Claim No: HT-06-131

NEUTRAL CITATION NO: [2007] EWHC 55 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

St. Dunstan's House

131-137 Fetter Lane

London EC4A 1HD

Monday, 15 th January 2007

BEFORE

THE HONOURABLE MR JUSTICE JACKSON

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B E T W E E N:

ALDI STORES LIMITED

Claimant

and

WSP GROUP PLC

WSP LONDON LIMITED

ASPINWALL & COMPANY LIMITED

Defendants

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MR DAVID THOMAS QC (instructed by Messrs. Cobbetts) appeared on behalf of ALDI STORES LIMITED

MR MICHAEL SOOLE QC (instructed by Messrs. Reynolds Porter Chamberlain) appeared on behalf of WSP GROUP PLC and WSP LONDON Limited

MR MICHAEL DOUGLAS QC (instructed by Simmons & Simmons) appeared on behalf of ASPINWALL & COMPANY LIMITED

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JUDGMENT

Monday, 15th January 2007

MR JUSTICE JACKSON:

1. This judgment is in five parts, namely Part 1 – Introduction; Part 2 – The facts; Part 3 – The Present Proceedings; Part 4 – The Law; Part 5 – The Application to Strike Out.

Part 1: Introduction

2. This is an application to strike out proceedings as an abuse of process. The claimant in this action, and respondent to the application to strike out, is Aldi Stores Limited, to which I shall refer as "Aldi". The defendants in this action are WSP Group PLC ("WSPG"), WSP London Limited ("WSPL") and Aspinwall & Company Limited ("Aspinwall"). Aspinwall are environmental consultants. WSPG and WSPL are consulting engineers. It should be noted that WSPG is the successor company of Kenchington Ford PLC. Since nothing turns on the distinction, I shall refer to both companies as "WSPG".

3. This litigation concerns a construction project on land at Dallow Road in Luton. I shall refer to that land as "the Dallow Road site". The main contractor which carried out the construction project was Holmes Building Limited, subsequently known as Holmes PLC. I shall refer to this company as "Holmes". The ground improvement contractor which Holmes employed was Norwest Holst Soil Engineering Limited, to which I shall refer to as "Norwest Holst".

4. In this judgment I shall refer to B&Q PLC as "B&Q". I shall refer Grantchester Properties (Luton) Limited and Grantchester Retail Parks PLC as "Grantchester". I shall refer to Laporte Industries Limited as "Laporte".

5. Let me now say something about Holmes' insurers. During the relevant years Holmes had insurance cover of £5 million. The primary layer insurers, who were on risk for £2 million, were Terra Nova. I shall refer to them as "the primary insurers". The second layer insurers, who were on risk for £3 million, were Brit UW Limited, to whom I shall refer as "BU".

6. Finally, I shall refer to the Third Parties (Rights against Insurers) Act 1930 as "the 1930 Act". That concludes my introductory remarks. It is now time to turn to the facts.

Part 2: The Facts

7. Between 1937 and 1969 Laporte used the Dallow Road site as a repository for chemical waste produced by works at its nearby factory. After 1969 Laporte no longer needed the Dallow Road site for that purpose. Instead, Laporte decided to develop the site.

8. In about 1989 Laporte retained Aspinwall to advise on geotechnical aspects of the proposed development. Between 1990 and 1994 Aspinwall tendered advice to Laporte and produced a number of reports concerning the Dallow Road site. In particular, Aspinwall recommended a geotechnical design for the proposed development which included vibro-compaction.

9. The terms of Aspinwall's engagement were not set out in any formal document until 28th October 1993. On that date Laporte and Aspinwall entered into a deed of appointment, which regulated Aspinwall's past and future services. By that deed Aspinwall warranted that it had exercised and would exercise reasonable skill and care in performing its services.

10. By a deed of appointment dated 29th November 1993 Laporte engaged WSPG to provide engineering services in relation to the proposed development. By that deed WSPG warranted that it had exercised and would exercise reasonable skill, care and diligence in performing its services.

WSPG gave advice to Laporte and prepared a conceptual design for the foundations of the proposed development. This design incorporated vibro-compaction in accordance with the recommendations made by Aspinwall.

11. In 1994 Laporte invited tenders from contractors for the design and construction of the proposed development. Holmes was one of the contractors which submitted a tender.

12. In April 1994 Holmes engaged WSPL to provide engineering services in relation to the project. That engagement was subsequently formalised in a deed of appointment dated 28th November 1994. It was an implied term of WSPL's engagement that WSPL would exercise reasonable skill and care in the performance of its services.

13. On 4th July 1994 Laporte and Aldi entered into an agreement for a lease in respect of part of the Dallow Road site. I shall refer to this part of the site as "Aldi's land". Under the agreement for a lease Laporte agreed to construct a store, service area, car park and access roads on Aldi's land.

14. Laporte entered into an agreement for a lease with B&Q in respect of the remaining part of the Dallow Road site. I shall refer to that part of the site as "B&Q's land". Laporte agreed to construct a retail warehouse building with garden centre and related facilities on B&Q's land. B&Q's retail warehouse was to be, and was in fact, substantially larger than Aldi's store.

