# Exhibit 6

A House of Lords

# Johnson *v* Gore Wood & Co (a firm)

2000 July 17, 19, 20; Dec 14

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

B *Company — Shareholder — Rights — Action by company for damages for breach of duty — Subsequent action by majority shareholder in respect of personal losses sustained — Whether losses recoverable where not merely reflective of company's losses*

*Damages — Contract — Breach — Measure of damages — Whether damages for mental distress and anxiety recoverable*

*Estoppel — Convention, by — Underlying assumption — Validity of test*

C *Practice — Pleadings — Striking out — Abuse of process — Company bringing action against solicitors for damages for professional negligence — Action compromised — Majority shareholder subsequently bringing action in respect of personal losses sustained — Whether question of abuse of process to be judged broadly on merits*

The plaintiff, a businessman, conducted his affairs through a number of
D companies, including W Ltd, in which he held all but two of the issued shares. On behalf of W Ltd he instructed the defendants, a firm of solicitors, who from time to time also acted on behalf of himself personally and of others of his companies, to act for W Ltd in connection with a proposed purchase of land, which it planned to develop. It had an option to purchase the land, and the defendants were instructed to serve a notice exercising the option. Service of the notice was followed by a dispute as to its validity and consequent proceedings in the Chancery Division, where an
E order for specific performance was made against the vendor. By the time the conveyance was completed W Ltd had suffered substantial loss because of the cost of the Chancery proceedings, in which the vendor had been legally aided, its inability to recover damages and costs from the vendor, the collapse of the property market and interest charges that it had incurred. In January 1991 it started proceedings against the defendants for professional negligence in connection with the exercise of the
F option. Before the action came to trial, solicitors representing W Ltd notified solicitors acting for the defendants that the plaintiff also had a personal claim against the defendants, arising out of the same matters, which he would pursue in due course. Subsequently, a solicitor acting for the plaintiff and a solicitor representing the defendants discussed the plaintiff's personal claim on the telephone and the plaintiff's solicitor explained that it had been thought better to wait until the company's claim had been concluded before dealing with the personal claim. An overall settlement of
G W Ltd's claim and the plaintiff's claim was discussed, as was a settlement of the plaintiff's claim. W Ltd's proceedings were eventually compromised during the trial on payment to W Ltd of a substantial proportion of the sum claimed by it. In April 1993 the plaintiff issued a writ against the defendants. In December 1997 the defendants applied for the action to be struck out as an abuse of the process of the court. They also sought determination of preliminary issues as to whether they had owed the plaintiff a duty of care and whether the damages claimed by him were in
H principle recoverable on the facts pleaded. The judge declined to strike out the plaintiff's claim, holding that the defendants were estopped by convention from contending that the plaintiff's action was an abuse of process. He further held that the heads of damage pleaded were not irrecoverable as a matter of law in respect of the breaches alleged by the plaintiff. The Court of Appeal, on appeal by the defendants, ordered that the judge's order be set aside in so far as he had dismissed

the defendants' application to strike out the proceedings as an abuse of the process of the court but not otherwise.

On appeal by the plaintiff and cross-appeal by the defendants—

*Held*, (1) allowing the appeal, that there was a public interest in the finality of litigation and in a defendant not being vexed twice in the same matter; but that whether an action was an abuse of process as offending against that public interest should be judged broadly on the merits taking account of all the public and private interests involved and all the facts of the case, the crucial question being whether the plaintiff was in all the circumstances misusing or abusing the process of the court; and that, in all the circumstances, the plaintiff's action was not abusive (post, pp 30H–31F, 32C–33A, 34C–G, 38F–G, 42D–F, 50H, 58G–60C, F–61A).

*Henderson v Henderson* (1843) 3 Hare 100 considered.

Observations as to estoppel by convention (post, pp 33C–G, 38H–41C, 60H–61A).

(2) Dismissing the cross-appeal but varying the order of the Court of Appeal, that the plaintiff was in principle entitled to recover in respect of any loss that he had himself suffered that was not merely a reflection of the loss suffered by W Ltd; that, save for his claims in respect of the dimunition in value of his pension and of his majority shareholding in W Ltd in so far as they were merely a reflection of W Ltd's loss, the plaintiff's heads of claim in respect of quantifiable damage should not be struck out; that damages for breach of contract could not generally include damages for mental distress and anxiety; that (Lord Cooke of Thorndon dissenting) the plaintiff's claim for damages under that head should be struck out; and that his claim for aggravated damages should also be struck out (post, pp 35E–37A, D, 38C–D, 41E–42C, 48B–D, 50G, 55D–56B, 67C, G–68C).

*Addis v Gramophone Co Ltd* [1909] AC 488, HL(E) applied.

Decision of the Court of Appeal [1999] Lloyd's Rep PN 91; [1999] PNLR 426 reversed in part.

The following cases are referred to in their Lordships' opinions:

*Addis v Gramophone Co Ltd* [1909] AC 488, HL(E)

*Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84; [1981] 3 WLR 565; [1981] 3 All ER 577, CA

*Arnold v National Westminster Bank plc* [1991] 2 AC 93; [1991] 2 WLR 1177; [1991] 3 All ER 41, H L(E)

*Ashmore v British Coal Corpn* [1990] 2 QB 338; [1990] 2 WLR 1437; [1990] 2 All ER 981, CA

*Bailey v Bullock* [1950] 2 All ER 1167

*Barings plc v Coopers & Lybrand* [1997] 1 BCLC 427, CA

*Barrow v Bankside Members Agency Ltd* [1996] 1 WLR 257; [1996] 1 All ER 981, CA

*Bradford and Bingley Building Society v Seddon* [1999] 1 WLR 1482; [1999] 4 All ER 217, CA

*Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyd's Rep 132, CA

*Brisbane City Council v Attorney General for Queensland* [1979] AC 411; [1978] 3 WLR 299; [1978] 3 All ER 30, PC

*Brown v Waterloo Regional Board of Comrs of Police* (1982) 136 DLR (3d) 49; (1983) 150 DLR (3d) 729

