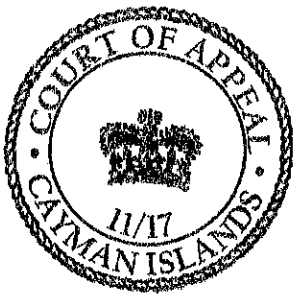
IN THE CAYMAN ISLANDS COURT OF APPEAL
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS

CICA (CIVIL) NO: 15 of 2017
CICA (CIVIL) NO: 16 of 2017
(CAUSE NO: FSD 25 of 2017 (IMJ))

BETWEEN

(1) XIE ZHIKUN
(2) FORTUNE FAVORS HOLDINGS LIMITED
(3) SHENGSHI VIEW INTERNATIONAL HOLDING LTD

Plaintiffs/Respondents



-and-

(1) XIO GP LIMITED
(2) ATHENE (XIANG) LI

Defendants/Appellants

BEFORE	**The Rt. Hon. Sir John Goldring, President** **The Rt. Hon. Sir Bernard Rix, Justice of Appeal** **The Rt. Hon. Sir Alan Moses, Justice of Appeal**
Appearances:	**Mr. Stephen Atherton QC and Ms. Blair Leahy instructed by Mr. Mark Goodman and Mr. Michael Popkin of Campbells for the Defendants/Appellants** **Lord Goldsmith QC, Mr. Colin McKie QC and Mr. Paul Smith instructed by Mr. Luke Stockdale of Maples and Calder for the Plaintiffs/Respondents**
Date of Hearing:	**2 and 3 November 2017**
Circulated for Comments:	**2 November 2018**
Judgment Delivered:	**14 November 2018**

JUDGMENT

Sir Bernard Rix JA

1. This appeal is principally about whether the rule against reflective loss, which in its archetypal form bars a shareholder in a company from claiming against third parties to compensate him against a loss which he has suffered by reason of diminution in the value of his shares, must summarily lead to a strike out of this action. In particular, it raises the question whether even if the rule against reflective loss would prima facie apply in this case if the company concerned had already suffered the loss complained of, it also applies to prevent the shareholder obtaining a *quia timet* injunction to prevent the loss occurring in the first place.

2. There are other issues about whether this case falls within an exception to the rule against reflective loss, known as the *Giles v. Rhind* exception (see *Giles v. Rhind* [2003] Ch 618 (CA)), where a defendant's wrongdoing has itself prevented the company concerned from bringing proceedings to vindicate its loss; and whether there is another exception to the rule against reflective loss in the case of intentional torts aimed specifically against a shareholder claimant; and whether the circumstances generally in this case in any event allow for the grant of any injunction.

3. If the claim survives, there is also an issue concerning security ordered against the defendants, namely whether fortification of the plaintiffs' undertaking in damages in support of the judge's injunction below can legitimately be provided by a foreign bank without either business presence or assets within this jurisdiction.

The parties and the background

4. The company concerned in this case is Dorsey Ventures Ltd ("**Dorsey**" or "**the Company**"), a Cayman Islands limited company. Dorsey was made the fourth defendant to these proceedings, but is not party to these appeals.

5. Dorsey is the sole limited partner of XiO Fund I LP ("**the Fund**"), which was founded in the Cayman Islands in 2014.

6. The sole 100% registered shareholder in Dorsey is, and its sole director until she resigned on 6 February 2017 was Ms Athene (Xiang) Li ("**Ms Li**"), the third defendant and second appellant herein. Although Ms Li claims to be both legal and beneficial owner of the Dorsey shares, their beneficial ownership is claimed by the first plaintiff and respondent herein, Mr Xie Zhikun ("**Mr Xie**"). Mr Xie evidences his claim to beneficial ownership inter alia by reference to an Entrustment Agreement, under whose terms the shares in Dorsey are held by Ms Li on a bare trust for Mr Xie (the "**Entrustment Agreement**").

7. Ms Li disputes the validity of the Entrustment Agreement. In a letter dated 24 January 2017 from her then lawyers, she said that she did not consider herself bound by it. In her evidence in these proceedings, she said that she did not "*knowingly*" execute it (para 93 of her first affirmation herein). The Entrustment Agreement however bears what purport to be her, and Mr Xie's signatures. The question of what she was saying about her signature was a matter of enquiry from the bench during the appeal hearing. This was because it was not clear whether she was saying that she had not entered into it at all, or was tricked into doing so, or whether she simply could not remember, or whether her signature was a forgery. It was only in the course of Mr Stephen Atherton QC's reply on behalf of the appellants, in the closing stages of the hearing, that it was said, for the first time, that Ms Li had now instructed him that her signature on the Entrustment Agreement was a forgery.

