litigation hitherto In the context of the present case, moreover, I can see no material difference between invoking promissory estoppel or acquiescence as the ground on which the defendant firm should be precluded from asserting that the plaintiff had abused the process of the court The truth of the matter is that the defendant firm, by its conduct and in particular by participating in negotiations for settlement of the company's claim against it on the basis that Mr Johnson would thereafter be free to pursue his own personal claim against it, lulled Mr Johnson into a sense of security that he was free to pursue such a claim against the firm, without objection, in separate proceedings, with the effect that it became unconscionable for the firm to contend that his personal proceedings constituted an abuse of the process of the court. In the end, I am inclined to think that the many circumstances capable of giving rise to an estoppel cannot be accommodated within a single formula, and that it is unconscionability which provides the link between them.

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

(2) The cross-appeal

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

The principal ground on which it is said by the respondent firm that some of these heads of claim should be struck out is derived from the well-known case of *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204. I agree with the analysis of that case, and of the other cases following upon it, set out in the opinion of my noble and learned friend, Lord Millett (which I have had the opportunity of reading in draft). I accordingly agree with his conclusion, post, p 126C–D that:

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

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

relates to enhancement of the value of his pension if the payments had been made, it is unobjectionable and should be allowed to stand

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

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

LORD COOKE OF THORNDON My Lords, having had the advantage of reading in draft the speech of my noble and learned friend, Lord Bingham of Cornhill, I agree with all that he says on the subject of abuse of process. The course adopted by the parties of settling Westway Homes Ltd's claim against Gore Wood & Co, but leaving open any personal claim by Mr Johnson against the same solicitors, subject to a cap on certain heads of damages and an undertaking concerning personal guarantees, strikes me as a sensible one: the personal claim against the solicitors plainly involves different and more difficult issues. The belated raising by the defendants of the contention, more ingenious than realistic, that the settlement had the effect of preventing the personal claim seems to me closer to abuse of process than the plaintiff's conduct in pursuing the claim. The defendants are saved from that stigma by the acceptance of their contention by the Court of Appeal, but I agree that on this part of the case the appeal of the plaintiff must be allowed.

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

Damages for quantifiable financial loss

As the present is an action by one claiming to be a personal client against solicitors, not an action by a shareholder against a company and directors, *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, including the well known passage at pp 222–223, has only a limited bearing. The cash box illustration given by the Court of Appeal (Cumming-Bruce, Templeman and Brightman LJJ) is not helpful in this case because it does not envisage any loss except of the company's £100,000 It is by no means self-evident that, if the controlling shareholder had lost a valuable business opportunity for want of prompt access to the company's money, he would have been unable to recover damages for that loss caused by the

A defendant's deceit and theft of the cash box. The court did give as a possible instance of a recoverable personal loss the cost caused to the shareholder in consequence of a fraudulent circular, such as the cost of attending a meeting; but this single specific example is not fully illuminating. Nothing that I am about to say involves any criticism of the decision in the *Prudential* case or anything said in it. My point is simply that it was not concerned with the B kind of issue arising in the present case and contains no observations about this kind of issue. The same applies to *Stein v Blake* [1998] 1 All ER 724.

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

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

> H "We do not need to enter upon a close examination of the *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 decision. It has attracted not insignificant and, at times, critical comment. See e g L C B Gower, *Gower's Principles of Modern Company Law*, 5th ed (1992), pp 647–653; L S Sealy, 'Problems of Standing, Pleading and Proof in Corporate Litigation' (ed B G Pettet), p 1, esp pp 6–10; and

M J Sterling, 'The Theory and Policy of Shareholder Actions in Tort' (1987) 50 MLR 468, esp pp 470–474. It may be accepted that the Court of Appeal was correct, however, in concluding that a member has no right to sue directly in respect of a breach of duty owed to the company or in respect of a tort committed against the company. Such claims can only be bought by the company itself or by a member in a derivative action under an exception to the rule in *Foss v Harbottle* (1843) 2 Hare 461. But this is not necessarily to exclude a claim brought by a party, who may also be a member, to whom a separate duty is owed and who suffers a personal loss as a result of a breach of that duty. Where such a party, irrespective that he or she is a member, has personal rights and these rights are invaded, the rule in *Foss v Harbottle* is irrelevant. Nor would the claim necessarily have the calamitous consequences predicted by counsel in respect of the concept of corporate personality and limited liability. The loss arises not from a breach of duty owed to the company but from a breach of duty owed to the individuals. The individual is simply suing to vindicate his own right or redress a wrong done to him or her giving rise to a personal loss.

