Exhibit 9

Court of Appeal

Giles *v* Rhind

[2002] EWCA Civ 1428

2002 July 18;
Oct 17

Waller, Chadwick and Keene LJJ

Company — Shareholder — Rights — Action by company for damages for breach of covenant — Breach of covenant resulting in failure of company's business — Action discontinued by reason of company's impecuniosity — Subsequent action by director shareholder in respect of loss of future remuneration and value of shareholding — Whether losses merely reflective of company's losses — Whether director shareholder's losses recoverable

The claimant and the defendant were the directors of a food company, each holding about 50% of the issued shares. In 1990 a venture capital company invested £1·285m in the company in exchange for shares and loan stocks, the claimant's and the defendant's shareholdings being reduced to about 20% each. The claimant also subscribed for £81,330 of unsecured loan stock. All parties entered into a subscription and shareholding agreement under which each agreed to keep secret and confidential and not to use, disclose or divulge to any third party any confidential information relating to the company. The agreement also contained terms restricting the directors' involvement in other business after the end of their employment with the company. In 1993 the relationship between the claimant and the defendant broke down and the defendant left the company, accepting that the restrictions in the agreement would continue to bind him. The defendant thereafter set up his own food business and sold his shares to the venture capital company for £331,000. Using confidential information gathered while acting as a director of company, the defendant diverted the company's most lucrative contract to another company in which he had an interest. Following the loss of that contract the company went into administrative receivership. An action by the company against the defendant was discontinued when it was unable to put up security for his costs, the company undertaking not to bring any further action in relation to its claim. The claimant then brought an action against the defendant, alleging breaches of the shareholders' agreement so far as there were covenants in his favour and claiming damages for the loss of value of his shares in the company and for loss of remuneration he would otherwise have earned. The defendant denied breaching any covenants and asserted that the claimant was estopped from bringing proceedings by virtue of the terms of the discontinuance of the company's action against him. The judge found in favour of the claimant for damages to be assessed. When the damages came to be assessed the question arose whether, in the light of House of Lords authority, any items of the claimant's loss were recoverable as loss suffered by him personally as opposed to being reflective of the company's loss. The judge who heard that question held in favour of the defendant.

On appeal by the claimant—

Held, allowing the appeal, that, although in general a shareholder could not recover damages from a wrongdoer for a loss which was reflective of loss suffered by the company in circumstances where the company itself could have recovered in respect of that loss but had chosen not to do so, since the loss to the shareholder in such a case was caused by the decision of the company not to pursue its remedy and not by the wrongdoer's fault, there were no reasons of principle or policy to prevent a shareholder from recovering damages where the wrong done to the company had made it impossible for it to pursue its own remedy against the wrongdoer; that, since the claimant had established both a contract containing covenants in his favour the

A object of which was to protect his investment in, his loan to and his remuneration from the company and a breach of those covenants by the defendant of a kind that led to serious damage to his investment, irrecoverability of his loan and discontinuance of his remuneration, since the devastating effect of that breach was not only foreseeable but intended and since the company had not settled its claim but had been forced to abandon it by reason of impecuniosity attributable to the wrong which had been done to it, the claimant was entitled to pursue his claim against the defendant;
B and that, accordingly, the case would be referred back to the High Court to assess the damages payable by the defendant to the claimant (post, paras 18, 19, 28, 34, 35, 39, 40, 41, 66–67, 69, 76, 79, 80, 82).

Day v Cook [2001] Lloyd's Rep PN 551, CA considered.

Johnson v Gore Wood & Co [2002] 2 AC 1, HL(E) distinguished.

Decision of Blackburne J reversed.

C The following cases are referred to in the judgments:

Barings plc v Coopers & Lybrand [1997] 1 BCLC 427, CA

Christensen v Scott [1996] 1 NZLR 273

Day v Cook [2001] EWCA Civ 592; [2001] Lloyd's Rep PN 551, CA

Fischer (George) (Great Britain) Ltd v Multi Construction Ltd [1995] 1 BCLC 260, CA

Gerber Garment Technology Inc v Lectra Systems Ltd [1997] RPC 443, CA

D *Heron International Ltd v Lord Grade* [1983] BCLC 244, CA

Howard (R P) Ltd v Woodman Matthews & Co [1983] BCLC 117

Johnson v Gore Wood & Co [1999] Lloyd's Rep PN 91, CA; [2002] 2 AC 1; [2001] 2 WLR 72; [2001] 1 All ER 481, HL(E)

Lee v Sheard [1956] 1 QB 192; [1955] 3 WLR 951; [1955] 3 All ER 777, CA

Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204; [1982] 2 WLR 31; [1982] 1 All ER 354, CA

E *Stein v Blake* [1998] 1 All ER 724, CA

Walker v Stones [2001] QB 902; [2001] 2 WLR 623; [2000] 4 All ER 412, CA

Watson v Dutton Forshaw Motor Group Ltd (unreported) 22 July 1998; Court of Appeal (Civil Division) Transcript No 1284 of 1998, CA

Weld-Blundell v Stephens [1920] AC 956, HL(E)

The following additional cases were cited in argument

F *Agrotexim v Greece* (1995) 21 EHRR 250

Fairchild v Glenhaven Funeral Services Ltd [2002] UKHL 22; [2003] 1 AC 32; [2002] 3 WLR 89; [2002] 3 All ER 305, HL(E)

Humberclyde Finance Group Ltd v Hicks (unreported) 14 November 2001, Neuberger J

Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, HL(Sc)

G **APPEAL** from Blackburne J

By a writ and statement of claim issued on 23 January 1996 the claimant, Edward John Giles, claimed against the defendant, Roderick Middleton Rhind, damages for breach of terms of a shareholders' agreement dated 11 June 1990 between the claimant, the defendant, Surrey Hill Foods Ltd ("SHF") and Alan Patricof Associates Ltd later Apax Partners & Co Ventures Ltd ("APA") to keep secret and confidential and not to use, disclose or
H divulge to any third party any confidential information relating to SHF. By a judgment dated 26 January 2001 Michael Kallipetis QC sitting as a deputy judge of the Chancery Division held that the defendant had, in breach of the terms of the shareholders' contractual duty of confidence, caused loss to SHF by diverting a lucrative contract of SHF with Netto Foodstores Ltd to a

newly-formed company in which the defendant had an interest causing loss to the claimant and ordered damages to be assessed. At a subsequent preliminary hearing as to the assessment of damages on 24 July 2001 Blackburne J held that the principle established by the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1 prevented the claimant from recovering (1) arrears of remuneration, holiday pay, expenses and pension contributions, (2) loss of future remuneration, pension contributions and health insurance and car benefit, (3) loss of the nominal value of convertible loan stock, interest on that loan stock, (5) loss of value of his existing holding of 19,900 ordinary shares, (6) less certain payments received from SHF since they were reflective of SHF's claim for loss. Blackburne J granted permission to the claimant to appeal from his decision.

By an appellant's notice filed on 7 August 2001 the claimant appealed from the decision of Blackburne J on the grounds that *Johnson v Gore Wood & Co* was distinguishable on the facts since SHF had been effectively prevented by the defendant from pursuing its claim against the defendant, that a party who suffered loss was not arbitrarily to be denied fair compensation and that if the decision of Blackburne J was upheld it would amount to a licence to perpetrate fraud leaving a wrong without remedy.

The facts are stated in the judgment of Waller LJ.

George Bompas QC and *Sharif Shivji* for the claimant. Blackburne J held that *Johnson v Gore Wood & Co* [2002] 2 AC 1 precluded the claimant from recovering any damages on the basis that the claimant's loss was reflective of the company's loss. This was despite the fact that the claimant's cause of action was for breach of an express term of a contract between the claimant and the defendant, the breach being one which was calculated to enrich the defendant while driving the company into insolvency and to leave the company unable to pursue any claim it might have against the defendant for the wrongs done to the company. Further, the defendant had caused the company to give up any cause of action it had against him, so that as a practical matter there was no possibility of the company making any recovery. It would be "offensive to instinctive notions of what justice requires and fairness demands" (see *Fairchild v Glenhaven Funeral Services* [2003] 1 AC 32, 68, para 36) if a wrongdoer were allowed to enjoy the fruits of his wrongdoing without paying any compensation at all to the victim: see *Walker v Stones* [2001] QB 902 and *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39. The measure of the damages is the sum which will put the claimant in the same position as he would have been in if the defendant had performed his contract with the claimant. In the present case the loss suffered by the claimant is not reflective of a loss suffered by the company but flows from the insolvency of the company, the insolvency and the loss being immediately caused by the defendant's breach.

Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204 did not lay down any general principle of law about reflective loss; it was only about causes of action where loss was an essential ingredient and no loss could be shown beyond some unrealised diminution in value of shares measured by a market index: see *George Fischer (Great Britain) Ltd v Multi Construction Ltd* [1995] 1 BCLC 260; *Heron International Ltd v Lord Grade* [1983] BCLC 244 and *Barings plc v Coopers & Lybrand* [1997] 1 BCLC 427.

A The operation of the exclusionary principle as regards loss which is reflective of, or parasitic on, loss suffered by a company, as it has been established by *Johnson v Gore Wood & Co* [2002] 2 AC 1, was described by Arden LJ in *Day v Cook* [2001] Lloyd's Rep PN 551, 560, para 38, as involving the company's claim (if any) "trumping" that of the shareholder. However the reason why in the present case *Gore Wood* does not dictate the
B conclusion reached by the judge is in summary as follows. First, the loss which the claimant suffered is not "merely a reflection" of a loss suffered by the company. His loss flows from the insolvency of the company (the insolvency and the loss being immediately caused by the defendant's breach); but it is not measured by the company's loss and is not even a function of the amount of the company's loss. His loss could not now be, and would never have been diminished on a pound for pound basis—if
C indeed at all—by any damages which the company might have recovered from the wrongdoer, the defendant, or the other defendants initially sued by the company (that is, had the company been able to obtain a judgment and had those sued by the company been good for the amount of the judgment): the extent of any diminution would simply have been the fortuitous combination of the liabilities of the company in its insolvency proceedings
D and the amount which, with the recovered damages, the relevant office holder had been able to realise for the company's assets on a forced sale.

