Decision in respect of the preliminary issue, as to whether the Plaintiff's claim was not recoverable because of the legal principle known as the rule against recovery of reflective loss.

[2021]GRC012

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between	**PILATUS (PTC) LIMITED**	**Plaintiff**
	-and-	
	RBC TRUSTEES (GUERNSEY) LIMITED	**Defendant**

Hearing dates: 24th and 25th September 2019

Judgment handed down: 14th May 2021

Before: Richard James McMahon, Esq., Bailiff

Counsel for the Plaintiff: **Advocate A M Davidson**
Counsel for the Defendant: **Advocate E R Gray**

Cases, Texts & Legislation referred to:

Jefcoate v Spread Trustee Company Limited 2014 GLR Note 10 (31 October 2014)
Marex Financial Ltd v Sevilleja [2019] QB 173
Sevilleja v Marex Financial Ltd [2020] UKSC 31, [2021] AC 39
Primeo Fund (in liquidation) v Bank of Bermuda (Cayman) Limited (unreported, 13 June 2019)
Cherub Investments Limited v The Channel Islands Aero Club (Guernsey) Limited (unreported, 13 January 1982)
Willers v Joyce (No. 2) [2016] 3 WLR 534
Jackson v Dear (unreported, 26 March 2013)
Flightlease Holdings (Guernsey) Limited v Flightlease Ireland Limited [2009-10] GLR 38
Freeman v Ansbacher 2009 JLR 1
Roundtable on Freedom of Investment 18: Summary of Roundtable Discussions by the OECD Secretariat (20 March 2013)
Christensen v Scott [1996] 1 NZLR 273
Walker v Stones [2001] QB 902
Prudential Assurance Co. Ltd v Newman Industries Ltd (No. 2) [1982] 1 Ch 204
Johnson v Gore Wood & Co [2002] 2 AC 1
Gardner v Parker [2004] 2 BCLC 554
Shaker v Al-Bedrawi [2003] 1 BCLC 157
Lewin on Trusts (19th ed.)
Giles v Rhind [2003] Ch 618
Hotung v Hillhead Ltd [2008] 3 HKC 301
Webster v Sandersons [2009] 2 BCLC 542
Thomas v D'Arcy [2004] QSC 260

Introduction

1. The Plaintiff, Pilatus (PTC) Limited, is the trustee of a settlement dated 21 December 1990 known as the Shallan Trust, which is a discretionary trust governed by Guernsey law. It has been the trustee since 28 June 2018. The Defendant, RBC Trustees (Guernsey) Limited, is a former trustee of the Shallan Trust, having retired from that office on 30 October 2015.

2. The Plaintiff's Cause was tabled on 21 September 2018. Its prayer seeks *inter alia*:

   (1) equitable compensation (including interest, if appropriate);

   (2) an account of and/or an inquiry as to the loss or diminution in the value of the Shallan Trust by reason of the loss of the deadlock on the board of Primefuels Investments Limited ("PIL") and/or representation on the board of Primefuels Holdings Limited ("PFHL"), any further loss or diminution in value caused by the actions of George Machan, New Rodina Limited (and more latterly Maxim Ventures Trading Corporation, but for ease of reference both will be referred to simply as "New Rodina") and Asif Abdulla made possible by reason of their unintended control of PIL and/or made possible by the Shallan Trust's loss of representations on the PFHL board, the costs incurred in trying to remedy the consequences of the Defendant's breaches of duty, including the costs of all litigation and other legal costs involved;

   (3) an order for the payment of the sums found due on the taking of such account and/or inquiry; and

   (4) all such further orders, declarations, account and inquiries as may be necessary to reconstitute the trust fund of the Shallan Trust.

3. Les Defences were tabled on 16 November 2018. They include an *exception de fond* but, in any event, deny that the Plaintiff is entitled to any relief. They also include *exceptions de forme*, which were answered on behalf of the Plaintiff in its Réplique dated 19 February 2019.

4. By an application dated 21 March 2019, the Defendant sought a direction that its *exception de fond* be tried as a preliminary issue. That application was heard on 3 May 2019. It resulted in an order made on 30 July 2019 that the preliminary issue to be tried be in the following terms: "*Whether the Plaintiff's claim for loss (or any part thereof) as pleaded in the Cause and the Réplique is not recoverable from the Defendant because of a legal principle known as the rule against recovery of reflective loss*". By the same order, the Defendant was permitted to amend Les Defences.

5. The *exception de fond* is at para. 8 of the Amended Les Defences:

   "*The Plaintiff's claim is barred in its entirety by the rule against recovery for reflective loss. The said rule applies because:*

   8.1 The entirety of the losses alleged at paragraphs 58 to 60 are losses suffered by SOIL and/or PIL and/or PFHL;

   8.2 Insofar as the Shallan Trust has suffered a loss, such loss is suffered qua shareholder in the diminution in the value of shares belonging to the Shallan

*Trust in Shallan Group Holdings Limited ("**Shallan Group Holdings**") which (on the Plaintiff's case) ultimately own SOIL, PIL and PFHL;*

8.3 Any loss to the Shallan Trust are, therefore, merely reflective of the losses allegedly suffered directly by SOIL and/or PIL and/or PFHL; and

8.4 SOIL, PIL and PFHL has remedies against the wrongdoers who have caused them the alleged direct losses. Those remedies are being pursued in unfair prejudice proceedings brought by SOIL in the High Court of Justice of the British Virgin Islands (Commercial Division) commenced on or around 18 January 2018."

The reference to "SOIL" is to Shallan Overseas Investments Ltd.

6. Prior to the hearing in September 2019, I had the benefit of a detailed Skeleton Argument on behalf of the Defendant prepared by Advocates Gray and Kapp. Its basic tenet is that Guernsey should fully adopt the reflective loss principle as it operates in England and Wales, the application of which would mean that the *exception de fond* succeeds and the Plaintiff's action should be dismissed. It ranges over how the principle has been applied in other jurisdictions as well and comments on the one decision of this Court in which the principle has been considered, *Jefcoate v Spread Trustee Company Limited* 2014 GLR Note 10 (otherwise unreported, 31 October 2014), in which it was suggested that it was uncertain how far the doctrine of reflective loss applied in Guernsey. In response, I also had the benefit of a similarly detailed Skeleton Argument on behalf of the Plaintiff prepared by Advocate Davidson. He submitted that the reflective loss principle did not apply because the action before this Court is different to SOIL's proceedings in the BVI for different relief and against completely different defendants. He further suggested that the concerns aired in *Jefcoate* about the applicability of the principle as a matter of Guernsey law remained, were supported in the context of proceedings relating to trusts by the approach taken by the Royal Court of Jersey, all of which should result in the preliminary issue being decided against the Defendant with the Plaintiff's action being permitted to proceed. Advocates Gray and Davidson developed those submissions at the hearing, at the end of which I reserved judgment.

7. One of the cases to which both parties made reference in their written and oral submissions was the decision of the Court of Appeal in England and Wales in *Marex Financial Ltd v Sevilleja* [2019] QB 173. They noted that an appeal to the Supreme Court had been heard on 8 May 2019, but judgment had not yet been handed down. In the event, pressure of other matters meant that I did not manage to prepare this reserved judgment before I was informed by Counsel that the Supreme Court's judgments were handed down on 15 July 2020 in what is now *Sevilleja v Marex Financial Ltd* [2020] UKSC 31, [2021] AC 39. One of the reasons for the delay until that time was managing the effects of the coronavirus pandemic as they impacted on other Court business. However, given the way in which the Supreme Court has now narrowed the application of the reflective loss principle in English law, where the Defendant's primary case is to adopt and apply this English law principle, that delay enabled me to invite Counsel to make any supplementary submissions they wished to in writing to assist me in how to deal with this decision. Their supplementary submissions are both dated 24 September 2020. I am afraid that the further, lengthy delay in turning my attention to this judgment results from having had other matters to deal with in the meantime and there having been a second lockdown earlier this year, which had a further unforeseen effect on my time. I do most sincerely apologise to all concerned about what has been a much longer time than would be normal before I have been able to set out my decision in respect of this preliminary issue.

8. There might have been a further delay because I was informed on 23 April 2021 that another of the cases to which the parties had referred, *Primeo Fund (in liquidation) v Bank of Bermuda (Cayman) Limited* (unreported, 13 June 2019), had been appealed to the Privy Council, with

the hearing having taken place just a few days earlier. However, there was no agreement between Counsel that it would assist to wait for judgment in that case to be delivered, so I have concluded the preparation of this judgment without waiting any longer. As Advocate Davidson pointed out, if the basis on which this decision rests might be changed by the outcome of that appeal, it will be open to the party affected to seek leave to appeal out of time.

Facts

9. On behalf of the Defendant, it was accepted that its *exception de fond* falls to be determined on the basis that the Plaintiff can establish the facts it has pleaded in its Cause and Réplique. Advocate Gray acknowledges that most of the background facts are uncontentious as shown in the admissions in the Amended Les Defences. Further, where any facts would be disputed at trial, for present purposes the facts pleaded by the Plaintiff can be assumed to be correct. This is, of course, entirely consistent with what the Court of Appeal explained in *Cherub Investments Limited v The Channel Islands Aero Club (Guernsey) Limited* (unreported, 13 January 1982), where the test for whether an *exception de fond* can succeed or not was stated to be whether there are no admissible facts consistent with the pleading which could be proved at the trial which would allow the Plaintiff to succeed in the action. As a consequence, I have considered the reflective loss principle on which the Defendant relies on the basis that the following facts will have been established by the Plaintiff.

10. By a declaration of trust dated 21 December 1990, Monument Trust Company Limited, by which name the Defendant was at that time known, settled the Shallan Trust as a discretionary Guernsey law trust for the benefit of members of the Somji family. There had been two instruments of variation dated 2 June 2006 and 11 December 2007 prior to the Defendant's retirement as trustee on 30 October 2015, at which time Hanif Somji was the trust's protector.

11. At all material times prior to the Defendant's retirement as trustee, the assets of the Shallan Trust comprised one ordinary share in Shallan Group Holdings Limited ("Shallan Group Holdings") registered in the Defendant's name as trustee and one ordinary share in that company registered in the name of RBC Corporate Services (CI) Limited ("RBC Corporate Services") as nominee for the Defendant as trustee, plus cash held in the bank accounts in the Defendant's name as trustee.

12. During its years as sole trustee of the Shallan Trust, the Defendant provided corporate services (including directors and administrative services) to the underlying companies owned by the Shallan Trust through RBC Directorship Services (CI) Limited ("RBC Directorship") and RBC Corporate Services, which acted on the trustee's instructions and as its agent. These entities had the same or substantially the same officers, in particular Lindsay Ozanne (although the Cause refers to her as "Lyndsey"). Through its shared officers, the Defendant had notice of all matters of which RBC Directorship and RBC Corporate Services were aware.

13. PIL is a BVI company. It was registered on 16 January 2007. It represents a joint venture between the Somji family and Asif Abdulla. The shareholding in PIL was split equally between SOIL and New Rodina. George Machan, a director of New Rodina, was appointed as a director of PIL on or about 21 December 2009, from which time he and RBC Directorship were the directors. They represented New Rodina and the Shallan Trust respectively and this ensured each side of the joint venture had equal representation on PIL's board. Until 30 October 2015, the secretary of PIL was RBC Corporate Services and the Defendant provided administrative services to PIL.

14. PIL was structured in such a way that the absence of unanimity led to deadlock as between the directors and as between the shareholders. Article 8.1 of the Articles of Association provides:

"*The first directors of the Company shall be appointed by the first registered agent in accordance with the Act upon the incorporation of the Company; and thereafter, the directors shall be elected by Resolution of Shareholders or by Resolution of Directors for such term as the Shareholders or directors determine*".

Both types of Resolution are defined in Article 1.1 as requiring a majority vote. A Resolution of Directors was required by Article 12 to appoint a new secretary. Article 8.6 permits a director to resign from that office by written notice. Accordingly, Mr Abdulla and New Rodina could not effect any change to the board of directors of PIL, its company secretary or its administrator without agreement from the relevant entities within the RBC group.

15. At the end of 2007, all the shares in SOIL were owned by Shallan Overseas Limited ("SOL"), largely directly, although one share was owned by the Defendant as nominee for SOL and, in turn, all the shares in SOL were owned by Shallan Group Holdings. New Rodina was ultimately owned or controlled by Mr Abdulla. PIL owned 85% of PFHL, which was also incorporated in the BVI, but was subsequently migrated to and registered in Mauritius on 6 July 2011. The remaining 15% of the shares in PFHL were owned by Aureos East Africa Fund LLC ("Aureos"), which is unconnected to the Shallan Trust. PFHL owned a number of other companies, including Primefuels Kenya Limited, Primefuels Tanzania Limited, Primefuels Uganda Limited and Primefuels Gambia Limited. These were operating companies carrying out the business of the group relating to bulk liquids, dry cargo and petroleum supply in East Africa.

16. On 30 March 2007, Aureos, Mr Abdulla, PIL and PFHL entered into an investment agreement relating to PFHL, which provided that PFHL would have a board of nine directors, two of whom would be nominated by Aureos, six by PIL and one jointly by Aureos and PIL. At around the same time, SOIL, New Rodina and PIL entered into a voting pool agreement, under which SOIL and New Rodina agreed that PIL's votes as shareholder at general meetings of PFHL and the votes of PIL's nominated directors would be voted as a block as agreed between SOIL and New Rodina or, in the absence of agreement, against any motion.

17. By an agreement governed by English law dated 25 February 2011, SOL sold the entirety of the shares in SOIL to Hanif Somji. The purchase price was US$5.95 million, which was loaned by SOL to Mr Somji at an interest rate of 4.75% per annum. On the same day, Mr Somji granted an equitable mortgage expressly subject to English law over the issued share capital in SOIL to secure the loan made by SOL.

