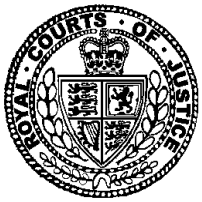

Neutral Citation Number: [2023] EWCA CIV 209

Case No: CA-2022-000479

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LUTON COUNTY COURT
HER HONOUR JUDGE BLOOM
G00LU844

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 March 2023

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE MALES
and
LORD JUSTICE PHILLIPS

- -

Between:

DAMIAN WARBURTON	**Appellant**
- and -	
THE CHIEF CONSTABLE OF AVON AND SOMERSET CONSTABULARY	**Respondent**

- -
- -

David Hirst (instructed via **Direct Access**) for the **Appellant**
Robert Talalay (instructed by the **Legal Services Directorate, Avon and Somerset Constabulary**) for the **Respondent**

Hearing date: 10 November 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 2 March 2023
by circulation to the parties or their representatives by e-mail
and by release to the National Archives

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Lord Justice Phillips:

1. In these proceedings the appellant ("Mr Warburton") claims damages and injunctive relief against the respondent police force ("Avon & Somerset") for alleged breaches of the Data Protection Acts of 1998 and 2018 ("the DPAs") in respect of personal data relating to Mr Warburton held or formerly held by Avon & Somerset.

2. On 20 January 2022 Her Honour Judge Bloom ("the Judge") struck out the claim in so far as it related to the period before 11 July 2019 ("the pre-July 2019 DPA claim"). The Judge made that order having held, in a reserved judgment dated 19 January 2022, that the pre-July 2019 DPA claim was an abuse of the process of the court within the principle described in *Henderson v Henderson* (1843) 3 Hare 100 as it could and should have been brought, if at all, in earlier defamation proceedings between the same parties ("the Defamation Proceedings"). The Defamation Proceedings had been settled on 11 July 2019 when Mr Warburton accepted a Part 36 offer from Avon & Somerset to settle the whole of the Defamation Proceedings for £20,000.

3. The Judge also summarily dismissed most of Mr Warburton's claim in relation to matters which post-dated 11 July 2019, refusing to do so only in relation to the continued retention of one piece of data, the claim in respect of which will proceed to trial in any event. To the extent that the Judge struck out or dismissed Mr Warburton's claim, she thereby allowed an appeal from the judgment of District Judge Ayers dated 14 May 2021 (and amended on 29 May 2021) in which he had refused to strike out or grant summary judgment in respect of any part of the claim, but granted Avon & Somerset permission to appeal.

4. Mr Warburton brings this second appeal against the Judge's decision to strike out the pre-July 2019 DPA claims, permission having been granted by Asplin LJ in respect of his two grounds of appeal, namely:

    i) first, that the Judge was wrong to hold that the pre-July 2019 DPA claim had not been "raised" or "brought forward" by Mr Warburton in the Defamation Proceedings. Mr Warburton relies upon the fact that he had set out that claim in draft amendments to the Particulars of Claim in the Defamation Proceedings, which had been provided to Avon & Somerset and put before the court, although permission to amend had not been granted by the date of the settlement.

    ii) second, that the Judge failed to recognise that the effect of accepting a Part 36 offer is the settlement of the pleaded claim, and only that claim, wrongly considering the pre-settlement correspondence. In the present circumstances, the settlement excluded the pre-July 2019 DPA claim, despite the fact that Avon & Somerset well knew that that claim was being advanced by Mr Warburton at the time, albeit not yet formally pleaded. Mr Warburton contends that it was not an abuse for him to take advantage of Avon & Somerset's "litigation mistake".

The background facts

5. The following summary of the facts relevant to the appeal is drawn from the chronology agreed by the parties, the detailed account set out in the Judge's reserved judgment and the documents before the Court.

(i) West Midlands Police ("West Midlands")

6. In 1998, whilst Mr Warburton was a probationary constable with West Midlands, he was investigated in relation to two matters, namely (1) that he had performed a striptease in the student bar; and (2) that he had racially abused Muslims, including a Muslim police officer. He left the force to join the army before any action was taken.

(ii) Avon & Somerset

7. In June 2004 Mr Warburton started work in the Crime Administration Support Unit of Avon & Somerset. In February 2005 he applied to become a Special Constable on that force. Vetting checks revealed various matters, including the allegations made while Mr Warburton was with West Midlands. Those allegations were recorded in a log completed by an Avon & Somerset officer, DC Beable, on 4 February 2005 and subsequently found their way into an intelligence file numbered 015/05 held by Avon & Somerset's Counter Corruption Unit ("CCU"). CCU files numbered 074/04 and 227/04 referred to a separate allegation of workplace misconduct by Mr Warburton whilst in Avon & Somerset's employ, namely, that he had put inappropriate pictures on a colleague's desk, an allegation recorded in an email sent by the colleague (Mr Tippetts of the Trials Unit) dated 3 February 2005.

8. Mr Warburton's application to become a Special Constable was refused, by which time he had left Avon & Somerset to become a legal academic.