*C (A Minor) v Hackney London Borough Council* [1996] 1 WLR 789; [1996] 1 All ER 973, CA

*Christensen v Scott* [1996] 1 NZLR 273

*Clark Boyce v Mouat* [1994] 1 AC 428; [1993] 3 WLR 1021; [1993] 4 All ER 268, PC

*Fischer (George) (Great Britain) Ltd v Multi Construction Ltd* [1995] 1 BCLC 260, CA

*Foss v Harbottle* (1843) 2 Hare 461

*Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443, CA

A *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510; [1977] 3 All ER 54
*Greenhalgh v Mallard* [1947] 2 All ER 255, CA
*Halliday v Shoesmith* [1993] 1 WLR 1, CA
*Hayes v James & Charles Dodd* [1990] 2 All ER 815, CA
*Henderson v Henderson* (1843) 3 Hare 100
*Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145; [1994] 3 WLR 761; [1994] 3 All ER 506, HL(E)
B *Heron International Ltd v Lord Grade* [1983] BCLC 244, CA
*Hobbs v London and South Western Railway Co* (1875) LR 10 QB 111
*Home and Colonial Insurance Co Ltd, In re* [1930] 1 Ch 102
*House of Spring Gardens Ltd v Waite* [1991] 1 QB 241; [1990] 3 WLR 347; [1990] 2 All ER 990, CA
*Howard (R P) Ltd v Woodman Matthews & Co* [1983] BCLC 117
*Hunter v Chief Constable of the West Midlands Police* [1982] AC 529; [1981] 3 WLR
C 906; [1981] 3 All ER 727, HL(E)
*Lee v Sheard* [1956] 1 QB 192; [1955] 3 WLR 951; [1955] 3 All ER 777, CA
*Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20; [1997] 3 WLR 95; [1997] 3 All ER 1, HL(E)
*Manson v Vooght* [1999] BPIR 376, CA
*Mouat v Clark Boyce* [1992] 2 NZLR 559
*President of India v Lips Maritime Corpn* [1988] AC 395; [1987] 3 WLR 572; [1987] 3 All ER 110, HL(E)
D *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204; [1982] 2 WLR 31; [1982] 1 All ER 354, CA
*Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344; [1995] 3 WLR 118; [1995] 3 All ER 268, CA
*Stein v Blake* [1998] 1 All ER 724, CA
*Talbot v Berkshire County Council* [1994] QB 290; [1993] 3 WLR 708; [1993] 4 All ER 9, CA
E *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd (Note)* [1982] QB 133; [1981] 2 WLR 576; [1981] 1 All ER 897
*Vervaeke (formerly Messina) v Smith* [1983] 1 AC 145; [1982] 2 WLR 855; [1982] 2 All ER 144, HL(E)
*Walker v Stones* [2001] QB 902; [2001] 2 WLR 623; [2000] 4 All ER 412, CA
*Watson v Dutton Forshaw Motor Group Ltd* (unreported) 22 July 1998; Court of Appeal (Civil Division) Transcript No 1284 of 1998, CA
F *Watts v Morrow* [1991] 1 WLR 1421; [1991] 4 All ER 937, CA
*Whelan v Waitaki Meats Ltd* [1991] 2 NZLR 74
*Windsor Steam Coal Co (1901) Ltd, In re* [1929] 1 Ch 151, CA
*Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581; [1975] 2 WLR 690, PC

The following additional cases were cited in argument:

G *Allison (Kenneth) Ltd v A E Limehouse & Co* [1992] 2 AC 105; [1991] 3 WLR 671; [1991] 4 All ER 500, HL(E)
*Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853; [1966] 3 WLR 125; [1966] 2 All ER 536, HL(E)
*Compania Portorafti Commerciale SA v Ultramar Panama Inc (The Captain Gregos) (No 2)* [1990] 2 Lloyd's Rep 395, CA
*Farley v Skinner* (unreported) 6 April 2000; Court of Appeal (Civil Division)
H Transcript No 577 of 2000, CA
*Fox v Star Newspaper Co Ltd* [1898] 1 QB 636, CA; [1900] AC 19, HL(E)
*Goodwill v British Pregnancy Advisory Service* [1996] 1 WLR 1397; [1996] 2 All ER 161, CA
*Hall v Governor and Co of the Bank of England* (unreported) 19 April 2000; Court of Appeal (Civil Division) Transcript No 725 of 2000, CA

*Hiscox v Outhwaite* [1992] 1 AC 562; [1991] 2 WLR 1321; [1991] 3 All ER 124, CA; [1992] 1 AC 562; [1991] 3 WLR 297; [1991] 3 All ER 641, HL(E)
*Ketteman v Hansel Properties Ltd* [1987] AC 189; [1987] 2 WLR 312; [1987] 1 All ER 38, HL(E)
*L R v Witherspoon* [1999] Lloyd's Rep PN 401, CA
*MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 2 BCLC 659, CA
*Norwegian American Cruises A/S v Paul Mundy Ltd (The Vistafjord)* [1988] 2 Lloyd's Rep 343, CA
*Verderame v Commercial Union Assurance Co plc* [1992] BCLC 793, CA
*Wapshott v Davis Donovan & Co* [1996] PNLR 361, CA

APPEAL and CROSS-APPEAL from the Court of Appeal

This was an appeal by the plaintiff, William Henry John Johnson, by leave of the House of Lords (Lord Hope of Craighead, Lord Clyde and Lord Millett) given on 25 May 1999 and a cross-appeal by the defendants, Gore Wood & Co (a firm), by leave of the House of Lords (Lord Hope of Craighead, Lord Clyde and Lord Millett) given on 3 November 1999 from a judgment of the Court of Appeal (Nourse, Ward and Mantell LJJ) given on 12 November 1998.