15. By a building contract dated 25th August 1994, made between Laporte and Holmes, Holmes agreed to design and construct the various buildings and associated works which were required on Aldi's land and B&Q's land. One term of the building contract was that the maximum settlement permitted would be 25 millimetres.

16. Holmes duly carried out the building works which were required. Holmes engaged Norwest Holst to carry out vibro-compaction works on the Dallow Road site before the various buildings were constructed. Holmes completed its construction work in or about June 1995.

17. On 22nd December 1995 Laporte granted a lease of the Aldi land to Aldi for a term of 25 years beginning on 24th June 1995. At about the same time Laporte granted a lease of the B&Q land to B&Q for a term of 25 years.

18. Pursuant to their contractual arrangements with Laporte, both Aldi and B&Q were entitled to warranties from the various entities which had carried out works of design and construction. Accordingly, Aspinwall, WSPG, WSPL, Holmes and Norwest Holst all executed warranties to the effect that they had properly performed their respective functions.

19. In the late 1990's settlement occurred which caused damage both to Aldi's buildings and to B&Q's buildings. Both companies were advised that the vibro-compaction was an unsuitable method of ground improvement and had not achieved its objective. Accordingly, both companies commenced legal proceedings in order to recover their losses.

20. On 22nd June 2001 Aldi commenced an action in the Technology and Construction Court against Holmes, claiming damages for breaches of the warranty given by Holmes to Aldi, and also damages for negligence. I shall refer to this litigation as "the Aldi action". On 7th March 2002 B&Q commenced an action in the Technology and Construction Court against Holmes, claiming damages for breaches of the warranty given by Holmes to B&Q. I shall refer to this litigation as "the B&Q action".

21. It should be noted that during the interval between the commencement of the Aldi action and the commencement of the B&Q action, Holmes went into administration. In the short term this

circumstance did not affect the conduct of the litigation, because Davies Lavery, who were solicitors instructed by Holmes' primary insurers, were acting for Holmes in both actions. The primary insurers took the view that Aldi's claim and B&Q's claim attached to different years of cover.

22. I shall not recite the detailed procedural history of both actions in this judgment. Suffice it to say that in due course Holmes brought Part 20 proceedings in both actions against Aspinwall, WSPG, WSPL and Norwest Holst. There were further Part 20 proceedings brought as between the various Part 20 defendants. The Part 20 proceedings brought by Holmes against Aspinwall, WSPG, WSPL and Norwest Holst were based upon the warranties which each of those parties had given to Aldi and B&Q respectively. Holmes alleged breaches of those various warranties. Holmes also alleged that the same conduct amounted to breaches of duties of care which the Part 20 defendants owed to Aldi and B&Q.

23. During 2001 and early 2002 the Aldi action proceeded separately from the B&Q action. During this period Aldi's action was prosecuted with signal success. On 15th March 2002 Aldi obtained judgment on liability against Holmes. On 1st October 2002 Aldi obtained judgment in its favour on a preliminary issue concerning the interpretation of Aldi's covenants under the lease. This preliminary issue was relevant to quantum. On the same occasion the court ordered Holmes to make an interim payment of £218,593.50.

24. Let me now turn to the B&Q action. B&Q decided to join the Part 20 defendants, or at least most of them, as defendants to B&Q's claim. Thus, by late 2002 the pleadings in that action had substantially increased in volume.

25. In September 2002 a third action was commenced concerning the Dallow Road site. The claimant in the third action was Grantchester. Grantchester was by then the owner of the freehold of the property. Grantchester contended that the value of its reversion had been diminished by the foundation defects. Initially, Grantchester only sued WSPL. Subsequently, however, Grantchester joined other parties as defendants in what became a consolidated action. I shall refer to this litigation as "the Grantchester action".

26. On 29th November 2002 a case management conference was held in all three actions. On that occasion the court ordered that Aldi's quantum trial should commence on 3rd June 2003. The court ordered that all other issues should be tried together on a later date to be fixed. Those issues would comprise the entirety of the Part 20 proceedings in the Aldi action and all of the issues in the B&Q action and the Grantchester action. For convenience, I shall refer to the litigation concerning all those issues as "the main action".

27. In December 2002 Aldi issued an application for a further interim payment. That application was heard on 24th January 2003. By consent, the court ordered Holmes to make a further interim payment in the sum of £1.3 million. This sum was agreed between solicitors as being the sum likely to exhaust the liability of Holmes' primary insurers in respect of Aldi's claim. In fact, the estimate proved to be somewhat low and the primary insurers subsequently made an additional payment to Aldi of £131,196.67.

28. Once the court order of 24th January had been made and complied with, Davies Lavery's role in the Aldi action was concluded. Their insurer clients had paid out the full amount for which they were on risk (subject to a modest later adjustment upon which nothing turns) in respect of Aldi's claim. Davies Lavery were not instructed by BU, Holmes second layer insurers. Accordingly, Davies Lavery came off the record on 11th April 2003.