9. In 2008 Mr Warburton made a public complaint on a Facebook site about a police sergeant who worked for Avon and Somerset, PS King, recorded in a CCU file numbered 112/09.

(iii) 2008 arrest

10. Also in 2008 Mr Warburton was arrested on suspicion of criminal damage. He was not convicted, but a record of the alleged incident was retained on the Police National Computer ("PNC") and the Police National Database ("PND"). His fingerprints and DNA were captured and retained. In or about October 2015 the fingerprints and DNA were deleted from those databases.

(iv) Hertfordshire Constabulary ("Hertfordshire")

11. In 2017 Mr Warburton applied to be a constable with Hertfordshire. He initially passed vetting and was to start as a constable in July 2017. However, after Avon & Somerset disclosed to Hertfordshire CCU files 015/5, 227/04 and 112/09, DC's Beable's log and Mr Tippet's email, the offer was withdrawn.

12. Hertfordshire disclosed to Avon & Somerset their vetting file for Mr Warburton (a "Viapoar"). The file disclosed what Mr Warburton had said when asked by Hertfordshire about the allegation of racism.

13. In December 2017 Hertfordshire provided Mr Warburton with copies of the material it had been sent by Avon & Somerset.

(v) The Defamation Proceedings

14. Mr Warburton commenced the Defamation Proceedings on 27 April 2018, claiming £167,992.57 as damages, alleging that the information supplied by Avon & Somerset to Hertfordshire was defamatory and untrue. He asserted that the libel had caused him special damage by way of lost earnings and, more generally, the loss of a police career.

15. Paragraph 1 of Mr Warburton's Particulars of Claim stated "This is a claim in defamation", although in paragraph 5 it was asserted that Avon & Somerset's actions were also in breach of Data Protection Principles imposed by the Data Protection Act 1998. In its Defence Avon & Somerset stated its understanding that those assertions were "background only" and that no claim was made in respect of them. In paragraph 28 of his Reply, Mr Warburton confirmed that "There is not a claim under the 1998 Act brought as part of this action", and that the matters referred to were "relevant to one aspect of proving the Defendant not to have access to qualified privilege, for reason of s.15(4)(a) Defamation Act 1996".

16. Avon & Somerset applied to strike out the Defamation Proceedings, causing Mr Warburton to apply to amend the Particulars of Claim by application dated 19 September 2018. Amongst other substantial revisions, the proposed amended pleading (apparently drafted by Mr Warburton himself) included new data protection claims, complaining of the creation and retention of the various documents and database records referred to above and seeking aggravated and exemplary damages, declarations and injunctions.

17. On 17 December 2018, notwithstanding the proposed amendments, DJ Ayers struck out the Defamation Proceedings as being out of time and for failing to comply with the rules relating to the pleading of defamation claims. On 9 April 2019, however, the Judge allowed Mr Warburton's appeal and directed that the Defamation Proceedings, including the application for permission to amend the Particulars of Claim, be transferred to the High Court. The Judge further ordered Mr Warburton to file and serve "properly pleaded Amended Particulars of Claim which comply with the CPR and any relevant practice directions" by 7 May 2019.

18. On 7 May 2019 Mr Warburton filed and served completely revised draft Amended Particulars Claim, settled by Mr Hirst, counsel who appeared for him before the Judge and on this appeal. The draft pleaded two distinct claims: (i) a defamation claim, seeking general damages, including aggravated damages; and (ii) a data protection claim, seeking compensation under the DPA 1998 and/or damages for breach of statutory duty. The draft further sought an injunction to prevent further publication or an order that Avon & Somerset permanently erase all personal data about Mr Warburton.

(vi) Settlement of the Defamation Proceedings

19. On 23 April 2019, shortly after the Judge had allowed Mr Warburton's appeal and restored the Defamation Proceedings, Mr Hirst made the following offer to Avon & Somerset on behalf of Mr Warburton:

> "Erasure/permanent hard deletion of all of the evidence logs complained of.

> Undertaking not to disclose again to any third party.
>
> Compensation of £25k to reflect the extreme distress, hurt and depression he has suffered for the last two years as a result of the ill-advised disclosures to Herts, and the knowledge that the prospect of further disclosures shut him out of his chosen career.
>
> Private message of apology from a senior officer on the vetting side at [Avon & Somerset] ..."

20. On 7 May 2019, just after serving his revised draft Amended Particulars of Claim, Mr Warburton emailed Rhodri Davies of the Legal Services Directorate at Avon & Somerset, emphasising that the offer he had made was on the basis that he did not incur further legal costs and that it would be withdrawn if, for instance, an Amended Defence was served.

21. On the 3 June 2019 Mr Talalay, counsel for Avon and Somerset (who appeared before the Judge and on this appeal) conveyed to Mr Hirst an offer of £10,000 in full and final settlement "*to reflect the distress your client felt in respect of breaches of the Data Protection Act 1998*". The defamation claim was refuted in its entirely, but it was accepted that there were some data protection breaches, albeit not in respect of the racial abuse allegation.