8. The sole general partner of the Fund is XiO GP Limited, the first defendant and appellant, another Cayman Islands company ("**XiO GP**"). Ms Li is its sole director. Another defendant, Mr Pacini, who is not party to this appeal, is XiO GP's authorised representative. Ms Li (with Mr Pacini) thus effectively controls the Fund.

9. Two investors, the second and third plaintiffs and respondents, Fortune Favours Holdings Limited ("**Fortune**") and Shengshi View International Holding Ltd ("**Shengshi**"), have put funds into Dorsey: Fortune invested a net US$ 50 million and Shengshi US$ 20

million. These investments were documented, Mr Xie says at Ms Li's request, as loan transactions, but Mr Xie claims them to be and to have been understood to be, equity contributions in the Fund.

10. Changes in regulations covering offshore investment from the People's Republic of China ("**PRC**") then intervened to make it necessary to alter the structure of investment by the Fund, in favour of the creation of a second, PRC onshore fund, called Shanghai Li Hong Investment Centre (Limited Partnership) ("**Shanghai Li Hong**"). This was therefore established, again under the control of Ms Li and Mr Pacini, in Shanghai, for the purposes of allowing investment into offshore portfolio companies.

11. Shanghai Li Hong has three limited partners, known in these proceedings as **Onshore LP1, LP2 and LP3** respectively. Mr Xie claims to own Onshore LP1 beneficially, and to control all three. However the general partner of Shanghai Li Hong is controlled by Ms Li and Mr Pacini.

12. The major investments by the Fund, through Shanghai Li Hong, have been in two separate businesses, known as **Project Camping** (a German fertiliser company) and **Project Laguna** (an Israeli medical company). The investments in these businesses amounted to nearly US$ 800 million. These investments were to be held jointly by the Fund and Shanghai Li Hong. Share subscription agreements (the "**SSAs**") between the Fund, Shanghai Li Hong and the target companies, were accordingly entered into for each investment: providing for the shares in the target companies to be registered in Shanghai Li Hong's name. Ms Li executed these SSAs in her various roles on behalf of all three sets of parties.

13. However, following these investments in 2015, relations between the parties have deteriorated. Ms Li and Mr Pacini have failed to provide ongoing information or to answer correspondence. Shares in the target companies have not been registered in the name of Shanghai Li Hong. Ms Li now denies the validity of the SSAs, and in the PRC proceedings has had it asserted that they were entered into under duress.

14. Matters came to a head at the end of 2016, when a deadline for information was set by Mr Xie, but not met. Instead, in January 2017 the Fund issued three capital calls on Dorsey, totalling US$ 65 million, and further calls for US$ 65 million were issued by the general partner of Shanghai Li Hong (the "**Onshore GP**") on the three Onshore LPs.

15. As a result, on 18 January 2017 Mr Xie wrote to Ms Li to exercise his rights under the Entrustment Agreement to require the transfer of the shares in Dorsey to his nominee; and on 20 January 2017 Mr Xie's Hong Kong solicitors, Debevoise & Plimpton LLP, wrote to XiO GP and Ms Li and Mr Pacini seeking confirmation that the capital calls against Dorsey would not be enforced nor lead to default for non-payment.

16. It was in reply to these demands that Ms Li replied through her solicitors to say that she did not consider herself bound by the Entrustment Agreement.

17. On 3 February 2017 the plaintiffs therefore commenced these proceedings, claiming breach of fiduciary duty, dishonest assistance and unlawful means conspiracy, and damages caused thereby, and on 9 February 2017 applied for injunctions which were subsequently granted and confirmed by the Grand Court (see further below).

18. The substance of the plaintiffs' complaint is that the capital calls were unlawfully demanded in a dishonest attempt to divest Mr Xie of his interest in the Fund, and through the Fund of his investments in Project Camping and Project Laguna. He does not claim to have personally funded the whole of these investments, but he alleges that he controls them. An email from Mr Pacini to Mr Xie dated 31 August 2015 refers to Mr Xie "*own*[ing] *80% of XIO Group*".

