Neutral Citation Number: [2024] EWCA Civ 844

Case No: CA-2023-002568

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY AND CONSTRUCTION COURT (KB)
His Honour Judge Stephen Davies (sitting as a High Court Judge)
[2023] EWHC 2885 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2024

Before:

LORD JUSTICE COULSON
LORD JUSTICE ARNOLD
and
LORD JUSTICE STUART-SMITH

- -

Between:

(1) Outotec (USA) Inc	**Appellants**
(2) Metso OYJ (formerly Metso Outotec OYJ)	
- and -	
MW High Tech Projects UK Limited	**Respondent**

- -
- -

Adrian Williamson KC, Paul Bury and John Steel (instructed by **Walker Morris LLP**) for the **Appellants**
Simon Hale (instructed by **Holman Fenwick Willan LLP**) for the **Respondent**

Hearing date: 26 June 2024

- -

Approved Judgment

This judgment was handed down remotely at 11.00am on 24 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

LORD JUSTICE COULSON

1 Introduction

1. The issue that arises on this appeal is whether the judge below erred in deciding that, although the misrepresentation claims made in these proceedings against the first appellant ("Outotec") could and should have been raised in the Main Action, these proceedings should not be struck out as an abuse of process in accordance with the principles outlined in *Johnson v Gore Wood and Co. (a firm)* [2002] 2 AC 1 and subsequent cases. The appeal raises, in unusual circumstances, a particular issue as to whether a breach of the guidelines set out in *Aldi Stores Ltd v WSP Group PLC* [2007] EWCA Civ 1260; [2008] 1 WLR 748 ("the *Aldi* guidelines") can be sufficient, or whether it is also necessary to demonstrate vexation/oppression/harassment sufficient to justify striking out the claim as an abuse of process. If the latter is necessary, can Outotec show it here?

2. I set out the factual background and the issues before the judge in Sections 2 and 3 respectively. I identify the more limited scope of this appeal in Section 4. Then, having identified the parts of the judgement below that are relevant to the issue on appeal (Section 5), the applicable principles of law (Section 6), and an outline of the parties' submissions (Section 7), I approach the central issue in this way. In Section 8, I summarise the principal findings made by the judge against MW, the respondent. Thereafter, I go on in Section 9 to analyse whether the judge was right not to strike out the misrepresentation claims against Outotec. I am very grateful to counsel on both sides for their excellent written and oral submissions.

2 The Factual Background

3. Pursuant to a main contract dated 20 November 2015, Energy Works (Hull) Limited ("EWH") engaged MW as a main contractor to build a new 'waste to energy' power plant in Hull.

4. Pursuant to a sub-contract also dated 20 November 2015, MW engaged Outotec to supply some of the relevant plant, in particular a gasifier, and to carry out other related works. The second appellant, ("Metso") provided a parent company guarantee ("PCG") to MW on behalf of Outotec. The original PCG was provided in 2017 and a second PCG, in substantially the same terms, was provided in 2022.

5. The main contract works were significantly delayed. On 4 March 2019, EWH terminated the main contract because, on their case, MW's liability for liquidated damages had reached the contractual cap, thus entitling them to terminate. That termination brought about an automatic assignment by MW to EWH of the benefit of the sub-contract with Outotec.

6. On 26 July 2019, EWH started proceedings against MW, claiming damages in respect of the delays and the consequences of the termination. They also advanced a claim for defects in MW's work. The total claim was around £164.5m. MW defended the claim, primarily on the basis that they were entitled to an extension of time, which would in turn have meant that EWH were not entitled to terminate the main contract. MW also brought their own Part 20 proceedings against Outotec. Outotec defended the Part 20 claim and counterclaimed for monies outstanding under the subcontract. I shall refer

to all those claims and cross-claims, including the Part 20 claims and cross-claims, as "the Main Action".

7. The Main Action was carefully case managed in the TCC and proceeded to a five week trial before Pepperall J in the summer of 2021. Thereafter there were detailed oral and written closing submissions. The first judgment in the Main Action was handed down on 20 December 2022 ([2022] EWHC 3275 (TCC)). That was primarily concerned with MW's liability to EWH. One of the reasons for the lengthy period between trial and judgment was, as Pepperall J pointed out at [8] – [10] of his judgment, that the evidence at trial had often just scratched the surface of the many issues, and he had been left to do a good deal of 'unpacking' on his own.

8. Pepperall J's findings in his first judgment were largely adverse to MW. In consequence, MW immediately settled with EWH by making a payment of £75 million.

9. MW's Part 20 claim alleged that Outotec were liable for any liquidated damages due to MW and for 15 items of defective work. The delay case was abandoned shortly before trial, so the focus was on the 15 defects. The Part 20 claim was eventually advanced by way of contribution and abatement only. It could not be pursued as a claim for damages for breach of the sub-contract, because O'Farrell J had concluded, in a judgment at [2020] EWHC 2537 (TCC), that such claims were not open to MW following the assignment of the sub-contract to EWH.

10. The Part 20 claims were the subject of Pepperall J's second judgment, handed down on 12 May 2023 ([2023] EWHC 1142 (TCC)). Again, the findings were broadly adverse to MW. What Pepperall J found due to MW by way of abatement was far less than the sums he had found due to Outotec under the sub-contract in his first judgment. The overall result was that Outotec were entitled to judgment in the sum of around £9.3m, together with interest of around £2.2m. Outotec were also awarded its costs of the Main Action on an indemnity basis, in consequence of MW's failure to beat Outotec's offer under CPR Part 36.

11. On 21 December 2022, the day after Pepperall J had handed down the first part of his judgment in the Main Action, MW commenced the current proceedings against Outotec and (by reference to the PCG) against Metso. In these proceedings, MW allege that it was induced to enter into the Hull sub-contract with Outotec as a result of fraudulent or alternatively negligent misrepresentation. The allegations are summarised at paragraphs 7 of the Particulars of Claim as follows:

> "7. In summary, M+W's case is that:
>
> 7.1. Between 2011 and February 2016 Outotec knowingly or recklessly, alternatively negligently, made false representations to M+W that it had experience in the design, supply, and manufacture of process plant and technology suitable for the staged gasification of RDF as required for the Hull Project. Further, Outotec represented that it had pilot plants which:
> 7.1.1. had been used to test, and thereby verify, process plant and technology equivalent to the Subcontract Plant and which was already proven to be successful in the processing of RDF equivalent to that anticipated to be processed at the Hull Project, and/or

> 7.1.2. could and would be used to prove, and verify, that the relevant process plant and technology was proven to be successful in the processing of RDF equivalent to that anticipated at the Hull Project prior to the delivery of the Subcontract Plant.
>
> 7.2. As Outotec intended, M+W acted in reliance on those representations and was induced to enter into the Subcontract.
>
> 7.3. Contrary to its representations, Outotec:
> 7.3.1. did not have any experience or track record of successfully designing or manufacturing or procuring plant or equipment capable of the successful staged gasification of RDF;
> 7.3.2. did not have multiple pilot plants that it either had used or intended to use to verify that its process plant was proven, and that its technology was viable for the gasification of RDF;
> 7.3.3. did not have a pilot plant at which it could test plant and equipment equivalent to the Subcontract Plant to be supplied for the Hull Project;
> 7.3.4. did not have any intention of establishing that the process plant, and technology it intended to supply for the Hull Project would work and was 'proven' before delivery of the Subcontract Plant for the Hull Project;
> 7.3.5. did not have sufficiently experienced personnel to provide advisory and supervisory services for the construction, installation, commissioning and testing of the Subcontract Plant in accordance with Good Industry Practice (as defined by Clause 1.1 of the Subcontract) and/or good engineering practice and/or as otherwise required by the Subcontract."

12. Paragraph 59 of the Particulars of Claim makes plain that MW allege that "each and every representation" on which they rely was made "fraudulently, in that the individual making or adopting the particular representation on behalf of Outotec knew it was false, or did not believe it to be true, or was reckless, not caring whether it was true of false." The misrepresentations themselves are put into five different categories (Categories A-E). They are then scheduled out at length in Schedule 1. They are all said to have been made during the pre-sub-contract negotiations between MW and Outotec, between 2011 and 2015, before work ever started on site.