By its judgment, the Court of Appeal had allowed an appeal by the defendants from an order of Pumfrey J dated 21 May 1998. The judge, on application by the defendants, had declined to strike out the plaintiff's claim against them. On preliminary issues ordered by Sir Richard Scott V-C sitting as an additional judge of the Queen's Bench Division, the judge had determined that (a) the facts and matters relied on by the plaintiff as constituting breaches of duty by the defendants were capable of constituting the breach of a contractual, tortious or fiduciary duty owed as a matter of law by the defendants to the plaintiff and (b) the heads of damage alleged in paragraphs 23 and 24 of the re-amended statement of claim were not irrecoverable as a matter of law as damages for the pleaded breaches alleged by the plaintiff. The Court of Appeal ordered that his judgment be set aside in so far as he had dismissed the defendants' application to strike out the proceedings as an abuse of the process of the court but not further or otherwise. It held that one head of damage, namely diminution in the value of the plaintiff's shareholding in Westway Homes Ltd, should be struck out of the re-amended statement of claim.

The facts are stated in the opinion of Lord Bingham of Cornhill.

*Roger ter Haar* QC and *Simon Howarth* for the plaintiff. The Court of Appeal correctly identified the underlying principle in all cases of abuse of process as that articulated by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 536C–D. The Court of Appeal's decision is inconsistent with *Bradford and Bingley Building Society v Seddon* [1999] 1 WLR 1482. No "additional element" of the type suggested in that case is present here, nor was any such additional element identified by the Court of Appeal. The Court of Appeal appears to have regarded it as being for the plaintiff to establish that special circumstances existed; the approach in *Bradford and Bingley* is to be preferred as being more consonant with justice and consistent with Lord Diplock's dicta in *Hunter* and dicta in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, 590 and *Brisbane City Council v Attorney General for Queensland* [1979] AC 411, 425. May LJ in *Manson v Vooght* [1999] BPIR 376, 387–

388, in a dictum correctly stating the effect of the authorities, said that "it may in particular cases be sensible to advance cases separately". This was such a case. The Court of Appeal appears to have regarded the mere fact of "re"-litigation as sufficient to amount to abuse of process: compare *Bradford and Bingley Building Society v Seddon* [1999] 1 WLR 1482, 1492G. In effect, this equated the case to one of issue estoppel, which it is not. With abuse of process, one is looking at much broader issues of justice; many cases involve a collateral attack on a previous decision. If necessary, *Talbot v Berkshire County Council* [1994] QB 290 should be overruled. [Reference was also made to *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853.]

Further, the Court of Appeal gave no or inadequate consideration to the reasons put forward in the plaintiff's affidavit explaining the reasons for the course adopted. Its reference to full legal aid having been available "long before the trial" was incorrect. The plaintiff was obliged to have regard, and did have regard, to the interests of the other shareholders and creditors of the company in reaching his decision. The Court of Appeal was wrong to hold that the plaintiff was "in control throughout". His options were severely limited.

It appears, although it is not entirely clear, that the Court of Appeal accepted that "most practitioners [in 1992] would not have thought the rule [in *Henderson v Henderson* (1843) 3 Hare 100] applied at all". If that is so, then the pursuit of the personal claim separately from the company claim was not an abuse of process: see per Lord Kilbrandon in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, 590. Whilst the diligence or lack of diligence of a legal adviser may not be relevant in a true case of issue estoppel, it is relevant where the court is considering questions of abuse of process (as here) or exercise of its discretion. On the other hand, if the Court of Appeal took the view that most practitioners in 1992 would have thought that the rule in *Henderson v Henderson* applied, then the defendants could and should have taken the point then and it was unconscionable for them to take it for the first time in December 1997. Moreover, the consequence will be that court time will not be saved by striking out this action as suggested by the Court of Appeal [1999] Lloyd's Rep PN 91, 114; on the contrary, it will now be occupied by further and more complicated litigation against the solicitors and counsel advising the plaintiff in respect of his personal claim in 1992. Further, in deciding whether the commencement of the present proceedings was an abuse of process the applicable principles are those applying in 1992, not those current in 1998; accordingly, the Court of Appeal was wrong to take into account, "the current reform of civil justice". In deciding whether the present proceedings constitute an abuse of process it is relevant to consider not only the plaintiff's conduct but also that of the defendants. The Court of Appeal's approach is contrary to recent comments made in *L R v Witherspoon* [1999] Lloyd's Rep PN 401, where the guidance in *Halliday v Shoesmith* [1993] 1 WLR 1 was approved and followed. The Court of Appeal in the present case appears to have considered that there were conflicting decisions of the court as to the proper approach to be adopted in the circumstances, comparing, at pp 113–114, *Halliday v Shoesmith* with *Goodwill v British Pregnancy Advisory Service* [1996] 1 WLR 1397. The true rule, which both *Halliday* and *Goodwill* support, is that where a case is

hopeless the court should accede to an application to strike out however late it is made because it is bound to save time and costs. If, however, the claim is arguable in law then a belated application to strike it out without a trial on the merits should only be entertained on receiving a valid explanation for the delay in making it. The Court of Appeal accepted, that the reason for the point not being taken earlier was that it had not been considered until Mr Steinfeld was instructed. The plaintiff also accepts that that is the explanation for the delay. It is a bad reason for failure to take such a point: see *L R v Witherspoon* [1999] Lloyd's Rep PN 401 and *Ketteman v Hansel Properties Ltd* [1987] AC 189, 219–220. There was accordingly no proper reason for the delay.

In the circumstances, the present proceedings do not constitute an abuse of process. Applying the dictum of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 536C, bringing them is not "manifestly unfair" to the defendants, because they settled the original company proceedings on the basis that the plaintiff's personal claim would be litigated or settled later. To allow this claim to be pursued would not "bring the administration of justice into disrepute among right-thinking people" given that the defendants settled the company proceedings on the basis that they knew that the personal claim would be brought, that they obtained valuable concessions on the basis that it would he litigated or settled later and that both they and the plaintiff acted for a considerable time on a common assumption that it would be made and would be entertained by the court. If it is necessary for the plaintiff to show "special circumstances", these matters constitute them. The plaintiff is not the same party as the company, nor are his claims the same.