22. Mr Warburton sent various emails in response. On 5 June 2019 he made a without prejudice offer save as to costs. He was concerned that the offer made by Avon & Somerset permitted retention of the log relating to the racial abuse allegation: he required that the admission that processing of the logs was not data compliant extended to CCU file 015/15. He further stated that £10,000 might be appropriate for one head of claim (DPA) but would not adequately reflect additional damages for defamation. Later in the same email he stated that Avon & Somerset's admission of liability in respect of data protection breaches concluded that issue. He restated his offer to accept £25,000 on terms that all data held by Avon and Somerset was erased, including his arrest data. In addition, he required an apology and an undertaking regarding further use. In return he would discontinue his existing claim and undertake not to bring future claims or make further complaints.

23. On 2 July 2019 Mr Talalay conveyed to Mr Hirst an increased offer of £20,000, essentially for business reasons, which would be embodied in a Part 36 offer. The email again reiterated that Avon & Somerset did not consider the defamation claim would succeed and that the force considered it was lawful to process the racial abuse allegation. It was also made clear that if the offer was not accepted, Avon & Somerset would progress the case, consenting to the amendments to the Particulars of Claim and serving an amended Defence. A Part 36 offer to settle "the whole of the claim" for £20,000 was duly made by Avon & Somerset on 5 July 2019.

24. On the same date Mr Warburton wrote to Mr Davies to say he saw no mention in the latest offer of an apology, erasure of data etc. He said this "*If data is not erased, then sooner or later your client and I are likely to be in litigation again as the only purpose your client can have for retaining it is to share it again, and as you have seen, if it is shared I will litigate*." He concluded by demanding the data, including PNC and PND, entries were deleted.

25. However, on the 11 July 2019 Mr Warburton accepted the Part 36 offer, resulting in the settlement of the Defamation Proceedings.

(vii) Subsequent events

26. Avon & Somerset deleted the PNC record on 11 September 2019. The PND record was deleted by 18 September 2019. Further local records held were deleted in early October 2019. Only CCU file 015-05 was retained, amended to include Mr Warburton's response given to Hertfordshire in response to the allegations of racial abuse.

27. Mr Warburton issued these proceedings on 17 August 2020. The Particulars of Claim, again settled by Mr Hirst, advance essentially the same data protection claims as were set out in the revised draft Amended Particulars of the Claim in the Defamation Proceedings, and seek exactly the same relief in respect of them.

28. On the 23 October 2020 Avon & Somerset made its application to strike out these proceedings and for summary judgment in its favour.

The relevant legal principles

Henderson abuse of process

29. The starting point (as confirmed by Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seat UK Ltd* [2013] UKSC 46, [2014] AC 160 at [18]) remains the statement of principle of Wigram V-C in *Henderson*. In that case the former business partner of a deceased sought an account against the estate of his deceased business partner by proving transactions which had not been before the court in similar proceedings between the same parties in Newfoundland in which an account had been ordered and taken and judgment given for the estate for the sums found due. Wigram V-C accepted the estate's contention that the claim should not be permitted to proceed, stating:

> "[W]here 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 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...Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and prima facie, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule."

30. The *Henderson* abuse principle, as developed in subsequent cases, was authoritatively reviewed by the House of Lords in *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1. Mr Johnson's company, WWH, sued its solicitors for professional negligence in relation to the exercise of an option to purchase land. During the course of those proceeding Mr Johnson notified the solicitors that he had a personal claim against the firm in relation to the exercise of the option that he would pursue in due course, after WWH's claim had been concluded. After six weeks of the trial of WWH's claim, those proceedings were compromised. The settlement agreement between WWH and the solicitors contained provisions designed to limit the quantum of any personal claim Mr Johnson might make, including an undertaking by him that any claim qua shareholder would be limited to £250,000 not including interest or costs. A confidentiality clause contained an exception for any action that Mr Johnson might bring against the solicitors. After subsequent proceedings brought by Mr Johnson against the solicitors had been underway for over 4 years, the solicitors applied to strike out the action as an abuse of the process of the court.

31. Lord Bingham of Cornhill, with whom Lord Goff, Lord Cooke and Lord Hutton agreed on the question of abuse of process, explained the modern principle at p. 31A as follows:

> "…*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…."

32. Lord Bingham further held at p. 33D that the fact that Mr Johnson was not a plaintiff in the first action did not take the case out of the scope of the *Henderson* principle as Mr Johnson had the power to include his personal claim in the company's action had he wished to do so, emphasising that "a formulaic approach to the application of the rule would be mistaken". Neither was the rule excluded because the first action had culminated in a compromise rather than in a judgment, Lord Bingham holding at p. 32H that "a second action is no 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."

33. Nevertheless, Lord Bingham held at p. 34B that the solicitors were estopped by convention from striking out Mr Johnson's claim given the underlying assumption by the parties that further proceedings would not be an abuse of process and the unfairness in permitting the solicitors to resile from that assumption. Further, even if there was no estoppel, Lord Bingham held at p. 34C that there were reasons for deferring the prosecution of Mr Johnson's personal claim, in particular the urgent need to obtain an early and favourable decision in the company's action due to the solicitor's breach of duty to the company, such that it would be wrong to stigmatise as abusive what was, in practical terms, unavoidable.

