JUDGMENT : Mr Mark Cawson Q.C. Ch.Div. Manchester District Registry. 3rd November 2005

Introduction

1. This is an application by the First and Second Defendants, Philip Estry ("*Mr Estry*") and James Andrew Dempsey ("Mr Dempsey") to strike out proceedings brought against them and against the Third Defendant, The Santhouse Pensioneer Trustee Co. Ltd ("*Santhouse*"), by Michael Jonathan Basso ("*Mr Basso*"). Santhouse is not a party to the application, and I consider the consequences of this below.

2. The grounds of the application, as set out in the Application Notice dated 29th April 2005 and as expanded upon in paragraph 1 of Mr Estry's witness statement dated 27th May 2005, are that the present claim is an abuse of the Court's process both under the Civil Procedure Rules ("CPR") and the Court's inherent Jurisdiction because:
   (a) The matters raised could and should have been raised in earlier proceedings ("*the First Action*") brought by Mr Basso against the present Defendants and against Anchor International Management Services Ltd ("*Anchor*");
   (b) By reason of Mr Basso's "*extensive delay*" in the conduct of the present claim, viewed against the background of the First Action which is also said to have been *"protracted"*, it is to be inferred that Mr Basso has no intention of bringing the present claim to a conclusion; and
   (c) Mr Basso has failed to comply with the requirement in CPR Part 1.3 to assist the Court in ensuring that the present case is dealt with "expeditiously".

3. The jurisdiction to strike out is said to arise under CPR 3.4(2)(b) and the inherent jurisdiction of the Court. I shall refer to the ground referred to in sub-paragraph 2(a) above as the *"**Henderson v. Henderson** Ground"*, and the grounds referred to in sub-paragraph 2(b) and (c) above as the *"Delay Grounds"*.

4. Mr Estry's witness statement also alleges that the present claim ought to be struck out *"because the matters raised in the claim are time-barred"*. However, in opening the application, Counsel for Mr Estry and Mr Dempsey, Mr Jonathan Arkush, realistically recognised and accepted that it was not appropriate to deal with issues of limitation on a summary basis at this stage, and that it was at least arguable that the claims sought to be raised in the present proceedings are not statute barred. Consequently, I am not required to decide whether the present claim ought to be struck out on this additional ground.

5. The application is opposed by Mr Basso who appears by Miss Sue Carr Q.C.. Miss Carr QC did not act for Mr Basso in the First Action or at the time of the commencement of the present claim.

BACKGROUND The Core Dispute

6. Mr Basso and Mr Estry, who are brothers-in-law, are the sole beneficiaries under the Hillingdon Shirt Company Ltd Retirement Benefits Scheme ("Scheme"), established by a Deed of Trust dated 30th May 1975. The initial trustees of the Scheme were Mr Basso and Mr Estry, together with a Solicitor, Mr Raymond Donn. It is Mr Basso's case that Mr Donn was replaced as a trustee by Santhouse in 1991, and that he, Mr Basso, also ceased to be a trustee in 1991 since when Mr Dempsey has also acted as a trustee of the Scheme albeit that he may not formally have been appointed as such.

7. In 1983 and 1984 the Scheme lent sums of £103,000 and £79,216 to Anchor. In July 1988 a further £34,425 was lent by the Scheme to Anchor. The first two loans, if not also the third loan, were made with the consent and approval at the time of Mr Basso.

8. Mr Basso was a director of Anchor until 18th April 1988. Thereafter and until 7th January 1993, Mr Estry and Mr Dempsey were both directors of Anchor. Mr Estry resigned as a director of Anchor in January 1993, and Mr Dempsey resigned as a director of Anchor in June 1998. However, it is common ground that, at all relevant times thereafter, Anchor continued to be under the effective control of Mr Estry and Mr Dempsey.

9. In October 1997 Mr Basso expressed a desire to transfer his share and interest in the Scheme to another pension scheme, and the actuaries to the Scheme indicated that the transfer value of Mr Basso's interest therein was £307,940. In November 1997 the actuaries sought confirmation from Mr Dempsey that the loans made to Anchor by the Scheme would be repaid by 31st December 1997 to enable Mr Basso to transfer his interest to another scheme. In response thereto, Mr Dempsey replied that Anchor was unable to repay any part of the amount owed by Anchor to the Scheme.

10. Anchor does not have the funds or resources to repay the loans, and Mr Basso holds the Defendants to the present proceedings responsible for the loss of the value of his interest in the Scheme.

The First Action

11. The First Action was commenced on 20th May 1998. Prior thereto, Solicitors acting for Mr Basso, namely Wacks Caller, had written letters before action dated 3rd March 1998 in similar terms to each of Mr Estry and Mr Dempsey. The letters referred to the fact that Mr Basso has been informed that the value of his interest in the Scheme was £308,000 or thereabouts, only to be told subsequently that the loans to Anchor made by the Scheme were irrecoverable, and thus that the value of his interest in the Scheme was nil. The letter then went on to allege as follows:

    2. *We are aware that yourself and Mr Estry are the directors and have effective control of Anchor. You are well aware that as a trustee of the Hillingdon Shirt Company Retirement Benefit Scheme, you agreed, without out client's consent, to a loan being granted to Anchor which would not be repaid until 31st December 1997 and which did not carry any provisions for yearly interest to be paid. We believe the position of yourself and Mr Estry*

to be untenable and other than the obvious fraudulent connotations which we believe arose as a consequence of the actions you have taken, there is quite clearly a civil action against you for mismanaging the Benefit Scheme Fund.

3. *We are aware that no proceedings have been issued by the trustees against Anchor. We suspect this is hardly surprising given that two of the three trustees have effective control of Anchor.*
4. *In the event that Anchor is unable to pay the sums due to the benefit scheme and is subsequently placed into liquidation, you should be in no doubt that our client will be instructing a liquidator to investigate all of the financial affairs of Anchor dating back five years from the date of liquidation. We are aware, for example, of `management charges' which were apparently due to a company in Hong Kong with which you and Mr Estry have a direct connection."*

12. One sees in this letter an assertion of fraud, and what was in effect an assertion that Mr Estry and Mr Dempsey, notwithstanding their position as trustees of the Scheme, had, deliberately preferred the interests of Anchor to those of the beneficiaries under the Scheme.

13. The Statement of Claim dated 20th May 1998 served in the First Action was very much more circumspect in the allegations made on behalf of Mr Basso, and pleaded the case on a very narrow basis. The case as pleaded largely rested on a written agreement dated 30th June 1991 and complaint that this document contained an agreement that had purported to extend the loans to Anchor until 31st December 1997. This document was later admitted by the Defendants to the First Action not to have been authentic in the sense of not being created when it purported to have been created, an admission made notwithstanding that the purported agreement dated 30th June 1991 had been referred to in the Defence and asserted as a genuine document.

14. The allegations of negligence and breach of duty as pleaded in the Statement of Claim. which were based on an allegation that Anchor was insolvent as at June 1991 (see paragraph 11), were confined to this purported extension of the loans to December 1997 (see paragraphs 20 and 22), and the loss alleged was said to flow therefrom (see paragraphs 23 and 24).

15. Paragraph 26 of the Statement of Claim alleged as follows: *"The first, second and third defendants having failed to issue proceedings for the recovery of the said sum and having demonstrated by their conduct that they have no intentions of so doing, the Plaintiff in his capacity as a beneficiary of the scheme seeks an order requiring the fourth defendant to pay the first, second and third defendants as trustees the sum of £472,641.56"*

    However, it formed no part of the pleaded case that a failure to issue proceedings amounted to a breach of trust, or that Mr Estry and Mr Dempsey has deliberately preferred the interests of Anchor.

16. A Defence was served in July 1998. The Defence itself relied upon the insolvency of Anchor as at the supposed date of the agreement dated 30th June 199 I , which such agreement was, as I have already stated, admitted without qualification. Further and better particulars subsequently served by the defendants established that it was the Defendants' case that Anchor became insolvent between April 1988 and April 1989.

