Neutral Citation Number: [2018] EWCA Civ 1468

Case No: A4/2017/1372

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE MR JUSTICE KNOWLES CBE
[2017] EWHC 918 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/06/2018

Before:

LORD JUSTICE LEWISON
LORD JUSTICE LINDBLOM
and
LORD JUSTICE FLAUX

- -

Between:

CARLOS SEVILLEJA GARCIA	**Appellant**
- and –	
MAREX FINANCIAL LIMITED	**Respondent**

- -
- -

David Lewis QC and Richard Greenberg (instructed by **Mackrell Turner Garrett**) for the **Appellant**
Alain Choo Choy QC and Sophie Weber (instructed by **Memery Crystal LLP**) for the **Respondent**

Hearing date: 14 June 2018

- -

Approved Judgment

Lord Justice Flaux:

Introduction

1. This appeal raises the as yet undecided question whether the rule against reflective loss applies to claims by unsecured creditors who are not shareholders of the relevant company. In his judgment, Knowles J decided on a jurisdiction challenge by the appellant (to whom I will refer as "Mr Sevilleja") that the respondent (to which I will refer as "Marex") had the better of the argument that Mr Sevilleja had committed the torts of (i) knowingly inducing and procuring two companies of which Marex claims he was the ultimate beneficial owner to act in wrongful violation of Marex's rights under the judgment it had obtained and (ii) intentionally causing loss to Marex by unlawful means. The judge then concluded that Marex also had the better of the argument that the rule against reflective loss did not bar its ability to show a completed cause of action in tort. Mr Sevilleja sought to appeal all those findings but Asplin LJ only granted permission to appeal in relation to the judge's finding in relation to the rule against reflective loss.

Factual background

2. Creative Finance Limited and Cosmorex Limited ("the Companies") were companies incorporated in the British Virgin Islands and were the principal trading vehicles of Mr Sevilleja for foreign exchange trading. They were clients of Marex, which is a foreign exchange broker. In 2013, claims by Marex against the Companies on the account between them were tried before Field J in the Commercial Court.

3. Field J released his draft judgment to the parties on 19 July 2013 which showed that Marex had succeeded in its claim against the Companies in a sum in excess of US $5 million. The judgment in final form was handed down by the judge on 26 July 2013. A freezing order was then obtained by Marex against the Companies on 14 August 2013. The disclosure of assets by the Companies pursuant to that order revealed that the Companies held only US $4,392.48.

4. In the present proceedings against Mr Sevilleja, Marex alleges that, after the release of the draft judgment he took the opportunity to dishonestly asset-strip the Companies of some US $9.5 million held in their bank accounts in this jurisdiction which he transferred into his personal control in the period between 24 July 2013 and 12 August 2013. It is contended that Mr Sevilleja has thereby committed the torts identified above. As a consequence of that tortious conduct, the Companies were unable to pay the judgment debt to Marex. The Companies are now in liquidation in the British Virgin Islands. In these proceedings, Marex claims as damages the principal amount of the judgment debt, together with interest and costs. Credit is given for sums recovered in enforcement proceedings in New York. Marex also claims as damages costs incurred in taking steps to enforce the judgment of Field J in various jurisdictions.

5. On 11 August 2016, Marex obtained permission to serve the proceedings on Mr Sevilleja out of the jurisdiction. On 5 October 2016 he issued his application to set aside service, disputing the jurisdiction. The judgment under appeal was in relation to that application.

The judgment below

6. In relation to the two torts relied upon, the judge rejected the arguments, on behalf of Mr Sevilleja, that the tort of knowingly inducing and procuring the Companies to act in wrongful violation of Marex's rights under the judgment did not exist and that Marex could not show unlawful means for the purposes of the tort of intentionally causing loss by unlawful means. He held, at [33] of the judgment, that the asset-stripping had been carried out to take away from the Companies the freedom to meet their obligations to Marex. As already noted, Mr Sevilleja was refused permission to appeal against the judge's conclusion that Marex had the better of the argument that the two torts had been committed.

7. The judge then recorded at [37] the submission on behalf of Mr Sevilleja that even if Marex otherwise had a cause of action in tort, the rule against reflective loss barred its ability to show a completed cause of action in tort. The judge cited the statement of the principle by Lord Bingham in his speech in *Johnson v Gore Wood* [2002] 2 AC 1 at p 35E-F (set out at [17] below).

8. He went on to cite various passages from the judgment of Neuberger LJ in *Gardner v Parker* [2004] EWCA Civ 781; [2004] 2 BCLC 554, in particular [71] where reference is made to the speech of Lord Millett in *Johnson v Gore Wood* at p 67. Neuberger LJ noted that Lord Millett had said in terms that it made no difference to the application of the rule against reflective loss that Mr Johnson was claiming *qua* employee rather than *qua* shareholder. Neuberger LJ said obiter that it was: "hard to see why a creditor who is an employee should be treated differently from any other creditor of the company when it comes to applying the rule against reflective loss."

9. The judge then noted that, in two cases at first instance, (*Fortress Value Recovery Fund LLC and Others v Blue Sky Special Opportunities Fund LP (A Form) and Others* [2013] EWHC 14 and *Erste Group Bank AG v JSC "VMZ Red October" and Others* [2013] EWHC 2926), I had doubted the correctness of this obiter dictum of Neuberger LJ. Although Knowles J relied upon those cases, neither is of any real assistance in resolving the issue on this appeal as to the correct ambit of the rule against reflective loss, since in neither case was this issue fully argued to the extent it has been on this appeal.

