National Westminster Bank Plc* [1991] 2 A.C. 93. The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter . . .
>
> "Thus, abuse of process may arise where there has been no earlier decision capable of amounting to res judicata (either or both because the parties or the issues are different) for example, where liability between new parties and/or determination of new issues should have been resolved in the earlier proceedings. It may also arise where there is such an inconsistency between the two that it would be unjust to permit the later one to continue . . ."

At page 1492 Auld L.J. continued:

> "In my judgment mere re-litigation, in circumstances not giving rise to cause of action or issue estoppel, does not necessarily give rise to abuse of process. Equally, the maintenance of a second claim which could have been part of an earlier one, or which conflicts with an earlier one, should not, per se, be regarded as an abuse of process. Rules of such rigidity would be to deny its very

> concept and purpose. As Kerr L.J. and Sir David Cairns emphasised in *Bragg v. Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1982] 2 Lloyd's Rep. 132, 137, 138-139 respectively, the courts should not attempt to define or categorise fully what may amount to an abuse of process; see also *per* Stuart-Smith L.J. in *Ashmore v. British Coal Corporation* [1992] Q.B. 338, 352. Sir Thomas Bingham M.R. underlined this in *Barrow v. Bankside Agency Ltd.* [1996] 1 W.L.R. 257, stating, at page 263B, that the doctrine should not be circumscribed by unnecessarily restrictive rules" since its purpose was the prevention of abuse and it should not endanger the maintenance of genuine claims; see also *per* Saville L.J. at page 266D-E.
>
> "Some additional element is required, such as a collateral attack on a previous decision (see e.g. *Hunter v. Chief Constable of the West Midlands Police* [1982] AC 529; *Bragg's* case [1982] 2 Lloyd's Rep. 132, *per* Kerr L.J. and Sir David Cairns, at pp. 137 and 139 respectively, and *Ashmore's* case [1990] 2 Q.B. 338), some dishonesty (see e.g. *per* Stephenson L.J. in *Bragg's* case, at p. 139, and Potter L.J. in *Morris v. Wentworth-Stanley* [1999] 2 W.L.R. 470, 480 and 481; or successive actions amounting to unjust harassment (see e.g. *Manson v. Vooght* . . .))."

The Court of Appeal held that Mr. Seddon's third-party proceedings were not an abuse of process, and the appeal succeeded.

It may very well be, as has been convincingly argued (Watt, "The Danger and Deceit of the Rule in *Henderson v. Henderson*: A new approach to successive civil actions arising from the same factual matter," 19 *Civil Justice Quarterly*, (July 2000), page 287), that what is now taken to be the rule in *Henderson v. Henderson*, has diverged from the ruling which Wigram V.-C. made, which was addressed to res judicata. But *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. 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 early 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 the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. 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.

Mr. ter Haar, for Mr. Johnson, submitted (as the judge had held) that GW was estopped by convention from contending that the bringing of an action to enforce his personal claims was an abuse of process. In resisting GW's complaint of abuse, Mr. ter Haar relied, as he did in the courts below, on three features of this case in particular. The first was the acute financial predicament in which Mr. Johnson personally and WWH found themselves as a result, as Mr. Johnson alleges, of GW's negligence. The burden of financing the continuing operation of WWH, and of its very expensive litigation against GW, fell on him. His means was stretched to the utmost. The only hope of financial salvation lay in an early and favourable

outcome to the company's claim against GW. Mr. Johnson did not have a full legal aid certificate to pursue a personal claim. In any event, the addition of a personal claim would have complicated and delayed the trial of the company's claim, which might well have jeopardised the company's survival. Secondly, Mr. ter Haar relied on the conduct of the parties after the settlement agreement was made (if, contrary to his earlier submission, there was no estoppel by convention). He pointed out that four-and-a-half years elapsed from the issue of Mr. Johnson's writ in this action before GW first intimated their intention to apply to strike out the proceedings as an abuse of the court's process, during which period pleadings and evidence were exchanged, considerable costs were incurred, a substantial payment into court was made and a trial date fixed. This procedural history, he submitted, was evidence of the expectation of the parties at the time when the company's action was settled, and was in itself ground for rejecting GW's application; *Halliday v. Shoesmith* [1993] 1 W.L.R. 1 at 5. Thirdly, Mr. ter Haar submitted that, to the extent that issues litigated in the company's action were to be re-litigated in this action, it was because GW had insisted on this and rejected the invitation of Mr. Johnson to treat the evidence given in the earlier action as if given in this action.

Two subsidiary arguments were advanced by Mr. ter Haar in the courts below and rejected by each. The first was that the rule in *Henderson v. Henderson* did not apply to Mr. Johnson since he had not been the plaintiff in the first action against GW. In my judgment this argument was rightly rejected. A formulaic approach to application of the rule would be mistaken. WWH was the corporate embodiment of Mr. Johnson. He made decisions and gave instructions on its behalf. If he had wished to include his personal claim in the company's action, or to issue proceedings in tandem with those of the company, he had power to do so. The correct approach is that formulated by Sir Robert Megarry V.-C. in *Gleeson v. J. Wippell & Co. Ltd.* [1977] 1 W.L.R. 510 at 515 where he said:

> "Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest . . . .'"

On the present facts that test was clearly satisfied.

The second subsidiary argument was that the rule in *Henderson v. Henderson* did not apply to Mr. Johnson since the first action against GW had culminated in a compromise and not a judgment. This argument also was rightly rejected. An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, indeed, that outcome would make a second action the more harassing.

On the estoppel by convention issue, Mr. Steinfeld Q.C. for GW submitted that the Court of Appeal had been right and the judge wrong. There had been no common understanding between the parties on the issue of abuse, a topic which had never been raised. There was nothing to suggest that GW had tacitly agreed to forgo any defence properly open to it. Mr. Steinfeld further submitted that the present proceedings did amount to an abuse, as the Court of Appeal had rightly held. Mr. Johnson could have advanced his personal claim at the same time as the company's claim and therefore should have done so. The consequence of his not doing so was to expose GW to the harassment of further proceedings canvassing many of the same issues as had been canvassed in the earlier action, with consequential waste of time and money and detriment to other court users. The facts relied on to excuse his earlier inaction were not accepted. He should have sought a full legal aid certificate earlier. He could not rely on lack of means. Any loss caused to Mr. Johnson by GW's delay in applying to strike out could be compensated in costs.

Neither party challenged the correctness in principle of Lord Denning M.R.'s statement in the *Amalgamated Investment* case, above, at page 122 which, despite its familiarity, I quote:

> "The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands."

The question is whether the parties to the settlement of WWH's action (relevantly, Mr. Johnson and GW) proceeded on the basis of an underlying assumption that a further proceeding by Mr. Johnson would not be an abuse of process and whether, if they did, it would be unfair or unjust to allow GW to go back on that assumption. In my judgment both these conditions were met on the present facts. Mr. Johnson was willing in principle to try to negotiate an overall settlement of his and the company's claims but this was not possible in the time available and it was GW's solicitor who said that the personal claim "would be a separate claim and it would really be a matter for separate negotiation in due course." It is noteworthy that Mr. Johnson personally was party to the settlement agreement, and that the agreement contained terms designed to preclude (in one instance) and limit (in another) personal claims by him. Those provisions only made sense on the assumption that Mr. Johnson was likely to make a personal claim. GW did not, of course, agree to forgo any defence the firm might have to Mr. Johnson's claim if brought, and the documents show that GW's solicitor was alert to issues of remoteness and duplication. Had Mr. Johnson delayed unduly before proceeding, a limitation defence would have become available. But an application to strike out for abuse of process is not a defence, it is an objection to an action being brought at all. The terms of the settlement agreement and the exchanges which preceded it in my view point strongly towards acceptance by both parties that it was open to Mr. Johnson to issue proceedings to enforce a personal claim, which could then be tried or settled on its merits, and I consider that it would be unjust to permit GW to resile from that assumption.

If, contrary to my view, GW is not estopped by convention from seeking to strike out Mr. Johnson's action, its failure to take action to strike out over a long period of time is potent evidence not only that the action was not seen as abusive at the time but also that, on the facts, it was not abusive. The indicia of true abuse are not so obscure that an experienced professional party, advised by leading counsel (not, at that stage, Mr. Steinfeld), will fail to recognise them. It is accepted that Mr. Johnson had reasons which he regarded as compelling to defer prosecution of his personal claim. If, as he contended, the urgency of obtaining an early and favourable decision in the company's action was itself a result of GW's breach of duty to the company and to him, it would seem to me wrong to stigmatise as abusive what was, in practical terms, unavoidable. I agree with GW that it would certainly have been preferable if the judge who tried the company's action, and thereby became familiar with much of the relevant detail and evidence, had been able at the same time or shortly thereafter to rule on the personal claim. That would have been efficient and economical. But there were reasons accepted at least implicitly by both parties at the time for not proceeding in that way, and GW could, if it wishes, limit the extent to which issues extensively canvassed in the earlier action are to be reopened. It is far-fetched to suggest that this action involves a collateral attack on GW's non-admission of liability in the first action when that action was settled by insurers on terms quite inconsistent with any realistic expectation that GW would not be found liable.

In my opinion, based on the facts of this case, the bringing of this action was not an abuse of process. The Court of Appeal adopted too mechanical an approach, giving little or no weight to the considerations which led Mr. Johnson to act as he did and failing to weigh the overall balance of justice. I would allow Mr. Johnson's appeal.

The recoverability of the damages claimed by Mr. Johnson

By its notice of cross-appeal GW challenged the Court of Appeal's ruling that all the heads of damage pleaded on behalf of Mr. Johnson (with one exception) were or might be recoverable in principle if the pleaded facts were fully proved.

GW's first argument before the House, applicable to all save two of the pleaded heads of damage, was in principle very simple. It was that this damage, if suffered at all, had been suffered by WWH and Mr. Johnson, being for this purpose no more than a shareholder in the company, could not sue to recover its loss. As the Court of Appeal pointed out in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. and others (No. 2)* [1982] Ch. 204 at 210:

> "A derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested."

Here, it was argued, Mr. Johnson was seeking to recover damage which had been suffered by WWH.

Mr. Johnson's response was equally simple. It was accepted, for purposes of the application to strike out the damages claim, that GW owed a duty to him personally and was in breach of that duty. Therefore, subject to showing that the damage complained of was caused by GW's breach of duty and was not too remote, which depended on the facts established at trial and could not be determined on the pleadings, he was entitled in principle to recover any damage which he had himself suffered as a personal loss separate and distinct from any loss suffered by the company.

On this issue we were referred to a number of authorities which included *Lee v. Sheard* [1956] 1 QB 192; *Prudential Assurance v. Newman,* above; *Heron International Ltd. and Others v. Lord Grade, Associated Communications Corp. Plc. and Others* [1983] BCLC 244; *R. P. Howard Ltd. & Richard Alan Witchell v. Woodman Matthews and Co. (a firm)* [1983] BCLC 117; *George Fischer (Great Britain) Ltd. v. Multi Construction Ltd., Dexion Ltd. (third party)* [1995] 1 BCLC 260; *Christensen v. Scott* [1996] 1 NZLR 273; *Barings plc. (in administration) and another v. Coopers & Lybrand (a firm) and others* [1997] 1 BCLC 427; *Gerber Garment Technology Inc. v. Lectra Systems Ltd. and another* [1997] RPC 443; *Stein v. Blake and Others* [1998] 1 All ER 724; and *Watson and Another v. Dutton Forshaw Motor Group Ltd. and others,* Court of Appeal, unreported, 22 July 1998.

These authorities support the following propositions:

1) Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss. So much is clear from *Prudential*, particularly at pages 222-3, *Heron International*, particularly at pages 261-2, *George Fischer*, particularly at pages 266 and 270-271, *Gerber* and *Stein v. Blake*, particularly at pages 726-729.

