[2018] EWHC 485 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

No. HQ16X01317

Royal Courts of Justice

Before:

MASTER McCLOUD

B E T W E E N :

(1) Andrew Breeze

Claimants

(2) Dominic Wilson

- and -

The Chief Constable of Norfolk Constabulary

Defendant

Mr. Leslie Thomas QC and Mr Nick Scott (instructed by Messrs Hatch Brenner, Solicitors), appeared for the Claimants

Mr. Jason Beer QC and Ms Charlotte Ventham (instructed by Messrs Weightmans LLP, Solicitors) appeared on behalf of the Defendant.

Keywords:

Reflective loss principle (exceptions to) – shareholders – pleading – principles on amendment of statements of case - strike out

Hearing: 5th October 2016
Draft Judgment: 31st October 2016
Handed down: 15th March 2018

Cases referred to in judgment (in addition to cases cited in quotations from other judgments):

Johnson v Gore Wood (No. 1) [2002] AC 1
Bank Mellat v HM Treasury [2016] EWCA Civ 452
A v Hoare [2008] 1 AC844
Letang v Cooper [1965] 1 QB 232
Three Rivers DC v Governor and Company of the Bank of England (No. 3) [2003] 2 AC at 191B-193H
Akenzua v Home Secretary [2003] 1 WLR at para. 29-32
Giles v Rhind [2002] EWCA Civ 1428
Gardner v Parker [2005] BCC 46
Towler v Wills [2010] EWHC 1209 (Comm.)
Kim v Park [2011] EWHC 1781 (QB)
Spencer v Barclays Bank PLC (unrep)

J U D G M E N T

MASTER VICTORIA McCLOUD:

The application

1. Insofar as material to this judgment, this is an application by the defendant to strike out two heads of claim brought by the claimants totalling over £30m, and/or to grant summary judgment dismissing those aspects of the claim. The claims in question are for loss of share value. Both sides were ably represented by leading and junior counsel before me. In this decision I must consider the Reflective Loss principle and exceptions to it, and principles in relation to amendment of statements of case in the context of a strike out application.

The parties and history

2. The claimants were the main shareholders in a company latterly called Cawston Park Holdings Ltd (CPH). The company was concerned in the provision of medical mental health services to the National Health Service's Primary Care Trusts (PCTs). The services were supplied at Cawston Park Hospital. Sometimes CPH raised charges for 'extra care' in respect of certain patients where additional or more onerous work had been required than usual. The first claimant was at the material time the General Manager and Director of the hospital and the second claimant was the Finance Director.

3. The claimants, personally, were charged and unsuccessfully prosecuted for alleged over-charging in respect of 'extra care' charges which the Crown alleged had not been provided. They were exonerated at trial by an acquittal directed by the judge, and are innocent men. It is pleaded that the judge stated that they were "*vindicated*" and could "*leave court with heads held high*", and those statements are admitted by the defendant.

4. A former employee at the hospital whom I shall call Mr D alleged in January 2006 to the NHS fraud reporting line that the claimants were committing fraud in respect of the 'extra care' charges. In the hearing before me we did not explore what if any personal history lay behind that report but the Particulars of Claim plead (and the Defence admits) that the employee in question had been caught photocopying business plans relating to a new proposed business, at work. He was suspended and disciplinary steps were taken. Pornography was found on his work computer as well as business plans for the new business. The new business was substantially a duplicate of the business plan of the hospital. On 14 November 2005 Mr D and another member of staff resigned before the disciplinary hearing. It was not until January 2006 that the now former employee made the report of alleged fraud to the NHS.

5. In July 2006 Norfolk police created 'Operation Meridian' to investigate the allegations. The Claimants were arrested in November 2006 at an early morning raid of their homes, tried in April 2009 and acquitted in June 2009. I note in passing that there was a period of more than two years before arrest and trial during which these serious charges hung over the heads of the Claimants. At some stage the Claimants were removed from their posts during the criminal process and replaced with other people, though they remained the major shareholders in CPH.