19. The substance of the defendants' defence, as expressed in their affirmations and pleadings, is that the critical documents on which the plaintiffs rely to show their beneficial interest in their investments, such as the Entrustment Agreement and the SSAs, are invalid; and that Mr Xie, so far from being an investor in Dorsey or the Projects was merely an introducer of third party capital (which the appellants, however, have failed so far to identify). They deny that Mr Xie has any beneficial interest or control in any of the vehicles which he claims to own. They state that the capital calls are needed to support

the expenses of the Fund, and have been legitimately made. It is the appellants' case that the US$ 65 million called from Dorsey was to be used as to US$ 20 million in respect of management fees for calendar years 2017 and 2018 (i.e. to be paid in advance), as to US$ 5 million in expenses already incurred on behalf of the Onshore LPs, and as to US$ 40 million for expenses of the Fund and additional capital requirements of Project Camping and Project Laguna.

20. Apart from these proceedings in the Cayman Islands, the plaintiffs have also commenced proceedings in Hong Kong, both in court for similar injunctions in aid of arbitration, and in arbitration pursuant to an arbitration agreement contained in the Entrustment Agreement. On 8 February 2017 the Hong Kong court granted interim injunctions restraining Ms Li from (i) taking any steps which would have the effect of impairing or restructuring or dissipating all or part of the assets of Dorsey; (ii) transferring, dealing with or encumbering or voting in respect of the shares in Dorsey; and (iii) taking any steps or actions on behalf of Dorsey or holding herself out as representing Dorsey.

21. There are also proceedings in the PRC (commenced in January 2017) regarding the Shanghai Li Hong onshore fund structure, in which the Onshore LPs seek to remove and replace the Onshore GP and Ms Li as its representative.

The proceedings herein

22. On 3 February 2017 the plaintiffs issued their generally indorsed writ against the defendants claiming for breach of fiduciary duty, dishonest assistance and conspiracy.

23. On 6 February 2017, in the face of this litigation, Ms Li resigned as director of Dorsey and appointed new directors in her place, namely Mr David Griffin and Mr Daniel Chow, chartered accountants and insolvency practitioners (the "**original directors**").

24. On 9 February 2017 the plaintiffs applied *ex parte* for an interim injunction against XiO GP to restrain it from enforcing the capital calls on Dorsey and a further injunction against Ms Li in a form equivalent to the Hong Kong injunctions.

25. The plaintiffs' statement of claim was dated 23 February 2017. It was amended 31 March 2017 (during the *inter partes* hearing before Justice Mangatal), adding a further claim for injunctions against Ms Li. The plaintiffs claimed inter alia to have suffered loss and damage by reason of breaches of fiduciary duties owed both to Mr Xie and to Dorsey by XiO GP, Ms Li and Mr Pacini (at para 84). The loss and damage were particularised as follows:

> "*Full particulars of the Plaintiffs' loss and damage will be provided before trial, but include*:
>
> *84.1 Legal and investigative expenses to try to prevent the loss of Dorsey's involvement in the XiO Fund;*
>
> *84.2 Shengshi and Fortune have transferred US$70 million in aggregate to Dorsey. The value of their right to recover any money from Dorsey has been damaged by the capital calls and failure to respond to the capital calls and/or has been put in immediate risk by those actions; and*
>
> *84.3 The value of Xie's shares in Dorsey are likely to have been damaged and/or are in immediate risk of damage by the capital calls, jeopardising Dorsey's rights to the XiO Fund."*

26. The return date for the injunctions was heard on 28, 29 and 31 March 2017 before Justice Mangatal. She reserved judgment, and, subject to certain variations, continued the injunctions until further order.

27. On 2 May 2017, the original directors resigned with effect from 12 May 2017. On 12 May 2017 the plaintiffs applied to serve additional evidence concerning the original directors and their resignation, and on 23 May 2017 received leave to do so from Justice Mangatal. That evidence, which was responded to by Ms Li, demonstrated that the reasons given by the original directors for their resignation cited Ms Li's failure to provide information to them. Ms Li accepted limiting her engagement with the original directors (so as to avoid any suggestion of seeking to influence them), but denied that

"*the withholding of information...is indicative of a lack of good faith on my part*" (para 24 of her second affirmation made 22 May 2017).

28. On 9 June 2017, Justice Mangatal handed down her reserved judgment, in which she refused to strike out these proceedings and maintained the injunctions, as slightly varied, which she had granted, until trial. She held that there were serious issues to be tried, and that the balance of convenience favoured the maintenance of the status quo.