10. The judge's reasoning in relation to the non-application of the rule against reflective loss in the present case then appears at [41] to [42] of the judgment:

> "41. The no reflective loss principle is a valuable and important principle. However in my judgment, the better argument is that the no reflective loss principle does not apply where the claimant sues, as here, for a defendant's knowingly inducing and procuring a third party to act in wrongful violation of the claimant's rights, or for the defendant's intentionally causing loss to the claimant by unlawful means.
>
> 42. Were the position otherwise these torts would be left with little application in situations where, in my view, they have a principled part to play. The primary focus of these torts is on loss to the claimant, not to the third party (the company in the

> no reflective loss context). They purposely recognise that the defendant incurs liability to the claimant by what he has caused to be done to the claimant through his actions with or to the third party. I strongly resist the proposition that the claimant is then to be confined to remedies against the third party, perhaps often (as here) remedies in its insolvency. I strongly resist the proposition that the defendant is answerable in law, and for damages, only to the third party for what he has done."

11. At [43] the judge concluded that it was not necessary to have resort to the exception to the rule recognised by this Court in *Giles v Rhind* [2003] Ch 618 where the alleged wrongdoing has left the company unable to pursue the wrongdoer. In the Respondent's Notice, Marex seeks to uphold the judgment on the alternative basis that the exception recognised in *Giles v Rhind* does apply.

The correct ambit of the rule against reflective loss

12. It is quite clear from the terms in which Asplin LJ granted permission to appeal that she contemplated that, at the appeal hearing, the full Court would determine the question of law as to the correct ambit of the rule against reflective loss and, in particular whether it applies (subject to the potential application of the *Giles v Rhind* exception) to claims by unsecured creditors, where the loss claimed is in effect the same loss as suffered by the company as a consequence of the wrongdoing of the defendant. Whilst this is not determinative of whether the Court should decide that question of law on a jurisdiction challenge, it militates against the suggestion advanced by Mr Alain Choo Choy QC for Marex that we should simply decide that Marex has a sufficiently arguable case that the rule does not apply to creditors for its claim to be allowed to go to trial. I consider that the issue raised by the appeal is a pure question of law which will not be affected by any facts which might emerge at trial, so that we should decide that question of law at this stage. This will increase certainty in this area of the law and address the concern expressed by Arden LJ in *Johnson v Gore Wood (No 2)* [2003] EWCA Civ 1728 at [162] that: "it is to be hoped that the current will o' the wisp character of the no reflective loss principle will be clarified before long".

13. In order to decide the proper ambit of the rule against reflective loss, it is necessary to look in some detail at how the rule has developed. The genesis of the rule was in the decision of this Court in *Prudential Assurance v Newman Industries (No. 2)* [1982] 1 Ch 204. In that case the plaintiff, which had a 3.2% shareholding in the company, Newman Industries, *inter alia* sued two individual directors in respect of a fraud on the company. The Court of Appeal (Cumming-Bruce, Templeman and Brightman LJJ) held that this claim was misconceived. In the judgment of the Court at 222H-223B, they said:

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

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

14. Mr Choo Choy QC correctly submitted that the rationale for that decision was that such a personal action would subvert the "proper plaintiff" rule in *Foss v Harbottle* (1843) 2 Hare 461. That appears from 224A-C of the judgment of the Court. To that extent and if the principle had rested there, it would only be applicable to claims by a shareholder seeking to pursue causes of action which are not his but the company's. However, the scope and the rationale for the rule have developed since that case.

15. In *Johnson v Gore Wood* [2002] 2 AC 1, Mr Johnson was managing director and holder of all but two of the shares in the company WWH. He instructed the defendant solicitors on behalf of the company to act in relation to the purchase of land over which the company had an option. There was a dispute with the vendor as to the validity of the notice of exercise of the option served by the solicitors which led to protracted Chancery proceedings. By the time the property was conveyed to the company, it had suffered substantial loss consisting of the costs of the Chancery proceedings which could not be recovered from the vendor who was legally aided, together with losses from the collapse of the property market and interest charges. The company pursued proceedings against the solicitors for professional negligence which were compromised by payment of a substantial proportion of the company's claim.

16. Mr Johnson then pursued a personal claim against the solicitors. Part of the decision of the House of Lords was that this claim was not an abuse of process. We are not concerned with that aspect of the decision but with the aspect concerned with the rule against reflective loss. The House of Lords held that his claims for diminution in the value of his shareholding in the company and diminution in the value of his self-administered pension scheme in so far as it related to payments the company would have made into the scheme were not recoverable by reason of the rule against reflective loss and were struck out. Other claims which were not reflective of the company's loss (such as loss of investment opportunity and that part of the pension claim which related to the enhancement in its value if the company had made the payments) were allowed to stand and go to trial.

17. Lord Bingham set out at 35F-36A three propositions derived from earlier authorities as follows (omitting citations):

> "(1) Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the

> company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss…
>
> (2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding…
>
> (3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other…"

18. Dealing with the first proposition, Lord Millett said at 62E-F:

> "The position is, however, different where the company suffers loss caused by the breach of a duty owed both to the company and to the shareholder. In such a case the shareholder's loss, in so far as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder."

19. Later in his speech, he rejected an analysis based upon the decision of the Court of Appeal of New Zealand in *Christensen v Scott* [1996] 1 NZLR 273 that the diminution in value of the shares was a personal loss and not a corporate loss, saying at 66C-D:

> "It is of course correct that the diminution in the value of the plaintiffs' shares was by definition a personal loss and not the company's loss, but that is not the point. The point is that it merely reflected the diminution of the company's assets. The test is not whether the company could have made a claim in respect of the loss in question; the question is whether, treating the company and the shareholder as one for this purpose, the shareholder's loss is franked by that of the company. If so, such

> reflected loss is recoverable by the company and not by the shareholders."

20. He noted that in *Christensen*, Thomas J had recognised the problem of double recovery but considered that it did not arise where the company had settled its claim. He did not accept this proposition, saying at 66D-G:

> "With respect, I cannot accept this either. As Hobhouse LJ observed in *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443, 471, if the company chooses not to exercise its remedy, the loss to the shareholder is caused by the company's decision not to pursue its remedy and not by the defendant's wrongdoing. By a parity of reasoning, the same applies if the company settles for less than it might have done. Shareholders (and creditors) who are aggrieved by the liquidator's proposals are not without a remedy; they can have recourse to the Companies Court, or sue the liquidator for negligence.
>
> But there is more to it than causation. The disallowance of the shareholder's claim in respect of reflective loss is driven by policy considerations. In my opinion, these preclude the shareholder from going behind the settlement of the company's claim. If he were allowed to do so then, if the company's action were brought by its directors, they would be placed in a position where their interest conflicted with their duty; while if it were brought by the liquidator, it would make it difficult for him to settle the action and would effectively take the conduct of the litigation out of his hands. The present case is a fortiori; Mr Johnson cannot be permitted to challenge in one capacity the adequacy of the terms he agreed in another."