13. The damages claimed in the current proceedings are put at no less then £166.9m. This is calculated by identifying the gross costs incurred by MW on the whole Hull project, less the total monies that they received. Of course, the largest single item that makes up that balance is the sum of £75m that MW paid to EWH, together with the costs of the Main Action. Thus MW are now seeking to pass on to Outotec all the consequences of its loss of both the upstream and the downstream elements of the Main Action. The current proceedings are due to be heard at a TCC trial in February 2026, together with MW's very similar misrepresentation claim against Outotec arising out of a contemporaneous sub-contract between MW and Outotec, for similar plant (including a gasifier), provided for a similar waste-to-energy project in Surrey (to which I refer in greater detail below). The underlying premise of MW's misrepresentation claim in respect of the Surrey project is the same as the misrepresentation claim here: they say that, but for Outotec's misrepresentations, MW would never have entered into the sub-contract at all.

3 The Judgment Below

14. Outotec and Metso sought to strike out the current proceedings as an abuse of process pursuant to CPR 3.4. There was also an application for summary judgment in respect of MW's attempt to rely on the sub-contract, which MW claimed had been validly re-assigned to them by EWH. The applications were heard over two days in October 2023 by His Honour Judge Stephen Davies, sitting as a High Court Judge (the "judge"). With admirable efficiency, the judge circulated his draft judgment on 9 November 2023 and his final judgment was handed down on 17 November 2023. The neutral citation number is [2023] EWHC 2885 (TCC).

15. There were four separate issues before the judge, only one of which arises again on appeal. The judge concluded that:

a) MW's claims against Outotec for breach of sub-contract failed because the sub-contract, which had been assigned to EWH, had not been validly re-assigned to MW by EWH. The relevant analysis and conclusions are set out at [38]-[54] of the judge's judgment. MW sought permission to appeal against that decision, but I refused such permission, and explained why in my Order of 21 February 2024. That issue has not been re-opened.

b) As a result of the ineffective reassignment, MW could also make no claim against Metso for damages under or for breach of the PCG. The relevant analysis and conclusions are set out at [55]-[69] of the judge's judgment. MW sought permission to appeal against that decision, but I refused such permission, and explained why in my Order of 21 February 2024. That issue has not been re-opened.

c) MW were entitled to pursue their claim for misrepresentation against Metso under the PCG. The relevant analysis and conclusions are at [79]-[88] of the judge's judgment. Outotec and Metso sought permission to appeal against that decision, but I refused such permission and explained why in my Order of 21 February 2024. My refusal of Grounds 1, 2 and 3 of Outotec's proposed appeal has not been re-opened.

d) MW's claim for damages for fraudulent misrepresentation should not be struck out as an abuse of process. The relevant analysis and conclusions are set out at [89]-[136] of the judge's judgment. It was in respect of this last element of the judge's judgment that I granted permission to appeal.

4 The Scope of the Issue on Appeal

16. Accordingly, the single issue which arises on this appeal is whether or not the judge was wrong to refuse to strike out the Hull misrepresentation claims made against Outotec as an abuse of process. That issue is encompassed in Grounds 4 and 5 of the Outotec appeal which are in the following terms:

> "Ground 4
> Outotec has a real prospect of showing the Judge was wrong in his conclusions and/or took into account irrelevant matters as to the "two key factors" (Judgment at [136]) militating against striking out.

> Ground 5
> Outotec has a real prospect of showing the Judge was wrong in his broad merits-based assessment."

17. The challenge to this part of the judge's decision therefore has two aspects. Ground 4 is specific and identifies two particular factors (namely the claim under the PCG against Metso, and the existence of MW's very similar misrepresentation claims in respect of both the Surrey project, and another site in Scotland called Levenseat), which Outotec say the judge should not have taken into account at all. Ground 5 is general and, as explained by Mr Williamson during his oral submissions, takes issue with the way in which, having made a number of findings against MW, the judge then appeared to minimise them in deciding not to strike out the claim.

18. There was no Respondent's Notice. In those circumstances, I consider that MW cannot challenge any of the specific findings of fact made by the judge. The scope of the appeal is therefore broadly within the four corners of the judge's evaluation, subject to the challenges identified by Outotec. This is not therefore a case in which this court can or should re-do the judge's evaluation from scratch.

19. For completeness, I should also say that there were suggestions in Outotec's appeal skeleton argument that this court might wish to reconsider whether the misrepresentation claim against Metso should also be struck out as an abuse of process. I did not understand that argument to be maintained at the oral hearing, but if it was, I am in no doubt that it was not open to Outotec/Metso. I refused that aspect of Metso's application for permission to appeal: see paragraph 15(c) above. In any event, it was comprehensively demonstrated by the judge that the misrepresentation claims under the PCG were arguable and should not be struck out, particularly given that there had never been a claim against Metso in the Main Action. Since, as Mr Williamson insisted, Metso were a separate legal entity from Outotec, there can be no question of Metso having (yet) been vexed once with these proceedings, let alone twice.

5 The Relevant Parts of the Judgment for the Purposes of the Appeal

20. Having set out the legal principles at [89]-[101], the judge turned to a discussion of the abuse of process submissions at [104] onwards. First, he dealt with the scope of the new misrepresentation claims. He noted that they involved a detailed analysis of the pre-contract discussions between MW and Outotec from 2011 to 2015, which concerned not just the Hull project, but five other 'waste to energy' projects that were being considered at the time. Two of those other projects (the one in Surrey and the one at Levenseat) led on to sub-contracts between MW and Outotec. Both projects, like Hull, went wrong, and are the subject of TCC litigation, and arbitration, respectively.

21. At [105], the judge considered the issue of overlap between the issues in the Main Action and the issues raised in the current proceedings. He concluded that the position between MW and Outotec before and during the pre-contractual stages, when the representations were allegedly made by Outotec, had not been in issue in the Main Action. As to the defects, having read the evidence and the written submissions, the judge was not persuaded that there was in fact "any or any significant overlap between the case on defects" in the Main Action and the matters pleaded in the

current proceedings[1]. At [106] he concluded that, although the damages claim in the new proceedings will involve "an investigation into the course and outcome of the previous proceedings in terms of the ultimate financial position in which MW have been left…it does not involve any re-litigation of the issues raised" in the Main Action.

22. At [107] the judge noted that, even if the misrepresentation claims against Outotec were struck out, that would not have the effect of bringing the same claims against Metso under the PCG to a halt. He also noted that the separate proceedings in relation to Surrey and Levenseat were concerned with very similar claims for misrepresentation, and concluded that Outotec (and Metso in respect of the Surrey project) were always going to have to defend themselves against these claims in a later, second hearing in any event. That paragraph is important because these two matters were subsequently described by the judge at [136] as "the two key factors militating against striking out".

23. Between [108] and [118] the judge considered the question of whether MW *could* have brought the misrepresentation claim in the Main Action. He explained in some detail why the answer to that question was "Yes".

24. Between [119] and [121], the judge considered whether MW *should* have brought the misrepresentation claim in the Main Action. At [121], the judge considered whether or not MW had complied with the guidelines set out in the *Aldi* case. He said:

> "121. In my judgment compliance with the Aldi guidelines would have required MW either to have pleaded the misrepresentation claim in its Part 20 claim (which, as I have said, in my judgment it could have done) or to have notified the other parties and the court prior to the October 2019 hearing that it was considering bringing a misrepresentation claim against Outotec, in order that the other parties and the court could have considered what – if any – directions should be sought or made in that respect..."

25. For the rest of this section of the judgment, the judge went on to address what might have happened if MW had complied with the guidelines and raised the misrepresentation claims with the court. He rejected at [122] MW's suggestion that, had the matter been raised, the court would have decided to do nothing "because it was obvious that the misrepresentation claim had no connection with the existing claims and could not be case-managed and tried together with the existing claims". On the contrary, the judge said that, if the court had been informed, the obvious course would have been to direct MW to notify the other parties and the court within a specified period as to whether or not it intended to make an application to amend, and if so, to make that application within a further specified period.

26. As to what might have happened thereafter, at [125] the judge rejected MW's submission that the judge would have decided that it would be unmanageable for the misrepresentation claims to proceed alongside the existing claims. Two principal possibilities were identified by the judge at [126] and [127]. The first was that the misrepresentation claims would have been dealt with as part of the first trial in the

[1] It should be noted that the defects claim has subsequently been amended, but it was not said that the amendments made any difference to this aspect of the judgment, which is not in any event the subject of this appeal.

Main Action, leaving the second trial to deal with smaller defects claims and quantification. The second possibility would have been for all issues to be litigated at the same time, but with the time allowed for the trial to be extended accordingly.