17. Miss Carr Q.C. helpfully provided me with a chronology, the material parts of which I adopt for the purposes of explaining the course of the First Action up to 3rd September 200I, the date upon which the trial of the First Action was due to commence. This is not an agreed chronology and I have ought to indicate below where Mr Estry and Mr Dempsey raise particular objection to Miss Carr QC's description of events.

"20.5.98 The 1st claim, brought against the Defendants herein and Anchor, was issued.

24.7.98 Common Defence of all Defendants filed.

11.9.98 Request for Further and Better Particulars of the Defence.

25.11.98 Defendants ordered to serve replies by 16.12.98 and to pay Claimant's costs of application.

17.12.98 Replies served.

28.7.99 Disclosure due

11.8.99 Inspection due.

17.8.99 Date of disclosure lists provided by 1st and 2nd Defendants and Anchor - served on 19.8.99.

27.8.99 Disclosure list provided by the Claimant.

14.10.99 Defendants apply for extension of time to exchange witness statements.

20.10.99 3rd Defendant applies for extension of time to serve list of documents - unless order extension granted to 27.10.99.

25.10.99 3rd Defendant applies for further extension of time to serve list of documents.

27.10.99 Order extending time for list of documents - 3rd Defendant ordered to pay the Claimant's costs.

3.11.99 3rd Defendant provides list of documents.

15.12.99 Claimant's application for extension on time for witness statements because of outstanding disclosure from Defendants - granted by consent while Defendants sought to complete necessary disclosure.

19.5.00 Supplemental list of documents from lst and 2nd Defendants, dealing with disclosure which provoked application 5 months earlier for an extension of time for witness statements.

23.5.00 Claimant's application for specific disclosure dismissed with costs.

1.3.01 Defendants' application for order debarring the Claimant from relying on evidence of fact at trial dismissed, with Claimant's costs in the case. Claimant's application for third party disclosure relating to Anchor's financial information successful, costs in the action.

23.4.01 Defendants ordered to pay Claimant's costs of application to extend time for service of draft amended particulars of claim. Time sought because of delay in obtaining third party disclosure.

14.6.01 Directions on Claimant's application for leave to amend, including costs orders against both Claimant and Defendants, including an order that the Defendants pay the Claimant's costs since 18th May 2001 assessed in the sum of £5,500 plus VAT.

29.6.01 Defendants' apply for extension of time for amended defence - time granted, Defendants ordered to pay Claimant's costs.

22.8.01 Claimant issues application for specific disclosure of bank statements from 4` Defendant. Successful, and costs of £3,525 ordered in Claimant's favour. Supplemental disclosure also ordered against Claimant with Claimant to pay 2/3 of Defendants' costs of that application.

30.8.01 Defendants ordered to make further disclosure and to serve Part 18 response to request for further information. Claimant awarded costs.

3.9.01 Trial due to commence - instead application to amend the trial adjourned."

18. There are a number of points arising from this Chronology that I need to develop.

19. In paragraph 15 of his Judgment delivered on 20th September 2001 referred to below, His Honour Judge Raynor Q.C. ("*Judge Raynor*") quoted various passages from a written statement of a Mr Kennedy of Wacks Caller made in support of the specific disclosure application disposed of on 23rd May 2000, and from a letter dated 3rd December 1989 written by Mr Kennedy and exhibited to this witness statement. The latter letter included the following quote: *"Our client is obviously entitled to know the substance of any transactions entered into by [Anchor] with `connected companies' i.e companies to which Mr Estry and Mr Dempsey have an involvement. No such documentation is enclosed".*

    The letter also said this: *"It is alleged [i.e by the Defendants] that [Anchor] is insolvent. Our client's forensic accountant will be required to carry out a complete review of [Anchor's] financial documentation to be able to properly assess, not only when [Anchor] became insolvent, but why. As [Mr Estry] and [Mr Dempsey] have complete control of [Anchor], our client will contend that transactions were entered into by [Anchor] which were potentially to the detriment of that company and to the benefit of [Mr Estry] and [Mr Dempsey]."*

    Judge Raynor commented thereon, in my view quite accurately, that *"it is clear that the Claimant, and/or his Solicitors, were alert to the possibility of a challenge on the grounds of contrived insolvency and the preference of [Mr Estry] and [Mr Dempsey] as early as 3rd December 1999."*

20. Whilst the application for specific disclosure heard on 23rd May 2000 was dismissed, the application was, of course, decided on the basis of the then state of the pleadings.

21. An order was subsequently made in July 2000 that permitted the service by Mr Basso of accountancy evidence directed at the question of whether, and if so why, Anchor was insolvent over the period between May 1988 and 30th April 1992. It is a striking feature of the case that Mr Basso never availed himself of the opportunity to adduce accountancy evidence of this kind, evidence that might, in the light of the way the case has subsequently been put, have been expected to be directed at the question of Anchor's ability to repay the loans during the period in question.

22. In September 2001, Mr Basso made an application for third party disclosure against Anchor's Chartered Accountants, Baker Tilley. In his witness statement in support of the application, Mr Kennedy of Wacks Caller commented that. *"The Claimant believes that the working papers and documentation in the possession of Baker Tilley may well assist the Claimant in being able to show whether in fact [Anchor's] alleged insolvency has been brought about deliberately by the actions of [Mr Estry] and [Mr Dempsey]".*

23. In June 2001, Mr Basso was given permission to make substantial amendments to his Statement of Claim in the First Action. In paragraph 21 of his Judgment, Judge Raynor explained that the amendments were made consequential upon Mr Basso discovering the true position in relation to the unauthentic documents Including the agreement dated 30th June 1991) that had been relied upon by the Defendants, and after detailed perusal of Anchor's audited accounts.

24. An amended Statement of Claim was served pursuant to the Order made on 14th June 2001. In their amended form, the allegations in the Statement of Claim were, by way of summary as follows:

    (a) Mr Basso's "primary case" was stated to be that the loans had actually been repaid in the year ending April 1987 and that the money representing the same should therefore have been available to the Scheme, and should be still available to the Scheme, and that the first three Defendants to the First Action were, as trustees of the Scheme, liable to account for the same - see in particular paragraphs 6(q) and 6(r) of the Amended Statement of Claim.

    (b) The "secondary case" pleaded was that, in breach of trust and negligently, fresh advances had been made in, inter alia, the year ended April 1989 or alternatively on 1st January 1989, and/or in breach of trust and negligently there were extended periods of the payment allowed. These transactions were alleged to amount to a breach of trust and negligence because Anchor was alleged to be insolvent at all relevant times (i.e July 1988, January 1989, the year ended April 1990, July 1991 and October 1991).

25. There are a number of important points in relation to these amendments and the application that enabled them to be made:

(a) Neither the witness statement of Mr Kennedy made on behalf of Mr Basso in support of the application to amend, nor the amendments themselves, challenged the insolvency of Anchor asserted by the Defendants, but rather relies upon such insolvency as the basis for a claim in negligence, and neither did Mr Kennedy's witness statement nor the amendments themselves assert that in breach of trust the Defendants had failed to obtain payment when repayment was procurable;

(b) According to paragraph 22 of Judge Raynor's judgment, on the hearing of the application for permission to amend, Leading Counsel for Mr Basso, who subsequently appeared at the trial before Judge Raynor on 3`d September 2001, confirmed to the District Judge that no allegation of fraudulent conduct was alleged against the Defendants to the First Action;

(c) Although this is not made clear from the papers before me, it is reasonable to suppose that by then the First Action had either been listed for trial to commence on 3rd September 2001 or was at least very close to being so listed.

