Enterprise CHAMBERS

# Where are we with reflective loss?

# Sevilleja -v- Marex Financial Limited


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Zoom Webinar

30th July 2020

5pm - 6pm

# SEVILLEJA V. MAREX FINANCIAL LIMITED

## Reflective Loss

**MADELEINE HEAL**

1. In 2013, Field J tried claims in the Commercial Court in England by Marex, a foreign exchange broker, against two BVI companies which were the principal foreign exchange trading vehicles for one Mr Sevilleja. He was the ultimate beneficial owner of the BVI companies, controlled them, was a defacto and "shadow" director and held a power of attorney. Marex's claims were in contract for sums due on an account between it as broker and the BVI companies as its clients.

2. Marex succeeded before Field J on its claims against the BVI companies, and the judge issued a draft judgment for payment to Marex for over $US5 million. Once his judgment was formally handed down, Marex obtained a freezing order over the companies' assets, which required them to disclose those assets. The grand total amounted to only a little over $US 4,000, so there was nothing left to pay Marex on its judgment.

3. Marex found out that in the 7 days between the draft judgment being circulated and the Order for judgment being sealed, Mr Sevilleja had taken the opportunity to asset-strip from the BVI companies' London bank accounts, over $US 9.5 million which was deposited into to their Gibraltar and Dubai accounts. By the end of 2013, the BVI companies had been placed into voluntary shareholder liquidation in the BVI. The liquidator was appointed by Mr Sevilleja.

4. Marex issued a separate claim form in the Commercial Court in London for permission to serve Mr Sevilleja out of the jurisdiction, which came before Knowles J in 2017. Marex claimed, against Mr Sevilleja personally, damages for the judgment debt minus $1.7M which had been recovered in proceedings in New York, and Marex claimed its costs in various jurisdictions of enforcing the judgment. The claim was for dishonest procurement of the transfer of $9.5M into his personal control inducing a violation of Marex's rights under the judgment, and for intentionally causing loss to Marex by unlawful means. Knowles J found in 2017 that, subject to the issue of "reflected loss" those claims were arguable and suitable for service out of the jurisdiction.

5. Mr Sevilleja did not appeal the leave to serve out decision. He appealed on a distinct argument, that the loss suffered by Marex by his alleged unlawful actions reflected the loss suffered by the BVI companies, and that reflected loss of this kind is irrecoverable. Marex, he said, is unable to raise any cause of action in tort against him, because the decision of the Court of Appeal in *Prudential Assurance v Newman [1982] Ch. 204* and the decision of the House of Lords in *Johnson v Gore Wood & Co. [2002] 2 AC 1* lay down a principle of law which precludes recovery of reflective loss of this kind. Knowles J had not accepted Mr Sevilleja's reflective loss argument, preferring Marex's submissions that the reflective loss principle did not apply. Mr Sevilleja challenged Knowles J's reasoning on reflective loss on appeal, because if the reflective loss principle meant Marex could not raise a valid cause of action against Mr Sevilleja, there was no mechanism by which Marex could claim the money.

6. To shore up its position if it was needed, Marex filed a Respondent's Notice in the Court of Appeal by which it said if the reflective loss principle did apply to defeat its claim, both its claims under Field J's judgment and its claim under *OBG v Allan* for causing loss by unlawful means, fell within an exception established by the Court of Appeal in 2002 in *Giles v Rhind [2002] EWCA Civ. 1428*. That case held that the reflective loss principle denying a cause of action does not apply where the asset-stripping makes it impossible for a claim to be pursued by the company itself.

7. The Court of Appeal allowed Mr Sevilleja's appeal, reversing Knowles J, upholding the reflective loss principle on the facts of *Marex*, and dismissing Marex's submissions based on the exception in *Giles v Rhind*.

8. Marex was granted leave to appeal to the Supreme Court on an application which came before Lady Justice Asplin. The Supreme Court's decision was handed down 2 weeks ago. All 7 justices reached the conclusion that Marex's appeal should be allowed, but the three in the minority, Lady Hale, Lord Kitchin and Lord Sales, differed in their reasoning from that of the majority, that is, Lord Reed, Lady Black, Lord Lloyd-Jones and Lord Hodge.

