UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendant. This Document Relates To: All Actions	Master File No. 09-cv-118 (VM)

AFFIDAVIT OF ROBERT MILES, Q.C.

Exhibit 2

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

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

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 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 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 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 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 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. A

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). B

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). C D

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) 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 F

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 G

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 H

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

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)
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 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)
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
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
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:

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) 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–

A 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
B 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
C 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.

D 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
E 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
F 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
G 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*
H *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*

A *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.]

B *Bradford and Bingley Building Society v Seddon* [19991 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 C 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 D 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 E 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 F 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 G 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 H 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.]

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.

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.

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.

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