27. However, the judge accepted that there were other possibilities, which he outlined in [128]:

> "128. I accept that I cannot be confident that either course would have been taken. It is entirely possible, for example, that MW might have said that it wanted to run the misrepresentation claims for Surrey and (subject to agreement not to arbitrate it, for Levenseat) in one combined claim. The case managing judge would probably have accepted that it would not have been realistic to have added such an expanded claim to the existing case. It is also possible that the case managing judge would have taken a more pessimistic view than I have as to the additional time required, or it might not have been possible to add the extra time onto the existing trial and EWH would have successfully opposed any attempt to put back the trial. The case managing judge might have decided that in the circumstances it was best, especially if MW and Outotec agreed, to leave what to do about the misrepresentation claim on the back-burner, at least until after the trial of the preliminary issues and possibly until after the principal trial. If the decision had been taken to leave over the question of the misrepresentation claim until after the preliminary issues had been determined then it almost certainly would have been too late to shoehorn the misrepresentation claim into the existing trial.

28. The judge concluded this part of his judgment, which ran the 'should' and the 'would' arguments together, in these terms:

> "129. The authorities do not suggest that the court is required to make a retrospective finding as to what would have happened had a party complied with the Aldi guidelines. However, it seems to me at least to be relevant to consider the realistic outcome (or range of realistic outcomes) had it done so, because that will be a relevant factor when deciding whether there has been an abuse and if so that is such as to justify striking out the claim. If it is obvious that the current claim could and would have been case managed and tried with the existing claim without any or significant delay or expense that will be a factor strongly supporting a conclusion of abuse, whereas the reverse is also true.
>
> 130. In this case, in my view, MW's failure to comply with the Aldi guidelines is a factor which weighs against it, especially because had it acted with appropriate expedition from the outset the misrepresentation claim could, should and probably would have been tried with the previous proceedings. However, I must acknowledge that there is room for reasonable doubt as to whether or not that would have happened and, thus, this cannot be said to be a clear-cut case which points very strongly to the current claim being struck out as an abuse of process."

29. The judge then went on to identify other factors relevant to his broad, merits-based evaluation. At [131], he repeated that "this is not a case where there is any significant

overlap between the issues litigated in the previous proceedings and the issues which will be litigated in the misrepresentation claim". He again referred to the very similar misrepresentation claims against Outotec awaiting trial (or arbitration hearing) in respect of Surrey and Levenseat. He also said that it was "always extremely unlikely that compliance with the *Aldi* guidelines would have led to all of the claims in the Hull proceedings, including the misrepresentation claim, being tried in the same proceedings together with the parallel misrepresentation claims in relation to Surrey and, subject again to the arbitration issue, the Levenseat project." He therefore said it was always "extremely likely" that Outotec would have been faced with two separate claims in any event. This led him to say:

> "131…It follows that this is not a case where it can clearly be seen that to allow the misrepresentation claim to proceed would lead to unjust harassment or oppression of Outotec, still less of Metso who was not a party to the previous proceedings and who could still be sued even if the claim against Outotec was struck out for abuse unless the claim against Metso itself was also struck out for abuse."

30. The judge's conclusion as to whether or not the current proceedings represented an abuse of process against Outotec can be found at [134]-[136]. I set them out in full:

> "134. Abuse of process as against Outotec? In the circumstances I am satisfied that Outotec has not satisfied the onus of proving abuse of process such as to justify striking out in relation to the misrepresentation claim. Whilst having stronger arguments than does Metso, in my view they are still not strong enough to justify the sanction of strike out. Although MW failed to comply with the Aldi guidelines, it is not the most egregious of non-compliances. It cannot be said that as a result of its failure Outotec is now faced with an entirely new claim which is very closely connected with the previous proceedings in terms of the issues for determination. Nor can it be said with complete confidence that the misrepresentation claim would have been litigated as part of the previous proceedings had MW complied with the Aldi guidelines or, therefore, that Outotec is now beyond doubt faced with a very expensive and very disruptive second set of proceedings which could, should and would have been avoided had MW complied. Furthermore, this is not a case of collateral attack on the previous proceedings or a case where MW has acted dishonestly.
>
> 135. Whilst allowing the misrepresentation claim to proceed will result in Outotec and individuals having to defend statements made up to 14 years ago, and whilst it is possible that some individuals may already have left Outotec's employment, no specific details of specific prejudice are provided so that this factor is of relatively limited weight. Paragraph 101 of Mr Harbage's witness statement does not provide sufficient detail to justify giving this factor any greater weight.
>
> 136. Moreover, and perhaps the two key factors militating against striking out, are first that since the claim against Metso will continue in any event, it is difficult to justify the striking out of the claim against Outotec as Metso's subsidiary company in the absence of some evidence of prejudice specific to

> Outotec from continuing to be involved even if Metso is still a party, as to which there is none specified. And second is the fact that Outotec will still have to defend the claims brought by MW in relation to the Surrey project and the Levenseat project in any event, so that again Outotec will still have to address the same key issues, at least in relation to the issues of representation and falsity, in those proceedings in any event."

6 The Applicable Principles of Law

6.1 Henderson v Henderson Abuse

31. The principle in *Henderson v Henderson* (1843) 3 Hare 100, 115 is usually distilled in this way: where A claims against B, A must bring forward its whole case against B such that, save in special circumstances, A cannot pursue B in subsequent litigation in respect of those matters which it could have advanced in the previous proceedings, but failed to do so.

32. *Barrow v. Bankside Agency Ltd.* [1996] 1 W.L.R. 257 was one of the cases in the early 1990's arising out of losses in the Lloyd's insurance market. Mr. Barrow was a member of an action group which had successfully sued a number of members' agents for negligent underwriting. Having recovered only a proportion of the damages he had claimed, Mr. Barrow issued fresh proceedings against his members' agent, but on different grounds. It was clear that this claim, even if it had been made earlier, would not have been tried at the same time as the earlier action, since the scheduling of cases was the subject of detailed management by the Commercial Court. The members' agent contended that to bring this further claim, not raised at the time of the earlier proceedings, was an abuse of process.

33. In the Court of Appeal, Sir Thomas Bingham MR began his judgment by saying:

> "The rule in *Henderson v. Henderson* (1843) 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever 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."

34. This court concluded that *Barrow* was an unusual case which did not fall within the mischief at which the rule in *Henderson v Henderson* was aimed. This was primarily because the defendant was not being exposed to a series of unnecessary trials: case management constraints meant that there would always have been two trials or hearings, so the defendant was no worse off than it would have been if Mr Barrow had pleaded the new claim from the outset.

35. The modern law in respect of what has been called *Henderson v Henderson* abuse can be found in *Johnson v Gore Wood* [2000] UKHL 65; [2001] 1 All ER 481; [2001] 2 WLR 72. Lord Bingham (with whom the majority agreed) said:

> "But *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early 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."

36. Those observations were identified as a series of principles by Clarke LJ (as he then was) in *Dexter v Vlieland-Boddy* [2003] EWCA Civ 14. He said at [49]:

> "i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.
> ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C.
> iii) The burden of establishing abuse of process is on B or C or as the case may be.
> iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.
> v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process.
> vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C."

37. In *Michael Wilson & Partners v Sinclair* [2017] EWCA Civ 3; [2017] 1 WLR 2646, at [100], Simon LJ said that, in a case of *Henderson v Henderson* abuse, the burden was on the defendant to identify reasons why the bringing of the second claim was manifestly unfair. He had noted earlier in his judgment that "it will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process…" [48(5)]. In what was complicated commercial litigation, this court overturned the order to strike out, concluding that the claimants, MWP, could bring the same allegations in a second action against different defendants.

6.2 The Correct Approach in Ongoing Litigation

38. The correct approach, where one party in ongoing litigation realises that it has a connected claim against another party which is not currently before the court, is set out in *Aldi.* There, Aldi had brought claims against the main contractor Holmes. Holmes issued Part 20 claims against the WSP Group and Aspinwall. They both subsequently settled with Holmes. Holmes were found liable to Aldi, but had gone into administration. Subsequently, Aldi brought their own proceedings against WSP Group and Aspinwall. That claim was struck out as an abuse of process by Jackson J (as he then was), but this court overturned that order.

39. In the leading judgment, Thomas LJ (as he then was) identified the nature of the appellate court's task in these circumstances:

> "16. In considering the approach to be taken by this court to the decision of the judge, it was rightly accepted by Aspinwall that the decision to be made is not the exercise of a discretion; WSP were wrong in contending otherwise. It was a decision involving the assessment of a large number of factors to which there can, in such a case, only be one correct answer to whether there is or is not an abuse of process. Nonetheless an appellate court will be reluctant to interfere with the decision of the judge where the decision rests upon balancing such a number of factors; see the discussion in *Assicurazioni Generali v Arab Insurance Group* [2002] EWCA Civ 1642) [2003]1 WLR 577 and the cases cited in that decision and *Mersey Care NHS Trust v Ackroyd* [2007] EWCA Civ 101 at paragraph 35. The types of case where a judge has to balance factors are very varied and the judgments of the courts as to the tests to be applied are expressed in different terms. However, it is sufficient for the purposes of this appeal to state that an appellate court will be reluctant to interfere with the decision of the judge in the judgment he reaches on abuse of process by the balance of the factors; it will generally only interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him. In this case, I consider that the judge, despite the weight that must be accorded his view given his great experience in this type of litigation and the conspicuous success with which he has managed the TCC, reached a decision which was impermissible by taking into account factors which he should not have done and omitting factors which he should have taken into account."