6. It is pleaded in the POC that the police appreciated that there was a risk of the hospital business failing in the event of a prosecution, and that the police considered whether an administrator should be appointed. Orders under the Proceeds of Crime Act 2002 were obtained restraining the claimants from disposing of their assets, though the Defence places some of that averment in issue.

7. I need not summarise the whole pleading and what it says about the manner in which the investigation and prosecution proceeded, but the upshot is that the claimants now sue for malicious prosecution and/or misfeasance in public office.

8. There are 15 heads of damage (POC para 210) but only two are material to this judgment. The relevant ones are heads 13 and 14 which state the value of both claimants' interests in the company, being £15,151,874 each. Criticism was made by the defendant of the particulars of loss and damage merely state the value of the claimants' interests in the company but in my judgment reading the preamble to para 210 and 211 it is clear that the intention is that the whole of those sums – totalling well over £30m – are claimed. The pleading is however somewhat lacking a pleading of the mechanism by which that loss was sustained other than that it was by reason of the alleged torts and that per 209 (4) that *"the Defendant's officers knew that the prolonged investigation and prosecution of the Claimants would lead to the demise of their business."*

9. The effective claim pleaded when read with the Part 18 reply is that the prolonged investigation and alleged malicious prosecution or misfeasance caused and was known to risk causing the demise of the CPH business, and that by reason thereof the claimants claim, as a head of loss, the full pleaded value of their interests in the business.

10. The business of CPH – which by that stage was of course not managed by the claimants albeit they remained shareholders restrained from dealing with their own assets – was taken into receivership in November 2009 some months after the failed prosecution and was dissolved in February 2011. The company itself did not at any stage bring proceedings against the present defendant in respect of any loss of company value nor were any rights of action which might have been vested in the company assigned to the current claimants.

The application before me

11. This application before me is to strike out or summarily dismiss the claims for loss of share value pleaded in heads of loss 13 and 14, as further clarified by a response to a Part 18 request dated 10 May 2016 in which the question was posed:

"Please confirm whether it is the Claimants' intention to advance a case at trial that, by reason of the alleged malicious prosecution and/or misfeasance in public office on the part of the Defendant's officers, the company (latterly known as Cawston Park Holdings Ltd) suffered a diminution in its share value which, in turn, caused the Claimants to sustain financial losses in the sum of £15,151,874 each, which sums represented the diminution in their respective share values in the company?"

To which the answer was "*Yes*".

The arguments and law

12. I had the benefit of four skeleton arguments from counsel, specifically two skeletons followed by two supplemental skeletons (a total of two from each side). This came about because following service of the first skeletons the claimants introduced a new line of argument rather late in the day in a supplement to which the defendant naturally responded. In the event I heard argument on all points.

(i) That the claim cannot succeed because it falls foul of the 'Reflective Loss' principle

13. The defendant relied on Johnson v Gore Wood (No. 1) [2002] AC 1 for the basis and application of the 'Reflective Loss' principle, as it was termed in submissions. I was taken by both sides to parts of their Lordships' decisions in that case and the two sides had markedly different interpretations of what was said about the scope of that principle. I shall therefore need to quote the parts relied on.

14. The essence of the principle, subject to disagreement over the circumstances in which it applies, was not in dispute. That is that, per Lord Bingham in *Johnson* at 35E-36C *"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."*

15. It is important that I cite the passage in full and most of the other passages to which I was taken because there was a difference between the defendant and the claimants as to whether, as the claimants contend, the Reflective Loss principle in *Johnson* is limited to cases where there is specifically a 'breach of duty' owed by the tortfeasor to the company, or as the defendant contends, that the principle is wider than that and includes any claim where an action lies at the suit of the company to make good loss of its assets by suing the tortfeasor (even if in principle a claim could, but for the Reflective Loss principle, be brought by the shareholder as well).

16. It is important that I quote the whole passage extracted from Lord Bingham's judgment. The emphasis in this and other quotations is my own, highlighting the passages which seem to me to be of most relevance to the issues in this case.