9. As the flyer for this talk sets out, the reflective loss principle that shareholders cannot claim for a diminution in the value of their shareholding because this reflects a loss suffered by the company, has been upheld by the majority in *Marex*, however the extension of the reflective loss principle established by later cases to also bar a claim by

a creditor, has been overturned. Marex's appeal as a creditor of the BVI companies has been allowed.

10. The minority, on the other hand allowed Marex's appeal not only on the basis that there should be no extension to the reflective loss principle, but on the basis that the conceptual justification for it, even in the case of shareholder claims, is in doubt, and the reflective loss principle itself should be abandoned.

11. I will be focussing for the rest of my time this afternoon on the speeches of the majority and Simon will be considering the arguments of the minority.

12. To make clear where the differences between the majority and the minority lie, Lord Reed in his majority speech says that while the reflective loss principle is justified in a shareholder case, the rationale for it does not extend to cover a creditor case. On his account, the reflective loss principle laid down in *Prudential* is a rule of law: that is, the court deems that the loss suffered by a shareholder in relation to the diminution in the value of shares or loss of dividends, is to be regarded as irrecoverable in a case where the company has a parallel claim against the third party defendant (see paras 9, 28-39 and 52).

13. Lord Hodge also of the majority also says in his speech that the Court of Appeal in *Prudential* laid down a rule of law (paras 99, 100 and 108) and that it is one which has been followed in other common law jurisdictions. Lord Sales in the minority makes the point that, apart from this deeming effect, the reflective loss principle is not concerned with the issue of double recoverability against the third-party defendant, in this case, Mr Sevilleja.

14. Before looking further at the speeches of the majority, it is relevant to have in mind some basic points. A company is a legal person distinct from its shareholders, which has its own assets which are distinct from the shareholders' assets. A share in a company is an item of property owned by the shareholder, which is distinct from the assets owned by the company. A share in a company has a market value which reflects the market's estimation of the future business prospects of the company, not what its new asset position happens to be at any given point in time.

15. The rule in *Prudential* is itself an exception to the general rule that the fact that a company has a claim does not in itself affect the claimant's entitlement to be compensated for wrongs done to it. The highly specific

exception in *Prudential* encapsulates a rule of law that a shareholder cannot bring a claim in respect of a diminution in the value of his shareholding or a reduction in distributions which is merely the result of a loss suffered by the company by the actions of a wrongdoer, even if the wrongdoer's conduct was directed specifically against the shareholder and even if no proceedings have been brought by the company.

16. The rule in *Prudential* is distinct from the general principle of the law of damages, that double recovery should be avoided. The rationale for it is that the shareholder does not suffer a loss distinct from the company's loss. The rule in *Foss v Harbottle* provides that the only person who can seek relief for loss to a company, where the company has a cause of action, is the company itself.

17. The decision of the House of Lords in *Johnson v Gore Wood* extended the reflective loss principle to bar claims by a creditor of a company, where he also held shares in it, and the company had a concurrent claim. That is Mr Sevilleja's position. In *Marex* in the Court of Appeal, Lords Justice Lewison, Lindblom and Flaux held on the basis of *Johnson v Gore Wood* that the reflective loss principle applied to a claim brought by an ordinary creditor (who was <u>not</u> a shareholder) where the company had a concurrent claim, barring the creditor's action. This was controversial.

18. The Supreme Court in *Marex* was invited to clarify the law, examine the effect of the decision in *Prudential* in order to consider the reasoning in *Johnson v Gore Wood*, and if necessary to depart from it and overrule some later authorities including *Giles v Rhind*.

19. The majority discussed at para 38 that in addition to arguments based on *Foss v Harbottle* there are also pragmatic advantages in having a clear rule that only the company can pursue a right of action in circumstances falling within the ambit of the decision in *Prudential*. The clear rule avoids the complexities and costs of concurrent claims by shareholders and creditors at a trial, which Lord Reed said, "should not be underestimated". But for a clear rule, it would also be necessary to consider the question of double recovery and how it should be addressed both procedurally and substantively. There would be a proliferation of proceedings, possibly in different jurisdictions. Lord Reed pointed out that the reflective loss principle in *Prudential* has no application to losses suffered by a shareholder which are distinct from the company's loss or to situations where the company has no cause of action.