26. An Amended Defence was served on 2nd July 2001, and on 16th July 2001 a Reply was served to the Amended Defence. Paragraph 14 of the latter alleged as follows:

"14. Whilst it is admitted that Anchor was insolvent on a balance sheet basis during the periods set out in the Amended Particulars of Claim:

a. Anchor did not and has not yet entered into insolvent liquidation;

b. The bank accounts for Anchor demonstrate that Anchor continued to trade with the benefit of a substantial overdraft facility. If the directors of Anchor had so wished then the debt due to the Scheme could have been repaid;

c. The directors of Anchor allowed their own interests in Anchor to conflict with their duties as trustees of the Scheme."

27. Witness statements were exchanged as late as 21st August 2001, and on 22nd August 2001 and 30th August 2001 orders were made against the defendants to disclose certain bank statements, and on the latter date the defendants were also ordered to serve a response to a request for further information.

28. In a response dated 20th August 2001 to a request for further information served by the defendants to the First Action from Mr Basso, Mr Basso asserted that: *"it is the claimant's case notwithstanding the balance sheet position of [Anchor], that [Anchor] was at various times since December 1988 able to make repayment of the whole of the indebtedness to the Scheme, either in one lump sum or by instalments, and that the trustees had wilfully and in breach of their duties as trustees failed and continued to fail to seek repayment, thereby preferring themselves and [Anchor] over the interest of the claimant as beneficiary of the Scheme."*

This was, of course, not the case advanced in the Amended Statement of Claim.

29. On Friday 3rd August 2001, Mr Basso's Skeleton Argument for the trial commencing the following Monday 3rd September 2001, prepared by Leading and Junior Counsel, was served on the defendants' Leading and Junior Counsel. The Skeleton Argument sought to advance a case of fraudulent breach of trust based upon the deliberate and conscious decision of Mr Estry and Mr Dempsey not to cause Anchor to repay the Scheme when it was in a position to do so thereby, notwithstanding their position as trustees of the Scheme, preferring themselves and/or Anchor.

30. At the commencement of the trial before Judge Raynor on 3rd September 2001 the defendants objected to this allegation being run on the basis that it had not been pleaded in the Amended Statement of Claim served pursuant to the Order dated 14th June 2001. The matter was adjourned to the following day to enable Leading and Junior Counsel for Mr Basso to formulate further amendments to the Statement of Claim, and to seek permission to re-amend.

31. The re-amendments were formulated, and can be summarised as follows:

(a) Paragraphs 11 A and 11 B thereof were re-amended so as to refer to the "*apparent*" insolvency of Anchor, rather then the insolvency thereof;

(b) A new paragraph 11 C was added that asserted that despite apparent insolvency, Anchor had since 30th April 1998, been in a position from time to time to repay the loans if those controlling Anchor (i.e Mr Estry and Mr Dempsey) had chosen to do so; and

(c) A new paragraph 22A set out the allegations of fraudulent breach of trust. I set out this paragraph in full because, in sub-paragraphs a. to c. thereof, it seeks to set out and explain why the allegation was only being made at this late stage, matters relevant to a submission made by Miss Carr Q.C. on behalf of Mr Basso that I refer to below.

"22A. In breach of their said duties and notwithstanding that the Fourth Defendant was at various times since April 1988 able to make repayment of the whole of the indebtedness to the Scheme either in one lump sum or by instalments the Trustees have wilfully and in breach of their duties as trustees failed and continue to fail to seek repayment from the Fourth Defendant thereby consciously and wilfully preferring themselves and the Fourth Defendant over the interests of the Claimant as beneficiary of the Scheme.

a. It was not until the Defendants served their Amended Defence and thereafter replied to the Claimant's Part 18 request that it was alleged that the Defendants' explanation for the removal of the Pension Scheme as

a creditor of the Fourth Defendant in the year end 1987 accounts (and that those accounts did not, therefore, truly and accurately reflect the position) was by reference to the transaction referred to in paragraph 15 of the Amended Defence and that it was alleged that the onus of repaying the Pension Scheme had been transferred to Appleheath as past consideration in the transfer of the property there referred to;

b. *Nor was the Claimant aware (the same having been deliberately concealed from the Claimant by the Defendants) that having so transferred the loan liability to Appleheath, Appleheath proceeded to sell the said property in March 1989 and, rather than insisting upon repayment of the loans to the Pension Scheme at that time pursuant to the obligation which Appleheath had assumed, the trustees permitted (and the First and Second Defendants as controllers of Appleheath caused) the re-transfer of the liability to the Fourth Defendant and simply utilized the sum of £718,000 in reducing the overdraft of the Fourth Defendant;*

c. *Nor was the Claimant aware (the same having been deliberately concealed from the Claimant by the Defendants) until provision of the bank statements by the Defendants Further Supplemental Disclosure dated 18th July 2001 that despite its apparent insolvency, during the period after 30th April 1988 to today the First and Second Defendants have caused the Fourth Defendant to make substantial payments to themselves and/or for the benefit of the third party companies in which they are beneficially interest and/or directors. The best particulars which the Claimant can provide at present are those set out in the schedules attached to the witness statement of Michael Kennedy dated 21st August 2001. Such payments show that at all material times, if the First and Second Defendants had properly considered the exercise of their duties as trustees to recover for the benefit of the Pension Scheme the monies they could have procured the Fourth Defendant to repay the same. In fact, the said payments made for their own benefit demonstrate no good reason why the monies could not have been repaid and show that the First and Second Defendants have wilfully and consciously chosen not to cause the Fourth Defendant to repay the Pension Scheme in breach of their obligations as trustees of the Scheme."*

(d) A new paragraph 22B alleged that the Defendant trustees had failed to give a full and proper account of their dealings and a new paragraph 26A followed on therefrom; and

(e) The prayer was re-amended to reflect the above claims.

32. The application to re-amend was supported by a further statement (dated 3rd September 2001) from Mr Kennedy. I have not seen this witness statement, but in his judgment, Judge Raynor described it as follows: *"That [i.e. the statement] relies almost exclusively on matters said to have come to light as a result of a perusal of bank statements disclosed in July of this year, the effect of which has been summarised in Mr Kennedy's witness statement of the 21st August 2001 in support of the application for disclosure of further bank statements. That summary is at page 70 of bundle 4 where it was asserted that the claimant is extremely sceptical as to the defence, in particular the whole question of the fourth Defendants' insolvency. That is elaborated on, including reference to the bank statements, the effect of which is summarised at page 72 of that bundle and in particular in the schedules at "MBRK8"."*

Judge Raynor's Judgment

33. After a hearing lasting, as I understand, several days, Judge Raynor reserved .judgment until 20th September 2001 when he dismissed, at least so far as is material for present purposes, Mr Basso's application to re-amend the Statement of Claim. It is important to consider in some detail Judge Raynor's reasons for doing so.

34. Judge Raynor in paragraphs 39 to 44 of his Judgment, first dealt with the proposed re-amendments to paragraph 11 of the Statement of Claim. He set out four key reasons for rejecting these proposed amendments. His four reasons can be summarised as follows:

(a) Firstly, Judge Raynor was concerned that to allow the re-amendment would open up *"a massive and incredibly costly enquiry into the financial status and standing of [Anchor] from 30th April 1988 until the present time"*. Judge Raynor expressed concern that consideration would have to be given to the obtaining of evidence from additional witnesses, that expert evidence would have to be obtained at very considerable cost, and that there would have to be an extensive review of disclosure in *"a case where detailed explanations would be sought to be obtained in relation to events which occurred over the past 13 years in relation to a company that was transacting, as the Claimant knew, a huge amount of business and in circumstances in which it is clear that early documentation was no longer available"*. Judge Raynor referred to the absence of the accounting records of Anchor pre-dating 1993, and to the fact that he did not think that, in the circumstances, justice would be served by opening up that enquiry at that stage.

(b) Secondly, Judge Raynor expressed concern that the re-amendment sought would necessitate a very long adjournment and a lengthy trial, whereas without the re-amendments sought, the First Action could be got back on for trial that term with a very much shorter time estimate.