To apply the rule in *Henderson v Henderson* 3 Hare 100 to a party in the plaintiff's position is a substantial and unnecessary extension of the law in so far as it applies to issue estoppel. So far as that doctrine is concerned, it is desirable that it should be clearly and unambiguously applied so that parties know where they stand and should not depend on questions as to whether an action "should" have been joined with another. In so far as wider considerations apply in respect of abuse of process, the mere fact that the plaintiff could more conveniently have joined in the earlier action against the defendant does not render the later claim an abuse of process: see *C (A Minor) v Hackney London Borough Council* [1996] 1 WLR 789 and *Bradford and Bingley Building Society v Seddon* [1999] 1 WLR 1482. In these circumstances the court is concerned with wider questions of justice and fairness than the strict ratio of *Henderson v Henderson*. In so far as the Court of Appeal extended the rule in *Henderson v Henderson* by treating this case as an instance of issue estoppel they were wrong to do so. In so far as they considered it to be a case of abuse of process going beyond *Henderson v Henderson* they failed to consider the matter in the round. Had they done so, they should have concluded that the significant differences between the company and the personal claims and the reason for proceeding first with the company claim justified (or excused) the course taken.

One of the main reasons for the rule in *Henderson v Henderson* is the prevention of the risk that different courts seized of different actions dealing with the same subject matter and raising the same issues will come to different conclusions. This would be unfair to the parties, particularly to an initially successful party who fails in a subsequent proceeding, and likely to

A bring the administration of justice into disrepute. It is self-evident that where there is a settlement of the first action these dangers fall away. It is open to a party fearful of a second action following settlement of the first to negotiate terms of settlement that preclude his adversary from issuing further proceedings. To hold that the rule applies where there has been a compromise of the first action gives rise to practical problems. Is the rule to
B apply (and if so how) in a situation where two actions are started and one is settled by a prompt payment into court? There is no reason why the second action should be regarded as an abuse of process. The defendant is aware of both actions, has chosen to settle one and has thereby removed the risk of inconsistent results. No one could have contemplated in the instant case that as soon as the company action was settled the plaintiff's personal action should immediately have been struck out.

C As to estoppel by convention, the judgment of the Court of Appeal confuses it with estoppel by representation, is contrary to previous binding authority and is illogical and contrary to principle. The defendants knew that another action was likely to be commenced and also knew that it would involve repetition of allegations made in the company action. An objection to a second action per se (i e, to its very existence rather than to the time
D when it was launched or the detail of the case made in it) would necessarily always be open to the defendant. Accordingly, such an objection could and should have been perceived at the time of the settlement agreement and the defendants could and should expressly have reserved their right to take it if they had wished to preserve such a right. There was unchallenged evidence that the plaintiff would not have agreed to the undertakings he gave in the settlement agreement if there had been any intimation that this point would
E be taken. Silence on the matter amounted to an undertaking not to take it. That the defendants not only kept silent but also obtained concessions in relation to the second action shows that the parties were proceeding on the assumption that a second action could be brought if commenced in time and properly constituted. Otherwise, the concessions extracted from the plaintiff make no sense.

F The Court of Appeal appear to have misunderstood or misconstrued the meaning of "common assumption" in this context. They identified, at p 113, as the assumption on which the estoppel was based as being that if the rule in *Henderson v Henderson* did apply it would not be raised. That formulation was not suggested by the plaintiff and he disputes its accuracy. "Assume" means "take as being true, for purpose of argument or action": see *Concise Oxford English Dictionary*, 7th ed (1982). In the present case, for the
G purpose of entering into the settlement agreement the parties took it as being true that the plaintiff could bring a second action against the defendants provided that it was brought within time and disclosed a reasonable cause of action. There could not have been any relevant assumption in relation to *Henderson v Henderson* because no one had spotted the point. The assumption must, therefore, be formulated in more general terms. The court
H should not inquire into the reasons why the assumption was made once it is satisfied that it existed and was relied on. If the Court of Appeal were correct, a distinction would be drawn between a case where the parties form their assumption because a point is overlooked and one where they notice the point but mistakenly believe that it is a bad one. In consequence of this distinction, an estoppel would arise in the latter case but not in the former.

Such a distinction is not logical or justifiable in principle. Further, it is not clear how any rule involving such a distinction would apply where party A misses the point entirely and party B spots the point but, thinking it a bad one, does not mention it to party A. The parties then proceed on the assumption that the point is not available but party B then changes his mind as to its merits. There ought to be an estoppel, because the important factor that suggests (as a matter of broad justice) the application of an estoppel would be present. The parties would both have acted in good faith on the basis that the point was not available. [Reference was made to *Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, 122; *Ashmore v British Coal Corpn* [1990] 2 QB 338; *Barrow v Bankside Members Agency Ltd* [1996] 1 WLR 257; *Hiscox v Outhwaite* [1992] 1 AC 562 and *Kenneth Allison Ltd v A E Limehouse & Co* [1992] 2 AC 105.]

*Alan Steinfeld* QC and *Elizabeth Overy* for the defendants. The Court of Appeal was correct to hold that the rule in *Henderson v Henderson* 3 Hare 100 prima facie applies to these proceedings. In so far as the principle covers matters that might have been, but were not, brought forward, it is now well established that it depends not on a strict application of the doctrine of res judicata but on the public policy that requires that there should be an end to litigation and so treats actions falling within it as an abuse of process: see *Talbot v Berkshire County Council* [1994] QB 290, 296D. This case is concerned with that wider, public policy, aspect of the *Henderson v Henderson* principle. The policy itself has assumed greater importance with the much greater stress now laid on case management under the Civil Procedure Rules. It is not possible for the court properly to direct the parties how to manage the case unless both it and the parties know the full range of the issues that lie between the parties.