2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding. This is supported by *Lee v. Sheard*, at pages 195-6, *George Fischer* and *Gerber.*

3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other. I take this to be the effect of *Lee v. Sheard*, at pages 195-6, *Heron International*, particularly at page 262, *R. P. Howard*, particularly at page 123, *Gerber* and *Stein v. Blake*, particularly at page 726. I do not think the observations of Leggatt

L.J. in *Barings* at p. 435B and of the Court of Appeal of New Zealand in *Christensen v. Scott* at page 280, lines 25-35, can be reconciled with this statement of principle.

These principles do not resolve the crucial decision which a court must make on a strike-out application, whether on the facts pleaded a shareholder's claim is sustainable in principle, nor the decision which the trial court must make, whether on the facts proved the shareholder's claim should be upheld. On the one hand the court must respect the principle of company autonomy, ensure that the company's creditors are not prejudiced by the action of individual shareholders and ensure that a party does not recover compensation for a loss which another party has suffered. On the other, the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation. The problem can be resolved only by close scrutiny of the pleadings at the strike-out stage and all the proven facts at the trial stage: the object is to ascertain whether the loss claimed appears to be or is one which would be made good if the company had enforced its full rights against the party responsible, and whether (to use the language of *Prudential* at page 223) the loss claimed is "merely a reflection of the loss suffered by the company." In some cases the answer will be clear, as where the shareholder claims the loss of dividend or a diminution in the value of a shareholding attributable solely to depletion of the company's assets, or a loss unrelated to the business of the company. In other cases, inevitably, a finer judgment will be called for. At the strike-out stage any reasonable doubt must be resolved in favour of the claimant.

I turn to consider the heads of claim now pleaded by Mr. Johnson.

1)

CPV and Adfocus. The claim is for sums which Mr. Johnson, acting on GW's advice, invested in these companies and lost. This claim is unobjectionable in principle, as Mr. Steinfeld came close to accepting.

2)

Cost of personal borrowings: loan capital and interest. The claim is for sums which Mr. Johnson claims he was obliged to borrow at punitive rates of interest to fund his personal outgoings and those of his businesses. Both the ingredients and the quantum of this claim will call for close examination, among other things to be sure that it is not a disguised claim for loss of dividend, but it cannot at this stage be struck out as bad on its face. The same is true of Mr. Johnson's claims for bank interest and charges and mortgage charges and interest (which will raise obvious questions of remoteness).

3)

Diminution in value of Mr. Johnson's pension and majority shareholding in WWH. In part this claim relates to payments which the company would have made into a pension fund for Mr. Johnson: I think it plain that this claim is merely a reflection of the company's loss and I would strike it out. In part the claim relates to enhancement of the value of Mr. Johnson's pension if the payments had been duly made. I do not regard this part of the claim as objectionable in principle. An alternative claim, based on the supposition that the company would not have made the pension payments, that its assets would thereby have been increased and that the value of Mr. Johnson's shareholding would thereby have been enhanced, is also a reflection of the company's loss and I would strike it out.

4)

Loss of 12.5 per cent. of Mr. Johnson's shareholding in WWH. Mr. Johnson claims that he transferred these shares to a lender as security for a loan and that because of his lack of funds, caused by GW's breach of duty, he was unable to buy them back. This claim is not in my view objectionable in principle.

5)

Additional tax liability. If proved, this is a personal loss and I would not strike it out.

The second limb of GW's argument on the cross-appeal was directed to Mr. Johnson's claim for damages for mental distress and anxiety. This is a claim for general damages for "the mental distress and

anxiety which he has suffered as a result of the protracted litigation process to which he has been subjected, the extreme financial embarrassment in which he and his family have found themselves, and the deterioration in his family relationships, particularly with his wife and son, as a result of the matters complained of in the Re-Amended Statement of Claim." Closely allied to this was a claim, pleaded at length, for aggravated damages "by reason of the fact that the manner of the commission of [GW's] tort was such as to injure his pride and dignity." GW contended that damages for mental distress and anxiety did not lie for breach of a commercial contract such as the present and that this was not a class of case in which aggravated damages were in principle recoverable. Mr. ter Haar took issue with both these points.

The general rule laid down in *Addis v. Gramophone Company Ltd.* [1909] AC 488 was that damages for breach of contract could not include damages for mental distress. Cases decided over the last century established some inroads into that general rule (see, generally, *McGregor on Damages*, 16th ed. (1997) at paras. 98-104). But the inroads have been limited and *McGregor* describes as a useful summary a passage in *Watts v. Morrow* [1991] 1 WLR 1421 at 1445:

> "A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy. But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead."

Your Lordships' House had occasion to touch on this question in *Ruxley Electronics and Construction Ltd. v. Forsyth* [1996] AC 344, an unusual case in which the issue concerned the measure of compensation recoverable by a building owner against a contractor who had built a swimming pool which was 18 inches shallower at the deep end than the contract specified. At page 374, Lord Lloyd of Berwick said:

> "*Addis v. Gramophone Co. Ltd.* established the general rule that in claims for breach of contract, the plaintiff cannot recover damages for his injured feelings. But the rule, like most rules, is subject to exceptions. One of the well established exceptions is when the object of the contract is to afford pleasure, as, for example, where the plaintiff has booked a holiday with a tour operator. If the tour operator is in breach of contract by failing to provide what the contract called for, the plaintiff may recover damages for his disappointment: see *Jarvis v. Swans Tours Ltd.* [1973] QB 233 and *Jackson v. Horizon Holidays Ltd.* [1975] 1 WLR 1468.
>
> "This was, as I understand it, the principle which Judge Diamond applied in the present case. He took the view that the contract was one 'for the provision of a pleasurable amenity'. In the event, Mr. Forsyth's pleasure was not so great as it would have been if the swimming pool had been 7 feet 6 inches deep. This was a view which the judge was entitled to take. If it involves a further inroad on the rule in *Addis v. Gramophone Co. Ltd.* [1909] AC 488, then so be it. But I prefer to regard it as a logical application or adaptation of the existing exception to a new situation."

I do not regard this observation as throwing doubt on the applicability of *Addis* in a case such as the present. It is undoubtedly true that many breaches of contract, cause intense frustration and anxiety to the innocent party. I am not, however, persuaded on the argument presented on this appeal that the general applicability of *Addis* should be further restricted.

I would strike out Mr. Johnson's claim for damages for mental distress and anxiety. I would also strike out his claim for aggravated damages: I see nothing in the pleaded facts which would justify any award beyond the basic compensatory measure of damages.

Conclusion

For these reasons I would allow Mr. Johnson's appeal and dismiss GW's cross-appeal, save that I would strike out his claims (identified in (3) above) for pension payments and the enhanced value of his shareholding, and for damages for mental distress and anxiety and aggravated damages. I would order

GW to pay Mr. Johnson's costs before the Court of Appeal and the judge, and the costs of the appeal and the cross-appeal to this House.

LORD GOFF OF CHIEVELEY

My Lords,

(1)

The appeal

(a)

Abuse of process

On the question whether there was an abuse of process on the part of the appellant, my noble and learned friend Lord Bingham of Cornhill has reviewed the facts and the relevant authorities in lucid detail. I find myself to be in complete agreement with his analysis of the authorities, and with his conclusion that on the facts there was no abuse of process on the part of the appellant; and I do not propose to burden this opinion with a repetition of his reasoning. I only wish to add a few words on the separate question of estoppel, with regard to the nature of the estoppel on which the appellant could, if necessary, have relied.

(b)

Estoppel

The conclusion of the learned judge, and the contention of Mr. ter Haar for the appellant, was that the relevant estoppel was estoppel by convention. Reliance was placed in particular on a well-known passage in the judgment of Lord Denning M.R. in *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.* [1982] Q.B. 84 at p. 122, where he said:

> "The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands."

This broad statement of law is most appealing. I yield to nobody in my admiration for Lord Denning; but it has to be said that his attempt in this passage to identify a common criterion for the existence of various forms of estoppel - he refers in particular to proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel - is characteristically bold; and that the criterion which he chooses, viz. that the parties to a transaction should have proceeded on the basis of an underlying assumption, was previously thought to be relevant only in certain cases (for example, it was adopted by Oliver J. (as he then was) in his important judgment in *Taylors Fashions v. Liverpool Victoria Trustees Co. Ltd.)* and, in particular, in the case of estoppel by convention, a species of estoppel which Lord Denning does not mention. Furthermore, if he intended that his broad statement of principle should apply in the case of estoppel by convention, a further problem arises in that, in relation to that doctrine, it has been authoritatively stated in Spencer Bower and Turner on Estoppel by Representation, in the scholarly and much admired Third Edition (1977) by Sir Alexander Turner, at pp. 168-9, that:

> "Just as the representation which supports an estoppel *in pais* must be a representation of *fact*, the assumed state of affairs which is the necessary foundation of an estoppel by convention must be an assumed state of facts presently in existence . . . No case has gone so far as to support an estoppel by convention precluding a party from resiling from a promise or assurance, not effective as a matter of contract, as to future conduct or as to a state of affairs not yet in existence. And there is no reason to suppose that the doctrine will ever develop so far. To allow such an estoppel would amount to the abandonment of the doctrine of consideration, and to accord contractual effect to assurances as to the future for which no consideration has been given."

I myself suspect that this statement may be too categorical; but we cannot ignore the fact that it embodies a fundamental principle of our law of contract. The doctrine of consideration may not be very popular nowadays; but although its progeny, the doctrine of privity, has recently been abolished by statute, the doctrine of consideration still exists as part of our law.

I myself was the judge of first instance in the *Amagamated Property Co. v. Texas Bank* case. I remember the doctrine of estoppel by convention being urged upon me; but the case was concerned with the scope of a guarantee, which was a matter of law, and, in the light of the passage in Spencer Bower and Turner which I have just quoted, I hesitated to adopt the doctrine. Cautiously, and I still think wisely, I founded my conclusion on a broader basis of unconscionability. In the Court of Appeal, however, both Eveleigh L.J. and Brandon L.J. (as he then was) expressly founded the relevant parts of their judgments on the doctrine of estoppel by convention. They did so relying on the statement of principle from Spencer Bower and Turner which I have already cited, which limits the doctrine to cases where there has been an agreed assumption as to *facts*, but nevertheless applied that statement to a case where the agreed assumption (as to the scope of the guarantee) was one of law. If Lord Denning's statement of principle is to be read as applying to the case of estoppel by convention, he implicitly rejected the statement of the law in Spencer Bower & Turner, holding that there could be an estoppel whether the common underlying assumption was one of fact or of law.

I accept that in certain circumstances an estoppel may have the effect of enabling a party to enforce a cause of action which, without the estoppel, would not exist. Examples are given in my judgment in *Amalgamated Property Co. v. Texas Bank* [1982] Q.B. 84 at pp. 105-7. But in my opinion it is not enough for that purpose that the estoppel may be characterised as an estoppel by convention, or that it can be said to be founded upon a common assumption by the parties.