Secondly, the *Gore Wood* trumping principle does not apply in a case where the claimant's loss has been caused by a breach of covenant given by the wrongdoer to the claimant not to injure a company. In such a case it matters not whether or not part of the claimant's loss can be characterised as
E reflective of or parasitic upon damage sustained by the company by reason of the wrongdoing which gave rise to the breach of covenant: the principle is not so detached from reality that in such circumstances recovery must be denied.

Thirdly, the *Gore Wood* trumping principle is not applicable where the wrongdoing is intentional, the claimant's damage the natural consequence
F of the wrongdoing, and the circumstances of the wrongdoing are such that in practice there is no realistic prospect of the wrongdoer being made to pay anyone any compensation for injury caused by his wrongdoing, unless the compensation is allowed to be recovered by the claimant.

Finally, if contrary to the above the *Gore Wood* trumping principle has any application to a case such as the present, it is nevertheless confined to loss which a claimant suffers in his capacity as a shareholder. It does not
G apply to loss which he suffers in some other capacity, such as that of employee or creditor.

In any case, the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms entitles the claimant to the protection and peaceful enjoyment of his property within the spirit of the Convention: see *Humberclyde Finance Group Ltd v Hicks* (unreported)
H 14 November 2001 (Neuberger J) and *Agrotexim v Greece* (1995) 21 EHRR 250.

Paul Greenwood for the defendant. Blackburne J applied the right principle as set out in *Johnson v Gore Wood & Co* [2002] 2 AC 1. Therefore, it is unnecessary to delve into the merit of the claimant's claim.

Where a company suffers loss caused by a breach of duty owed to it, it is only the company which should sue for the loss caused to it and a shareholder has no claim for the company's loss, damages or loss which was reflective of the company's loss. The claimant's claim is merely reflective of the company's loss which is not recoverable in this action. [Reference was made to *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204; *Heron International Ltd v Lord Grade* [1983] BCLC 244; *R P Howard Ltd v Woodman Matthews & Co* [1983] BCLC 117; *Stein v Blake* [1983] 1 All ER 724 and *Day v Cook* [2001] Lloyd's Rep PN 551.]

The claimant's schedule of loss and damages refers to (1) loss referable to pay, benefits, expenses and remuneration, (2) loss referable to the inability of the company to repay a loan and (3) loss referable to the diminution in the value of the claimant's shares in the company. The first category does not fall within the exception set out in *Johnson* at page 35 for an independent claim since the alleged breach was in respect of the duty owed to the company. The claims under categories 2 and 3 ought to be a claim against the company; the latter being reflective of the company's loss: see *Johnson* page 66. In effect, the claimant is seeking to recover damages from the defendant which derive from and reflect the inability of the company to meet its obligations to the claimant as a consequence, whether direct or indirect, of the loss which it has suffered as a result of the defendant's conduct.

These are not losses separate and distinct from those of the company, but losses which would or could be made good if the company had enforced its full rights against the defendant.

Bompas QC replied.

Cur adv vult

17 October. The following judgments were handed down.

WALLER LJ

Introduction

1 This appeal raises for consideration the width of what was decided by the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1. By a judgment dated 24 July 2001 Blackburne J held that all the heads of damage claimed by Mr Giles in this case are irrecoverable by virtue of that decision but said, in paragraph 29: "I reach this conclusion with reluctance because, to my mind, it leaves a wrong without a remedy." He further granted permission to appeal on the basis that the matter should be reviewed by this court. When the appeal first came on Mr Giles appeared in person with Mr Greenwood representing Mr Rhind. That court thought that the points to be argued were of sufficient importance for Mr Giles to be represented (if possible). Mr Greenwood had no objection to that course. The matter was adjourned and Mr Giles has been able to enlist the assistance of Mr George Bompas, who has, as we understand it, rendered his services pro bono. The court is very grateful to Mr Bompas for the care and attention he has given to the appeal.

The facts

2 Mr Giles and Mr Rhind were formerly directors and shareholders of a company called Surrey Hills Foods Ltd ("SHF"). SHF had been formed by

A them in 1987, at which time they each held approximately 50% of the issued shares, 12 shares being issued to a third person who does not feature further in the story. The principle activity of SHF was to run a business concerned with the manufacture of cooked meat suitable for use in pizzas, ready meals or canned products.

3 The business was a success and in July 1990 the company was able to attract venture capital support from an organisation called APA Ventures
B ("Apax"). This enabled SHF to expand by acquiring a cooked meat business based in Northampton. Apax invested £1·285m, receiving in return a quantity of ordinary shares, preference shares and convertible unsecured loan stock. Others, including a family trust, invested a further £27,500. The existing shareholdings were subdivided into 1p ordinary shares. Mr Giles in the result held 19,900 ordinary shares, Mr Rhind 18,900 ordinary shares
C and the third party 1,332 ordinary shares. The shareholding of Mr Giles and Mr Rhind represented approximately 20% of the issued ordinary share capital.

4 The directors also subscribed for convertible unsecured loan stock carrying interest at 18%. Mr Giles became the holder of £81,330 of the stock. The stock was redeemable at the option of the director on or before
D 10 June 1997 or convertible at a stated rate into ordinary shares of 1p each. Mr Giles was appointed managing director of SHF, Mr Rhind the commercial director and a Mr Hancock was appointed chairman. A Mr Freedman was also appointed to the board.

5 The terms of Apax's investment in SHF, the acquisition of the Northampton business and the alteration of SHF's shareholdings and other changes made necessary by this development in the company's fortune were
E enshrined in a subscription and shareholders' agreement and a sale agreement, each dated 11 June 1990. At the same time Mr Giles and Mr Rhind entered into service agreements with SHF under which they were entitled to remuneration and, as I understand it, pension rights.

6 It was a term of the subscription and shareholders' agreement, to which Apax, Mr Rhind, Mr Giles and SHF were parties, that:

F > "9.1 . . . each of the parties agrees to keep secret and confidential and not to use disclose or divulge to any third party or to enable or cause any person to become aware of (except for the purposes of the company's business) any confidential information relating to the company including . . ."

There then followed a list of various matters. Clause 9.2 contained
G restrictions on the part of Mr Giles and Mr Rhind, expressed to be for the purpose of protecting Apax's investment in the business, concerning their involvement in other businesses after their employment by SHF should cease. Matching provisions in substantially similar terms were contained in the service agreements entered into by Mr Giles and Mr Rhind.

7 As a result of the relocation to Northampton the business of SHF progressed, the turnover increasing from approximately £4·5m to
H £12·5m by the year ending March 1994. It initially traded at a considerable loss but by March 1993 it was operating at a small net profit.

8 It was alleged in paragraph 9(2) of the statement of claim in the action between Mr Giles and Mr Rhind that part of the confidential information belonging to SHF was the fact that "[SHF] had a large and lucrative

contract . . . with one Netto Foodstores . . . for the supply of cooked meat and that the future solvency of [SHF] would depend largely on the continuance of [that] contract". That paragraph was expressly admitted by Mr Rhind in his amended defence.

9 Unhappily by the beginning of 1993 the relationship between Mr Rhind and Mr Giles had broken down. In March 1993 the board of SHF decided that Mr Rhind would have to go. He did so, ceasing from March 1993 to be in the company's employment, but continuing as a shareholder and director. Terms were agreed for Mr Rhind's resignation. They included a termination payment of £32,000 and his written acceptance that certain provisions of his service agreement and all material provisions of the subscription and shareholders' agreement would continue.

10 In June 1993 Mr Rhind set up his own food business, operating through a company called Bedfield Foods Ltd. In September 1993, before Mr Giles, or one assumes Apax, had any knowledge of Mr Rhind's plans, Mr Rhind sold his shares (only slightly fewer than Mr Giles's holdings) to Apax for £331,000.

11 Having been paid off by SHF and having achieved payment for his shares, Mr Rhind then in breach of his covenant with SHF, Apax and Mr Giles, in effect stole the business of SHF. The details are set out in the judgment of Mr Michel Kallipetis QC sitting as a deputy High Court judge when he gave judgment on liability in this action. He found in effect that Mr Rhind had masterminded the diversion of the Netto contract from SHF to a company, MW Foods Ltd, making use of the confidential information of SHF. Having regard to the admission by Mr Rhind of the importance of the Netto contract, there can be little doubt that he intended by his conduct to destroy the SHF business and the value of any investment which Apax and Mr Giles had in that business.

12 In March 1994 SHF launched proceedings against Mr Rhind, MW Foods Ltd and Bedfield Foods Ltd and two other individuals who were former employees of SHF. The writ in that action set out a claim for injunctive relief against the individual defendants and also claimed damages for breach of contract together with an order for delivery up of such confidential information as they had. SHF applied by summons in that action for interim injunctive relief but the matter never came on for hearing. On 15 April 1994 SHF was placed in administrative receivership. At this stage Mr Rhind was stoutly denying any involvement in the misuse of confidential information and stoutly denying any involvement in MW Foods Ltd. Thus in that action, as noted by Mr Kallipetis in paragraph 37 of his judgment, Mr Rhind swore a affidavit stating: "I should make it clear that I am not and never have been a director of nor a shareholder in MW Foods and have never been involved in MW Foods activities." Mr Kallipetis found that "that cannot be a truthful statement".