29. On 11 August 2017, new directors were appointed to Dorsey. These were Mr David Bennett and Ms Tsz Nga Georgia Chow of Grant Thornton (the "**replacement directors**"). They were appointed pursuant to a protocol of that date agreed between Mr Xie and Ms Li. Pursuant to that protocol: the replacement directors were to remain in office as "*independent directors*" until a final and binding determination "*in either the Hong Kong Arbitration or the Cayman Proceedings*"; and the replacement directors' remit was inter alia to "*[d]efend the Cayman Proceedings in any way they see fit*" and to "*[t]ake any other legal action on behalf of Dorsey as they consider appropriate*", and to report to Mr Xie and Ms Li jointly.

30. Following a further hearing before Justice Mangatal to settle the terms of her orders consequent on her judgment, her Order of 22 August 2017 provided for an injunction against XiO GP to prevent it issuing default notices against Dorsey or resolving that its interests have been forfeited, and a further injunction against Ms Li restraining her from –

> "*2.1 taking any steps that would have the effect of impairing or restructuring or dissipating all or part of the assets of Dorsey;*
>
> *2.2 transferring, dealing with or encumbering, or voting in respect of, any and/or all of the shares held in Li's name in Dorsey; and*
>
> *2.3 taking any steps or actions on behalf of Dorsey, or holding herself out as representing the interests of Dorsey.*"

The Order further ordered the plaintiffs to provide fortification for their undertakings as to damages in the total amount of US$ 7 million by letters of credit in favour of XiO GP

and Ms Li (in the amounts of US$2 million and US$ 5 million respectively) issued by the East West Bank (a Californian bank without assets or presence in the Cayman Islands).

Justice Mangatal's judgments

31. In her main judgment delivered 9 June 2017, Justice Mangatal dealt in detail with all the factual and legal arguments made as to whether serious issues for trial had been raised and whether the injunctions claimed were in her discretion appropriately to be granted on the balance of convenience.

32. In what are for the purposes of this appeal the critical paragraphs of her judgment, Justice Mangatal said this:

> *"110. In my view, the 1st and 3rd Defendants' Counsel correctly, and appropriately, conceded (albeit, as they made clear, for the purposes of this hearing only), that there are serious issues to be tried in relation to the factual basis of the claims; for example, Mr Xie's assertion that he is the beneficial owner of Dorsey, and whether Ms Li owed Mr Xie fiduciary duties. It is my view that there is also a serious issue of whether the capital calls, the subject of the injunction against XiO GP, have been issued in good faith. The Plaintiffs maintain that they are "bogus" and were issued in retribution for Mr Xie's written request of 30 December 2016. XiO GP maintains that they were issued for proper purposes, and in good faith.*
>
> *111. It has been argued that the RL* [Reflective Loss] *Rule point is in the nature of a "knock-out" point. I have struggled with this point somewhat. However, on balance, I am of the view that the question of whether the Plaintiffs' claim for a permanent injunction takes it outside the RL Rule's operation, and, whether the Plaintiffs' claim falls within the type of "wrongdoer" exception discussed in* ***Giles v***

Rhind *raise serious issues to be tried, that claim appears to have real prospects of success. In relation to* ***Giles v Rhind*** *there was some force in these Defendants' arguments that the issue is whether the wrong done to the company has made it impossible for the company to pursue its remedy against the wrongdoer, over and above the question whether Dorsey is under wrongdoer control. There is also the issue of whether it can properly be said that Dorsey is under wrong-doer control. This would particularly be so if new independent directors are appointed in relation to Dorsey. However, here the Plaintiffs, in the evidence and skeleton arguments submitted for the hearing on 23 May say that even if independent directors are appointed, that still leaves concerns as to whether Dorsey would truly be able to investigate and pursue claims, based upon the circumstances of the case, as well as the circumstances in which the FTI directors* [the original directors] *resigned.*

112. *In relation to the further evidence submitted on 23 May 2017, I accept the 1st and 3rd Defendants' point that arguably, the Plaintiffs' attorneys did seek to have the independent directors request information prior to their resignation, that these Defendants say did not fit comfortably with their role. However, the email of 9 May 2017 from Mr Griffin in response to Mr Goodman, Attorney-at-Law for Ms Li's request for clarification as to the reason for the resignation, does to some extent arguably support the Plaintiffs' position. It reads as follows:*

> *"...Having reflected on the information provided during the call on 2 May 2017 and the information provided previously by your client and the General Partner, the Directors did not consider we had been given full, consistent and/or timely information in relation to the affairs of Dorsey, despite our requests and having reviewed the evidence filed in the ongoing proceedings..."*

113. For whatever relevance it may have in relation to this point, it has also to be remembered that the Plaintiffs have sued Dorsey itself as being involved in the alleged conspiracy.