"We consider, therefore, that it is certainly arguable that, where there is an independent duty owed to the plaintiff and a breach of that duty occurs, the resulting loss may be recovered by the plaintiff. The fact that the loss may also be suffered by the company does not mean that it is not also a personal loss to the individual. Indeed, the diminution in the value of Mr and Mrs Christensen's shares in the company is by definition a personal loss and not a corporate loss. The loss suffered by the company is the loss of the lease and the profit which would have been obtained from harvesting the potato crop. That loss is reflected in the diminution in the value of Mr and Mrs Christensen's shares. They can no longer realise their shares at the value they enjoyed prior to the alleged default of their accountants and solicitors. (For a discussion of the policy issues which arise in considering these questions, see Sterling, at pp 474–491.)

"In circumstances of this kind the possibility that the company and the member may seek to hold the same party liable for the same loss may pose a difficulty. Double recovery, of course, cannot be permitted. The problem does not arise in this case, however, as the company has chosen to settle its claim. Peat Marwick and McCaw Lewis accepted a compromise in the knowledge that Mr and Mrs Christensen's claim was outstanding. It may well be, as was acknowledged by Mr Pidgeon in the course of argument, that an allowance will need to be made for the amount already paid to the liquidator in settlement of the company's claim.

"It is to be acknowledged, however, that the problem of double recovery may well arise in other cases. No doubt, such a possibility is most likely with smaller private companies where the interrelationship between the company, the directors and the shareholders may give rise to independent duties on the part of the professional advisers involved. But the situation where one defendant owes a duty to two persons who suffer a common loss is not unknown in the law, and it will need to be examined in this context. It may be found that there is no necessary reason why the company's loss should take precedence over the loss of the individuals who are owed a separate duty of care. To meet the problem of double

A recovery in such circumstances it will be necessary to evolve principles to determine which party or parties will be able to seek or obtain recovery. A stay of one proceeding may be required. Judgment, with a stay of execution against one or other of the parties, may be in order. An obligation to account in whole or in part may be appropriate The interest of creditors who may benefit if one party recovers and not the B other may require consideration. As the problem of double recovery does not arise in this case, however, it is preferable to leave an examination of these issues to a case where that problem is squarely in point.

"Essentially, Mr and Mrs Christensen are alleging that as a result of Peat Marwick and McCaw Lewis's breach of duty owed to them personally they suffered a personal loss, that is, a reduction in the value of their assets. Their assets in this case had been channelled into their C company. Thus, it is arguable that the diminution in the value of their shareholding is the measure of that loss. It may well be that when the evidence is heard it will be apparent that Mr and Mrs Christensen's claim is inflated, but that is a matter for the trial.

"We are not prepared to hold at this stage that they do not have an arguable case to recover damages for the breach of an acknowledged D duty."

When that passage is read as a whole, two features will be noted. It will be seen not only that the whole passage is throughout guarded and provisional, but also that the court recognised both that double recovery cannot be permitted and that the interests of creditors may require consideration. In this field, if a client is suing his own solicitor, it would E appear that only the problems of double recovery or prejudice to the company's creditors would justify denying or limiting the right to recover personal damages which, on ordinary principles of foreseeability, would otherwise arise. One other observation should be made about the passage in Thomas J's judgment. Although he did mention that *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 had not gone without criticism, he did not find it necessary to examine that case closely. F I would repeat that in no way am I criticising it. On the contrary I accept it to the full.

The next closest of the English reported cases cited is *Barings plc v Coopers & Lybrand* [1997] 1 BCLC 427, 435. In that case (arising from the activities of Mr Leeson) a United Kingdom company was suing the auditors of its Singapore subsidiary; the auditors were also responsible for supplying G audit information for the group accounts. On a pre-trial appeal, Leggatt LJ stated the law in terms which, albeit briefer, are much the same as those of Thomas J in *Christensen v Scott* [1996] 1 NZLR 273 which case was cited by Leggatt LJ.