21. Lord Millett went on to emphasise that the rule was not limited to claims for the diminution of the value of shares, saying at 66H-67C:

> Reflective loss extends beyond the diminution of the value of the shares; it extends to the loss of dividends (specifically mentioned in *Prudential Assurance v Newman Industries*...) and all other payments which the shareholder might have obtained from the company if it had not been deprived of its funds. All transactions or putative transactions between the company and its shareholders must be disregarded. Payment to the one diminishes the assets of the other. In economic terms, the shareholder has two pockets, and cannot hold the defendant liable for his inability to transfer money from one pocket to the other. In principle, the company and the shareholder cannot together recover more than the shareholder would have recovered if he had carried on business in his own name instead of through the medium of a company. On the other hand, he is entitled (subject to the rules on remoteness of damage) to recover in respect of a loss which he has sustained by reason of

> his inability to have recourse to the company's funds and which the company would not have sustained itself.
>
> The same applies to other payments which the company would have made if it had had the necessary funds even if the plaintiff would have received them qua employee and not qua shareholder and even if he would have had a legal claim to be paid. His loss is still an indirect and reflective loss which is included in the company's claim. The plaintiff's primary claim lies against the company, and the existence of the liability does not increase the total recoverable by the company, for this already includes the amount necessary to enable the company to meet it."

22. In the Court of Appeal in *Giles v Rhind* (which I consider in more detail later in this judgment in the context of Mr Choo Choy QC's reliance on the exception to the rule against reflective loss which that case recognises) the claimant shareholder and director had claims not merely for diminution in the value of his shareholding but claims including for arrears of remuneration, expenses and pension contributions and for loss of future such payments. Waller LJ considered that these claims should not be caught by the rule against reflective loss, saying at [40]:

> "In any event I do not see that [these] other heads are pure "reflective loss". If Mr Giles had not been a shareholder but simply an employee or a lender with an enforceable covenant in his favour, those losses surely would have been recoverable. The fact that he is also a shareholder should not deny him his claims under those other heads."

23. Mr Choo Choy QC relied upon this statement in support of his case that the rule against reflective loss should not be extended to claims by unsecured creditors, but the problem with the statement is that, to the extent that it is suggesting that the rule should be restricted to claims made by a party *qua* shareholder, it is inconsistent with the statements made by the House of Lords in *Johnson v Gore Wood*, specifically by Lord Millett, which I have quoted above. Furthermore, the other fully reasoned judgment in *Giles v Rhind*, that of Chadwick LJ, does not support Waller LJ's analysis on this point.

24. This issue of whether the rule against reflective loss should be restricted to claims made by shareholders was touched on by the Court of Appeal in *Johnson v Gore Wood (No 2)* [2003] EWCA Civ 1728. At [162] of her judgment, Arden LJ noted that Lord Millett had considered that the rule should apply to non-shareholder claims. As she said: "This result would indeed be conducive to creditor protection and minority shareholder protection." However, as she went on to say at [163], the ambit of the no reflective loss principle did not fall for decision in that case.

25. In *Gardner v Parker* [2004] EWCA Civ 781; [2004] 2 BCLC 554, the defendant owned 85% of the shares in a company BDC, the remaining 15% being owned by trusts for the benefit of the claimant and his family. One of the company's principal assets was a 9% shareholding in Scoutvale, the remaining 91% being owned by the defendant, who was in substance the sole director of both companies. The defendant

procured the transfer by Scoutvale of an asset it owned to another company in which he had an interest. BDC went into liquidation and the liquidator assigned to the claimant all its rights and causes of action against the defendant. The claimant then brought proceedings in the name of BDC against the defendant alleging breach of fiduciary duty as a director, since the transfer by Scoutvale had been at a substantial undervalue. One of the issues which arose as a preliminary issue was whether that claim in the name of BDC was precluded by the rule against reflective loss since it was the company, Scoutvale which had suffered the loss.

26. The judge at first instance, Blackburne J, considered that it was so precluded, in terms which suggest that the rationale of the rule is that a claim is precluded by it where the loss claimed is the same loss as suffered by the company, extending beyond claims made by a shareholder, including to claims made by a creditor: see [34] to [41] of his judgment: ([2003] EWHC 1463 (Ch); [2004] 1 BCLC 417, in particular at [35]. This decision was upheld by the Court of Appeal ([2004] EWCA Civ 781; [2004] 2 BCLC 554). At [35] of the main judgment Neuberger LJ stated:

> "35. On analysis, the present case appears to contain the two essential ingredients which result in the rule against reflective loss being engaged, namely:
>
> i) the losses claimed to have been suffered by BDC are losses suffered in its capacity as shareholder in, or creditor of, Scoutvale: that is made as clear as could be in paragraph 14 of the Re-amended Statement of Claim;
>
> ii) the damages claimed in these proceedings against Mr Parker, being based on the losses suffered by BDC as a result of the transfer of the Old Hall Shares at a substantial undervalue, are damages which would have been made good if Scoutvale 'had enforced its rights' against Mr Parker. The fact that BDC only had a proportion of the issued shares in Scoutvale, and the fact that one may not be able to 'trace' Scoutvale's loss to the shareholders, without effecting some sort of adjustment, cannot make any difference. If it were otherwise, then the reflective loss principle would in practice rarely apply."