18. By a further written agreement dated 25 July 2011 ("the Put and Call Option Agreement") between SOL and Mr Somji, the right to repurchase the shares is SOIL was given to SOL and the ability for Mr Somji to require the repurchase of those shares was given to him, with the price being the amount of the outstanding loan, including interest, less dividends received from SOIL by Mr Somji. Either option had to be exercised between 25 February 2015 and 25 February 2017. It was exercised on 24 January 2017. In a letter from RBC to Mr Somji dated 5 August 2011, confirmation was given that this arrangement was not intended to alter the previous position and the RBC entities remained as director, secretary and administrator of PIL:

"*Effectively by putting the option contracts in place, the trustees will be in no different position than had they continued to have held Shallan Overseas Investments Limited within the Shallan Trust structure and you will be in no different position either. …*

Naturally, if the shares of Shallan Overseas Investments Limited increase in value, the trustees will have benefited from being able to purchase them back at effectively the consideration value for which they were transferred to you. If on the other hand the share value should decrease in value then you can exercise the option to sell the shares back to Shallan Overseas Limited at the consideration value for which they were

transferred to you and Shallan Overseas Limited will acquire shares which have fallen in value. However, as stated above either transaction puts us in no different position than had we continued to hold the shares of Shallan Overseas Investment Limited in the trust structure."

19. On 5 July 2013, Aureos, Mr Abdulla, PIL and PFHL entered into a further agreement intended to supersede the agreement dated 30 March 2007. They also agreed a new constitution for PFHL, which was in substantially the same terms as the previous arrangements for the appointment of directors. A new agreement reflecting the changes to dates and terminology relating to pooling their voting rights was agreed between SOIL, New Rodina and PIL on 1 July 2013.

20. On 16 July 2013, Aureos transferred its 15% shareholding in PFHL to its subsidiary, Fuel Transport Holdings Limited. The following month, Aureos sold its shares in Fuel Transport Holdings Limited to Mapplewell Global Group Limited, which is an entity wholly or partly owned and controlled by Mr Abdulla. The purchase price was equivalent to US$453.33 per share, which extrapolates to a value of PFHL of US$45.33 million.

21. In or about August 2015, the RBC group decided on policy grounds that it wished its entities to exit relationships concerning certain geographical areas, including Kenya. A letter was sent dated 26 August 2015 to the then protector of the Shallan Trust explaining that:

> "*If it appears that RBC will not have been replaced by an alternative firm by September 18, 2015, we will be taking steps to appoint a regulated financial services firm to take on Trustee responsibility from September 30, 2015. This will ensure the affairs of the Trust continue to be managed effectively after September 30, 2015 following RBC's withdrawal of service. We will ensure we are satisfied that the firm is suitable to take over responsibility of the Trust and provide continuity of trusteeship upon RBC's resignation. We will also work with the new Trustee to transfer legal title to the Trust assets and Trust documentation to them by October 31, 2015 to ensure the account is closed by that date.*"

The protector replied by letter dated 10 September 2015, addressed to Mrs Ozanne, seeking an extension of the proposed retirement date at the end of September 2015 by 60 days to ensure "*an orderly handover to the new trustees given RBC Trustees' long tenure*".

22. On 30 October 2015, the Defendant retired as trustee of the Shallan Trust and was replaced by Novatrust Limited. On this day, Mrs Ozanne, along with her colleague, Paul Rogers, signed three letters relating to PIL and PFHL. The first resigned RBC Directorship's offices as director of PIL and PFHL, without compensation for loss of office, with immediate effect. The second resigned RBC Corporate Services' offices as company secretary of PIL and director of PFHL on similar terms. The third was sent on behalf of the Defendant advising that it would no longer be providing administration services to the company, which was also to take immediate effect. Mrs Ozanne, as authorised signatory of RBC Directorship and a fellow authorised signatory, Sarah-Jane Parker, signed a resolution relating to the retirements, which sought to appoint Chasseral (Directors) Limited and Aventine (Secretaries) Limited in place of RBC Directorship and RBC Corporate Services, with the administration office being changed to Stonehage Fleming SA. These resolutions followed a meeting attended by these two women in their capacities as representatives of the directors of PFHL, although that meeting did not comply with the quorum of three directors and was without proper notice to the other directors of PFHL. The resolutions passed and recorded in the minute of that date were, therefore, ineffective.

23. However, that resolution was sent by another person at RBC to George Machan on 12 November 2015, who replied within minutes that they were not happy to appoint entities in Switzerland when everyone was based in the Channel Islands. Mr Machan also requested sight

of the resignation letters. Confirmation was sought from Amit Thakrar, the financial controller of the Somji family's interests, that there were no objections to providing the requested copies, to which Mr Thakrar replied asking them not to act until he had checked and reverted. Despite hearing nothing further, the three letters dated 30 October 2015 were provided to Mr Machan around 25 November 2015. Mr Machan responded that he needed to consider the position further before giving his final decision on the resolutions themselves. On 11 December 2015, Mr Machan queried whether the resignation letters would take effect when the relevant resolutions had been passed, with nothing changing in the meantime. On 14 December 2015, Mr Rogers replied:

> "*Please find attached copies of the resignation letters from RBC Directorship Services (CI) Ltd as Director, RBC Corporate Services (CI) Ltd as Secretary and RBC Trustees (Guernsey) Ltd as administrative office, all effective 30 October 2015, which I trust clarifies the situation regarding RBC's position and the matter of the Directors resolution you were asked to sign.*
>
> *As we are no longer involved with Primefuels Investment Limited and we have previously provided you with copies of Financial Statements and explanations of loan balances, we suggest that you contact the new Directors and administrators for the Company going forward.*"

24. By letter dated 12 January 2016, Mr Machan, acting as sole director of PIL, accepted the resignations of RBC Directorship and RBC Corporate Services and appointed Verite Secretaries Limited as the new secretary of PIL. He refused to agree that the administrative office be changed to Stonehage Fleming SA and resolved, as sole director, to change it to the registered address of Verite Secretaries Limited, which is part of the group that includes Verite Trust Company Limited, which administers New Rodina.

25. The Plaintiff's complaint is that the loss of the benefit of deadlock in PIL means control of PIL is now in the hands of New Rodina. Further, the Shallan Trust has lost representation on the board of PFHL. All of this has led to the Shallan Trust's interests diminishing in value. Examples are given of Mr Abdulla and New Rodina procuring a rights issue in PFHL at a gross undervalue. The rights issue appears to have valued PFHL at US$14.7 million. The interest of the Shallan Trust has dropped by almost half. Further, control has been seized of Primefuels Tanzania Limited and Primefuels Kenya Limited, with these companies having a proposed loan facility of US$30 million, guaranteed by PFHL. In addition, the shares in Primefuels Lubricants Limited have been procured from PFHL to a company wholly owned by Mr Abdulla.

26. On or about 18 January 2018, SOIL commenced proceedings in the BVI against PIL, PFHL, New Rodina (including both that company and Maxim Ventures Trading Corp), Fuel Transport Holdings Limited, Mr Abdulla and Mr Machan. These are unfair prejudice proceedings under the BVI Business Companies Act 2004. The facts set out in SOIL's Statement of Claim reflect those set out in the Plaintiff's Cause, although the second half of that pleading descends into far greater detail about the steps allegedly taken by which control has been taken of PIL and so PFHL and the other companies in the Primefuels group. There are allegations that other parties have breached the joint venture agreement associated with the Primefuels group between the Somji family and Mr Abdulla and the agreements entered on 30 March 2007 and 5 July 2013 relating to how voting as shareholder and on the board of directors would be undertaken. There are allegations that Mr Abdulla has acted in breach of fiduciary duty. In short, the Defendants are claimed to have acted and continue to act contrary to agreed terms and/or understanding as to parity of interest, equal participation in the management of the Primefuels group and equality of voting rights in PIL between what are termed the Shallan Parties on the one hand and Mr Abdulla and the Rodina Parties on the other, thereby controlling the group for the benefit of Mr Abdulla and to the detriment and at the expense of the Shallan Parties and so have conducted and continue to conduct the affairs of PIL in a manner which is oppressive, unfairly

discriminatory and/or unfairly prejudicial to the interests of SOIL as a member of PIL. Included among the heads of relief being sought are various orders that would restore the position within PIL to how it was expected to be when the Defendant resigned as trustee and RBC Directorship and RBC Corporate Services purported to appoint Chasseral (Directors) Limited, Aventine (Secretaries) Limited and Stonehage Fleming SA. Further, SOIL seeks all necessary accounts and inquiries, an order against Mr Abdulla in respect of profits received by him and/or companies controlled by him, directly or indirectly, as a result of the breaches of duty pleaded and an order that he, New Rodina and others pay equitable compensation to SOIL. From the pleading it is apparent that Chasseral (Directors) Limited is the sole director of SOIL.

27. There are aspects of this set of facts with which the Defendant does not agree. They have been set out in this manner so as to contrast what is claimed in the action before this Court with what is sought by SOIL in the BVI proceedings. There is an overlap of facts and some overlap of relief.

Reflective loss in Guernsey previously

28. Although Advocate Gray has only turned to the position as set out in the ***Jefcoate*** case at the end of her submissions in support of the Defendant's *exception de fond*, I take the view that it is the proper starting point for considering how to approach this preliminary issue. This is because, although this Court is not bound by a previous decision of the Royal Court, it will not depart from an earlier decision unless persuaded that it has been wrongly decided. As it was described in ***Willers v Joyce (No. 2)*** [2016] 3 WLR 534 (at para. 9), a first instance court, which in that case was a puisne judge sitting in the High Court of Justice, should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so. In my view, that approach operates in Guernsey in the same way as in England. Further, in any analysis of what the legal position in Guernsey is, the first consideration will always be to refer to existing Guernsey law. It is only in the absence of a satisfactory answer by reference to construing legislation or any previous domestic decisions that the need to consider what the law of Guernsey should be by turning to decisions from other jurisdictions arises. When that situation arises, it is important also to have regard to the extent to which that other jurisdiction's jurisprudence is of persuasive value, where those with a closer common legal heritage, particularly our neighbours, are likely to be viewed more favourably than those from further afield.

29. At para. 369 of the judgment in ***Jefcoate***, the Lieutenant Bailiff indicated that:

> "*With a little hesitation, I have come to the conclusion that even insofar as the rule of "no recovery for reflective loss" may be held to be a part of Guernsey law – and I am far from entirely satisfied that it needs or ought to be – that does not require it to be applied in this case, and I do not do so.*"

I take this to mean that the question as to whether the reflective loss principle forms part of Guernsey law remains an open one and the discussion in ***Jefcoate*** amounts to *obiter*. The discussion, though, is informative because this was a claim brought by a beneficiary of a discretionary trust for breach of trust, and so the current proceedings, involving an action by a current trustee against a former trustee for breach of trust, are sufficiently similar in substance to bear close analysis, especially when the other English cases on which the Defendant relies are generally further away from that factual matrix.

30. The first stage in the reasoning found in para. 370 leads to the conclusion in the following paragraph, before the Lieutenant Bailiff moved on to consider matters as if that conclusion were assumed to be incorrect:

"*370. I should say at this point that I am not fully convinced that the basis for applying the "no reflective loss" rule necessarily exists in the first place. The claim which I have upheld is against STC [the First Defendant] for negligent breach of trust in respect of the LS. The negligence happens to have brought about a sale of a property owned by HIL at an undervalue. However, that sale was actually implemented by the Second and Third Defendants acting as directors of HIL. They were under no separate duty to the LS, and STC's duty to guard the LS's individual interest is a significant part of the basis upon which I have held STC to be liable to the Plaintiff. A claim by HIL would prima facie be brought against its directors, and STC was not such a director. As I have already indicated, the directors of STC were accustomed to act in accordance with the expressed wishes, virtually amounting to instructions, of STC in the shape of Mr Schreibke, but I have heard no argument or analysis of the situation on the basis of the concept of STC as a "shadow director" of HIL and how far and to what extent that is part of Guernsey law. Whether, therefore, HIL would have a claim against STC in the situation in which I have found Stuart Jefcoate to have such a claim is not necessarily a foregone conclusion. Although I think it has been suggested in the English cases that the rule against reflective loss can apply even when the prospective defendants would not be the same persons, it again does not seem to me that this is entirely settled, and since the major justification for the rule against recovery of reflective loss appears to be that of double recovery against defendants, rather than potential unjust enrichment of the Plaintiff (see Gardner v Parker at [2004] 2 BCLC 566 at [49]) that again seems to make such a claim somewhat questionable. I note the reasons given by Neuberger LJ in Gardner v Parker for declining to depart from the reasoning of Shaker v Al-Bedrawi as a "recent clear, unanimous and fully-reasoned conclusion" of the same court in "a difficult and developing topic" (see 2004 2 BCLC 566 at [46]). These reasons, though, appear to me to owe much to a policy of promoting consistency where law is currently developing. That, though, is in England, and this is not (or more accurately not yet on this point) a consideration in Guernsey, which is free to develop its own rules and limits on any such doctrine as appear to be most appropriate.*

371. In principle, and untrammelled by authority, I would find the argument that a claim by a beneficiary against a trustee for breach of trust referable to a duty which is not identical with the duty of care imposed on a director to the relevant company, would be sufficiently different from the loss suffered by the company to mean that any principle of "no recovery for reflective loss" did not obviously apply. However, in the circumstances, I do not treat that as a reason for rejecting this argument at the first hurdle, and I proceed on the assumption that the facts surrounding the loss in this case prima facie fall within the qualifications for being classed as "reflective loss"."