(c) Thirdly, and perhaps most importantly for present purposes, Judge Raynor stated that he was *"quite satisfied"* that Mr Basso *"could and should have raised these matters a long time ago and certainly in sufficient time to ensure that there was not an aborted trial in early September 2001"*. Judge Raynor referred to the letter before action dated 3rd March 1998 and held that the disclosed accounts of Anchor revealed *"ample evidence of payments to directors and connected companies"*. In paragraph 44 of his judgment, Judge Raynor played down the significance of the bank statements disclosed very late in the day in the weeks leading up to trial, Judge Raynor expressing the view that they only showed "*one side of the transaction*". Judge Raynor held that it was of fundamental importance that provision had been made for forensic evidence as long ago as July 2000,

and he relied upon the fact that Mr Basso had opted at that stage not to adduce such evidence, and that Mr Basso had "*elected to rely on the fact of insolvency for the purpose of the amendment as recently as June of this year*".

(d) Fourthly, Judge Raynor held that the amendments proposed in relation to paragraph 11 were the *"platform on which the Claimant wishes to raise allegations of dishonest breach of trust"*, an thus that if permission was refused to raise such latter allegations, then permission should be refused in relation to paragraph 11.

35. Judge Raynor did not deal in any detail with the explanations for seeking to reamend so late in the day as set out in sub-paragraphs 22A a. to c. of the proposed re-amendment referred to in sub-paragraph 31 (c) above, or as raised in Mr Kennedy's witness statement dated 3rd September 2001. I can see some force in the argument that until the late disclosure had occurred in the weeks leading up to trial, there may have been the perception that there was not the evidence upon which to plead the allegations of fraud that were ultimately sought to be introduced. However, it is plain from his judgment that Judge Raynor had the relevant arguments in mind. Judge Raynor had before him very much more by way of original materials, such as witness statements and copies of documents that I have simply not seen. In these circumstances, I do not consider that I am in any position to, or that 1 ought to begin to second guess or go behind Judge Raynor's specific finding that the relevant allegations could and should have been properly raised very much earlier in the day and in time to have the matters adjudicated upon at the trial in early September 2001.

36. Judge Raynor adopted similar reasoning in rejecting the proposed re-amendment sought to introduce the new paragraph 22A, a paragraph that Leading Counsel then acting for Mr Basso confirmed was intended to raise an allegation of fraud. Judge Raynor held as follows: *"I am quite satisfied that it is too late now to permit this late raising of allegations of fraud. First, it would involve the re-opening of the whole financial history of the fourth defendant with all the consequences that 1 have dealt with at length already. Secondly, if fraud was to be raised, I am quite satisfied it could and should have been raised much sooner. Thirdly, in June of 2001 the Court was informed that fraud was not being alleged and I am not satisfied that there is any reasonable explanation for this change of stance. I have dealt already with the bank statements and the information said to have been derived from them."*

37. The other proposed re-amendments further advancing the new case based on fraud were rejected on the same basis.

38. After having dealt (in paragraphs 49 to 51 of his Judgment) with limitation points that it is not necessary for me to go into, Judge Raynor dealt with a final argument advanced by Leading Counsel for Mr Basso, namely that the re-amendments should be allowed because there would be a trial in any event of the non-statute barred claims in a new action. In relation to this point, Judge Raynor commented as follows: *"I am not willing to speculate on whether the Claimant will in fact commence a new action, or if he does what the fate of that action would be, because the defendants have made clear that they will seek to have any new action dismissed as an abuse of process. It seems to me that the contention is plainly arguable and I will leave the matters arising from the commencement of any new action to be determined in the course of that action, if indeed the claimant chooses to commence it."*

39. It is thus clear from this latter passage that it was made clear on behalf of the Defendants in the face of Mr Basso's application to re-amend that if Mr Basso sought to raise the new issues then sought to be introduced by re-amendment by way of new proceedings, then application would be made to strike out the new proceedings as an abuse of process.

Commencement of the Present Claim

40. On 9th November 2001, after having instructed new Leading Counsel, Mr Basso commenced the present claim. It was common ground at the present hearing that the "Statement of Case" settled by new Leading Counsel raises what are, in essence, the same allegations that Mr Basso sought to raise by re-amendment at the trial in September 2001, namely that Mr Estry and Mr Dempsey had deliberately and consciously preferred the own interests and those of Anchor (in which they were interested) over the Scheme (of which they were trustees) by causing the loans made to Anchor to remain outstanding from and after April 1988 notwithstanding the alleged ability of Anchor, from time to time, to repay the same.

41. Paragraph 2 of the Statement of Case contained a plea to the effect that it was not intended that the Statement of Case should raise issues "*justiciable*" between the parties in the First Action, and that, to the extent that it did so, then Mr Basso accepted that those issues should be dealt with the First Action.

42. Mr Arkush takes the point that the claims raised in the present proceedings were "*justiciable*" within the First Action and thus that the pleading, by its terms, excludes the very claims that it raises. Whilst it is right that the new claims would have been `justiciable" within the First Action had they been raised in time, at the date of the service of the Statement of Claim they were not so *"justiciable"* because Judge Raynor had excluded them. Commonsense suggests that the aim of the draughtsman was simply to ensure that there were excluded from the present proceedings claims that had been pleaded and were then still being pursued in the First Action, and I consider that the Statement of Case should be construed accordingly. Thus I do not consider that the wording of paragraph 2 of the Statement of Case, by itself, prevents Mr Basso from pursuing the present claim.

43. The commencement of the present claim left the First Action on foot and ready for trial on the basis of the case as pleaded in the Amended Statement of Claim for which leave to amend had been granted on 14th June 2001, subject only to the further limited re-amendments permitted by Judge Raynor on 20th September 2001.

Exchanges between Counsel and Judge Raynor following the judgment suggest that the Court was looking to list the matter for trial commencing on 26th November 2001.

44. As I understand it, no appeal was brought against Judge Raynor's judgment.

Compromise of First Action

45. The First Action was compromised by Order dated 26th November 2001, the date on which, as I understand it, the First Action would have come back on for trial.

46. The structure of the Order dated 26th November 2001 was as follows. The Order:
    (a) Recited that it was made on the adjourned trial of the First Action;
    (b) Recited that the Defendants did not oppose the Order, without prejudice to their right to apply to strike out the present claim;
    (c) Recited that Mr Basso undertook to abandon and not to pursue any claim in relation to a loan of £21,104.52 alleged to have been made by the Scheme to Anchor on 1st October 1991;
    (d) Contained a declaration as to the outstanding liability of Anchor to the Scheme, namely a total sum of £473,763.53;
    (e) Contained a paragraph dismissing *"all other claims of Mr Basso as pleaded herein and on the basis as pleaded herein";*
    (f) Contained a paragraph providing for Mr Basso to pay the Defendants' costs of the First Action from 25th July 2001, to be subject to a detailed assessment, if not agreed, on an indemnity basis, after giving credit in the sum of £21,500, it being further provided that there should be no order in relation to costs prior to 25th July 2001;
    (g) Contained an order imposing a stay on the continuation of the present proceedings pending payment by Mr Basso of the costs ordered to be paid by Mr Basso, without set off or deduction of any kind.

47. The evidence before me not did go into any detail as to the circumstances in which Mr Basso and the Defendants came to agree the terms of the Order dated 26th November 2001. However, I consider that I am entitled to infer that Mr Basso must have considered that there was little point in proceeding to a trial that did not deal with what had become, albeit late in the day, his real case, and that the Defendants saw little point in insisting that a trial proceed, if Mr Basso was prepared to drop his other pleaded claims - apart from the declaration concerning the liability of Anchor to the Scheme. However, the fact remains that if the First Action had not been so compromised, then the trial of the First Action would have taken place on 26th November 2001 or shortly thereafter, and would have been decided on the basis of the Statements of Case as they then stood.

48. Further, it is clear that the present Defendants were anxious to preserve (so far as they could) their point, first made at the hearing before Judge Raynor in early September 2001, that any new action that sought to raise allegations that could and should have been raised in the First Action, at an earlier stage, should be struck out as an abuse of process.