27. Neuberger LJ then considered the various arguments advanced as to why the rule should not apply in that case, starting with the submission on behalf of the claimant that the rule should not apply to a claim for breach of fiduciary duty. He rejected that submission, as had Blackburne J, on the basis that it had been considered and rejected in the decision of this Court in *Shaker v Al-Bedrawi* [2002] EWCA Civ 1452; [2003] Ch 350, that a claim by a beneficiary against a trustee for breach of fiduciary duty can be barred by the rule against reflective loss. He went on to conclude at [49] that the rule was concerned with barring certain types of loss, not causes of action:

> "49. It is clear, from the analysis and discussion in the cases to which I have referred, that the rule against reflective loss is not concerned with barring causes of action as such, but with barring recovery of certain types of loss. On that basis, there is obviously a powerful argument for concluding, as this court did

> in *Shaker's* case, that, whether the cause of action lies in common law or equity, and whether the remedy lies in damages or restitution, should make no difference as to the applicability of the rule against reflective loss. Furthermore, given that the foundation of the rule is the need to avoid double recovery, there is a powerful case for saying that the rule should be applied in a case where, in its absence, both the beneficiary and the company would be able to recover effectively the same damages from the defaulting trustee/director."

28. To the extent that Knowles J in the present case at [41] and [42] of his judgment concluded that the rule against reflective loss should not apply to the present claims, because of the nature of the torts committed against Marex and the deliberate asset stripping of the Companies, that conclusion cannot be reconciled with this part of the ratio in *Gardner v Parker* (as Phillips J recently pointed out in *St Vincent European General Partner v Robinson* [2017] EWHC 3267 (Comm) at [61] in declining to follow Knowles J's decision in the present case). Indeed Mr Choo Choy QC did not seek to uphold the judge's analysis on this basis. Rather he sought to sidestep the point by arguing that Knowles J was not focusing on the cause of action but on the fact that the torts alleged gave rise to loss to Marex. I cannot agree. It seems to me quite clear that Knowles J was focusing on the nature of the cause of action alleged, as a basis for disapplying the rule against reflective loss and, in doing so, he overlooked this part of the ratio in *Gardner v Parker* and adopted an analysis which cannot be justified as a matter of law.

29. One of the other arguments raised on behalf of BDC in *Gardner v Parker* was that its claim as a creditor of Scoutvale should not be barred by the rule against reflective loss. The Court of Appeal considered that that claim was barred by the rule just as much as its claim for diminution of the value of its shareholding, on the reasoning of the House of Lords in *Johnson v Gore Wood* that Mr Johnson's claim for loss of payments the company would have made to his pension fund was barred by the rule. Neuberger LJ said at [70]:

> 70. It is clear from those observations, and indeed from that aspect of the decision, in *Johnson* that the rule against reflective loss is not limited to claims brought by a shareholder in his capacity as such; it would also apply to him in his capacity as an employee of the company with a right (or even an expectation) of receiving contributions to his pension fund. On that basis, there is no logical reason why it should not apply to a shareholder in his capacity as a creditor of the company expecting repayment of his debt. Indeed, it is hard to see why the rule should not apply to a claim brought by a creditor (or indeed, an employee) of the company concerned, even if he is not a shareholder. While it is unnecessary to decide the point, as BDC was a shareholder in Scoutvale, it is hard to see any logical or commercial reason why the rule against reflective loss should apply to a claim brought by a creditor or employee, who happens to be a shareholder, of the company, if it does not

> equally apply to an otherwise identical claim by another creditor or employee, who is not a shareholder in the company.

30. He then referred to the various passages in Lord Millett's speech at p 66 which I have quoted above and said at [71]:

> "Similarly, he said in terms that the fact that Mr Johnson was claiming, as it were, *qua* employee, rather than *qua* shareholder, made no difference (see [2002] 2 AC at 67). I can see no basis whatever in logic or principle as to why, if a claim *qua* employee is barred by the rule, a claim made *qua* creditor is not similarly so barred. In most cases where an employee's claim is barred by the rule against reflective loss, the employee will be a creditor of the company. It is hard to see why a creditor who is an employee should be treated differently from any other creditor of the company when it comes to applying the rule against reflective loss."

31. Neuberger LJ then referred to his own earlier decision at first instance in *Humberclyde Finance Group v Hicks* (2000) unreported, where he had expressed the obiter view at [30] that if the shareholder in that case (who was also an employee) had held only a few shares rather than being the sole shareholder, it would have been wrong to strike out his claim for lost pension rights. Neuberger LJ had clearly changed his view, since he said that Blackburne J had rightly disagreed with that view in *Gardner v Parker* in the light of what Lord Bingham and Lord Millett had said in *Johnson v Gore Wood*. Neuberger LJ said at [73]:

> "It appears to me that, even if the claimant in *Humberclyde* had held no shares in the company, his claim would almost certainly have been barred by the rule against reflective loss. In any event, it is clear that, provided the claimant owns some shares in the company concerned, his claim for lost pension rights is liable to fail owing to the rule against reflective loss."

32. On behalf of Mr Sevilleja, Mr David Lewis QC submitted that what emerges from these authorities is that there is a four-fold justification for the rule against reflective loss. I agree with that analysis. The four aspects or considerations justifying the rule which emerge from the authorities, in particular Lord Millett's speech in *Johnson v Gore Wood*, are: (i) the need to avoid double recovery by the claimant and the company from the defendant: see per Lord Millett at 62E-F quoted at [18] above ; (ii) causation, in the sense that if the company chooses not to claim against the wrongdoer, the loss to the claimant is caused by the company's decision not by the defendant's wrongdoing: see per Lord Millett at 66D-F quoted at [20] above and Chadwick LJ in *Giles v Rhind* at [78]; (iii) the public policy of avoiding conflicts of interest particularly that if the claimant had a separate right to claim it would discourage the company from making settlements: see per Lord Millett at 66F-G again quoted at [20] above; and (iv) the need to preserve company autonomy and avoid prejudice to minority shareholders and other creditors. The point about company autonomy is made by Lord Millett at 66H-67A quoted at [21] above and the point about protecting minority shareholders and other creditors is made by Arden LJ at [162] in *Johnson v Gore Wood (No 2)* quoted at [24] above.