This difference between the duties owed to each type of defendant in such a situation reflects the primary submission made by Advocate Davidson on behalf of the Plaintiff. What this passage indicates strongly is that, had it fallen for decision, the point would have been decided against recognising that the principle of reflective loss applied to a trusts claim.

31. Whilst the Court accepted that in English law the principle can extend to claims made by beneficiaries of trusts, by which it means that the principle applies to those who have interests in trusts that hold the shares in the same manner that claimants who hold shares directly are covered by it, "*in the many different factual situations which may require to be considered, it is the practical effect of the challenged claim, and whether in practical reality it corresponds to a claim by the company, which is regarded as the key factor, and not what the nature of the*

cause of action might be" (para. 372). The way the case is summarised (2014 GLR Note 10) clarifies that the Court was not convinced that any application of the rule in Guernsey should not apply to claims by beneficiaries of trusts. The approach described in *Jackson v Dear* (unreported, 26 March 2013) of looking to English law principles relating to companies because the notion of a company was imported into Guernsey law from English law "*does not require slavish following of English decisions as authoritative in all aspects*" (para. 373). This repeats what had been said in *Flightlease Holdings (Guernsey) Limited v Flightlease Ireland Limited* [2009-10] GLR 38, at para. 91.

32. The Court next proceeded, by reference to the policy reasons of avoiding double recovery and potential defeat or prejudice to the company's creditors, to explain the rationale underlying the reflective loss principle in para. 375:

> "*The "no reflective loss" rule is recognised to be exclusionary. It prevents a plaintiff who otherwise has a recognised good claim against a defendant from making any direct recovery from that defendant. It is accepted, even in the English authorities, that it should therefore be applied cautiously, and only in the cases where it ought, according to its rationale, clearly to be invoked, and I accept Advocate Lund's submission to this effect. In my judgment, therefore, the proper approach must be to have close regard to the principles behind the rule to see whether, in any particular case, Guernsey law also must view that principle as being applicable. This is not to suggest that the application of the rule is a matter of discretion in the sense of a judgment as to reasonableness, but merely that the precise parameters within which it applies may justifiably be found to differ in Guernsey law from English law. The rule is stated in the highest English authority, Johnson v Gore Wood to be one of "policy": see Lord Millett, at [62]. This suggests, in any event, that in an appropriate case it may cede to any other policy which the court judges ought to carry greater weight. In fact, it appears to me that this is implicitly recognised in the judgment of Neuberger LJ in Gardner v Parker (supra) as it accepted that the rule can be "disapplied" in appropriate circumstances.*"

This ability to reach a different outcome from the position as it might pertain in England and Wales is also relied upon by Advocate Davidson. The facts of the present case put these issues into even sharper focus because it is not solely about whether one set of proceedings before this Court should be excluded in favour of another set of proceedings seeking relief from this Court. The inter-jurisdictional nature of the proceedings here and in the BVI add a further element to the considerations of what policy approach is most appropriate. In *Jefcoate*, the Court acknowledged that the claim available to HIL was little more than a theoretical possibility because that company no longer existed, having been dissolved, which meant that there was no realistic prospect of needing to guard against any double recovery. Further, that dissolution rendered any alternative remedy of pursuing a derivative action as effectively being unavailable.

33. The Court moved on to address a decision of the Royal Court of Jersey, *Freeman v Ansbacher* 2009 JLR 1. That decision set out why it was strongly arguable that the reflective loss principle did not apply in Jersey to the maladministration of the affairs of a company which is wholly-owned by the trust and run by the trustee. The Lieutenant Bailiff considered "*that the same considerations which impelled the learned Deputy Bailiff of Jersey (as he then was) to that view, apply similarly to Guernsey*" (para. 381). However, the conclusions of the Court on this issue (at para. 383) were:

> "*Whilst, as mentioned, I respectfully find the arguments advanced by Birt DB in Freeman v Ansbacher to be very attractive and persuasive, I am therefore cautious about applying them to this case as a general principle of law. I therefore prefer to rest my decision on the first, and narrower, basis set out above, namely that, neither of*

the two policy reasons for applying this exclusionary rule in fact operate on the facts of this case, that it is a rule of policy rather than a rule of legal principle, and that otherwise the Plaintiff is, in practical terms, without any remedy, and was so at the commencement of the action."

34. From the approach that was taken in the only domestic case to address the principle of reflective loss, it is easy to see why Advocate Davidson encourages this Court to follow it. First, there are the general doubts expressed as to the desirability of recognising that reflective loss operates in Guernsey law. However, even if that broadest submission were to fail, there are more specific doubts expressed as to it operating in the context of a discretionary trust with a wholly-owned company involved. However, Advocate Gray seeks to meet those concerns by reference first to the desirability of Guernsey law recognising the principle, as shown by what was set out in the *Roundtable on Freedom of Investment 18: Summary of Roundtable Discussions by the OECD Secretariat* (20 March 2013):

> "*The Roundtable recognised that all of the advanced national law systems surveyed to date, including both leading common law and civil law systems, generally bar shareholder claims for reflective loss due notably to concerns about consistency raised by such claims … The general no reflective loss principle is also applied in customary international law and under the European Convention on Human Rights.*"

She further submits that, because the way the reflective loss principle has been established under English law as coherent, logical and consistent, it would be preferable to find that it operates in a similar fashion under Guernsey law, where the underlying policy considerations should be embraced rather than rejected. Accordingly, the reasoning given in the ***Jefcoate*** case should not be followed, because to do so would bring Guernsey law in line with New Zealand law (as set out in ***Christensen v Scott*** [1996] 1 NZLR 273), which has been criticised. It would also lead to conclusions similar to those in ***Walker v Stones*** [2001] QB 902, which have also been rejected since. Finally, the reasoning in ***Jefcoate*** led to the following commentary in para. 39-040 in the Fourth Supplement to *Lewin on Trusts* (19th ed.):

> "*The rule was said not to apply in Guernsey in circumstances where the company had been struck off the register of companies, such that the policy preventing double recovery did not apply … We do not consider, in light of the authorities considered in § 39-041, that this represents English law. The avoidance of double recovery is a justification for the rule but it is not disapplied merely because the risk of double recovery does not exist on the facts or, as in Jefcoate, where the judge considered it to be vanishingly small.*"

Impact of the *Marex* decision

35. Whatever the position previously as it might be found to operate in Guernsey, English law on reflective loss has now developed as a result of the Supreme Court's decision in the ***Marex*** case. On the basis that the Defendant asks this Court to determine that the Guernsey law approach to reflective loss should properly mirror that in English law, the narrowing of the position in English law needs to be borne in mind. Moreover, the fact that this decision was reached by a majority of four Justices to three Justices, where the minority would have ruled that the principle should no longer apply at all, means that this case requires careful analysis, which is why supplementary submissions in respect of it were invited.

36. The root of the reflective loss principle remains the same. It is found in ***Prudential Assurance Co. Ltd v Newman Industries Ltd (No. 2)*** [1982] 1 Ch 204. The passage to which Advocate Gray has referred from the judgment of all the members of the court begins towards the bottom of page 222:

> "*It is also correct that if directors convene a meeting on the basis of a fraudulent circular, a shareholder will have a right of action to recover any loss which he has been personally caused in consequence of the fraudulent circular; this might include the expense of attending the meeting. But what he 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 on 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. A simple illustration will prove the logic of this approach. Suppose that the sole asset of a company is a cash box containing £100,000. The company has an issued share capital of 100 shares, of which 99 are held by the plaintiff. The plaintiff holds the key of the cash box. The defendant by fraudulent misrepresentation persuades the plaintiff to part with the key. The defendant then robs the company of all its money. The effect of the fraud and the subsequent robbery, assuming that the defendant successfully flees with his plunder, is (i) to denude the company of all its assets; and (ii) to reduce the sale value of the plaintiff's shares from a figure approaching £100,000 to nil. There are two wrongs., the deceit practised on the plaintiff and the robbery of the company. But the deceit on the plaintiff causes the plaintiff no loss which is separate and distinct from the loss to the company. The deceit was merely a step in the robbery. The plaintiff obviously cannot recover personally some £100,000 damages in addition to the £100,000 damages recoverable by the company.*"

37. Thereafter, the principle of reflective loss was dealt with in the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1. As a result of para. 67 of the majority judgment in *Marex* delivered by Lord Reed PSC, reliance can now only be placed on what Lord Bingham said in his speech in that case, to which I will return:

> "*In summary, Johnson gives authoritative support to the decision in Prudential that a shareholder is normally unable to sue for the recovery of a diminution in the value of his shareholding or in the distributions he receives as a shareholder, which flows from loss suffered by the company, for the recovery of which it has a cause of action, even if it has declined or failed to make good that loss. Lord Bingham's speech is consistent with the reasoning in Prudential. On the other hand, the reasoning on the other speeches, especially that of Lord Millett, departs from the reasoning in Prudential and should not be followed.*"

Further, having considered the subsequent cases which had relied on what was in Lord Millett's speech, Lord Reed summarised the current position in para. 89:

> "*I would therefore reaffirm the approach adopted in Prudential and by Lord Bingham in Johnson, and depart from the reasoning in the other speeches in that case, and in later authorities, so far as it is inconsistent with the foregoing. It follows that Giles v Rhind, Perry v Day and Gardner v Parker were wrongly decided. The rule in Prudential is limited to claims by shareholders that, as a result of actionable loss suffered by their company, the value of their shares, or of the distributions they receive as shareholders, has been diminished. Other claims, whether by shareholders or anyone else, should be dealt with in the ordinary way.*"

38. The supplemental submissions on behalf of the Defendant point out that the narrowing of the principle does not directly affect the basis on which its *exception de fond* is advanced. More importantly, the majority view in the Supreme Court has confirmed that the principle continues to operate. ***Marex*** was a case involving a creditor who was not a shareholder and so is different from a case involving a shareholder. Although ***Gardner v Parker*** [2004] 2 BCLC 554 is said to be wrongly decided, there were three questions determined in that case and it was only the second and third questions that have been held to be wrongly decided. The first question relating to whether the principle applies where the wrongdoing concerned was a breach of fiduciary duty rather than a breach of a common law duty has been left undisturbed and rests on the earlier decision of ***Shaker v Al-Bedrawi*** [2003] 1 BCLC 157, on which the Defendant relies. Because that decision remains good law as part of the overall English law reflective loss principle, it is capable of being adopted as part of Guernsey law in the present case, which is the outcome for which the Defendant argues. In other words, the decision in ***Marex*** has not undermined the submissions made on behalf of the Defendant.

39. Advocate Gray then raises the possibility that the case management basis on which the minority view has been put, and to which Lord Hodge DPSC has also aligned himself in his short concurring judgment, means that, even if the principle should not be applied to uphold the Defendant's *exception de fond*, it makes sense to stay the Plaintiff's action to allow the proceedings in the BVI to run their course. In a subsequent e-mail sent by Advocate Davidson for my attention, he notes that this is a fresh argument falling outside the terms of the agreed preliminary issue. I will deal with this issue later in this judgment.

40. The supplemental submissions on behalf of the Plaintiff also suggest that the decision in ***Marex*** is not directly relevant to the issues falling to be determined in the present case. That is because the Plaintiff's primary contention is that the principle should not apply where the two sets of proceedings are against different defendants. Advocate Davidson suggests that the analysis given in Lord Reed's judgment is such that it supports the Plaintiff's primary contention. Indeed, none of the judgments given deal with the position where the claim that would be barred through the reflective loss principle arising against a different wrongdoer. By reference to para. 89 of the majority judgment, to which reference has just been made, the Plaintiff's action does not fall within the description given by Lord Reed. The Plaintiff's claim is brought on behalf of the beneficiaries of a trust for the reconstitution of the trust fund, where those beneficiaries are not, even indirectly, shareholders in SOIL. This means that the Court should avoid the distraction of the Plaintiff indirectly owning the shares in SOIL. The Plaintiff's claim is not being brought as a shareholder in that right, but rather on behalf of the beneficiaries, any one of whom could have brought a claim against the Defendant. Advocate Davidson also highlights the short concurring judgment from Lord Hodge as having emphasised that the principle is a rule of company law. Finally, developing the submissions made about the approach in this jurisdiction represented by the ***Jefcoate*** case, he suggests that there is much force on what the minority has to say about introducing as a matter of policy a "*bright line rule*" otherwise precluding what would be a valid cause of action (para. 192).

Application of principle

41. I will start my consideration of the question of whether any reflective loss principle should be recognised in Guernsey law by putting into context the analysis undertaken in the ***Marex*** judgments. Whilst this is a decision of the highest authority, the fact that the Justices split four to three makes the possibility of it being open to this Court to prefer the approach set out in the minority judgment of Lord Sales, with whom Lady Hale and Lord Kitchin agreed, rather than adopting the majority judgment of Lord Reed, with which Lady Black and Lord Lloyd-Jones

agreed and to which Lord Hodge aligned himself, greater than would be the case were they to have been unanimous. However, I am persuaded that the majority judgment sets out an approach to this issue of company law in a manner that can properly be adopted as part of Guernsey law.