13 An application was made evidently for security of costs and it seems that again, according to the judgment of Mr Kallipetis, Apax was not willing to put up the security. In the result SHF did not have the money to pursue the action and SHF discontinued that action in June 1994. The consent order provided for discontinuance on the basis that it precluded SHF from bringing any further action against any of the defendants in respect of its claims in the action.

A 14 It was in that context that Mr Giles began this action in January 1996. He alleged breaches of the shareholders' agreement so far as there were covenants in his favour and asserted that he had suffered loss and claimed for the value of his shares in the business and for the remuneration unparticularised which he otherwise would have earned. Mr Rhind initially put in an uninformative defence making no admissions but ultimately by an amended defence asserted that he had not breached any covenant in the way B alleged by Mr Giles. Mr Rhind also asserted that Mr Giles was estopped from bringing proceedings by virtue of the discontinuance of the action by SHF and the terms of the order obtained therein. There was no assertion that the loss and damage claimed by Mr Giles would in any event be irrecoverable.

15 The trial on liability came on before Michel Kallipetis QC. C Mr Rhind continued to suggest that he was not in breach of any covenant and was not a party to the using of confidential information for the purposes of persuading Netto to terminate their contract with SHF and a contract with MW Foods. In a judgment dated 26 January 2000 Mr Kallipetis held resoundingly in favour of Mr Giles, concluding: "I am quite satisfied that Mr Rhind is in breach of his obligations to Mr Giles under the shareholders' agreement and thus I find in the claimant's favour on this part of the action." D

16 Assessment of damages was then left over. Mr Giles prepared a schedule of damage under the following heads: (1) arrears of remuneration, holiday pay, expenses, pension contributions and loan interest; (2) loss of future remuneration, pension contributions and health insurance, death in service and car benefit for three years from 18 April 1994; (3) loss of the nominal value of convertible loan stock (alternative loss of value of the E shares in SHF to which Mr Giles would have become entitled if he had exercised his right of conversion in April 1997); (4) loss of interest on the loan stock between April 1994 and April 1997; (5) loss of value of his existing holding of 19,900 ordinary shares; (6) *less* certain payments received from SHF. It was in that context that Deputy Master Teverson raised the question whether, in the light of the decision of the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1, any of the items were F recoverable. He thought that point worthy of consideration by a judge and directed that a preliminary issue be tried as to whether any, and if so which, items included in the claimant's amended schedule of loss were recoverable as loss suffered by him personally. It was that issue which was determined, reluctantly, by Blackburne J in favour of Mr Rhind.

17 It must be remembered that the court is concerned simply with a G preliminary issue. One does not know what evidence would be available to establish what. To a large extent the court is seeking to analyse recoverability of damage in the context of assertions by one side as against the other. Only if it is clear that Mr Giles cannot succeed in recovering any of the heads of loss flowing from what is now an established breach of contract should the court prevent the assessment of damages going ahead.

18 If the court were looking at this case on the basis that it was a claim H for breach of contract then it would I suggest, before looking at *Johnson v Gore Wood & Co*, be inclined to hold the heads of damage recoverable. It would I think reason along the following lines. First, Mr Giles has established a contract containing covenants in his favour. The object of those covenants was to protect his investment in the company, his loan to the

company and his remuneration from the company. Second, he has established a breach of those covenants by Mr Rhind, those breaches occurring continuously between October 1993 and March 1994. Third, the breaches were of a kind that led to serious damage to Mr Giles's investment, irrecoverability of his loan and discontinuance of his remuneration and employment. Indeed, the breach by Mr Rhind which involved the use of confidential information to obtain the contract on which the business depended was bound to have the consequence of destruction of the business of the company. Thus the devastating effect on Mr Giles's investment, his loan and his remuneration was not only foreseeable but intended. Fourth, the loss of value of his investment would appear, at least prima facie, to be readily ascertainable in that Mr Rhind sold his shares for over £331,000 in September 1993 while Mr Giles has not been able to obtain one penny for approximately the same number of shares. Fifth, the insolvency of the company has made any loans that Mr Giles made to the company irrecoverable. Sixth, stopping the company in its tracks would be likely to cause loss of remuneration and pension for Mr Giles in the future. Clearly evidence would be necessary to establish precisely what the position of Mr Giles would be if the taking of the confidential information and the Netto contract had not taken place, but looking at the matter in the above way a court could not contemplate striking out any of the heads of damage.

19 Ultimately when quantification of damage had to be considered certain factors would have to be borne in mind. Again, even without reference to *Johnson v Gore Wood & Co* [2002] 2 AC 1, the judge would be conscious that it was important that Mr Giles recovered damage that he had suffered and not the damage that the company had suffered. Mr Giles and the company were promisees of the same covenants given independently to each other. The judge would wish to ensure that Mr Giles did not recover twice. He still has the shares which he says are worthless, and if the company could recover damages for the misuse of confidential information and the taking of the Netto contract, those shares might come to have some value. Indeed, if the company could recover damages, there might be a possibility of Mr Giles recovering past remuneration and some part of his loan. But, if the court were satisfied that the destruction of the company was so complete and Mr Rhind's conduct such that the company simply had no ability to bring any claims, that would eliminate any concerns. It would be a matter for evidence, but Mr Giles suggests that the destruction was that complete and indeed so complete that the action brought by the liquidator had to be withdrawn because Mr Rhind obtained an order for security for costs which the company could not provide. If that were established then there would be no risk of the company making any claim against Mr Rhind and no question of the shares having any value from such a claim.

20 How then, it may be asked, can Mr Rhind effectively strike out Mr Giles's heads of damage? He does that by relying on the fact that the contractual duty that he owed to Mr Giles is the same contractual duty that he owed to the company, and in reliance on *Johnson v Gore Wood & Co.* He submits that the heads of damage claimed by Mr Giles are merely reflective of the claim that the company would have had if it could have pursued its action and are thus irrecoverable by Mr Giles. 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, as the judgment of Mr Kallipetis demonstrated, 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 in order to defeat Mr Giles's claim. If he is successful his wrongdoing will render him liable to nobody.

21 Mr Greenwood, for Mr Rhind, engagingly and realistically commenced his submissions by saying that he would not be referring to the merits of Mr Rhind's position, but would submit simply that, by virtue of the House of Lords authority and various Court of Appeal authorities, Blackburne J was right. The question is whether Mr Greenwood is right in that submission.

22 *Johnson v Gore Wood & Co* [2002] 2 AC 1 is the starting point. The facts are in my view important. They were that the plaintiff Johnson conducted his affairs through a number of companies, including W Ltd, in which company he held all but two shares. On behalf of W Ltd he instructed a firm of solicitors who from time to time acted on his behalf personally. The solicitors were negligent in serving a notice exercising an option on behalf of W Ltd. By the time the conveyance was completed W Ltd had suffered substantial loss because of the cost of certain proceedings in which the vendor had been legally aided, its inability to recover damages and costs from the vendor, the collapse of the property market and interest charges that it had incurred. In January 1991 W Ltd commenced proceedings against Gore Wood & Co, the solicitors. The solicitors representing W Ltd notified solicitors representing Gore Wood & Co that Johnson had a personal claim which he would pursue in due course. W Ltd's proceedings were eventually compromised during the trial on payment to W Ltd of a substantial proportion of the sum claimed by it. Thereafter the plaintiff issued a writ against the defendant making a personal claim. There were two issues before the House of Lords. The first issue related to whether the personal action was an abuse of process and the second related to the question whether certain heads of loss should be struck out prior to a trial. We are only concerned with the heads of damage aspect. It is right to point out that the Court of Appeal [1999] Lloyd's Rep PN 91 had struck out Mr Johnson's claim in so far as he was claiming that "the value of the plaintiff's shareholding in WWH has been and continues to be greatly diminished, and further the said shareholding has been and continues to be less readily saleable". That claim was struck out, the court saying, at p 109:

> "The company had the opportunity fully to restore its coffers and if it did not do so in the compromise it reached with the defendants, then Mr Johnson's loss was caused by the inadequacy of the settlement and not by the defendants' fault."

There was no appeal from that aspect to the House of Lords. The House of Lords were concerned to consider an appeal by Gore Wood & Co seeking to strike out further heads which the Court of Appeal had allowed to remain. In relation to those other heads the House of Lords allowed all to remain save the claim he had made in respect of the diminution in value of pension. On that claim they distinguished between the value of the pension in so far as the company would have contributed to the same and the enhancement of

that pension if the company had contributed to the same. The enhancement aspect they allowed to remain.

23 Lord Bingham of Cornhill referred to the following Court of Appeal authorities: *Lee v Sheard* [1956] 1 QB 192, *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, *Heron International Ltd v Lord Grade* [1983] BCLC 244, *R P Howard Ltd v Woodman Matthews & Co* [1983] BCLC 117, *George Fischer (Great Britain) Ltd v Multi Construction Ltd* [1995] 1 BCLC 260, *Christensen v Scott* [1996] 1 NZLR 273, *Barings plc v Coopers & Lybrand* [1997] 1 BCLC 427, *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443, *Stein v Blake* [1998] 1 All ER 724 and *Watson v Dutton Forshaw Motor Group Ltd* (unreported) 22 July 1998; Court of Appeal (Civil Division) Transcript No 1284 of 1998. He then summarised the position in the following way [2002] 2 AC 1, 35–36:

> "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 Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, particularly at pp 222–223, *Heron International*, particularly at pp 261–262, *George Fischer*, particularly at pp 266 and 270–271, *Gerber* and *Stein v Blake*, 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 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 pp 195–196, *Heron International*, particularly at p 262, *R P Howard*, particularly at p 123, *Gerber* and *Stein v Blake*, particularly at p 726. I do not think the observations of Leggatt LJ in *Barings*, 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. 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

A 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 B company had enforced its full rights against the party responsible, and whether (to use the language of *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, 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 C 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."