"These authorities support the following propositions:

1) **Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss.** So much is clear from *Prudential*, particularly at pages 222-3, *Heron International*, particularly at pages 261-2, *George Fischer*, particularly at pages 266 and 270-271, *Gerber* and *Stein v. Blake*, particularly at pages 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*, at pages 195-6, *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 breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other.** I take this to be the effect of *Lee v. Sheard*, at pages 195-6, *Heron International*, particularly at page 262, *R. P. Howard*, particularly at page 123, *Gerber* and *Stein v. Blake*, particularly at page 726. I do not think the observations of Leggatt L.J. in *Barings* at p. 435B and of the Court of

Appeal of New Zealand in *Christensen v. Scott* at page 280, lines 25-35, can be reconciled with this statement of principle.

These principles do not resolve the crucial decision which a court must make on a strike-out application, whether on the facts pleaded a shareholder's claim is sustainable in principle, nor the decision which the trial court must make, whether on the facts proved the shareholder's claim should be upheld. **On the one hand the court must respect the principle of company autonomy, ensure that the company's creditors are not prejudiced by the action of individual shareholders and ensure that a party does not recover compensation for a loss which another party has suffered. On the other, the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation.** The problem can be resolved only by close scrutiny of the pleadings at the strike-out stage and all the proven facts at the trial stage: **the object is to ascertain whether the loss claimed appears to be or is one which would be made good if the company had enforced its full rights against the party responsible, and whether (to use the language of *Prudential* at page 223) the loss claimed is "merely a reflection of the loss suffered by the company."** In some cases the answer will be clear, as where the shareholder claims the loss of dividend or a diminution in the value of a shareholding attributable solely to depletion of the company's assets, or a loss unrelated to the business of the company. In other cases, inevitably, a finer judgment will be called for. At the strike-out stage any reasonable doubt must be resolved in favour of the claimant"

17. The public policy justification for the principle is easy to see and was not disputed (subject to the important question of how far the principle extends and when it applies): per Lord Millett in *Johnson* at p62 (with my bold emphasis):

"Where the company suffers loss as a result of a wrong to the shareholder but has no cause of action in respect of its loss, the shareholder can sue and recover damages for his own loss, whether of a capital or income nature, measured by the diminution in the value of his shareholding. He must, of course, show that he has an independent cause of action of his own and that he has suffered personal loss caused by the defendant's actionable wrong. Since the company itself has no cause of action in respect of its loss, its assets are not depleted by the recovery of damages by the shareholder.

The position is, however, different where the company suffers loss caused by the breach of a duty owed both to the company and to the shareholder. **In such a case the shareholder's loss, insofar as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at**

the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder. These principles have been established in a number of cases, though they have not always been faithfully observed. The position was explained in a well-known passage in *Prudential v Newman*[1] at p. 222:

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

18. As to the ways in which the principle was described in *Johnson*, I was taken to the following passages:

Per Lord Hutton at 51C onwards:

"**I consider it to be clear that where a shareholder is personally owed a duty of care by a defendant and a breach of that duty causes him loss, he is not debarred from recovering damages because the defendant owed a separate and similar duty of care to the company, provided that the loss suffered by the shareholder is separate and distinct from the loss suffered by the company.** This principle was recently stated in the judgment of the Court of Appeal delivered by Sir Christopher Slade in *Walker and others v. Stones and others* [19th July 2000], the court stating that a claimant is entitled to recover damages where:

"131. (a) **the claimant 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 branch of the law) AND**

132. (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.

133. 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

[1] [1982] 1 Ch. 204

company in which the claimant 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."

