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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 refers to the observations of Leggatt LJ in *Barings* and the New Zealand Court of Appeal case of *Christensen v Scott* 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 nor Lord Millett would, I think, argue with the following propositions. First that the principle which *Johnson v Gore Wood* establishes will not, in the words of Sir Christopher Slade in *Walker v Stones* ([2000] 4 All ER 412 at 438, [2001] 1 QB 902 at 932–933)—

> 'operate to deprive a claimant of an otherwise good cause of action in a case where (a) the claimant can establish that the defendant's conduct has constituted a breach of some legal duty owed to him personally (whether under the law of contract, torts, trusts or any other branch of the law) *and* (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.' (My emphasis.)

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 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

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shareholder although the company does not or may not have a cause of action. But it is right to say that Lord Millett 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 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 where he is considering what should constitute a mere 'reflection of the loss suffered by the company' put it this way ([2001] 1 BCLC 313 at 338, [2002] 2 AC 1 at 36):

> '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 ...'

[33] In *Johnson v Gore Wood* there was no difficulty about the company having a cause of action and being able to recover on the cause of action. I also think that in the light of Lord Bingham's observation 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* in mind, ie that there had been nothing to stop the company continuing with its action if it had so chosen.

[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'.

[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'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*. 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* [2002] EWCA 592, [2002] 1 BCLC 1. In that case Mr Day was the principal shareholder in TL, he again was someone who carried on his business through TL 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*, said this ([2002] 1 BCLC 1 at [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 ([2002] 1 BCLC 1 at [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'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's proposition (3) and see *Heron International Ltd v Lord Grade* [1983] BCLC 244, as explained by Lord Millett in *Johnson v Gore Wood*. 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* 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.

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[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 enquiry 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 (a firm)* [2001] 1 BCLC 313, [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 cl 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, in February 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, 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 cl 8, placed restrictions on the disposal by Mr Giles and Mr Rhind of their shares. It contained, at cl 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 cl 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 cl 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 cl 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 9 February 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 Mr Rhind controlled. He held, further, that the breach by Mr Rhind of the obligations imposed by cl 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 the judgment of Blackburne J [2001] 2 BCLC 582 at [8]).

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,

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 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 premiss which underlies the claim, of course, is that (but for Mr Rhind's breach of the obligations imposed on him by cl 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.

[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 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 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 premiss which underlies that claim is that (but for Mr Rhind's breach of the obligations imposed on him by cl 9.1 of the 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 and 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 premiss which underlies those claims is that (but for Mr Rhind's breach of the obligations imposed on him by cl 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 cl 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 did 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 (a firm)* [2001] 1 BCLC 313 at 370, 369–370, [2002] 2 AC 1 at 64, 66. SHF was party to the subscription and shareholders' agreement. The obligation not to disclose confidential information imposed on Mr Rhind by cl 9.1 of that agreement was 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 former 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. 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 (as he was then) in *Stein v Blake (No 2)* [1998] 1

BCLC 573 at 575–580, [1998] 1 All ER 724 at 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 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 at 471).

[53] The position in the present case, in relation to that further question of causation, was described by Blackburne J at paras 10 and 11 of his judgment. Proceedings by SHF against Mr Rhind and others in respect of the disclosure of confidential information – the same wrong as that alleged in the present proceedings – were commenced in March 1994. Those earlier proceedings 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 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, 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 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 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 cl 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 cl 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 cl 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 re-listed 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 (a firm)* [2001] 1 BCLC 313, [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 ([2001] 2 BCLC 582 at [27]), after a full and careful review of the speeches in the House of Lords in *Johnson v Gore Wood & Co (a firm)*, derived the following propositions:

> '(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 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) 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) 'to other payments which the company would 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 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* [2002] 1 BCLC 1 at [38], [39]:

> '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 ...'

[59] In the light of the propositions which he derived from the speeches in *Johnson v Gore Wood* 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 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 ([2001] 2 BCLC 582 at [28]):

> 'This is because all of the heads claimed are either monies 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 claim 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, ie 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, ie 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 have been compensated in full for the losses which 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*. They are, I think, consistent, with the analysis of those speeches in the judgments in this court in *Day v Cook*. As Arden LJ put it, 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' apples 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* 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* 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 [2001] 1 BCLC 313 at 318, [2002] 2 AC 1 at 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* – although, on the facts in that case, perhaps it might have been – that the failure of the companies in the TL 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 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*

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