29. Let me now turn to the position of BU. BU took the view that they may not have any liability to indemnify Holmes against Aldi's claim. This position had been made clear both to Holmes and to Aldi in July 2002. Indeed, BU advised Holmes in July 2002 "to act as a prudent uninsured". BU informed Aldi's solicitors in December 2002 that they may be alleging late notification.

30. By early 2003 it was clear that BU's reservation of rights was no mere formality. When Davies Lavery came off the record, BU did not choose to instruct solicitors to act for Holmes in any of the actions concerning the Dallow Road site. Thus, Holmes had no solicitors on the record either to defend Aldi's quantum claim or to prosecute Holmes' Part 20 proceedings.

31. Accordingly, the position in which Aldi found itself in early 2003 was as follows: It had obtained judgment on liability against Holmes, although quantum remained to be assessed. Aldi had recovered from Holmes' primary insurers sums representing just under half the value of Aldi's claim. Holmes' secondary insurers, BU, were not admitting that they had any liability to indemnify and were intimating a defence of late notification. BU were declining to instruct solicitors to act for Holmes in the Aldi action, even on the basis of a reservation of rights. Holmes was in administration and was unlikely to have the funds to meet any judgment debt. Thus, there was clearly a risk that Aldi would recover no more from Holmes and its insurers than the interim payments already received.

32. In those circumstances, Aldi had to decide whether to join as defendants in the Aldi action other parties who had given warranties to Aldi. Those other parties would be some or all of the following: WSPG, WSPL, Aspinwall and Norwest Holst. If Aldi decided to take this course, the most sensible procedure would have been to rejoin the main action and to participate in the full trial of all issues.

33. During May 2003 Aldi's solicitors, Hammonds, sent two letters to BU's solicitors, Denton Wilde Sapte, concerning this possibility. In their letter dated 12th May 2003 Hammonds stated:

"In particular, our client has an understandable reason to wish to pursue to a conclusion the issue of enforcement under the 1930 Act, which is that our client currently retains the benefit of various other potential causes of action against other parties. Claims against those other parties are subject to concerns in relation to limitation law. Further, those other parties are Defendants to various other claims (Part 20 claims) before the Technology and Construction Court which are due to come to trial in January of next year. It is our client's view that the court would expect our client to seek to bring any claims against such parties at the same time so as to avoid duplication and wastage of court time. We are therefore instructed to advance, if necessary, proceedings under the 1930 Act as a matter of urgency in order to conclude whether our client needs to pursue others."

34. In their letter to Denton Wilde Sapte dated 27th May 2003 Hammonds stated:

"You will be aware that there is extensive ongoing litigation in the Technology and Construction Court between various different parties, all due to go to trial early in the New Year. Our client has other causes of action which it may wish to take up in the event that indemnity is not provided by your client pursuant to our client's rights under the 1930 Act. Given the extent of the litigation and the number of parties, our client's Queen's Counsel has advised that the court would expect to hear Aldi in relation to allegations against any other party (such as the engineer and environmental consultant) at the same time as against all of the other parties early in the new year. It is therefore a matter of urgency that the issue in relation to your client is resolved and we intend to make these observations to the court when seeking, if necessary, an early hearing in this matter."

35. In the event, Aldi did not take steps to rejoin the main action. Instead, Aldi pinned its hopes on making a full recovery from Holmes and its various insurers.

36. Aldi duly proceeded to an assessment of damages as against Holmes. The assessment hearing was brought forward from June and took place in two stages, on the 1st and 22nd May respectively. This court assessed Aldi's damages in the sum of £3,311,922.40. Thus, after giving credit for the interim payments previously made, the outstanding sum due to Aldi was £1,793,328.90. By the time of the hearings in May 2003 Holmes was represented by new solicitors, namely Walker Morris, who had been instructed by Holmes' administrator.

37. In the meantime, the main action was progressing. A trial date of 12th January 2004 was fixed with an estimated length of 12 weeks. Witness statements and expert reports were being exchanged. Pleadings were being refined and amplified.

38. One feature of the pleadings in the main action should be noted at this stage. Norwest Holst served a re-amended statement of case against the other Part 20 defendants, which ran to considerable length. This re-amended statement of case included very serious allegations against three employees of WSPG and WSPL, namely Mr Pirie, Mr Sharp and Mr Medak. Norwest Holst alleged that those three individuals were aware of the foundation deficiencies in 1994 but deliberately concealed these matters.

39. Let me now return to Aldi. Aldi was well aware that it may be unsuccessful in recovering the outstanding balance of the judgment debt from BU, Holmes' second layer insurers. On 11th June 2003 Aldi sent the following letter to Walker Morris:

"We attach by way of service sealed copy of the order of the court, sealed 2nd June. We should be grateful if you would kindly acknowledge safe receipt.

In order that all other parties in the associated actions are aware of Aldi's position we are providing a copy of this order to them also. Aldi's intention is currently to press for payment of the judgment sums from the second layer insurers of Holmes Building. If satisfaction of the two judgment sums is not obtained, then it may be that our client will wish to call upon other causes of action available to it and we will keep other parties appraised in that regard."