24 Lord Millett's judgment really needs reading in extenso but it is right to quote [2002] 2 AC 1, 61–62:

D "*The firm's cross-appeal: recoverable heads of damage*

"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 is a legal chose in action which represents part of its assets. Accordingly, where a company E 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, 210. Correspondingly, of course, a company's shares are the property of the shareholder and not of F 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 G 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 QB 192, *George* H *Fischer (Great Britain) Ltd v Multi Construction Ltd* [1995] 1 BCLC 260, and *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 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. 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, in so far 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."

25 He also dealt with Leggatt LJ in *Barings plc v Coopers & Lybrand* [1997] 1 BCLC 427 in the following way [2002] 2 AC 1, 65:

"In *Barings plc v Coopers & Lybrand* a parent company, brought an action in negligence against the auditors of a wholly-owned subsidiary. Leggatt LJ correctly distinguished both *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, where the shareholder had no independent cause of action of his own, and *George Fischer (Great Britain) Ltd v Multi Construction Ltd* [1995] 1 BCLC 260, where the company had none. Here each of them had its own cause of action. But he stated, at p 435B–E, that if the shareholder suffered loss as a result of a breach of duty on the part of the defendant owed to it, it could not be disentitled from suing merely because the damages claimed would or might include damages for which the defendant was liable to the company. There was, he said, no legal principle which debarred a holding company from recovering damages for loss in the value of its subsidiaries resulting directly from the breach of a duty owed to the holding company as distinct from a duty owed to the subsidiaries. I do not accept this as correct."

26 Thereafter he dealt with *Christensen v Scott* [1996] 1 NZLR 273 and having quoted the following passage, at p 280, from Thomas J giving the judgment of the court:

"the diminution in the value of Mr and Mrs Christensen's shares in the company is by definition a personal loss and not a corporate loss. The loss suffered by the company is the loss of the lease and the profit which would have been obtained from harvesting the potato crop. That loss is reflected in the diminution in the value of Mr and Mrs Christensen's shares. They can no longer realise their shares at the value they enjoyed prior to the alleged default of their accountants and solicitors."

A Lord Millett then continued [2002] 2 AC 1, 66:

> "I cannot accept this reasoning as representing the position in English law. It is of course correct that the diminution in the value of the plaintiff's shares was by definition a personal loss and not the company's loss, but that is not the point. The point is that it merely reflected the diminution of the company's assets. The test is not whether the company
> B could have made a claim in respect of the loss in question; the question is whether, treating the company and the shareholder as one for this purpose, the shareholder's loss is franked by that of the company. If so, such reflected loss is recoverable by the company and not by the shareholders. Thomas J acknowledged that double recovery could not be permitted, but thought that the problem did not arise where the company had settled its claim. He considered that it would be sufficient to make an
> C allowance for the amount paid to the liquidator. With respect, I cannot accept this either. As Hobhouse LJ observed in *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443, 471, if the company chooses not to exercise its remedy, the loss to the shareholder is caused by the company's decision not to pursue its remedy and not by the defendant's wrongdoing. By a parity of reasoning, the same applies if the
> D company settles for less than it might have done. Shareholders (and creditors) who are aggrieved by the liquidator's proposals are not without remedy; they can have recourse to the Companies Court, or sue the liquidator for negligence. But there is more to it than causation. The disallowance of the shareholder's claim in respect of reflective loss is driven by policy considerations. In my opinion, these preclude the shareholder from going behind the settlement of the company's claim. If
> E he were allowed to do so then, if the company's action were brought by its directors, they would be placed in a position where their interest conflicted with their duty; while if it were brought by the liquidator, it would make it difficult for him to settle the action and would effectively take the conduct of the litigation out of his hands. The present case is a fortiori; Mr Johnson cannot be permitted to challenge in one capacity the
> F adequacy of the terms he agreed in another."

27 Lord Goff of Chieveley simply agreed with Lord Bingham of Cornhill and Lord Millett in their conclusion, i e that Mr Johnson should be entitled to recover damages in respect of all heads of "non-reflective consequential loss which are not too remote". Lord Cooke of Thorndon was clearly less happy about the very firm lines that Lord Millett and Lord
G Bingham of Cornhill might be said to be drawing. Lord Hutton also was clearly less happy about the firm lines although did feel that having regard to its history the principle in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 should be followed in preference to the approach of the New Zealand case *Christensen v Scott* [1996] 1 NZLR 273.

28 There are certain facts which distinguish our present case from
H *Johnson v Gore Wood & Co* [2002] 2 AC 1. First, *Johnson v Gore Wood & Co* was a case, as emphasised by Lord Bingham of Cornhill and Lord Millett, where Mr Johnson carried on his business through a small private company. His position was practically indistinguishable from that of his company. It was a case where the depletion in the value of the assets reflected in the diminution in the value of the shares was likely to correspond exactly (in the

words of Lord Millett, at p 62B). Second, W Ltd had brought an action and compromised the same; indeed Johnson was the directing mind of the company when it agreed to the compromise. There is no reason to think that the company would not have recovered if it had chosen to do so precisely that value which would have reflected the diminution in value of the shares which Johnson was claiming. There was no question of W Ltd having been disabled from bringing the claim by the very wrongdoing which by contract the defendant had promised the plaintiff he would not carry out. Third, the action was tried on the assumption that the solicitors owed an independent duty to Johnson, but the nature of the case was such that it was not easy to assume such a totally independent duty. Fourth, it could not be argued ultimately that the loss of value was other than reflective of the company's loss despite the way the claim was pleaded. But, so far as the damage in relation to investment in shares in this case is concerned, Mr Giles's losses are not as it seems to me "merely reflective". The shares became valueless on his case because the company's business as a whole was destroyed. Obviously the value of his shares reflect to some extent the value of the assets of the company but in his case they also reflect what Lord Millett described as market sentiment or what would have been considered their value because of the potential which the business had. Fifth, it certainly is not in my view in reality a case where Mr Giles is seeking to recover as damages damages which the company could have recovered. The company's claim for damages for breach of contract would have been of a quite different nature based on an assessment of profits lost by virtue of the confidential information being used to take the Netto contract. Mr Giles's loss relates to the fact that the business as a whole was totally destroyed. Indeed even if the company had recovered damages the Netto contract would never have been restored, the business would never have been the same and Mr Giles's share would inevitably have been devalued by Mr Rhind's activities. The value of the shares when Mr Rhind obtained £300,000 for them in 1993 reflected not only the assets of the company but the good prospects of the company into the future and that loss of value could not be recovered by SHF in any action that it might have brought.

29 When Lord Bingham of Cornhill refers to the observations of Leggatt LJ in *Barings plc v Coopers & Lybrand* [1997] 1 BCLC 427 and the New Zealand Court of Appeal case *Christensen v Scott* [1996] 1 NZLR 273 not being reconciled with his statement of principle, he is referring to the fact that in the passages that he there refers to both judges were suggesting that, in relation to a breach of duty owed to A, A might recover damage which B could recover in relation to the breach of duty as against B. That that is an important principle there is no doubt, but even that principle has this qualification. Even though the damage may have been suffered by B if B has no cause of action for it A as a shareholder may recover by reference to the diminution in the value of shares.

30 Thus neither Lord Bingham of Cornhill nor Lord Millett would I think argue with the following propositions. First that the principle which *Johnson v Gore Wood & Co* [2002] 2 AC 1 establishes will not, in the words of Sir Christopher Slade in *Walker v Stones* [2001] QB 902, 932–933,

> "operate to deprive a claimant of an otherwise good cause of action in a case where (a) the plaintiff can establish that the defendant's conduct

A 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 (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."

B Second (as they both recognised), if shareholders have a cause of action in relation to damage suffered by the company in which they hold the shares where that company does not have a cause of action, the shareholders may bring a claim even if in reality they are claiming damages reflective of the loss suffered by the company.

31 The logic of that second exception ought to be based on the injustice C of a wrongdoer being able to defeat a claim by suggesting that the loss being suffered was suffered by the company and is thus irrecoverable by the shareholder although the company does not or may not have a cause of action. But it is right to say that Lord Millett [2002] 2 AC 1, 62D justifies that exception on the basis that "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". Thus Lord Millett appears to have in mind the D concept that the cause of action which a company has (if it has) is one which enables the company to bring about full recovery.

32 Lord Bingham of Cornhill, where he is considering what should constitute a mere "reflection of the loss suffered by the company", put it this way, at p 36:

> "The problem can be resolved only by close scrutiny of the pleadings at E 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 . . ."

33 In *Johnson v Gore Wood & Co* there was no difficulty about the company having a cause of action and being able to recover on the cause of F action. I also think that in the light of Lord Bingham of Cornhill's observation, at p 36C, that it is important for the "court [to] be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied compensation", it is clear that he had the particular facts in *Johnson v Gore Wood & Co* in mind, i e that there had been nothing to stop the company continuing with its action if it had so chosen.

G 34 One situation which is not addressed is the situation in which the wrongdoer by the breach of duty owed to the shareholder has actually disabled the company from pursuing such cause of action as the company had. It seems hardly right that the wrongdoer who is in breach of contract to a shareholder can answer the shareholder by saying, "The company had a cause of action which it is true I prevented it from bringing, but that fact alone means that I the wrongdoer do not have to pay anybody."