There are three vices in litigating or relitigating issues that have already been litigated or should have been, any one of which is sufficient to constitute an abuse of process. (i) It is a substantial waste of court time and is unfair to other litigants; to that extent the rule in *Henderson v Henderson* is founded in public policy. The courts should be wary of finding that the parties agreed that the rule should not apply. (ii) It subjects, or potentially subjects, the defendant to more than one set of proceedings, which is prima facie unfair. It substantially increases costs, as in the present case. (iii) In many cases, relitigation may constitute a collateral attack on the outcome of the previous proceedings. There are two objections to this: it offends against the principle that there should be an end of litigation, and it could result in conflicting decisions. Here, where the plaintiff takes the view that the amount recovered by the company in its proceedings was not enough to put it back on its feet, all three vices are present.

The fact that the roots of the principle lie in public policy offers guidance both on the question whether it should be applied in circumstances where it is contended that a party could and should have brought his case forward at an earlier stage but the factual situation differs from the precise situation outlined in *Henderson v Henderson* 3 Hare 100 and on the question of the exercise of discretion. The question of prima facie application is ultimately whether to permit the claim to proceed would amount to a misuse of procedure in the way indicated by Lord Diplock in *Hunter v Chief Constable*

*of the West Midlands Police* [1982] AC 529, 536C. The existence of the wider *Henderson v Henderson* principle and its foundation in public policy were clearly recognised in *Vervaeke (formerly Messina) v Smith* [1983] 1 AC 145, 157F, 163B–E. [Reference was also made to *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 and *Brisbane City Council v Attorney General for Queensland* [1979] AC 411.]

*Bradford and Bingley Building Society v Seddon* [1999] 1 WLR 1482 suggests that in the application of *Henderson v Henderson* 3 Hare 100 a distinction is to be drawn between cases in which the narrower principle is relevant, where the principle applies unless there are special circumstances, and those in which the wider principle is invoked, where it is for the person alleging abuse of process to establish that when all the circumstances are weighed there will be found to be an abuse. No sufficient warrant for such a distinction is to be found in any of the former authorities or was made in the present case. Public policy points clearly against relitigation and thus a prima facie abuse exists equally in any relitigation case. The need for a careful examination of all the circumstances was recognised in both *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 and *Brisbane City Council v Attorney General for Queensland* [1979] AC 411, but with no indication that something over and above the abuse normally resulting from relitigation had to be shown. *Barrow v Bankside Members Agency Ltd* [1996] 1 WLR 257 involved consideration of the wider *Henderson v Henderson* principle and is not properly to be relied on in the way in which it was relied on in *Bradford and Bingley Building Society v Seddon* [1999] 1 WLR 1482. Auld LJ seems to suggest that the House of Lords in *Arnold v National Westminster Bank plc* [1991] 2 AC 93 was dealing with issue estoppel in its strict form and not deciding anything in relation to the wider principle based on abuse of process. It is clear, however (see at pp 106B and 108G–H), that their Lordships were not drawing any distinction between cases in which the issue had actually been decided and those in which the relevant point might have been brought forward but was not. As *Talbot v Berkshire County Council* [1994] QB 290 shows, that is the very distinction between the narrower and the wider aspects of the principle. *Bradford and Bingley Building Society v Seddon* [1999] 1 WLR 1482 should, therefore, be overruled in so far as it requires a different approach to the two types of case. Any balancing process comes only at the stage of the exercise of discretion.

The Court of Appeal was correct to hold that the rule in *Henderson v Henderson* 3 Hare 100 applies to a privy of the claimant in the first action as it would to the claimant himself and that the plaintiff was a privy of Westway Homes Ltd ("WWH") for the purposes of the rule. As to privity generally, an abuse of process objection based on relitigation may be taken against a person who is a privy of the original claimant in the sense of having a common interest in the determination of the original action: see *Ashmore v British Coal Corpn* [1990] 2 QB 338; *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241 and *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] BCLC 793. There is no logical justification for distinguishing between the position of a privy in a case of estoppel under the narrower *Henderson v Henderson* principle and his position in a case of abuse of process under the wider principle. It follows that the general rule should be that in the latter case as in the former there is no need to show any special or exceptional circumstances before a privy may be bound. The real

question is who is a privy of the original party for these purposes. [Reference was made to *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853.] A

The plaintiff contended in the Court of Appeal that the application of the wider *Henderson v Henderson* 3 Hare 100 principle to privies was an extension that could have dramatic and unfair consequences and so should not be made. If it is an extension at all, rather than a case not previously considered but plainly within the original rule, then it is an extension that ensures a consistent approach to all aspects of *Henderson v Henderson*. The difficulties identified by the plaintiff in the Court of Appeal all stem from a choice by two closely related parties bringing claims covering substantially the same issues to proceed independently. In such circumstances, the answer lies in proper case management. Both claims have in fact been put forward and it is for the parties and the court to manage the litigation in such a way that the court's process is not abused by exposing the defendants to relitigation. The argument does not show a basis for the House of Lords to determine that the *Henderson v Henderson* principle does not apply to a privy. The misuse of procedure test is satisfied. B C

As to privity specifically in this case, the test in *Gleeson v J Whippell & Co Ltd* [1977] 1 WLR 510, 515F is correct. The essence of the plaintiff's case is that WWH was his alter ego. There is the closest possible identification between him and WWH, the original party. In substance they are one and the same for present purposes, and it is just that the plaintiff should be bound under the principle binding privies. Further, he relies on allegations that the defendants owed him duties in exactly the same terms as they did to WWH and were in breach of those duties in exactly the same way. The Court of Appeal [1999] PLR 426, 462F rightly said that those allegations encompass "practically the whole of the ground traversed for six weeks" in the company proceedings. The plaintiff is fairly and squarely covered by the approach of Stuart-Smith LJ in *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241, 254A–B. If the company action had gone on to judgment and been dismissed on a finding that the defendants had not been negligent, it is inconceivable that he would not have been estopped by that judgment in the same way as the plaintiff in the *Spring Gardens* case was so as to preclude his bringing his personal claim. He is therefore to be regarded as a privy of WWH not only as a matter of practical identity but also through his conduct in relation to the company proceedings. D E F