Copies of this letter were duly sent to the solicitors for all other parties in the main action.

40. On 25th July 2003 Aldi commenced proceedings in the Commercial Court against BU. I shall refer to these proceedings as "the insurance action". In the insurance action Aldi sought to recover against BU the unpaid balance of the judgment debt pursuant to the provisions of the 1930 Act. BU's first substantive response to that claim came in the form of a letter from its solicitors dated 6th August 2003, giving notice that BU was avoiding the policy for non-disclosure. This letter went into considerable detail, and copies of relevant documents were attached.

41. On 1st September 2003 BU served its defence in the insurance action. In its defence BU denied that it was under any liability to indemnify Holmes against the judgment which had been given in Aldi's favour. BU's defence further amplified the grounds of avoidance which had been set out in BU's solicitors' letter dated 6th August 2003. Further relevant documents were annexed to BU defence.

42. Thereafter, both the insurance action and the main action proceeded. Aldi's solicitors pressed for disclosure of further relevant documents in the insurance action, and this disclosure was given in December 2003. The parties in the main action continued their preparations for trial.

43. The main action duly came on for trial in January 2004. That action settled during the second week of trial. As is not unusual, the terms of settlement were confidential; therefore I do not know what they were.

44. The insurance action continued for a few months after the conclusion of the main action. Aldi took advice from specialist counsel. Although privilege in respect of that advice has not been waived, Aldi's solicitor, Mr Bessey, has set out the gist of that advice in his witness statement. The gist of that advice was that Aldi was unlikely to be successful in its claim against BU. In April 2004 Aldi decided to accept that advice. Subsequently, Aldi came to terms with BU. As is not unusual, the terms of settlement with BU were confidential and have not therefore been put in evidence. The formal order made by the court was that Aldi discontinued its claim with no order as to costs.

45. As a result of Aldi's lack of success in the insurance action, approximately half of the judgment debt owed by Holmes remained unpaid. In those circumstances, Aldi decided to seek to recover the balance of its losses against WSPG, WSPL and Aspinwall. Aldi's solicitors sent letters of claim to the solicitors for those parties in the summer of 2004. Those letters received an adverse response. WSPG, WSPL and Aspinwall denied that they had any liability to Aldi. Furthermore, they maintained that any action commenced against them by Aldi would be an abuse of process. Aldi did not accept this denial of liability. Accordingly, after some delay, Aldi commenced the present proceedings.

Part 3: The Present Proceedings

46. By a claim form issued in the Technology and Construction Court in Birmingham on 18th October 2005 Aldi claimed against WSPG, WSPL and Aspinwall damages for breaches of warranty and for negligence. The claim form was served on the defendants in February 2006. The particulars of claim were served on 17th February 2006. The essence of Aldi's claim as pleaded is that the vibro-compaction carried out was inappropriate and that this has caused unacceptable settlement. Accordingly, it is alleged that the defendants are in breach of the warranties which each of them has given to Aldi.

47. I will not extend this judgment by reading out lengthy extracts from pleadings. Suffice it to say that Aldi's case against WSPG, WSPL and Aspinwall substantially repeats allegations which Holmes pleaded against those parties in the Part 20 proceedings in the Aldi action.

48. The defendants took strong exception to facing a fresh action which raised the same issues as those which they had faced in the earlier litigation. Accordingly, on 16th March 2006 all three defendants applied to strike out Aldi's claim on the grounds that the bringing of this action constituted an abuse of process.

49. On 15th May 2006 the present action was transferred by consent from the Technology and Construction Court in Birmingham to the Technology and Construction Court in London. It was recognised that the strike out application was a substantial one and that it would require a two day hearing. There was some difficulty in fixing a hearing date which was convenient to all leading counsel and the court. In the result, the strike out application was listed to be heard in January 2007.

50. The evidence filed in support of the strike out application comprises a witness statement made by Mr Robert John of Simmons & Simmons, who are Aspinwall's solicitors, and a witness statement made by Mr Richard Moody of Reynolds Porter Chamberlain, who are WSPG and WSPL's solicitors. Both Mr John and Mr Moody helpfully set out the history of the earlier litigation concerning the Dallow Road site.

51. Mr Moody estimates that the total costs incurred by all parties in the main action, up to the date of settlement, would have exceeded £7.5 million. On the basis of the evidence before me, and my own experience of litigation in this court, I regard that as a reasonable estimate. Mr Moody also states that if the present action proceeds WSPG and WSPL will bring contribution proceedings against Norwest Holst. Mr Moody estimates that a full trial of the present action would take several weeks and that the total costs of all parties would be unlikely to be less than £2.5 million. In my view, this is a reasonable assessment.