But a more difficult question arises where the shareholder claims a loss which is not separate and distinct from the loss suffered by the company but his loss flows from loss suffered by the company. In *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.* [1982] 1 Ch. 204, the claimants sued the directors of the company alleging that they had issued a circular to the shareholders containing a fraudulent misrepresentation concerning the true value of certain assets, and the court stated at pp. 222h and 223a-b:

[…][2]

I shall call this statement "the Prudential Assurance principle".” […]

and at 55E:

“My Lords, whilst in a case such as *Christensen v. Scott*[3] there may be merit in permitting an individual shareholder to sue, the decision in *Prudential Assurance* has stood in England for almost twenty years and, whilst the decision has sometimes been distinguished on inadequate grounds, it has been regarded as establishing a clear principle which the Court of Appeal has followed in other cases. I further consider that the principle has the advantage that, rather than leaving the protection of creditors and other shareholders of the company to be given by the trial judge in the complexities of a trial to determine the validity of the claim made by the plaintiff against the defendant, where conflicts of interest may arise between directors and some shareholders, or between the liquidator and some shareholders, **the principle ensures at the outset of proceedings that where the loss suffered by the plaintiff is sustained because of loss to the coffers of the company, there will be no double recovery at the expense of the defendant nor loss to creditors of the company and other shareholders.** Therefore whilst I think that this House should uphold the *Prudential Assurance* principle, I also consider that it is important to emphasise that the principle does not apply where the loss suffered by the shareholder is separate and distinct from the loss suffered by the company.”

19. Per Lord Millett at 61G onwards:

“A company is a legal entity separate and distinct from its shareholders. It has its own assets and liabilities and its own creditors. The company's property belongs to the company and not to its shareholders. **If the company has a cause of action, this represents a legal chose in action which represents part of its assets. Accordingly, where a company**

[2] See the same quotation already provided above from the speech of Lord Bingham.
[3] A New Zealand case reported at [1996] 1 NZLR 273.

suffers loss as a result of an actionable wrong done to it, the cause of action is vested in the company and the company alone can sue. No action lies at the suit of a shareholder suing as such, though exceptionally he may be permitted to bring a derivative action in right of the company and recover damages on its behalf: see *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)* [1982] Ch. 204 at p. 210. Correspondingly, of course, a company's shares are the property of the shareholder and not of the company, and if he suffers loss as a result of an actionable wrong done to him, then prima facie he alone can sue and the company cannot. On the other hand, although a share is an identifiable piece of property which belongs to the shareholder and has an ascertainable value, it also 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. The correspondence may not be exact, especially in the case of a company whose shares are publicly traded, since their value depends on market sentiment. But in the case of a small private company like this company, the correspondence is exact.

This causes no difficulty where the company has a cause of action and the shareholder has none; or where the shareholder has a cause of action and the company has none, as in *Lee v. Sheard* [1956] 1 Q.B. 192, *George Fischer (Great Britain) Ltd. v. Multi Construction Ltd.* [1995] 1 B.C.L.C. 260, and *Gerber Garment Technology Inc. v. Lectra Systems Ltd.* [1997] R.P.C. 443. **Where the company suffers loss as a result of a wrong to the shareholder but has no cause of action in respect of its loss, the shareholder can sue and recover damages for his own loss, whether of a capital or income nature, measured by the diminution in the value of his shareholding. He must, of course, show that he has an independent cause of action of his own and that he has suffered personal loss caused by the defendant's actionable wrong. Since the company itself has no cause of action in respect of its loss, its assets are not depleted by the recovery of damages by the shareholder."**

And at 63E:

" It has sometimes been suggested (see, for example, *George Fisher v Multi Construction* at p. 266 g-i) that *Prudential v Newman* is authority only for the **proposition that a shareholder cannot recover for the company's loss, and is confined to the case where the defendant is not in breach of any duty owed to the shareholder personally. That is not correct.** The example of the safe-deposit box makes this clear. It is the whole point of the somewhat strained business of the key. The only reason for this is to demonstrate that **the principle applies even where the loss is caused by a wrong actionable at the suit of the shareholder personally**."