Against this background I am, despite my great admiration for Lord Denning, reluctant to proceed on the basis of estoppel by convention in the present case. The function of the estoppel is here said to be to preclude the respondent firm from contending that Mr. Johnson, by personally advancing a separate claim to damages against the respondent firm instead of doing so at the same time as pursuing his company's claim, was abusing the process of the court. That, as I see it, must relate to a matter of law. It could, however, be appropriate subject matter for an estoppel by representation, whether in the form of promissory estoppel or of acquiescence, on account of which the firm is, by reason of its prior conduct, precluded from enforcing its strict legal rights against Mr. Johnson (to claim that his personal proceedings against the firm constituted an abuse of the process of the court). Such an estoppel is not, as I understand it, based on a common underlying assumption so much as on a representation by the representor that he does not intend to rely upon his strict legal rights against the representee which is so acted on by the representee that it is inequitable for the representor thereafter to enforce those rights against him. This approach, as I see it, is consistent with the conclusion of my noble and learned friend Lord Millett, who considers that the firm would be so precluded by virtue of its acquiescence in the manner in which Mr. Johnson had conducted the litigation hitherto. In the context of the present case, moreover, I can see no material difference between invoking promissory estoppel or acquiescence as the ground on which the respondent firm should be precluded from asserting that the appellant had abused the process of the Court. The truth of the matter is that the respondent firm, by its conduct and in particular by participating in negotiations for settlement of the company's claim against it on the basis that Mr. Johnson would thereafter be free to pursue his own personal claim against it, lulled Mr. Johnson into a sense of security that he was free to pursue such a claim against the firm, without objection, in separate proceedings, with the effect that it became unconscionable for the firm to contend that his personal proceedings constituted an abuse of the process of the court. In the end, I am inclined to think that the many circumstances

capable of giving rise to an estoppel cannot be accommodated within a single formula, and that it is unconscionability which provides the link between them.

For these reasons I would, like the remainder of your Lordships, allow the appeal; and I now turn to the cross-appeal of the respondent firm.

(2) The cross-appeal.

Here the question is whether certain heads of claim advanced by the appellant, Mr. Johnson, against the respondent firm, should be struck out. The relevant heads of claim are usefully recorded in the opinion of my noble and learned friend, Lord Bingham of Cornhill. I do not propose to repeat them in this opinion. The Court of Appeal held that each of the heads of damage pleaded in paragraphs 23 and 24 of the Re-Amended Statement of Claim is recoverable as a matter of law by the appellant by way of damages for the breaches of duty pleaded by him, and so should not be struck out. It is against that decision that the respondent firm now cross-appeals to your Lordships' House.

The principal ground on which it is said by the respondent firm that some of these heads of claim should be struck out is derived from the well-known case of *Prudential Assurance Co. Ltd v. Newman Industries Ltd* [1982] Ch. 204. I agree with the analysis of that case, and of the other cases following upon it, set out in the opinion of my noble and learned friend Lord Millett (which I have had the opportunity of reading in draft). I accordingly agree with his conclusion that:

> "On the assumption which we are bound to make for the purpose of this appeal, which is that the firm was in breach of a duty of care owed to Mr. Johnson personally, then he is in principle entitled to recover damages in respect of all heads of non-reflective consequential loss which are not too remote."

On that basis I, like Lord Millett, agree with my noble and learned friend Lord Bingham of Cornhill that the heads of damage specified by him as items 1, 2, 4 and 5 are unobjectionable and should not be struck out. Item 3 relates to the diminution in value of the appellant's pension policy set up by the company and accruing to the benefit of the appellant as part of his remuneration in his capacity as director of the company. In so far as the claim relates to payments which the company would have made into a pension fund for the appellant, I agree that the claim is merely a reflection of the company's loss and should therefore be struck out. But in so far as it relates to enhancement of the value of his pension if the payments had been made, it is unobjectionable and should be allowed to stand.

The second ground relates to the appellant's claims for general damages for mental distress, and for aggravated damages based on the fact that the manner of commission of the respondent firm's wrong was "such as to injure his pride and dignity". I agree with my noble and learned friend Lord Bingham of Cornhill that, as a matter of principle, damages on these grounds are not generally recoverable: see *Addis v. Gramophone Co.* [1909] AC 488; *Watts v. Morrow* [1991] 1 WLR 1421, 1445, *per* Bingham LJ; *McGregor on Damages, 16th ed. (1997) paras. 98-104.* It is true that there has in recent years been a softening of this principle in certain respects (see *McGregor on Damages, ubi sup.,* and *Mahmud v. Bank of Credit and Commerce International S.A.* [1998] AC 20), but none of these developments has, so far as I can see, gone so far as to allow recovery on the broad grounds here pleaded. I also would therefore strike out these two heads of claim.

For these reasons, I agree with the order proposed by my noble and learned friend Lord Bingham of Cornhill as to the disposal of both the appeal and the cross-appeal. I also agree with the order proposed by him as to costs.

LORD COOKE OF THORNDON

My Lords,

Having had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill, I agree with all that he says on the subject of abuse of process. The course adopted by the parties of settling Westway Homes Limited's claim against Gore Wood & Co., but leaving open any personal claim by Mr Johnson against the same solicitors, subject to a cap on certain heads of damages

and an undertaking concerning personal guarantees, strikes me as a sensible one: the personal claim against the solicitors plainly involves different and more difficult issues. The belated raising by the defendants of the contention, more ingenious than realistic, that the settlement had the effect of preventing the personal claim seems to me closer to abuse of process than the plaintiff's conduct in pursuing the claim. The defendants are saved from that stigma by the acceptance of their contention by the Court of Appeal, but I agree that on this part of the case the appeal of the plaintiff must be allowed.

On the recoverability of personal damages, I have much more difficulty, for the following reasons. It will be convenient to deal first with the claim for quantifiable financial loss, secondly with the claim based on other forms of suffering.

Damages for Quantifiable Financial Loss

As the present is an action by one claiming to be a personal client against solicitors, not an action by a shareholder against a company and directors, the case of *Prudential Assurance Co. Ltd v Newman Industries Ltd* (No. 2) [1982] Ch. 204, including the well-known passage at 222-223, has only a limited bearing. The cash box illustration given by the Court of Appeal (Cumming-Bruce, Templeman and Brightman L.JJ.) is not helpful in this case because it does not envisage any loss except of the company's £100,000. It is by no means self-evident that, if the controlling shareholder had lost a valuable business opportunity for want of prompt access to the company's money, he would have been unable to recover damages for that loss caused by the defendant's deceit and theft of the cash box. The court did give as a possible instance of a recoverable personal loss the cost caused to the shareholder in consequence of a fraudulent circular, such as the cost of attending a meeting; but this single specific example is not fully illuminating. Nothing that I am about to say involves any criticism of the decision in the *Prudential* case or anything said in it. My point is simply that it was not concerned with the kind of issue arising in the present case and contains no observations about this kind of issue. The same applies to *Stein v. Blake* [1998] 1 All ER 724.

I respectfully agree that the three numbered propositions set out in the speech of Lord Bingham of Cornhill are supported by the English authorities cited by him. But these authorities and the propositions are not comprehensive. Nor, as my noble and learned friend also indicates, do they resolve the crucial question arising on a strike-out application in a case such as the present. This is a case about solicitors' negligence. The English authorities cited include only one relating to the not uncommon situation of a solicitor acting both for a client personally and for a company controlled by the latter. This is *R.P. Howard Ltd and Richard Alan Witchell v Woodman, Matthews & Co.* [1983] B.C.L.C. 117. In that case the solicitor was negligent in failing initiate a timely application for statutory protection of the company's lease. The company negotiated with the landlord a new lease on terms less favourable than could have been obtained with the bargaining power of an extant application (loss A). The new lease also stipulated that the shareholder could not sell his shares without the landlord's consent (loss B). Against the solicitor Staughton J. (as he then was) awarded the company loss A and the shareholder loss B. Although it flowed from the company's loss of bargaining power, loss B was not suffered by the company. So, too, in the present case Mr Johnson claims that at least the greater part of the losses for which he sues were not suffered by the company.

As the report of *Christensen v Scott* [1996] 1 N.Z.L.R. 273 may not be readily available in England, it is as well to reproduce here the whole of the relevant passage in the judgment of the Court of Appeal delivered by Thomas J. I must not conceal that I was a member of the court of five on behalf of whom the judge spoke, although I confess to little independent recollection of the case. It was a case in which the defendants, firms of chartered accountants and solicitors, acted for the plaintiffs personally and in the course of doing so advised on channelling their assets into a company taking a lease of farm land. Naturally the defendants came to act for the company as well. By reason of alleged negligence on the part of the defendants the consent of the landlord's mortgagees was not obtained, nor was a caveat registered against the title. Consequently the land was lost and the company failed. The company's claim against the defendants was settled by the liquidator for a sum alleged by the plaintiffs to be totally inadequate. The Court of Appeal held that the personal claims should not be struck out before trial. Thomas J. said at 280-281 -

> "We do not need to enter upon a close examination of the *Newman Industries* decision. It has attracted not insignificant and, at times, critical comment. See eg L C B Gower, *Gower's Principles of Modern Company Law* (5th ed, 1992) at pp 647-653; L S Sealy, "Problems of Standing, Pleading and Proof in Corporate Litigation" (Ed, B.G. Pettit) at p 1 esp at pp 6-10; and M J Sterling, "The Theory and Policy of Shareholder Actions in Tort" (1987) 50 MLR. 468, esp at pp 470-474. It may be accepted that the Court of Appeal was correct, however, in concluding that a member has no right to sue directly in respect of a breach of duty owed to the company or in respect of a tort committed against the company. Such claims can only be bought by the company itself or by a member in a derivative action under an exception to the rule in *Foss v Harbottle* (1843) 2 Hare 461. But this is not necessarily to exclude a claim brought by a party, who may also be a member, to whom a separate duty is owed and who suffers a personal loss as a result of a breach of that duty Where such a party, irrespective that he or she is a member, has personal rights and these rights are invaded, the rule in *Foss v Harbottle* is irrelevant. Nor would the claim necessarily have the calamitous consequences predicted by counsel in respect of the concept of corporate personality and limited liability. The loss arises not from a breach of duty owed to the company but from a breach of duty owed to the individuals. The individual is simply suing to vindicate his own right or redress a wrong done to him or her giving rise to a personal loss.

We consider, therefore, that it is certainly arguable that, where there is an independent duty owed to the plaintiff and a breach of that duty occurs, the resulting loss may be recovered by the plaintiff. The fact that the loss may also be suffered by the company does not mean that it is not also a personal loss to the individual. Indeed, the diminution in the value of Mr and Mrs Christensen's shares in the company is by definition a personal loss and not a corporate loss. The loss suffered by the company is the loss of the lease and the profit which would have been obtained from harvesting the potato crop. That loss is reflected in the diminution in the value of Mr and Mrs Christensen's shares. They can no longer realise their shares at the value they enjoyed prior to the alleged default of their accountants and solicitors. (For a discussion of the policy issues which arise in considering these questions, see Sterling (*supra*) at pp 474-491.) In circumstances of this kind the possibility that the company and the member may seek to hold the same party liable for the same loss may pose a difficulty. Double recovery, of course, cannot be permitted. The problem does not arise in this case, however, as the company has chosen to settle its claim. Peat Marwick and McCaw Lewis accepted a compromise in the knowledge that Mr and Mrs Christensen's claim was outstanding. It may well be, as was acknowledged by Mr Pidgeon in the course of argument, that an allowance will need to be made for the amount already paid to the liquidator in settlement of the company's claim. It is to be acknowledged, however, that the problem of double recovery may well arise in other cases. No doubt, such a possibility is most likely with smaller private companies where the interrelationship between the company, the directors and the shareholders may give rise to independent duties on the part of the professional advisers involved. But the situation where one defendant owes a duty to two persons who suffer a common loss is not unknown in the law, and it will need to be examined in this context. It may be found that there is no necessary reason why the company's loss should take precedence over the loss of the individuals who are owed a separate duty of care. To meet the problem of double recovery in such circumstances it will be necessary to evolve principles to determine which party or parties will be able to seek or obtain recovery. A stay of one proceeding may be required. Judgment, with a stay of execution against one or other of the parties, may be in order. An obligation to account in whole or in part may be appropriate. The interest of creditors who may benefit if one party recovers and not the other may require consideration. As the problem of double recovery does not arise in this case, however, it is preferable to leave an examination of these issues to a case where that problem is squarely in point. Essentially, Mr and Mrs Christensen are alleging that as a result of Peat Marwick and McCaw Lewis's breach of duty owed to them personally they suffered a personal loss, that is, a reduction in the value of their assets. Their assets in this case had been channelled into their company. Thus, it is arguable that the diminution in the value of their shareholding is the measure of that loss. It may well be that when the evidence is heard it will be apparent that Mr and Mrs Christensen's claim is inflated, but that is a matter for the trial. We are not prepared to hold at this stage that they do not have an arguable case to recover damages for the breach of an acknowledged duty."