42. I find it helpful to cite extensively from the judgments in order to explain why that is so and will begin by setting out the introductory remarks from Lord Reed's judgment because it explains why the question arises (at para. 2):

> "*It is not uncommon for two persons, A and B, to suffer loss as a result of the conduct of a third person, C. If that conduct was in breach of an obligation owed by C to A, then A will in principle have a cause of action against C. If the conduct was also in breach of an obligation owed by C to B, then B will also have a cause of action against C. A and B are both at liberty to sue C whenever they please, subject to rules of limitation and prescription, and C is normally liable to compensate them both for the loss which they have suffered. If A obtains and enforces a pecuniary award against C, and some time later B also seeks a similar award but C is unable to pay it, then in principle that is B's misfortune. However, where C is insolvent at the time when the first claim is made against him, the law of insolvency protects the position of both A and B by imposing a regime for the distribution of C's assets among his creditors which ensures that they are treated equally, after the claims of secured and preferred creditors have been met.*"

43. I take the view that this accurately describes the position in Guernsey law as a general statement of principle. Further, what then follows by way of elucidation of the principle of avoiding double recovery and how that developed into the ruling in the ***Prudential*** case equally satisfies me that there is a sound basis for adopting the same approach to a company law claim in this jurisdiction:

> "*3. The position can become more complicated where A and B have concurrent claims in respect of losses which are inter-related in such a way that a payment by C to one of them will have the practical effect of remedying the loss suffered by the other. The general position in situations of that kind was described by Brandon J in The Halcyon Skies [1977] QB 14, 32:*
>
> > *"There is no reason, as a matter of law, why two different persons should not have concurrent rights of recovery, based on different causes of action, in respect of what is in substance the same debt. The Court will not allow double recovery or, in a case of insolvency, double proof against the insolvent estate: The Liverpool (No 2) [1963] P 64. Subject to this, however, either of the two persons is entitled to enforce his right independently of the other."*
>
> *4. The principle that double recovery should be avoided does not prevent a claimant from bringing proceedings for the recovery of his loss. But the court will have to consider how to avoid double recovery in situations where the issue is properly before it. Procedurally, that may occur in a number of ways. For example, both claimants may bring proceedings concurrently, or the wrongdoer may raise the issue by way of defence to proceedings brought by one claimant, and join the other potential claimant as a defendant, or the court may itself direct the claimant to notify the other potential claimant so that he has an opportunity to intervene (as explained in In re Gerald Cooper Chemicals Ltd [1978] Ch 262, 268-269).*
>
> *5. The principle that double recovery should be avoided does not deflect the law from compensating both claimants, but affects the remedial route by which the law achieves that objective. There are a number of ways in which the law can avoid double*

recovery, or double proof in insolvency, where concurrent rights of recovery might otherwise have that result. In some circumstances, priority is given to the cause of action held by one person, and the claim of the other person is excluded so far as may be necessary to avoid double recovery. The rationale in such cases is that, by directly achieving its remedial objective in respect of the person who is permitted to bring the prior claim, the law indirectly achieves that objective in respect of the person whose claim is excluded.

6. That was the approach adopted, for example, in the decision cited by Brandon J, The Liverpool (No 2) [1963] P 64. In that case, a port authority sought to prove against an insolvent fund, established to meet the liabilities of the owners of one vessel, the Liverpool, for the cost of clearing the wreck of another, the Ousel, which had been damaged in a collision for which the Liverpool was responsible. The authority also made a statutory claim for the same cost against the owners of the Ousel, and they in turn sought to prove for that amount against the fund. The Court of Appeal held that the claim of the authority against the fund should be given priority over that of the owners of the Ousel, since the authority was actually out of pocket, while the claim of the owners of the Ousel against the fund should be disallowed. It was observed that it would be consonant with justice and good sense that, in the event that the authority sought to recover also from the owners of the Ousel (for any balance remaining after it had received a dividend out of the fund), it would have to give credit for the amount that it had already recovered. In that way, the owners of the Ousel benefited from the authority's recovery from the fund to the same extent as they would have done if their claim against the fund had been allowed. A similar approach, in the context of concurrent claims arising out of the breach of a construction contract, can be seen in Alfred McAlpine Construction Ltd v Panatown Ltd [2001] 1 AC 518, 595.

7. There are also circumstances in which the law finds other means of avoiding double recovery, such as subrogation (as discussed, for example, in Gould v Vaggelas [1984] HCA 68; (1984) 157 CLR 215), or the imposition on one claimant of an obligation to account to the other out of the damages which the former has received (as, for example, in O'Sullivan v Williams [1992] 3 All ER 385). The most suitable approach to adopt in a particular case will depend upon its circumstances.

8. This appeal is concerned with a particular type of situation in which two persons, A and B, suffer loss as a result of the conduct of a third person, C. The situation in question is one in which A is a company, B is a creditor of that company, and B's loss is consequential upon the loss suffered by A, because C's conduct has rendered A insolvent and unable to pay its debts to B.

9. The fact that a claim lies at the instance of a company rather than a natural person, or some other kind of legal entity, does not in itself affect the claimant's entitlement to be compensated for wrongs done to it. Nor does it usually affect the rights of other persons, legal or natural, with concurrent claims. There is, however, one highly specific exception to that general rule. It was decided in the case of Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204 that a shareholder cannot bring a claim in respect of a diminution in the value of his shareholding, or a reduction in the distributions which he receives by virtue of his shareholding, which is merely the result of a loss suffered by the company in consequence of a wrong done to it by the defendant, even if the defendant's conduct also involved the commission of a wrong against the shareholder, and even if no proceedings have been brought by the company. As appears from that summary, the decision in Prudential establishes a rule of company law, applying specifically to companies and their shareholders in the particular circumstances described, and having no wider ambit.

> *10. The rule in Prudential, as I shall refer to it, is distinct from the general principle of the law of damages that double recovery should be avoided. In particular, one consequence of the rule is that, where it applies, the shareholder's claim against the wrongdoer is excluded even if the company does not pursue its own right of action, and there is accordingly no risk of double recovery. That aspect of the rule is understandable on the basis of the reasoning in Prudential, since its rationale is that, where it applies, the shareholder does not suffer a loss which is recognised in law as having an existence distinct from the company's loss. On that basis, a claim by the shareholder is barred by the principle of company law known as the rule in Foss v Harbottle (1843) 2 Hare 461: a rule which (put shortly) states that the only person who can seek relief for an injury done to a company, where the company has a cause of action, is the company itself.*"

44. Pausing at this point, given that the origins of Guernsey company law are found in developments in English company law, where the statutes have tended to be reviewed and, to the extent applicable, then enacted domestically, albeit with some adjustments to suit local circumstances, I share the view expressed in various other cases in this Court that states that regard can sensibly be had to English authority to see whether developments in that jurisdiction are appropriate in Guernsey. The rule in *Foss v Harbottle* is, so far as I understand it, accepted as part of domestic law. As Lord Reed further explains in para. 51 of his judgment, this position in which a shareholder stands in relation to the company is a critical part of the overall explanation. As a consequence, the extension of that rule into the reflective loss principle as stated in the *Prudential* case is likely to be an uncontroversial development, which is why I take as my starting point that such a principle can properly be recognised as forming part of Guernsey's domestic law. The more pertinent question is now whether Guernsey law ought to recognise any principle wider than that now stated in the *Marex* case or even whether there is any further narrowing in the context of the present *exception de fond*.

45. Lord Reed's judgment spells out the extent of the principle arising from the *Prudential* case in a manner that shows why it should be strictly confined to the rule that the case establishes and to be applied no further than that. For example, the summary he had set out in para. 9 is further explained in para. 28:

> "*As I understand its reasoning, what the court meant, put shortly, was that where a company suffers actionable loss, and that loss results in a fall in the value of its shares (or in its distributions), the fall in share value (or in distributions) is not a loss which the law recognises as being separate and distinct from the loss sustained by the company. It is for that reason that it does not give rise to an independent claim to damages on the part of the shareholders.*"

In my opinion, the simplicity of this explanation deserves the level of repetition I have afforded it in this judgment because, each time it is put in this fashion, it becomes clear that the principle has no application to the present case. This is further demonstrated by the references made as to why the principle has to be confined in this fashion.

46. The analysis of the majority looks at the nature of a shareholding:

> "*31. The starting point is the nature of a share, and the attributes which render it valuable. A share is not a proportionate part of a company's assets: Short v Treasury Comrs. Nor does it confer on the shareholder any legal or equitable interest in the company's assets: Macaura v Northern Assurance Co Ltd. As the court stated in Prudential, a share is a right of participation in the company on the terms of the articles of association. The articles normally confer on a shareholder a number of rights, including a right to vote on resolutions at general meetings, a right to participate in*

the distribution which the company makes out of its profits, and a right to share in surplus assets in the event of its winding up. ...

33. Considering, then, the situation where a company suffers actionable loss as the result of wrongdoing, the company then acquires a right of action. If the company's loss results (or is claimed to result) in a fall in the value of its shares, then, but for the rule in Prudential, the shareholder would simultaneously acquire a concurrent right of action. The purpose of an award of damages to the company is to restore it to the position in which it would have been if the wrongdoing had not occurred. In circumstances where an award which restores the company's position to what it would have been if the wrongdoing had not occurred would also restore the value of the shares, the only remedy which the law would require to provide, in order to achieve its remedial objectives of compensating both the company and its shareholders, would be an award of damages to the company. For the shareholders to have a personal right of action, in addition to the company's right of action, would in those circumstances exceed what was necessary for the law to achieve those objectives, and would give rise to a problem of double recovery. Most of the cases in which the rule in Prudential had been applied (but not Prudential itself) have concerned small private companies, where those circumstances are likely to have existed. As I have explained, however, there are also circumstances where there may not be a close correlation between the company's loss and any fall in share value. The avoidance of double recovery cannot, therefore, be sufficient in itself to justify the rule in Prudential.

34. That conclusion is also supported by another point. What if the company fails to pursue a right of action which, in the opinion of the shareholder, ought to be pursued, or compromises its claim for an amount which, in the opinion of a shareholder, is less than its full value? If that opinion is shared by a majority of the shareholders, then the company's articles will normally enable them to direct the company's course of action by passing a suitable resolution at a general meeting. Even if the shareholder finds himself in a minority, he has a variety of remedies available to him, including the bringing of a derivative action on the company's behalf, equitable relief from unfairly prejudicial conduct, or a winding up on the "just and equitable" ground if (put shortly) those in control of the company are abusing their powers."

47. In the context of the proceedings that have been commenced in the BVI by SOIL, these are precisely the type of proceedings available to a minority shareholder seeking to restore the position within PIL to what it argues it should have been but for the actions of others which have affected its position within that company. In many respects, what SOIL is seeking to do in those proceedings is to rely on the terms of the suite of agreements which were structured to create deadlock in the absence of agreement. This strikes me as being different from the type of situation being described in Lord Reed's judgment where there are concurrent claims by a company and a shareholder in that company where the rule derived from the ***Prudential*** case leaves the company to pursue the wrongdoer to the exclusion of the shareholder. If it is said that the Plaintiff, holding all the shares in Shallan Group Holdings, which in turn is the ultimate beneficial owner of SOIL, which is the company pursuing those proceedings, thereby prevents the Plaintiff from having any actionable claim in the current proceedings against an entirely different alleged wrongdoer, it is difficult to understand how the principle, as described, can be said to operate within the company law context. There may be overlaps between what is claimable on the one hand by the Plaintiff and what is claimable by SOIL, but double recovery is not in itself sufficient to justify a rule excluding the Plaintiff from pursuing the Defendant. Because the BVI proceedings are unfair prejudice proceedings, these are described as constituting another remedy available to a shareholder rather than being dependent on the majority of the shareholders causing the company in which they all hold shares to pursue the alleged wrongdoer, effectively on their behalves. This is not a situation in which the

shareholder's claim against the wrongdoer is simply not to be recognised because of the existence of a concurrent claim vesting in the company.

48. Turning to the way in which Lord Reed deals with *Johnson v Gore Wood & Co*, there is approval of the principles set out in the speech of Lord Bingham (at page 35):

> "*(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 that 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. So much is clear from Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204, particularly at pp 222-223,Heron International [ie, Heron International Ltd v Lord Grade [1983] BCLC 244], particularly at pp 261-262, George Fisher [ie, George Fischer (Great Britain) Ltd v Multi Construction Ltd [1995] 1 BCLC 260], particularly at pp 266 and 270-271, Gerber, [ie, Gerber Garment Technology Inc v Lectra Systems Ltd [1997] RPC 443] and Stein v Blake [ie, Stein v Blake [1998] 1 All ER 724], particularly at pp 726-729. (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. This is supported by Lee v Sheard [1956] 1 QB 192, 195-196, George Fischer and Gerber. (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 a breach of 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. I take this to be the effect of Lee v Sheard, at pp 195-196, Heron International, particularly at p 262, R P Howard [ie, R P Howard Ltd v Woodman Matthews & Co [1983] BCLC 117], particularly at p 123, Gerber and Stein v Blake, particularly at p 726. I do not think the observations of Leggatt LJ in Barings [ie, Barings plc v Coopers & Lybrand [1997] 1 BCLC 427] at p 435B and of the Court of Appeal of New Zealand in Christensen v Scott at p 280, lines 25-35, can be reconciled with this statement of principle.*"

49. However, the speech of Lord Millett is not treated as favourably because it is described as "*the origin of the expansion of the supposed "reflective loss" principle in the subsequent case law*". Those comments were based on the flawed premise that a share "*represents a proportionate part of the company's net assets, and if these are depleted the diminution in its assets will be reflected in the diminution in the value of the shares*" (at page 62 in the *Johnson* case), which led to the statement:

> "*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 … 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.*"

50. At para. 52 of his judgment, Lord Reed proceeds to show why this approach was a departure from the *Prudential* rule:

> "*One problem with reasoning based on the avoidance of double recovery is that the principle is one of the law of damages. It does not deny the existence of the*

shareholder's loss, as the rule in Prudential does, where the loss falls within its ambit, but on the contrary is premised on the recognition of that loss. Applying an approach based on the avoidance of double recovery, it is therefore possible for a shareholder to bring a personal action based on a loss which would fall within the ambit of the decision in Prudential, and to obtain a remedy which that decision would have barred to him, provided the relief that he seeks is not an award of damages in his own favour. This device has been exploited in a number of cases subsequent to Johnson, in ways which circumvent the rule of Foss v Harbottle: a rule which is not confined to actions for damages but also applies to other remedies …".