20. I was also referred by both sides to the Court of Appeal judgment in Bank Mellat v HM Treasury [2016] EWCA Civ 452 (10 May 2016). Most

relevantly at para. 20 per Lord Thomas of Cwmgiedd, CJ referring to the principle in *Johnson*:

"The explanation by Lord Bingham at pages 35-36 of the circumstances where a shareholder can bring a claim in relation to a loss suffered by the shareholder and the company is **premised on the existence of a separate duty to the shareholder and a loss to the shareholder distinct and separate from the loss suffered by the company** ….. as Lord Millett makes clear at page 66 **the fact that the shareholder has suffered loss because the company has not brought an action is caused by the decision of the company not to pursue its remedy and not by the wrong of the defendant".**

21. The defendant's position was that the Reflective Loss principle expounded in Johnson, and interpreted in Bank Mellat, is not confined to the narrow circumstance of a breach of duty owed to the company, but also encompasses any case where a cause of action would enable a company to sue a defendant in order to make up a loss suffered by the company. In that situation, if the shareholder could but for the principle also sue for the same loss, then the shareholder is debarred from doing so on the public policy grounds described in Johnson.

22. In support of that the defendant (whilst primarily relying on the judgments in Johnson properly understood) also prayed in aid examples, if required, of the notion of 'breach of duty' being given a broad meaning. Those were examples in other contexts such as A v Hoare [2008] 1 AC844, where the question whether an assault claim fell within the scope of s.11 of the Limitation Act 1980 such that the court had the power to extend time for a personal injury claim. S.11 refers to "damages for nuisance, negligence or breach of duty". It was held that even prior to the 1980 Act the concept of 'breach of duty' had been construed widely, as it had been in Letang v Cooper [1965] 1 QB 232 (also a personal injury case) and the preferred construction was a broad one. I gain limited assistance from that line of authority which was in a wholly different context and based on statutory construction, not the interpretation of *Johnson* or the Reflective Loss principle.

23. The claimant relied on Johnson. The speeches of their Lordships repeatedly referred to "breaches of duty" owed to the company eg Lord Bingham "Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss.", and there was a clear statement in *Johnson* to the effect that the judgment in that case was reaching a

balance between, important rights, such that the specific words used by their Lordships in formulating the principle were significant. Per Lord Bingham already cited above with my emphasis:

"On the one hand the court must respect the principle of company autonomy, ensure that the company's creditors are not prejudiced by the action of individual shareholders and ensure that a party does not recover compensation for a loss which another party has suffered. **On the other, the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation."**

In other words, the formulation based specifically on a breach of a duty owed to the company, causing it loss, was the formulation which balanced the two considerations identified by their Lordships. This court was urged not to accept the broader approach proposed by the defendant.

Conclusion on the issue of scope of the Reflective Loss Principle

24. I was not persuaded by the Claimants' argument. The extensive extracts quoted above both from *Johnson* show that whilst 'breach of duty' was referred to frequently, which is hardly surprising given that *Johnson* was a professional negligence case, their Lordships' speeches when read fully and as a whole support the view that the intended scope of the principle is that it includes any situation where a company (whether or not it actually sues) has a cause of action in respect of an actionable wrong, which, if pursued to its fullest extent, would enable it to seek to recoup the loss. It is in my judgment plainly not confined to cases of a breach of duty, though of course it includes such cases. I refer for example to Lord Bingham already quoted:

"A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss" […]

"the object is to ascertain whether the loss claimed appears to be or is one which would be made good if the company had enforced its full rights against the party responsible, and whether (to use the language of *Prudential* at page 223) the loss claimed is "merely a reflection of the loss suffered by the company.""

Lord Hutton:

"the principle ensures at the outset of proceedings that where the loss suffered by the plaintiff is sustained because of loss to the coffers of the company, there will be no

double recovery at the expense of the defendant nor loss to creditors of the company and other shareholders"

Lord Millett:

"If the company has a cause of action, this represents a legal chose in action which represents part of its assets. Accordingly, where a company suffers loss as a result of an actionable wrong done to it, the cause of action is vested in the company and the company alone can sue."

"the principle applies even where the loss is caused by a wrong actionable at the suit of the shareholder personally."