When that passage is read as a whole, two features will be noted. It will be seen not only that the whole passage is throughout guarded and provisional, but also that the court recognised both that double recovery cannot be permitted and that the interests of creditors may require consideration. In this field, if a client is suing his own solicitor, it would appear that only the problems of double recovery or prejudice

to the company's creditors would justify denying or limiting the right to recover personal damages which, on ordinary principles of foreseeability, would otherwise arise. One other observation should be made about the passage in Thomas J.'s judgment. Although he did mention that *Prudential* had not gone without criticism, he did not find it necessary to examine that case closely. I would repeat that in no way am I criticising it. On the contrary I accept it to the full.

The next closest of the English reported cases cited is *Barings plc (in administration)* v *Coopers & Lybrand* [1997] 1 B.C.C.L.R. 427, 435. In that case (arising from the activities of Mr Leeson) a United Kingdom company was suing the auditors of its Singapore subsidiary; the auditors were also responsible for supplying audit information for the group accounts. On a pre-trial appeal, Leggatt L.J. stated the law in terms which, albeit briefer, are much the same as those of Thomas J. in *Christensen v Scott*, which case was cited by Leggatt L.J.

Gerber Garment Technology Inc. v Lectra Systems Ltd [1997] R.P.C. 443 is more distant from the present case on the facts. It was a suit for infringement of patents in which some of the lost profits for which the plaintiff company claimed damages were suffered by subsidiary companies in which it held all the shares. The decision was that, when a shareholder has a cause of action but his company has none, he can recover damages measured by the reduction in value of his shareholding; but that the plaintiff must prove the amount of his own loss and that it cannot be assumed that this is the same as the loss suffered by the company. Such relevance as the case has lies in the reasoning of Hobhouse L.J. (as he then was) in the Court of Appeal. At 474 he described *Christensen v Scott* as "a good illustration of the application of the relevant principles." After an extensive quotation from the judgment in that case, he added at 475 -

> "There is no reason to suppose that this case would have been differently decided in England. The decision helpfully illustrates that, provided that the plaintiff can establish a personal cause of action and can prove a personal loss caused by the defendant's actionable wrong, then the fact that the loss is felt by the plaintiff in the form of the loss of the value of the plaintiff's shares in a company is no answer to the plaintiff's claim. (In that case, as in the present case, no question of remoteness arose.)"

Thus *Christensen v Scott* does not appear to have caused problems for English judges hitherto, and I would hope that this position might continue. But it is necessary to add some further discussion of principle, as on the facts the present case is not on all fours with that case or any of the others cited in argument.

Assuming that this is a fairly typical case of a man carrying on business wholly or partly through a company or companies controlled by him, the first question at a trial will be whether Gore Wood & Co. owed duties to Mr Johnson personally as well as to Westway Homes Limited. Such personal duties could arise from a contract of retainer or in tort because of the closeness of relations ("proximity"), or from both sources concurrently. *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 finally established in English law the legitimacy of recognising that professional advisers may owe to the same client a duty to exercise reasonable care and skill derived from both contract and tort law. Conceivably the rules as to remoteness or the measure of damages could produce different consequences; but in the interests of justice and the clarity of the law this should obviously be avoided unless forced upon the courts. The duty in such a case is most simply seen as a civil law obligation to conform to professional standards. In the argument it was not suggested that for the purposes of this appeal there is any material difference.

Although more elaborately pleaded here, the duty owed to the personal claimant would be to exercise reasonable care and professional skill in handling the legal side of his affairs and those of his relevant company. In this case it would include the elementary responsibility of exercising efficiently the company's option to purchase Mr Moores' land, on the basis that the risk of personal loss to Mr Johnson from a questionable exercise of the option was reasonably foreseeable by Gore Wood & Co. The duty was one of taking reasonable steps to safeguard his interests, not one of indemnity. Subject to that important qualification, there is some analogy with a contract of insurance When a solicitor is acting for both a shareholder personally and his company, the essence of the personal relationship is that the individual looks to the solicitor for care to provide personal financial protection.

That brings the discussion to what is perhaps the crucial point in this case. The required degree of personal protection will extend, I think, to protection against the operation of rules of law that might

foreseeably restrict the individual's right to recover damages if no duty were owed to him personally by the solicitor. In cases of the present class, two such rules may be relevant among other factors. One may be called the rule in *Prudential v Newman Industries*, using that as a shorthand to convey that a shareholder in a company has as such no right to recover from a third party damages for breach of the latter's duty to the company. The other may be called the rule in *The Lips*, using that as shorthand for the proposition in *Lips Maritime Corp. v President of India* [1988] A.C. 395, 425 per Lord Brandon of Oakbrook -

> "There is no such thing as a cause of action in damages for late payment of damages. The only remedy which the law affords for delay in paying damages is the discretionary award of interest pursuant to statute."

But for the solicitor's duty owed to the individual client, such restrictions could result in inability on the part of the latter to recover damages caused to him by the solicitor's negligence. Thus in the present case, whereas the option should have been exercised in a unquestionable manner in February 1988, it was not until more than four years later that the land was belatedly conveyed to Westway Homes Limited, and not until a further period of about eight months had elapsed that the company obtained a monetary settlement of its claim against the solicitors.

Mr Johnson alleges (*inter alia*) that in the meantime the property market had collapsed, the development project had ceased to be financially advantageous, and he had incurred very high interest charges for personal borrowings. To the extent that he can establish at a trial that the delay in the obtaining by the company of the land or monetary compensation was caused or materially contributed to by negligence on the part of the defendant solicitors, there would appear to be no sound reason for denying him personal relief for any damages foreseeably caused to him personally by the delay: provided always that double recovery is not sanctioned and the interests of the company's creditors are protected.

While double recovery has to be avoided, at this pre-trial stage I would not rule out the possibility that, on the close scrutiny at trial spoken of by Lord Bingham of Cornhill, it will be found that the ultimate agreed payment to the company was not intended to and did not in fact adequately compensate Mr Johnson for the company's want of title to the land in early 1988. It may be chiefly a matter of the timing. The rule in *The Lips* would not exclude the plaintiff's personal claim; he is not claiming damages for delay in paying damages to him. Rather he is claiming damages for the fact that his company did not have the land in 1988 - a claim outside the provenance and the purview of the rule in *The Lips.*

Thus the true scope of the settlement in 1992 is one of the matters requiring examination. In the instant case the settlement covered a very large part of the company's claim. It may well have been a reasonable settlement, reached after having due regard to the interests of the company's creditors, who could not successfully claim that more should have been recovered. There may nevertheless be some possibility that, in addition to any other right to personal damages that he may have against the solicitors, Mr Johnson could be heard to say against them that in any event he should be compensated for his company not having recovered fully. Such a possibility may be more significant in a case like *Christensen v Scott* where the shareholder has opposed and complains of the inadequacy of the company's settlement; but I do not think that it can be ignored in the present case at this stage.

In a company winding up the liquidator may be liable to the company for negligence on his part in making a compromise: see *In re Windsor Steam Coal Co. (1901) Ltd* [1929] 1 Ch. 151; *In re Home & Colonial Insurance Co. Ltd* [1930] 1 Ch. 102. Accordingly I think that in cases within that principle the court should avoid sanctioning not only double recovery, but also any real prospect of double recovery. As this aspect was not explored in argument, it need not now be explored further.

Apart from the question of any shortfall in the company's recovery, I think that Mr Johnson could have a good personal claim against the solicitors for compensation on the basis already stated, that is to say on the basis that the damages claimed by him were not suffered by the company. Accordingly I agree with Lord Bingham that the claimed heads of damages numbered in his speech 1, 2, 4 and 5 should not be struck out before trial, and that the same applies to the part of head 3 relating to the enhancement of the value of Mr Johnson's pension if the payments had been duly made. I am rather less clear that the remaining parts of head 3 should be struck out. Certainly, however, these claims relating to lost payments into a pension fund or retention of corresponding amounts in the company's assets look very much like

claims for double recovery. As the other members of your Lordships' Appellate Committee are in no doubt that they should be struck out, I am content to concur in that conclusion.

In short, agreeing that at the strike-out stage any reasonable doubt must be resolved in favour of the claimant, I think it safer to avoid fine distinctions, especially before trial; and, with the very limited exceptions just mentioned, to leave all the extant claims in this case of complicated facts open for examination at trial. The open questions would include remoteness. And I would add one other cautionary remark. The trial judge would have to consider, not only issues of double recovery by Mr Johnson and the company, but also any issue of overlapping among Mr Johnson's claims themselves.

Damages for General Suffering

In *Watts v Morrow* [1991] 1 WLR 1421, 1445, Bingham L.J. (as he then was) said -

> "A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.

But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category. In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort. If those effects are foreseeably suffered during a period when defects are repaired I am prepared to accept that they sound in damages even though the cost of the repairs is not recoverable as such. But I also agree that awards should be restrained, and that the awards in this case far exceeded a reasonable award for the injury shown to have been suffered. I agree with the figures which Ralph Gibson L.J proposes to substitute."

I regard that as an authoritative statement of the present law of England regarding commercial contracts. The exceptional category is not confined, in my view, to contracts to provide pleasure and the like. For example, breaches of contracts for status such as membership of a trade union or a club may carry damages for injured feelings; but it is unnecessary to go into that area further, as I accept that, if there was a contract between Mr Johnson and Gore Wood & Co., it is to be classified in English law as commercial in the sense that damages for mere distress are not available. Contract-breaking is treated as an incident of commercial life which players in the game are expected to meet with mental fortitude. For present purposes it may be assumed that the same principle applies insofar as the claim is grounded in tort: see *Hayes v Dodd* [1990] 2 All ER 815, 826-827 per Purchas L.J. A fuller discussion of these various matters can be found in *Mouat v Clark Boyce* [1992] 2 N.Z.L.R. 559 (a stage of the litigation not under consideration by the Privy Council in *Clark Boyce v Mouat* [1994] 1 A.C. 428).

But that does not quite dispose of Mr Johnson's claim for non-quantifiable damage. He alleges extreme financial embarrassment; it is said that from a state of some prosperity he was reduced to subsistence on social security benefit. He also alleges deterioration in his family relationships, particularly with his wife and son. Although the pleader has treated them as mental distress, such consequences are in truth significantly more than mental distress. They are more akin to the physical inconvenience and discomfort referred to in Bingham L.J.'s third paragraph. In my opinion the common law would be defective and stray too far from reality, humanity and justice if it remorselessly shut out even a restrained award under these heads. Hence I would leave the claim in this part of the case standing also, although only on the footing that damages could not be awarded merely for injured feelings, nor could aggravated damages be awarded merely on that account.