Assessment of Costs and Further Conduct of the Present Proceedings

49. There was considerable delay in dealing with and resolving the assessment of the costs that Mr Basso had been ordered to pay under the terms of the Order dated 26th November 2001.

    1. The relevant history is helpfully summarised in Miss Carr Q.C.'s Chronology as follows. As 1 have said, this is not an agreed chronology, and I have indicated where Mr Estry and Mr Dempsey raise particular objection thereto.

    "The costs proceedings – 2nd Claim stayed

01-02	Defendants served two bills of costs totalling approx. £144,000. Claimant served points of dispute. Hearing for detailed assessment requested.
30.4.02	Costs directions. Parties ordered to discuss costs. Claimant ordered to pay £60,000 on account of costs by 7.5.02. Claimant believes not informed of payment deadline until Defendants served statutory demand.
8.5.02	Statutory demand served. Claimant applied for extension of time to pay.
29.5.02	Parties agreed £50,000 should be paid on account.
17.6.02	Meeting between the parties re costs. Insufficient time available to deal with both bills. Meeting adjourned.
18.6.02	Telephone con between the parties re costs.
27.6.02	Defendants' solicitors letter-no significant concessions.
30.7.02	Defendants' solicitors write to Court maintaining position on costs and seeking a further hearing.
23.9.02	Defendants offer to settle for £58,000 (against outstanding principal balance of £53,197.95).
26.9.02	Claimant offers to settle for £30,000.
27.9.02	Defendants reject £30,000 offer
30.9.02	Claimant offers to settle for £35,000.
1.10.02	Defendants' offer to settle for £52,750.
1.10.02	Assessment hearing. Claimant ordered to pay additional £21,500 on account. Payment made on time as ordered.

4.12.02 Judgment - costs assessed in sum of approx £34,000. Net effect is that Claimant owed E14,128.02 to Defendants. Defendants do not accept judgment and seek clarification.

28.1.03 Claimant offers £16,500 in full and final settlement of all outstanding costs. No reply.

30.6.03 Claimant's solicitors complain that Defendants not prepared to agree financial net effect of 4.12.02 judgment.

1.7.03 Hearing - Defendants query/seek to appeal order of 4.12.02 with Points to Clarify. Application dismissed. DJ orders hearing on costs of assessment procedure to take place on 22.12.03.

24.7.03 Claimant offers £17,000 in full and final settlement. Rejected.

22.8.03 Final costs certificates issued in error (see judgment of 16.1.04) - sent to Claimant under cover of letter dated 2.9.03.

8.9.03 Further statutory demand served for balance of costs in reliance on erroneous costs certificates. Paid by Claimant by cheque on 23.9.03.

22.12.03 Costs hearing dealing with costs of detailed assessment.

16.1.04 Judgment - Defendants ordered to pay Claimant's assessment costs. Defendants heavily criticised as the case has been *"remarkable for its lack of any genuine attempt by the Defendants to reach a compromise."* Judgment clarifies costs certificates were issued in error, should be treated as interim.

Developments after payment by the Claimant of assessed costs

23.9.03 Claimant pays final element of outstanding principle costs - despite no final costs certificate and assessment proceedings still ongoing. Claimant's solicitors invite Defendants' solicitors to agree that stay lifted. No reply.

4.11.03 Claimant's chase solicitors for reply. No reply.

24.11.03 Claimant's solicitors chase for reply.

27.1 1.03 Defendants' solicitors say reviewing the file.

11.12.03 Claimant's solicitors chase for reply.

16.12.03 Defendants' solicitors say will await outcome of December costs hearing before responding.

22.12.03 Hearing on costs of assessment procedure.

22.12.03 Claimant's solicitors write seeking confirmation that 2"d claim may proceed.

29.12.03 Judgment on costs of detailed assessment procedure - Defendants launch application for permission to appeal, so costs still not concluded. Application ultimately abandoned.

[Mr Estry and Mr Dempsey maintain that the application was not abandoned, but rather that it was not pursued as the result of the parties' reaching agreement on the remaining costs issues - see paragraph 41 of Mr Estry's first witness statement.]

19.1.04 Claimant's solicitors chase for response.

20.1.04 Defendants' solicitors respond but fail to address stay.

27.1.04 Claimant's solicitors chase again - threaten to report to Office for the Supervision of Solicitors if no response on the stay issue.

28.1.04 Defendants' solicitors say due to take instructions - need to consider with clients whether the further action can proceed, on basis stay is on foot until payment of all costs, including costs which were the subject of 22.12.03 hearing (which Defendants are seeking to appeal).

4.2.04 Claimant's solicitors chase.

18.2.04 Claimant's solicitors chase.

2.3.04 Defendants' solicitors saying would not object to proceeding with 2nd claim, subject to reserving their position on the costs appeal, but would meet any progress with a strike out application.

15.3.04 Defendants' solicitors say Claimant needs to apply to Court to lift stay, if Claimant applies, Defendants will apply to strike out. Requests 28 days notice of any steps being taken in the 2nd Claim.

22.3.04 Defence served.

24.3.04 Defendants' solicitors write to Court stating stay would not be automatically lifted.

[Mr Estry and Mr Besso maintain that this letter to the Court did not state that the stay would not be automatically lifted, but rather stated that they took no issue about the stay, but that if the Mr Basso to proceed with the present proceedings, then he would need to apply to the Court for directions, and that if he did so, then the Defendants would apply to strike out the claim.]

30.3.04 Claimant's solicitors write stating Defendants should issue strike out application as first step, if they intend to make such application at all. Also request information about the costs appeal and proposals for payment of the costs due to the Claimant from the Defendants.

21.4.04 Defendants' solicitors ask Claimants to keep correspondence about 2 actions separate. No substantive reply.

4.5.04 Claimant's solicitors chase re strike out application.

19.5.04 Defendants' solicitors simply acknowledge.

20.5.04 Claimant's solicitors chase.

21.6.04 Defendants' solicitors state Wacks Caller should refer files to independent solicitors, clearly implying that they will not deal with the 2n d claim until the Claimant appoints new solicitors.
[Mr Estry and Mr Dempsey maintain that the words from *"clearly implying"* are not justified by the letter. Miss Carr QC no doubt expressed herself' in the way that she did because the letter concluded: *"When you have forwarded your file of papers to a firm of independent solicitors please notify us".]*

25.10.04 Wacks Caller purport to have written to the Court asking for stay to be lifted.

1.12.04 Ricksons serve notice of acting for Claimant.

3.2.05 Claimant's solicitors inform Defendants of intention to proceed and chase Court for update.

5.2.05 Court order stay lifted.

9.3.05 Defendants indicate intention to apply to strike out.

3.05 Reply to Defence served.

14.3.05 Directions - CMC to be heard unless Defendants issue application to strike out by 3.5.05

29.4.05 Application to strike out issued on behalf of all 3 Defendants but not served.

4.5.05 Claimant's solicitors request service.

6.5.05 Claimant's solicitors request service.

19.5.05 Claimant's solicitors request service.

20.5.05 Claimant's solicitors telephone Defendants' solicitors - no response.

23.5.05 Claimant's solicitors telephone Defendants' solicitors - no response.

25.5.05 Claimant's solicitors telephone Defendants' solicitors - no response.

26.5.05 Claimant's solicitors request service, threatening application for the issue of a debarring order.

27.5.05 Application served together with 1st Defendants' witness statement for 1st and 2nd Defendants. 3rd Defendant apparently not pursuing.