The Court of Appeal was correct to hold that the rule in *Henderson v Henderson* 3 Hare 100 was capable of applying in the situation where the first action was compromised rather than continued through to judgment and that the rule applied in the present case having regard (if necessary) to the stage the company proceedings had reached when they were compromised. The significance of the reference in *Henderson v Henderson* to adjudication is that adjudication is a final form of resolution after consideration of the merits. There is no reason in principle why a compromise should not have the same effect, given that it is equally a final form of resolution of the parties' disputes relating to the particular subject matter after consideration of the merits. There is no basis in public policy for distinguishing the two classes of case. G H

It is immaterial at what stage of the proceedings the compromise is reached. There is no basis on which the plaintiff can say that the trial of the

company proceedings had not got far enough. In any event, the principle in *Henderson v Henderson* 3 Hare 100 should apply where the action has gone beyond the stage at which the court would permit the claimant to discontinue and start again. That will be so where the claimant has opened his case (and a fortiori once, as here, he has closed his case on liability): see *Fox v Star Newspaper Co Ltd* [1898] 1 QB 636; [1900] AC 19. The situation is then comparable with the primary *Henderson v Henderson* case, in which the court and the parties will have full awareness of the material issues on which the court is adjudicating. On any view, the company proceedings had gone far enough for *Henderson v Henderson* to apply.

The Court of Appeal was correct to determine that there were no special circumstances that required that the present action should not be struck out despite the prima facie application of the rule in *Henderson v Henderson* 3 Hare 100. As to the first special circumstance relied on by the plaintiff, namely, his reasons for not bringing his personal claim at the same time as the company claim, all his arguments stem ultimately from his and the company's lack of financial resources. Difficulties in funding litigation do not in themselves amount to special circumstances for the purposes of the *Henderson v Henderson* principle: see *Manson v Vooght* [1999] BPIR 376. Any other approach would involve the risk that a claimant would pursue one head of claim after another as funding for each became available, whether from borrowing, legal aid, a contingency fee arrangement or even the fruits of success on previous heads. Such a process would clearly be oppressive to the defendant.

As to the second special circumstance relied on, namely, the defendants' conduct relating to the plaintiff's personal claim, essentially the matters of conduct amount to no more than that the defendants did not ask the plaintiff to join his claim with that of WWH in the company proceedings, contemplated but did not achieve settlement of the personal claim and did not raise the abuse point until late in the day. Complaint is also made that the defendants are not prepared to make concessions (i e, to admit liability) that would reduce the length of the trial. Save in so far as his conduct may found an estoppel argument, a potential defendant is under no obligation to advise a claimant how to make his claim so that a successful application to strike out on the ground of abuse of process may be avoided. Similarly, a defendant is not obliged to concede points not determined against him so that the claimant cannot be said to be relitigating those issues. The Court of Appeal rightly found that the delay was not a special circumstance.

As to the third special circumstance relied on, namely, the fact that the plaintiff was not warned by his legal advisers of the potential challenge to the personal claim, this should not be visited on the defendants as a special circumstance taking this case out of the *Henderson v Henderson* 3 Hare 100 principle. The mischief of relitigation between the original parties or their privies is the same in either case.

The Court of Appeal was correct to determine that the defendants were not estopped by convention from alleging that the present action was an abuse of the process of the court. The difference on this point between the Court of Appeal and Pumfrey J arose not from any difference as to the applicable law but because on the facts the Court of Appeal held that the common assumption on the basis of which the parties had acted was more limited than Pumfrey J had found. The classic statement of the principle

underlying estoppel by convention on the basis of which both Pumfrey J and the Court of Appeal proceeded is that of Lord Denning MR in *Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, 122. [Reference was also made to *Kenneth Allison Ltd v A E Limehouse & Co* [1992] 2 AC 105, 127D–G.] It is an essential feature of the application of the principle that each party should be aware of the assumption made by the other and that they should conduct their dealings on the basis of those assumptions: see *Norwegian American Cruises A/S v Paul Mundy Ltd (The Vistafjord)* [1988] 2 Lloyd's Rep 343, 351 and *Compania Portorafti Commerciale SA v Ultramar Panama Inc (The Captain Gregos) (No 2)* [1990] 2 Lloyd's Rep 395, 405. It is not sufficient that the assumption is common to both if they are not also both aware that it is common to both; in that sense, the assumption must be not only common but agreed. It is also an essential feature that the estoppel should arise on the basis of an assumption as to facts or law. It does not arise on the basis of a representation by one party to the other either as to fact or as to that party's future conduct: see *The Vistafjord*, p 351 and *Spencer Bower and Turner, Estoppel by Representation*, 3rd ed (1977), p 157, para 157. The inquiry concerns not what a party will do but what a state of affairs is. In *Hiscox v Outhwaite* [1992] 1 AC 562, which led Pumfrey J to his conclusion, there was no departure from those principles. The argument addressed to the Court of Appeal related solely to the facts of the case: see p 565H. The case is no more than an illustration of the application of the principles to particular factual circumstances. To succeed in the present case on the footing of estoppel by convention on the basis of the circumstances of and surrounding the settlement of the company proceedings and the terms of that settlement, the plaintiff needs to show an agreed assumption that as and when he made his personal claim it would not be open to attack as an abuse of process on the basis of *Henderson v Henderson* 3 Hare 100. An agreed assumption that the defendants would not adopt a particular line of attack would not be sufficient. The agreed assumption found by Pumfrey J that "the personal claim would be made, and would be entertained by the court" appears to be an assumption as to the future conduct of the plaintiff and, if it is intended to extend to an assumption that the claim would be considered on its merits, as to the future conduct either of the court or of the defendants. It could not support the estoppel by convention that the judge found.