20. In *Johnson v Gore Wood*, Mr Johnson was seeking to recover the damages which had been suffered by the company. Firstly, he claimed for the fall in value of his shareholding in the company, and secondly, he claimed for loss in the value of a pension policy set up by the company for his benefit. That aspect of his claim was not therefore brought as a creditor of the company. The pension contributions were a form of distribution of the company's profits to its 99% shareholder, an alternative to the payment of dividends or bonuses.

21. Lord Bingham dealt with this aspect in *Johnson* extremely briefly, which Lord Reed in the Supreme Court in *Marex* said was an indication that Lord Bingham did not regard it as raising any issue which he had not already addressed in his discussion of the shareholders' claims. Lord Bingham had stated at para 36 in *Johnson*:

    *"[T]his claim relates to payments which the company would have made into a pension fund for Mr Johnson: I think it plain that this claim is merely a reflection of the company's loss and I would strike it out."*

22. The other members of the House of Lords in *Johnson* agreed. Lord Reed in *Marex* said that there is no indication in their speeches on this element of Mr Johnson's claim which suggests that the *Prudential* principle should also apply to creditor claims. Lord Reed in *Marex* states that Lord Bingham in *Johnson* clearly intended the *Prudential* principle to be confined to claims brought by shareholders (see para 66). Lord Bingham's conclusion in *Johnson*, that this head of loss should be struck out, was consistent with the application of that proposition. Lord Reed in *Marex* at para 67 decided that the reasoning in the other speeches in *Johnson*, especially that of Lord Millett, departs from the reasoning in *Prudential* and should not be followed.

23. To summarise, the majority in *Marex* decided that it is necessary to distinguish between, firstly, cases where claims are brought by a shareholder in respect of a loss which he or she has suffered in that capacity, in the form of a diminution of 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 (because he has no legal or equitable interest in the company's assets – only the company does under the rule in *Foss v Harbottle*)); and secondly, cases where claims are brought, whether by a shareholder or 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.

24. The majority in the Supreme Court in *Marex* have ruled that the position is different in this second kind of case. In claims brought by creditors of the company, the arguments which arise in the case of a shareholder have no application (para 84). There is no analogous relationship between a creditor, and the company. There is no correlation between the value of the company's assets or profits, and the 'value' of the creditor's debt. A debt is a different kind of 'value' entity from a share. Creditors will not suffer any loss so long as the company remains solvent. Even where the company's loss results in the creditor also suffering a loss, he does not suffer the loss in the capacity of a shareholder, and his pursuit of a claim does not engage the rule in *Foss v Harbottle*.

25. The majority in *Marex* have held that where the risk of double recovery arises, how it should be avoided will depend on the circumstances. They have held that his does not mean that the company's claim must be given priority, nor does the *pari passu* principle mean that. *Pari passu* requires that in a winding up, a company's assets must be distributed rateably among its ordinary creditors, but it does not give the company or its liquidator a preferential claim on the assets of the wrongdoer, over the claim of any other person with rights against the wrongdoer, even if the claimant is also a creditor of the company. *Pari passu* may restrict a creditor to a dividend of an insolvent company, but it does not prevent him from his own right to recover damages from a third party or confer on the company an automatic priority.

26. The majority in *Marex* depart from the speeches other than that of Lord Bingham in *Johnson v Gore Wood* and from the reasoning in later authorities such that *Giles v Rhind*, *Perry v Day* and *Gardner v Parker* which the majority in *Marex* rule to have been wrongly decided. Lord Hodge in the majority reasons that the rule in *Prudential* has stood for almost 39 years, has been adopted in other common law countries and should not be departed from now.

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# SEVILLEJA V. MAREX FINANCIAL LIMITED

# THE MINORITY JUDGMENT OF LORD SALES

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## Biography

Simon Johnson is ranked as a leading junior in company and insolvency law. He advises company boards, directors, shareholders, banks, other creditors and insolvency office-holders on a wide range of matters, including corporate fraud. Simon's practice also encompasses contractual disputes of all kinds, bank recovery proceedings, professional negligence and property disputes. Very often he appears without a leader against QCs. He practises mainly in the Commercial Court and Chancery Division and has acted in the Supreme Court and Court of Appeal (in the latter with and without a leader).