Gerber Garment Technology Inc v Lectra Systems Ltd [1997] RPC 443 is more distant from the present case on the facts. It was a suit for infringement of patents in which some of the lost profits for which the H plaintiff company claimed damages were suffered by subsidiary companies in which it held all the shares. The decision was that, when a shareholder has a cause of action but his company has none, he can recover damages measured by the reduction in value of his shareholding; but that the plaintiff must prove the amount of his own loss and that it cannot be assumed that

this is the same as the loss suffered by the company. Such relevance as the case has lies in the reasoning of Hobhouse LJ in the Court of Appeal. At p 474 he described *Christensen v Scott* [1996] 1 NZLR 273 as "a good illustration of the application of the relevant principles". After an extensive quotation from the judgment in that case, he added, at p 475:

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

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

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

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

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

A individual's right to recover damages if no duty were owed to him personally by the solicitor. In cases of the present class, two such rules may be relevant among other factors. One may be called the rule in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, using that as a shorthand to convey that a shareholder in a company has as such no right to recover from a third party damages for breach of the latter's duty to the
B company. The other may be called the rule in *The Lips*, using that as shorthand for the proposition in *President of India v Lips Maritime Corpn* [1988] AC 395, per Lord Brandon of Oakbrook at p 425: "There is no such thing as a cause of action in damages for late payment of damages. The only remedy which the law affords for delay in paying damages is the discretionary award of interest pursuant to statute."

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

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

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

Thus the true scope of the settlement in 1992 is one of the matters requiring examination. In the instant case the settlement covered a very large part of the company's claim. It may well have been a reasonable settlement, reached after having due regard to the interests of the company's creditors, who could not successfully claim that more should have been
H recovered. There may nevertheless be some possibility that, in addition to any other right to personal damages that he may have against the solicitors, Mr Johnson could be heard to say against them that in any event he should be compensated for his company not having recovered fully. Such a possibility may be more significant in a case like *Christensen v Scott* [1996] 1 NZLR 273 where the shareholder has opposed and complains of the

inadequacy of the company's settlement; but I do not think that it can be ignored in the present case at this stage. A

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

Apart from the question of any shortfall in the company's recovery, I think that Mr Johnson could have a good personal claim against the solicitors for compensation on the basis already stated, that is to say on the basis that the damages claimed by him were not suffered by the company. Accordingly I agree with Lord Bingham that the claimed heads of damages numbered in his speech 1, 2, 4 and 5 should not be struck out before trial, and that the same applies to the part of head 3 relating to the enhancement of the value of Mr Johnson's pension if the payments had been duly made. I am rather less clear that the remaining parts of head 3 should be struck out. Certainly, however, these claims relating to lost payments into a pension fund or retention of corresponding amounts in the company's assets look very much like claims for double recovery. As the other members of your Lordships' Appellate Committee are in no doubt that they should be struck out, I am content to concur in that conclusion. C D

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

F

Damages for general suffering

In *Watts v Morrow* [1991] 1 WLR 1421, Bingham LJ said, at p 1445:

> "A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy. G
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> "But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category. H
>
> "In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and

A discomfort. If those effects are foreseeably suffered during a period when defects are repaired I am prepared to accept that they sound in damages even though the cost of the repairs is not recoverable as such. But I also agree that awards should be restrained, and that the awards in this case far exceeded a reasonable award for the injury shown to have been suffered. I agree with the figures which Ralph Gibson LJ proposes to
B substitute."

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

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

English case law has fluctuated as to the recoverability of damages in
G contract for mental distress, as is detailed in *McGregor on Damages* (1997), paras 98–106. See also Dr Harvey McGregor's preface at pp vii–viii. But it has been established since Victorian times that, by contrast with mere mental distress, damages are recoverable for substantial inconvenience and discomfort. Thus in *Hobbs v London and South Western Railway Co* (1875) LR 10 QB 111, a court including Cockburn CJ and Blackburn and Mellor JJ upheld an award to a husband and wife for the inconvenience of
H having to walk home with young children four or five miles late on a drizzling night, although the wife's catching of a cold was found too remote. That case was applied by Barry J in *Bailey v Bullock* [1950] 2 All ER 1167 in awarding damages against solicitors for the inconvenience to the plaintiff of having to live in an overcrowded house. Such authorities are treated in

McGregor on Damages, paras 93 to 96, as surviving the recent restriction of damages for mental distress. The third paragraph already quoted from Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421, 1445 is largely supported by them. The line may not always be easy to draw, and it is particularly difficult before trial to assess the weight of the claims in the present case. But both a changed way of life because of poverty and damaged family relationships can be grievous forms of non-pecuniary harm. I am respectfully unable to agree that they should be ruled out of the law's purview.