English case law has fluctuated as to the recoverability of damages in contract for mental distress, as is detailed in *McGregor on Damages* 16th ed. (1997) paragraphs 98 to 106. See also Dr Harvey McGregor's preface at vii to viii. But it has been established since Victorian times that, by contrast with mere mental distress, damages are recoverable for substantial inconvenience and discomfort. Thus in *Hobbs v. London and South Western Railway Co.* (1875) L.R. 10 Q.B. 111 a court including Cockburn C.J. and Blackburn

and Mellor JJ. upheld an award to a husband and wife for the inconvenience of having to walk home with young children four or five miles late on a drizzling night, although the wife's catching of a cold was found too remote. That case was applied by Barry J. in *Bailey v. Bullock* [1950] 2 All E.R. 1167 in awarding damages against solicitors for the inconvenience to the plaintiff of having to live in an overcrowded house. Such authorities are treated in McGregor, paragraphs 93 to 96, as surviving the recent restriction of damages for mental distress. The third paragraph already quoted from Bingham L.J. in *Watts v. Morrow* is largely supported by them. The line may not always be easy to draw, and it is particularly difficult before trial to assess the weight of the claims in the present case. But both a changed way of life because of poverty and damaged family relationships can be grievous forms of non-pecuniary harm. I am respectfully unable to agree that they should be ruled out of the law's purview.

Before parting with the case I would say something about *Addis v Gramophone Co.* [1909] AC 488. In severely confining damages for wrongful dismissal, your Lordships' House of those days appears to have seen the relationship of employer and employee as no more than an ordinary commercial one. This is a world away from the concept now, and in *Mahmud v Bank of Credit and Commerce International SA (in liq.)* [1998] AC 20 the House accepted that there is an implied obligation of mutual trust and confidence, and that an employer is under an implied obligation that he will not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage that relationship. Damages for financial loss, including impaired employment prospects, caused by harm to reputation could be recovered. It is true that *Addis* was distinguished on the ground that it related to injury to feelings caused by the manner of termination of the relationship, which question did not arise in *Mahmud*: see Lord Nicholls of Birkenhead at 38 and Lord Steyn at 51. But the philosophy is altogether different, as is the philosophy embodied in modern employment legislation. Again, as Lord Bingham has pointed out, *Addis* was not applied in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344. *Addis* has not uniformly been followed in the Commonwealth: see *Brown v Waterloo Regional Board of Commissioners of Police* (1982) 136 D.L.R. (3d) 49, a judgment of Linden J. (the author of *Canadian Tort Law*, now in its sixth edition). The decision was reversed on other grounds, but Linden J.'s statements of principle were substantially accepted: 152 D.L.R. (3rd) 729. According to that authority, an employee wrongfully dismissed may recover damages for mental distress in some circumstances. To the same effect is *Whelan v Waitaki Meats Ltd* [1991] 2 N.Z.L.R. 74, which contains an instructive survey of the authorities by Gallen J. I take leave to doubt the permanence of *Addis* in English law. But it is not a question arising in the present case either; I make these observations only to avoid being identified with any approbation of *Addis*.

For the reasons already given, I would allow Mr Johnson's appeal and would dismiss the cross-appeal except as to the two claims identified by Lord Bingham of Cornhill in his head 3 and as to aggravated damages. In the result the one point on which I differ concerns the claims for damages for financial embarrassment and injury to family relationships: those I would permit to go to trial. I concur in the order for costs proposed by Lord Bingham of Cornhill.

LORD HUTTON

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. I am in full agreement with his speech on the subject of abuse of process and I wish to confine my observations to the issue whether the damages claimed by Mr. Johnson are recoverable as a matter of law.

The case advanced by Mr. Johnson is that he instructed a firm of solicitors, Gore Wood & Co. (GW), to advise him personally as to the conduct of his businesses, including the business of property development which he carried on through a company Westway Homes Limited (WWH) of which he was the managing director and in which he held the entire shareholding with the exception of two shares, and that acting on behalf of WWH he also instructed GW to advise that company. He contends that in advising him as to the business affairs of the company, GW owed him a duty of care in contract and tort and in breach of that duty caused him very substantial financial loss. The question whether the damages claimed are recoverable comes before the House as a preliminary issue and is to be approached on the basis that the

facts pleaded by Mr. Johnson are capable of establishing a breach of a duty owed to him which caused him loss.

I consider it to be clear that where a shareholder is personally owed a duty of care by a defendant and a breach of that duty causes him loss, he is not debarred from recovering damages because the defendant owed a separate and similar duty of care to the company, provided that the loss suffered by the shareholder is separate and distinct from the loss suffered by the company. This principle was recently stated in the judgment of the Court of Appeal delivered by Sir Christopher Slade in *Walker and others v. Stones and others* [19th July 2000], the court stating that a claimant is entitled to recover damages where:

> "131. (a) the claimant can establish that the defendant's conduct has constituted a breach of some legal duty owed to him personally (whether under the law of contract, torts, trusts or any other branch of the law) AND
>
> 132. (b) on its assessment of the facts, the Court is satisfied that such breach of duty has caused him personal loss, separate and distinct from any loss that may have been occasioned to any corporate body in which he may be financially interested.
>
> 133. I further conclude that, if these two conditions are satisfied, the mere fact that the defendant's conduct may also have given rise to a cause of action at the suit of a company in which the claimant is financially interested (whether directly as a shareholder or indirectly as, for example, a beneficiary under a trust) will not deprive the plaintiff of his cause of action; in such a case, a plea of double jeopardy will not avail the defendant."

But a more difficult question arises where the shareholder claims a loss which is not separate and distinct from the loss suffered by the company but his loss flows from loss suffered by the company. In *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (2)* [1982] 1 Ch. 204, the claimants sued the directors of the company alleging that they had issued a circular to the shareholders containing a fraudulent misrepresentation concerning the true value of certain assets, and the court stated at pp. 222h and 223a-b:

> "But what [a shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3 per cent. shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company."

I shall call this statement "the Prudential Assurance principle".

In *Christensen v. Scott* [1996] 1 N.Z.L.R. 273 the Court of Appeal of New Zealand decided that where a plaintiff alleges a breach of duty owed to him personally by accountants and solicitors he is entitled to recover damages notwithstanding that his loss flows from loss suffered by a company in which he is a shareholder through a similar breach of duty owed to the company. In that case two shareholders claimed damages for the diminution in the value of their shareholding in a company caused by the negligence of their accountants and solicitors. In delivering the judgment of the court, after setting out part of the above passage in the judgment in *Prudential Assurance* Thomas J. stated:

> "It may be accepted that the Court of Appeal was correct, however, in concluding that a member has no right to sue directly in respect of a breach of duty owed to the company or in respect of a tort committed against the company. Such claims can only be bought by the company itself or by a member in a derivative action under an exception to the rule in *Foss v. Harbottle* (1843) 2 Hare 461. But this is not necessarily to exclude a claim brought by a party, who may also be a member, to whom a separate duty is owed and who suffers a personal loss as a result of a breach of that duty. Where such a party, irrespective that he or she is a member, has personal rights and these rights are

invaded, the rule in *Foss v. Harbottle* is irrelevant. Nor would the claim necessarily have the calamitous consequences predicted by counsel in respect of the concept of corporate personality and limited liability. The loss arises not from a breach of the duty owed to the company but from a breach of duty owed to the individuals. The individuals is simply suing to vindicate his own right or redress a wrong done to him or her giving rise to a personal loss.

"We consider, therefore, that it is certainly arguable that, where there is an independent duty owed to the plaintiff and a breach of that duty occurs, the resulting loss may be recovered by the plaintiff. The fact that the loss may also be suffered by the company does not mean that it is not also a personal loss to the individual. Indeed, the diminution in the value of Mr and Mrs Christensen's shares in the company is by definition a personal loss and not a corporate loss."

The approach taken by the Court of Appeal of New Zealand has been approved in a number of judgments of the Court of Appeal. In *Barings v. Coopers & Lybrand* [1997] 1 BCLC 427 the plaintiff, a company holding shares in a subsidiary company, claimed damages against the defendants, a firm of accountants, in respect of loss it suffered through loss sustained by its subsidiary, BFS, on the ground that the defendants were in breach of duties of care owed both to the plaintiff and to the subsidiary in carrying out an audit of the subsidiary's accounts. The defendants applied to set aside service of the writ in reliance on the Prudential Assurance principle. The defendants' application was rejected by the Court of Appeal and Leggatt L.J. stated at p. 435:

"The *Prudential Assurance* case decides that a shareholder in a company has no independent right of action based on an allegation of diminution in the value of his shares occasioned by damage to the company. Mr. Kentridge seeks to rely on it as authority for the proposition that where a company may have a cause of action for damage caused to it by a tortfeasor, a person who enjoys an independent right of action against the tortfeasor cannot sue him at least in so far as his damages are measured by a diminution in the value of the company's shares. But in my judgment that is a misapplication of the principle. If C&LS are in breach of a duty of care owed to Barings in respect of audit information supplied to them and the breach causes damage, Barings cannot be disentitled from suing merely because the damages for which C&LS are said to be liable to Barings would or might include damages for which they are said to be liable to BFS. For C&LS are also in breach of a different duty, whether contractual or tortious, owed to BFS. Whereas complications might arise if these claims were made in separate actions, any risk of double jeopardy or of double recovery, such as were envisaged by the New Zealand Court of Appeal in *Christensen v. Scott* [1996] 1 N.Z.L.R. 273 at 280-281, can be avoided if both claims are made in the same action. It may be, for instance, that C&LS are not liable to Barings for loss of the value of the shares in either BFS or any company which has a cause of action against C&LS for such loss.

"The present case differs from the *Prudential Assurance* case because here the person in the position of shareholder, namely Barings, has a right of action independent of the company, BFS. On the other hand, unlike the situation in the *George Fischer* case, BFS does have a right of action itself. As that case shows, there is no legal principle that a holding company is unable to recover damages for loss in the value of its subsidiaries, resulting directly from a breach of duty owed to it, as distinct from a duty owed (or not owed as the case may be) to the subsidiaries."

In *Gerber Garment Technology Inc. v. Lectra Systems* [1997] R.P.C. 443 the plaintiff was entitled to damages for infringement of patent rights held by it and sought to recover damages for losses suffered by subsidiary companies in which it held all the shares, and which themselves had no cause of action, and the defendant contended that the claim was barred by the Prudential Assurance principle. That argument was rejected by the Court of Appeal and Hobhouse L.J. (as he then was) cited the judgment of the Court of Appeal of New Zealand in *Christensen v. Scott* and stated at p. 475:

"There is no reason to suppose that this case would have been differently decided in England. The decision helpfully illustrates that, provided that the plaintiff can establish a personal cause of action and can prove a personal loss caused by the defendant's actionable wrong, then the fact that the loss is felt by the plaintiff in the form of the loss of the value of the plaintiff's shares in a company is no answer to the plaintiff's claim. (In that case, as in the present case, no question of remoteness arose.)"

The judgments in *Prudential Assurance* and *Christensen v. Scott* are difficult to reconcile, and it is also difficult to reconcile the judgment in *Barings v. Coopers & Lybrand* with the judgment in the former case because the ground on which Leggatt L.J. sought to distinguish it, namely, that in *Prudential Assurance* the shareholders did not have an individual right of action is invalid, the court in *Prudential Assurance* stating at p. 222g that the defendants owed the shareholders a duty to give sound advice. *Gerber Garment Technology* can be distinguished from *Prudential Assurance* on the ground that the companies in which the plaintiff held shares did not themselves have a cause of action against the defendant. But I consider that the ruling in *Prudential Assurance* that the shareholders could not recover damages cannot be explained on the ground of causation, which was the explanation advanced by Hobhouse L.J. at p. 471; I think, in agreement with the Court of Appeal of New Zealand in *Christensen v. Scott,* that the shareholders can be regarded as suffering a loss caused by breach of duty of the defendant notwithstanding that their loss is reflective of loss suffered by the company. Therefore I consider that the issue to be decided is whether this House should follow the reasoning set out in *Prudential Assurance* or the reasoning set out in *Christensen v. Scott*.