40. On the material before the court, Thomas LJ said at [18] that Aldi had not behaved in any way that was culpable, let alone improper. He said:

> "Aldi had made a judgment that it would be in its interests to try and make a recovery against excess layer underwriters on the judgment that it had obtained rather than to continue to participate in the action of bringing claims against WSP and Aspinwall. In my view that was a decision which was open to Aldi as a sensible and cost-effective way of proceeding…"

Moreover, he noted that WSP and Aspinwall were made aware by Aldi that Aldi had a claim against them and that it might be pursued ([21]). He found at [22] that, when they settled with Holmes, they could and should have made their position to Aldi clear, and their decision not to do so meant that they settled in full knowledge of the fact that there might be a second claim against them.

41. Thomas LJ then went on to consider the public interest factors as follows:

> "24. The factors which I have set out are largely the private interest factors. As was made clear in *Johnson v Gore-Wood*, the public interest extends not only to finality and preventing a party being vexed twice, but also to economy and efficiency in litigation. The judge considered that the decision of Aldi not to bring its claims against WSP and Aspinwall in the original action was an abuse or misuse of the process of the TCC. I do not see how the mere fact that this action may require a trial and hence take up judicial time (which could have been saved if Aldi had exercised its right to bring an action in a different way) can make the action impermissible. If an action can be properly brought, it is the duty of the state to provide the necessary resources; the litigant cannot be denied the right to bring a claim (for which he in any event pays under the system which operates in England and Wales) on the basis that he could have acted differently and so made more efficient use of the court's resources. Although the judge was self evidently right in saying that it was the duty of the TCC to achieve the just and cost effective disposal of litigation and that this served the interests of the business community, he was wrong to find that the action brought by Aldi flew in the face of that policy. As I seek to explain at paragraphs 29-31 below, the problems that have arisen in this case should have been dealt with through case management.
>
> 25. Furthermore, there is a real public interest in allowing parties a measure of freedom to choose whom they sue in a complex commercial matter and not to give encouragement to bringing a single set of proceedings against a wide range of defendants or to complicate proceedings by cross-claims against parties to the proceedings. That freedom can and should be restricted by appropriate case management."

42. Finally, Thomas LJ set out the approach that should be adopted if similar problems arose in the future ("the *Aldi* guidelines"). He said that the proper course was for a party with potential connected claims to raise them with the court. Aldi had written to the court but not in terms that made it clear what the court was being invited to do. WSP and Aspinwall knew of Aldi's position and were before the court on numerous

occasions but they did nothing to raise it. Thomas LJ said at [30] that the matter should have been raised with the court, so that the court would, at the very least, have been able to express its view as to the proper use of its resources and on the efficient and economical conduct of the litigation. He identified a number of potential reactions from the court and acknowledged that "whatever might have happened in this case is a matter of speculation". But he was clear at [31] that, if a similar issue arises in complex commercial multi-party litigation, "it must be referred to the court seized of the proceedings. It is plainly not only in the interest of the parties but also in the public interest and in the interest of the efficient use of court resource that this is done. There can be no excuse for failure to do so in the future."

43. In *Stuart v Goldberg Linde (a firm) & Others* [2008] EWCA Civ 2; [2008] 1 WLR 823, a claimant successfully sued G and L, partners in a solicitor's firm, for breach of an undertaking. Thereafter, still within the relevant limitation period, the claimant issued further proceedings against G and L arising out of the same background facts, but this time alleging misrepresentation and inducing breach of contract. The Master struck out the second claim as an abuse of process, and the judge dismissed the appeal but, on a second appeal to this court, the second action was reinstated. This court concluded that the judge had taken into account irrelevant factors and that, in all the circumstances, it was not an abuse for the claimant to bring the second action, despite his awareness before the trial of matters relevant to the inducement claim (as well as some of the facts relevant to the misrepresentation claim), and despite his failure to warn G and L of the possibility of later proceedings.

44. On the *Henderson v Henderson* point, Lloyd LJ reiterated at [65] that the courts will not lightly shut out a party from pursuing a genuine claim, unless abuse of process can clearly be made out. As to the proper approach in ongoing litigation, this court was clear that parties should not keep future claims secret, even where the second claim might involve other complex issues (Sir Anthony Clarke MR at [96]). The approach of the CPR was to require cards to be put on the table in cases of this kind and, if that did not happen, the claimant was, in the words of Sedley LJ at [77] at "high risk" of the second action being struck out.

45. Sir Anthony Clarke MR also reiterated what Thomas LJ had said in *Aldi* about the approach of an appellate court. He said that, although a decision as to whether or not to strike out was not the exercise of a discretion, it was "very similar" to it ([82]). That was because, he said, it involved the balancing of a series of different factors. In consequence, the appellate court would be reluctant to interfere with the decision of the judge unless he or she had taken into account immaterial matters, failed to take into account material matters, had erred in principle, or if the judge had reached a conclusion that was not open to him or her (i.e. he or she was plainly wrong).

46. In *Gladman Commercial Properties v Fisher Hargreaves Proctor and others* [2013] EWCA Civ 1466; [2014] P.N.L.R. 11 this court again considered the *Aldi* guidelines. Two sites in Nottingham were marketed by agents, FHB and HEB. GCP agreed to buy the sites, intending to develop them for student accommodation, but then found out there were planning difficulties. The vendors, which included the City Council, issued proceedings for specific performance; GCP defended the claim and bought a counterclaim, indicating that the vendors' agents, FHB and HEB, had made false representations as to the suitability of the site. GCP subsequently indicated to the agents that, if their action against the vendors was unsuccessful, they would pursue

them in separate proceedings, but they failed to raise that same point with the court. The original claim against GCP was compromised on terms that it was in full and final settlement of all and any claims of any nature. Subsequently GCP brought proceedings against FHB and HEB which were in similar terms to the Part 20 claims they had brought against the City Council, alleging fraudulent and/or negligent misrepresentation. The claims were struck out, partly by reference to the terms of the settlement; partly because they were an abuse of process (because if the claims against FHB and HEB had been brought within the original proceedings, directions would have been given to regulate the hearing of all claims together); and partly because GCP could not plead an intelligible claim for loss additional to that which they had already recovered. The appeal against the order striking out the claim was dismissed.

47. As to GCP's failure to follow the *Aldi* guidelines, Briggs LJ (as he then was) said:

> "65. As has been repeatedly stated, the conduct of civil proceedings is a process in which the stakeholders include not merely the parties, but also other litigants waiting for their cases to be tried, and the public at large, who have an interest in the efficient and economic conduct of litigation. I consider that Arnold J was correct to treat a failure by the Appellant to follow guidelines laid down as mandatory future conduct in two successive reported decisions of this court as relevant matters pointing to a conclusion that the Second Claim constituted an abuse of the process of civil litigation.
>
> 66. The shocking consequence of permitting the Second Claim to continue would be that precisely the same issues would fall to be litigated at two successive trials involving the waste of between four and six working weeks of court time and, no doubt, millions of pounds of wasted costs and lost management time, quite apart from the double jeopardy faced by Mr. Bishop and Mr. Hargreaves to which I have referred. The judge's conclusion was that compliance with what were by then mandatory guidelines could have entirely avoided that wasteful duplication of time, money and effort. I agree that the failure was, as described in the *Aldi* case, inexcusable. An inexcusable failure to do something which would have contributed so substantially to the economy and efficiency with which this dispute might have been resolved seems to me to be a primary candidate for identification as an abuse."

48. In *Otkritie Capital International Limited v Threadneedle Asset Management* [2017] EWCA Civ 274 at [49], Arden LJ (as she then was) rejected the submission that, once there was a breach of the *Aldi* guidelines, any subsequent proceedings were automatically an abuse of process. There, Action 1 was against Threadneedle's employees; Action 2 was against Threadneedle itself. Arden LJ said:

> "49. As to Mr Malek's submission that, once the judge found that Otkritie had acted in breach of the *Aldi* guidelines in Action 1, Action 2 was an abuse of process and should be struck out, in my judgment, that approach is clearly not consistent with *Johnson v Gore Wood* and its adherence to a broad merits-based assessment of whether a second action was an abuse of the process of the court. In my judgment, it is clear that this Court

> in *Aldi* did not intend to depart from the decision in *Johnson v Gore Wood*. So there is no hard-edged rule of law that a claim, which a party could have raised in one set of proceedings, will be struck out if that party seeks to bring it in another set of proceedings. The *Aldi* guidelines are a facet of the principle of a "broad merits-based judgment" as to whether this is the just outcome, which was established in *Johnson v Gore Wood*."