The Court of Appeal was correct to hold that the facts did not evidence a common assumption of the necessary nature. The fact that the defendants did nothing to indicate that they accepted that the threatened claim was or might be a good one or one capable of being maintained (i e, in this context, a claim that would not be vulnerable to a striking-out application on the ground of abuse of process) and that they would limit the nature of any defences or objections that they might have is fatal to the plaintiff's case. It is in fact inconceivable that there should have been an agreed assumption about possible lines of attack on the plaintiff's present claim at a time when there was no pleading in existence and in view of the fact that the claim as now formulated is very different from the claim then notified. If the plaintiff's personal claim had been statute-barred, there was nothing in the compromise or in the defendants' conduct to give rise to an estoppel that would have prevented them from taking a limitation point in the personal action when it was brought. There is no logical distinction between that and

A any other defence or objection. The position is not affected by bringing into the equation the defendants' delay in making the striking-out application. It is true that when the claim was actually brought and pleaded they became able to assess to some degree whether or not it was an abuse of process. (The position became clearer after completion of service of the plaintiff's factual and expert evidence.) It cannot be said, however, that conduct consisting of
B nothing more than, on the one part, failure to make an application and, on the other, continuing with the action involves a communication between the parties of the fact that each is proceeding on the assumption that the action is not an abuse of process. Delay is to be considered, as it was by the Court of Appeal and Pumfrey J, in relation to the issues of special circumstances and the exercise of the striking-out power.

As to the possibility of an estoppel by representation, if the point is sought
C to be raised, there is nothing in the evidence to show any representation by the defendants to the plaintiff that they would conduct their defence of the action in any particular way or without taking any particular point.

There are no grounds for attacking the Court of Appeal's exercise of its discretion to strike out the plaintiff's claim as an abuse of process. Once the abuse of process has been shown, the court has a duty to put an end to it by
D striking the action out unless in the exercise of its discretion it concludes that its duty to do so is outweighed by other considerations. It "defies common sense" (see *Goodwill v British Pregnancy Advisory Service* [1996] 1 WLR 1397, 1402), and would defeat the general public policy underlying *Henderson v Henderson* 3 Hare 100, to refuse to prevent an abuse of the court's process simply to punish the defendants for their delay. *Goodwill*
E should be preferred to *Halliday v Shoesmith* [1993] 1 WLR 1. It shows that the decision in *Halliday* should be confined to similarly exceptional cases.

"Special circumstances" cannot be resurrected at the discretion stage as contended for by the plaintiff. The points raised are explicit or implicit in the issues already considered and do not support an independent attack on the exercise of discretion. The present action is manifestly unfair to the defendants, who only some years after the settlement of the company
F proceedings became aware of the extent to which the plaintiff proposed to go over again issues extensively canvassed in the previous action. That could not have been foreseen from the sketchy details available at the end of November 1992. It would bring the administration ofjustice into disrepute to allow the plaintiff to do this simply because through his alter ego (and by his own choice) he did not recover as much in the company proceedings as he
G would have liked to. Alternatively, on any view the Court of Appeal was entitled to exercise its discretion as it did, having regard to the overall principle of *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 and cannot be said to have been plainly wrong.

As to delay, the prospect of a trial of at least eight weeks (the parties' current estimate), which ex hypothesi constitutes an abuse of process, has to be balanced against the time, effort and expense incurred in the progress of
H the litigation to date and the stress of the litigation on the plaintiff. His advisers are sufficiently compensated for their time and effort through their entitlement to costs. While the plaintiff has himself spent time on the action and has experienced stress, that is the consequence of his having persisted in an action that will be found to have been an abuse. When the balancing

exercise has been performed, it is a decision not to strike out the action that would be plainly wrong.

On the cross-appeal, the first five principles put forward by the Court of Appeal [1999] PNLR 456B–F are correct. The fundamental principle is that, as a general rule, the company is the proper claimant in an action to recover loss that it has itself suffered: see *Foss v Harbottle* (1843) 2 Hare 461. A shareholder cannot in substance avoid that rule by bringing a personal claim to recover damages for loss in the value of his shares merely because the company in which he is interested has suffered damage, even if the conduct of which he complains gave him personally, and not the company alone, a cause of action: see *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, 222H–223A. He is suing for loss that simply reflects loss to the company. The *Prudential* principle is, as the Court of Appeal [1999] PNLR 457F said, salutary. It ensures that loss to the company is recovered only by the company and that the proceeds of recovery are not diverted to the shareholders to the potential prejudice of creditors. It similarly ensures that the process of recovery is conducted only by the company and that the company's right to recover is not adversely affected by outside compromises with the shareholders to the potential prejudice of creditors. It applies to loss of benefits as a director as well as to loss of dividends. There is no exception to it by which a shareholder can recover in respect of reflective loss that the company itself has for any reason failed to recover: see *Prudential*, at p 223E, and *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443, 471.

The loss claimed by the plaintiff as shareholder is entirely a reflection of WWH's loss, being referable to lack of available funds in WWH at a particular time and/or the compromise of the company proceedings for (it is alleged) a sum substantially less than the full amount of WWH's loss. The duties breach of which is alleged to have caused the plaintiff's loss are the same in content as those relied on in the company proceedings and are alleged to have been broken in the same way.

In any event, in accordance with general principles as to recoverability of damage a shareholder cannot recover for loss stemming from delayed payment of damages to him, a fortiori from delayed payment of damages to the company: see *Verderame v Commercial Union Assurance Co plc* [1992] BCLC 793. The essence of the claim to additional loss in such circumstances is that the claimant, having been deprived of financial resources to be expected from the company, has suffered a further loss resulting from his reflective loss. A claim by the company to consequential loss arising from deprivation of financial resources would be met by the general policy objection to recovery of damages for loss resulting from delayed payment and impecuniosity. A fortiori that policy constitutes a ground of objection to recovery of such damages by a shareholder whose right of recovery is only through the company, in accordance with *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204. It is essentially a policy limitation based on the ground that one party is not to be taken to contemplate that a breach of duty will cause the other to suffer additional loss of which the immediate cause is his impecuniosity. [Reference was made to *Lee v Sheard* [1956] 1 QB 192; *R P Howard Ltd v Woodman Matthews & Co* [1983] BCLC 117; *Heron International Ltd v Lord Grade* [1983] BCLC 244; *George Fischer (Great Britain) Ltd v Multi Construction Ltd*

A [1995] 1 BCLC 260; *Barings plc v Coopers & Lybrand* [1997] 1 BCLC 427 and *Hall v Governor and Co of the Bank of England* (unreported) 19 April 2000.]