33. It follows that the justification for the rule is not limited to company autonomy, in the sense of the unity of economic interest between a company and its shareholders as *Prudential Assurance v Newman Industries* might be thought to suggest. Once it is recognised that the justification for the rule is wider, it is difficult to draw a principled distinction between a claim by a shareholder *qua* creditor (in relation to which, as Mr Choo Choy QC accepted, *Johnson v Gore Wood* and *Gardner v Parker* are binding authority that the claim is barred by the rule) and a claim by any other creditor who is not a shareholder. As a matter of logic and principle, it is difficult to see why a claim by a creditor who has one share in a company should be barred by the rule against reflective loss whereas a claim by a creditor who is not a shareholder is not. That point is well illustrated by the example of a creditor who owns shares in the company, whose claim is initially barred by the rule, but, on this hypothesis, if he sells the shares, the rule no longer bars his claim. That makes no logical or legal sense at all.

34. Mr Choo Choy QC put forward the example of a case where a wrongdoer causes harm to an individual, such as abstraction of his assets, which also causes harm to the claimant who, in his example is a creditor of the individual, so that the individual cannot repay the debt. Assuming that the wrongdoer is liable in tort to both the individual and the claimant, there could be no question of the claimant's claim for damages being precluded by the rule against reflective loss. He submitted that the position should be no different where the creditor's claim was against a company rather than an individual.

35. Whilst, as I have said, Mr Choo Choy QC accepted that, on the basis of the ratio of *Johnson v Gore Wood* and *Gardner v Parker*, the rule against reflective loss precludes a claim by a shareholder *qua* employee or creditor, he submitted that the law had effectively taken a wrong turn when the Courts had extended the rule beyond the original justification for the rule in *Prudential Assurance v Newman Industries* at 222-3 (which I quoted at [13] above) that a shareholder cannot recover for a loss which is on analysis the company's loss, such as the diminution of the value of its shares. He submitted that two wrongs do not make a right and that this Court should make a start in putting the law back on what he submitted was the right course, by refusing to extend the rule against reflective loss beyond shareholders to creditors who are not shareholders.

36. The fundamental difficulty with that submission is that, at least in this Court, it would perpetuate the illogical and unprincipled distinction to which I have drawn attention between the shareholder with one share who is a creditor, whose claim is barred by the rule against reflective loss on the current state of the authorities and the creditor with no shares or who has sold his shares, whose claim is not barred. Furthermore, I agree with Mr Lewis QC that the answer to Mr Choo Choy QC's example of the creditor of an individual is that the non-shareholder creditor of a company is closer to the shareholder creditor of the company than to the creditor of an individual, the common thread being the company and the fact that the various considerations justifying the rule against reflective loss then come into play, as identified above, double recovery, causation, conflict of interests and avoiding prejudice to other creditors.

37. In my judgment, the last consideration applies with particular force to any creditor of a company, whether a shareholder or not. If the creditor were able to pursue a claim in relation to the asset stripping of the company such as in the present case, that would

bypass and subvert the *pari passu* principle, applicable to the unsecured creditors of the company in the event of liquidation, that the assets of the company be distributed rateably. On this hypothesis, if a creditor were able to pursue a claim for reflective loss, it could make a full recovery of its debt against the wrongdoer to the prejudice of the other creditors, whereas if the liquidator were to pursue the company's claim against the wrongdoer and thereby replenish its assets, they would be available for distribution to the general body of creditors.

38. Indeed there is some force in Mr Lewis QC's submission that, even in Mr Choo Choy QC's example of the creditor of the individual, there would be something to be said for a rule precluding the creditor from pursuing a claim for loss which is, on analysis, for the diminution in the individual's assets caused by the wrongdoer, leaving it to the individual or his trustee in bankruptcy to pursue the wrongdoer. The considerations justifying the rule against reflective loss might be said to be equally applicable to such a case. That is not the law, but I consider that should not deter the Court from concluding that in the case of companies, the rule against reflective loss should preclude a claim such as in the present case by a creditor for loss caused by the abstraction of money from the company. The artificial distinction between shareholder creditors and non-shareholder creditors is anomalous and, in my judgment, the rule should apply to all creditors of the company in cases of reflective loss such as the present, the considerations which justify the rule being equally applicable to all creditors.

The *Giles v Rhind* exception

39. That conclusion necessitates consideration of whether the rule against reflective loss does not apply, because this is a case where the exception recognised in *Giles v Rhind* [2002] EWCA Civ 1428; [2003] Ch 618 applies. The judge did not consider it necessary to consider the exception in the light of his conclusion that the rule against reflective loss did not apply to the present claims, but Marex seeks by its Respondent's Notice to uphold the judgment on the alternative ground that the exception does apply in this case. Consideration of this issue requires an examination of the facts and the judgments in *Giles v Rhind*.

40. In that case the claimant and the defendant were directors of a food company holding about 50% of the shares each. After a falling out, the defendant sold his shares to Apax, a venture capital company which had invested in the company. He set up his own rival food company and, using confidential information gained when he was a director of the company, diverted the company's most lucrative contract to another company in which he had an interest, in effect he stole the company's business, as Waller LJ said at [11]. The company commenced proceedings against the defendant and his companies but soon thereafter went into administrative receivership. The defendant issued an application for security for costs. As Waller LJ records at [13], Apax was not willing to put up the security and the company could not, so that the company discontinued the proceedings by a consent order which provided that the company was precluded from bringing any further action against the defendant or his companies.

41. The claimant then commenced his own proceedings against the defendant alleging breach of the shareholders' agreement. Following a trial, judgment on liability was entered against the defendant. At the subsequent trial of quantum, Blackburne J held that the claimant's claims were precluded by the principle established in *Johnson v Gore Wood*, since they were reflective of the company's claim for loss and he struck out the claims. On appeal, the Court of Appeal held that certain of the claimant's claims were personal claims, not reflective claims, so not caught by the rule. They held that in relation to the other claims, the rule should not apply in the particular circumstances of that case.