49. The judge had concluded that there had been a breach of the *Aldi* guidelines but that, if Otkritie had raised the possibility of their claim over against Threadneedle, the Commercial Court would have declined to make an order joining them into Action 1, because that would have delayed the trial (the so-called Hypothetical Scenario). The argument was that Action 2 should be struck out if it was *possible* that Threadneedle should have been joined into Action 1. This court rejected that submission, and accepted the argument that there had to be a causative effect between the failure to comply with the *Aldi* guidelines, and any prejudice. At [52] of her judgment, Arden LJ said:

> "52. In making a broad merits-based judgment, the judge was clearly entitled to assess the seriousness of the breach and so to seek to determine what would have happened if the necessary application had been made. So I reject Mr Malek's submission, which was an important part of his submissions, that he should not have attempted to determine the Hypothetical Scenario. Nor do I accept that any error has been demonstrated in his assessment of what a judge of the Commercial Court would be likely to have done. This case was different from those, such as *Clutterbuck*, where the court was not able to determine what the judge in the first action would have done. Furthermore, the fact that in those cases there was no determination of the Hypothetical Scenario does not of course mean that it is wrong to make the determination where it can properly be made."

6.3 Other Authorities

50. We were referred to a number of other authorities, including *Playboy Club London Limited v Banca Nazionale Dell Lavoro Spa* [2018] EWCA Civ 2025 and *Goldman & Ors v Zurich Insurance PLC & Anr* [2020] EWHC 192 (TCC); [2020] BLR 236, in each of which a second action was predicated on evidence which emerged during the first trial. Mr Williamson KC relied on those authorities to demonstrate the very different sort of case with which we are concerned. It is unnecessary therefore to set out those cases in any detail in this judgment.

51. During the course of argument, my Lord, Lord Justice Stuart-Smith, raised with counsel the potential relevance of CPR 3.9(1) (Relief from Sanctions) and the approach set out in *Denton v TH White Limited* [2014] EWCA Civ 906; [2014] 1WLR 3296. Mr Williamson considered that any reference to *Denton* would be an over-complication and may lead to confusion; Mr Hale was rather more equivocal.

52. In my view, whilst I do not suggest that the whole panoply of the rules relating to relief from sanctions are appropriate here, it is incumbent on any court faced with an application to strike out, particularly where there has been a breach of the *Aldi* guidelines, to consider very similar matters as those which arise under the three stages

of *Denton*: the seriousness and significance of the breach, the reasons for it, and all the circumstances of the case (including the consequences if the sanction remained, or if it was lifted). This chimes with the references in *Johnson v Gore Wood* and *Aldi* to the public and private interests that will always need to be considered on a strike-out.

6.4 Summary of Applicable Principles

53. The applicable principles of law relating to an application to strike out for abuse of process can, therefore, be summarised as follows:

53.1 Although historically it was said that, absent special circumstances, a second claim could not be brought if it could have been brought in earlier proceedings (*Henderson v Henderson)*, that is too dogmatic an approach (*Johnson v Gore Wood).*

53.2 Instead, what is required is "a broad merits-based judgment which takes account of the public and private interests involved and all the facts of the case, focussing 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" (*Johnson v Gore Wood*).

53.3 The burden rests on the defendant to establish that it is an abuse of process for them to be subjected to the second action (*Johnson v Gore Wood, Michael Wilson*). Because the focus is on abuse, it will be rare for a court to find that a subsequent action is an abuse unless it involves "unjust harassment or oppression" (Lord Clarke MR in *Dexter* and Lloyd LJ in *Stuart v Goldberg Linde*). Putting the same point another way, the courts will not lightly shut out a genuine claim unless abuse of process can clearly be made out (Lloyd LJ in *Stuart v Goldberg Linde,* and Simon LJ in *Michael Wilson*).

53.4 In ongoing litigation, a party who realises that he may have connected claims which are not currently pleaded must follow the *Aldi* guidelines, and at least raise with the court the existence of such new claims. A breach of those guidelines will give rise to a "high risk" that the second action will be found to be an abuse of process (*Stuart v Goldberg Linde)* and will always be a relevant factor to be taken into account in any application to strike out (*Gladman*).

53.5 However, a breach of the *Aldi* guidelines does not automatically mean that the second action is an abuse of process and will be struck out. The *Aldi* guidelines are simply one facet of the broad merits-based evaluation (*Okritie*).

53.6 A decision as to whether a claim is an abuse of process is not a matter of discretion, but the decision will turn on an evaluation which is "very similar" to the balancing exercise undertaken when a judge exercises his or her discretion (*Aldi*, *Stuart v Goldberg Linde*).

53.7 That evaluation must consider, not only whether there has been a misuse of the court's process, oppression or harassment (*Dexter*), but also the causative effect of the failure to follow the *Aldi* guidelines (*Otkritie*). This may involve, for example, consideration of hypothetical consequences and possible case management outcomes (*Barrow, Otkritie*).

53.8 The evaluation will also consider the public interest, as set out in *Johnson v Gore Wood* and *Aldi,* which is unchanging from case to case (the efficient use of court resources, the needs of other users, finality etc.), and the legitimate private interests involved, which will always vary, depending on the particular facts. This may therefore involve a consideration of the consequences of striking out or not, in a broadly similar way to the third part of the test in *Denton*.

53. 9 This court will be reluctant to interfere in the evaluation carried out by the judge at first instance, and will only do so if the judge took account of something he or she should not have done, failed to take into account something he or she should have done, erred in principle, or reached a conclusion that was so perverse as to be "plainly wrong" (*Aldi*, *Stuart v Goldberg Linde*).

54. With those principles in mind, I turn to the submissions and the resulting analysis.

7 Outline of the Parties' Submissions

55. On behalf of Outotec, Mr Williamson's submissions focused on Ground 5. They were founded on the judge's findings that the misrepresentation claim could and should have been tried in the Main Action, and that MW were in breach of the *Aldi* guidelines. He said that, in the light of those findings, the action should have been struck out. He submitted that, since 'could/should' was a cornerstone of the test formulated in *Johnson v Gore Wood*, that was "good enough" for the new proceedings to be struck out as an abuse of process. He said that, if 'could' and 'should' were established, that amounted to a finding of abuse of process, "or was very close to it". He said that oppression/harassment "was relevant, but not necessary".

56. As to the judge's merits-based evaluation, Mr Williamson said that the judge was wrong to find that the consequential breach of the *Aldi* guidelines was "not the most egregious of non-compliances". He said that it was particularly serious because (amongst other things):

(a) MW could and should have brought the fraud allegations in the Main Action and appeared to have made an informed decision not to do so. They kept the claim "up their sleeve" and the judge had not acknowledged the "high risk" that this created that the new proceedings would be struck out;

(b) The judge had been wrong to say that there was no overlap between the Main Action and the current proceedings. He submitted that the link was obvious because MW were now saying that, but for the misrepresentations, they would not have entered into the sub-contract at all.

57. In addition, Mr Williamson attacked the judge's explanation for his conclusion that the non-compliance with the *Aldi* guidelines was not the most egregious of breaches. On the case management issue, he submitted that the judge erred in saying that it could not be said "in complete confidence" that the misrepresentation claim would have been litigated as part of the Main Action: that was not the test, and in any event, it was at odds with his finding that the current proceedings "could, should and probably would have been tried with the previous proceedings".

58. As to Ground 4, Mr Williamson submitted that the "two key factors" identified by the judge at [136], namely the continuation of the misrepresentation claims under the PCG against Metso in any event, and the existence of very similar claims in respect of both Surrey and Levenseat, were irrelevant, and the judge had been wrong to have regard to either matter. As to the claim under the PCG, Mr Williamson submitted that Outotec and Metso were separate and distinct legal entities, and that it was therefore not correct as a matter of law to say that a claim against one was, in reality, a claim against both.

59. As to the second "key factor", namely the very similar misrepresentation claims in respect of Surrey and Levenseat, Mr Williamson submitted that those too were an irrelevant consideration. He said the question was whether or not Outotec was oppressively vexed in respect of claims relating to the Hull project, and that that was an issue which should be determined on its own merits. The existence of separate proceedings between the parties on other projects was irrelevant to the question of whether the misrepresentation claims should have been brought in the Main Action. He said that, if the existence of those other projects was relevant, that merely underlined the fact that a further claim in respect of Hull increased, rather than diminished, the prejudice to Outotec.

