



CLAIMS AGAINST TRUSTS WITH UNDERLYING COMPANIES

How do you cope with reflective loss ?

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Three areas

What is the principle of reflective loss ?

How does the principle arise in breach of trust claims ?

Practical problems caused by the principle



Principle of reflective loss: what is it ?

Per Lord Bingham in *Johnson v Gore Wood* [2002] 2
AC 1 at 35E

- (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”.

Only the company can sue for loss which can be recovered by the company, even if the loss suffered by the company has resulted in a reduction in the value of its shares



(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.”

But the principle does not prevent a shareholder making recovery in respect of loss suffered by the company if the loss is not recoverable by the company



(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.”

Where the recoverable losses suffered by the company and the shareholder are distinct from each other, the company and the shareholder may each recover their losses but no double recovery.



Principle of reflective loss – idiot's guide

- 1) Only the company can sue for loss which can be recovered by the company, even if the loss suffered by the company has resulted in a reduction in the value of its shares
- 2) **But** the principle does not prevent a shareholder making recovery in respect of loss suffered by the company if the loss is not recoverable by the company
- 3) Where the recoverable losses suffered by the company and the shareholder are distinct from each other, the company and the shareholder may each recover their losses but no double recovery.



Principle of reflective loss (cont)

Important point:

Not limited to double recovery (see eg *Day v Cook [2001]* EWCA Civ 592 per Arden LJ at para 38)

Where qualifying loss was once recoverable by the company, principle still applies even if loss becomes no longer fully recoverable. Eg

- Company's claim is compromised

- Not pursued

- Limitation/prescription-barred



The principle in breach of trust claims

What type of claim might the principle bar ?

Affects the *Re Lucking* type of case – trustees fail to use their powers as shareholders of a company properly in supervising the company’s management

Does the trust deed include a clause limiting the obligations of the trustees to engage in the company’s business (the “*anti-Bartlett*” clause) ?

Effect of *anti-Bartlett* clause where the same individuals are involved at trustee and company level ?

Classic Jersey approach (see eg *Freeman v Ansbacher* para 97(ix))



Reflective loss raises its head – English authority

Shaker v Al-Bedrawi [2003] Ch 350:

Claim by beneficiary against bare trustee director can be barred by the principle if:

“the claim by {the beneficiary} for an account is in substance a claim to monies for which the company has a claim against {the trustee/director}”

per Peter Gibson LJ at para 81

Shaker followed in *Gardner v Parker [2004] 2 BCLC 554* (Neuberger LJ) (not private trust case) and see *Ellis v Property Leeds (UK) Ltd [2002] EWCA Civ 32* at para 21



Reflective loss raises its head – English authority (ii)

Some issues:

Does the principle apply when the company's cause of action is not against the trustee director ?

Or when the wrongdoer has made it impossible for the company to pursue him ? (*Giles v Rhind* [2003] Ch 618 (CA): yes; Lord Millett: no (*Waddington v Chan Chun* [2009] 2 BCLC 82 at para 88))

What is the effect of ratification of the wrongful act ? (cf *Freeman v Ansbacher* [2009] JRC 003 at para 79)



Reflective loss raises its head – Jersey and Hong Kong

Freeman v Ansbacher Trustees [2009] JRC 003

Grounds of distinction of *Shaker*:

Defendant to the company's claim not trustee (para 97(vi))

Discretionary trust - relief equitable and trustee could be ordered to reconstitute trust by paying money to underlying company (para 97(iv))

Jersey policy reasons make full-blooded application of the principle unattractive and unrealistic (para 97(ix) and (xiv))

Hotung v Ho Yuen Ki [2010] HKCA 385



Practical problems caused by the principle

For safety's sake assume what ?:

Principle not limited to trustee directors (although interrelation with *anti-Bartlett* clause?)

Giles v Rhind will not apply ?

Ansbacher exception will not apply ?

NB potential limitation issues



Practical problems caused by the principle

Who do you sue ?

Does the underlying company potentially have a claim which might be in respect of the same loss as the breach of trust claim ?

If so, *prima facie* need to get the company to bring the claim in tandem with the breach of trust claim

Get control of company – but what if defaulting trustee still in place ?

- Replace trustee

- Administration claim ?

- Rely on trustee's breach of trust in failing to bring company's claim ?



Practical problems caused by the principle Does the company really have a claim ?

If the claim is against a director:

Does the breach fall within the scope of the director's duty ?

Is the claim exonerated/indemnified by the articles ? (nb art.110 Jersey Standard Table – art.77 CJL 1991)

Is the claim exonerated by the trust deed ? (nb art 30(10) TJL)

Is the loss really the same ?

What about claims against non-directors – eg administration companies ?



Practical problems caused by the principle Limitation/Prescription

May be different limitation periods for company's claim and trustee's claim:

Breach of trust claim – art.57 TjL (3 years from knowledge/final accounts)

Breach of fiduciary duty – 10 years ? (*Re Northwind Yachts [2005] JLR 137*)

Other claims ?

Reliance on *empêchement d'agir* ? but whose knowledge (and how does it work) ?



Practical problems caused by the principle What if you end up suing everybody ?

Numerous parties (although may in fact depend on how cover is split)

Complex pleadings

Difficult to settle ?

Costs - What if unsuccessful against company or trustee defendants?

Is this a *Sanderson/Bullock* situation?

Moon v Garrett [2007] 1 Costs LR 41 and Irvine v Commissioner of Police [2005] EWCA Civ 129



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