## What the Directories Say:

> *"A strong all-rounder, with a talent for getting to the heart of the issues."*
> *"He is excellent at everything and should be a silk already."*
> *"An outstanding Chancery barrister who is a QC and High Court Judge in the making."*
> *"A great court presence; he is tenacious yet always has a very pleasant manner about him."*
> *"Very technically able in his area and able to translate that into practical steps."*

Simon is a contributor to Gore-Browne on Companies (chapter 46, restructuring) and PLC (company law and insolvency). He lectures and publishes articles on matters of interest arising in his practice.

## Introduction

1. It is a great pleasure to speak to you this evening on the subject of the Supreme Court's 15 July decision in *Sevilleja v. Marex Financial Limited* [2020] UKSC 31. It is rare for the Supreme Court to hear an appeal that concerns a pure point of company law, and particularly unusual for that point to have such a wide potential impact.

2. I am going to address you on the minority judgment delivered by Lord Sales, with whom Lady Hale and Lord Kitchin agreed. This took up half the judgment and would have been amply sufficient to dispose of the appeal if the other Justices had supported the minority view.

3. I will summarise the minority judgment. I will then briefly consider two specific topics which featured in it: the "*basic principles*" which influenced Lord Sales and his analysis of *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.* [1982] Ch 204. I will then offer some conclusions. There is much more to be said about the minority judgment, but the short time available in this webinar does not allow a more extensive discussion.

4. No aspect of this talk constitutes legal advice on any fact or matter. References to paragraphs are to the paragraphs of the judgments in *Marex*.

## Background

5. I start by recapping on how the case came before the courts. Marex obtained permission to serve proceedings out of the jurisdiction upon Mr Sevilleja. It sought damages for the commission of economic torts under the principles discussed in *OBG v. Allan* [2007] UKHL 21; [2008] 1 AC 1 and *Lumley v. Gye* 118 ER 749, from Mr Sevilleja, who was alleged to have stripped two companies under his control of their assets, to frustrate the enforcement of a judgment obtained against them by Marex. Mr Sevilleja applied to set aside that permission. He used the reflective loss principle to claim that Marex had suffered no damage and did not therefore have completed causes of action in tort. There is no cause of action in tort until material damage has been suffered: *In re T&N* [2005] EWHC 2870 (Ch), [2006] 1 WLR 1728. The issue was, therefore, whether Marex had suffered actionable damage and whether the alleged torts

were completed causes of action. The judge at first instance, Mr Justice Robin Knowles CBE, held that the claims were arguable on their facts and not defeated by the reflective loss principle. There was no appeal from his finding that the claims were arguable on their facts (paragraph 111).

6. The reflective loss principle originated in the proposition that a shareholder could not claim loss by reference to the fall in the value of his shares or the reduction of a dividend if the company had a corresponding claim for the same loss arising from the same wrong committed by the same defendant. The fall in value of the shares or the inability to pay a dividend were the company's claims. Permitting a shareholder to advance them would contravene the principle in *Foss v. Harbottle* 67 ER 189, namely that only the company could assert claims that belonged to the company and if the company's organs decided not to do so, there was nothing an individual shareholder could do about it, unless grounds exist for a derivative action or unfair prejudice proceedings.

7. The reflective loss principle had been expanded to include different types of claim brought by shareholders where the company had also suffered damage. It had been further extended to bar claims brought by shareholders suing as creditors. The Court of Appeal in *Marex* developed it still further to apply to creditors who were not shareholders at all. The Court of Appeal thus prevented Marex pursuing 90% of the value of its claim, which it considered to be reflective of the companies' loss. The Supreme Court unanimously overruled that decision.

## Lord Sales' judgment

8. It is important to note the common ground between the majority and Lord Sales.

9. First, everyone agreed that Mr Sevilleja could not rely on the reflective loss principle because he was merely a creditor, not a shareholder. The extension by the Court of Appeal of reflective loss beyond shareholders to creditors was closed down unanimously and completely.

10. Secondly, everyone agreed on the importance of analysing the claims of the company on the one hand and the shareholder on the other hand – shareholders being the only constituency conceivably affected by

reflective loss – to see whether the claims were independent and could proceed unhindered, or whether the shareholder was trampling on the company's toes and had to be stopped. Thus, everyone agreed that not every claim by a shareholder where he and the company were victims of a wrong committed by the same defendant would be caught by the reflective loss principle, confined to shareholders.

11. I turn now to the divergence. There was disagreement between the majority and Lord Sales on when a shareholder's claim should be prohibited.