52. The evidence filed in opposition to the strike out application comprises a witness statement made by Mr James Bessey, a partner in Cobbetts, who are Aldi's solicitors. Mr Bessey has at all material times acted as solicitor for Aldi, initially when he was an assistant solicitor employed by Edge Ellison, then as a partner with Hammonds, and now as a partner in Cobbetts. Mr Bessey gives a detailed history of events from Aldi's perspective. This usefully supplements the evidence given on behalf of the defendants. The factual history is not in dispute between the parties. All relevant documents have been exhibited to the witness statements.

53. The hearing of the defendants' application to strike out commenced last Thursday, namely 11th January 2007. Mr David Thomas QC appears for Aldi. Mr Michael Soole QC appears for WSPG and WSPL. Mr Michael Douglas QC appears for Aspinwall. At this point, may I pay tribute to the excellent submissions of counsel. Counsel's arguments have neatly exposed all of the conflicting considerations and issues in this somewhat unusual case.

54. Counsel's submissions occupied Thursday and Friday of last week. I said that I would consider their submissions over the weekend and give judgment on Monday morning. This I now do. Before addressing the application to strike out, I must first review the law.

Part 4: The Law

55. In Henderson v Henderson (1843) 3 Hare 100 the plaintiff brought proceedings for an account of money owed to him by his late brother. The action was brought against the brother's personal representative and various family members who had received money from the estate. The defendants issued a demurrer (in effect, an application to strike out) on the grounds that these matters had already been decided by the Supreme Court of Newfoundland. The issue then arose as to what had been the scope of the Newfoundland proceedings. Sir James Wigram, the Vice-Chancellor, held that all relevant matters had been litigated in the Newfoundland proceedings. Accordingly, he allowed the demurrer. At pages 114 to 115 the Vice- Chancellor said this:

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

56. This famous and eloquent passage has become known as the rule in Henderson v Henderson. A long of authority built upon the dictum in Henderson v Henderson establishes that the court will

strike out as abusive claims which should have been raised, but were not raised, in the course of earlier litigation.

57. That long line of authorities was reviewed and digested by the House of Lords in Johnson v Gore Wood & Co. [2002] 2 AC 1. In those circumstances, it may be thought unnecessary for me to cite any of the authorities decided before Johnson. I shall, nevertheless, cite one authority from this period, because it has been the subject of much analysis by counsel.

58. In Bradford & Bingley Building Society v Seddon Hancock [1999] 1 WLR 1482, S brought an action against H, an accountant, claiming damages for (a) negligent advice leading to investment loss and (b) contractual indemnity in respect of that loss. H admitted liability for the contractual indemnity and S obtained judgment on that basis. S was unable to enforce the judgment because of H's lack of funds. Subsequently, the building society, which had funded the failed investment, brought proceedings against S to recover its loan and to enforce its security, namely a charge over S's house. In this second action S brought third party proceedings against H and his two partners for negligent advice and misrepresentation leading to the failed investment. A county court judge struck out the claim as an abuse of process. The Court of Appeal allowed S's appeal. There were a number of significant features in this case. In particular, the first action was against H personally, whereas the second action was against the partnership. Also, the claims in the second action were wider. S did not join the partnership in the first action because of his impecuniosity and his inability to obtain legal aid. In the Court of Appeal Auld LJ gave the leading judgment, with which Ward and Nourse LJJ agreed. At 1491 to 1492 Auld LJ said this:

"Thus, abuse of process may arise where there has been no earlier decision capable of amount to a res judicata (either or both because the parties or the issues are different) for example, where liability between new parties and/or determination of new issues should have been resolved in the earlier proceedings. It may also arise where there is such an inconsistency between the two that it would be unjust to permit the later one to continue. The first of those examples is an adaptation of Sir James Wigram V-C's inclusion in Henderson in the principle of res judicata of a requirement that a party should be bound by what he and the court has not done before as well as what they have done. However, his words are now more notable as a source of the doctrine of abuse of process, rather than exact definition of what may constitute res judicata…

In my view, it is now well established that the Henderson rule, as a species of the modern doctrine of abuse of process, is capable of application where the parties to the proceedings in which the issue is raised are different from those in the earlier proceedings. Indeed, it is inherent in Sir James Wigram V-C's reasoning that, as a general rule, all persons who are to be sued should be sued at the same time and in the same proceedings where such a course is reasonably practicable, and whenever it is so and it is not taken then, in an appropriate case the rule may be invoked so as to render the section action and abuse."

59. It is, of course, necessary to look at Seddon through the prism of Johnson. Certain dicta in Auld LJ's judgment were disapproved by the House of Lords in Johnson and I have avoided reading out those dicta. Nevertheless, the Court of Appeal's decision in Seddon has not been impugned, nor has the passage from Auld LJ's judgment quoted above been impugned. It seems to me that this passage remains good law.

60. I now come to the House of Lords' decision in Johnson v Gore Wood & Co. [2002] 1 AC 1. J's company sued G, a firm of solicitors, for professional negligence. That claim was settled during the trial. J subsequently brought a personal claim against G in respect of the same matter. The Court of

Appeal, reversing the decision of the judge, held that the second action should be struck out as an abuse of process. The House of Lords reversed the decision of the Court of Appeal and allowed the second action to proceed.

