beneficiary would not be able to recover damages from the other two trustees, on the basis that the loss which founds his claim has the character of reflective loss and is therefore irrecoverable. Alternatively, if the two trustees were sued by the beneficiary, the remedy would lie in their hands, namely by joining the trustee director and the company to the proceedings, with a view to protecting their position by ensuring that the court's primary order involved the trustee/director having to reimburse the company for its loss, thereby enabling the other two trustees to avoid liability.

[53] Accordingly, I am unpersuaded that the alleged anomaly justifies this court refusing to follow its recent and carefully considered decision in *Shaker*'s case. First, the anomaly, if it exists, would apply, at least in principle, to any type of claim, and not merely to a claim for fiduciary duty, where the rule against reflective loss might apply. Secondly, the anomaly may not even arise, for reasons of principle or in practice. In any event the anomaly would be an insufficient reason, in my view, to justify our refusing to follow *Shaker*'s case.

THE SECOND CONTENTION: THE RULE AGAINST REFLECTIVE LOSS SHOULD BE DISAPPLIED AS A RESULT OF THE 1995 SETTLEMENT?

[54] The second contention raised on behalf of Mr Gardner is that, even if the rule against reflective loss would otherwise apply in the present case, it has ceased to apply as a result of the 1995 settlement. In this connection, Mr Steinfeld relies on the exception to the rule established by this court in *Giles v Rhind*. In that case, the defendant had conducted a business in competition with a company in which he and the claimant owned the shares. By carrying on his business, the defendant acted in breach of his duty to the company and in breach of contract with the claimant. As a consequence, the company went into administrative receivership. The company issued proceedings against the defendant, but, following a successful application by the defendant for security for costs which it could not meet, the company discontinued on terms that it would bring no further proceedings. Thereafter, the claimant started proceedings against the defendant to recover the damages he had suffered, including the loss in value of his shares in the company and loss of the remuneration he would have earned. The defendant applied to strike out that claim on the ground that the damages sought were reflective loss. While it is clear that the majority of damages claimed in that case by the claimant constituted reflective loss, the Court of Appeal none the less unanimously held that the claimant's claim was not debarred by the rule.

[55] In so doing, the court held that the rule against reflective loss does not apply in a case where the claim is against—

> '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 action 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.' (See [2003] 1 BCLC 1 at [66], [2003] Ch 618 at [66] per Chadwick LJ.)

As Chadwick LJ went on to say in the same paragraph:

> 'I would not find it easy to reconcile [such a] result with Lord Bingham's observation ([2001] 1 BCLC 313 at 338, [2002] 2 AC 1 at 36), that "the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation" .'

[56] To much the same effect, Waller LJ said ([2003] 1 BCLC 1 at [34], [2003] Ch 618 at [34]):

> 'One situation which is not addressed [in *Johnson's* case] 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".'

He went on to hold that the contention that the wrongdoer could answer the shareholder's claim in this way was 'unarguable' (see [2003] 1 BCLC 1 at [35], [2003] Ch 618 at [35]).

[57] The reasoning in *Giles v Rhind*, as I understand it, was that the objection to a shareholder suing the wrongdoer for what would otherwise be reflective loss would not be sustained for a combination of two reasons. First, from the claimant's point of view, application of the rule against reflective loss would represent an 'arbitrary den[ial] of fair compensation' if he was prevented from suing, in circumstances where the company could not sue for its loss, because of the very wrongdoing of which complaint was being made. Secondly, from the defendant's point of view, and indeed, from the point of view of principle, there could be no objection to the claimant suing in such a case, because the ultimate reason for the rule against reflective loss is the need to avoid the risk of double recovery from the defendant, and if the company cannot sue, the defendant is not exposed to such a risk.

[58] On behalf of Mr Gardner, it is contended that the reasoning in *Giles v Rhind* applies in the present case, or, if it does not, that the exception to the rule against reflective loss established in *Giles v Rhind* should be extended to cover the present case. In this connection, reliance is placed on the 1995 settlement, whereby, through the agency of the receivers, Scoutvale released Mr Parker from any liability he might have (other than a liability to a liquidator of Scoutvale, which is of no direct relevance, because Scoutvale, even now, is not in liquidation). Mr Steinfeld contends that Mr Gardner's case for avoiding the rule against reflective loss is even stronger than that of the claimant in *Giles v Rhind* because, when the 1995 settlement was entered into, Mr Parker owed a continuing fiduciary duty to BDC, namely to reinstate its asset which, by his breach of duty to BDC he had caused to be lost.

