UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendant. This Document Relates To: All Actions	Master File No. 09-cv-118 (VM)

AFFIDAVIT OF ROBERT MILES, Q.C.

Exhibit 4

BUTTERWORTHS COMPANY LAW CASES

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Giles v Rhind

[2002] EWCA Civ 1428

COURT OF APPEAL, CIVIL DIVISION
WALLER, CHADWICK AND KEENE LJJ
18 JULY, 17 OCTOBER 2002

Shareholder – Damage to company – Shareholder claiming loss – Company claimed against former director/shareholder for breach of contractual duty of confidence by diverting contract from company – Company going into liquidation and discontinuing action because of lack of funds – Shareholder bringing proceedings for loss of remuneration and loss of value of shares and share conversion rights – Shareholder entitled to pursue claim because defendant had by his own wrongdoing destroyed or disabled company thereby preventing it from pursuing its claim.

The claimant and the defendant were the major shareholders and directors of a company, SHF, in which they each held just under 50% of the shares. In 1990 by a subscription and shareholders' agreement the business was refinanced by the introduction of outside capital and the holdings of the claimant and the defendant were reduced to approximately 20% each. In addition they subscribed for convertible unsecured loan stock. The claimant became the managing director of the company and the defendant the commercial director. They each entered into service agreements regulating their remuneration and pension rights. The service agreements contained 'lock-in' and confidentiality clauses restraining them from engaging in a competing business for a period of two years after they ceased to be connected with the company and from using any confidential information relating to the company or disclosing or divulging such information to a third party. In 1993 the relationship between the claimant and the defendant broke down and R's employment was terminated on terms which included a termination payment of £32,000. The defendant then sold his shares for £331,000 to the outside shareholder which had provided the refinancing and, in breach of the 'lock-in' and confidentiality covenants, set up a competing business and induced the company's major customer, on which it was almost entirely dependant for its profitability, to sever its contract with the company and trade with his new business. As a direct consequence the company's business failed. The company issued proceedings against the defendant and his new business but was unable to pursue its claim because it was placed in administrative receivership and then liquidation and was unable to put up the security for costs which, on the defendant's application, it was ordered to provide. The company's action was discontinued on terms that it was precluded from bringing any further action against any of the defendants in respect of its claims. The claimant then commenced an action against the defendant claiming (i) loss of remuneration and benefits resulting from his loss of employment with the company and (ii) loss of his investment in the company as the result of his shares and loan stock being rendered valueless by the failure of the company. At the trial of the action the deputy

judge found that the defendant, by his use of confidential information in breach of the confidentiality covenant, had diverted the company's major customer to his own business and gave judgment for the claimant for damages to be assessed. However, on the assessment the question arose whether the claimant was barred from recovering damages because his loss was merely reflective of a loss suffered by the company, which was the only person or entity that could claim. On the trial of a preliminary issue, the judge held that the irrecoverability of loss by a shareholder extended to all heads of loss which the company could have claimed but had chosen not to, and included not only loss of dividends on shares and diminution in the value of a shareholding but also all other payments which a shareholder would have received from the company if it had not been deprived of funds, regardless of whether such payments would have been received in the capacity of shareholder or employee. The claimant appealed.

Held – The principle of no reflective loss which barred a shareholder from recovering in respect of loss suffered by the company as the result of a breach of duty owed to it did not apply where the defendant had by his own wrongdoing destroyed or disabled the company so that, by reason of the wrong done to it, it was unable to pursue its claim against the defendant. Accordingly, given that the object of the covenants broken by the defendant was to protect the claimant's investment in, loan to, and remuneration from, the company, and that the defendant's breaches and use of confidential information to poach the company's major customer had caused the claimant's investment to be seriously damaged, his loan to become irrecoverable and his remuneration and employment to be discontinued as the result of the company's business being destroyed, the claimant was entitled to pursue his claim that his shares had become valueless and he had lost his loan as a result of the defendant's actions. In any event, his claim for loss of remuneration and other benefits was not a claim for reflective loss and therefore he was also entitled to pursue those claims. The appeal would therefore be allowed. *Johnson v Gore Wood & Co (a firm)* [2001] 1 BCLC 313 distinguished.

Decision of Blackburne J [2001] 2 BCLC 582 reversed.

Cases referred to in judgments

Barings plc (in administration) v Coopers & Lybrand (a firm) [1997] 1 BCLC 427, CA.