My Lords, I consider, with respect, that part of the reasoning in the *Prudential Assurance* case is open to criticism. In my opinion the view of the Court of Appeal of New Zealand that the loss suffered by a shareholder through the diminution in the value of this shareholding is a personal loss is a more realistic assessment than the view of the Court of Appeal in *Prudential Assurance* that the shareholder's loss is merely a reflection of the loss suffered by the company and that the shareholder suffers no personal loss. This view has been criticised in an article by Mr. M. J. Sterling on *"The Theory and Policy of Shareholder Actions in Tort"* (1987) 50 Modern Law Review 468 at pp. 470 and 471:

> "The description of the Court of Appeal is not wrong, in that the value of a share is related to the present and expected future levels of dividend of the company and the right to receive dividends is a right of participation in the company, but it is suspiciously limited because a share is commonly treated as a piece of personal property. The fact that a share is valuable because it is a right of participation in a company does not preclude one as a matter of logic from regarding it as a piece of property ….
>
> "The Court of Appeal gave no reason for preferring their description of a share to one which includes its nature as an item of personal property but some good reason is surely necessary to justify exclusion of this obvious characteristic. It is therefore suggested that, if necessary, a share can be regarded as a piece of personal property and a shareholder could be allowed to sue for injury to it."

In my respectful opinion there is force in this criticism. However, even if this criticism be accepted, there remains the need to ensure that there is no double recovery and that creditors and the other shareholders of the company are protected. It was this need which was emphasised by Millett L.J. (as he then was) in *Stein v. Blake* [1998] 1 All ER 724, 730a, as the reason why the principle in *Prudential Assurance* should be followed:

> "If this action were allowed to proceed and the plaintiff were to recover for the lost value of his shareholding from the first defendant, this would reduce his ability to meet any judgment which might thereafter be obtained by the liquidators, or by any of the old companies which were not in liquidation, to the prejudice of their creditors. The plaintiff would have obtained by a judgment of the court the very same extraction of value from the old companies at the expense of their creditors that the first defendant is alleged to have obtained by fraud and deceit."

In *Christensen v. Scott* the court considered that the problem of double recovery did not arise in that case as the defendants had settled the company's claim with the knowledge that the plaintiffs' claim was outstanding. But the court recognised that double recovery cannot be permitted and that the interests of the creditors of a company must be protected. In my opinion the resolution of the conflict between *Prudential Assurance* and *Christensen v. Scott* narrows down to the issue whether, as held in the former case, the shareholder is debarred from bringing to trial an action claiming loss where such loss is merely reflective of loss suffered by the company, or whether the shareholder is entitled to proceed to trial on such a claim, it being a matter for the trial judge, if the plaintiff establishes his claim, to ensure that there

is no double recovery and that creditors and other shareholders of the company do not suffer loss, which was the course which Pumfrey J. held should be followed.

My Lords, whilst in a case such as *Christensen v. Scott* there may be merit in permitting an individual shareholder to sue, the decision in *Prudential Assurance* has stood in England for almost twenty years and, whilst the decision has sometimes been distinguished on inadequate grounds, it has been regarded as establishing a clear principle which the Court of Appeal has followed in other cases. I further consider that the principle has the advantage that, rather than leaving the protection of creditors and other shareholders of the company to be given by the trial judge in the complexities of a trial to determine the validity of the claim made by the plaintiff against the defendant, where conflicts of interest may arise between directors and some shareholders, or between the liquidator and some shareholders, the principle ensures at the outset of proceedings that where the loss suffered by the plaintiff is sustained because of loss to the coffers of the company, there will be no double recovery at the expense of the defendant nor loss to creditors of the company and other shareholders. Therefore whilst I think that this House should uphold the *Prudential Assurance* principle, I also consider that it is important to emphasise that the principle does not apply where the loss suffered by the shareholder is separate and distinct from the loss suffered by the company.

The five heads of claim pleaded by Mr. Johnson have been set out in the speech of my noble and learned friend Lord Bingham of Cornhill. I consider that the losses claimed in heads 1, 2, 4 and 5 are separate and distinct from loss sustained by WWH and that those heads of claim should not be struck out. In respect of head 3 I am also in agreement with the opinion of Lord Bingham that because it is not a separate and distinct loss, Mr. Johnson cannot claim in respect of the monies which WWH would have paid into a pension fund for him if those monies had been available to it, and that that part of the claim should be struck out, but that Mr. Johnson can claim in respect of enhancement of the value of the pension if the payments had been made.

For the reasons given by Lord Bingham I would strike out Mr. Johnson's claims for damages for mental distress and anxiety and for aggravated damages. Accordingly, I would allow Mr. Johnson's appeal and dismiss GW's cross-appeal, save that I would strike out his claim in head 3 for pension payments (or, in the alternative, for the increase in the value of his shareholding if those pension payments had not been made), and for damages for mental distress and anxiety and for aggravated damages. I would concur in the order for costs proposed by Lord Bingham.

LORD MILLETT

My Lords,

My noble and learned friend Lord Bingham of Cornhill has recounted the facts and I need not set them out again at any length. The Appellant, Mr. Johnson, is an entrepreneur who carried on business through a number of companies which he owned and controlled. One of them was Westway Homes Limited ("the Company"). Mr. Johnson was its managing director and virtually only shareholder. The Respondent firm ("the firm") is a firm of solicitors. Mr. Johnson was in the habit of instructing the firm from time to time to act for him in connection with his personal affairs as well as for his various companies.

In 1988 the Company held a valuable option to buy land for development. Mr. Johnson instructed the firm to exercise the option on the Company's behalf. The firm accepted his instructions and served the appropriate notice, but failed to do so in a manner which was incapable of challenge by the vendor. The vendor claimed that the option had not been validly exercised, and the Company was obliged to bring proceedings for specific performance against him in the Chancery Division ("the Chancery proceedings"). These were not straightforward, and although the Company was ultimately successful it was unable to obtain title to the land until April 1992, that is to say more than four years after it had exercised the option. It was awarded damages and costs against the vendor, but these proved to be irrecoverable.

The firm's failure to deal with the option in a manner which put its exercise beyond dispute caused the Company substantial loss. As well as having to bear the costs of the Chancery proceedings, it sustained heavy financial loss as a result of the delay in obtaining title to the land. This loss was of two kinds. First, until the Company established its title, it was unable to offer the land as security for its borrowings and so

obtain a reduction in the very high interest charges it was paying. Secondly, delay in obtaining title to the land caused a corresponding delay in the commencement and completion of the development and thus in the time when the Company could hope to realise any profit from the venture. As it happens, the delay frustrated the development altogether, for the collapse in the property market which took place during the currency of the Chancery proceedings made the venture unprofitable. But this was obviously not foreseeable in 1988, or Mr. Johnson would not have caused the Company to exercise the option and the vendor would not have resisted its claim to have done so.

In January 1991 the Company brought proceedings against the firm for professional negligence. The firm admitted that it had been retained by the Company to exercise the option and that it had owed the Company a duty of care in doing so. But it denied both liability and quantum. The action came on for trial in October 1992 and was estimated to last 10-12 days. In December 1992, after the trial had already lasted for six weeks and evidence was still being given on behalf of the firm, the case was settled upon payment by the firm of £1,480,000 and £320,000 towards the Company's costs. The sum of £1,480,000 represented the greater part of the damages claimed.

Mr. Johnson has always claimed that the firm's negligence in the manner in which it exercised the option also caused substantial financial loss to him personally. In April 1993 he brought his own proceedings against the firm. This can have come as no surprise. Mr. Johnson had made no secret of his intention to bring such a claim. He had indicated as much in January 1991, well before the Company's action came to trial, and his solicitors had been in correspondence with the firm's insurers during 1991-2. On the eve of the trial his solicitors told those representing the firm that his personal claim would be pursued whether the current proceedings resulted in judgment or settlement. During the settlement negotiations in December 1992 the parties' respective solicitors discussed the possibility of an overall settlement of both Mr. Johnson's personal claim and the Company's claim, but the paucity of information to enable his personal claim to be quantified made this impossible. It was left that it was a separate claim which would be a matter for separate negotiation in due course. In agreeing the terms on which the Company's claim was settled, Mr. Johnson submitted to having most of his personal claim capped at £250,000 excluding interest and costs, and the Company agreed to apply the settlement moneys in the discharge of liabilities of the Company in respect of which Mr. Johnson had given personal guarantees. This was designed to avoid the possibility of double recovery in respect of these liabilities if Mr. Johnson brought his own proceedings and was successful.

For the next four and a half years the proceedings brought by Mr. Johnson followed the normal course. The parties served and amended their pleadings and exchanged witness statements. Mr. Johnson served expert evidence. The firm made a payment into court. A trial date was obtained. But then came a sudden change of tack. The firm instructed fresh Leading Counsel. In December 1997 the firm's solicitors indicated, for the first time, that it intended to apply *inter alia* for an order to strike the action out as an abuse of the process of the Court. In February 1998 the Court ordered the trial of two preliminary issues: (i) whether the proceedings should be struck out as an abuse of the process of the Court; and (ii) to what extent (if at all) and assuming the truth of the facts pleaded the heads of damages pleaded in paragraphs 23 and 24 of the Re-Amended Statement of Claim were irrecoverable by Mr. Johnson as a matter of law by way of damages for the pleaded breaches of duty owed to him.

Mr. Johnson pleaded his claim in both contract and tort, and alleged that he had retained the firm to act for him personally as well as for the Company in connection with the exercise of the Company's option. He alleged that the firm had acted negligently in the manner in which it caused the option to be exercised, and that it had from time to time negligently and with unwarranted optimism advised him personally as to the likely duration and outcome of the Chancery proceedings.

On the first question, the Judge (Pumfrey J.) found that the proceedings might well have been an abuse of the process of the Court, but that in the light of the circumstances in which the Company's action had been settled the firm was estopped by convention from contending that they were. Both parties had acted on the common assumption that Mr. Johnson would bring his own proceedings and that these would be entertained by the Court. On the second question he ruled that none of the heads of damage pleaded was irrecoverable in law.

The Court of Appeal (Nourse, Ward and Mantell L.JJ.) allowed the firm's appeal. It held that there was no excuse for Mr. Johnson's failure to launch his own claims when the Company brought its action. "If he could have done so", Mantell L.J. said, "he should have done so". It held that there was no estoppel by convention; the parties shared a common assumption that Mr. Johnson would bring his own proceedings, but they made no assumption one way or the other whether the Court would entertain them; they never thought about the matter. On the second question the Court differed from the Judge on the authorities, which it agreed were in an unsatisfactory state, but held that, with only one exception, the pleaded heads of damage were arguably recoverable. Both parties now appeal to the House. Mr. Johnson appeals on the first question; the firm cross-appeals on the second.

Mr. Johnson's appeal: abuse of process.

In describing the proceedings brought by Mr. Johnson as an abuse of the process of the Court, the Court of Appeal was seeking to apply the well-known principle which Sir James Wigram V.-C. formulated in *Henderson v Henderson (1843)* 3 Hare 100 at p. 114 as follows:

> ". . . I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, *and of adjudication by,* a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. *The plea of res judicata applies,* except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time" (my emphasis).