60. On behalf of MW, Mr Hale acknowledged that MW were in a certain amount of difficulty. He accepted that MW could have brought the claims in the Main Action. He accepted that there was a breach of the *Aldi* guidelines. He was also bound to accept, during oral argument, that MW had proffered no excuse for the non-notification to the court of the existence of the misrepresentation claims. Despite those difficulties, he provided a robust defence of MW's position and argued that, on the unusual facts of this case, there was no abuse, and the judge had been correct not to strike out the claim.

61. He endeavoured to submit that it could not be said that, practically, MW *should* have raised the misrepresentation claims in the Main Action. He pointed to the fact that MW was a defendant and a Part 20 claimant in the Main Action, and that it was neither culpable nor improper for MW to limit itself to trying to pass down EWH's breach of contract claims to Outotec, rather than opening up the issue of fraudulent misrepresentation in the EWH proceedings. Of course, that part of Mr Hale's submissions raised the question as to whether this point was even open to him, given the judge's clear finding that MW should have raised these claims in the Main Action.

62. Mr Hale submitted that the judge's broad merits-based assessment was correct. He said that the criticisms of that assessment were unfounded. More particularly, MW's skeleton said that Outotec's submission that the breach of the *Aldi* guidelines was "particularly egregious" was meaningless rhetoric, which did not identify any error of principle. The skeleton argument also referred to the submission as to a "high risk" of strike-out and said again that this went nowhere, beyond re-running an argument that had been unsuccessful before the judge, thereby inviting this court to make a different decision, which was impermissible.

63. Mr Hale submitted that the judge had been right to take into account, in his broad-based review of all the circumstances, the "two key factors", namely the claim against Metso concerning Hull, which had not been struck out, and the existence of very similar misrepresentation claims in respect of the sub-contracts for Surrey and

Levenseat, which were now the subject of separate actions and forthcoming hearings. He submitted that the claim against Metso would involve the same misrepresentation allegations, the same documents, and the same witnesses, as the current claim against Outotec, and therefore it was meaningless to differentiate, for these purposes, between Outotec and Metso. As to the other projects, he pointed to the fact that the trial in the TCC in February 2026 will concern very similar claims in respect of the Surrey sub-contract between the same parties. As to the Levenseat arbitration, he said that that was due this year and was likely to involve the same witnesses dealing with the same misrepresentation allegations, so that at the very least the witness statements taken in the arbitration may very well be relevant to these proceedings. In consequence, Mr Hale submitted, there was always going to be at least two rounds of hearings in this case, and that Outotec always faced at least two trials regarding the MW/Outotec 'waste-to-energy' sub-contracts.

8 Analysis: The Principal Findings Against MW

64. The starting point is whether MW *could* have raised the misrepresentation claims in the Main Action. The judge found that they could and MW do not and cannot challenge that.

65. The next building block is whether MW *should* have raised misrepresentation claims in the Main Action. The judge found that they should have done. In the absence of a Respondent's Notice, I have concluded that it is not open to MW to argue that the judge was wrong to reach this conclusion.

66. I note that Mr Hale's principal argument in this context was to point out that it would have been very difficult for MW, who were defending a large claim by EWH in the Main Action, to suggest that the plant for which they were responsible was hopelessly inadequate because of the misrepresentations made to them by Outotec at the outset. I see the force of that: I agree that the idea of a main contractor alleging that his sub-contractor lied to him to obtain the crucial plant sub-contract, whilst at the same time defending himself from the employer's claims based on his inability to commission that very same plant, is above and beyond the normal situation in which a main contractor in the TCC commonly has to 'look both ways'.

67. But some of these concerns misunderstand the nature of MW's obligations under the *Aldi* guidelines. The requirement is not, at least in the first instance, to plead out the new claims in detail. The requirement is to *raise*, with the court and with the other parties, the fact that there were such claims, not as yet formulated, but which might have a serious impact on the case management of the ongoing proceedings. I consider that, although great care would have been needed, it should have been possible for MW to undertake that more limited task without doing irreparable damage to their defence to EWH's allegations.

68. The third building block is whether or not there was a breach of the *Aldi* guidelines. The judge found that there was, and Mr Hale accepted that. It appears that MW made "a commercial decision" not to notify anyone of the existence of the misrepresentation claims. Although this is a point reiterated in the skeleton argument before us, as it was in the skeleton argument before the judge, there is no separate evidence about that commercial decision: nothing about who made it, how, when, and what the decision-makers knew and what they did not know. However, as Mr Hale

also accepted, no excuse has been offered for the failure to raise the misrepresentation claims with the court in late 2019.

69. There is a separate issue about the nature and seriousness of MW's breach of the *Aldi* guidelines. The judge, having found that there was a failure to comply with the guidelines, described the non-compliance as "not the most egregious". As noted at paragraphs 56 and 57 above, Mr Williamson challenges that conclusion.

70. In [134], the judge explains why he reached that conclusion. It was partly because he considered that there was no or very little overlap between the misrepresentation claims and the issues in the Main Action, and it was partly because it could not be said with complete confidence that, even if they had complied with the guidelines, the misrepresentation allegations would necessarily been dealt with in the trial before Pepperall J, and might instead have been hived off and addressed separately.

71. In my view, these two factors are of importance, but are better addressed when considering the issue of vexation/oppression/harassment, which I deal with in the next Section of this judgment. On the seriousness of the breach, it is sufficient to say that, in circumstances where the failure to comply with the *Aldi* guidelines has not been explained or justified, the breach must be regarded as serious. The only mitigating factor, to which some (but not too much) weight can be attached, is the point at paragraph 66 above, and the potential difficulties that MW would have found themselves in in the Main Action if the misrepresentation claims had been raised in any detail with the court and the other parties.

72. Pausing there, it is perhaps legitimate to ask at this point: how was it that the current proceedings were not struck out by the judge? He had found that the misrepresentation claims could and should have been raised in the Main Action. He had found that MW were in breach of the *Aldi* guidelines. On Mr Williamson's primary submission, that should have been sufficient to strike out this claim.

9. Analysis: Abuse of Process and Striking Out

73. In my view, the answer to Mr Williamson's primary submission is that the *Aldi* guidelines are only one facet of the necessary merits-based evaluation identified by Lord Bingham in *Johnson v Gore Wood*. In other words, it does not automatically follow that a breach of the *Aldi* guidelines will make the second action abusive. A breach may be a strong pointer towards such a result, but it does not obviate the need for the applicant, in this case Outotec, to demonstrate vexation, oppression or harassment: see the principles at paragraphs 53.3 and 53.7 above. It is therefore necessary to consider what potential vexation/oppression/harassment might exist in this case. Most of these factors were referred to by the judge in his evaluation, although the effect is not always spelt out. Since they led him to conclude that the action should not be struck out, it is necessary to consider each in turn.

9.1 The Absence of Overlapping Claims

74. This is the starting point, because the essence of *Henderson v Henderson* abuse is to prevent one party being vexed twice with the same or similar claims. The judge concluded that there was very little overlap between the Main Action and the new allegations. He undertook his comparison exercise at [104]-[107]. That part of his

analysis is not the subject of challenge in the Appeal Notice or the written skeleton argument. It is therefore unnecessary to embark on a detailed analysis of the absence of overlap, as is, for example, attempted at paragraph 44 of the skeleton argument served on behalf of MW.

75. Although not foreshadowed in the Appeal Notice or his written skeleton argument, Mr Williamson sought to attack the judge's conclusion in his oral submissions, on the basis that: i) the new claims were connected to the old (and there can be no doubt about that, but that does not mean that they overlap in any meaningful sense); and ii) the nature of the damages claimed in the current proceedings meant that, as he put it, "everything would have to be looked at again".

76. I take the view that, since these complaints were not in the Appeal Notice/Grounds of Appeal, or the supporting skeleton argument, they are not now open to Outotec. But, for the avoidance of doubt, I would agree with the judge that there was and is no, or no significant, overlap between the Main Action and the misrepresentation claims. The misrepresentation claims focus on the pre-contract period between 2011 and 2015. That period and those events simply did not feature in the Main Action at all, which instead was concerned with the problems with the plant onsite during the construction and commissioning, the delays in the commissioning, and the eventual termination. None of those matters, save possibly for some of the defects (and no-one was very sure about that), arise again in the misrepresentation claims.