H 35 In my view there are two aspects of the case which Mr Giles seeks to bring which point to Mr Giles being entitled to pursue his claim for the loss of his investment. First, as it seems to me, part of that loss is not reflective at all. It is a personal loss which would have been suffered at least in some measure even if the company had pursued its claim for damages. Second,

even in relation to that part of the claim for diminution which could be said to be reflective of the company's loss, since, if the company had no cause of action to recover that loss the shareholder could bring a claim, the same should be true of a situation in which the wrongdoer has disabled the company from pursuing that cause of action. I accept that on the language of Lord Millett's speech there are difficulties with this second proposition, but I am doubtful whether he intended to go so far as his literal words would take him. Furthermore it seems to me that on Lord Bingham of Cornhill's speech supported by the others, it would not be right to conclude that the second proposition is unarguable.

36 So far I have only considered *Johnson v Gore Wood & Co* [2002] 2 AC 1. Since that authority analyses such Court of Appeal authorities as there were prior to its decision, I do not find it necessary to analyse those previous Court of Appeal decisions. It seems to me that nothing I have said conflicts with them.

37 The only further authority to which I should refer is *Day v Cook* [2001] Lloyd's Rep PN 551. In that case Mr Day was the principal shareholder in T Ltd, he again was someone who carried on his business through T Ltd and other companies. It was also a case brought against a solicitor for breach of duty where it was difficult to ascertain whether any breach of duty was a breach of the duty owed to a corporate entity rather than the individual. It was not a case where there was any suggestion that the breach of duty to the individual involved the destruction of the corporate entity thus preventing the corporate entity bringing its own claim. Nor was it a case where it was argued that the diminution in value of the shareholding contained different elements one of which could be categorised as a purely personal loss. Arden LJ having analysed *Johnson v Gore Wood & Co* said, at p 560, para 38:

> "It will thus be seen from the speeches in *Johnson v Gore Wood* that where there is a breach of duty to both the shareholder and the company and the loss which the shareholder suffers is merely a reflection of the company's loss there is now a clear rule that the shareholder cannot recover. That follows from the graphic example of the shareholder who is led to part with the key to the company's money box and the theft of the company's money from that box. It is not simply the case that double recovery will not be allowed, so that, for instance if the company's claim is not pursued or there is some defence to the company's claim, the shareholder can pursue his claim. The company's claim, if it exists, will always trump that of the shareholder."

She however recognised there were limits when she said, at p 560, para 41:

> "However, it is apparent that there are limits to the application of the no reflective loss principle. The principal limit is that the no reflective loss principle does not apply where the company has no claim and hence the only duty is the duty owed to the shareholder (Lord Bingham of Cornhill's proposition (2)). Likewise it does not apply where the loss which the shareholder suffers is additional to and different from that which the company suffers and a duty is also owed to the shareholder: see Lord Bingham of Cornhill's proposition (3) and see *Heron International Ltd v*

Lord Grade [1983] BCLC 244, as explained by Lord Millett in *Johnson v Gore Wood & Co*. There may well be other limits."

38 I do not understand Arden LJ or any other members of the court in that case to be going any further than they thought that *Johnson v Gore Wood & Co* had gone. Nor do I understand them to be suggesting that if a shareholder has suffered a distinct loss he is not entitled to recover that distinct loss. The question whether the destruction of the company disabled the company from bringing a claim simply was not in issue.

39 In my judgment Mr Giles should be entitled to pursue his head of damage relating to his case that his shares became valueless as a result of the activities of Mr Rhind.

40 As regards his other heads of loss, again on the basis that Mr Rhind disabled the company from pursuing any claim for damages, I would suggest that Mr Giles should not be precluded from proceeding with those claims. In any event I do not see that the other heads are pure "reflective loss". If Mr Giles had not been a shareholder but simply an employee or a lender with an enforceable covenant in his favour, those losses surely would have been recoverable. The fact that he is also a shareholder should not deny him his claims under those other heads. There will of course have to be detailed consideration given to the quantification of those claims. It may be relatively straightforward to demonstrate that the shares should have had the value of £330,000 as at April 1994 and that he would also have recovered his loan plus arrears of remuneration if the breach of contract had not taken place when it did. But what might have happened if the Netto contract had not been taken wrongfully as it was is far more speculative. Would Mr Giles have continued with the company? What would the company's fortunes have been? Certainly he would not be entitled as it seems to me to have the value of his shares as at April 1994 and future remuneration because the sale of the shares would presumably have meant resignation from the company. In any event all those matters need proper inquiry and investigation at assessment. All it is necessary for us to decide is whether the heads of claim should be struck out as at this stage and I would be in favour of allowing them to go forward. I would thus allow the appeal.

CHADWICK LJ

41 I agree that this appeal should be allowed. But, in the circumstances that we are differing from the judge's view that he was required, by the decision of the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1, to reach the conclusion that he did, I think it appropriate to add some observations of my own to the judgment given by Waller LJ.

42 These proceedings are brought by the appellant, Mr Giles, to enforce a claim for damages in respect of loss which, as alleged, he has suffered as a result of the breach by the respondent, Mr Rhind, of obligations imposed by clause 9.1 of an agreement of 11 June 1990. That there was a breach of those obligations is no longer in issue. That question was determined by Mr Michel Kallipetis QC, sitting as a deputy judge of the High Court, on 26 January 2000. There has been no appeal against his order. The issue before this court is whether Blackburne J was correct to hold, on 24 July 2001, that loss under the heads claimed by Mr Giles was not recoverable.

The agreement of 11 June 1990

43 The circumstances in which Mr Giles and Mr Rhind—together with the company, Surrey Hill Foods Ltd ("SHF"), and a source of venture capital, then known as Alan Patricof Associates Ltd ("Apax")—entered into the subscription and shareholders' agreement of 11 June 1990 upon which Mr Giles relies have been set out by Waller LJ. It is unnecessary for me to rehearse them. But it is, I think, important to emphasise that, as Blackburne J pointed out in his judgment, at para 5, the agreement was made in order to define the terms of "Apax's investment in SHF, the acquisition of the Northampton business and the alteration of SHF's [existing] shareholdings" and the other changes consequent upon the introduction into SHF's existing business of substantial funds (some £1·285m) from an external source. It was to be expected that an agreement made in those circumstances and for that purpose would contain provisions which "locked in" the individuals—Mr Giles and Mr Rhind—upon whose experience, know-how and contacts the success of the business must have been thought to depend, and which were intended to protect that business from competition by those individuals.

44 The agreement of 11 June 1990, at clause 8, placed restrictions on the disposal by Mr Giles and Mr Rhind of their shares. It contained, at clause 9.2, provisions which restrained Mr Giles and Mr Rhind—while directors or employees of, or shareholders in, the company (or for two years thereafter)—from engaging in activities which might compete with the company's business. The purpose of those provisions, as clause 9.2 itself makes clear in express terms, was that "of assuring to the investor"—meaning Apax—"the value of the businesses and the full benefit of the goodwill of the businesses of the company".

45 Clause 9.1 of the agreement of 11 June 1990 must be read in that context. The clause required

> "each of the parties . . . to keep secret and confidential and not to use disclose or divulge to any third party or to enable or cause any person to become aware of (except for the purposes of the company's business) any confidential information relating to the company. . ."

The obligations in clause 9.1 were obligations undertaken by each of the parties to each of the other parties. It is not in dispute that the parties to the 1990 agreement intended not only (i) that the obligation not to disclose confidential information relating to SHF should be enforceable by the company against each of Mr Giles and Mr Rhind (as directors and employees)—an obligation which would, in any event, be imposed under the general law—but also (ii) that that obligation would be enforceable by Apax against Mr Giles and Mr Rhind—in common with the restrictions in clause 9.2—and (iii) that that obligation would be enforceable between Mr Giles and Mr Rhind inter se or by either of them against Apax.

The judgment of 26 January 2000

46 The deputy judge held that Mr Rhind had used and disclosed to others confidential information relating to the company's contract for the supply of cooked meat to Netto Foodstores for the purpose of diverting the business generated by that contract to MW Foods Ltd, a company which

A Mr Rhind controlled. He held, further, that the breach by Mr Rhind of the obligations imposed by clause 9.1 of the agreement of 11 June 1990 was intended to and did cause Netto Foodstores to transfer its business from SHF to MW Foods. The deputy judge accepted, also, that the loss of the Netto Foodstores contract "was one of the prime causes of the demise of SHF": see paragraph 28 of his judgment and paragraph 8 in the judgment of Blackburne J.

B

The claim for damages

47 SHF was placed in administrative receivership on 15 April 1994. On 19 December 1994 the company went into creditors' voluntary liquidation. The losses in respect of which Mr Giles claims fall under three main heads. The first head of loss—quantified at £10,310—is in respect of remuneration,
C benefits and loan interest said to have accrued and become payable before the receivership commenced. Mr Giles accepts that credit must be given against the claim under that head for the amount which he received as a preferential creditor (in respect of unpaid salary) in the subsequent liquidation. That is plainly correct. Upon a true analysis, his claim under that first head of loss is for the difference between what he has received as a
D creditor of the company in the events which happened and what he would have received as a creditor if the company had not been placed in receivership and liquidation. The premise which underlies the claim, of course, is that, but for Mr Rhind's breach of the obligations imposed on him by clause 9.1 of the 1990 agreement, SHF would have paid the remuneration, benefits and loan interest which accrued before 15 April 1994 as and when those payments became due.