114. The Plaintiffs' arguments with regards to an injunction claim and quia timet injunctions needing to be treated differently than a claim for loss and damages gain some support from the ***Peak Hotel*** *case, which the 1st and 3rd Defendants, through the commendable industry and candour of Counsel, brought to the attention of the Court and to the Plaintiffs. I am of the view (although I appreciate that the facts were not identical and the decision is not binding on this Court) that it is something that I consider worthy of putting into the equation in the Plaintiffs' favour. Ms Leahy quite rightly made the point that the* ***Kazakhstan*** *case did concern a freezing injunction. However, the freezing injunction appears to have been granted in respect of a money claim that was being made and thus does not take away from the arguability of the Plaintiffs' point.*

115. For completeness, I state that I do not consider the point advanced by the Plaintiffs, that Clause 20 of the Amended LPAs bars any claims against XiO GP or Ms Li that Dorsey may have, to have any real prospect of success.

116. It is a close call, but overall, I am of the view that there are serious issues to be tried on the RL Rule point, in the circumstances of this case."

33. On 22 August 2017 Justice Mangatal gave a further, this time *ex tempore*, judgment, of which we have an agreed note, on inter alia the fortification issue, whereby she found that

the Californian bank's letters of credit were adequate security to stand as fortification. She said that "*they did appear to provide real security, as the Chief Justice referred to in considering security for costs in his decision in* ***Caribbean Island Developments***," adding "*they provided real security and did seem to amount to a promise which would in all likelihood be honoured*" (at para 6.4 of the agreed note).

The reflective loss doctrine

34. The leading modern case on the reflective loss doctrine is *Johnson v. Gore Wood & Co* [2002] 2 AC 1, where some of the plaintiff's heads of loss were struck out under the doctrine, but other heads of loss survived. There Lord Bingham of Cornhill cited previous authority (including *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 and *Heron International Ltd v Lord Grade* [1983] BCLC 244) and set out three propositions (at 35E-36A, omitting citations):

> "*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 to make good that loss...(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...(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..."

35. Pausing there, I observe that each of these three propositions begin with the words "*Where a company suffers loss...*", in other words, the doctrine as there enunciated is premised on a loss already suffered. This refrain is picked up by Lord Millett (at 62E-F), where he continues in explanation of the doctrine:

> *"If the shareholder is allowed to recover in respect of such loss* [a diminution in value of his shareholding or the loss of dividends], *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."*

Lord Millett went on to explain (at 66E-G):

> *"As Hobhouse LJ observed in* ***Gerber Garment Technology Inc v Lectra Systems Ltd*** *[1997] RPC 443, 471, if the company chooses not to exercise its remedy, the loss to the shareholder is caused by the company's decision not to pursue its remedy and not by the defendant's wrongdoing. By a parity of reasoning, the same applies if the company settles for less than it might have done. Shareholders (and creditors) who are aggrieved by the liquidator's proposals are not without remedy; they can have recourse to the Companies Court, or sue the liquidator for negligence.*
>
> *But there is more to it than causation. The disallowance of the shareholder's claim in respect of reflective loss is driven by policy*

considerations. In my opinion, these preclude the shareholder from going behind the settlement of the company's claim. If 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."

36. As for the nature of reflective loss, this is well explained in the famous example of the robbery of a company's cash box, given in *Prudential Assurance* at 222-223 and cited by Lord Millett in *Johnson v. Gore Wood* at 62G-63D. As was said in *Prudential Assurance*, *"[b]ut the deceit on the plaintiff* [by the robber, to cause him to surrender the key to the cash box] *causes the plaintiff no loss which is separate and distinct from the loss to the company."*

37. Where, however, a separate and distinct loss can be demonstrated, a claimant is permitted to advance his claim for that head of loss, as was decided on the facts of *Johnson v Gore Wood*, and see also *Heron*, as explained by Lord Millett at 64D-G of his speech in *Johnson v. Gore Wood.*

38. Two questions however arise, relevant to the issues in the present case. The first is: Where the wrongdoer defendant is in control of the company which has suffered loss, can the shareholder really be prevented from suing that defendant when *ex hypothesi* the company, controlled by him, will not do so? And the second question is: Where the loss has not yet occurred, but is threatened, can the claimant seek an injunction against the defendant to prevent the loss, as distinct from claiming to be compensated in respect of it?