77. Of course, Mr Williamson was right to say that, if the misrepresentation allegations are successful, then it will be necessary to consider the various heads of loss, many of which arise out of MW's failure in the Main Action. There is, to that extent, a connection. But the judge expressly considered that argument at [106], and concluded that it would not involve any re-litigation of issues previously addressed in the Main Action. So, whilst it is possible to envisage all sorts of arguments which may be open to Outotec when dealing with, say, causation, such as the existence of numerous supervening events or breaks in any chain of causation, and the reasonableness of that settlement in accordance with the rule in *Biggin v Permanite* [1951] 1 KB 422, none of those matters were litigated in the Main Action.

78. I also accept Mr Hale's submission that, if a formal application had ever been made by MW under CPR 20.9 to add the misrepresentation claims to the Part 20 proceedings in the Main Action, the lack of connectivity with the existing Part 20 claims (r.20.9(2)(a)), and the fact that different remedies were sought (r.20.9(2)(b)), may well have meant that the new claims would have been case-managed and dealt with separately rather than together with the Main Action. Whilst such an application would have been unlikely in such a complex case, it remains one way to test the proposition that there was no, or no significant, overlap between the misrepresentation claims and the issues in the Main Action.

79. Finally on the absence of overlap point, it is plain that having two trials in relation to Hull (leaving aside the claim in respect of the Surrey sub-contract, which I address later) would not have any significant detrimental effect on the efficient use of the court's resources. What was saved in time and resources, because the Main Action did not include the Hull misrepresentation claims, will now be incurred in the current proceedings, which does include them. The net effect on the public interest is therefore neutral.

80. Accordingly, I consider that the new misrepresentation claims are just that: new, in that they have never been made against Outotec before, and concern matters that did not arise in the Main Action. There is no reason to believe that they are anything other than genuine claims. There is no obvious vexation, oppression or harassment in their being pursued now. There is no detriment to the public interest. Thus, in accordance with the principle noted at paragraph 53.3 above, the court will not lightly strike out such untested claims, regardless of the breach of the *Aldi* guidelines.

9.2 The Hypothetical Case Management Considerations

81. Outotec's next argument in relation to vexation or oppression is that, if MW had complied with the *Aldi* guidelines, the case managing judge would have considered what to do about these claims and, on one view of the judge's judgment, was likely to have concluded that they be dealt with as part of the first trial in the Main Action. They also say that that is to be contrasted with the position now, where allegations of fraud will have to be tried 10-15 years after the relevant events.

82. In a case of this kind, it is impossible to state precisely what would have happened if MW had raised the misrepresentation claims in accordance with the *Aldi* guidelines: as Thomas LJ noted at [30] of his judgment in that case, such things are "a matter of speculation". The most important thing is that, if MW had done what they should have done, and raised the matter with the court, everyone would have known where they stood.

83. That said, a consideration of the hypothetical case management outcomes is not an entirely academic task, because it can serve as a comparator with what has actually happened. The judge therefore dealt with this topic in some detail, although his language in the relevant passages in his judgment is not always very clear, and tests such as having "complete confidence" in an outcome, or something being "beyond reasonable doubt", are inapt in a civil context. For myself, I read [126]-[130] of his judgment as saying no more than that there was a range of hypothetical possibilities and that, although the judge favoured those which might have seen the misrepresentation claims being dealt with as part of the first trial, he could do no more than say that this was perhaps the likeliest of a number of other possibilities, none of which could be excluded. One such possibility, noted at [130], was that the misrepresentation claims would have been put "on the back-burner" and dealt with at a second trial, after the conclusion of the Main Action.

84. For what it is worth, I think that this last possibility was much more likely than the others. If it had been raised at the first CMC, I consider that the idea of hearing the misrepresentation claims alongside everything else at the first trial would have been regarded as impractical for two reasons. First, there is the likely attitude of EWH. I consider that they would have baulked at the idea that their termination claim should suddenly find itself playing second fiddle to a dispute about the way in which the sub-contract came to be agreed in the first place. After all, what mattered to them was to be able to justify their termination of the main contract. That turned primarily on MW's culpability for delay and, to a lesser extent, certain defects. It had nothing to do with what Outotec had said or not said to MW in discussions in which EWH were not involved, which in turn led to a sub-contract to which they were not a party. Whilst they might have gained some assistance from any evidence that supported the misrepresentation claims against Outotec, they would not have gained any assistance

if the evidence had gone the other way, and it would all have delayed the hearing of the issue which EWH were really interested in, namely MW's failure to complete the commissioning on site, and the justification for EWH's decision to terminate.

85. Secondly, it is clear that Pepperall J found the existing issues more than enough for one trial as they stood (see paragraph 7 above). The idea that the issues at the first trial could have been increased by adding in the new and wide-ranging misrepresentation claims, which are said to have induced the sub-contract in the first place, seems to me to be unrealistic. Thomas LJ's observation at [25] of *Aldi* (paragraph 41 above), that there was a real public interest in discouraging the complication of existing proceedings by the introduction of other claims, is of direct application here.

86. In one sense, it does not matter that I take a slightly different view to the judge about the most likely case management outcome: the short point is (as the judge made plain) that hiving off the misrepresentation claims for a later date was a possibility which could not be ignored. Although the judge does not spell this out, that hypothetical possibility matters because it is very similar to the position that has in fact eventuated. If the misrepresentation claims had been left over to be tried later, after the two judgments of Pepperall J had been handed down and digested, then directions would have been given and a trial of those claims listed, probably for some time in 2025. The case managing judge would inevitably have allowed a period between the end of the Main Action and the need for the parties to gear up again to deal with the misrepresentation claims. On this basis, whilst there may be some delay between when the misrepresentation claims would have been tried had the matter been raised by MW at the time, and when they are in fact going to be tried, such a difference is, in the overall context of this case, relatively insignificant.

87. The judge clearly felt that it would be wrong to strike out these new claims, in circumstances where, if they had been raised at the time, they might have been hived off and dealt with after the first trial, in a not dissimilar way to the way in which they are in fact going to be dealt with now. I agree with that view. So, although the hypothetical case management position cannot provide a complete answer here, as it did in *Barrow* and in *Otkritie*, it points away from any finding of vexation, oppression or harassment. That comes into still sharper focus on a consideration of the next point.

9.3 The Misrepresentation Claims in respect of the Surrey and Levenseat Sub-Contracts

88. In his evaluation, the judge took into account the fact that, because of the ongoing claims in respect of two other contemporaneous sub-contracts between the parties, in respect of the Surrey and Levenseat projects, each of which is said to have been induced by very similar misrepresentations, Outotec were always going to have to address the misrepresentation allegations in a second (or even third) trial/hearing subsequent to the Main Action. Mr Williamson said that this was an irrelevance and should not have been taken into account by the judge. Mr Hale said, as a matter of common sense, this was not only relevant but a critical element in the conclusion that the new misrepresentation claims were not oppressive. He described this (rightly, I think), as the "high point" of his submission.

89. In my view, the court should take a generous view of the matters to be taken into account when considering this sort of application. After all, Lord Bingham in *Johnson v Gore Wood* stressed that what mattered was a consideration of "all the

circumstances" without qualification. Lloyd LJ in *Stuart v Goldberg Linde* said that, in consequence, it was necessary to proceed with care when considering a submission that some aspect of a particular case must be disregarded as irrelevant in principle (see [57]). Although he went on to refer to matters that were relevant to the question of whether the claimant could or should have brought his claim as part of the earlier proceedings, it seems to me that the same approach must also apply to matters touching on whether or not there has been vexation/oppression/harassment.

90. In my judgment, the judge was right to conclude that one of the relevant circumstances here was that very similar misrepresentation allegations are being pursued against Outotec in relation to two other projects. Indeed, the misrepresentation claims in respect of the Surrey sub-contract are so closely connected to the Hull misrepresentation claims that they are due to be heard together in the TCC in February 2026. The Levenseat claims are being dealt with even before that, albeit in arbitration and, for present purposes, I am prepared to leave the existence of that claim out of account.

91. Focussing just on the ongoing claims in the TCC, it seems clear that Outotec were always going to face two different trials: the first in respect of Hull, where the pace and, at least to an extent, the content was dictated by EWH; and the second in respect of Surrey, where the pace and content has been dictated by MW. As I have said, the Surrey claim turns on very similar allegations of misrepresentation to those now raised in respect of Hull. In this way, Outotec were always at risk of being vexed by a second trial, concerned with those misrepresentations, in any event.