61. This case had a number of special features which significantly affected the outcome. In particular, J was prevented by impecuniosity and similar factors, from participating in the first action. Furthermore, the settlement of the first action was negotiated on the express understanding that J would subsequently bring a separate action against G for his personal losses. Finally, G delayed for almost five years after the commencement of the second action before issuing an application to strike out.

62. The leading speech in the House of Lords was delivered by Lord Bingham. Lord Bingham reviewed a long line of authorities on abuse of process. He then set out his conclusions as follows, at pages 31 to 33:

“But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party’s conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice…

Two subsidiary arguments were advanced by Mr ter Harr in the courts below and rejected by each. The first was that the rule in Henderson v Henderson 3 Hare 100 did not apply to Mr Johnson since he had not been the plaintiff in the first action against GW. In my judgment this argument was rightly rejected. A formulaic approach to application of the rule would be mistaken. WWH was the corporate embodiment of Mr Johnson. He made decisions and gave instructions on its behalf. If he had wished to

include his personal claim in the company's action, or to issue proceedings in tandem with those of the company, he had power to do so. The correct approach is that formulated by Sir Robert Megarry V-C in Gleeson v J Wippell & Co. Ltd [1977] 1 WLR 510 where he said, at p 515:

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

On the present facts that test was clearly satisfied.

The second subsidiary argument was that the fule in Henderson v Henderson 3 Hare 100 did not apply to Mr Johnson since the first action against GW had culminated in a compromise and not a judgment. This argument also was rightly rejected. An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, indeed, that outcome would make a second action the more harassing."

63. Lord Goff, Lord Cooke and Lord Hutton all agreed with Lord Bingham's review of the law on abuse of process and his conclusions. Lord Millett undertook his own analysis of the authorities and summarised the law in somewhat different terms. In so far as Lord Millett's summary of the law differs from that of Lord Bingham, I am bound to prefer and follow the speech of Lord Bingham.

64. Let me now turn to the authorities since 14th December 2000 (the date of the House of Lords' decision in Johnson). Toth v Ledger (CAT 21st December 2000) was decided just one week after Johnson. In Toth the claimant brought a claim under the Fatal Accidents Act for medical negligence causing the death of his five year old son. That claim was settled for £10,500.00. This represented damages for bereavement. The claimant then pursued a second action, claiming damages for his own psychiatric injury in respect of the same matter. The district judge struck out the claimant's claim as an abuse of process. The judge allowed the claimant's appeal and the Court of Appeal upheld that decision. A significant feature of this case was that the claimant did not obtain legal aid to pursue his claim for psychiatric injury until four weeks after the settlement of the bereavement action. Laws LJ gave the leading judgment, with which Kennedy LJ and Jacob J agreed. Towards the end of this judgment, when setting out his conclusions, Laws LJ said this:

"43. Thus, in my judgment, the appellant settled the County Court action in the full knowledge that the second claim remained outstanding and would be legally unaffected by that compromise. At any rate, Miss Ross ought to have so appreciated. She should also have appreciated that any application to strike out the High Court claim would most likely be energetically resisted.

44. The settlement of the first claim therefore, as it seems to me, cannot assist the appellant in the context of our consideration of an assertion of abuse following their Lordships' decision in Johnson. If

anything, as I see it, the settlement of the first claim could be said to assist the respondent, who is entitled to submit that the appellant settled that first claim well knowing that the issues of merits or demerits of the second claim remained at large. This is not a case of a claimant manipulating the procedures of the court, as for instance by keeping back a second claim until he has a fair wind with his first one, or anything of the kind. But for the difficulties of legal aid, which he did his best to overcome, the respondent would plainly have issued a single claim covering both aspects of the case in October 1996. There is no blowing hot and cold or taking inconsistent positions or anything of that kind. The nervous shock claim was instituted (albeit by a bare writ) effectively contemporaneously with the bereavement claim."

65. Dexter Limited (in administrative receivership) v Vlieland-Boddy [2003] EWCA Civ 14 concerns the alleged misappropriation of company funds. The first action was brought against MVB, who was company secretary and a director. The second action was brought against other family members involved in the company. On the facts of that case both the judge and the Court of Appeal held that the second action did not constitute an abuse of process.

66. At first instance, Lloyd J noted that the defendants in the two actions were different and were not privies. He also noted that the first defendant was not being vexed a second time, even though he was involved as a witness in the first action. In the Court of Appeal Peter Gibson LJ, giving the leading judgment, said this at paragraph 34:

"Lloyd J recognised that the rule in Henderson v Henderson could apply to successive claims involving different defendants who were not privies, referring as he did to the decision of His Honour Judge Bowsher Q.C. in Time Group Ltd v Computer 2000 Distribution Ltd. [2002] EWHC 126 (TCC) on 4th April 2002 for that. I can see no error in Lloyd J saying in para. 24 of his judgment that it may be unusual for the rule to be properly applicable to such a case or in considering that it was at least highly relevant against it being an abuse that the defendants in successive claims are different and not privies. In my judgment it would be unrealistic not to recognise that as a material, albeit not a conclusive, consideration."