42. Waller LJ noted at [33] of his judgment that, in *Johnson v Gore Wood*, there was no difficulty in the company having a cause of action on which it could recover. He continued at [34]:

> "34 One situation which is not addressed is the situation in which the wrongdoer by the breach of duty owed to the shareholder has actually disabled the company from pursuing such cause of action as the company had. It seems hardly right that the wrongdoer who is in breach of contract to a shareholder can answer the shareholder by saying, 'The company had a cause of action which it is true I prevented it from bringing, but that fact alone means that I the wrongdoer do not have to pay anybody.'"

43. He developed this point at [35]:

> "…even in relation to that part of the claim for diminution which could be said to be reflective of the company's loss, since, if the company had no cause of action to recover that loss the shareholder could bring a claim, the same should be true of a situation in which the wrongdoer has disabled the company from pursuing that cause of action. I accept that on the language of Lord Millett's speech there are difficulties with this second proposition, but I am doubtful whether he intended to go so far as his literal words would take him. Furthermore it seems to me that on Lord Bingham of Cornhill's speech supported by the others, it would not be right to conclude that the second proposition is unarguable."

44. Chadwick LJ noted at [66] the effect of the judge's judgment:

> "To put the point more starkly, the effect of the judge's decision—as he himself recognised—is that a wrongdoer who, in breach of his contract with the company and its shareholders, "steals" the whole of the company's business, with the intention that the company should be so denuded of funds that it cannot pursue its remedy against him, and who gives effect to that intention by an application for security for costs which his own breach of contract has made it impossible for the company to provide, is entitled to defeat a claim by the shareholders on the grounds that their claim is "trumped" by the claim which his

> own conduct was calculated to prevent, and has in fact prevented, the company from pursuing. If that were, indeed, the law following the decision in *Johnson v Gore Wood*, I would not find it easy to reconcile the result with Lord Bingham of Cornhill's observation, at p 36c, that 'the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation'".

45. He considered that the decision of the House of Lords did not compel that conclusion. He analysed the various speeches. At [74] he noted, in relation to the passage in Lord Millett's speech at p 62 which I quoted at [18] above, that:

> "The premise which underlies that passage is that the company has, and can pursue, its own cause of action. Absent that premise there would be no danger of double recovery at the expense of the defendant; and no occasion to protect the interests of the creditors and other creditors of the company. It is, I think, clear that Lord Millett was not addressing his observations, in that passage, to a case where the company has abandoned its cause of action against the wrongdoer; a fortiori, he was not addressing those observations to a case where the company has had to abandon its cause of action because of the wrong done to it by the wrongdoer."

46. He then referred to the passage from Lord Millett's speech at p 66 which I quoted at [19] above. He said at [77] that he found it difficult to reconcile the sentence in that passage: "The test is not whether the company could have made a claim in respect of the loss in question; the question is whether, treating the company and the shareholder as one for this purpose, the shareholder's loss is franked by that of the company" with the second of Lord Bingham's propositions. He said that:

> "I do not think that Lord Millett could have intended it to be understood, from that sentence, that the question whether the company ever had a cause of action in respect of the wrong which has caused its loss is irrelevant."

47. Chadwick LJ then referred to the policy consideration which Lord Millett had said at p 66F-G also lay behind the rule against reflective loss, of precluding a shareholder from going behind the settlement of the company's claim. He considered that that policy consideration would not apply to a case such as the case he was considering, where the company had been forced to abandon its claim by impecuniosity attributable to the wrongdoing. Chadwick LJ at [79] said:

> "79 The policy consideration to which, as it seems to me, Lord Millett is referring in that passage is the need to avoid a situation in which the wrongdoer cannot safely compromise the company's claim without fear that he may be met with a further claim by the shareholder in respect of the company's loss. That, I think, is what he had in mind when he referred to the difficulty which a liquidator would have in settling the action if a shareholder, or creditor, were able to go behind the

> settlement. He had recognised, in the previous paragraph, that an aggrieved shareholder or creditor could sue the liquidator; his concern was to limit their remedy to a claim against the liquidator. Similar considerations apply where the company's claim is settled by the directors. But, in such a case, there is the further consideration that directors who are also shareholders (or creditors) should not be in a position where settlement of the company's claim at less than its true value (or abandonment of that claim) leaves them with a claim which they can pursue against the wrongdoer in their own interest. If that is a correct analysis of that passage, then the passage presents no difficulty in the case where the company has not settled its claim, but has been forced to abandon it by reason of impecuniosity attributable to the wrong which has been done to it. In such a case the policy considerations to which Lord Millett referred are not engaged. And it is difficult to see any other consideration of policy which should lead to the conclusion that a shareholder or creditor who has suffered loss by reason of a wrong which, itself, has prevented the company from pursuing its remedy should be denied any remedy at all."

48. Accordingly, like Waller LJ, he thought that the judge should not have struck out the claims. He considered at [80] that the question whether or not the wrong done to the company by the defendant was a direct cause of the receiver's decision to discontinue the company's claim could not be determined without a trial.

49. The exception in *Giles v Rhind* has been relied upon in a number of subsequent cases, but only once successfully, in the decision of Judge Rich QC in the Chancery Division in *Perry v Day* [2004] EWHC 3372 (Ch); [2005] 2 BCLC 405. That was a case where, as was arguably the case in *Giles v Rhind* the wrongdoer had prevented the company from bringing the relevant claim in respect of his wrongdoing. He had insisted that a clause be inserted in the agreement for the transfer of the relevant land that it was in full and final settlement of any claim the company had against the wrongdoer.