E 48 The second head of loss—quantified at £123,261—is in respect of the remuneration and benefits which, as alleged, Mr Giles would have received, as managing director until September 1995 and thereafter as non-executive chairman until April 1997, if SHF had continued in business. That head may be described as "loss of future benefits". The end date—April 1997—is the date upon which it is said that (but for the loss of the Netto
F Foodstores contract and the collapse of its business) SHF would have been sold to a third party. Mr Giles accepts that credit must be given against that claim for the amounts which he actually received upon the termination of his employment (including a redundancy payment and payment in respect of the statutory notice period) and for amounts which he was able to earn because he was no longer employed by SHF. Again, that is plainly correct. The claim, under the second head of loss, is for the difference between what he
G has received upon, or consequential upon, termination of his employment by the company and what he would have received by way of remuneration and benefits as managing director (or non-executive chairman) if his employment had not been brought to an end by the appointment of receivers. And, again, the premise which underlies that claim is that, but for Mr Rhind's breach of the obligations imposed on him by clause 9.1 of the
H 1990 agreement, Mr Giles's employment by SHF would have continued.

49 The third—and the most substantial—head of loss may be described as "loss of investment". That, itself, comprises three elements: (i) loss of the value of Mr Giles's existing holding of 19,900 ordinary shares of 1p each, (ii) loss of the value of £81,330 18% convertible loan stock—alternatively, loss of the value of the ordinary shares to which Mr Giles would have

become entitled if he had been able to exercise the right to convert—and (iii) loss of interest on the loan stock in respect of the period from April 1994 to April 1997. It is not suggested that there is anything to be brought into account by way of credit against the claims under this head. The claims under this head are for the difference between the value of the ordinary shares and loan stock in the events which happened (which is taken to be nil) and the amount (discounted to April 1994) which, as alleged, Mr Giles would have received in respect of the shares and loan stock if the company had been sold in April 1997. The premise which underlies those claims is that, but for Mr Rhind's breach of the obligations imposed on him by clause 9.1 of the 1990 agreement, SHF would have continued in business, that its business would have been profitable over the period to April 1997 and that the company could (and would) then have been sold at the price per share postulated by the accountant's report upon which Mr Giles relies.

Causation and remoteness

50 By his order of 9 February 2000 the deputy judge directed that there be a trial of the issue what damages should be paid by Mr Rhind in the light of the findings which he had made. Had the issue "what damages should be paid by the defendant?" proceeded to trial as the deputy judge had directed, it would have been necessary to determine questions of causation and remoteness in relation to loss said to be recoverable under a claim to damages for breach of contract.

51 In particular, it would have been necessary to determine the questions of causation which I have identified in the preceding section of this judgment. That is to say, it would have been necessary to decide whether—if Mr Rhind had not disclosed confidential information relating to the Netto Foodstores contract in breach of the obligations imposed on him by clause 9.1 of the agreement of 11 June 1990—(i) SHF would have paid the remuneration, benefits and loan interest which accrued before 15 April 1994 as those payments became due, (ii) Mr Giles's employment as managing director of SHF would have continued beyond April 1994 (and, if so, for how long after that date) and (iii) the business of SHF would have continued (and would have been profitable) for a period of three years or more. It may be said that the first of those questions would present little, if any, difficulty. There is no reason to think that while it continued to have the benefit of the Netto Foodstores contract SHF would not have met its contractual obligations to Mr Giles as they fell due. But the answers to the second and third questions are not self-evident. It is pertinent to have in mind that Mr Giles was not the controlling shareholder of SHF. Nor did SHF have an established record of sustained profitability as operator of the Netto Foodstores contract. Further, there was no guarantee that Netto Foodstores would not take its business elsewhere. It may be that the second of those questions would have to be approached on the basis that Mr Giles's loss was the loss of a chance. But those are questions of fact which could, and would, have been resolved at a trial.

52 It would have been necessary, also, to resolve the further question of causation to which Lord Millett referred in *Johnson v Gore Wood & Co* [2002] 2 AC 1, 64A–B, 66D–E. SHF was party to the subscription and shareholders' agreement. The obligation not to disclose confidential information imposed on Mr Rhind by clause 9.1 of that agreement was

A enforceable by the company. If Mr Rhind were in breach of that obligation, the company had a claim for damages against Mr Rhind under the agreement. And, prima facie, the company had a claim against him as a director and employee under the general law. If the company's assets would otherwise have been diminished by reason of Mr Rhind's disclosure of confidential information, they were enhanced by a corresponding amount equal to the value of the company's claim or claims in respect of that wrong.
B So long as it was open to the company to enforce those claims in full its assets were not depleted and (on one view, at least) the value of Mr Giles's investment was not diminished: see the analysis in the judgment of Millett LJ in *Stein v Blake* [1998] 1 All ER 724, 727–730. And so it may be said that, if the company chose not to enforce its claims in respect of the wrong done to it, the loss to Mr Giles of his investment was caused by the
C company's decision not to pursue its remedy and not by the wrong done to it by Mr Rhind: see the observations of Hobhouse LJ in *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443, 471.

53 The position in the present case, in relation to that further question of causation, was described by Blackburne J at paragraphs 10 and 11 of his judgment. Proceedings by SHF against Mr Rhind and others in respect of the
D disclosure of confidential information—the same wrong as that alleged in the present proceedings—were commenced in March 1994. Those earlier proceedings (1994 S No 755) were pending at the date, in April 1994, when the administrative receivers were appointed. They were discontinued in June 1994 upon terms which precluded SHF from bringing any further claims against the defendants in respect of the matters raised in that action. That is a matter on which Mr Rhind relies in his pleaded defence in these
E proceedings. Blackburne J was told that the decision to discontinue the earlier proceedings was taken by the administrative receivers in the circumstances that they were faced with an application by Mr Rhind for security for costs which they could not provide. The issue of causation which would have fallen for determination in the present proceedings, if they had proceeded to a trial on damages as the deputy judge had directed,
F would have been whether, upon a proper understanding of the factual position, the real cause of the present inability of the company to enforce its claims in respect of the wrong done to it by Mr Rhind was the wrong itself. To put the point another way, it would have been necessary to decide whether the loss of the Netto Foodstores contract—which, as the deputy judge found, was "one of the prime causes of the demise of SHF"—was so serious a blow to the company's fortunes that it was really inevitable that the
G company would be in no position to pursue a claim in the courts against a defendant who sought security for costs. If so, then it could not be said that the receivers' decision to discontinue the company's proceedings against Mr Rhind broke the chain of causation which Mr Giles had to establish in order to succeed in his own proceedings against Mr Rhind.

54 If those questions of causation had been resolved in favour of
H Mr Giles, it would have been necessary, also, for the court to consider whether the loss claimed was too remote to be recoverable in proceedings for breach of the contractual obligation in clause 9.1 of the 1990 agreement. Prima facie, at least, the test in the present context would have been whether loss under the heads claimed by Mr Giles was within the reasonable contemplation of the parties to the 1990 agreement as a serious possibility in

the event that confidential information upon which the company's business relied was disclosed to a potential competitor. There are strong grounds for thinking that that test would be satisfied. Clause 9.2 of the 1990 agreement makes it clear that the purpose of the restrictions in that clause was to protect Apax against loss in respect of the investment which it was to make under the terms of the agreement. There is no reason to suppose that the obligations in clause 9.1 were not also imposed with that purpose in mind; and no reason to suppose that the parties did not contemplate that each of Mr Giles and Mr Rhind needed protection from loss caused by the improper disclosure of the company's confidential information by the other, or by Apax (as the case might be). It is material to have in mind that, as Blackburne J recorded, one element of the arrangements under which Apax introduced venture capital in June 1990 was that Mr Giles and Mr Rhind subscribed for convertible unsecured loan stock. They were, themselves, making a further investment in SHF which the mutual obligations in clause 9.1 of the subscription and shareholders' agreement into which they entered were, as it seems to me, plainly intended to protect.

The preliminary issue

55 As I have said, those questions of causation and remoteness would have fallen for determination in the present proceedings if they had proceeded to a trial on damages as the deputy judge had directed. But matters did not proceed in that way. A hearing of the trial on damages had been listed for three days in December 2000. Directions in connection with that trial had been given by Master Bowles (on 14 March 2000) and by Master Winegarten (on 17 August 2000). The hearing fixed for December 2000 was vacated (at a late stage) on the grounds that counsel for Mr Rhind was not available. The hearing was relisted for 19 February 2001. Neither party was then represented; they each appeared before Deputy Master Teverson in person. On 20 February 2001 the deputy master set aside the earlier directions given by Master Bowles and Master Winegarten and, of his own motion, ordered a preliminary hearing of the issue:

> "whether in the light of the House of Lords decision in *Johnson v Gore Wood & Co* [2002] 2 AC 1 and the authorities reviewed therein all or any of the items and if so which included in the claimant's amended schedule of loss are recoverable by him against the defendant as loss suffered separately and distinct from the loss suffered by Surrey [Hill] Foods Ltd."

56 It was that issue that Blackburne J was asked to decide in July 2001. He held, with obvious reluctance, that none of the heads of loss set out in Mr Giles's amended schedule was recoverable. He gave permission to appeal, expressing the view that the matter should be reviewed by the Court of Appeal.

The judgment of 24 July 2001

57 The judge, after a full and careful review of the speeches in the House of Lords in *Johnson v Gore Wood*, derived the following propositions from the decision in that appeal, at paragraph 27:

A "(1) a loss claimed by a shareholder which is merely reflective of a loss suffered by the company—ie a loss which would be made good if the company had enforced in full its rights against the defendant wrongdoer—is not recoverable by the shareholder; (2) where there is no reasonable doubt that that is the case, the court can properly act, in advance of trial, to strike out the offending heads of claim; (3) the irrecoverable loss (being merely reflective of the company's loss) is not B confined to the individual claimant's loss of dividends on his shares or diminution in the value of his shareholding in the company but extends (in the words of Lord Millett [2002] 2 AC 1, 66G–H) to 'all other payments which the shareholder might have obtained from the company if it had not been deprived of its funds' and also (again in the words of Lord Millett, at p 67B) 'to other payments which the company would C have made if it had had the necessary funds even if the plaintiff would have received them qua employee and not qua shareholder'; (4) the principle is not rooted simply in the avoidance of double recovery in fact; it extends to heads of loss which the company could have claimed but has chosen not to and therefore includes the case where the company has settled for less than it might . . . (5) provided the loss claimed by the shareholder is merely reflective of the company's loss and provided D the defendant wrongdoer owed duties both to the company and to the shareholder, it is irrelevant that the duties so owed may be different in content."