67. Clarke LJ, in his concurring judgment, said this:

"49. The principles to be derived from the authorities, of which by far the most important is Johnson v Johnson v Gore Wood & Co. [2002] 2 AC 1, can be summarised as follows:

i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.

ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C.

iii) The burden of establishing abuse of process is on B or C or as the case may be.

iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.

v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process.

vi) The court will rarely find that the later action is an abuse of process unless the later action involves injust harassment or oppression of B or C.

50. Proposition ii) above seems to me to be of importance because it is one thing to say that A should bring all his claims against B in one action, whereas it is quite another thing to say that he should bring all his claims against B and C (let alone against B, C, D, E, F and G) in one action. There may be many entirely legitimate reasons for a claimant deciding to bring an action against B first and, only later (and if necessary) against others.

51. Those reasons include, for example, the cost of proceeding against more than one defendant, especially where B is apparently solvent and the case against B seems stronger than against others. More defendants mean more lawyers, more time and more expense. This is especially so in large commercial disputes. It by no means follows that either the public interest in efficiency and economy in litigation or the interests of the parties, including in particular the interests of C, D and E, is or are best served by one action against them all.

52. It seems to me that the courts should be astute to ensure that it is only in the case where C can establish oppression or an abuse of process that a later action against C should be struck out. I could not help wondering whether the defendants in this case would have given their lawyers the same instructions on the question whether they should have been sued in the first action if they had been asked before that action began as they have given now that a later action has been begun.

53. It is clear from the speeches of both Lord Bingham and Lord Millett that all depends upon the circumstances of the particular case and that the court should adopt a broad merits based approach, but it is likely that the most important question in any case will be whether C, D, E or any other new defendant in a later action can persuade the court that the action against him is oppressive. It seems to me to be likely to be a rare case in which he will succeed in doing so."

Scott Baker LJ agreed with both judgments.

68. There is a further brief discussion of abuse of process in Aldi Stores Limited v Holmes Buildings PLC [2003] EWCA Civ 1882. That decision arose from the earlier litigation concerning the Dallow Road site. I understand from counsel that Johnson was not cited to the Court of Appeal on that occasion and that the argument on abuse of process was very brief. In all the circumstances, I am not persuaded that Aldi should be treated as in any way expanding the boundaries of abuse of process.

69. Although certain other authorities post 14th December 2000 are mentioned in counsel's skeleton arguments, it has become clear in the course of the hearing that no substantial reliance is placed on those authorities.

70. I shall not myself attempt to reformulate the rules on abuse of process. The principles which this court must follow are clearly set out in Johnson at pages 31 to 33 of Lord Bingham's speech, and in Dexter at paragraphs 49 to 53 of Clarke LJ's judgment. In addition, this court just bear in mind the general guidance given in the other authorities mentioned above.

71. That concludes my review of the law which this court must apply when dealing with the present application to strike out.

Part 5: The Application to Strike Out

72. The applicants contend that the present action is an abuse of process because they are facing the very same allegations in this action as Holmes pleaded against them in the first action. If Aldi wished to bring the present claims against the applicants it could and should have done so in the first action, in which Aldi was claimant and the applicants were Part 20 defendants.

73. Aldi denies that it is abusing or misusing the process of the court. Aldi contends that the decisions which it took at each stage of the first action were reasonable and sensible and that the steps taken by Aldi were designed to minimise the costs and resources devoted to litigating Aldi's claims. Furthermore, Aldi has never previously sued any of the present applicants. The earlier litigation, to which those applicants were parties, was concluded by settlement.

74. The facts of this case are somewhat removed from the facts of the various reported cases. Counsel have diligently drawn my attention to points of similarity and dissimilarity between the present case and the facts of Seddon, Johnson, Dexter and so forth. Interesting though that exercise may be, what I must do is focus upon the legal principles identified in part 4 above. Adopting the language of Lord Bingham, this court has got to form: "a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before".

75. In forming this "broad merits- based judgment" I regard the following seven features of this case as significant:

(i)
Aldi was not making any direct claims against the applicants in the first action.

(ii)
Nevertheless, both Aldi and the applicants were parties to the first action.

(iii)
By suing Holmes in the first action Aldi caused the applicants to face claims for breach of warranty in the Part 20 proceedings. It was almost inevitable that Holmes would make such claims against the applicants.

(iv)
In or before May 2003 Aldi was aware of the legal principle that if it wished to sue the applicants it should do so in the context of the first action, so that the allegations against the applicants could all be dealt with on one occasion rather than in two separate trials. Aldi, nevertheless, made a deliberate decision to take no further part in the first action and not to participate in the trial of January 2004.

(v)
Aldi was not prevented from suing the applicants in the first action by impecuniosity or any similar circumstance. It would have been perfectly feasible for Aldi to rejoin the main action even as late as September 2003. Aldi's decision not to do so was a decision based upon its own perceived commercial interests, taken with the benefit of advice from solicitors and counsel. This was a decision which Aldi was fully entitled to take.