[59] The first problem faced by this argument is that the preliminary point which the judge was invited to consider was, in terms, by reference to 'Mr Gardner's pleaded case'. Although it is true that the re-amended statement of claim includes the allegation that Scoutvale was put into administrative receivership by Westpac, and that Westpac appointed the receivers, that is as far as the pleadings go. In those circumstances, any

reliance on the 1995 settlement, let alone the circumstances in which that settlement was entered into, faces obvious difficulties. That is not a mere pleading point. Given that there were no pleaded allegations that Scoutvale was forced to release Mr Parker from any liability, owing to Scoutvale's impecuniosity, and that the impecuniosity was attributable to the wrongdoing alleged against Mr Parker, there was little, if any, evidence in the form of witness statements or other documents, which would have impinged upon those sort of allegations if the hearing had gone ahead.

[60] Secondly, over and above any point that might be taken on the pleadings, it is important to bear in mind the limits of the exception established in *Giles v Rhind* to the rule against reflective loss. As was made clear by Lord Millett in *Johnson's* case [2001] 1 BCLC 313 at 369, [2002] 2 AC 1 at 66, cited above at [30], the mere fact that the company chooses not to claim against the defendant, or settles with the defendant on comparatively generous terms, does not, at least without more, justify disapplying the rule against reflective loss (and in this connection it is perhaps worth noting that he was supported by similar observations in this court in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 at 367, [1982] Ch 204 at 223). Accordingly, the court must be satisfied that the sort of circumstances described in *Giles v Rhind* [2003] 1 BCLC 1 at [34], [2003] Ch 618 at [34] by Waller LJ or at [66] by Chadwick LJ exist, before the fact that the company has abandoned, or settled on apparently generous terms, its claim against the defendant, justifies disapplying of the rule against reflective loss.

[61] In my judgment, there was simply no evidence before the judge to support the contention that the release of Mr Parker, as contained in the 1995 settlement, was forced upon Scoutvale by Mr Parker, let alone that Scoutvale was prevented from pursuing Mr Parker because of its impecuniosity, or even that any such impecuniosity had been caused by the wrongdoing alleged in the re-amended statement of claim against Mr Parker.

[62] The mere fact that Scoutvale was in administrative receivership plainly did not of itself prevent that company starting an action, as is evidenced by the existence of the s 423 proceedings. Further, in his judgment, the judge said ([2004] 1 BCLC 417 at [47]):

> 'It is not suggested by [counsel then appearing for Mr Gardner] that it can be shown (and it is certainly neither pleaded nor a matter of common ground between the parties) that Scoutvale was disabled from pursuing any claim against Mr Parker by reason of a lack of financial means caused by his wrongdoing. On the contrary, [counsel] very fairly conceded in his skeleton argument that "the financial pressures on ... [Scoutvale] may have that effect [ie an inability to pursue any claim against Mr Parker] independent of any action taken by Mr Parker to deplete its assets". Nor does the fact, if fact it be, that Mr Parker has continued to control Scoutvale mean that Scoutvale has been disabled from bringing a claim.'

[63] The fact that Mr Parker was a party to, and was released from liability by, the 1995 settlement is not by any means even indicative of the fact that there was financial, or indeed any, pressure on Scoutvale or the receivers, to release him from liability for any wrongdoing. The receivers

may well have taken the view that, because they considered that any claim was worth much less than the re-amended statement of claim suggests, or because of the existence of rights of third parties (such as Rothschilds), or because of the relative impecuniosity of Mr Parker, the terms agreed in the 1995 settlement were commercially attractive. Further, it is not as if Mr Parker was a party to the 1995 settlement purely for the purpose of releasing him from any liability: there were other provisions in the document whereby he released various parties, including Scoutvale itself, from any claims which he might have against them.

[64] The fact that the 1995 settlement looks generous to Mr Parker on the basis of the facts and figures which are alleged in the re-amended statement of claim, but which are neither established nor agreed, cannot of itself justify the conclusion that the present case falls within the ambit of the exception to the rule as established in *Giles v Rhind*. Accordingly, especially in light of the concessions recorded by the judge as having been made on behalf of Mr Gardner, no doubt on the basis of the fairly voluminous evidence before the court, it appears to me that the judge's rejection of his contention on this issue was inevitable. Even without those contentions, there was simply no evidence to support it.