34. Lord Millett explained the interrelationship between res judicata and *Henderson* abuse at p. 58G as follows:

> "As the passages which I have emphasised indicate, Sir James Wigram did not consider that he was laying down a new principle, but rather that he was explaining the true extent of the existing plea of *res judicata.* Thus he was careful to limit what he was saying to cases which had proceeded to judgment, and not, as in the present case, to an out of court settlement. Later decisions have doubted the correctness of treating the principle as an application of the doctrine of *res judicata*, while describing it as an extension of the doctrine or analogous to it….But these various defences [res judicata, issue or cause of action estoppel] are all designed to serve the same purpose: to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions. While the exact relationship between the principle expounded by Sir James Wigram and the defences of *res judicata* and cause of action and issue estoppel may be obscure, I am inclined to regard it as primarily an ancillary and salutary principle necessary to protect the integrity of those defences and prevent them from being deliberately or inadvertently circumvented.
>
> In one respect, however, the principle 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 where 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 unsuspected part remained outstanding.

> However this may be, the difference to which I have drawn attention is of critical importance. It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is *prima facie* a denial of the citizen's right of access to the court conferred by the common law and guaranteed by Article 6…. While, therefore, the doctrine of *res judicata* in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the Court from abuse and the defendant from oppression…".

35. At p. 59F Lord Millett identified the key question as follows:

> "…There is, therefore, only one question to be considered in the present case: whether it was oppressive or otherwise an abuse of the process of the court for Mr. Johnson to bring his own proceedings against the firm when he could have brought them as part of or at the same time as the Company's action. This question must be determined as at the time when Mr. Johnson brought the present proceedings and in the light of everything that had then happened. There is, of course, no doubt that Mr. Johnson *could* have brought his action as part of or at the same time as the Company's action. But it does not at all follow that he *should* have done so or that his failure to do so renders the present action oppressive to the firm or an abuse of the process of the court….it may in a particular case be sensible to advance claims separately. Insofar as the so-called rule in *Henderson v. Henderson* suggests that there is a presumption against the bringing of successive actions, I consider that it is a distortion of the true position. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action."

36. Lord Millett concluded, without putting it on the grounds of estoppel by convention, that Mr Johnson was entitled to defer his personal claims until after WWH's claim had been resolved and that he did not act unconscionably or abusively in doing so.

37. In *Virgin Atlantic* Lord Sumption JSC summarised the general principles relating to res judicata (all the other Justices agreeing with the analysis), recognising that that is a "portmanteau" term used to describe a number of different legal principles. At [17], after describing (i) cause of action estoppel, (ii) the principle preventing a successful claimant bringing a second claim on the same cause of action, (iii) the doctrine of merger and (iv) issue estoppel, Lord Sumption referred to the *Henderson* abuse principle "which precludes a party from raising in subsequent proceedings matters which were not but could and should have been raised in the earlier ones". Lord Sumption finally identified "the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles, with the possible exception of the doctrine of merger."

38. At [24] Lord Sumption rejected the contention that recent case law had re-categorised the *Henderson* abuse principle so as to treat it as being concerned with abuse of process and to take it out of the domain of res judicata altogether, explaining at [25] as follows:

> "…Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in Arnold v National Westminster Bank at p 110G, "estoppel per rem judicatam, whether cause of action estoppel, or issue estoppel is essentially concerned with preventing abuse of process."

The scope of a Part 36 offer

39. Part 36.5(1)(d) provides that a Part 36 offer must "state whether it related to the whole of the claim or to part of it or to an issue that arises in it…".

40. In *Hertel v Saunders* [2018] EWCA Civ 1831, [2018] 1 WLR 5852 the claimants in existing proceedings served a draft amended claim form containing a proposed new claim. Before the claimants had obtained permission to amend, the defendants made an offer to settle the new claim headed "Part 36 offer" which was accepted by the claimants. The Court of Appeal held that, despite the heading, the offer did not constitute a Part 36 offer, Coulson LJ stating:

> "33…I would construe the words "claim", "part of a claim"; and "issue" as referring to *pleaded* claims, parts of claims or issues, and not other claims or issues which may have been intimated in some way but never pleaded. Once proceedings have started, the certainty required for Part 36 to operate properly can only be achieved by this interpretation. A new claim which has been intimated, but which is not part of the pleadings, is not therefore caught by… current rule 36.5(1)(d).
>
> 34. Does it make a difference that, in this case, the new claim had been the subject of a proposed amendment and/or that the defendants' solicitors had indicated that they would not oppose that amendment. On analysis I do not think that it does".

41. The corollary of that reasoning, accepted by both parties, is that where a party makes what is undoubtedly a Part 36 offer to settle "the whole of the claim" (as Avon & Somerset did in the Defamation Proceedings) it is clear that such offer (and a settlement resulting from the acceptance of the offer) is to be construed as relating only to the pleaded claims and therefore excludes from its scope any other claims, even if clearly articulated in a draft amended pleading which had been served but in respect of which the required permission to amend had not yet been obtained.