As the passages which I have emphasised indicate, Sir James Wigram did not consider that he was laying down a new principle, but rather that he was explaining the true extent of the existing plea of *res judicata.* Thus he was careful to limit what he was saying to cases which had proceeded to judgment, and not, as in the present case, to an out of court settlement. Later decisions have doubted the correctness of treating the principle as an application of the doctrine of *res judicata,* while describing it as an extension of the doctrine or analogous to it. In *Barrow v. Bankside Members Agency Ltd.* [1996] 1 W.L.R. 257, Sir Thomas Bingham M.R. explained that it is not based on the doctrine in a narrow sense, nor on the strict doctrines of issue or cause of action estoppel. As May L.J. observed in *Manson v. Vooght* [1999] BPIR 376 at p. 387, it is not concerned with cases where a court has decided the matter, but rather cases where the court has not decided the matter. But these various defences are all designed to serve the same purpose: to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions. While the exact relationship between the principle expounded by Sir James Wigram and the defences of *res judicata* and cause of action and issue estoppel may be obscure, I am inclined to regard it as primarily an ancillary and salutary principle necessary to protect the integrity of those defences and prevent them from being deliberately or inadvertently circumvented.

In one respect, however, the principle goes further than the strict doctrine of *res judicata* or the formulation adopted by Sir James Wigram V.-C., for I agree that it is capable of applying even where the first action concluded in a settlement. Here it is necessary to protect the integrity of the settlement and to prevent the defendant from being misled into believing that he was achieving a complete settlement of the matter in dispute when an unsuspected part remained outstanding.

However this may be, the difference to which I have drawn attention is of critical importance. It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is *prima facie* a denial of the citizen's right of access to the court conferred by the common law and guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4th. November 1950). While, therefore, the doctrine of *res judicata* in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the Court from abuse and the defendant

from oppression. In *Brisbane City Council v. A.-G. for Queensland* [1979] AC 411 at p. 425 Lord Wilberforce, giving the advice of the Judicial Committee of the Privy Council, explained that the true basis of the rule in *Henderson v Henderson* is abuse of process and observed that it

> ". . . ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation."

There is, therefore, only one question to be considered in the present case: whether it was oppressive or otherwise an abuse of the process of the court for Mr. Johnson to bring his own proceedings against the firm when he could have brought them as part of or at the same time as the Company's action. This question must be determined as at the time when Mr. Johnson brought the present proceedings and in the light of everything that had then happened. There is, of course, no doubt that Mr. Johnson *could* have brought his action as part of or at the same time as the Company's action. But it does not at all follow that he *should* have done so or that his failure to do so renders the present action oppressive to the firm or an abuse of the process of the court. As May L.J. observed in *Manson v Vooght* at p. 387, it may in a particular case be sensible to advance claims separately. Insofar as the so-called rule in *Henderson v. Henderson* suggests that there is a presumption against the bringing of successive actions, I consider that it is a distortion of the true position. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action.

The rule in *Henderson v Henderson* cannot sensibly be extended to the case where the defendants are different. There is then no question of double vexation. It may be reasonable and sensible for a plaintiff to proceed against A first, if that is a relatively simple claim, in order to use the proceeds to finance a more complex claim against B. On the other hand, it would I think normally be regarded as oppressive or an abuse of process for a plaintiff to pursue his claims against a single defendant separately in order to use the proceeds of the first action to finance the second, at least where the issues largely overlap so as to form, in Sir James Wigram's words, "the same subject of litigation".

Particular care, however, needs to be taken where the plaintiff in the second action is not the same as the plaintiff in the first, but his privy. Such situations are many and various, and it would be unwise to lay down any general rule. The principle is, no doubt, capable in theory of applying to a privy; but it is likely in practice to be easier for him to rebut the charge that his proceedings are oppressive or constitute an abuse of process than it would be for the original plaintiff to do so.

Mr. Johnson conceded that he and the Company are privies. He was in a position to decide when to pursue the two claims and whether to pursue them together or separately, and that is enough for present purposes. But Mr. Johnson and the Company are different legal persons, each with its own creditors, and that is a fact of critical significance. Mr. Johnson's personal claims raised difficult issues not present in the Company's action: (i) did he retain the firm to act for him personally? (ii) should the firm have foreseen that failure to exercise the option properly would cause loss to Mr. Johnson personally as well as to the Company? (iii) which if any of his personal losses were recoverable (the issues in the cross-appeal)? (iv) quantum. It was not in the Company's interest for his personal claims to be joined with its own much simpler claim, or for its case to be delayed until Mr. Johnson's own case was ready for trial. Had the Company been in liquidation and its action brought by the liquidator, he would have been well advised to insist on separate trials and to object to any delay in the trial of the Company's action.

In these circumstances I am satisfied that Mr. Johnson, who was bound to have regard to the interests of the Company and its creditors, was entitled to defer the bringing of his own claims until after the Company's claim had been resolved. Even if he had chosen to join the two claims in the same writ, it would have been both possible and appropriate for separate trials to be held of (i) liability (ii) quantum (Company) (iii) Mr. Johnson's title to sue and (iv) quantum (Mr. Johnson); and for (iii) and (iv) to be held over until after (i) and (ii) had been determined. Even as things are, there is no real question of double vexation. The firm was always liable to be sued by two different plaintiffs each with its own cause of action and its own heads of loss. The only area of overlap is in relation to the standard of care which the firm observed. Given that Mr. Johnson and the Company are privies, neither of them could re-open an adverse judgment on this, being bound by issue estoppel; while the parties could make their own arrangements in the event of a settlement.

Accordingly, I would reject the firm's contention that it was an abuse of process for Mr. Johnson to bring his action after the Company's claim had been resolved. Even if this were not the case, however, I agree with the trial judge that it would be unconscionable for the firm to raise the issue after the way in which it handled the negotiations for the settlement of the Company's action. I would not myself put it on the ground of estoppel by convention. Like the Court of Appeal, I have some difficulty in discerning a common assumption in regard to a matter about which neither party thought at all. This is not to say that estoppel has no part to play in this field. I would regard it as operating in the opposite way. Given that Mr. Johnson was entitled to defer the bringing of his own proceedings until after the Company's claims had been resolved, it would have been unconscionable for him to have stood by without disclosing his intentions and knowingly allowed the firm to settle the Company's action in the belief that it was dealing finally with all liability arising from its alleged negligence in the exercise of the option. To bring his own claim in such circumstances would, in my opinion, amount to an abuse of the process of the Court. But nothing like this took place.

This makes it unnecessary to deal with Mr. Johnson's submission that it is too late for the firm to raise the issue. If necessary, however, I should have regarded the delay as fatal. Indeed, I should have regarded it as more than delay; I think it amounted to acquiescence. There is no proper analogy with the case which discloses no cause of action. Although it is obviously desirable to apply to strike out a claim which is doomed to fail at the earliest opportunity, there is no point in proceeding with a trial which serves no useful purpose. Even if the point is taken at the trial itself, it is a matter for the trial judge to decide whether to hear the evidence and adjudicate on the facts before deciding whether they give rise to liability, or to assume that the plaintiff will establish his allegations and decide whether, as a matter of law, they give rise to liability.

But the premise in the present case is that Mr. Johnson has a good cause of action which he should have brought earlier if at all. I do not consider that a defendant should be permitted to raise such an objection as late as this. A defendant ought to know whether the proceedings against him are oppressive. It is not a question which calls for nice judgment. If he defends on the merits, this should be taken as acquiescence. It might well be otherwise if the ground on which the proceedings are alleged to be an abuse of process were different. But in a case of the present kind the Court is not so much protecting its own process as the interests of the defendant.

Accordingly, I would allow Mr. Johnson's appeal on the first question.

The firm's cross-appeal: recoverable heads of damage.

A company is a legal entity separate and distinct from its shareholders. It has its own assets and liabilities and its own creditors. The company's property belongs to the company and not to its shareholders. If the company has a cause of action, this represents a legal chose in action which represents part of its assets. Accordingly, where a company suffers loss as a result of an actionable wrong done to it, the cause of action is vested in the company and the company alone can sue. No action lies at the suit of a shareholder suing as such, though exceptionally he may be permitted to bring a derivative action in right of the company and recover damages on its behalf: see *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)* [1982] Ch. 204 at p. 210. Correspondingly, of course, a company's shares are the property of the shareholder and not of the company, and if he suffers loss as a result of an actionable wrong done to him, then prima facie he alone can sue and the company cannot. On the other hand, although a share is an identifiable piece of property which belongs to the shareholder and has an ascertainable value, it also represents a proportionate part of the Company's net assets, and if these are depleted the diminution in its assets will be reflected in the diminution in the value of the shares. The correspondence may not be exact, especially in the case of a company whose shares are publicly traded, since their value depends on market sentiment. But in the case of a small private company like this company, the correspondence is exact.

This causes no difficulty where the company has a cause of action and the shareholder has none; or where the shareholder has a cause of action and the company has none, as in *Lee v. Sheard* [1956] 1 Q.B. 192, *George Fischer (Great Britain) Ltd. v. Multi Construction Ltd.* [1995] 1 B.C.L.C. 260, and *Gerber Garment Technology Inc. v. Lectra Systems Ltd.* [1997] R.P.C. 443. Where the company suffers loss as a result of a wrong to the shareholder but has no cause of action in respect of its loss, the shareholder can

sue and recover damages for his own loss, whether of a capital or income nature, measured by the diminution in the value of his shareholding. He must, of course, show that he has an independent cause of action of his own and that he has suffered personal loss caused by the defendant's actionable wrong. Since the company itself has no cause of action in respect of its loss, its assets are not depleted by the recovery of damages by the shareholder.

The position is, however, different where the company suffers loss caused by the breach of a duty owed both to the company and to the shareholder. In such a case the shareholder's loss, insofar as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder. These principles have been established in a number of cases, though they have not always been faithfully observed. The position was explained in a well-known passage in *Prudential v Newman* at p. 222:

> "But what [the shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a loss is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only loss is through the company, in the diminution of the value of the net assets of the company, in which he has (say) a 3 per cent. shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company. A simple illustration will prove the logic of this approach. Suppose that the sole asset of a company is a cash box containing £100,000. The company has an issued share capital of 100 shares, of which 99 are held by the plaintiff. The plaintiff holds the key of the cash box. The defendant by a fraudulent misrepresentation persuades the plaintiff to part with the key. The defendant then robs the company of all its money. The effect of the fraud and the subsequent robbery, assuming that the defendant successfully flees with his plunder, is (i) to denude the company of all its assets; and (ii) to reduce the sale value of the plaintiff's shares from a figure approaching £100,000 to nil. There are two wrongs, the deceit practised on the plaintiff and the robbery of the company. But the deceit on the plaintiff causes the plaintiff no loss which is separate and distinct from the loss to the company. The deceit was merely a step in the robbery. The plaintiff obviously cannot recover personally some £100,000 damages in addition to the £100,000 damages recoverable by the company."

It is indeed obvious that (on the given facts, where no consequential losses are stated to have arisen) the defendant cannot be made liable for more than £100,000 in total. It is equally obvious, however, that if the damages were recoverable by the shareholder instead of by the company, this would achieve the same extraction of the company's capital to the prejudice of the creditors of the company as the defendant's misappropriation had done.

It has sometimes been suggested (see, for example, *George Fisher v Multi Construction* at p. 266 g-i) that *Prudential v Newman* is authority only for the proposition that a shareholder cannot recover for the company's loss, and is confined to the case where the defendant is not in breach of any duty owed to the shareholder personally. That is not correct. The example of the safe-deposit box makes this clear. It is the whole point of the somewhat strained business of the key. The only reason for this is to demonstrate that the principle applies even where the loss is caused by a wrong actionable at the suit of the shareholder personally.

Prudential v Newman was followed in *Stein v. Blake* [1998] 1 All ER 724, where the facts bore some resemblance to the illustration in the earlier case. The defendant was a 50% shareholder and the sole director of a group of companies ("the old companies"). The plaintiff, who was the other 50%

shareholder, alleged that, in breach of fiduciary duty, the defendant had misappropriated the assets of the old companies by purchasing them at an undervalue and transferring them to other companies in his sole ownership. The plaintiff, who could have brought a derivative action on behalf of the old companies, chose instead to bring a personal action, claiming that he had been deprived of the opportunity to sell his shares in the old companies at their proper value and had suffered personal loss. The Court of Appeal set aside an earlier grant of leave to appeal from the Judge's order striking out the plaintiff's action.