15.8.05 Basso witness statement in reply.

9.9.05 Return date for strike-out application".

THE HENDERSON v. HENDERSON GROUND The Law

51. The relevant rule derives from the now well known passage from the judgment of Sir James Wigram V-C in ***Henderson v. Henderson*** (1833) 3 Hare 100, 114115: *"In trying this question, I believe 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 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 judgement, but to every point which properly belonged to the subject of litigation, and which the parties, exercising diligence, might have brought forward at the time."*

52. The rule in ***Henderson v. Henderson*** requires parties to litigation to bring their whole case before the court so that all aspects of it may be finally decided once and for all. Where the rule does apply, a party will be prevented from pursuing by way of fresh proceedings a claim that could and should have been raised in the earlier proceedings. On strict analysis, the rule is different from res judicata or issue estoppel in that it is concerned with what could and should have been decided in earlier proceedings, and not what was actually decided. *"It is a rule of public policy based on the desirability, (in the general interest as well that of the parties themselves) that litigation should not drag on forever and that a Defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."* ***Banks v Bankside Ltd*** [1996] I WLR 257 at 260 per Sir Thomas Bingham MR (as he then was).

53. The decision of the House of Lords ***in Johnson v. Gore Wood & Co*** [2002] 2 AC 1, makes it quite clear that the rule is not one of absolute application. I was referred in submissions to the speech of Lord Bingham of Cornhill, and his consideration of the authorities including the judgment of Auld LJ in ***Bradford & Bingley Building Society v Seddon*** [1999] 1 WLR 1482 at 1490- 1493.

54. It is not in dispute that the most recent authoritive statement of the rule in Henderson v. Henderson is to be found in the speech of Lord Bingham in ***Johnson v. Gore-Wood*** at page 31 A-F: *"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 proceedings 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."

55. The appropriate principles can be summarised as follows:
(a) Where A has brought an action against B, a later action against B may be struck out where the second action is an abuse of process.
(b) The burden of establishing abuse of process is on B.
(c) 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 an abuse.
(d) 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.
(e) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B.

56. It is clear the rule is not confined to those cases where a case is disposed of on the merits after a judgment, but is capable of application where there has been a compromise - see ***Johnson v. Gore-Wood*** at 32H-33A per Lord Bingham. As Lord Bingham put it: *"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 nonetheless harassment 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 harrowing."*

57. I was referred by both Miss Carr Q.C. and Mr Arkush to the speech of Lord Millett in ***Johnson v. Gore-wood*** at page 59C where Lord Millett said this: *"in one respect, however, the principle [i.e of Henderson v. Henderson) goes further than the strict doctrine of res judicata or the formulation adopted by Sir James Wigram V-C, for I agree that it is capable of applying even when the first action concluded in a settlement. Here it is necessary to protect the integrity of the settlement and to prevent the Defendant from being misled into believing that he was achieving a complete settlement of the matter in dispute when an unsuspecting part remained outstanding"*

The Rival Contentions

58. The submissions of Mr Arkush on behalf of the Defendants can be summarised as follows:
(a) The finding of Judge Raynor in the First Action that the claims in the present case could and should have been raised in the First Action "*a long time ago*" creates an issue estoppel that Mr Basso is not entitled to go behind;
(b) The only possible reasons for the matters not being raised in the First Action are that there was a deliberate decision on the part of Mr Basso or his advisors, or was due to (in the words of Sir James Wigram V-C in ***Henderson v. Henderson***) "*negligence, inadvertence or even accident*". It is to be noted that in paragraph 8 of his witness statement dated 15th August 2005 Mr Basso states that he feels "extremely badly let down by my former professional advisors, both Solicitors and Leading and Junior Counsel'". I understand that Mr Basso has at least intimated a claim against some or all of his former professional advisors.
(c) There are no "*special circumstances*" that Mr Basso can pray in aid to Justify his raising by the present proceedings claims that could and should have been litigated in First Action.
(d) It is impossible to identify a single factor that could mitigate, let along remove, the injustice of the Defendants being subjected to a second claim that will necessarily involve going over the same ground as the First Action in even more detail, complexity and massive expense.
(e) The injustice is increased by difficulties caused by the delay and the passage of time (in excess of 20 years) since the events giving rise to the claim. Mr Arkush points, in particular, to the fact that the accounting records of Anchor pre-dating 1993 (apart from audited accounts) do not exist, and to the fact that a deliberate decision was taken by or on behalf of Mr Basso in the first action not to obtain an expert accountancy report when he had the opportunity to do so in 2000.
(f) The public interest referred to by Lord Bingham includes the fact that resources of the Court otherwise be available for other cases would have to be deployed towards a second set of proceedings that ought to have been unnecessary.
(g) Thus applying Lord Bingham's broad merits based judgment, the overriding consideration is that the present claim will subject the Defendants to harassment that can fairly be described as unjust and an abuse of process.

59. Miss Carr Q.C., on behalf of Mr Basso, began by pointing to the unfortunate circumstances that she said Mr Basso now finds himself in, having thought that he had gone to trial to have his case decided on its full merits only to find, through no fault of his own, that he was not only unable to do so, but liable to pay substantial costs to the Defendants.

60. Miss Carr Q.C. quite rightly stressed that the Henderson v. Henderson rule should be applied with caution and that the mere fact that a new action involved the re-litigation of issues did not necessarily amount to an abuse. Miss Carr Q.C. pointed to five principal considerations that I should taken into account when applying Lord Bingham's broad merits based judgment, namely:

(a) The claims sought to be raised in the present proceedings were raised in the First Action, but were not allowed to be advanced. Thus there was no withholding of claims in the sense considered by Sir James Wigram V-C in Henderson v. Henderson;

(b) The present proceedings were already on foot when the First Action was compromised. Miss Carr Q.C. places reliance on the passage from the speech of Lord Millett in Johnson v. Gore-Wood at page 5913-C referred to in paragraph 57 above, and submits that this passage is authority for the proposition that there can be no abuse of process where, as in the present case B settles an existing action with A well knowing that A will try and maintain a second action raising issues that could and should have been raised in the first action. In those circumstances, there was no question of B being misled or of any necessity to protect the integrity of the settlement.

(c) There has been no adjudication of the claims raised in the present proceedings on their merits. Miss Carr Q.C., whilst recognising that this is not a conclusive factor, submits that it is an important factor.

(d) The Defendants' general conduct in relation to the First Action with particular reference to the following:

(i) The fact that the Defendants had relied in their Defence in the First Action upon, and had disclosed documents, including the Agreement dated 30th June 1991, that they knew or must have known were not authentic - a matter that Judge Raynor had deplored in paragraph 15 of his judgment:

(ii) The Defendants' approach to disclosure. Miss Carr Q.C. submitted that the late disclosure of documents in 2001 was material to the change to Mr Basso's case reflected in the re-amendment sought. I have referred above to the significance attached to the same in the proposed new sub-paragraphs 22 a. to c. of the Statement of Case.

(e) The nature of the claims and the public interest in ensuring that fraudulent conduct in relation to pension schemes is properly dealt with.

61. Miss Carr Q.C. submitted that I should ignore the fact that Mr Basso might have a remedy against his professional advisors, and that I should, in relation to this ground ignore, or give limited weight to Mr Arkush's submission that a fair trial might no longer be possible. As to this latter point, Miss Carr Q.C. pointed out that the accounting records of Anchor covering the period prior to 1993 were already missing in 2000 when permission was given to adduce expert accountancy evidence, and Miss Carr Q.C. notes the general point that there was no real evidence that it would be any harder to have a fair trial now than it would have been had all the issues been fully pleaded earlier, and the case tried in November 2001 or shortly thereafter. Miss Carr Q.C. makes the further point that if the present claims are not statute barred, being claims for fraudulent breach of trust falling within section 21 of the Limitation Act 1980, then the Court ought to have cognisance of the fact that Parliament permits such claims to be brought without any time bar.

MY CONCLUSIONS

62. Given that Judge Raynor was concerned with a late application to re-amend made at trial rather than an application to strike out for abuse of process in respect of which somewhat different considerations arise, I do not consider, as Mr Arkush sought to suggest, that any issue estoppel in the true sense arises from Judge Raynor's judgment so as to oblige me to strike out the present proceedings without more. However, whilst having considerable sympathy with Mr Basso given the circumstances that he finds himself in, and whilst doing so with some hesitation recognising that this result will deprive Mr Basso of what would ordinarily have been his opportunity to have his case decided on its full merits, it is my judgment that proper application of the broad merits - based approach referred to by Lord Bingham in ***Johnson v. Gore-Wood,*** taking into account the relevant public and private interests, leads to the conclusion that Mr Basso, in seeking to raise in the present claim the claims that he does, is misusing or abusing the process of the Court, and that there are no special circumstances that sufficiently excuse or justify his actions.