The judgments below

42. DJ Ayers, in his written judgment, took the view that the application of the *Henderson* abuse principle was complicated in this case because the Defamation Proceedings had been settled by acceptance of a Part 36 offer. He held that, as the settlement related solely to the defamation claims, the current proceedings were not res judicata and Mr Warburton was not in some way estopped from pursuing the pre-July 2019 DPA claim.

43. In determining Avon & Somerset's appeal from that decision, the Judge (after considering the authorities) first addressed Mr Warburton's argument, not specifically addressed by the District Judge, that the *Henderson* abuse principle was simply not engaged because Mr Warburton had "raised" the pre-2019 Data Protection Claim in the Defamation Proceedings. The Judge dismissed the argument in the following terms:

> "47. … I do not agree with Mr Hirst that it is enough to "raise" an issue ie to mention the same but not plead an alternative cause of action to avoid the effects of *Henderson*. That is not how I read the authorities. I would make the initial point that, if the issue had been pleaded in the first action, then there would be no second action. The phrase "raising" is used in some of the cases but what is plainly envisaged is bringing the claim forward. It cannot be sufficient to raise an issue in correspondence or otherwise obliquely. It is quite clear that Wigram V-C was referring in *Henderson* to "bringing forward" the whole case. I have no doubt that he meant pleading the same not simply raising it in discussion. When Lord Sumption in *Virgin Atlantic* at para 22 and 24 was considering *Arnold v National Westminster Bank plc* and used the expression "raised" it is clear that he meant argued in the proceedings ie that they were pleaded and before the court. It is not simply something that is mentioned in passing but rather the issues are properly brought before the court so that they can be ruled on or a compromise reached on those issues. In *Johnson v Gore Wood* it is plain that Lord Bingham is addressing the "claim" or "defence" that is raised before the court. Proposed draft pleadings are not the claim or defence that is raised in the proceedings unless, or until, there is a consent order or order permitting the amendment. Further, as Mr Hirst argued, the fact of accepting the Part 36 offer meant that Mr Warburton abandoned his other prospective claims so plainly they were no longer before the court. The fact of raising them obliquely is however relevant when the court considers whether on the facts it is abusive to bring new proceedings. It therefore is plainly relevant and part of the circumstances that the parties both knew that there were other prospective claims. However, I have no doubt that the principle set out in *Henderson* applies to this case as the cause of action in relation to the DPA could have been brought forward with the defamation claim and was not.

44. The Judge proceeded to consider the Defamation Proceedings and the settlement of those proceedings (including the negotiations between the parties) in more detail. The Judge noted that DJ Ayers had placed huge weight on the fact that the case settled using the Part 36 procedure, which meant that the pre-July 2019 DPA claim was not res judicata, but she held at [52] that, whilst the method of settlement was plainly a

significant factor, it was only one factor in assessing whether the new proceedings are an abuse of process, part of the circumstances but not definitive.

45. The Judge finally turned to consider whether it was unfair to Mr Warburton to prevent him bringing a new claim for damages, holding that it was not for the following reasons:

> "54. Mr Warburton says it is as the other side had lawyers and they used the wrong settlement method. It is not fair to deprive him of his remedy in respect of the data breaches. Mr Warburton is a lawyer by training and knew and understood the Part 36 offer. He knew from the emails that the money offer was to compensate him for all disclosure of data. He was clear that he wanted the data deleted and at the time the offer was accepted, he had made clear he retained that right. He is not deprived of his rights to pursue a claim in relation to retention of data logs. He can make such a claim as it is not res judicata. However I am satisfied looking at all the factors in this case that there is no question that it would be an abuse of process to allow him to continue with the claim for damages up to and including the period to date of settlement.
>
> 55. It is trite that had he brought forward all of his claims in the original claim at the outset, none of this would have arisen. He knew that Avon and Somerset's offer was intended to settle quantum in respect of data breaches. He accepted the offer to settle the claim knowing that the money offer was intended to compensate not for defamation but the underlying breach of data issues that had been identified. It is unconscionable to permit him to bring new proceedings seeking further damages for breach of DPA in these circumstances. Adapting the words of Lord Bingham in *Gore Wood v Johnson*, the crucial question is whether in all the circumstances Mr Warburton is misusing or abusing the process of the court by seeking to raise the issue which could have been raised before. I am satisfied having looked at all factors, that by bringing this claim for damages for breach of data that arose prior to the settlement in July 2019, Mr Warburton is abusing the process of this court as he has been compensated for the same which were integral to the defamation claim and none of this would have arisen if he had brought the totality of his claims to court in the first instance. He has never explained why he did not do so."

46. The Judge concluded that DJ Ayes had erred in refusing to strike out the pre-July 2019 DPA claim as an abuse as he had elided the issues and failed to pay sufficient or any weight to all the factors and gave primacy to the Part 36 offer.