50. The exception has also been somewhat controversial. In the Hong Kong case of *Waddington Ltd v Chan Chun Hoo* [2009] 4 HKC 381, Lord Millett sitting in the Final Court of Appeal, considered that the exception did not exist and that *Giles v Rhind* and *Perry v Day* were wrongly decided and should not be followed in Hong Kong. However, in *Webster v Sandersons Solicitors* [2009] EWCA Civ 830; [2009] 2 BCLC 542 Lord Clarke MR, giving the judgment of the Court (of which the other members were Arden and Lloyd LJJ) noted at [1] that, in granting permission to appeal in that case, Longmore LJ had noted that this Court would regard itself as bound by *Giles v Rhind* notwithstanding what had been said in the Hong Kong Court of Final Appeal. This was reiterated at [36], where the Court said that there was no proper basis on which it could decline to follow *Giles v Rhind*.

51. At [37] this Court approved the summary of the relevant principles derived from *Johnson v Gore Wood* as qualified by what Chadwick LJ had said in *Giles v Rhind* (in italics), including:

> "a loss claimed by a shareholder which is merely reflective of a loss suffered by the company – i.e. a loss which would be made good if the company had enforced in full its rights against the defendant wrongdoer – is not recoverable by the shareholder *save in a case where, by reason of the wrong done to it, the company is unable to pursue its claim against the wrongdoer*".

52. The Court reiterated at [38] that:

> "…the critical point in *Giles v Rhind* was, as Waller LJ put it at [28], that the company was disabled from bringing the claim by the very wrongdoing which the defendant had by contract promised him, as a shareholder, and the company that he would not carry out.

53. As Males J said very recently in *St Vincent General Partner v Robinson* [2018] EWHC 1230 (Comm) at [94], subsequent cases after *Webster* "have emphasised the limited scope of the exception and the demanding nature of the test of impossibility caused by the wrongdoing which a …claimant must meet". It is not necessary to refer to all those cases as I am quite satisfied that Males J has correctly stated the law as to the limited circumstances in which the exception will apply.

54. Mr Lewis QC relied upon these authorities to emphasise that the exception only applies in limited circumstances where the wrongdoing of the defendant has disabled, made it impossible for, the company from bringing a claim against him. He submitted that impecuniosity is insufficient to bring the exception into play, as was clear from [46] of *Webster*. It was clear that in the present case, Marex could fund litigation in the name of the Companies, such as by appointing its own liquidator (as it had come close to doing in September 2013, but had not pursued its application to do so for some tactical reason) or by putting the existing liquidator in funds or, if he proved recalcitrant, by applying to the Court in the British Virgin Islands to replace him or by taking an assignment of the Companies' claim against Mr Sevilleja. Mr Lewis also relied upon the fact that Marex had chosen to take garnishment proceedings in New York which had garnished US $1.7 million of assets of the Companies which would otherwise have been available to the liquidator as a "war chest". In all the circumstances, it could simply not be said by Marex that it was impossible for the Companies to pursue a cause of action against Mr Sevilleja.

55. Mr Choo Choy QC submitted that the exception should be available wherever it was legally or factually impossible for the company to pursue proceedings against the wrongdoer, as this corresponded with Lord Bingham's second proposition in *Johnson v Gore Wood* that, where the company has suffered wrong but has no cause of action against the wrongdoer, the shareholder can bring a claim. Mr Choo Choy QC submitted that it should be no answer to the exception applying, that a third party such as Marex could put the company in funds. That would emasculate the exception. Indeed in *Giles v Rhind* itself, the third party, Apax, could have put up security for costs, but chose not to do so.

56. I cannot accept Mr Choo Choy QC's submissions as to the ambit of the *Giles v Rhind* exception, which seem to me to fly in the face of the authorities. In my judgment the exception can only apply in limited circumstances where the wrongdoing of the

defendant has been directly causative of the impossibility the company faces in bringing the claim. That was the issue which Chadwick LJ considered at [80] of *Giles v Rhind* should go to trial and the need for that direct causal relationship between the impossibility and the wrongdoing is emphasised in a number of cases, including in *Webster* at [46] and the judgment of Males J in *St Vincent* at [88].

57. The exception is a narrow one, only applicable where as a consequence of the actions of the wrongdoer, the company no longer has a cause of action and it is impossible for it to bring a claim or for a claim to be brought in its name by a third party such as Marex in the present case. Contrary to Mr Choo Choy QC's submissions, I consider the impossibility or disability must be a legal one and what might be described as factual impossibility in insufficient. Although, in the passage at [79] of his judgment in *Giles v Rhind* which I have quoted above, Chadwick LJ referred to "[the company] being forced to abandon its claim by impecuniosity attributable to the wrong which has been done to it", he cannot have intended that every case where the impecuniosity of a company is attributable to the wrongdoing would fall within the exception. If that were what Chadwick LJ was saying, given that, in many cases where the rule against reflective loss is in play, the company's assets have been abstracted by the wrongdoer, so that without an injection of funds, for example from a shareholder or creditor, it is not possible for the company to bring a claim, the exception would risk becoming the rule.

58. Rather it seems to me that Chadwick LJ intended that the exception would be limited to cases where the impossibility of the company bringing a claim was directly caused by the wrongdoing of the defendant. If, through an injection of funds by a third party shareholder or creditor, it is possible for the company to bring a claim against the wrongdoer (as in the decision of Birss J in *Peak Hotels and Resorts Ltd v Tarek Investments Ltd* [2015] EWHC 3048 (Ch) where the company could have brought a derivative claim) or the third party can take an assignment of the company's claim, then impossibility which would bring the exception into play is simply not made out.

59. The narrowness of the exception is demonstrated by the fact that it has only been invoked successfully in two cases. In *Giles v Rhind* itself it was arguable that the wrongdoer had made it impossible for a claim to be pursued by the company by making an application for security for costs and, when security could not be provided, inserting a provision in the consent order for discontinuance that precluded the company from bringing further proceedings. In *Perry v Day* the wrongdoer made it a condition of transferring the land that the company agreed that this was in full and final settlement of any claim against him. Those are both, therefore, cases of legal impossibility directly caused by the wrongdoing.

