

UK Supreme Court Gives Landmark Ruling on Reflective Loss

by Joseph Lewin

The Supreme Court Judgment in *Sevilleja v Marex Financial Ltd* [2020] UKSC 31, handed down on 15 July 2020, clarifies and substantially confines the scope of the doctrine of reflective loss.

The Court, in a majority decision, has confirmed that:

- The doctrine now only prohibits 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 reduction in share value or in distributions, which is the consequence of loss sustained by the company and in respect of which the company has a cause of action against the same wrongdoer.
- It no longer prevents claims being brought against wrongdoers, whether by a shareholder or by anyone else, in respect of loss which does not fall within the type of case referred to above, but where the company has a right of action in respect of substantially the same loss.

Overview: Reflective loss and its development

The case of *Prudential Assurance Co Ltd v Newman Industries Ltd (No.2)* [1982] 1 Ch 204 (“**Prudential**”) established the rule that recovery cannot be made for “reflective loss”. In *Prudential*, the court ruled that a shareholder cannot bring a claim against a defendant in respect of a diminution in value of its shareholding or a reduction in its distributions resulting from a loss suffered by the company as a consequence of a wrong done to the company by the defendant. As such, the principle of “reflective loss” blocks claims against wrongdoers by shareholders of a company, where their loss is merely reflective of the loss of the company.

Over the years this principle has been expanded by the courts; barring claims on the basis of reflective loss by shareholders who were also: creditors of the company in the case of *Johnson v Gore Wood* [2002] 2 AC 1 (where Lord Millett held that the rationale was in the rule against double recovery); shareholders in their capacity as employees of the company in *Gardner v Parker* [2004] EWCA Civ 781; and to non-shareholder

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creditors of a company in *Sevilleja v Marex* [2018] EWCA Civ 1468.

In the present case, the Supreme Court held that this expansion of the doctrine of reflective loss was no longer sustainable; restricting the doctrine to cases where a shareholder seeks to claim in his capacity as a shareholder.

The case: *Sevilleja v Marex Financial Ltd*

Case History

Marex Financial Limited (“**Marex**”) issued proceedings in the Commercial Court against two BVI companies owned and controlled by Mr Sevilleja. In July 2013, Marex obtained judgment against the two companies for approximately US\$5.5 million for sums due to it under contract. Following this, it is alleged that Mr Sevilleja stripped the companies of their assets; thereby preventing Marex from obtaining payment of the judgment debt. Subsequently, the BVI companies went into insolvent liquidation. Marex then issued proceedings against Mr Sevilleja to recover the judgment debt awarded by the Commercial Court, and further costs incurred in trying to recover the judgment debt.

Marex was granted permission to serve proceedings on Mr Sevilleja out of the jurisdiction. However, Mr Sevilleja applied to the Court of Appeal to have this decision set aside on the basis that the losses suffered by Marex were reflective of the loss suffered by the BVI companies, and the Court of Appeal agreed. The impact of losing at the Court of Appeal prevented Marex from pursuing 90% of the loss it had suffered (because the rule of reflective loss applied to 90% of Marex’s claim). Marex appealed to the Supreme Court.

The Supreme Court Decision

Marex was successful at the Supreme Court, which sat as a seven member panel to hear the case. The Supreme Court held that a claim by a company’s creditor against a third party will not be barred where it reflects loss suffered by the company, even if the creditor is also a shareholder, thereby restricting the scope of the principle of reflective loss.

Whilst the court restated the principle that a company’s shareholders cannot recover damages against a wrongdoer for loss which is reflective of a loss caused by the wrongdoer to the company itself, it confined the principle to loss suffered by a shareholder in the form of reduction in the value of his shares, or in the loss of some other distribution of the company’s profits which he might have received by virtue of his being a shareholder, but for the wrong of the defendant.

In the Supreme Court’s ruling, Lord Reed explained *Prudential* on the basis of a rule that loss suffered by a shareholder cannot be recovered from the wrongdoer because in the eyes of the law the loss is not treated as separate and distinct from the loss suffered by the company.

Lord Reed, who gave judgment for the majority, held that Lord Millet's reliance on the rule against double recovery in *Johnson v Gore Wood* to explain the basis for the reflective loss principle had the effect of expanding it too far. The majority found that the foundation for the rule against recovery of reflective loss was not because of the need to avoid double recovery, noting that whilst double recovery is an issue that the courts need to be aware of, there are other mechanisms to address it, rather than barring claims on the basis of the reflective loss principle.

Numerous cases which had relied upon the reasoning in *Johnson v Gore Wood* were found to be wrongly decided by the Supreme Court.

Comment

As a result of this decision, the scope of the reflective loss principle has now been significantly narrowed and, as can be seen, allows a claim to be brought in respect of an intentional economic tort which would otherwise have been barred by the doctrine of reflective loss. It will be welcomed by many, including creditors, who will no longer be prevented from recovering losses which are reflective of a company's losses.

The Supreme Court's ruling should provide certainty in an area of law which had expanded to cover claims not only by shareholders, but also creditors and employees. The panel of judges unanimously agreed that the principle of reflective loss had expanded to a level which was no longer sustainable.

The Supreme Court panel of judges was split four to three regarding the correct legal analysis. Whilst the majority view of Lord Reed narrowed down the scope of the doctrine of reflective loss, the radical minority view of Lord Sales would be to abolish it completely. Does this suggest that the doctrine of reflective loss will be abolished in the future? Only time will tell. In the meantime, the doctrine continues to survive, all be it in a curtailed form.

For more information, please contact [Tim Maloney](#) or [Matthew Blower](#).

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