Ground 1 – the scope of the *Henderson* abuse principle

Mr Warburton's argument

47. Mr Warburton's argument, that the pre-July 2019 DPA claim is altogether outside the *Henderson* abuse principle, is founded on Lord Bingham's reference in the passage from *Johnson v Gore Wood* set out at [31] above to the question of abuse arising for consideration when "a matter could have been raised in earlier proceedings". Mr

Warburton contends that this is an "expansive" formulation (one also used by Lord Sumption in *Virgin Atlantic* as set out at [37] above) and that matters can be considered to have been "raised" in prior proceedings even though they were not formally pleaded, provided that the party alleged to have abused the process has "raised or introduced in a deliberate, certain and comprehensible manner, a claim, defence, point, matter or issue into the earlier proceedings" (Mr Warburton's skeleton argument for this appeal at [26]). In the present case Mr Warburton claims that the pre-July 2019 DPA claims had been sufficiently raised or introduced by being referenced in the Defamation Proceedings and/or expressly set out in the revised draft Amended Particulars of Claim, although they never became formally pleaded claims.

48. Mr Warburton thereby contends that his case falls into a gap between the concepts of res judicata (claims or issues which have been determined) and *Henderson* abuse (claims which should have been brought forward but which were not). Mr Hirst, on behalf of Mr Warburton, accepted that there was no authority directly supporting the existence of a third category of case (which he described as "raised but not brought"), but contended that the decision in *Johnson v Gore Wood* could not have been reached if that was not the case. He contended that, as a matter of principle, it was not abusive to pursue claims which had fairly been flagged so that the other party was aware of them. Requiring that claims be formally pleaded before they could be considered to be "on foot" was too strict a standard, particularly where (as in this case) a represented party had chosen to settle only the pleaded claim whilst knowing that other claims were to be pursued absent a settlement. Mr Hirst contended that it was not unconscionable to pursue the unpleaded claims in such circumstances: on the contrary, it was unconscionable for the party who had chosen to settle only pleaded claims to seek to the prevent the pursuit of claims of which it was well aware and which had not been settled.

Analysis

49. In *Henderson* itself, the recognised starting point, Wigram V-C stated that the court would not (except under special circumstances) permit the 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". There is no doubt that this was a reference to a failure to bring the matter formally before the court for adjudication: this is further made clear by the explanation that the general rule applies where a party has, from negligence, inadvertence or even accident "omitted part of their case" and from the decision that the claim under consideration was abusive because it could have been adjudicated upon in Newfoundland.

50. The question is whether Lord Bingham in *Gore Wood* (or Lord Sumption in *Virgin Atlantic*) intended, simply by using the word "raised", to exclude altogether from the general rule matters that had not been brought formally before the court for adjudication, but had been mentioned (by way of a draft pleading or otherwise) as matters which might later be brought forward. The answer is, quite plainly, that neither so intended.

51. First, the language used by Lord Bingham does not justify the interpretation placed upon it by Mr Warburton. As the Judge pointed out, Lord Bingham's reference to "a matter" which could have been raised in previous proceedings must be understood as shorthand for his earlier reference to a "claim or defence" which should have been

raised. On the face of it, claims and defences are raised by way of formal pleading and there is no reason to consider that Lord Bingham was using those terms in any other sense in this context.

52. Second, Lord Bingham emphasised that the *Henderson* principle was based on the underlying public interest in the finality of litigation and that a party should not be twice vexed in the same matter. That public interest is fully engaged where a party makes a claim which could and should have been brought and adjudicated upon (or formed part of a settlement) in earlier proceedings but was not, whether or not the possibility of the further claim had been mentioned during the earlier proceedings. Excluding a "raised but not brought" claim from the scope of the *Henderson* principle altogether would create an unnecessary and unprincipled exception which would enable parties to bring second claims with impunity, no matter how obviously abusive and contrary to the clear public interest they might be. For example, a claimant who had pursued a complex claim to a lengthy trial and ultimate judgment, would be entitled to bring a second action in relation to the same subject matter if the further claim had been contained in a proposed amendment which was served but not pursued at an early stage of the first action. On the other hand, regarding "raised but not brought" claims within the *Henderson* principle enables the court to identify and prevent such abuse, but also permits the court to consider, applying a broad merits-based test, whether the fact that the second claim had been "raised" informally in the first action means that it was not in fact abusive.

53. Indeed, in *Gore Wood* Mr Johnson had, during the course of WWH's claim and the settlement of that claim, made clear his intention to bring further proceedings in his own name in due course. Lord Bingham found that Mr Johnson's claim was within the scope of the *Henderson* abuse principle (notwithstanding that Mr Johnson was not a claimant in the first action and that it had culminated in a settlement), albeit that he held that the defendant solicitors were estopped from asserting that the claim was an abuse and, in any event, a second claim was unavoidable and therefore not an abuse. Mr Warburton is entirely wrong to suggest that the decision in *Gore Wood* could not have been reached if a "raised but not brought" claim was within the *Henderson* abuse principle. It is only because Mr Johnson's "raised but not brought claim" was within the principle that the question of estoppel by convention arose and, in the alternative, whether the claim was abusive as a matter of the broad merits.

