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A 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, B 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* C 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. D 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 E 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 F 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 G 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 H 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

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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. A

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. B C D

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. E

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* F G H

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 G 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. A

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. B

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.] C D

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. E

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. F

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. G

H

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 Burlesdon in Hampshire from a Mr Moores. WWH planned to develop the B 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 connection with any business matter would or might be acted upon by him D 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 performance of the contract created by the exercise of the option. This was F 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 delay before the land was conveyed to WWH. It was April 1992, more than H 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

A 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 B 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 C 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; D 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 E 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 F 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 G 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 H 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: A

> "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]." B

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: C D

> "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." E

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: F

> "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 G H