25. In my judgment therefore, provided this is a case where the company could have sued for the loss of company value reflected in the lost share value, then the Reflective Loss principle applies and (subject to the line of argument under *Giles v Rhind* considered below) debars the claimants from suing for that loss.

Could the company have sued as a matter of law?

26. I will take this briefly, since it did not ultimately appear to be disputed that the company could in principle have sued for misfeasance in public office, though not for malicious prosecution (since it was not prosecuted). It seems to me that the cases of Three Rivers DC v Governor and Company of the Bank of England (No. 3) [2003] 2 AC at 191B-193H, and Akenzua v Home Secretary [2003] 1 WLR at para. 29-32, both cited, establish that a company on the facts of this case would have had standing to sue in the tort of misfeasance in public office. It follows that subject to the argument below, the heads of loss in items 13 and 14 which are the subject of this application, are not actionable at the suit of these claimants because they are claims for reflective loss.

(2) Exception to the Reflective Loss principle: Giles v Rhind [2002] EWCA Civ 1428

27. On the eve of hearing, the Claimants raised a new argument, which was addressed in a supplemental skeleton to which the Defendant responded by way of a supplemental skeleton of his own. This is that a

person ought not to be entitled to take advantage of their own wrong, and that where a company such as CPH is rendered unable to sue for its loss, by the actions of the tortfeasor, then *Johnson v Gore Wood* may be distinguished and the shareholder may be permitted to sue for what would otherwise be reflective loss. It was asserted that in this case on the facts the actions of the Defendant's officers caused the company to enter receivership in the first place, rendering it unable to sue for itself (and the receiver did not do so).

28. In *Giles v Rhind*, a company pursued an alleged tortfeasor (D) but abandoned its claim because it could not provide security for costs. There was a consent order for discontinuance. In a subsequent action by Mr Giles against D, D argued that the claim was met by the Reflective Loss principle. The court said at 626 H "*The irony of this line of argument is that, not content with misusing confidential information in order to take the Netto contract which had the effect of rendering the company insolvent, he achieved his aim of defeating the company's claim by … dishonestly denying that he had broken any duty to the company, and then seeking security for costs. Once having achieved the objective of stopping the company's claim, when faced by a claim by Mr Giles personally he accepted and relied on the fact that he broke his contract with the company to defeat Mr Giles's claim. If he is successful his wrongdoing will render him liable to nobody.*" (Per Waller LJ).

29. Per Chadwick LJ at 643 F *"… the effect of the judge's decision – as he himself recognised – is that a wrongdoer who, in breach of his contract with the company and its shareholders, 'steals' the whole of the company's business, with the intention that the company should be so denuded of funds that it cannot pursue its remedy against him, … is entitled to defeat a claim by the shareholders on the grounds that their claim is 'trumped' by the claim which his own conduct was calculated to prevent, and has in fact prevented, the company from pursuing. If that were, indeed, the law following the decision in Johnson v Gore Wood & Co. … I would not find it easy to reconcile the result with Lord Bingham of Cornhill's observation, at p36C, that 'the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation.'*"… [at 644H] "*But Lord Bingham of Cornhill did not address directly the question whether a shareholder could recover for reflective loss in circumstances where the wrong done to the company had made it impossible for the company to pursue its own remedy against the wrongdoer. He did not need to do so* …"

30. The Court of appeal accordingly distinguished *Johnson v Gore Wood.*

31. The Defendant relied on a narrow interpretation of *Giles v Rhind* in Gardner v Parker [2005] BCC 46 to the effect that it is not enough to show that a company chooses not to sue a tortfeasor: the principle in *Giles v Rhind* applies where the company could not sue or (as in *Giles v Rhind*) was compelled to discontinue because it had no choice but to do so financially.

32. Here, said the Defendant, there was no pleaded basis in the claim for being able hold that *Giles v Rhind* applies. The necessary averments were not pleaded, and the possibility of a *Giles v Rhind* argument was mooted in a supplemental skeleton at the last minute. It was noted that in (for example) Towler v Wills [2010] EWHC 1209 (Comm.) reliance on *Giles v Rhind* failed for lack of the required factual allegations in the statement of case.