54. Third, Lord Bingham deprecated a "dogmatic approach" to what should be "a broad merits-based judgment" as to whether a second claim was abusive. It would have been wholly contrary to that concept of the *Henderson* abuse principle and its application to have recognised a highly technical exception to the principle which would prevent the court from considering the merits of permitting second claims to proceed. It is not arguable, in my judgment, that Lord Bingham recognised (and effectively created) such an exception.

55. Fourth, and as again pointed out by the Judge, the language used by Lord Sumption in *Virgin Atlantic* does not, on proper analysis, justify Mr Warburton's interpretation of its meaning. Although initially referring to "matters" that could and should have been raised in earlier proceedings as falling within the *Henderson* abuse principle, Lord Sumption later made clear at [22] that he was referring to "points which were not raised" in earlier proceedings, considering them together with "points which were

unsuccessfully raised". It is clear that he had in mind points that had not been raised formally by way of pleading.

56. Fifth, Lord Sumption explained that res judicata and *Henderson* abuse of process are "overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation". It is clear from that formulation, in which estoppel and abuse overlap, that there is no room for a "third" type of duplicative litigation ("raised but not brought"), which escapes all of the principles designed to prevent it where it is abusive. Indeed, Lord Sumption referred in support of his analysis to Lord Millet's statement in *Gore Wood* set out at [34] above that the *Henderson* abuse principle is "primarily an ancillary and salutary principle necessary to protect the integrity of [res judicata] defences and prevent them from being deliberately or inadvertently circumvented". That purpose entirely rules out the possibility of a third category comprising "raised but not brought" claims, which are incapable of being regarded as an abuse. To recognise such a category would be to create a significant gap in the court's ability to control abusive litigation and Lord Sumption plainly did not intend to do so.

57. I should mention, for completeness, that Mr Hirst suggested that Mr Warburton's argument gained some support from *De Crittenden v Bayliss* [2005] EWCA Civ 1425, in which a proprietary claim was struck out because it could and should have been brought in previous proceedings between the same parties in which the claimant had obtained damages for breach of an agreement relating to the same land. Mr Hirst placed some reliance on the fact that the Court of Appeal held that, to avoid the second claim being an abuse, the claimant should have amended his first claim to introduce the proprietary claim. However, far from supporting Mr Warburton's argument, the case is entirely consistent with a straightforward application of the *Henderson* abuse principle: the Court of Appeal upheld the first instance judge's finding that the claimant "could and should have amended his pleading in the first action so as to plead a proprietary claim" [30]. There was no suggestion whatsoever that it would have been sufficient to have "raised" the proprietary claim in a draft amended pleading, but taking it no further. Indeed, Parker LJ considered that the relevant general rule of public policy at play was that "in the ordinary way a claimant must bring forward his entire case in a single action. That is a rule based on the need for finality in litigation…" [28].

58. In the present case there is no doubt that Mr Warburton did not bring forward the pre-July 2019 DPA claim for adjudication in the Defamation Proceedings. Indeed, Mr Warburton's expressly pleaded position remained at all times in those proceedings that there was no DPA claim, and he emphasises that the pre-July 2019 DPA claim was not included in the settlement precisely because it was not pleaded.

59. For the above reasons I find no merit in ground 1 of the appeal. Mr Warburton's argument is an attempt to escape the wide scope of a well-understood principle by latching on to certain words in the leading judgments and ascribing to them a meaning they will not bear textually and an effect which would run counter to the very principles and policies explained in those judgments. It is an approach to legal analysis which, in my judgment, should be seriously discouraged.

Ground 2 – the effect of the settlement of the Defamation Proceedings

60. It was common ground before the Judge, and remained so on this appeal, that (applying the rational of *Hertel*) the effect of the acceptance of Avon & Somerset's Part 36 offer

was to settle the pleaded claims in the Defamation Proceedings and only those claims (the pre-July 2019 DPA claim not being settled because it was not pleaded). It is apparent that the Judge fully understood and accepted that position, not least because she repeatedly stated that the pre-July 2019 DPA claim was not res judicata and that Mr Warburton was entitled to bring it unless it could be shown to be an abuse: see [52] and [53].

61. It is also clear, and stated by the Judge at [52], that the fact that the Defamation Proceedings culminated in a settlement (whether by acceptance of a Part 36 offer or otherwise) does not prevent the application of the *Henderson* abuse principle to any further proceedings in which one of the parties mounts a claim or defence which could have been raised in the settled claim: see Lord Bingham's explanation set out at [32] above.

62. As the Judge further recognised at [47] and [52], once it is accepted that the *Henderson* abuse principle is engaged, there is a further broad merits-based question as to whether the second claim is in fact an abuse, considering the overall balance of justice. It is important to appreciate that it was in the context of this further question that the Judge considered the negotiations leading up to the Part 36 settlement.