12. The majority interpreted ***Prudential*** as establishing a rule of law. The rule is that where a shareholder claims for a wrong also committed against the company, and where the measure of his loss is the fall in value of his shares or the reduction in a dividend, the law regards that loss as properly recoverable by the company alone and not by the shareholder, whether or not the company pursues its own claim. The majority has therefore narrowed the reflective loss principle to apply, as a rule of company law, to shareholders advancing a claim with specific measures of damages: the fall in value of shares or the reduction of a dividend.

13. Lord Sales rejected the existence of this rule of law. He said that it would apply regardless of the facts, and without needing to be proved as such, because that is how rules of law operate. It would work serious injustice against shareholders who had suffered a loss quite apart from any loss suffered by the company. The law of damages exists to restore claimants to the position they would have been in, had the wrong not occurred: "the compensatory principle". There is no reason to prohibit restoring a loss measured by the value of shares, if that is the loss the claimant has sustained. The law has other means of preventing injustice arising from the advancement of claims by both the shareholder and the company. Indeed there is a well-established policy against double recovery, which the court was able to police by active case management or the law of subrogation and restitution. Lord Sales said in paragraph 167:

> "*It is true that the adoption of the rule of law identified by Lord Reed and Lord Hodge would eliminate the need for debate about the interaction of the company's cause of action and the shareholder's cause of action, and in that way would reduce*

> *complexity. Bright line rules have that effect. But the rule only achieves this by deeming that the shareholder has suffered no loss, when in fact he has, and deeming that the shareholder does not have a cause of action, when according to ordinary common law principles he should have. In my respectful opinion, the rule would therefore produce simplicity at the cost of working serious injustice in relation to a shareholder who (apart from the rule) has a good cause of action and has suffered loss which is real and distinct from any loss suffered by the company. In my opinion, the fact that the interaction between the company's cause of action in respect of its loss and the shareholder's cause of action in respect of his own loss gives rise to complexity is more a reason for* not *adopting a crude bright line rule which will inevitably produce injustice, and requiring instead that the position be full explored case by case in the light of the all the facts, with the benefit of expert evidence in relation to valuation of shares and with due sensitivity to the procedural options which are available*."

14. Lord Sales would only stop shareholders claims when they were self-evidently infringing the rule in *Foss v. Harbottle*, i.e. when the shareholder was – as he thought in the *Prudential* case – simply claiming the company's loss.

15. When shareholders' claims would be stopped for this reason would be worked out on a case-by-case basis. There was no principled objection to shareholders claiming for a fall in the value of their shares or the reduction of a dividend, if that is what they had lost, subject to the court's general power to prevent the claim working injustice.

16. Why did Lord Sales reach that view?

17. First, because he thought that the reflective loss principle identified in *Prudential* was based on a false premise. This is that the value of shares corresponds to the value of the company's assets, with the result that if the shareholder complains about the fall in value in his shares, he is in fact complaining about the fall in value of the company's assets – which it is the company's right alone to pursue (paragraph 146). In *Johnson v.*

Gore Wood & Co. (No. 1) [2002] 2 AC 1, the House of Lords, particularly Lord Millett, had adopted this false premise.

18. Given that this premise – which the majority also disavowed (paragraphs 49 and 55 per Lord Reed in the context of *Johnson v. Gore Wood*) – underpinned the whole doctrine of reflective loss, the doctrine itself was flimsy and unsound.

19. Analysis of the caselaw with the care of an archaeologist is a valuable judicial skill in which Lord Sales, in particular, excels. One sees this in his analysis of *Prudential*. Other examples include Lord Sales' first instance judgment on the court's control of the availability of the remedy of an account of profits for breach of contract (as opposed to damages), in *Vercoe v Rutland Fund Management Ltd.* [2010] EWHC 424 (Ch), [2010] Bus LR Digest, D141, at [332]-[345].

20. Secondly, "the knotweed problem". Professor Tettenborn had likened the reflective loss principle to "*some ghastly legal Japanese knotweed*" spreading through company and commercial law (paragraph 121).

21. The principle had got out of control. The speeches of Lord Bingham and particularly Lord Millett in *Johnson v. Gore Wood* supported the proposition that the reflective loss principle stopped not just a shareholder's claim measured by reference to the fall in value of his shares or the reduction of a dividend, but other claims by a shareholder where the company also had a claim for its own loss against the same person, or indeed any claim originating from the company's inability to make a payment.