The plaintiff sought to distinguish *Prudential v Newman* by arguing that the defendant was in breach of a duty owed to him personally. But, as I pointed out, that was not the problem. The problem was that the only conduct relied upon as constituting a breach of that duty was the misappropriation of assets belonging to the old companies, so that the only loss suffered by the plaintiff consisted of the diminution in the value of his shareholding which reflected the depletion of the assets of the old companies. The old companies had their own cause of action to recover their loss, and the plaintiff's own loss would be fully remedied by the restitution to the companies of the value of the misappropriated assets. It was not alleged that the plaintiff had been induced or compelled to dispose of his shares in the companies; he still had them. If he were allowed to recover for the diminution in their value, and the companies for the depletion of their assets, there would be double recovery. Moreover, if the action were allowed to proceed and the plaintiff were to recover for the lost value of his shares, the defendant's ability to meet any judgment which the old companies or their liquidators might obtain against him would be impaired to the prejudice of their creditors. The plaintiff would have obtained by a judgment of the court the very same extraction of value from the old companies at the expense of their creditors as the defendant was alleged to have obtained by fraud. *Heron International Ltd. v. Lord Grade* [1983] B.C.L.C. 244 was a case on the other side of the line. In the course of a contested take-over bid, the directors of the target company who owned a majority of the company's voting shares were alleged, in breach of their duties both to the company and to its shareholders, to have accepted proposals which would reduce the value of the company's assets and hence of its shares and induce the shareholders to accept the lower of two rival offers. The Court of Appeal granted the shareholders injunctive relief. It observed out that the decision of the directors, if implemented, would cause loss in two directions. First, the company would suffer loss to the extent that the value of its assets would be depreciated. That loss would be borne exclusively by the company. It was not a loss in respect of which the shareholders could recover, even if the market value of their shares fell in consequence. The other loss would be to the pockets of the shareholders because they were deprived of the opportunity of accepting the higher offer. That loss would be suffered exclusively by the shareholders. It was not a loss to the coffers of the company, which would remain totally unaffected. That could readily be demonstrated. If, as a result of the decision of the board which was impugned, the take-over went through and the entire shareholding in the company became vested in one bidder at a lower price than was available from the other, the recovery of damages by the company would not` compensate the former shareholders for their loss. Only a direct action by those shareholders in their own right, and not in right of the company, could provide the necessary compensation.

In *R.P. Howard Ltd. v. Woodman Matthews and Co.* [1983] B.C.L.C. 117 a company and its principal shareholder brought an action in negligence against a firm of solicitors, alleging that, as a result of the firm's failure to advise an application for a new tenancy under the Landlord and Tenant Act 1954, the company had been obliged to accept a new lease on terms less favourable than those it would have obtained under the Act. In addition, the principal shareholder was obliged to agree that he would not sell his controlling interest in the company without the landlord's consent. The Judge (Staughton J.) distinguished *Prudential v Newman* on the ground that the shareholder was not seeking to recover a sum which merely reflected the loss suffered by the company but his own independent loss because his shares were less easily saleable and therefore had a lesser market value. This is capable of being misunderstood, but was correct on the facts, since the shareholder's claim was rightly limited to the loss arising from the requirement to obtain the landlord's consent to any sale of the shares. This was additional to and did not reflect the loss suffered by the company as a result of the terms of the new lease. The shareholder made no claim on his own account in respect of the diminution in the value of his shares due to this.

In *Barings plc v. Coopers v. Lybrand* [1997] 1 BCLC 427 a parent company, brought an action in negligence against the auditors of a wholly-owned subsidiary. Leggatt L.J. correctly distinguished both *Prudential v Newman*, where the shareholder had no independent cause of action of his own, and *George Fisher v Multi Construction*, where the company had none. Here each of them had its own cause of action. But he stated (at p. 435b-e) that if the shareholder suffered loss as a result of a breach of duty on

the part of the defendant owed to it, it cannot be disentitled from suing merely because the damages claimed would or might include damages for which the defendant was liable to the company. There was, he said, no legal principle which debarred a holding company from recovering damages for loss in the value of its subsidiaries resulting directly from the breach of a duty owed to the holding company as distinct from a duty owed to the subsidiaries. I do not accept this as correct.

In *Christensen v.* Scott [1996] 1 N.Z.L.R. 273 the company carried on the business of potato farming on tenanted land. The landlord defaulted on a mortgage of the land and the mortgagee entered into possession and exercised its power of sale. Access to the standing crop was refused and the company was unable to harvest it, with disastrous financial consequences. The company went into liquidation and receivership, and the receiver and the liquidator brought proceedings for negligence against the company's professional advisers. The action was settled. The shareholders, who had guaranteed the company's debts, opposed the settlement, alleging that the sums offered by way of settlement were totally inadequate. In due course they brought their own proceedings, alleging that the defendants owed duties of care to them personally. They claimed damages representing the diminution in the value of their shareholdings arising from the defendants' negligence. The judge held that such damages reflected the company's loss and could not be recovered by the shareholders. The Court of Appeal of New Zealand allowed the shareholders' appeal.

In giving the judgment of the Court, Thomas J. distinguished *Prudential v Newman* on the ground that it did not necessarily exclude a claim brought by a shareholder to whom a separate duty was owed and who suffered his own personal loss as a result of that breach of duty. So far, of course, this is correct: *Heron* and *Howard* are just such cases. The Judge observed that the fact that the loss was also suffered by the company did not mean that it was not also a personal loss suffered by the shareholder. "Indeed", he added

> "the diminution in the value of Mr. and Mrs. Christensen's shares in the company is by definition a personal loss and not a corporate loss. The loss suffered by the company is the loss of the lease and the profit which would have been obtained from harvesting the potato crop. That loss is reflected in the diminution in the value of Mr. and Mrs. Christensen's shares. They can no longer realise their shares at the value they enjoyed prior to the alleged default of their accountants and solicitors."

I cannot accept this reasoning as representing the position in English law. It is of course correct that the diminution in the value of the plaintiffs' shares was by definition a personal loss and not the company's loss, but that is not the point. The point is that it merely reflected the diminution of the company's assets. The test is not whether the company could have made a claim in respect of the loss in question; the question is whether, treating the company and the shareholder as one for this purpose, the shareholder's loss is franked by that of the company. If so, such reflected loss is recoverable by the company and not by the shareholders.

Thomas J. acknowledged that double recovery could not be permitted, but thought that the problem did not arise where the company had settled its claim. He considered that it would be sufficient to make an allowance for the amount paid to the liquidator. With respect, I cannot accept this either. As Hobhouse L.J. observed in *Gerber* (at p. 471), if the company chooses not to exercise its remedy, the loss to the shareholder is caused by the company's decision not to pursue its remedy and not by the defendant's wrongdoing. By a parity of reasoning, the same applies if the company settles for less than it might have done. Shareholders (and creditors) who are aggrieved by the liquidator's proposals are not without a remedy; they can have recourse to the companies Court, or sue the liquidator for negligence.

But there is more to it than causation. The disallowance of the shareholder's claim in respect of reflective loss is driven by policy considerations. In my opinion, these preclude the shareholder from going behind the settlement of the company's claim. If he were allowed to do so then, if the company's action were brought by its directors, they would be placed in a position where their interest conflicted with their duty; while if it were brought by the liquidator, it would make it difficult for him to settle the action and would effectively take the conduct of the litigation out of his hands. The present case is a fortiori; Mr. Johnson cannot be permitted to challenge in one capacity the adequacy of the terms he agreed in another.

Reflective loss extends beyond the diminution of the value of the shares; it extends to the loss of dividends (specifically mentioned in *Prudential*) and all other payments which the shareholder might have obtained from the company if it had not been deprived of its funds. All transactions or putative transactions between the company and its shareholders must be disregarded. Payment to the one diminishes the assets of the other. In economic terms, the shareholder has two pockets, and cannot hold the defendant liable for his inability to transfer money from one pocket to the other. In principle, the company and the shareholder cannot together recover more than the shareholder would have recovered if he had carried on business in his own name instead of through the medium of a company. On the other hand, he is entitled (subject to the rules on remoteness of damage) to recover in respect of a loss which he has sustained by reason of his inability to have recourse to the company's funds and which the company would not have sustained itself.

The same applies to other payments which the company would have made if it had had the necessary funds even if the plaintiff would have received them qua employee and not qua shareholder and even if he would have had a legal claim to be paid. His loss is still an indirect and reflective loss which is included in the company's claim. The plaintiff's primary claim lies against the company, and the existence of the liability does not increase the total recoverable by the company, for this already includes the amount necessary to enable the company to meet it.

On the assumption which we are bound to make for the purpose of this appeal, which is that the firm was in breach of a duty of care owed to Mr. Johnson personally, he is in principle entitled to recover damages in respect of all heads of non-reflective consequential loss which are not too remote. Mr. Johnson's principal complaint is that the firm negligently failed to exercise the Company's option in a manner which would be incontestable. Even if this constituted the breach of a duty owed to Mr. Johnson personally as well as to the Company, there was a single breach which made it impossible for the Company to establish that it had exercised the option without litigation. In the event this delayed by four years the commencement of the development by the Company and the time when the Company could raise money at normal commercial rates of interest on the security of the land and commence the proposed development. Damages in respect of these heads of damage are recoverable by the Company, and insofar as they are reflected in the diminution in the value of Mr. Johnson's shares in the Company are not recoverable by him.

There is a subsidiary complaint, that the firm represented both to the Company and to Mr. Johnson personally that the Chancery proceedings were certain of success and that judgment would be obtained within a relatively short time. These are separate representations which may be separately sued upon by each representee. Insofar as Mr. Johnson relied upon the representation made to him and suffered a separate and distinct loss qua representee and not merely qua shareholder or potential recipient of money from the Company, he is entitled to recover.

Lord Bingham of Cornhill has identified the various heads of financial loss alleged in the Statement of Claim. I agree with his analysis and do not wish to add anything except in relation to Mr. Johnson's pension. Mr. Johnson claims that, but for its lack of funds resulting from the firm's failure to exercise the option properly, the Company would have continued to make contributions to Mr. Johnson's pension scheme. For the reasons I have endeavoured to state, Mr. Johnson cannot recover the amount of the contributions which the Company would have made if it had had the necessary funds; this merely reflects the Company's loss and is included in its own claim. Nor can Mr. Johnson claim interest in respect of the lost contributions for the same reason. But Mr. Johnson's claim in respect of the enhancement of his pension is a different matter. The problem here is one of remoteness of damage, not reflective loss, for the loss (or strictly the net loss) is one which the Company could not have sustained itself. Had Mr. Johnson carried on business in his own name instead of through the medium of the Company, then (subject only to the question of remoteness) he would have been entitled to recover a sum representing the lost increase in the value of his pension after giving credit for the amount saved in respect of the contributions and interest. Such loss is separate and distinct from the loss suffered by the Company, and while Mr. Johnson's claim to recover it faces obvious difficulties it should not be struck out at this stage. But if he does establish his claim, he will have to give credit for the contributions which would have been required, whether by the Company (reflective loss) or himself (which he has saved) together with interest thereon.

For the reasons given by Lord Bingham of Cornhill, I too would strike out Mr. Johnson's claims to damages for mental distress and anxiety and aggravated damages.

Accordingly, I would dismiss the cross-appeal while varying the order of the Court of Appeal in the manner proposed.

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