63. Mr Hirst, on behalf of Mr Warburton, argued that it was wrong as a matter of principle for the Judge to have examined the without prejudice correspondence passing between the parties before the settlement, and that the Judge should have proceeded solely on the basis that Avon & Somerset had made an offer to settle the pleaded claims, which was accepted, leaving the pre-July 2019 DPA claim (of which Avon & Somerset was well aware) unaddressed. In those circumstances, he argued, it was not abusive for Mr Warburton to pursue the additional claim. To the extent that Avon & Somerset had made a litigation mistake, it was one of which Mr Warburton was entitled to take advantage without being regarded as having acted abusively.

64. It is, however, difficult to see why the court should not take into account all factors, including negotiations leading to a settlement, in its broad merits-based judgment as to whether a second action is abusive: in *Stuart v Goldberg Linde* [2008] EWCA Civ 2, [2008] 1 WLR 823 Lloyd LJ stressed at [57] that in applying that test it is necessary to proceed with care in relation to a contention that some aspect of a case must be disregarded.

65. In fact communications between the parties prior to and in the course of settlement of the first action, particularly as to the possibility of a second claim, have frequently been regarded as not only admissible and relevant but of serious importance in determining whether the second action was an abuse. In *Gore Wood* Lord Bingham gave detailed consideration to correspondence and a meeting between solicitors acting for Mr Johnson and for the defendant firm as to whether Mr Johnson's claim might be included in the settlement of WWH's claim. Similarly, in *Aldi Stores Ltd v WSP Group plc* [2007] EWCA 1260, [2008] 1 WLR 748 Thomas LJ regarded the fact that Part 20 defendants had settled an action in full knowledge of the fact that there might be a second claim by the claimant against them as relevant in finding that the second claim was not an abuse, stating at [22] that "The way in which this case settled was therefore a highly material consideration". In *Goldberg Linde* Sir Anthony Clarke emphasised that parties should place their cards on the table and that, in that case, it was arguable

that the deliberate failure of a party not to notify a potential further claim for partisan tactical reasons rendered the second action an abuse of process [92].

66. In my judgment the Judge was fully entitled and, indeed, obliged, to consider the manner in which the Defamation Proceedings settled, not least to ascertain what notice Mr Warburton gave Avon & Somerset of the possibility of a second claim. In so doing she discovered that, far from notifying a possible further claim, it was entirely clear that both parties had been negotiating on the basis that they would settle all claims, including the pre-July 2019 DPA claim: Avon & Somerset made it plain that the only reason it was offering to pay damages or compensation was its liability for data protection breaches. As Mr Warburton appears to have appreciated that his acceptance of the Part 36 offer did not in fact settle the pre-July 2019 DPA claim, despite the amount offered plainly being calculated on the basis that it did, he settled his claim without notifying Avon & Somerset of the possibility of a second claim and did so for partisan tactical reasons: he admits and avers that he was taking advantage of a litigation mistake. Such conduct fully justified the Judge in finding that bringing the pre-July 2019 DPA claim in these proceedings was not only within the scope of the *Henderson* abuse principle, but was an abuse of the process of the court.

67. It follows, in my judgment, that ground 2 is also without merit.

Conclusion

68. I would dismiss the appeal.

Lord Justice Males:

69. I agree that this appeal must be dismissed for the reasons given by Lord Justice Phillips. Leaving aside the one item which the judge allowed to go forward, the claim is plainly an abuse of process. I add four comments.

70. First, although (if I may say so) Lord Justice Phillips has dealt fully and carefully with the argument that the *Henderson v Henderson* principle is not engaged because the pre-July 2019 DPA claim was "raised" but not "brought" in the Defamation Proceedings, I would have been content simply to accept Mr Talalay's submission, made to the judge but not repeated in these terms in this court, that the argument is no more than sophistry. I would in addition specifically endorse what Lord Justice Phillips says at [59] above.

71. Second, in considering whether the present claim is abusive, to my mind the decisive fact is that, as the judge found at [55] of her judgment, Mr Warburton *knew* that the Part 36 offer was intended to settle his data protection claim as well as the defamation claim which had been pleaded, a finding which has not been challenged. As he knew, the amount of the Part 36 offer was only as much as it was because it included (and in fact principally comprised) compensation for the data protection claim. Mr Warburton is, as he now admits, seeking to take advantage of what he knew at the time was a slip by Avon & Somerset, in order to obtain further damages for a claim for which he has already accepted compensation. I have no doubt that such conduct is abusive.

72. Third, Mr Hirst submitted, as he did before the judge, that some leeway should be afforded to Mr Warburton because he conducted at least some of the Defamation Proceedings as a litigant in person. Whatever traction such an argument might have in

another case, as to which I say nothing, it has none here. As the judge pointed out, Mr Warburton is a trained lawyer (he was called to the bar in 2010) and legal academic. Far from being ignorant of the law, Mr Warburton was seeking to take advantage of his superior knowledge of a technical point under Part 36 to obtain a benefit which he knew that Avon & Somerset did not intend.

73. Finally, I would like to pay tribute to the clear and comprehensive judgment of Her Honour Judge Bloom in this case.

Lord Justice Moylan:

74. I agree with both judgments.