*Christensen v Scott* [1996] 1 NZLR 273 is inconsistent with the above principles, and the Court of Appeal [1999] PNLR 457G was correct to hold that it should not be followed in this country. Although Hobhouse LJ in B *Gerber Garment Technology Inc v Lectra Syatems Ltd* [1997] RPC 443 expressed approval of *Christensen*, he reached his conclusion for reasons that in no way depended on the correctness of anything in *Christensen*. The Court of Appeal, at p 457C–F, also rightly approved the approach of Millett LJ in *Stein v Blake* [1998] 1 All ER 724. [Reference was also made to *Hayes v James & Charles Dodd* [1990] 2 All ER 815; *Wapshott v Davis Donovan & Co* [1996] PNLR 361, 377–378; *Watson v Dutton Forshaw* C *Motor Group Ltd* (unreported) 22 July 1998 and *Farley v Skinner* (unreported) 6 April 2000.]

Damages for mental distress and anxiety in respect of a breach of duty causing purely economic loss in circumstances in which no physical injury was reasonably foreseeable as a consequence of the breach are not recoverable, and the plaintiff's claim to such damages accordingly fails. His D mental distress and anxiety were the consequence of the financial position of WWH and are irrecoverable under the *Prudential* principle: see *Hayes v James & Charles Dodd* [1990] 2 All ER 815 and *Verderame v Commercial Union Assurance Co plc* [1992] BCLC 793. [Reference was also made to *Wapshott v Davis Donovan & Co* [1996] PNLR 361, 377F–378D.].

As to aggravated damages, the facts pleaded in the re-amended statement of claim make it clear that the plaintiff's complaint is not as to the manner in E which the wrong was committed but as to the manner in which the claims have been defended. That does not constitute aggravation of the damage in circumstances such as the present. When aggravated damages are claimed on the basis of the manner of defence in defamation actions, it is because the defendant has pleaded justification and so by his defence has continued to repeat the wrong of which the claimant complains. No such case can be F made out here.

*ter Haar* QC in reply. It is important to look at the actual mischief that is said to have been caused by the alleged abuse of process.

On the cross-appeal, the primary relationship was that between the defendants and the plaintiff rather than between them and the company. In so far as they acted on behalf of the company they did so in support of C the plaintiff's business plans. As to the cost of the plaintiff's personal borrowings (loan capital and interest), bank interest and charges and mortgage charges and interest, these losses can be grouped together. In one sense they can be said to relate to the impecuniosity of the company, but that is an incomplete analysis. All the losses are the plaintiff's personal losses. To characterise them as losses arising out of a shortage of funds in the company gives inadequate weight to the facts that the plaintiff's personal wealth was H substantially concentrated in the company; that if the company were to lose its only substantial asset he would be liable on the guarantees given by him to support it and that support of it in its litigation could only come from him personally in circumstances where his principal asset had been rendered worthless unless the litigation succeeded; and that, accordingly, his ability to

borrow to finance his personal expenditure and other investments was increasingly constrained: the longer the litigation continued, the more the need for it to succeed increased while his creditworthiness decreased.

As to diminution in value of the plaintiff's pension/majority shareholding in Westway Homes Ltd, this claim is primarily related to loss of pension rights. The plaintiff has suffered a loss that is separate from the company's and that would not have been recompensed even if the company had achieved a 100% recovery in its action.

As to loss of the 12.5% shareholding in Westway Homes Ltd, this loss is the plaintiff's and from its nature could not be the company's. Additional tax liability is again in its very nature a loss suffered by the plaintiff.

The true ratio of *Stein v Blake* [1998] 1 All ER 724 and *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 is in each case that no separate duty was owed to the shareholder. The decision in *Heron International Ltd v Lord Grade* [1983] BCLC 244 is explicable on the basis that no actionable duty was owed to the shareholders in respect of the loss in question: see p 263. *Christensen v Scott* [1996] 1 NZLR 273 is a good statement of the law. There is no difference between English law and the law in New Zealand. No English authority supports the defendants' propositions. [Reference was made to *R P Howard Ltd v Woodman Matthews & Co* [1983] BCLC 117; *Walker v Stones* [2001] QB 902 and *Wapshott v Davis Donovan & Co* [1996] PNLR 361.]

In so far as the plaintiff has received indemnification for his losses as a result of the settlement of the company claim, credit will have to be given. The proper way to deal with this, as the judge observed, is to recognise the risks of double recovery and to ensure that appropriate directions are given so as to ensure that the true measure of loss is established.

As to damages for mental distress and anxiety and aggravated damages, the judge and the Court of Appeal were right to allow these heads of damage to proceed.

As to remoteness, this is essentially fact-driven and the facts should be found first.

*Steinfeld QC* replied on the cross-appeal.

Their Lordships took time for consideration.

14 December. **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 businessman 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 Ltd ("WWH"), of

A 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
B 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's land, and WWH instructed GW to serve a notice exercising this option.

Mr Johnson contends that from early April 1987, even before GW was
C 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
D 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
E companies other than WWH.

In February 1988 GW served notice exercising WWH's option on Mr Moores's 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
F 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's 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's
G 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
H 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 had 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 to 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 £2m. 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 £1m 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 $4\frac{1}{2}$ years the parties pleaded and repleaded 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

A 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 B 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 C 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 and Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 he concluded:

D "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* (1843) 3 Hare 100."

E 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 LJJ) 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 F 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:

G "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 H [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, 590 per Lord Kilbrandon, giving the advice of the Judicial Committee; *Brisbane City Council v Attorney General for Queensland* [1979] AC 411, 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, 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 Ord 18, r 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 CPR r 3.4.

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