[65] I turn to Mr Steinfeld's submission that Mr Parker effectively committed a breach of his fiduciary duty to BDC when he entered into the 1995 settlement. First, if it is thereby intended to suggest that there is a separate claim which could be raised against Mr Parker, it is simply not pleaded. Secondly, although attractive at first sight, the submission is flawed, because it assumes that, at the time of the 1995 settlement, Mr Parker was under an obligation to pay substantial damages to BDC, an assumption which is inconsistent with the rejection of the first argument raised on behalf of Mr Gardner.

[66] In light of the suggestion that this conclusion may leave Scoutvale and, whether directly or indirectly, BDC without any claim, even if Mr Parker ought not to have been released, it is right to add this, albeit with diffidence, in light of the fact that the receivers are not party to the present proceedings. If it were the case that the terms on which the receivers released Mr Parker from any liability to Scoutvale were too generous, it could well be that Scoutvale would have a cause of action for damages (which may by now be time-barred) against the receivers for breach of duty. In that connection, I would refer to the reasoning and cases cited in *Medforth v Blake* [1999] 3 All ER 97 at 106–107, 110–111, [2000] Ch 86 at 97–100, 101–102.

THE THIRD CONTENTION: BDC'S CLAIM AS CREDITOR IS NOT BARRED BY THE RULE AGAINST REFLECTIVE LOSS

[67] If, as I believe to be the case for the reasons given, the claim against Mr Parker for the loss suffered by BDC in relation to its shares in Scoutvale is barred by the rule against reflective loss, Mr Steinfeld's final contention is that the rule does not apply in so far as Mr Gardner's claim is based on BDC's inability to recover the loan from Scoutvale, and the judge was wrong to conclude otherwise. In this connection, Mr Steinfeld points out that the observations of the Court of Appeal in the *Prudential* case in relation to reflected loss were directed to claims by shareholders who have suffered a diminution in the value of their shares and a loss of dividends

payable in respect of those shares, and that the plaintiff in *Johnson's* case was effectively the sole shareholder in the company concerned. Accordingly, he argues that there is no reason to extend the rule against reflective loss to a claim by a person who sues as a creditor, rather than a shareholder, of a company concerned in which he has a relatively small interest.

[68] In my view, the rule against reflected loss bars any claim by BDC for the loss of its ability to recover on the loan, just as much as any loss it suffered in respect of its shares in Scoutvale, in light of the reasoning of the House of Lords, in particular that of Lord Millett, in *Johnson's* case. Lord Bingham dealt briefly with Mr Johnson's claim in that case for loss of payments which the company would have made to the plaintiff's pension fund. He said ([2001] 1 BCLC 313 at 338, [2002] 2 AC 1 at 36):

> '... this claim relates to payments which the company would have made into a pension fund for Mr Johnson: I think it plain that this claim is merely a reflection of the company's loss and I would strike it out.'

[69] Lord Millett reached the same conclusion in the passage I have quoted at [32] above.

[70] It is clear from those observations, and indeed from that aspect of the decision, in *Johnson's* case that the rule against reflective loss is not limited to claims brought by a shareholder in his capacity as such; it would also apply to him in his capacity as an employee of the company with a right (or even an expectation) of receiving contributions to his pension fund. On that basis, there is no logical reason why it should not apply to a shareholder in his capacity as a creditor of the company expecting repayment of his debt. Indeed, it is hard to see why the rule should not apply to a claim brought by a creditor (or indeed, an employee) of the company concerned, even if he is not a shareholder. While it is unnecessary to decide the point, as BDC was a shareholder in Scoutvale, it is hard to see any logical or commercial reason why the rule against reflective loss should apply to a claim brought by a creditor or employee, who happens to be a shareholder, of the company, if it does not equally apply to an otherwise identical claim by another creditor or employee, who is not a shareholder in the company.