Having then considered the remainder of the speeches in *Johnson*, Lord Reed concluded (at para. 67) that only the speech of Lord Bingham is consistent with the *Prudential* rule and the other speeches, especially that of Lord Millett, should not be followed. On the basis that this forms the current position in English law, on which Advocate Gray has based the Defendant's case, this ought to be treated as being the height of the case being advanced.

51. The expansion of the situations in which the reflective loss principle has been found applicable arose through placing reliance on the speech of Lord Millett in the *Johnson* case, as further explained in para. 77 by Lord Reed:

> "*The supposed "reflective loss" principle has been treated as being based primarily on the avoidance of double recovery and the protection of a company's unsecured creditors, and as being applicable in all situations where there are concurrent claims and one of the claimants is a company.*"

Marex was the first case in which the principle was extended to a claimant which is purely a creditor of a company and the Supreme Court has now ruled that such an extension is wholly unwarranted. Drawing the threads together, the basic proposition was summarised from para. 79:

> "*… it is necessary to distinguish between (1) cases where claims are brought by a shareholder in respect of loss 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.*"

52. Those cases falling within the first description are barred to the shareholder for the reasons already given. The rule in *Foss v Harbottle* means that it is only the company which has a cause of action in respect of its loss. As explained further in para. 83:

> "*The critical point is that the shareholder has not suffered a loss which is regarded by the law as being separate and distinct from the company's loss, and therefore has no claim to recover it. As a shareholder (and unlike a creditor or an employee), he does, however, have a variety of other rights which may be relevant in a context of this kind, including the right to bring a derivative claim to enforce the company's rights if the relevant conditions are met, and the right to seek relief in respect of unfairly prejudicial conduct of the company's affairs.*"

However, the position is different in the second type of case because the arguments applicable to shareholders have no application. There may be some risk of double recovery, but how to deal with the means by which that will be avoided will depend on the circumstances of the case. The exclusionary rule based on *Foss v Harbottle* does not apply and there is nothing comparable

as to whether the company's claim should be given priority. The ***Prudential*** principle is confined to the first situation and does not extend to the second situation.

53. For the sake of completeness, I will cover the approach of Lord Sales on behalf of the minority view, albeit more briefly. Rather than accepting, but limiting the rule derived from the ***Prudential*** case, he explains why it ought not to be followed at all (in para. 194):

> "*In summary, in my respectful opinion the reasoning in Johnson, in so far as it endorses the reflective loss principle as a principle debarring shareholders from recovery of personal loss which is different from the loss suffered by the company, ought not to be followed. The reasoning of Lords Bingham, Goff and Millett purports to be based on the logic in the Prudential case, which on critical examination is not sustainable. The reasoning of Lord Hutton relies on a policy-based bright line exclusionary rule which is not justified. The reasoning of Lord Cooke is suspended uneasily between the majority and Lord Hutton. Lord Cooke endorsed the decision in Prudential (and in my opinion was right to do so as to the result: para 148 above), albeit he was unwilling to disclaim the judgment in Christensen v Scott (even though the reasoning in the two cases cannot be reconciled, a fact which he was not prepared to acknowledge); and to the extent that, like Lord Hutton, he emphasised that there should not be double recovery and that the company's other shareholders and creditors should be protected, in my view he gave insufficient attention to the ways in which the law already allowed for the risk of double recovery to be taken into account and did not explain why the interests of the company's other shareholders and creditors should take priority over the interests of the claimant shareholder suing to vindicate a personal cause of action.*"

The reference to that earlier para. 148 dealing with the decision in the ***Prudential*** case shows why Lord Sales agrees with the outcome but not the reasoning:

> "*In my view, the Court of Appeal in Prudential was right to say that Prudential had no good cause of action in respect of the diminution in value of its shares in Newman; but this was for a different, and narrower reason than the one it gave. As explained above, at the hearing in the Court of Appeal Prudential's only argument was that it was entitled to say that it sustained damage in relation to the value of its shares equivalent to that part of the loss suffered by Newman which was proportionate to its shareholding in Newman. It did not attempt to establish that there had in fact been a fall in the market value of its shareholding and had adduced no evidence to that effect. On the case as presented by Prudential, the Court of Appeal was right to hold that Prudential had failed to show that it had suffered any loss which was different from the loss suffered by Newman. The distinction drawn by the court between Prudential's personal claim and the claim a shareholder might have to recover loss he has personally been caused when acting on his own behalf in consequence of a fraudulent circular, such as the expense of attending the meeting, is a valid one. By contrast, by reason of the way in which it presented its personal claim, Prudential had failed to show that it had suffered any loss in respect of the value of its shareholding and so could not establish that it had any cause of action. Its attempt to say that it had suffered loss equivalent to a proportionate share of Newman's loss was rightly dismissed by the Court of Appeal. That loss, on which Prudential sought to rely for the purposes of its personal claim, was not loss in respect of which it had any cause of action. The only person with a cause of action in relation to that loss was the company, Newman.*"

54. The response of Lord Sales to the issue as to what happens where the actions of a third party defendant constitute two wrongs, the first as against the company and the second as against the shareholder, is as follows:

"*155. As a matter of basic justice, the defendant ought not to be liable twice for the same loss, once to a shareholder with a personal claim and again to the company. But in the situation under review the wrongs and also the losses suffered by the claimant shareholder and the company respectively are different. The claimant and the company each have distinct causes of action of their own. The company can recover for its losses, eg depletion of its assets stolen by the defendant and consequential loss of profits. The claimant can recover for diminution in the value of his shares, which is a function of how the market values them, and for loss of dividends he might have received but for the wrong in relation to himself. These losses may have some relationship to the losses suffered by the company, but are not the same as those losses. The loss suffered by the company as a result of theft of its assets may represent a substantial loss of the working capital it needs to generate future profits; and if so, that may have an effect on the value which the market places on shares in the company (but, contrary to what is said to be demonstrated by the cash box example, the loss will be different from that suffered by the shareholder and there is unlikely to be direct correspondence between what the company has lost and the reduction in the value of the shareholder's shares). On the other hand, the loss suffered by the company might be insignificant in terms of any effect on its ability to generate profits in future, in which case the impact on share value might be practically nothing.*

156. If, after the wrongdoing of the defendant, the company is still trading and the claimant shareholder has not sold his shares, he retains shares of some worth in the market which reflects, among other things, the value of the company's own claims against the defendant. In my view, the claimant would then be entitled to claim damages in respect of the reduced market value of his shares due to the wrong against him committed by the defendant (by the means of or in parallel with his commission of a wrong against the company), ie their market value absent the wrong done to the company (and to the shareholder) less their actual current market value, reflecting among other things the company's claims against the defendant. Accordingly, it can be said that in such a case due allowance in respect of the company's claims against the defendant is reflected in what is recoverable by the claimant. It does not, then, seem to me to be unjust to allow both the claimant and the company to pursue their separate claims for their different losses against the defendant."

55. It is apparent that Lord Sales was not attracted by what he described as "*a crude bright line rule to exclude a shareholder's claim*" (para. 126). Drawing on similar basic principles to those already set out by Lord Reed and quoted above, even if there are overlapping claims against a third party defendant, "*there is scope at trial (if an action is brought) or in the insolvency process for the relationship between those claims to be worked out in a practical way which secures overall justice for all those parties.*" He further suggested (at para. 132) that there had been something akin to a version of judicial Chinese whispers as the language used in some of the subsequent cases broadened the principle beyond its origins:

"*In discussing the authorities, it is relevant to call attention to what I regard as unhelpfully slippery and imprecise language which has been used in them. Judges have talked about loss suffered by a shareholder in his personal capacity which "reflects" the loss suffered by a company. This is a rather deceptive word. Where the company suffers loss and this affects the value of shares in it, there is obviously some relationship between the loss suffered by the company and the loss suffered by a shareholder, so that in a loose sense it might be said that the latter loss reflects the former. But the loss suffered by the shareholder is not <u>the same as</u> the loss suffered by the company. There is no necessary, direct correlation between the two. The loss suffered by the shareholder does not reflect the loss suffered by the company, in the stricter sense of there being a one-to-one correspondence between them. These different senses of the word "reflects" have been conflated. A similar point may be made about references*

in the cases to whether the loss suffered by the shareholder is "separate and distinct" from the loss suffered by the company. In a loose sense of that phrase, it is not; but in a strict sense, it may be."

56. Given the previous position in Guernsey's jurisprudence, as found in the ***Jefcoate*** case, it would be possible to conceive of an outcome where this minority judgment could find favour. There is no absolute requirement, in the sense of this Court being bound by a previous decision, for the reflective loss principle to be adopted. I have set out in more detail than might strictly be necessary for the determination of the Defendant's *exception de fond* why I am inclined to find that the principle should be recognised as part of Guernsey law. Whether it applies to this particular case is, of course, another matter. However, I find myself agreeing with the approach set out in the majority view in ***Marex*** rather than the minority view, so I will not simply dismiss the Defendant's arguments on the basis that the reflective loss principle does not exist as a matter of Guernsey law.

57. In doing so, I adopt how Lord Hodge described the rule from the ***Prudential*** case as being "*a principled development of company law*". As such, I am satisfied that it has a place within Guernsey law, but that it is appropriately circumscribed as set out in the majority view. Before leaving the judgments in this case, I have further noted what Lord Hodge also explained at para. 103:

> "*A shareholding in a company confers a right of participation in the affairs of the company in accordance with the terms of the company's articles of association, often in the form of voting on resolutions at general meetings, and it entitles the shareholder to ensure that other shareholders comply with the rules imposed on them by the articles of association: Companies Act 2006 ("the 2006 Act") section 33(1). A shareholder in an unfair prejudice application under section 994 of the 2006 Act can also invoke equity to protect it from unfairness by restraining the exercise by another shareholder of its legal rights which are contrary to the understandings reached or promises made: In re A Company (No 00709 of 1992) (O'Neill v Phillips) [1999] 1 WLR 1092. It is a significant principle of company law that, in the absence of agreement to the contrary such as that expressed in the terms of a share issue, shares confer the same rights and impose the same liabilities: see for example section 284 of the 2006 Act and Birch v Cropper (1889) 14 App Cas 525, 543 per Lord MacNaghten.*"

58. This passage offers a further example of how proceedings under whatever provision may exist for claiming unfair prejudice takes those proceedings outside the basic situation where the shareholder has a claim against the company in which it is a shareholder. In the present case, the Defendant has to argue that the action of the corporate shareholder, SOIL, precludes the shareholder in that company, which is ultimately the trustee, from bringing any separate action at all if the loss involved could be said to reflect that being pursued in those unfair prejudice proceedings. Whilst on one level this might be regarded as being a situation where a shareholder's claim is capable of being barred, the causes of action of each are quite distinct and there appears to be no real overlap between the claims. To the extent that there might be any form of double recovery, that is something that could, as necessary, be dealt with in another way. This is not a case where the principles on which Advocate Gray, on behalf of the Defendant, has relied are applicable.

Reliance on other cases

59. Those principles were extracted by her at para. 44 of her Skeleton Argument. The first of those principles is not contentious, because it reflects the rule in ***Foss v Harbottle***. The second is the broader version of the principle on reflective loss which has now been narrowed to the extent that it relies on speeches in the ***Johnson*** case other than that of Lord Bingham. Similarly, the purported extension in the third of those principles to other payments which the shareholder

might have obtained from the company but for the wrong done to the company over and above the diminution in the value of the shareholding or the loss of dividends. To the extent that the rule applies, the fourth principle still operates, because it is for the company to bring its claim rather than for a shareholder to do so. The second part of the fifth principle and the sixth principle, referring to the extension to the rule and the exceptions to it, are now of no relevance because the extension of the principle in ***Johnson*** and through subsequent cases has been disapproved. It is really the first part of the fifth principle that needs to be addressed, because it relies on *Gardner v Parker*, referring to where the shareholder has a different type of cause of action to the company.

60. Advocate Gray continues to rely on what Neuberger LJ set out in *Gardner v Parker*, in particular from para. 49:

> "*[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.*
>
> *[50] As Mr Peter Crampin QC, who appears with Mr Ulick Staunton for Mr Parker, points out, the present facts arguably give rise to rather a stronger candidate than those in Shaker's case for the application of the rule against reflective loss. Here, the nature of the claim by the company, Scoutvale, against the defendant, Mr Parker, is very similar in nature to that by the shareholder, BDC, against the same defendant. In each case, the claim is for breach of fiduciary duty by a director (in one case as a director of the company, in the other as a director of the shareholder) in permitting an asset of the company to be transferred at a significant undervalue to a third party in which the defendant had an interest. On the other hand, there was a greater difference between the nature of the claim in Shaker's case, namely a beneficiary's claim against the defendant as a trustee of the settlement, and a company's claim against the defendant as a director of the company. While, as I have said, the nature of the two claims is not the centrally significant matter when deciding whether the rule against reflective loss applies, it seems to me that it is not an irrelevant factor when considering Mr Steinfeld's contention that, notwithstanding the decision in Shaker's case, the rule should not be applied in the present case. Furthermore, the nature of the remedy appropriate to each of the two causes of action in the present case is arguably much closer than it was in Shaker's case.*"

The Defendant's supplemental submissions contend that, although Lord Reed found that the case was wrongly decided (para. 89), the absence of any challenge to the first of the questions with which the case was concerned, as explained in para. 73 of ***Marex***, means that that aspect has survived.