Before parting with the case I would say something about *Addis v Gramophone Co Ltd* [1909] AC 488. In severely confining damages for wrongful dismissal, your Lordships' House of those days appears to have seen the relationship of employer and employee as no more than an ordinary commercial one. This is a world away from the concept now, and in *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20 the House accepted that there is an implied obligation of mutual trust and confidence, and that an employer is under an implied obligation that he will not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage that relationship. Damages for financial loss, including impaired employment prospects, caused by harm to reputation could be recovered. It is true that *Addis* was distinguished on the ground that it related to injury to feelings caused by the manner of termination of the relationship, which question did not arise in *Mahmud*: see per Lord Nicholls of Birkenhead, at p 38, and Lord Steyn, at p 51. But the philosophy is altogether different, as is the philosophy embodied in modern employment legislation. Again, as Lord Bingham has pointed out, *Addis* was not applied in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344. *Addis* has not uniformly been followed in the Commonwealth: see *Brown v Waterloo Regional Board of Comrs of Police* (1982) 136 DLR (3d) 49, a judgment of Linden J (the author of *Canadian Tort Law*, now in its sixth edition). The decision was reversed on other grounds, but Linden J's statements of principle were substantially accepted: (1983) 150 DLR (3d) 729. According to that authority, an employee wrongfully dismissed may recover damages for mental distress in some circumstances. To the same effect is *Whelan v Waitaki Meats Ltd* [1991] 2 NZLR 74, which contains an instructive survey of the authorities by Gallen J. I take leave to doubt the permanence of *Addis* in English law. But it is not a question arising in the present case either; I make these observations only to avoid being identified with any approbation of *Addis*.

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

LORD HUTTON My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Bingham of Cornhill. I am in full agreement with his speech on the subject of abuse of process and I wish to confine my observations to the issue whether the damages claimed by

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

I consider it to be clear that where a shareholder is personally owed a duty of care by a defendant and a breach of that duty causes him loss, he is not debarred from recovering damages because the defendant owed a separate and similar duty of care to the company, provided that the loss suffered by the shareholder is separate and distinct from the loss suffered by the
D company This principle was recently stated in the judgment in the Court of Appeal delivered by Sir Christopher Slade in *Walker v Stones* [2001] QB 902, 932–933, that a claimant is entitled to recover damages where:

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

But a more difficult question arises where the shareholder claims a loss which is not separate and distinct from the loss suffered by the company but his loss flows from loss suffered by the company. In *Prudential Assurance Co*
G *Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, the claimants sued the directors of the company alleging that they had issued a circular to the shareholders containing a fraudulent misrepresentation concerning the true value of certain assets, and the court stated, at pp 222–223:

> "But what [a shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He
H cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a 'loss' is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only 'loss' is through the company, in the diminution in the value of the net assets of the company, in which

> he has (say) a 3% shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company."

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

In *Christensen v Scott* [1996] 1 NZLR 273, the Court of Appeal of New Zealand decided that where a plaintiff alleges a breach of duty owed to him personally by accountants and solicitors he is entitled to recover damages notwithstanding that his loss flows from loss suffered by a company in which he is a shareholder through a similar breach of duty owed to the company. In that case two shareholders claimed damages for the diminution in the value of their shareholding in a company caused by the negligence of their accountants and solicitors. In delivering the judgment of the court, after setting out part of the above passage in the judgment in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 Thomas J stated, at p 280:

> "It may be accepted that the Court of Appeal was correct, however, in concluding that a member has no right to sue directly in respect of a breach of duty owed to the company or in respect of a tort committed against the company. Such claims can only be bought by the company itself or by a member in a derivative action under an exception to the rule in *Foss v Harbottle* 2 Hare 461. But this is not necessarily to exclude a claim brought by a party, who may also be a member, to whom a separate duty is owed and who suffers a personal loss as a result of a breach of that duty. Where such a party, irrespective that he or she is a member, has personal rights and these rights are invaded, the rule in *Foss v Harbottle* is irrelevant. Nor would the claim necessarily have the calamitous consequences predicted by counsel in respect of the concept of corporate personality and limited liability. The loss arises not from a breach of the duty owed to the company but from a breach of duty owed to the individuals. The individuals is simply suing to vindicate his own right or redress a wrong done to him or her giving rise to a personal loss.
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> "We consider, therefore, that it is certainly arguable that, where there is an independent duty owed to the plaintiff and a breach of that duty occurs, the resulting loss may be recovered by the plaintiff. The fact that the loss may also be suffered by the company does not mean that it is not also a personal loss to the individual. Indeed, the diminution in the value of Mr and Mrs Christensen's shares in the company is by definition a personal loss and not a corporate loss."

The approach taken by the Court of Appeal of New Zealand has been approved in a number of judgments of the Court of Appeal. In *Barings plc v Coopers & Lybrand* [1997] 1 BCLC 427 the plaintiff, a company holding shares in a subsidiary company, claimed damages against the defendants, a firm of accountants, in respect of loss it suffered through loss sustained by its subsidiary, BFS, on the ground that the defendants were in breach of duties of care owed both to the plaintiff and to the subsidiary in carrying out an

A audit of the subsidiary's accounts. The defendants applied to set aside service of the writ in reliance on the *Prudential Assurance* principle. The defendants' application was rejected by the Court of Appeal and Leggatt L.J stated, at p 435:

"[*Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204] decides that a shareholder in a company has no
B independent right of action based on an allegation of diminution in the value of his shares occasioned by damage to the company. Mr Kentridge seeks to rely on it as authority for the proposition that where a company may have a cause of action for damage caused to it by a tortfeasor, a person who enjoys an independent right of action against the tortfeasor cannot sue him, at least in so far as his damages are measured by a
C diminution in the value of the company's shares. But in my judgment that is a misapplication of the principle. If C & LS are in breach of a duty of care owed to Barings in respect of audit information supplied to them and the breach causes damage, Barings cannot be disentitled from suing merely because the damages for which C & LS are said to be liable to Barings would or might include damages for which they are said to be liable to BFS. For C & LS are also in breach of a different duty, whether
D contractual or tortious, owed to BFS. Whereas complications might arise if these claims were made in separate actions, any risk of double jeopardy or of double recovery, such as were envisaged by the New Zealand Court of Appeal in *Christensen v Scott* [1996] 1 NZLR 273, 280–281, can be avoided if both claims are made in the same action. It may be, for instance, that C & LS are not liable to Barings for loss of the value of the
E shares in either BFS or any company which has a cause of action against C & LS for such loss.

"The present case differs from the *Prudential Assurance* case because here the person in the position of shareholder, namely Barings, has a right of action independent of the company, BFS. On the other hand, unlike the situation in [*George Fischer (Great Britain) Ltd v Multi Construction Ltd* [1995] 1 BCLC 260], BFS does have a right of action itself. As that
F case shows, there is no legal principle that a holding company is unable to recover damages for loss in the value of its subsidiaries, resulting directly from a breach of duty owed to it, as distinct from a duty owed (or not owed as the case may be) to the subsidiaries."

In *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 the plaintiff was entitled to damages for infringement of patent rights held by
G it and sought to recover damages for losses suffered by subsidiary companies in which it held all the shares, and which themselves had no cause of action, and the defendant contended that the claim was barred by the *Prudential Assurance* principle. That argument was rejected by the Court of Appeal and Hobhouse L.J cited the judgment of the Court of Appeal of New Zealand in *Christensen v Scott* [1996] 1 NZLR 273 and stated, at p 475:

H "There is no reason to suppose that this case would have been differently decided in England. The decision helpfully illustrates that, provided that the plaintiff can establish a personal cause of action and can prove a personal loss caused by the defendant's actionable wrong, then the fact that the loss is felt by the plaintiff in the form of the loss of the

value of the plaintiff's shares in a company is no answer to the plaintiff's claim. (In that case, as in the present case, no question of remoteness arose.)"

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

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

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

In my respectful opinion there is force in this criticism. However, even if this criticism be accepted, there remains the need to ensure that there is no double recovery and that creditors and the other shareholders of the company are protected. It was this need which was emphasised by