[71] There are observations, which I have quoted, in the speech of Lord Millett in *Johnson's* case which appear to me strongly to reinforce the conclusion that the rule against reflective loss does indeed bar BDC's claim against Mr Parker in so far as it is based on the loan. Thus, in the passage from his speech I have quoted at [30] above, Lord Millett does not merely refer to 'shareholders' but also to 'creditors'. Secondly, in the passage cited at [31] above, Lord Millett emphasised that reflective loss does not only extend to 'diminution of the value of the shares' and 'loss of dividends', but also to 'all other payments which the shareholder might have obtained from the company if it had not been deprived of its funds'. Similarly, he said in terms that the fact that Mr Johnson was claiming, as it were, qua employee, rather than qua shareholder, made no difference (see [2001] 1 BCLC 313 at 370, [2002] 2 AC 1 at 67). I can see no basis whatever in logic or principle as to why, if a claim qua employee is barred by the rule, a claim made qua creditor is not similarly so barred. In most cases where an employee's claim is barred by the rule against reflective loss, the employee will be a creditor of the company. It is hard to see why a creditor who is an employee should

be treated differently from any other creditor of the company when it comes to applying the rule against reflective loss

[72] I should make two further comments about this part of the appeal. First, it seems to me that, in his judgment in *Walker v Stones* [2000] 4 All ER 412 at 439, [2001] QB 902 at 934, Sir Christopher Slade appears to have taken the view that, if (contrary to his opinion) a claim against a trustee/director by a beneficiary is barred by the rule against reflective loss, then a claim by the beneficiary against other trustees would similarly be barred. That observation seems to me consistent with the view taken by Lord Millett in *Johnson's* case in the passages to which I have just referred.

[73] Secondly, when reaching his conclusion that the claim based on the loan was barred by the rule against reflective loss, the judge disagreed with an obiter view I had expressed at first instance in *Humberclyde Finance Group Ltd v Hicks* [2001] All ER (D) 202 (Nov) at paras 29 and 33. I had suggested that, if the shareholder in that case had had only a few shares in the company concerned, rather than effectively being a sole shareholder, it would probably have been wrong to strike out his claim for lost pension rights. Blackburne J was right to express disagreement with my view in view of what was said by Lord Bingham and Lord Millett in *Johnson's* case. It appears to me that, even if the claimant in *Humberclyde* had held no shares in the company, his claim would almost certainly have been barred by the rule against reflective loss. In any event, it is clear that, provided the claimant owns some shares in the company concerned, his claim for lost pension rights is liable to fail owing to the rule against reflective loss. As Mr Crampin points out, this view is strongly reinforced by the observations of Chadwick LJ in his judgment in *Giles v Rhind* [2003] 1 BCLC 1 at [81], [2003] Ch 618 at [81]

[74] Mr Steinfeld suggests that this is a rather surprising result. However, if a creditor (or employee) whose claim is barred by the rule against reflective loss is not repaid, he is not without remedies. If the company concerned is solvent, he can sue the company for his loss. If the company is insolvent, the creditor (or employee) can put the company into liquidation (if that has not already happened) and can either fund a claim by the liquidator against the defendant or, as Mr Gardner did in relation to BDC, he can take an assignment of the company's claim. Indeed, the creditor (or employee) could probably take an assignment of the company's claim without seeking to wind it up.

[75] Part of Mr Steinfeld's argument in relation to his third (and indeed, his second) contention appears to me to question or challenge the justice of applying the rule against reflective loss in cases other than when the claim is made for diminution in the value of the claimant's shares or loss of dividends (as in the *Prudential* case) or where the claim is brought by a person who effectively owns the company (as in *Johnson's* case). That challenge, it seems to me, is not consistent with the principle established in *Johnson's* case, and perhaps most clearly expressed by Lord Millett ([2001] 1 BCLC 313 at 365–366, 369–370, [2002] 2 AC 1 at 62, 66 (cited at [29] and [30] above). The approach suggested by Mr Steinfeld appears to me to be more consistent with that of Thomas J in *Christensen v Scott* [1996] 1 NZLR 273, discussed in *Johnson's* case [2001] 1 BCLC 313 at 368–369, [2002] 2 AC 1 at 65–66 with disapproval by Lord Millett, and, indeed, discussed by Lord Cooke of Thorndon (see [2001] 1 BCLC 313 at

346–348, [2002] 2 AC 1 at 43–45). As with many points relating to reflective loss, Mr Steinfeld's arguments in this connection appear to me to be not without force, although not without difficulties either. However, in light of the decision and reasoning in *Johnson's* case, as subsequently applied in this court, those arguments could only be determined in the House of Lords, and then only if it was appropriate for their Lordships to reconsider the rule against reflective loss

CONCLUSION

[76] In these circumstances, I am of the view that the decision of Blackburne J was correct, and it follows that Mr Gardner's appeal must be dismissed.

BODEY J.

[77] I agree.

MANCE LJ.

[78] I also agree.

Appeal dismissed Any ancillary issues to be dealt with at a later date.

Mary Rose Plummer Barrister.