60. In my judgment, the exception simply does not apply in the present case, not least because, on the evidence before the Court, Marex cannot establish that the wrongdoing of Mr Sevilleja has caused it to be impossible for the Companies to pursue a claim against him. I agree with Mr Lewis QC that there is no evidence that there is anything preventing a claim against Mr Sevilleja by the present or another liquidator or preventing Marex from taking an assignment of the Companies' claim. In the event, neither factual nor legal impossibility is made out.

61. I am conscious that we are deciding this issue on a jurisdiction application. Nonetheless, whether Marex has to show that it has the better of the argument,

because the potential application of the exception is part of establishing that it can bring itself within the tort jurisdictional gateway in para 3(1)(9) of Practice Direction 6B of the CPR, as Mr Lewis QC contends, or only satisfy the lower "merits" test of showing a serious issue to be tried, as Mr Choo Choy QC contends, Marex comes nowhere near satisfying either test on the issue whether the *Giles v Rhind* exception applies in the present case.

Status of the proceedings

62. It follows that, in my judgment, the *Giles v Rhind* exception does not apply and Marex's claim to recover the judgment debt, together with interest and costs is barred by the rule against reflective loss. I would allow the appeal on that basis. As Mr Lewis QC pointed out, this does not leave Marex without other remedies, such as procuring that the present or a replacement liquidator pursues the Companies' claims against Mr Sevilleja in the British Virgin Islands or taking an assignment of the Companies' claims.

63. That leaves Marex's claim to recover, in the present proceedings, the costs incurred by it in various jurisdictions in seeking to enforce the judgment of Field J, as set out in paragraph 50(k) of the Particulars of Claim. Mr Lewis QC sought to argue that Marex had not shown any arguable basis for the English courts having jurisdiction over that claim, on the basis that "damage" in para 3(1)(9) of Practice Direction 6B means legally recoverable direct damage whereas these costs were consequential damage. He relied upon the decision of the Court of Appeal to that effect in *Brownlie v Four Seasons Holdings Inc* [2015] EWCA Civ 665; [2016] 1 WLR 1814, submitting that the ratio of that case was still binding on this Court, notwithstanding obiter dicta to the contrary in the Supreme Court ([2017] UKSC 80; [2018] 1 WLR 192).

64. Interesting though this question of precedent is, I am satisfied that we do not need to decide it, because I agree with Mr Choo Choy QC that Mr Sevilleja does not have permission to appeal on this point. It is true that the Respondent's Notice raised, as an answer to Mr Sevilleja's appeal on the issue of reflective loss, that some of Marex's claims would not be caught by the rule against reflective loss even if it were applicable. However, Mr Lewis QC does not contend that the claim to recover the costs of enforcement is a claim for reflective loss. Rather he seeks to challenge the arguability of that claim on a different basis, that it is not "direct damage", which is outside the scope of the issue of reflective loss which is the only issue on which he has permission to appeal.

65. In the circumstances, I do not consider that this Court should go further than concluding that the appeal is allowed, so that the claims other than to recover the costs of enforcement will be struck out as barred by the rule against reflective loss. In relation to the claim to recover the costs of enforcement, the permission to serve that claim out of the jurisdiction granted by the Commercial Court will stand.

Lord Justice Lewison

66. I have read the judgment of Flaux LJ in draft and I agree with it. I wish to add a few words on the question of precedent.

67. The principle of precedent plays a crucial role in English law. It ensures that like cases are treated alike; and it promotes legal certainty for citizens to arrange their affairs. In *Willers v Joyce (No 2*) [2016] UKSC 44, [2016] 3 WLR 534 at [4] Lord Neuberger, delivering the judgment of a panel of nine judges of the Supreme Court, said:

> "In a common law system, where the law is in some areas made, and the law is in virtually all areas developed, by judges, the doctrine of precedent, or as it is sometimes known stare decisis, is fundamental. Decisions on points of law by more senior courts have to be accepted by more junior courts. Otherwise, the law becomes anarchic, and it loses coherence clarity and predictability."

68. Lord Neuberger also emphasised at [18] that the rule of precedent "should be clear in its terms and simple in its application."

69. From the principle of precedent it follows that an appeal in this Court is not an academic seminar. We are not concerned with what the law should be in the abstract. Our starting point is the law as decided by decisions of other courts that bind us. In some circumstances it is possible for this court not to apply by analogy an earlier binding decision which concerns different facts. But that is only possible where there is a sound reason, rooted in legal principle, for not doing so. This is the technique of distinguishing cases. The technique should certainly not be used if it would result in the law losing its coherence. If the application of a principle decided by an earlier binding decision to a different (but cognate) set of facts results in an outcome which the losing party perceives to be unfair, the remedy is to appeal. In the case of an appeal to the Supreme Court that court may depart from what otherwise have been a binding decision of its own (or of the House of Lords) under the Practice Statement (Judicial Precedent) [1966] 1 WLR 1234. But that is not an option open to this Court.

70. As Flaux LJ has demonstrated, the decision of the House of Lords in *Johnson* establishes that a claim brought by a shareholder, even if not in his capacity as such, is barred by the rule against reflective loss if the loss that he himself has suffered would have been made good by restoration of the company's assets. *Gardner* establishes that this principle applies to a claim for repayment of a loan where the lender happens to be a shareholder in the company in question. Both these decisions bind us.

71. No judge who has considered whether a shareholder creditor and a non-shareholder creditor should be treated differently for the purposes of the rule against reflective loss has answered that question "yes". Waller LJ, upon whose observations in *Giles* Mr Choo Choy relied, thought that neither should be barred by the rule, whereas Neuberger LJ in *Gardner* and Arden LJ in *Johnson* (No 2) thought that both should be barred by the rule. It is not a question, in this court, whether "two wrongs make a right" as Mr Choo Choy put it. Rather is a question of coherence in the law. If the coherent application of the law in the current state of the authorities is wrong, it is for the Supreme Court to put it right.

72. For the reasons given by Flaux LJ, I agree that the appeal should be allowed to the extent that he has indicated.

Lord Justice Lindblom

73. I agree with both judgments.