61. *Gardner v Parker* was a case brought by the assignee of rights of action held by a company, referred to as the shareholder, which happened to be both a shareholder and a creditor of a second company, which for these purposes is referred to as the company. The defendant was a director of both the shareholder and the company and it was alleged that he had sold the company's principal assets at an undervalue to another entity in which he had an interest. This step rendered the company insolvent, thus preventing the shareholder recovering the debt owed to it by the company. It was alleged that the defendant had acted in breach of fiduciary duties

owed separately to the shareholder and the company because the defendant was a director of each. Proceedings had been brought by another of the company's creditors against the entity that had purchased the company's assets and a settlement had been reached, also involving the company, the terms of which released the defendant from all claims which the company might have against him. It was the argument seeking to address the contention that the reflective loss rule had no application in the situation where the basis of the shareholder's claim, alleging breach of fiduciary duty, is independent, and so different, to the claim that the company had that fell to be considered. That was the argument that was rejected, with reliance placed on the comparatively recent decision in *Shaker v Al-Bedrawi*.

62. In the *Shaker* case, the English Court of Appeal had to decide the issue summarised at para. 73 of the judgment given by Peter Gibson LJ:

> "*The question which therefore arises is whether the Prudential principle also applies in circumstances where a beneficiary with an equitable interest in a company's shares which are held in trust by a trustee sues the trustee for an account of the profit taken by the trustee, that profit being moneys in respect of which the company may have a prior claim against the trustee in his capacity as a director of the company for breach of fiduciary duty. Or to put it the other way round, does the Prudential principle debar the beneficiary's claim when the possibility cannot be excluded that the claim may extend to moneys lawfully extracted in respect of which the company can have no claim against the trustee director?*"

The response is then found in para. 83:

> "*In our judgment the Prudential principle does not preclude an action brought by a claimant not as a shareholder but as a beneficiary under a trust against his trustee for a profit unless it can be shown by the defendants that the whole of the claimed profit reflects what the company has lost and which it has a cause of action to recover. As the Prudential principle is an exclusionary rule denying a clamant what otherwise would be his right to sue, the onus must be on the defendants to establish its applicability. Further, it would not be right to bar the claimant's action unless the defendants can establish not merely that the company has a claim to recover a loss reflected by the profit, but that such claim is available on the facts.*"

63. Advocate Gray has further argued that to find any differently would amount to approving the approach taken in *Walker v Stones* [2001] QB 902, which has been disapproved in other English cases and elsewhere. In doing so, she also addresses one of Advocate Davidson's primary arguments about the rule not applying where there are different defendants. The factual situation in the present case is probably closer to that in *Walker v Stones*, where the facts assumed for the purposes of hearing an interlocutory application included that the trustees of a discretionary trust held shares in a company which in turn owned shares in another company, which also held shares in two other companies. It seems that it was the judge at first instance, Rattee J, who raised the possibility of the reflective loss principle barring the claim that was in issue in that case. On appeal, Sir Christopher Slade reached a different conclusion (at page 932-933):

> "*… I conclude that the Prudential Assurance principle will not operate to deprive a plaintiff of an otherwise good cause of action in a case where (a) the plaintiff can establish that the defendant's conduct has constituted a breach of some legal duty owed to him personally (whether under the law of contract, torts, trusts or any other breach of the law) and (b) on its assessment of the facts, the court is satisfied that such breach of duty has caused him personal loss, separate and distinct from any loss that may have been occasioned to any corporate body in which he may be financially interested.*

I further conclude that, if these two conditions are satisfied, the mere fact that the defendant's conduct may also have given rise to a cause of action at the suit of a company in which the plaintiff is financially interested (whether directly as a shareholder or indirectly as, for example, a beneficiary under a trust) will not deprive the plaintiff of his cause of action; in such a case, a plea of double jeopardy will not avail the defendant."

64. Earlier in this judgment, Sir Christopher Slade had drawn a distinction between the facts of the case with which he was dealing and those in the ***Prudential*** case. That same type of distinction operates in the present case. At page 929, he explained:

> "*An obvious and important distinction between the facts of the present case and those of the Prudential Assurance case [1982] Ch 204 and Stein v Blake [1998] 1 All ER 724 is that here the plaintiff beneficiaries were not shareholders of the companies Holt, SHL and Jasaro, whose assets are alleged to have been misappropriated, or of their parent company JSR Estates. Mr Trevor Philipson for the second and third plaintiffs has submitted that the Prudential Assurance principle does not preclude an action for breach of trust by beneficiaries against trustees who have caused or allowed the value of a trust shareholding to be diminished by causing or allowing the assets of the relevant company, or a subsidiary or sub-subsidiary of such a company, to be dissipated by improper diversions or uses of its assets.*
>
> *And indeed a claim of this very nature was allowed by Cross J in In re Lucking's Will Trusts [1986] 1 WLR 866 (an important authority which was not cited to Rattee J). In that case the defendants were trustees of a will. The trust holdings included a majority holding in a private company. The first defendant's niece had a life interest in one eighth of the estate and an absolute interest in another one-eighth. Having acquired knowledge that the managing director was withdrawing substantial sums from the company, the first defendant, who was a director of the company, failed adequately to supervise the managing director's drawings. In an action brought against the trustees by the niece, Cross J held, at p 878E-F, that the loss with which he was concerned was the decrease in value of the trust shares in consequence of the overdrawings and that the plaintiff was entitled to recover a proportionate part of this decrease in value.*
>
> *On the findings of fact in that case, it seems clear that the company itself would have had a cause of action against the first defendant in his capacity as director. But Cross J did not regard this as precluding an action by the beneficiary against him in his capacity as trustee. He said, at p 875:*
>
> > *"He cannot say that what he knew, or ought to have known, about the company's affairs he knew, or ought to have known, simply as a director with a duty to the company and no one else. He was in the position he was partly as a representative of the trust and if and so far as he failed in his duty to the company he also failed in his duty to the trust. To hold this is not, as I see it, inconsistent with any principles to be found in Solomon's [sic] case."*
>
> *(The well known principle of Salomon v Salomon & Co [1987] AC 22 is that a company is in law an entity quite distinct from its shareholders.)*
>
> *The Lucking case [1968] 1 WLR 866 was applied by Brightman J in the Bartlett case [1980] Ch 515, where he held that the plaintiffs who were beneficiaries under a trust, which (until sale) had formerly had a majority holding in a company, were entitled to compensation by the trustee for loss resulting from its having permitted the company to engage in hazardous speculation in property development.*

We have been referred to no decision in which the Prudential Assurance principle has been held to debar an action by beneficiaries against trustees. On the other hand, the Lucking case [1968] 1 WLR 866, which was apparently not drawn to the attention of the court in argument in the Prudential Assurance case [1982] Ch 204, suggests that such an action will lie. But that decision is not binding on us, so the point seems to be at large and to necessitate consideration of the principles on which the Prudential Assurance decision is based."

65. As is now apparent from how these principles have been considered in the *Marex* case, it is necessary to read the *Prudential* case and what Lord Bingham had to say in the *Johnson* case as a rule of company law under which a shareholder has no claim where there is a cause of action available to the company itself. Whilst the Plaintiff is the shareholder in Shallan Group Holdings, the basis on which it seeks to recover against the Defendant is on behalf of the beneficiaries for claims that any of them could make for breach of trust. Accordingly, the Plaintiff is not claiming as a shareholder and it is just coincidental that it happens to be a shareholder. Advocate Davidson also points out that *Walker v Stones* has not been overruled in England and so remains good law.

66. Advocate Gray also relied on the commentary about this case found in *Lewin on Trusts* (19th ed. At para. 39-039):

> "*The Court of Appeal held in Walker v Stones that the reflective loss principle does not prevent a beneficiary from bringing a claim against the trustees, even though the company has a claim in respect of the subject-matter of the loss, if (a) the claimant can establish that the defendant's conduct has constituted a breach of some legal duty owed to him personally, and (b) on its assessment of the facts, the court is satisfied that such breach of duty has caused him personal loss, separate and distinct from any loss that may have been occasioned to any corporate body in which he may be interested. This statement of principle is entirely consistent with the later decision of the House of Lords in Johnson v Gore Wood & Co. which is the leading authority on reflective loss. Reflective loss itself has nothing to do with point (a) upon which the claimant may rely upon a breach of duty under Bartlett principles, if liability is not excluded by a so-called "anti-Bartlett" clause. The fact that the beneficiaries' claim may be a claim for breach of fiduciary duty is not a reason why the reflective loss principle should not apply. It is in relation to point (b) that the reflective loss principle causes difficulty. Although the Court of Appeal held that the loss claimed by the beneficiaries did satisfy the requirement of being separate and distinct from the loss incurred by the underlying company comprised in the trust fund, the reasoning by which this conclusion was reached does not fit easily with the reasoning of the majority in the House of Lords' decision. It appears that the loss suffered by the beneficiaries in Walker v Stones was in respect of the diminution in the value of the trust's shareholding caused by the alleged plundering of the assets of a subsidiary of the company in which the trust held shares, though was nevertheless regarded as a separate and distinct loss. It should not necessarily be assumed that on similar facts a similar conclusion would be reached today. Hence the reflective loss principle normally does prevent the beneficiaries in a breach of trust claim from recovering the diminution in the value of the trust shareholding caused by a breach of duty by the trustee as a director of the company concerned for which the company has a claim against the director.*"

As a result, the Defendant adopts that analysis as being supportive of its position that its *exception de fond* should be upheld. Even with the narrowing of the principle through the decision of the Supreme Court in *Marex*, this is still a straightforward application of the *Prudential* case's reasoning because this should be regarded as a shareholder action case, where SOIL's BVI proceedings bar the present claim before this Court.

67. Advocate Davidson, on the other hand, points out that in Jersey the Royal Court's decision in *Freeman v Ansbacher* supports the view that the reflective loss principle does not apply in a case like this. The plaintiffs were beneficiaries of a discretionary trust of which the defendant was the former trustee. The trust held all the shares in a company and an employee of the defendant had carried out most of the trust administration and had been a director of that company whilst the defendant remained trustee of the trust. This was an application to strike out brought by the defendant. One of the bases on which that application was made was that the losses claimed by the beneficiaries were merely reflective of the losses suffered by the company.

68. The Jersey Court similarly identified that the reflective loss principle derived from the *Prudential* case is a matter of company law, re-affirming the rule in *Foss v Harbottle* and so was recognised as forming part of the law of Jersey (para. 82). Following a detailed and careful analysis of many of the cases to which I have also referred, which included drawing the distinction between the bare trust position of the company's shares operating in *Shaker v Al-Bedrawi* and the nature of the discretionary trust with which the Court was concerned, the conclusions were as follows:

> "*96 I accept that, if the Prudential principle applies to the present case, the order of justice should be struck out. However, I am by no means convinced that the principle should necessarily be applied to a situation such as the present involving a discretionary trust. I think it is not entirely clear that the principle would necessarily be applied in England; but, even if it were, I consider that there are strong grounds for believing that Jersey law should follow a different path. In this respect, I note that the Prudential principle as applied in England and Wales has not always found full favour in other jurisdictions (see, for example, Christensen v Scott).*
>
> *97 I would summarize my reasons for concluding that it is strongly arguable that the Prudential principle does not apply in the present case as follows:*
>
> *(i) The principle is an exclusionary rule. Thus, it applies where a shareholder has suffered loss (e.g. the diminution in the value of his shares) by reason of an actionable wrong done to him by the wrongdoer. In normal circumstances, he would be able to recover for such loss under ordinary legal principles. However, because the wrongdoer has also committed an actionable wrong against the company and because the shareholder's loss merely reflects the loss suffered by the company, the principle operates to prevent the shareholder from recovering what he has lost. However, it is an exclusionary rule which operates to prevent a shareholder recovering what he would normally be able to recover and it should therefore be confined to those circumstances where it is clearly applicable.*
>
> *(ii) The two policy reasons for the existence of the rule are clear and are conveniently summarized in the passage from Lord Millett's speech in Johnson referred to at para. 76 above. In the first place, there is a risk of double recovery from the defendant. If the company can sue for the wrong done to it by the defendant and the shareholder can sue for the wrong done to him, the defendant may end up paying twice for what is ultimately the same loss. Secondly, if the shareholder is allowed to recover from the defendant, this may prejudice creditors of the company as the recovered moneys will pass directly to the shareholder rather than returning to the company's coffers from which the creditors could be paid. The significance of the risk of double recovery was emphasized by Neuberger L.J. in his judgment in Gardner when explaining why the court should follow Shaker in holding that the Prudential principle applied to trusts. He said this ([2005] BCC 46, at para. 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, 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." [Emphasis supplied.]

(iii) In Shaker, the trust in question was a bare trust so that, if he recovered from the defendant trustee, the plaintiff would be absolutely entitled to the funds. They would therefore never find their way to the company, which would remain out of pocket. Accordingly, both reasons for the Prudential principle were applicable to the facts of that case.

(iv) None of the English cases has had to consider the position where there is a discretionary trust. It seems to me strongly arguable that the two reasons for the principle may have no application in a case such as the present. Rosanna has no entitlement to the trust fund. She will not be entitled to receive any moneys paid out by Ansbacher. She is merely seeking reconstitution of the trust fund. It seems to me strongly arguable that the remedy, were breaches of trust on Ansbacher's part proved, is at the discretion of the court and, being an equitable remedy, may be moulded to suit the circumstances of the case. Thus, in the event of the breaches of trust being proved, the court could arguably order Ansbacher to reconstitute the trust fund exactly by reimbursing that particular part of the trust fund which had been primarily affected by the breach of trust. Thus, the court could order Ansbacher to reimburse SDR from where the funds had been lost in the first place. Alternatively, if it was felt that the court could only order Ansbacher to reimburse the trust fund itself by putting the appropriate moneys into the trust fund, it seems to me arguable that the court could nevertheless direct as a term of such relief that the funds be used to acquire new shares in SDR, so that the funds eventually find their way into SDR. This would have the effect of exactly reconstituting the trust fund because it would take the value of the shares in SDR back to what they had been previously and the financial position of SDR back to what it had been. Such remedies may not be available in all cases but it seems to me strongly arguable that they are available where the company in question is wholly owned by a discretionary trust.