(vi)
If the present action goes ahead, (a) the applicants will have to face precisely the same allegations that they faced in the January 2004 trial; (b) Norwest Holst will be joined as an additional party, and thus Mr Pirie, Mr Sharp and Mr Medak will face the same serious allegations of improper conduct that they faced in the first trial; (c) further costs (possibly in the region of £2.5 million) will be incurred by the various parties in litigating for a second time about the Dallow Road site; (d) the resources of this court will be devoted, for a second time, to trying precisely the same allegations of breach of warranty made against the applicants.

(vii)
If the present action does not go ahead, Aldi will be left in the position that it recovers half of its losses from Holmes' insurers, but it is not permitted to seek to recover the other half from three professional firms which gave relevant warranties to Aldi.

76. I have weighed up all of the competing factors in this case. In my view, the balance comes down firmly in favour of characterising the present action as an abuse of process. There is, of course, no impropriety or culpable conduct on the part of Aldi. Nevertheless if this action goes ahead, the applicants will be "harassed" or "vexed" for the second time by a very substantial, expensive and time consuming action. In my judgment, that would be unjust. Also, in my view, that would be oppressive. Furthermore, it is a misuse or an abuse of the process of the Technology and Construction Court to bring a substantial and complex action which litigates for a second time the same alleged breaches of warranty by three professional firms in connection with the Dallow Road site. It is the policy, and indeed the duty, of this court to achieve, so far as possible, the efficient, just and cost effective disposal of all litigation which is brought. This policy serves the interests of the business community, in particular the construction industry and building owners, who are the principal users of this court. Re-litigation on the scale which Aldi now proposes flies in the face of that policy.

77. Having stated my overall conclusion in this case, let me now deal with a number of specific issues which have been canvassed. There has been debate about how easy it would have been for Aldi to rejoin the first action at a late stage. In my view, given the evidence which Aldi and other parties had already obtained, this would have been perfectly feasible. I have little doubt that the judge would have allowed such a course. Furthermore, I do not consider that Aldi's involvement would have materially increased the 12 week time estimate. It should also be noted that arrangements were made for Holmes to absent itself from the trial for significant periods, for example when Grantchester and B&Q were calling their quantum evidence. Precisely the same arrangements could and probably would have been made, if Aldi had become a party to the main action.

78. A separate issue which has been canvassed is the significance of the fact that the first action settled rather than proceeded to judgment. In my view, this fact does not make the second action less abusive. See the reasoning of Lord Bingham in Johnson, at 31 to 32.

79. Another question debated is how this case fits with Clarke LJ's analysis in Dexter, at paragraphs 49 to 53. In that passage B means someone whom A sued in the first action. C means someone who was not a party at all to the first action. The applicants in the present case cannot be precisely equated with either B or C. Nevertheless, in my view, the position of the applicants here is closer to that of B than that of C.

80. Another matter which has been debated is how strong Aldi's prospects of success against BU appeared to be. In my view, it was obvious by April 2003, if not before, that Aldi would face a serious contest on that front. BU had indicated in December 2002 that they had a point on late notification. It was clear that they were serious about this point when Davies Lavery came off the record and BU left Holmes unrepresented. That would have been a foolhardy course, if BU regarded themselves as on risk. The fact that the primary insurers had paid out is only of limited relevance. There may be commercial or other reasons why primary insurers do not take a coverage point.

81. The obvious difficulty which Aldi would face in any litigation against BU was that the relevant knowledge and the relevant witnesses were outside Aldi's control. Once Aldi had received the avoidance letter dated 6th August 2003, obviously it was still possible that Aldi might win the

insurance action. Nevertheless, there was no objective basis for asserting that Aldi's prospects were better than even, as Mr Thomas has submitted.

82. The next matter to consider is the fact that Aldi warned the applicants that Aldi might make claims against them and the applicants did not protest. In relation to this issue it should be noted that the warnings which Aldi gave in correspondence on 11th June and 4th September 2003 were mild in their terms and guarded. No response from the applicants was appropriate. On both of those dates it was still perfectly feasible that Aldi might rejoin the main action. In the event, this did not happen. As January 2004 approached, and still Aldi made no move, the applicants (who were all advised by experienced counsel and solicitors) no doubt took comfort from the rule in Henderson v Henderson.

83. The next point to consider is Mr Thomas' argument that Aldi's strategy might have worked. Aldi might have succeeded against BU. Such success would have enured to the benefit of the applicants as well as Aldi. There is some force in this point, but it cannot displace the overall assessment set out above. Furthermore it was Aldi which had to take the decision and Aldi which had to take the risk. It is not right that Aldi should reap the potential benefits of its chosen strategy, but inflict upon the applicants the risk of facing a second very substantial and wholly avoidable second action.

84. Let me now draw the threads together. For the reasons set out above, I am satisfied that this litigation is an abuse of the process of the court. Accordingly, pursuant to r 3.4 of the CPR, and the inherent jurisdiction of the court, I make an order that the particulars of claim be struck out and that this action be dismissed.