63. I remind myself that the onus is on the Defendants, and that the underlying public interest is that there should be finality in litigation and that a party should not be vexed twice in the same matter, and that the bringing of a claim may, without more, amount to abuse if the Court is satisfied that the claim ought to have been raised in the earlier proceedings if it was to be raised at all, albeit that there will rarely be abuse absent unjust harassment by the new proceedings.

64. The following factors are, in my judgment, of key importance:

(a) The First Action was, itself, protracted and involved numerous and vexing interlocutory applications for disclosure and so forth. Whilst the trial thereof never took place, the First Action was listed for trial upon one, if not two occasions, and the parties no doubt attended Court on 3rd September 2001, if not also 26th November 2001, in preparation for a fight on the merits.

(b) The First Action was Mr Basso's chosen vehicle to complain of the loss of his interest in the Scheme as a result of the Defendants' actions, and to seek redress. The application of the public interest considerations referred to above obliged Mr Basso to bring forward his full case, at least absent cogent explanations for not doing so.

(c) The clear finding of Judge Raynor was that the relevant claims, and in particular the core allegation that Mr Estry and Mr Dempsey had deliberately and consciously preferred their own interests by not causing Anchor to repay the loans so as to give rise to a claim for fraudulent breach of trust, could and should have been advanced much earlier in the First Action. As I have stated, I do not consider that it is open to me to even begin to go behind this clear finding notwithstanding the observations that I have made in paragraph 35 above about the late disclosure of documents by the Defendants in August 2001.

(d) Not only did Judge Raynor find that the claims should have been advanced very much earlier, he pointed out that fraud had been hinted at as early as the letter before action dated 3rd March 1998, and that in the course of the proceedings, Mr Basso had taken a stand by:
  (i) Not seeking to adduce accountancy evidence in relation to the financial position of Anchor notwithstanding having been given the opportunity to do so; and
  (ii) Through his Leading Counsel, confirming at the hearing before the District Judge on 14th June 2001 of Mr Basso's application to amend the Statement of Case, that Mr Basso did not seek to plead fraud.

65. I turn to consider the more specific matters relied upon by Miss Carr Q.C. on behalf of Mr Basso.

66. It is certainly true that the relevant claims were sought to be raised in the First Action, and that there was not a withholding of those claims in the classic sense perhaps envisaged by Sir James Wigram V-C in ***Henderson v. Henderson***. However, consistent with the policy considerations behind the rule identified by Lord Bingham in ***Johnson v. Gore-Wood*** at 31A-B, the rule is, in my judgment, capable of applying where a party did, as in the present case, withhold the claim within the first action until it was too late to advance it with the result that the First Action was disposed of without those issues being adjudicated upon. The overriding consideration is, as I see it, that the Court must be satisfied that the claims should have been raised, in the sense of being raised at an appropriate time, in the First Action if they were to be raised at all. I am satisfied that the present claims, if they were to be raised at all, should have been raised at an appropriate time in the First Action when, on the basis of Judge Raynor's findings, Mr Basso had ample opportunity to do so but specifically did not do so.

67. As to Miss Carr Q.C.'s second and third points, 1 readily accept that the Court should be considerably more reluctant to apply the rule in Henderson v. Henderson where there has been no determination or adjudication of the issues on their merits. The object of a Court of Justice ought to be to ensure that cases are dealt with on their full merits unless special circumstances, such as the need of the Court to regulate its own processes in the overall interests of justices, prevail. However, it is clear from the speeches in Johnson v. Gore-Wood that the rule is capable of applying where a case has been compromised, and I do not consider that Lord Millett was, at page 5913-C in ***Johnson v. Gore-Wood,*** intending to limit the circumstances in which the rule might apply in the case of compromise to the situation where B has been misled or where it is necessary to protect the integrity of the settlement. In any event, to the extend that Lord Millett did intend to introduce any such limitation on the application of the rule, I consider this to be inconsistent with Lord Bingham's wider formulation of the appropriate principles with which the majority of the House of Lords agreed.

68. In relation to the present settlement of the First Action, the key considerations are, in my judgment, as follows:
(a) A settlement was reached after the First Action had not only been listed for trial, but had come on for trial. The First Action had taken several years to get to trial, during the course of which the usual procedural steps had been gone through, and there had been a number of substantial interlocutory applications concerning matters such as amendments of pleading and disclosure.
(b) Settlement was only reached after it had been made quite clear on behalf of the Defendants, both prior to the issue of the present claim and thereafter, that application would be made to strike out as an abuse of process;
(c) Settlement was only reached after the adjourned trial had been relisted, such that the First Action would have been finally disposed of on its merits, i.e on the basis of the then pleaded case, shortly after 26 `" November 2001 absent a settlement; and
(d) The settlement was reached in circumstances in which the Defendants carefully reserved the right to apply to strike out the present claim. I further note that the Defendants avoided the order dated 26th November 2001 being described as a consent order.

69. It was suggested by Miss Carr Q.C. that in settling the First Action without specifically disposing of the present claims the Defendants took the risk that they would be pursued. However, equally, it might be said that Mr Basso took the risk that the Defendants would proceed with their stated aim of applying to strike out. Having regard to the considerations referred to in paragraph 66 above, 1 do not consider that the fact that the First Action was settled in the way that it was detracts from the overall point that if the present claims were to be pursued at all, they could and should have been raised at an appropriate time and pursued in the First Action. As a result of the present claims not having been dealt with in that way, the Defendants are now exposed to having to engage in the process of defending a second set of proceedings going over much of the same ground as the First Action but from a different angle, and of going through once again all the necessary procedural steps, with all the attendant consequences by way of cost and vexation of doing so.

70. As to Miss Carr Q.C.'s fourth and fifth points, I agree that in reaching a broad merits based judgment, I should, as part of the required balancing exercise, take into account the matters in respect of the Defendants' conduct that she has raised and the public interest in ensuring that pension schemes are properly and honestly administered by their trustees. I have given careful consideration to these factors and taken them into account, but I consider that they are outweighed by the other considerations involved.

71. I agree with Miss Carr Q.C. that I should ignore the fact that Mr Basso might have a claim against his former legal representatives, not least because I am in no position to form any sensible view as to the merits of any such claim, and it is at least quite possible that Mr Basso might be without remedy.

72. Equally. i am unable to form any sensible view as to the merits of Mr Basso's present claim against the Defendants. However, 1 proceed on the basis that Mr Basso may have at least a good arguable case on the merits in relation to the present claims that is not statute barred (at least against Mr Estry). However, in the present circumstances I do not consider that the present proceedings are any less an abuse by reason thereof.

7 3 . I do have concerns as to whether a fair trial would be possible after this length of time after the events in question. Whilst my instinctive feeling is that it will be all the more difficult to now have a fair trial given the further delays since September 2001 and the date of the original trial, I recognise that difficult factual issues arise on this point that I am unable to resolve on the materials before me. Further, I recognise the significance of the fact that no limitation period may be applicable to Mr Basso's claims (at least against Mr Estry). In the circumstances, I have given little or no weight to the effect of delay and the consequences thereof in considering the ***Henderson v. Henderson*** Ground.

Conclusion

74. Seeking to take all the relevant considerations into account and seeking to reach a broad, merits based judgment, 1 am of the firm view that the overriding consideration in the present case is that the Defendants were taken to trial in the First Action on the basis of a particular case in circumstances in which, on the basis of the finding of Judge Raynor, Mr Basso could and should have raised the present claims at a very much earlier stage, but specifically did not do so. In my judgement if those claims were to be raised at all, they should, in those circumstances, have been raised in the First Action. To now require the Defendants to have to defend a second set of proceedings going over much of the ground covered by the First Action, albeit from a different angle, offends against the public policy considerations that there should be finality in litigation and that a party should not be vexed twice in the same matter. The present proceedings do, in my judgment, amount to unjust harassment of the Defendants and an abuse of process.