(v) If either of these courses is followed, neither of the reasons for the Prudential principle would be applicable. SDR will have been reimbursed and will therefore no longer have suffered any loss. Accordingly, it may no longer bring any claim against its directors. There will therefore be no risk of double recovery. Secondly, because the moneys will have been replaced in SDR, there can be no prejudice to any creditors as they will be in the same position as they were prior to the wrongful investments which gave rise to the breaches of trust. Given the exclusionary nature of the principle and given the policy considerations referred to below, I would consider it strongly arguable that the Prudential principle should not be applied in circumstances where neither of the two underlying reasons for it are applicable.

(vi) Mr. Journeaux accepted in argument that, in all the cases so far, the same person was the defendant to both the action brought by the shareholder and to the potential action by the company. Certainly, the various expressions of principle in

the cases and the references to the risk of double recovery seem to envisage that the defendant will be the same in each case. Mr. Hoy argued that this is a requirement for the Prudential principle to apply and that it is not the case here. The defendant to the claim by Rosanna is Ansbacher, as trustee of the trust, whereas the defendants to any claim by SDR would be the directors at the time the various transactions were undertaken. He referred in support to the fact that, in the decision of the Court of Appeal in Walker v Stones to the effect that the Prudential principle did not prevent the claim in that case, Sir Christopher Slade mentioned, as one of the grounds for so holding, the fact that the principal defendants in any claim by the companies would not include the trustees, who were persons sought to be made liable by the beneficiaries ([2001] Q.B. at 933). In response, Mr. Journeaux referred me to the observation of Neuberger, L.J. in his judgment in Gardner ([2005] BCC 46, at para. 52) where he envisaged that the lack of identity of the defendants should not prevent the rule from applying where the same loss was concerned. He also referred me to Lewin, op. cit., para. 39-39, at 1571-1572 which reads:

> *"The beneficiaries' claim will be against the trustees while the company's claim will usually be against one or more of its directors. It is only where the trustees are also the directors against whom the company has a claim that the defendants to both claims will be the same. It is not, however, clear that the reflective loss principle can apply only where the defendants to both claims are the same. The purpose of the reflective loss principle is to ensure, first, that double recovery is not achieved and, secondly, that the company's assets are preserved in the interests of its creditors so that its claim takes precedence over the claims of persons interested in its shares. It is arguable that this purpose is engaged in the trust context irrespective of whether or not the trustees are the same as those against whom the company has a claim."*

I acknowledge the force of Mr. Journeaux's submission but nevertheless, as Lewin says, it is not clear whether the defendant has to be the same and I would be reluctant to strike out Rosanna's claim without allowing her the opportunity of exploring the matter fully in the light of the facts as found at trial. Where the defendant is the same, it is comparatively easy to conclude, on a strikeout application, that, if the shareholder is successful against the alleged wrongdoer, the company's claim against that wrongdoer would also be successful and therefore the company's assets would have been replenished by action against the wrongdoer. This is because the actions of the defendant relied upon are likely to be the same in each case. However, where the shareholder's claim is against A for his actions but the company's action is against B for his actions, it is harder to be sure, on a strike-out application, that if the shareholder succeeds in his action against A, the company must necessarily succeed in its action against B. If there is any question mark over whether the company would be able to replenish its assets by action against B, it would be wrong to strike out the shareholder's claim on the basis that his loss was bound to be reflective of the company's loss.

(vii) In his judgment in Walker v. Stones (with which the other two judges agreed), Sir Christopher Slade said this ([2001] Q.B. at 934):

> *"More generally, I do not think that any of the policy considerations which influenced this court in reaching its conclusions in the Prudential Assurance case ... and Stein v Blake ... apply in the present case. On the contrary, the policy considerations in my judgment point strongly the other way. As counsel for the plaintiffs pointed out, in many, perhaps most, cases where a trustee is found guilty of a breach of his duty to supervise the trust investments in accordance with the Bartlett principle, the company concerned will also have*

a claim against a director or manager who has mismanaged its corporate affairs (a fortiori if there has been dishonesty on the part of the trustee). If Rattee, J.'s ruling on this point in the present case were correct, it would appear that the Prudential Assurance principle would always afford a defence to the trustee in this situation. I cannot think that would be right."

(viii) Like Sir Christopher Slade, I consider that there are strong policy reasons for thinking very carefully before applying the Prudential principle in all its rigour to claims by beneficiaries of a discretionary trust in respect of alleged mismanagement of a company which is wholly owned by the trust and where the remedy sought is reconstitution of the trust fund. The case of Bartlett v. Barclays Bank Trust Co. Ltd. (which confirmed the duty of trustees to supervise the affairs of a company of which they were the controlling shareholder) is a case engraved on the hearts of all trust lawyers. Like Sir Christopher, it seems to me that, if the Prudential principle is to be applied fully to cases such as the present, that case must have been wrongly decided and it is difficult to envisage when such an action could ever be brought in future because the loss suffered by the trust will almost invariably be reflective of the loss suffered by the company.

(ix) Jersey has a very substantial trust industry. In some cases, the investments of the trust are held directly by the trustee (which will in the vast majority of cases be a corporate trustee licensed to carry on business as a trustee by the Jersey Financial Services Commission); but in many, if not most, cases the investments will be held through a company which is wholly owned by the trust and the shares of which comprise the sole directly-held asset of the trust. Whereas, in the days when Jersey had corporation tax, the directors of the company might well have been persons who were not employees of the trustee and resided outside Jersey, the strong likelihood nowadays is that the directors of the wholly-owned company will be the very same employees of the corporate trustee in Jersey who are responsible for administering the affairs of the trust. There will, therefore, as a practical matter so far as the beneficiaries are concerned, be no difference between the situation where the trustee holds the trust investments directly and where it chooses to do so through a company which is wholly owned by the trust. In each case, the decisions on investments will be taken by the employees of the corporate trustee acting in the course of their employment. The only technical difference is that in one case they will be doing it on behalf of the trustee, whereas in the other they will be acting as directors of the wholly-owned company.

(x) Yet, if these employees mismanage the investments, the consequences will be very different for the beneficiaries if the Prudential principle applies. Where the investments are held directly by the trustee, the remedy of the beneficiaries is simple. They may sue the trustee for breach of trust in making imprudent investments and seek the reconstitution of the trust fund. If, on the other hand, the investments have been made through a wholly-owned company and the Prudential principle applies, such an action cannot be brought. So how are the beneficiaries to obtain redress for mismanagement of the investments in those circumstances? They cannot sue the directors, as the directors owe no duty to the beneficiaries. Nor can the trustee sue the directors. The only entity which can sue the directors is the company. However, unless or until there is a change of trustee, it seems unlikely in the extreme that the trustee would cause the company to sue its directors, who are the persons employed by the trustee to administer the affairs of the trust as well as act as directors of the company.

(xi) During the course of the hearing, I pressed Mr. Journeaux on how, as a practical matter, he would expect the beneficiaries to be able to vindicate their

rights in such circumstances. His response was that there were at least two alternative courses which could be followed:

(a) If the trustee refused to cause the company to take the necessary action against its directors, the trustee would thereby be committing a new breach of trust which would give rise to a loss in respect of which the company would have no claim. In those circumstances, the Prudential principle would have no application and the beneficiaries could therefore sue the trustee for breach of trust in failing to cause the wholly-owned company to take the necessary action against the directors. The measure of loss caused by such a breach would be the same as that caused by the mismanagement of the directors and therefore there would be no prejudice to the beneficiaries.

(b) Alternatively, the beneficiaries could take proceedings to secure the removal of the trustee (if it did not resign voluntarily) on the ground of an obvious conflict of interest. The new trustee could then cause the company to take action against the directors and thereby recover the loss. If, for any reason, the company's claim against the directors had become prescribed, the new trustee could then sue the former trustee for breach of trust in failing to ensure that the company exercised its rights against the directors within the relevant period.

(xii) I accept that these options are available to the beneficiaries. But they are complex and far removed from the real complaint, which is that the trustee failed to ensure that its employees (in the form of directors of the company) managed the investments prudently. One can, for example, envisage the possibility of difficulty in finding a new trustee willing to embark on litigation against the old trustee or against the directors of the company. Alternatively, the new trustee might differ from the beneficiary on the strength of the case. A Beddoes application (with its additional costs) would certainly be necessary. In relation to the first alternative, one can envisage questions about when such a breach of trust would become actionable. Would the beneficiaries have to wait until the limitation period for the company to claim against the directors had expired? All of the options would involve the beneficiary in becoming involved in satellite litigation rather than addressing the real complaint.

(xiii) In my judgment, it would not reflect well on the law or on Jersey as a centre for the administration of trusts if beneficiaries had to go through these considerable hoops unless it was absolutely unavoidable. It is of the first importance that beneficiaries of a trust whose assets have been mismanaged should have a simple and effective remedy available to them, whether such assets are held directly by the trustee or through a wholly-owned company. I consider that it is strongly arguable that the law of Jersey provides this simple and effective remedy in a case such as the present by enabling the court to order the defaulting trustee to reconstitute the trust fund by reimbursing the company for its losses, thereby removing both reasons for the application of the Prudential principle.

(xiv) In his judgment in Gardner, Neuberger, L.J. described the question of the applicability of the Prudential principle to breach of fiduciary duty as ([2005] BCC 46, at para. 46) "a difficult and developing topic." Lewin, op. cit., paras. 39–37 – 39–43, at 1570−1573 contains, if I may say so, a most helpful summary of the current position, but it also refers at para. 39–43, at 1573 to the "uncertain state of the authorities concerning the application of the reflective loss principle in relation to trusts …" In these circumstances, it is clear that a court must be particularly careful

before striking out a claim on assumed facts. I do not consider that, assuming that she is ultimately successful in proving a breach of trust by Ansbacher, Rosanna's claim is doomed to failure by reason of the Prudential principle. On the contrary, for the reasons given, I consider that there are perfectly arguable grounds for concluding that the principle has no application in cases such as the present where a discretionary beneficiary is asking for reconstitution of the trust fund because of a failure by the trustee to supervise the investments of a wholly-owned company. Furthermore, I think that it would indeed be preferable for the facts to be established at trial and for all parties then to have the opportunity of making detailed and considered submissions as to the application of the law to those facts."

I have set out this reasoning in full because these comments were found to be very attractive and persuasive in the ***Jefcoate*** case, although they were not applied as the basis for finding that the reflective loss principle did not apply and I find them similarly persuasive in the present case and am minded to apply them although the situation at present is not identical to that found in ***Freeman v Ansbacher***.

69. Whereas a court is reluctant to strike out a claim where the area is a developing one, the basis on which the Court is being invited to uphold the Defendant's *exception de fond* is premised on there being no facts capable of being found enabling the Plaintiff's claim to succeed. The Defendant argues that, even if the Plaintiff would otherwise succeed in its claim, it is barred because of the application of the reflective loss principle. To that extent, the comments in the Jersey case relating to the test for striking out are not relevant. However, the suggestion that this is a situation which might not result in the application of the reflective loss principle in a case decided under English law does apply to the same effect. The dividing line between whether the loss sustained by the shareholder is the same as the company's loss or not is whether it can be viewed as separate and distinct. For the reasons explained in ***Freeman v Ansbacher*** the loss claimed by the Plaintiff in the present action is to reconstitute the trust fund as a result of alleged trustee-level mismanagement. The fact that the humans involved in acting on behalf of the trustee were the same as those, acting in their capacities as different legal entities and at the underlying corporate level does not, in my view, amount to anything other than there being a separate and distinct type of claim being made by the Plaintiff on the one hand and by SOIL in its unfair prejudice proceedings on the other hand. That said, there are potential outcomes that would mean that the Shallan Trust could recover from the respective defendants amounts that would otherwise be a windfall to the trust. This is a form of double recovery. However, any such double recovery can, as I will explain in due course, be managed through case management decisions rather than by barring the claim of this Plaintiff. In the ***Marex*** case the policy foundation for the reflective loss principle is shifting away from reliance on double recovery. The minority judgment seems to me to regard that as an unsound basis for the decision because it brings principles attaching to damages into the exclusionary rule for when a claim is barred in the context of the law applicable to companies. In any event, there is a real possibility that the unfair prejudice proceedings might not lead to the outcome SOIL seeks, in which case the only means by which the new trustee can seek to re-constitute the trust fund will be in this action against the Defendant as former trustee for the alleged breaches of trust set out in its Cause. I am, therefore, persuaded that the English law reflective loss principle on which the Defendant has based its *exception de fond* does not bar the Plaintiff's claim and so fails.