22. If that wasn't bad enough, it had been extended to shareholders who were also creditors, where they were suing in the capacity of a creditor: *Gardner v. Parker* [2004] EWCA Civ 781.

23. To cap it all, the Court of Appeal in *Marex* had extended it to stop a claim by a creditor who was not a shareholder, but a judgment creditor and the alleged victim of an audacious asset-stripping exercise.

24. Thirdly, the means by which the reflective loss principle had been extended were poorly reasoned. Double recovery, causation, protecting

the company's autonomy and protecting creditors' interests, did not compel the court to deny a damages remedy to shareholder claimants as a blanket policy.

## Basic principles

25. Much of what Lord Sales said about the basic principles that applied in the case was common ground with the majority. I mention it because when one deals with rules of law, one has a tendency to let the rule overshadow basic principles and the basic principles were the reason why Marex was permitted to pursue its full claim against Mr Sevilleja.

26. A share does not correspond to a proportionate interest in the company's assets, such that if the value of those assets falls, the value of the share also falls. This is implicit in the reasoning in *Prudential*: see the unfortunate cash box example which all Justices agreed was too simplisitic to be of any real use. It was particularly ill-suited to a company whose value might not be wholly contained in its physical assets or whose shares are traded on public markets, where value will be affected by numerous market forces (paragraphs 122, 145 to 146).

27. If a company has a claim, it is in charge of it. Shareholders cannot intervene except through the organs of the company or through a derivative action (paragraph 123).

28. Wrongdoing can produce numerous causes of action for various people. The law lays down no general principle about the order in which they should be pursued (paragraph 124). A product liability claim in the clinical context is an example. Patients, clinicians, hospitals and suppliers may have independent claims arising from the same facts against the defendant responsible for the defective product.

29. How or when a claimant pursues a claim may be subject to obligations the claimant has freely assumed to other people. But shareholders do not generally assume obligations that limit their right to pursue claims open to them. I am talking here at a very high level of generality – a shareholders' agreement or articles of association may limit shareholder action. The example given by Lord Sales illustrates the point. If a company employee runs over a shareholder in a company vehicle, the

shareholder can claim damages regardless of the fact that the company's assets would be diminished by the damages award, with a knock-on effect on the money available to pay dividends (paragraph 125).

30. The cases contained extensive discussion about protecting creditor interests and *pari passu* distribution. Creditor interests only intrude if the company is at risk of insolvency. The *pari passu* principle does not arise until insolvency occurs. (Paragraph 126.)

31. While shareholders may be subject to equitable obligations concerning the management of the company and their rights *inter se*, there is no general good faith obligation which would limit a shareholder's ability to vindicate a cause of action sounding in damages against a third party (paragraph 127).

32. There is no conceptual reason why the compensatory principle cannot operate with regard to loss represented by a fall in value of shares or reduction in dividend suffered by a shareholder (paragraph 128).

33. The language was unhelpful. Saying that the shareholder's loss was "reflective" of the company's loss ignored the fact that there was no necessary correlation between a company's claim and its loss, and a shareholder's claim and its loss. The losses were not the same thing. Likewise saying claims had to be "separate and distinct" tended to obscure the analysis (paragraph 132).

## Lord Sales' analysis of ***Prudential***

34. If you have to advise on a reflective loss case, I suggest that you read paragraphs 133 to 148 of Lord Sales' judgment. Lord Sales examined what was in fact alleged and argued in *Prudential* and pointed out that there was no allegation of a separate loss suffered by the shareholder and no evidence to support that loss. Indeed the value of the shares in the relevant company had actually risen after the alleged fraud had taken place. What was really in issue was the company's loss suffered by overpaying for the purchase of an asset, on account of the fraud. The shareholder's real objective was a derivative claim. As Lord Sales put it in paragraph 134: "[Prudential…] *entirely relied on the loss suffered by*

*the company, rather than seeking to prove any different loss suffered by itself*."

35. At first instance, Mr Justice Vinelott found for Prudential and directed an inquiry as to damages, among other things (paragraph 135).