58 He expanded the fourth of those propositions by referring to observations of Arden LJ in *Day v Cook* [2001] Lloyd's Rep PN 551, 560:

E "38. . . . It is not simply the case that double recovery will not be allowed so that, for instance, if the company's claim is not pursued or there is some defence to the company's claim, the shareholder can pursue his claim. The company's claim, if it exists, will always trump that of the shareholder.

"39. Accordingly the court has no discretion. The claim cannot be entertained." F

59 In the light of the propositions which he derived from the speeches in *Johnson v Gore Wood & Co* [2002] 2 AC 1 the judge found it possible to answer the preliminary issue which was before him without addressing the questions of causation and remoteness which I have identified earlier in this judgment. The judge must, I think, have taken the view that, even if Mr Giles were to succeed on each of those questions at a trial, his claim would G necessarily fail because—as the judge accepted—the heads of loss advanced by Mr Giles were all "merely reflective of SHF's losses". He said, at paragraph 28 of his judgment:

"This is because all of the heads claimed are either moneys which Mr Giles says he would have received from SHF but for the damage caused to it by the loss of the Netto contract (claimed in the statement of H claim in the action to have had an annualised value of over £2·5m) or are for the additional value of his shares in SHF, alternatively share entitlement, which those interests would have achieved but for the damage caused by the loss of that contract. No consequential losses are claimed, i e losses through not being put in funds by SHF at a time and in

an amount which, but for SHF's loss of the Netto contract, Mr Giles could reasonably have expected (for example, loss of the chance to exploit a valuable business opportunity). I therefore agree . . . that, if the company had recovered in full, i e if, by an award of damages, it had been put into the position it would have been in if there had been no breach of duty by Mr Rhind, Mr Giles would be compensated in full for the losses that he claims. The various debts which he seeks to recover would be paid in full. Equally his shareholding and the share conversion rights conferred by his holding of convertible loan stock would be restored to their full value."

The issues on this appeal

60 Subject to two reservations, I do not quarrel with the propositions which the judge derived from the speeches in *Johnson v Gore Wood & Co.* They are, I think, consistent, with the analysis of those speeches in the judgments in this Court in *Day v Cook* [2001] Lloyd's Rep PN 551. As Arden LJ put it, at p 560, para 38, where the loss suffered by the shareholder is merely a reflection of the loss suffered by the company, "The company's claim, if it exists, will always trump that of the shareholder."

61 My first reservation arises from the fact that in neither of those appeals did the court need to address the question whether what Arden LJ described in *Day v Cook* as the "no reflective loss principle" applies in a case where, by reason of the wrong done to it, the company is unable to pursue its claim against the wrongdoer. The first issue which arises on this appeal, as it seems to me, is whether the reasoning in *Johnson v Gore Wood & Co* requires an affirmative answer to that question.

62 My second reservation is whether the judge was right to take the view that the observations to which he referred in the third of his numbered propositions were intended to apply to the loss of future benefits to which the claimant had an expectation but no contractual entitlement; that is to say, whether the loss which Mr Giles claims under the second head is properly to be regarded as merely a reflection of some loss suffered by the company, so as to bring it within the "no reflective loss principle". That, I think, is the second issue which arises on this appeal.

The first issue: is this a case in which the no reflective loss principle should be applied?

63 The paradigm case in which, by reason of the wrong done to it, the company is unable, in practice, to pursue its claim against the wrongdoer is one in which the company is obliged to abandon its claim because the wrong has deprived it of the funds needed for that purpose. *Johnson v Gore Wood & Co* [2002] 2 AC 1 was not such a case. The company (WWH) had pursued its claim against Gore Wood & Co to trial. It had compromised that claim, in the sixth week of that trial, upon payment of a substantial sum. Although the company was in financial difficulties at the time of the compromise, those difficulties were caused by other factors: see the speech of Lord Bingham of Cornhill [2002] 2 AC 1, 17–18. There was no suggestion in that case that WWH had been forced to compromise at less than the true value of the claim by reason of impecuniosity directly attributable to the breach of duty by Gore Wood & Co. Nor was it suggested in *Day v Cook*

A [2001] Lloyd's Rep PN 551—although, on the facts in that case, perhaps it might have been—that the failure of the companies in the T Ltd group to pursue remedies against Mr Cook was directly attributable to the loss which those companies had sustained by reason of his breach of duty to them. In neither of those appeals—nor in any other appeal to which we have been referred—did the court need to address the question whether (or to what B extent) the no reflective loss principle applies where the shareholder claimant can establish causation notwithstanding the problem identified by Hobhouse LJ in *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443, 471 and referred to by Lord Millett in *Johnson v Gore Woo & Co* [2002] 2 AC 1, 66E–F.

64 I have described that problem earlier in this judgment; but, at the risk of repetition, it is convenient to set out the passage in which it was C raised, so succinctly, by Hobhouse LJ in the *Gerber* case [1997] RPC 443, 471:

> "As the judgment of the Court of Appeal [in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, 222–223] implies, the shareholder will ordinarily have difficulty in proving that he has suffered a loss caused by the fault of the third party. If the company is D able to recover from the third party, the company will be indemnified and the value of the shareholder's shares will not have been reduced. If the company chooses not to exercise its remedy, the loss to the shareholder will have been caused by the decision of the company not to pursue its remedy, not by the defendant's fault."

65 The effect of the judge's decision in the present case is that the E shareholder cannot recover even in a case where he can prove that the loss which he has suffered was caused by the fault of the defendant; that is to say, in a case where he can show that the decision (or failure) of the company to pursue its remedy was not a "new and independent" cause or, as it was formerly described, a novus actus interveniens: see *Weld-Blundell v Stephens* [1920] AC 956, 975, 983–984, 986.

66 To put the point more starkly, the effect of the judge's decision—as F 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, and who gives effect to that intention by an application for security for costs which his own breach of contract has made it impossible for the company to provide, is entitled to G 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* [2002] 2 AC 1, I would not find it easy to reconcile the result with Lord Bingham of Cornhill's observation, at p 36C, that "the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair H compensation".

67 In my view the reasoning in *Johnson v Gore Wood & Co* does not compel the conclusion that the law requires that result. The relevant principle in the speech of Lord Bingham of Cornhill [2002] 2 AC 1, 35–36 is set out as proposition (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.*" (Emphasis added.)

He explained the principle further, at p 36:

"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 . . . 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* . . ." (Emphasis added.)

68 Lord Bingham of Cornhill, as he said [2002] 2 AC 1, 36A–B, derived the principle formulated as proposition (3) from *Lee v Sheard* [1956] 1 QB 192, 195–196, *Heron International Ltd v Lord Grade* [1983] BCLC 244, 262, *R P Howard Ltd v Woodman Matthews & Co* [1983] BCLC 117, 123, *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 and *Stein v Blake* [1998] 1 All ER 724, 726. In three of those cases—*Lee v Sheard, Heron International Ltd v Lord Grade* and *Stein v Blake*—the shareholder had no cause of action of his own. They were, on their facts, cases within Lord Bingham of Cornhill's proposition (1). In the *Gerber* case the subsidiary companies, in which the primary loss had been suffered, had no cause of action. It was, on its facts, a case within proposition (2). The particular factual situation to which proposition (3) is directed—where there has been a breach of duties owed to both the company and the shareholder—arose in the *R P Howard* case. In that case the shareholder was entitled to recover for the loss which he had, himself, suffered, by reason of the fact that his shares had become less readily saleable: see the analysis in the speech of Lord Millett [2002] 2 AC 1, 65. In none of those cases to which Lord Bingham of Cornhill referred did the court address 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.

69 Lord Bingham of Cornhill's proposition (3) is based on two principles which are not in doubt: (i) that a shareholder cannot recover for a loss which he has not suffered and (ii) that a shareholder has not suffered loss which is attributable to (or reflective of) loss suffered by the company in circumstances where the company itself can recover in respect of that loss. It may be said that proposition (3)—taken in conjunction with the further passage to which I have referred—is authority, also, for the principle that a shareholder cannot recover from the wrongdoer for a loss which is reflective of loss suffered by the company in circumstances where the company itself could have recovered in respect of that loss but has chosen not to. In that case, as Hobhouse LJ explained in the *Gerber* case, the shareholder's loss is not caused by the wrongdoer. 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

A impossible for the company to pursue its own remedy against the wrongdoer. He did not need to do so; and it is not, I think, to be assumed that he had that question in mind when he explained that a shareholder could not be allowed to recover for a loss "which would be made good if the company had enforced its full rights against the party responsible".

70 Lord Cooke of Thorndon [2002] 2 AC 1, 43C expressed agreement B with Lord Bingham of Cornhill's three numbered propositions; but he went on to say that the propositions were not to be taken as comprehensive. There is nothing in his speech, nor in the speech of Lord Goff of Chieveley, which suggests that they had in mind 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; and nothing which lends support to a C contention that they would have regarded Lord Bingham of Cornhill's proposition (3) as providing the answer to that question.