70. In reaching that conclusion, I do not envisage that this means that a decision such as ***Walker v Stones*** is being applied as representing Guernsey law. The conclusion reached in that case may broadly reflect the conclusion reached in this case but the route is a different one. I accept the premise that the reflective loss principle operates as part of Guernsey law. However, now that the Supreme Court has ruled on the narrowness of what was decided in the ***Prudential*** case, (being limited to claims by shareholders that, as a result of actionable loss suffered by their company, the value of their shares, or of the distributions they receive as shareholders, has been diminished and so cannot be recovered by them, and falls only to be recovered by their

companies, and where all other claims, whether by shareholders or anyone else, should be dealt with in the ordinary way), I am not persuaded that this action is a claim by a shareholder at all, other than coincidentally, and is rather a claim by a trustee against a previous holder of that office where the consequences of a successful action will have to be carefully reviewed so as to ensure that any relief granted does not result in the trust fund being returned to a position different from what would have been the case if there had been no breach of trust. In other words, the outcome of the underlying company's unfair prejudice claim in the BVI proceedings will always need to be taken into account but that claim does not operate to bar the Plaintiff from proceeding with this action.

71. Whilst the parties referred to the analysis of the reflective loss principle undertaken in the ***Primeo*** case, which currently rests with the 2019 judgment of the Court of Appeal, with the opinion of the Privy Council awaited, I can deal with this decision comparatively quickly. For similar reasoning, I do not feel it necessary to deal expressly with the other cases on reflective loss to which Counsel have referred. This is because, since the Supreme Court's ruling in ***Marex***, these do not represent the current state of English law but explain the position that had been reached previously.

72. The ***Primeo*** decision contains a helpful summary of how the English law reflective loss principle had been adopted as part of Cayman's domestic law. It dealt with two particular points that had been covered at first instance. The first was the fact that the causes of action arose at a time when Primeo was not a shareholder in the companies concerned. That would potentially apply in the present case because the Plaintiff has come to be a shareholder subsequent to the events that are alleged to have given rise to the cause of action vested in the company, SOIL. However, the Court of Appeal of the Cayman Islands rejected that ground of appeal because the relevant time for assessing whether the plaintiff would be made whole for the loss of the company is when the claim is made, not by looking historically at a time preceding when the plaintiff became a shareholder. That strikes me as being the solution that would apply in Guernsey as well and so this aspect of the ***Primeo*** case does not assist the Defendant (or the Plaintiff). The second point related to the manner in which the merits of a claim by the company fell to be assessed. There was criticism that the court at first instance had incorrectly referred to the company's claim having a realistic prospect of success. Again, the appeal on this point was dismissed. Having found that the principle does not apply to this action, this second point does not assist the Defendant either.

73. The section of the judgment dealing with these two points is instructive as an analysis of the authorities as they stood at that time on each question. However, particular emphasis was placed on what had been said in the ***Johnson*** case, where the contents of those speeches that should no longer be followed have to be approached now with extra caution. Further, any reliance placed on the so-called exception derived from ***Giles v Rhind*** [2003] Ch 618, which has been rejected, or ***Gardner v Parker*** is of no assistance following ***Marex***. Accordingly, whilst I have paid appropriate regard to what this, and the other cases to which the Court has been referred, have to say about the rationale underlying the principle and how it developed post-***Johnson***, I am not persuaded that any of these cases assists as to how the question on this preliminary issue falls to be determined.

74. As I have endeavoured to explain, the premise of the Defendant is to apply English law on the reflective loss principle to the situation in Guernsey, not to rely on the law of any other jurisdiction. Whilst Advocate Gray has quite properly undertaken the comparative law approach that I indicated might be helpful, that was more related to whether the caution expressed in ***Jefcoate*** about embracing the principle in our domestic law was appropriate. I am persuaded that the reflective loss principle should be adopted in Guernsey on the basis that it is an application of the rule in ***Foss v Harbottle***. The confines of the principle, however, are now settled for the purposes of this preliminary issue by the ***Marex*** case. In those circumstances, there is no need to broaden the consideration to encompass how the previous cases have been

dealt with elsewhere. In particular, I do not feel it necessary to address the approach taken in New Zealand (eg, in *Christensen v Scott*), in Hong Kong or Singapore, to each of which Advocate Gray has referred to being an "outlier", in the sense of departing to some extent from the position in England, because those cases often base themselves on the aspects of the *Johnson* case that are now not to be followed. As far as I am concerned, a combination of *Marex* and *Freeman v Ansbacher* provides the answer to this preliminary issue.

75. Further, given that the *exception de fond* is being dismissed, I do not need to deal with the parties' submissions about whether just some of the losses being claimed by the Plaintiff survive because certain of them are barred by the reflective loss principle.

Identity of wrongdoer

76. I have deliberately left until the end of this judgment Advocate Davidson's primary contention that the reflective loss principle operates only where the third party wrongdoer against whom the shareholder and the company both have concurrent claims is the same person. It was for this reason that he argued that the principle is inapplicable here, where the defendants in SOIL's BVI proceedings are very different from the Defendant in this action. Indeed, neither the Plaintiff nor the Defendant is a party to the BVI proceedings. He noted that this was something that had been acknowledged in Hong Kong as remaining unsettled (*Hotung v Hillhead Ltd* [2008] 3 HKC 301). His supplemental submissions refer to lots of paragraphs in the Supreme Court's judgment in the *Marex* case, some of which I have already quoted, which demonstrate that there needs to be coincidence in identity of the wrongdoer. The position is supported by the description of the reflective loss principle contained in the *Primeo* case in the Cayman Islands, eg, the principle "*applies where a company and a shareholder both had a claim against a defendant arising out of the same facts*" (para. 352) and "*In some cases, it will be clear whether the company has or does not have a claim against the same wrongdoer for the same loss as the plaintiff has sustained but in other cases, such as this, while it is possible to say that in principle the company has a cause of action, there is uncertainty about its prospects of succeeding*" (para. 355). I find this argument a strong one and could have decided this preliminary issue on that basis, but I have instead considered the applicability of the principle and rejected that it applies to the Plaintiff's action for different reasons.

77. Advocate Gray sought to rebut Advocate Davidson's primary argument by reference to examples where she suggested the parties concerned were different. In *Webster v Sandersons* [2009] 2 BCLC 542, the proceedings were taken against a firm of solicitors who had failed to serve proceedings against another firm of solicitors in time. The judgment deals with an application for permission to amend the pleading to include a larger claim involving a company of which the claimant was the majority shareholder and managing director. Because this was a loss of chance claim, the case involved consideration of whether there was a claim on behalf of the shareholder as distinct from that of the company in the first place. If there were not, there could be no loss of chance. Accordingly, I am not persuaded that this is anything other than an example of looking back to whether the shareholder had a claim distinct from that of the company against the same wrongdoer and so does not support an argument that the principle could apply where the claims of the company and its shareholder would be started against different persons.

78. She also referred to two Australian decisions. The first is the first instance decision in *Thomas v D'Arcy* [2004] QSC 260. She highlighted the way the question was put in para. 13 of the judgment: "*whether the loss pleaded can be characterised as a loss separate and distinct from that suffered by the companies and caused by breach of a duty independently owed to the shareholder or was it merely a reflection of the companies' losses.*" This was answered in the following paragraph:

> "*I accept that the solicitors may well have owed a duty to the plaintiff separate from that they owed to the companies but it seems to me that the loss pleaded here is loss which would have been made good if the companies had enforced the rights they may have had against Mr Ebbage and Arthur Andersen & Co. They had such rights but did not seek to enforce them. The pleadings here relevantly allege no loss other than the decrease in the value of the shareholdings in the companies attributable to the allegedly negligent advice. That is the type of loss described in the last passage from Johnson v Gore Wood & Co at 36D-E that I have emphasised above and which Lord Bingham described as a case where the answer was clear.*"

These proceedings were against the plaintiff's former solicitors for alleged breach of retainer and breach of duty by negligence. The plaintiff was a shareholder in a mobile phone business and another company. Those companies borrowed money and took security over assets of the companies and over real property owned by the plaintiff. The lender called in its securities and these were sold by Mr Ebbage, who had been appointed for that purpose, at what were said to be undervalues in circumstances that the plaintiff alleged breached duties owed to him and to the companies. As can be seen, the reference to loss is to the loss that could have been claimed by the company concerned of which the plaintiff was a shareholder. This is closer to the position in the present case if the basis of the Plaintiff's action is to seek losses that can be recovered in the BVI proceedings by SOIL. However, I am not persuaded that this decision necessarily means that it supports the Defendant's contention that there is more than one wrongdoer involved. The duties are described as being different, but the identity of the person who is being alleged to have breached those duties is still the same. This was touched on when the case went on appeal ([2005] QCA 68, at para. 25):

> "*There is no doubt that a person A may owe duties to another person B and to companies with which B is associated, which are similar, if not identical. But that does not mean that the damages for breach of those duties recoverable by B and the companies will be the same. Each of B and the companies would have to establish the separate recoverable loss sustained by each.*"

79. The second of these cases is *Jakeman v Hawkins* [2006] QSC 289. This involved a bare trust and endorses the approach taken a couple of years earlier in *Thomas v D'Arcy*. The focus was said to be on "*the nature of the damages sought to be recovered which is important*" and so, where the loss to be claimed if the amendment sought were permitted is loss that can only be claimed by the company and not the shareholder, it necessarily means that no amendment should be permitted. Once again, I do not find that the mere fact that there are other parties involved means that this supports the proposition that the reflective loss principle operates even where the alleged wrongdoer is different. Each time the focus is on what the wrongdoer has done and that forms the basis of how to approach the claim being made.

80. This is not the situation in this action when compared with the BVI proceedings. It is overly simplifying the two sets of allegations to say that what the Plaintiff seeks to recover in this action is no more, and so merely reflective, of the loss that SOIL is seeking to recover. The two sets of proceedings have common facts but they address different allegations where the remedies, in the sense of recovering losses, are not necessarily the same. Accordingly, if I had needed to do so, I would have been minded to find for Advocate Davidson's primary contention and so dismiss the Defendant's *exception de fond* for that reason.

Staying the action

81. At the end of her supplemental submissions following the delivery of the Supreme Court's judgment in *Marex*, Advocate Gray suggested that, if the Plaintiff's submissions on the reflective loss principle were held to prevail, which they now have, as an alternative outcome, the Plaintiff's action could be stayed pending the outcome of the BVI proceedings. This is on

the basis that if SOIL is successful and recovers the losses it alleges it has suffered, there will be a corresponding reduction in, or even elimination of, the losses being claimed through this action against the Defendant. In doing so, she has highlighted what Lord Sales noted in ***Marex*** (at para. 162):

> "*... if the company does wish to pursue its claim, it may be beneficial in case management terms to allow the company's claim to be tried first or at the same time as the shareholder's claim, since then the extent of the company's recovery can be brought into account when valuing the loss suffered by the shareholder claimant. A procedural approach allows for nuanced adjustment of the vindication of parallel claims in the light of all relevant evidence about the circumstances regarding the interests of the company and the shareholder. The court can ensure that there is no double recovery and that the shareholder by his action does not deprive the company of sums properly due to it.*"

82. In a message sent following his review of these supplemental submissions, Advocate Davidson has pointed out that this is not a form of relief that had previously been canvassed and, if it were to hold any attraction, he would wish to make representations on behalf of the Plaintiff. I have not invited those representations at this stage because I accept that the parties need time to digest the outcome of the preliminary issue before deciding how best to proceed with this action.

83. Much will, I suspect, depend on the progress that has been made in SOIL's unfair prejudice proceedings as to how much merit there would be in staying this action. The other cases to which reference has been made do not appear to me to have addressed the situation where there are proceedings in separate jurisdictions. That is hardly surprising if the principle rests on pursuing the same wrongdoer, who would most likely be sued in its own jurisdiction where questions of enforcement of any order are more easily addressed. Where the two sets of proceedings arise within a single jurisdiction, case management decisions can be taken in respect of both. In a situation where the proceedings arise concurrently in two jurisdictions and where they do not involve the same parties, coordinating which set of proceedings should be afforded any priority necessarily becomes harder. If only by way of example, there may be merit in this action being dealt with to determine whether or not there was any breach of trust, but without proceeding to consider what remedies might then follow. This might be regarded as helpful because the actions being taken within the RBC group will have operated above the actions then capable of being taken in relation to PIL, which is the focus of SOIL's BVI proceedings. Everyone concerned might consider it more appropriate for that aspect of the facts to be decided in Guernsey against which there would then be a background to consider SOIL's position. Naturally, if there were to be no breach of trust found, that would end the Plaintiff's action here. However, if the Plaintiff was successful, the extent of what needs to happen to re-constitute the Shallan Trust may depend on the outcome of the BVI proceedings. In other words, it would not necessarily follow that the better course of action now that the *exception de fond* has been dismissed will be to stay this action to await the outcome of SOIL's claim. If there were to be an application to stay this action, and subject always to hearing the parties' representations, that decision could only really be made on the basis of having such a fuller understanding of the most appropriate forum to resolve some of these factual issues and that will probably involve some closer coordination between the lawyers acting for the parties in both sets of proceedings.

84. Given these possibilities, I am not minded to accede to Advocate Gray's alternative suggestion. As the *exception de fond* is being dismissed, the next step in the proceedings will be for the application to fix a case management conference to be dealt with, at which this type of issue can also be addressed.

Conclusion

85. The preliminary issue raised by the Defendant's *exception de fond* sought to bring this action by the Plaintiff to an end on the basis that the reflective loss principle as it operates under English law applies and so debars the Plaintiff from pursuing this action. For the reasons given, I reject the Defendant's arguments and find instead that the principle, as it now stands following the decision of the Supreme Court in the ***Marex*** case, does not apply to this action. Had I needed to do so, I would have decided as well that the question of the different identities of the alleged wrongdoers in both sets of proceedings also makes the principle inapplicable. The Plaintiff succeeds on the preliminary issue and its action is now capable of being progressed to a case management conference.

86. In respect of the costs of the preliminary issue, my provisional view is that costs should follow the event. If that outcome is not agreed between the parties, either is at liberty to seek a different order when the matter is next before the Court.