75. The proceedings will thus be struck out as against Mr Estry and Mr Dempsey.

76. As I have indicated, Santhouse, for reasons that are not clear to me, has not joined in the present application. 1 do not agree with Miss Carr Q.C.'s submission that the proceedings will necessarily continue against Santhouse. No party has sought to suggest that the position of Mr Santhouse is in any material respect different than that of Mr Estry and Mr Dempsey. Consequently, the present proceedings as against Santhouse are equally to be characterised as an abuse. The Court has wide powers to make orders of its own initiative - see CPR 3.3. In the light of my finding on Mr Estry's and Mr Dempsey's application, I propose to exercise my powers under CPR 3.3 to strike out the claim as against Santhouse.

THE DELAY GROUNDS

77. In the light of my findings above, it is strictly unnecessary for me to deal with these separate grounds to strike out. However, I was informed during the course of submissions that this Judgment may have implications going beyond the dispute as between Mr Basso and the Defendants in respect of which the basis for the proceedings being struck out might be important. In response 1 indicated that I would give a reasoned decision in relation to each ground upon which the Defendants seek to strike out the present claims. I deal with these Delay Grounds fairly shortly, but this should not be taken to mean that 1 have not given full consideration to the evidence and the submissions.

78. Paragraph I(1) of Mr Estry's witness statement makes it clear that the application made in relation to delay, whether made by reference to the complaint that Mr Basso has failed to comply with the requirements of CPR 1.3 by not assisting the Court in ensuring that the claim is dealt with expeditiously or on any other basis, is made because Mr Estry and Mr Dempsey maintain that the delay amounts to an abuse of the Court's process.

79. The appropriate principles appear from cases such as the decision of Neuberger J in ***Annodeus Ltd v. Gibson & Others,*** unreported 2nd February 2000 (where Neuberger J helpfully summarised the principles which the Court needs to take into account and describes the factors which the Court is likely to find relevant in deciding how to exercise its discretion), and the decision of the Court of Appeal in ***Habib Bank v. Jaffner***, unreported 29th March 2000. The recent decision of Mr Michael Furness Q.C. in Jeffrey v. Flanders, unreported 28th July 2005, helpfully brings together and summarises the various authorities.

80. The cases draw a distinction between an application to strike out where there is alleged to have been an abuse of process, and an application to strike out for want of prosecution in a wider sense. At the beginning of her submissions, Miss Carr Q.C. made the fair point that the application had been bought on the basis of abuse of process, and that I should resist any invitation contained within Mr Arkush's submissions to deal with the application on any wider basis.

81. The fact that the proceedings have now been on foot for some 4 years and have not got beyond the stage of pleadings is, at first blush, a startling one. However, this delay is largely explained by the fact that the proceedings were, under the terms of the order made on 26th November 2001, stayed until such time as Mr Basso paid the costs ordered to be paid by him thereunder. As appears from the recitation of the facts set out above, the assessment of costs, i.e the process by which the costs payable by Mr Basso were to be determined, was protracted.

82. When Mr Basso's liability had been conclusively ascertained, by letter to the Court dated 24th March 2004, the Defendants' Solicitors, Berg & Co, maintained that as a result of the proceedings having been stayed for so long,

Mr Basso would need to apply to the Court for confirmation that the stay had been lifted and for directions, and that service of a Defence should not automatically trigger the sending out of allocation questionnaires, a step that required to be taken before Mr Basso came under any requirement under the CPR to serve a Reply. As I understand it, the Court acceded to this, and no allocation questionnaire was sent out at that stage. In response to this stand taken by Berg & Co, Mr Basso's then Solicitors, Wacks Caller, not unreasonably took the view that if any application to strike out was to be made, then the proper course was for that application to be made before further procedural steps were taken (and thus costs wasted). There would, as I see it, have been nothing to prevent the strike out application being brought at that stage, i.e by March 2004, in which case more than a year's delay would have been avoided.

83 There is, however, some force in the point that the Defendants were entitled to sit back and see whether Mr Basso really intended to proceed with the present claim before launching an application to strike it out, and that Mr Basso was then somewhat tardy in bringing the matter back before the Court. On any view, it was not until October 2004 that it is suggested that steps were taken to bring the matter before the Court, but even then there is some issue as to whether a letter from Wacks Caller dated 25th October 2004 was, in fact, sent to the Court.

84. At the heart of Mr Arkush's submissions was the argument that, in the light of the delays in respect of the First Action, Mr Basso should, comparatively shortly after 26th November 2001, have paid the sums claimed by Defendants on account of costs in order to achieve the lifting of stay at that point, and to have then pursued the present claim.

85. This submission is, in my judgment, misconceived. The term of the Order dated 26th November 2001 providing for a stay had been introduced at the Defendants' request. Mr Basso had, albeit with some delay, paid the monies required to be paid on account, and he made a number of offers to settle the balance claimed. In his judgment delivered on 16th January 2004 the District Judge criticised the Defendant for having made no genuine attempt to compromise in relation the amount of costs claimed. Against this background, and bearing in mind it was always open to the Defendants to lift the stay or treat the same as lifted, and require Mr Basso to proceed with the present claims, I consider it unrealistic to suggest that Mr Basso could or should have done more to advance the present claims.

86. Abuse of process in the context of delay requires a finding that the party in question has abused a process of the Court. Although it is quite possible that abuse might be found in other circumstances, the examples of abuse cited to me were where a party had delayed because he had no intention of bringing his claim to a conclusion (see ***Grovit v. Doctor*** [1997] 1 WLR 640), and where the delay is caused by a party acting in wholesale disregard of the norms of conducting serious litigation in circumstances demonstrating an affront to the Court (***Habib Bank v. Jaffer***).

87 It is a feature of the present application that Mr Arkush was unable to point to any specific rule of the CPR or Court Order that Mr Basso had, in his conduct of the present claim, breached.

88. In my judgment, delay on the part of Mr Basso amounting to abuse of process is not made out. There is no sufficient evidence upon which I can properly conclude or infer that Mr Basso delayed in pursuing the present claim because he had no intention of pursuing it - the ground in fact relied upon by Mr Estry in his witness statement in support of the application. Further, I do not consider that Mr Basso has, by his conduct, acted in wholesale disregard of the norms of conducting serious litigation. The complicating factor in the present case is the stay imposed by the order dated 26th November 2001 and the effect thereof, which i have considered above. Mr Basso might have acted more promptly in progressing the claim once the costs had been assessed and paid, but his conduct has to be viewed in the context of the approach taken by the Defendants through their Solicitors, Berg & Co, and the fact that Mr Basso changed his Solicitors from Wacks Caller to Ricksons during the course of last year. I consider that Mr Basso's conduct falls well short of abuse of process.

89. Whilst I doubt that it is, strictly, open to the Defendants on the basis of their application as framed to advance a case of want of prosecution in the more general sense considered Neuberger J in ***Annadeus Ltd v. Gibson***, having regard to the criteria identified therein, I do not consider that a case of want of prosecution warranting the striking out of the claim is made out.

90. I thus reject the Delay Grounds to strike out.

OVERALL CONCLUSION

91. Given my finding on the Henderson v. Henderson Ground, I accede to the Defendants' application to strike out. Whilst I would be prepared to hear submissions as to the appropriate form of order, my provisional view is that the appropriate form of order would be to strike out Mr Basso's Statement of Case and to consequentially dismiss the action against each of the Defendants, including Santhouse.

Mr Jonathan Arkush (instructed by Berg & Co) for the Claimant
Miss Sue Carr QC (instructed by Ricksons) for the first and second Defendants