33. Further it was said that there was no material on which a court could conclude what was said to be required namely that the company had intended to sue and that it was thwarted through lack of funds and that the disabling factor was caused by the actions of the Defendant (rather than any other reason for a lack of funds or inability to sue).

34. There is much merit in the Defendant's argument. In *Giles v Rhind* there was no draft proposed amended pleading. The nearest averments in the current pleadings are (i) a plea at para. 100 of the POC that the Defendant's officers considered whether an administrator should be appointed to run Cawston Park and that they considered there was a risk of the business failing in the event of a prosecution. (ii) at 209 (4) it is pleaded that the Defendant's officers '*knew that the prolonged investigation and prosecution of the Claimants would lead to the demise of their business'*. It is not pleaded that the alleged torts of the Defendant's officers actually prevented the company from suing, or, if such be required, that the company wanted to sue or considered doing so. Nor is there any pleading in relation to any decision by the receiver not to sue.

35. I was urged by the Claimant's leading counsel to allow an application to amend the Particulars if such would be required to permit a *Giles v Rhind* argument to be heard.

36. I am in no doubt that the present pleading does not fully lay the groundwork for a *Giles v Rhind* argument. As examples of how courts

have approached the situation where a pleading is deficient I was referred to Kim v Park [2011] EWHC 1781 (QB) and Spencer v Barclays Bank PLC (unrep). In the former it was said (at para 40) *"However, where the court holds that there is a defect in a pleading, it Is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right."*

37. It seems to me that the decision whether to take a strict approach to pleading and therefore to bring this aspect of the claim to an end is essentially discretionary but must be exercised rationally, that is on some sensible basis. I do not in my judgment have to have, for example, a draft amended pleading before me. I take the view that in principle a credible request from counsel could in some circumstances be enough to persuade me to allow an effort to amend appropriately, but in this there is more material than that to go on.

38. The following points come to mind: that although not all requirements for a *Giles v Rhind* argument are pleaded (in my judgment those requirements are that the torts of the Defendant had the effect of preventing the company from being able to sue the Defendant to judgment, whether or not it actually considered doing so), some of the factual groundwork is there. It is pleaded that the Defendant's officers knew that prolonged prosecution and investigation of the Claimants 'would' cause the business to fail. It is pleaded that the company did fail albeit after a delay. It is (now, in the Part 18 response) pleaded that the torts of the Defendant caused the Claimants to lose the entire value of their shareholding in the company. The value of that loss is pleaded (at over £30m). Although not pleaded, it is not a submission which is surprising to suggest that where a tort causes a 100% loss of value of a company (reflected in a 100% loss to shareholders), that the (by then, worthless) company might have been rendered unable to sue the tortfeasor. Indeed such was ultimately much the factual position in *Giles v Rhind* and the unfairness which the Court of Appeal there sought to address. I must attach much weight also (as did the Court of Appeal) to the dictum of Lord Bingham of Cornhill that *"the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation.*"

39. There are clear gaps in the pleading but the material which is pleaded, combined with the potential injustice of halting claims valued at over £30m without providing a final opportunity to amend, together with

counsel's oral request for an opportunity to amend, has persuaded me that I should make an unless order to the effect that unless by a date to be determined the Claimants apply to amend their Particulars of Claim if so advised to plead reliance on the principles in *Giles v Rhind* and the appropriate factual averments, then that part of the claim shall be struck out. I accept that absent amendment the pleading does not establish the exception to the rule but equally I accept that there are grounds to believe that such a pleading may realistically be open to the Claimants.

40. I am minded, since in most respects this is an indulgence to the Claimants, to order the Claimants to pay the Defendant's costs of the application before me. I will hear argument if that is not accepted. I shall await a proposed draft order. If all matters are agreed then I shall hand down *in absentio* failing which the parties should fix a date for handing down at which I can hear submissions on the form of order.

MASTER VICTORIA MCCLOUD

15/3/18