36. The Court of Appeal overturned that decision on the basis that the shareholder did not suffer any personal loss, but merely loss which reflects the loss suffered by the company. There was no separate and distinct loss suffered by the shareholder (paragraph 136).

37. This reasoning was a departure in the law and from the common ground at first instance, where the defendants had been represented by Mr Richard Scott, QC as he then was. The Court of Appeal expressed itself in terms that appeared to apply to every claim brought by a shareholder where both he and the company had suffered a related loss (paragraph 139).

38. The critical point is that in *Prudential*, there was no real focus on the independent cause of action that the shareholder might have had in its own capacity. This was not surprising, because none had been alleged or proved. But the court assumed that a personal cause of action would subvert the rule in *Foss v. Harbottle* that where a company has a cause of action, it is for the relevant organs of the company to decide whether to sue upon it. The court did not consider the possibility of a truly separate cause of action for the claimant in that case and whether *Foss v. Harbottle* would apply. By contrast, Marex's cause of action was independent of any cause of action that the companies, acting by their liquidator in the BVI, might have against Mr Sevilleja. (Paragraph 142.)

39. There had been no rigorous argument on this vital question in *Prudential*. At paragraph 143 Lord Sales said that the reasoning in *Prudential* was flawed:

> "*Again, it conflates something which is undoubtedly correct (a shareholder cannot recover damages 'merely because the company in which he is interested has suffered damage': of course not, because the mere fact that the company suffers damages does not create a cause of action for the shareholder),*

> *with something which is highly questionable (a shareholder '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').*"

40. This confusion was compounded by implicitly equating a shareholding with an interest in the company's assets (paragraph 146).

41. The decision in *Prudential* was right, but for a narrower reason: the shareholder failed to prove as a matter of fact that it had suffered any greater or different loss from the loss suffered by the company (paragraph 148).

42. As to the causation argument, Lord Sales thought that it was artificial to say that the cause of the shareholder's loss is the company's decision not to pursue the claim, with the result that the shareholder could not establish causation against the wrongdoer. This begs the question whether the claim is the same and why the company's decision should have any impact on the shareholder's ability to pursue his claim (paragraphs 151 and 152). There are many reasons why a company might not pursue a claim, such as impecuniosity (cf. paragraph 57 per Lord Reed).

43. In Lord Sales' view, the shareholder should be able to maintain a claim for the diminution in vale of his shares (paragraph 156).

44. Double recovery is what the reflective loss principle was trying to prevent. Lord Sales thought that the court had adequate armoury to prevent injustice without barring the shareholders' claim altogether.

45. A shareholder claimant could be required to give notice of his claim to the company so that the company could join the proceedings and assert its own claim if it wanted to. Vinelott J had considered this himself at first instance in *Prudential* and it had appeared as a solution in Commonwealth jurisdictions. There was a precedent for companies and other claimants asserting claims for fraudulent or wrongful trading in the same set of proceedings under the insolvency legislation (paragraphs 161 to 164).

Assignment, reimbursement and subrogation may also assist (paragraphs 202 to 203).

46. The fact that a shareholder may recover compensation and the company does not, is no reason to deny the shareholder's claim (paragraph 166).

## Conclusion

47. In the light of the Supreme Court's judgment in *Marex*, the reflective loss principle has been recast as a rule of law that prevents a shareholder claiming damages measured by reference to a fall in the value of his shares or a reduction in a dividend, where the company has a claim arising from the same wrong, regardless of whether the company pursues that claim. There are no exceptions to this rule of law, such as *Giles v. Rhind* [2002] EWCA Civ 1428.

48. Claims by shareholders that do not seek such relief are not affected. Claims by shareholders where the company has no claim of its own are not affected. Claims by creditors are not affected.

49. An analysis of the components of the claim your client wishes to advance and whether it engages the reflective loss principle, and how it differs from any claim available to the company, is therefore essential. This might sound obvious, but as Lord Sales' judgment demonstrates, interrogating the types of claim available to different parties was skimmed over in *Prudential*, with a long-term distorting effect in subsequent cases.

50. Lord Sales' judgment is a powerful riposte to the continued existence of the reflective loss principle, even in its moderated form. The matter may well yet return to the Supreme Court in future years. If Lord Sales' approach were to be adopted, close attention would need to be given to procedural mechanisms, subrogation and restitution, to avoid the injustice of double recovery.

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30th July 2020

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