Christensen v Scott [1996] 1 NZLR 273, NZ CA.

Day v Cook [2002] EWCA 592, [2002] 1 BCLC 1, CA.

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

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

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

Howard (R P) Ltd v Woodman Matthews & Co (a firm) [1983] BCLC 117, CA.

Johnson v Gore Wood & Co (a firm) [2001] 1 BCLC 313, [2001] 1 All ER 481, [2002] 2 AC 1, [2001] 2 WLR 72, HL; *rvsg in part* [1999] BCC 474, CA.

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

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

Stein v Blake (No 2) [1998] 1 BCLC 573, [1998] 1 All ER 724, CA.

Walker v Stones [2000] 4 All ER 412, [2001] 1 QB 902, [2001] 2 WLR 623, CA.

Watson v Dutton Forshaw Motor Group Ltd [1998] CA Transcript No 1284.

Weld-Blundell v Stephens [1920] AC 956, [1920] All ER Rep 32, HL.

Appeal

The claimant, Edward John Giles, appealed from the decision of Blackburne J delivered on 24 July 2001 ([2001] 2 BCLC 582) declaring, on the trial of a preliminary issue ordered by Deputy Master Teverson, that none of the heads of loss claimed by the claimant in his action against the defendant, Roderick Middleton Rhind, for breach of a contractual duty of confidence contained in a shareholders' agreement was recoverable. The facts are set out in the judgments of Waller LJ and Chadwick LJ.

George Bompas QC and *Sharif Shivji* (instructed on a pro bono basis by *Lamb Brooks*, Basingstoke, also acting on a pro bono basis) for Mr Giles.

Paul Greenwood (instructed by *Douglas Wemyss*, Leicester) for Mr Rhind.

Cur adv vult

17 October 2002. The following judgments were delivered.

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 (a firm)* [2001] 1 BCLC 313, [2002] 2 AC 1. By a judgment dated 24 July 2001 Blackburne J ([2001] 2 BCLC 582) held that all the heads of damage claimed by Mr Giles in this case are irrecoverable by virtue of that decision but said (at [29]): 'I reach this conclusion with reluctance because, to my mind, it is 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 QC 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 them in 1987 at which time they each held approximately 50% of the issued shares, twelve shares being issued to a third person who does not feature

further in the story. The principal 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 (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 sub-divided into 1p ordinary shares. Mr Giles in the result held 19,900 ordinary shares, Mr Rhind 18,900 ordinary shares 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 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 enshrined in a subscription and shareholder's 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:

> '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 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 £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 para 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 Netto [Food Stores Ltd] 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 para 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 for 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.

[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 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. 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 in this part of the action.'

[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 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 (a firm)* [2001] 1 BCLC 313, [2002] 2 AC 1, any of the items were 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 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 for breach of contract then it would I suggest, before looking at *Johnson v Gore Wood,* 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* 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*. 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* 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 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:

> '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 referred to the following Court of Appeal authorities: *Lee v Sheard* [1955] 3 All ER 777, [1956] 1 QB 192; *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354, [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 (in administration) v Coopers & Lybrand (a firm)* [1997] 1 BCLC 427; *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443; *Stein v Blake (No 2)* [1998] 1 BCLC 573, [1998] 1 All ER 724 and *Watson v Dutton Forshaw Motor Group Ltd* [1998] CA Transcript No 1284. He then summarised the position in the following way ([2001] 1 BCLC 313 at 337–338, [2002] 2 AC 1 at 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] 1 All ER 354 esp at 366–367, [1982] Ch 204 esp at 222–223, *Heron International Ltd v Lord Grade* [1983] BCLC 244 esp at 261–262, *George Fischer (Great Britain) Ltd v Multi Construction Ltd* [1995] 1 BCLC 260 esp at 266 and 270–271, the *Gerber* case and *Stein v Blake (No 2)* [1998] 1 BCLC 573 at 575–579, [1998] 1 All ER 724 esp at 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* [1955] 3 All ER 777 at 778, [1956] 1 QB 192 at 195–196, the *Fischer* case and the *Gerber* case. (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* [1955] 3 All ER 777 at 778, [1956] 1 QB 192 at 195–196, *Heron International Ltd v Grade* [1983] BCLC 244 esp at 262, *R P Howard Ltd v Woodman Matthews & Co* [1983] BCLC 117 esp at 123, the *Gerber* case and *Stein v Blake (No 2)* [1998] 1 BCLC 573 at 575, [1998] 1 All ER 724 esp at 726. I do not think the observations of Leggatt LJ in *Barings plc v Coopers & Lybrand* [1997] 1 BCLC 427 at 435 and of the Court of Appeal of New Zealand in *Christensen v Scott* [1996] 1 NZLR 273 at 280, lines 25-35, can be reconciled with this statement of principle. These principles do not resolve the crucial decision which a court must make on a strike-out application, whether on the facts pleaded a shareholder's claim is sustainable in principle, nor the decision which the trial court must make, whether on the facts proved the shareholder's claim should be upheld. On the one hand the court must respect the principle of company autonomy, ensure that the company's creditors are not prejudiced by the action of individual shareholders and ensure that a party does not recover compensation for a loss which another party has suffered. On the other, the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation. The problem can be resolved only by close scrutiny of the pleadings at the strike-out stage and all the proven facts at the trial stage: the object is to ascertain whether the loss claimed appears to be or is one which would be made good if the company had enforced its full rights against the party responsible, and whether (to use the language of *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 at 367, [1982] Ch 204 at 223) the loss claimed is "merely a reflection of the loss suffered by the company". In some cases the answer will be clear, as where the shareholder claims the loss of dividend or a diminution in the value of a shareholding attributable solely to depletion of the company's assets, or a loss unrelated to the business of the company. In other cases, inevitably, a finer judgment will be called for. At the strike-out stage any reasonable doubt must be resolved in favour of the claimant.'

[24] Lord Millett's judgment really needs reading in extenso but it is right to quote the following passage ([2001] 1 BCLC 313 at 365–366, [2002] 2 AC 1 at 61–62):

'*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 represents a legal chose in action which represents part of its assets. Accordingly, where a company suffers loss as a result of an actionable wrong done to it, the cause of action is vested in the company and the company alone can sue. 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] 1 All ER 354 at 357, [1982] Ch 204 at 210. Correspondingly, of course, a company's shares are the property of the shareholder and not of the company, and if he suffers loss as a result of an actionable wrong done to him, then prima facie he alone can sue and the company cannot. On the other hand, although a share is an identifiable piece of property which belongs to the shareholder and has an ascertainable value, it also represents a proportionate part of the company's net assets, and if these are depleted the diminution in its assets will be reflected in the diminution in the value of the shares. The correspondence may not be exact, especially in the case of a company whose shares are publicly traded, since their value depends on market sentiment But in the case of a small private company like this company, the correspondence is exact. This causes no difficulty where the company has a cause of action and the shareholder has none; or where the shareholder has a cause of action and the company has none, as in *Lee v Sheard* [1955] 3 All ER 777, [1956] 1 QB 192, *George 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's observations in *Barings plc (in administration) v Coopers & Lybrand (a firm)* [1997] 1 BCLC 427 in the following way ([2001] 1 BCLC 313 at 368, [2002] 2 AC 1 at 65):

> 'In *Barings plc (in administration) v Coopers & Lybrand (a firm)* [1997] 1 BCLC 427 a parent company brought an action in negligence against the auditors of a wholly-owned subsidiary. Leggatt LJ correctly distinguished both the *Prudential* case, where the shareholder had no independent cause of action of his own, and the *Fischer* case, where the company had none. Here each of them had its own cause of action. But he stated (at 435) that if the shareholder suffered loss as a result of a breach of duty on the part of the defendant owed to it, it cannot 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 from Thomas J (at 280) giving the judgment of the court, which is in the following terms:

> '... 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.'

Lord Millett then continued ([2001] 1 BCLC 313 at 369, [2002] 2 AC 1 at 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 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 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 at 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 proposals are not without a 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 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 adequacy of the terms he agreed in another.'

[27] Lord Goff simply agreed with Lord Bingham and Lord Millett in their conclusion ie 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 was clearly less happy about the very firm lines that Lord Millett and Lord Bingham 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* should be followed in preference to the approach of the New Zealand case *Christensen v Scott*.

[28] There are certain facts which distinguish our present case from *Johnson v Gore Wood*. First, *Johnson v Gore Wood* was a case, as emphasised by Lord Bingham 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 [2001] 1 BCLC 313 at 365, [2002] 2 AC 1 at 62). 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