15 July 2020

PRESS SUMMARY

Sevilleja (Respondent) v Marex Financial Ltd (Appellant)
[2020] UKSC 31
On appeal from [2018] EWCA Civ 1468

JUSTICES: Lady Hale, Lord Reed, Lord Hodge, Lady Black, Lord Lloyd-Jones, Lord Kitchin, Lord Sales

BACKGROUND TO THE APPEAL

The respondent, Mr Sevilleja, owned and controlled two companies ("**the Companies**") incorporated in the British Virgin Islands ("**BVI**"). The appellant, Marex Financial Ltd ("**Marex**"), brought proceedings against the Companies for sums due under contract. After a trial in the Commercial Court before Field J, Marex obtained judgment for over US$5.5 million, plus costs of£1.65 million. On 19 July 2013, Field J gave the parties a confidential draft of his judgment, due to be handed down six days later. From 19 July 2013, Mr Sevilleja allegedly procured the offshore transfer of over US$9.5 million from the Companies' London accounts into his personal control. By the end of August 2013, the Companies' assets were just US$4,329.48, such that Marex could not receive payment of its judgment debt and costs.

In December 2013, Mr Sevilleja placed the Companies into liquidation in the BVI, their alleged debts exceeding US$30 million. Marex is the only creditor not connected to Mr Sevilleja. According to Marex, the liquidation process is effectively on hold, with the liquidator failing to investigate claims submitted to him, to locate Marex's missing funds, or to issue proceedings against Mr Sevilleja.

In the present proceedings, Marex seeks damages from Mr Sevilleja in tort for (1) inducing or procuring the violation of its rights under Field J's judgment and orders, and (2) intentionally causing it to suffer loss by unlawful means. The sums claimed are (1) the judgment debt, interest and costs awarded by Field J, less an amount Marex recovered in US proceedings, and (2) costs incurred by Marex in its attempts to obtain payment. Mr Sevilleja contends that Marex's claim in respect of (1) is barred by the "reflective loss" principle. That contention was upheld by the Court of Appeal.

JUDGMENT

The Supreme Court unanimously allows the appeal. The leading judgment is given by Lord Reed, with whom Lady Black and Lord Lloyd-Jones agree. Lord Hodge gives a separate judgment agreeing with the reasoning of Lord Reed. Lord Sales delivers a separate judgment, with which Lady Hale and Lord Kitchin agree, allowing the appeal on a wider basis.

REASONS FOR THE JUDGMENT

After explaining relevant general principles of law **[2-13]**, and the background to the appeal **[14-22]**, Lord Reed examines the decisions which are said to have established the "reflective loss" principle, namely *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 **[23-39]** and *Johnson v Gore Wood & Co* [2002] 2 AC 1 **[40-67]**. He concludes that *Prudential* laid down a rule of company law: a diminution in the value of a shareholding or in distributions to shareholders, which is merely the result

of a loss suffered by the company in consequence of a wrong done to it by the defendant, is not in the eyes of the law damage which is separate and distinct from the damage suffered by the company, and is therefore not recoverable. The rule is based on the rule in *Foss v Harbottle* (1843) 2 Hare 461, which would be subverted if the shareholder could pursue a personal action in those circumstances **[35-39]**. That understanding of the rule is consistent with the speech of Lord Bingham in *Johnson.* Lord Millett's speech, however, treated the "reflective loss" principle as a wider principle of the law of damages, based on the avoidance of double recovery **[61-63]**. Lord Reed then reviews subsequent cases in which the "reflective loss" principle as explained by Lord Millett has developed, including *Giles v Rhind* [2002] EWCA Civ 1428, *Perry v Day* [2004] EWHC 3372 (Ch), and *Gardner v Parker* [2004] EWCA Civ 781 **[68-77]**. This examination makes clear the need to distinguish "*(1) cases where claims are brought by a shareholder in respect of loss which he has suffered in that capacity, in the form of a diminution in share value or in distributions, which is the consequence of loss sustained by the company, in respect of which the company has a cause of action against the same wrongdoer, and (2) cases where claims are brought, whether by a shareholder or by anyone else, in respect of loss which does not fall within that description, but where the company has a right of action in respect of substantially the same loss*" **[80]**. The first kind of case is barred by the rule in *Prudential*, regardless of whether the company recovers its loss in full **[80-83]**. In the second kind of case, recovery is permissible in principle, although it may be necessary to avoid double recovery **[84-88]**.

In light of this, Lord Reed holds that the reasoning in *Johnson* (other than that of Lord Bingham) should be departed from, and that *Giles*, *Perry* and *Gardner* were wrongly decided **[89]**. The rule in *Prudential* does not apply to Marex, which is a creditor of the Companies, not a shareholder **[92]**.

Lord Hodge agrees with Lord Reed's reasons, noting that the panel was in agreement that the reflective loss principle has been expanded too greatly and would cause injustice if applied to Marex's situation **[95]**. Lord Hodge also points out the central role of company law in the Court of Appeal's judgment in *Prudential*, and how the reflective loss principle's departure from those foundations has given rise to problems and uncertainties in the law **[95-108]**. The bright line rule has a principled basis in company law and ought not to be departed from now **[109]**.

Lord Sales concludes that Marex's appeal should be allowed, but for reasons differing from those of the majority **[116]**. The majority see the reflective loss principle, per *Prudential*, to be a rule of law deeming a shareholder's loss by reduction in value of their shares or dividends to be irrecoverable where the company has a parallel claim. However, in Lord Sales's view, *Prudential* did not lay down a rule that would exclude a shareholder's recovery where, factually, the loss was different from that of the company. The court in *Prudential* set out reasoning why it thought a shareholder in such a case had suffered no separate loss, but this is not sustainable **[117-118]**. The governing principle is indeed avoidance of double recovery, as was the view of the Law Lords in *Johnson* (*contra* Lord Reed) **[119]**.

Lord Sales criticises the authorities' use of the word "*reflective*" as being unhelpful. Although there is necessarily a relationship between a company's loss and the reduction in share values that it causes, "*the loss suffered by the shareholder is not <u>the same as</u> the loss suffered by the company*" and there is no one-to-one correspondence between the two **[132]**. The Court of Appeal in *Prudential* conflated the rationale for the rule in *Foss v Harbottle* with that for the reflective loss principle and assumed that a personal action would subvert the rule. That is not the case **[142]**. A shareholder ought not to be prevented from pursuing a valid personal cause of action; double recovery can be prevented by other means **[149-155]**. Lord Sales therefore questions the justification for the reflective loss principle and whether it should still be recognised **[194]**. Even if the principle is accepted, it should not be extended to cover a case involving loss suffered by a creditor of the company. There are better ways to avoid double recovery in such a situation, such as by according the wrongdoer a right of subrogation to the extent he pays the creditor sums in respect of the debt owed by the company **[198-205]**.

References in square brackets are to paragraphs in the judgment.

<u>NOTE</u>
This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: http://supremecourt.uk/decided-cases/index.html