92. Thus, even if the Hull sub-contract misrepresentation claims had been heard as part of the trial before Pepperall J (about which I am doubtful, for the reasons previously given), the effect of MW's breach of the *Aldi* guidelines has been to take them out of the Main Action and add them in to a second, separate trial, which would always have happened, in respect of the very similar Surrey sub-contract misrepresentation claims. As the authorities show, successive trials can be acceptable in principle, depending on the facts: there were successive trials in *Barrow*, in *Aldi*, and in *Otkritie*.

93. For all these reasons, therefore, I reject the argument that the judge erred in taking this factor into account. It seems to me that, on the contrary, it was highly relevant, because it meant that, whatever had happened in the case management of the Main Action, there would always have been a second, later trial concerning Outotec's alleged misrepresentations in 2011-2015. In my view, this factor also points firmly away from the existence of vexation/oppression/harassment, and confirms the conclusion that, in the round, the new claims do not constitute an abuse of process.

9.4 Metso

94. Finally, the judge took into account the fact that Metso would be facing these misrepresentation claims in any event, regardless of Outotec's position. It was Mr Hale's submission that this was a further example of how Outotec's complaints were a matter of form rather than substance. He said that, since the claim based on the Hull misrepresentations would be going ahead against Metso in any event, it was artificial to say that there was an abuse of process. As I have already noted, Mr Williamson disagreed and relied on the fact that Metso were an entirely different legal entity.

95. Mr Hale's submission had a superficial attraction, but I have concluded that there is no answer in law to Mr Williamson's submission. If Metso had been an unrelated company, like a Bank or third party Guarantor, then I suspect that this point would not even have been raised by MW. Metso are a different legal entity, so just as Metso – unlike Outotec - have not yet faced any claim in relation to Hull, and therefore could not strike out the claim against them as an abuse, so MW cannot rely on the existence of those same allegations against Metso to defeat Outotec's application to strike out. In addition, the claim against Metso is different in nature to the claim against Outotec, being a claim over against a guarantor (even if it may in the end turn on evidence from the same employees of Outotec).

96. I should add that, on my analysis, despite the apparent weight attached to it by the judge, this factor actually makes little difference overall. The fact that there was always going to be a second trial in any event between MW and Outotec, focused on the misrepresentation claims, seems to me to be a much more important consideration.

9.5 The Overall Position of the Parties

97. When considering questions of abuse of process, vexation, oppression, and harassment, it is always instructive to consider the position of the parties overall. If the new Hull misrepresentation claims are not struck out, Outotec will have to address them in the normal way. The trial of those allegations will not be significantly later than it might have been if MW had raised them with the court (as they should have done), and they had been hived off and dealt with after the trial of the Main Action. Moreover, Outotec will address those claims together with the allegations in respect of the Surrey sub-contract, which they would always have had to address in any event. Indeed, dealing with the two together will be more efficient than if they had been addressed separately, since the misrepresentations which induced the respective sub-contracts are said to be very similar. Any vexation, oppression or harassment is therefore negligible. There is also no negative effect on court time and resources, for the reasons I have explained.

98. If the Hull misrepresentation claims are struck out, then it would mean that the genuine claims which MW have in respect of the misrepresentations which they say induced the Hull sub-contract will never be heard by any court, despite their size, and their obvious importance to MW. Outotec would be gaining a windfall in never even having to answer claims worth £165 million, in circumstances where, if those claims had been raised in the Main Action but had been hived off (an outcome which was on any view a possibility), there would have been little difference or delay compared to that which is actually going to happen. In those circumstances, I consider that a court considering an application for relief from sanctions would be very unlikely to impose such a draconian consequence on a party who, translating to this case, made one (albeit very serious) mistake: MW's failure to comply with the *Aldi* guidelines.

99. For all the reasons set out in this Section, I consider (just as the judge did) that the factors pointing away from striking out this claim outweigh - by a small but still meaningful margin - the factors which indicate striking out as an abuse of process.

10 Conclusions

100. In my view, there are a number of factors which suggest that these misrepresentation claims are an abuse of process and should be struck out. I have summarised those in Section 8 above. As against that, there are a number of factors which point to the opposite conclusion. I have outlined those in Section 9 above.

101. The judge evaluated all those matters and came to his decision. Save for the existence of the claim against Metso, it cannot be said that he failed to take into account something that was relevant or took into account something that was irrelevant. Moreover, the point in respect of Metso makes no real difference to the analysis, given the other key factor, namely the existence of the very similar misrepresentation claims in respect of the Surrey sub-contract, which were always going to be heard at a second trial. There was no error of principle, and none was seriously suggested. So in my view we are left with the only remaining question: Was the judge plainly wrong?

102. I do not consider that the judge's conclusion was plainly wrong or that this court should interfere with it. It is miles away from the epithet 'perverse'. When I granted permission to appeal, I said that I might well have done what the judge did. Although that is immaterial to the test this court has to apply on appeal, I reiterate that view. That is primarily because of the absence of vexation, oppression or harassment to Outotec. Whilst I accept that a breach of the *Aldi* guidelines is a serious matter, and one which weighs heavily in the balance against MW, I do not consider that that can or does provide a complete answer. I have indicated that, in my view, on a consideration of all the circumstances, the misrepresentation claims should survive by a small – but still meaningful - margin.

103. In all those circumstances, if my Lords agree, I would dismiss this appeal.

LORD JUSTICE ARNOLD:

104. I agree that the appeal should be dismissed. I am in almost entire agreement with the reasoning of Coulson LJ. The one point I differ slightly on is with respect to the hypothetical case management considerations (section 9.2 of Coulson LJ's judgment). The judge's assessment at [130] was that, had MW complied with the *Aldi* guidelines, the misrepresentation claim probably would have been tried with the previous proceedings, although the judge accepted that that would not have been inevitable. Not only has that assessment not been challenged by MW by a respondent's notice, but also it is an evaluation which I do not consider that this Court is justified in interfering with notwithstanding my Lords' great experience in this field. Despite finding that (i) the misrepresentation claim could have been raised in the earlier proceedings, (ii) the claim should have been raised in the earlier proceedings and (iii) if it had been raised, the claim probably would have been tried together with the earlier proceedings, the judge concluded that the bringing of the claim now was not an abuse of process. I agree with Coulson LJ that one of his reasons for reaching that conclusion, namely the existence of the claim against Metso under the parent company guarantee, was flawed, but that reason was a minor factor. The major factor was that Outotec is going to be vexed by the misrepresentation claim in any event. In those circumstances, I consider that the judge was entitled to reach the conclusion he did. Moreover, like Coulson LJ, I would, by a small but still meaningful margin, reach the same conclusion.

LORD JUSTICE STUART-SMITH:

105. I too agree that this appeal should be dismissed and, like Arnold LJ, I am in almost entire agreement with Coulson LJ's compelling judgment. Specifically, on the point raised by Arnold LJ at [104] I prefer the approach adopted by Coulson LJ at [83] above to what HHJ Davies said at [130] of his judgment. When [130] is read in the wider context of the preceding paragraphs, which are set out above, it seems clear that the Judge was not making a binary finding on the balance of probabilities about whether or not the misrepresentation claim would have been tried with the Main Action. Rather, given his acknowledgment elsewhere that there were a number of alternative case management possibilities, he was saying that in his view, trying the misrepresentation claim with the Main Action was the most likely of those alternative options to have been adopted, not that it was more likely than not that it would have been adopted. This interpretation means that I can accept the Judge's assessment (while not necessarily agreeing with it), whereas I would have had significant reservations if the suggested binary finding were his true meaning.

106. The point on which I express a reservation does not affect the outcome since it is a point that provides modest additional support for the decision to dismiss the appeal. At [94]-[96] Coulson LJ (with whom Arnold LJ agrees) concludes that the separate legal personality of Metso provided a complete answer to the Judge's inclusion of the prospective proceedings against Metso as a relevant feature. Although Metso is a different legal entity, it seems to me to be relevant that the people who are going to have to shoulder the burden of the claim against Metso - particularly the people who are alleged to have been guilty of the various misrepresentations alleged by MW and who are likely to have to give evidence about their alleged conduct – would be the same whether in an action brought against Outotec or an action against Metso. In an area which is to be determined adopting a broad-based merits approach, I think it is too dogmatic to insist on the niceties of separate legal personality. The position can be tested by considering what would be the position if the boot were on the other foot: if it were to be demonstrated that bringing a second action would be vexatious and oppressive in its effect on the people who would be the main actors in subsequent litigation, I would not be inclined to exclude that fact when considering whether the second proceedings were abusive, simply because the first proceedings had been against a separate legal personality.

107. That said, I agree with Coulson LJ that this difference of approach cannot affect the outcome of the appeal. I concur with the dismissal of the appeal and gratefully endorse and adopt the reasons he so clearly gives.