71 Lord Hutton identified what he described as "the *Prudential Assurance* principle" in these terms, at pp 51–52:

> "But what [a shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He D 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 in the value of the net assets of the company, in which he has (say) a 3% shareholding. The plaintiff's shares are merely a right of E 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."

72 He took the view, at p 54C–D, that the decision in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 could not F be explained on the ground of causation advanced by Hobhouse LJ in the *Gerber* case [1997] RPC 443, to which I have already referred. He thought that the question to be decided was whether the House should follow the reasoning set out in the *Prudential* case in preference to the reasoning set out in the judgments of the Court of Appeal of New Zealand in *Christensen v Scott* [1996] 1 NZLR 273. While recognising the force of the reasoning in the New Zealand case, he held that the *Prudential Assurance* principle G should be applied. His speech has relevance in the context of the present appeal not, I think, because of his rejection of Hobhouse LJ's reasoning in the *Gerber* case—a rejection that finds no support in the speeches of the other members of the House—but for the following passage [2002] 2 AC 1, 55:

> "I further consider that the [*Prudential Assurance*] principle has the advantage that, rather than leaving the protection of creditors and other H 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 the creditors of the company and other shareholders."

73 As Waller LJ has said, it is difficult to do justice to Lord Millett's speech in *Johnson v Gore Wood & Co* by citing passages selectively. Waller LJ has set out substantial passages from that speech, and it is unnecessary for me to repeat that exercise. To my mind the most important passages in the present context are to be found at [2002] 2 AC 1, 62E–G, 66C–D, E–F, F–G.

74 In the first of those passages, at p 62, Lord Millett explained the general rule in terms which present no difficulty in the context of the present appeal:

"In such a case [where the company suffers loss caused by the breach of a duty owed both to the company and to the shareholder] the shareholder's loss, in so far 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."

The premise which underlies that passage is that the company has, and can pursue, its own cause of action. Absent that premise there would be no danger of double recovery at the expense of the defendant; and no occasion to protect the interests of the creditors and other creditors of the company. It is, I think, clear that Lord Millett was not addressing his observations, in that passage, to a case where the company has abandoned its cause of action against the wrongdoer; a fortiori, he was not addressing those observations to a case where the company has had to abandon its cause of action because of the wrong done to it by the wrongdoer.

75 Lord Millett reviewed, at pp 62–66, the earlier authorities, commencing with the *Prudential* case and including *Stein v Blake* [1998] 1 All ER 724, *Heron International Ltd v Lord Grade* [1983] BCLC 244, *R P Howard Ltd v Woodman Matthews & Co* [1983] BCLC 117 and *Christensen v Scott* [1996] 1 NZLR 273. In rejecting the reasoning in *Christensen's* case, he approved the approach to causation adopted by Hobhouse LJ in the *Gerber* case [1997] RPC 443. He said [2002] 2 AC 1, 66:

"It is of course correct that the diminution in the value of the plaintiffs' shares was by definition a personal loss and not the company's loss, but that is not the point. The point is that it merely reflected the diminution of the company's assets. *The test is not whether the company could have made a claim in respect of the loss in question; the question is whether, treating the company and the shareholder as one for this purpose, the*

A *shareholder's loss is franked by that of the company.* If so, such reflected loss is recoverable by the company and not by the shareholders. Thomas J [in *Christensen v Scott* [1996] 1 NZLR 273] acknowledged that double recovery could not be permitted, but thought that the problem did not arise where the company had settled its claim. He considered that it would be sufficient to make an allowance for the amount paid to the
B liquidator. With respect, I cannot accept this either. As Hobhouse LJ observed in *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443, 471, if the company chooses not to exercise its remedy, the loss to the shareholder is caused by the company's decision not to pursue its remedy and not by the defendant's wrongdoing. By a parity of reasoning, the same applies if the company settles for less than it might have done. Shareholders (and creditors) who are aggrieved by the liquidator's
C proposals are not without a remedy; they can have recourse to the Companies Court, or sue the liquidator for negligence." (Emphasis added.)

76 But for the sentence which I have emphasised, those passages would present no difficulty in the context of the present appeal. They contain express recognition that one reason, at least, why a shareholder cannot
D recover in a case where the company (acting through its directors or its liquidator) has chosen not to pursue its claim is that (in such a case) the shareholder's loss is not caused by the wrongdoer. In such a case the shareholder's remedy lies against the directors or the liquidator (as the case may be). If the shareholder can surmount that problem of causation, then (but for the sentence which I have emphasised) those passages do not lead to
E the conclusion that his claim must fail.

77 I confess that I have found it difficult to reconcile the point which Lord Millett appears to be making in the sentence "The test is not whether the company could have made a claim in respect of the loss in question; the question is whether, treating the company and the shareholder as one for this purpose, the shareholder's loss is franked by that of the company" with the second of Lord Bingham of Cornhill's propositions or with the decision
F in the *Gerber* case [1997] RPC 443, which Lord Millett did not criticise. In a case where the company never had a cause of action in respect of the wrong which has caused it loss, the shareholder may sue on his own cause of action (if he has one) even though the loss is a diminution in the value of the shareholding: see [2002] 2 AC 1, 35H, 43B. I do not think that Lord Millett could have intended it to be understood, from that sentence, that the
G question whether the company ever had a cause of action in respect of the wrong which has caused its loss is irrelevant. And, in the light of his approval (in the following paragraph) of Hobhouse LJ's reasoning in the *Gerber* case, he could not have intended it to be understood that the circumstances in which the company fails to pursue its remedy are necessarily irrelevant.

78 It is clear, however, that Lord Millett did not think that the inability
H of the shareholder to establish causation was the sole reason for the no reflective loss principle. In the paragraph which immediately follows that which I have just set out Lord Millett said, at p 66:

> "*But there is more to it than causation. The disallowance of the shareholder's claim in respect of reflective loss is driven by policy*

considerations. In my opinion, these preclude the shareholder from going behind the settlement of the company's claim. If he were allowed to do so then, if the company's action were brought by its directors, they would be placed in a position where their interest conflicted with their duty; while if it were brought by the liquidator, it would make it difficult for him to settle the action and would effectively take the conduct of the litigation out of his hands." (Emphasis added.)

79 The policy consideration to which, as it seems to me, Lord Millett is referring in that passage is the need to avoid a situation in which the wrongdoer cannot safely compromise the company's claim without fear that he may be met with a further claim by the shareholder in respect of the company's loss. That, I think, is what he had in mind when he referred to the difficulty which a liquidator would have in settling the action if a shareholder, or creditor, were able to go behind the settlement. He had recognised, in the previous paragraph, that an aggrieved shareholder or creditor could sue the liquidator; his concern was to limit their remedy to a claim against the liquidator. Similar considerations apply where the company's claim is settled by the directors. But, in such a case, there is the further consideration that directors who are also shareholders (or creditors) should not be in a position where settlement of the company's claim at less than its true value (or abandonment of that claim) leaves them with a claim which they can pursue against the wrongdoer in their own interest. If that is a correct analysis of that passage, then the passage presents no difficulty in the case where the company has not settled its claim, but has been forced to abandon it by reason of impecuniosity attributable to the wrong which has been done to it. In such a case the policy considerations to which Lord Millett referred are not engaged. And it is difficult to see any other consideration of policy which should lead to the conclusion that a shareholder or creditor who has suffered loss by reason of a wrong which, itself, has prevented the company from pursuing its remedy should be denied any remedy at all.

80 For those reasons, I am satisfied that the decision in *Johnson v Gore Wood & Co* does not compel the conclusion which the judge reached on the preliminary issue which he had to decide. In my view, on the particular facts alleged in this case, it cannot be held—on what is, in effect, an application to strike out the claim to damages without a trial—that the no reflective loss principle is applicable. The question whether or not the wrong done to the company by Mr Rhind was a direct cause of the receiver's decision to discontinue the claim made by the company in proceedings 1994 S No 755 cannot be determined without a trial in the present proceedings. If and so far as that question is not raised squarely on the pleadings, I would think it right (in the circumstances in which the question arose) to give permission to amend. I would allow the appeal on that ground.

The second issue: is the loss of future benefits properly to be regarded as reflective of the company's loss?

81 The question turns on whether the loss which Mr Giles has suffered as a result of the termination of his employment by the receivers is reflective of loss suffered by the company by reason of the wrong done to it by Mr Rhind. In my view the judge was wrong to hold that it was. I think that

A he fell into error by confusing the loss claimed under this head with the circumstances which had given rise to that loss. There is a distinction to be drawn between the claim for accrued remuneration under the first head and the claim for loss of future benefits under the second head. In the first case, the loss suffered by Mr Giles as an employee is reflective of the company's own loss: if the company had been able to enforce its rights against Mr Rhind, it would have the funds needed to pay its debts. In the second B case, the loss suffered by Mr Giles is not reflective of any loss suffered by the company: it flows from the termination of his employment following the destruction of the company's business. If the company had been able to enforce its rights against Mr Rhind, following the destruction of its business, the damages which the company might recover would not compensate Mr Giles for the loss which flows from the termination of his employment. C I would allow the appeal, in relation to the second head of loss, on this ground also.

KEENE LJ

82 I agree with both judgments. In particular, it does not seem to me that the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1 was contemplating or seeking to deal with the circumstances which are to be D taken to exist in the present case. I too would allow this appeal.

Appeal allowed and order of Blackburne J made on 24 July 2001 set aside.

Case referred back to High Court to E *assess damages payable to claimant for breach of contract and breach of confidence.*

Defendant to pay claimant's costs of preliminary issue and appeal subject to detailed assessment if not agreed.

F *Solicitors: Lamb Brooks, Basingstoke; Douglas Wemyss Solicitors, Loughborough.*

Reported by KEN MYDEEN ESQ, Barrister

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