39. Something approaching the first of these two questions was addressed in *Giles v. Rhind* [2002] EWCA Civ 1428, [2003] Ch 618. There the claimant and defendant had both been directors and shareholders in company X. After those parties had fallen out, the defendant

left X and set up his own business where, using confidential information owed to X, he had diverted X's most lucrative contract to another company in which he had an interest. X went into receivership. X sued the defendant, but discontinued its action when it was unable to put up the security for costs required, and undertook not to bring any further action in respect of its claim. The claimant then sued the defendant, relying on his shareholders' agreement with the defendant and claiming loss of the value of his shares in X, and other losses due to loss of employment. On a trial of preliminary issues, the judge struck out the claim on the grounds of reflective loss, but on appeal the claimant's claim survived, on the basis of an exception to the reflective loss doctrine which, as expressed in the headnote is "*where the wrong done to the company had made it impossible for it to pursue its own remedy against the wrongdoer*".

40. It may be observed that what happened in *Giles v. Rhind* was not that the company was prevented from suing because it was in the defendant's control, but that the company was prevented from suing because it was unable to secure the defendant's costs of the company's action. Nevertheless, on the claimant's case the company's impecuniosity had been caused by the defendant's own wrongdoing.

41. Waller LJ considered (at para [35]), first, that the claimant's claim for loss of employment was a personal and not reflective loss; and secondly, as to the reflective loss claim, that just as there was no reflective loss where a company had never had a cause of action for the loss in question:

> "*the same should be true of a situation in which the wrongdoer has disabled the company from pursuing that cause of action.*"

Chadwick LJ agreed, stating (at para [79]):

> "*If that is a correct analysis of that passage* [in Lord Millett's speech in **Johnson v. Gore Wood**]*, then the passage presents no difficulty in the case where the company has not settled its claim, but has been forced to abandon it by reason of impecuniosity attributable to the wrong which has been done to it. In such a case the policy considerations to which Lord*

Millett referred are not engaged. And it is difficult to see any other consideration of policy which should lead to the conclusion that a shareholder or creditor who has suffered loss by reason of a wrong which, itself, has prevented the company from pursuing its remedy should be denied any remedy at all."

Keene LJ agreed with both judgments.

42. The *Giles v. Rhind* exception has subsequently been considered in two significant English Court of Appeal decisions.

43. The first was *Gardner v. Parker* [2004] EWCA Civ 781, [2005] BCC 46. The claimant there owned, in effect either personally or through family trusts, 100% of the shares in company A, whose principal asset was a 9% holding in company B. All the other shares in company B were owned by the defendant, who was the sole director of both companies. The defendant procured the sale by company B of shares it owned in another company to company C, a company wholly owned by the defendant, at a large undervalue. Company A's liquidator assigned its rights of action to the claimant, who was therefore seeking to vindicate company A's claim against its director for breach of his fiduciary duties to company A. The difficulty was that the defendant's acts were equally a breach of his fiduciary duties, as a director of company B, to company B. On that ground, the court of appeal held that company A's loss was entirely reflective of company B's loss. The question then arose whether it made any difference that the defendant owed separate *fiduciary* duties to both company A and company B, and the court held, following an earlier decision in *Shaker v. Al-Bedrawi* [2003] BCC 465, that it did not (at paras [37]ff). At para [49], Neuberger LJ (with whom Mance LJ and Bodey J agreed), said this:

"It is clear, from the analysis and discussion in the cases to which I have referred, that the rule against reflective loss is not concerned with barring causes of action as such, but with barring recovery of certain types of loss. On that basis, there is obviously a powerful argument for concluding, as this court did in ***Shaker****, that whether the cause of action lies in common*

law or equity, and whether the remedy lies in damages or restitution, should make no difference as to the applicability of the rule against reflective loss. Furthermore, given that the foundation of the rule is to prevent double recovery, there is a powerful case for saying that the rule should be applied in a case where, in its absence, both the beneficiary and the company would be able to recover effectively the same damages from the defaulting trustee/director."

44. The next question was whether the exception in *Giles v. Rhind* applied. What had happened was that receivers appointed in company B had commenced proceedings against company C. Under section 423 of the UK Insolvency Act 1986 the proceedings were deemed to have been brought on behalf of all the "*victims*" of the transaction, including company A as a creditor of company B. The proceedings were compromised. The plaintiff relied on this for saying that only company A now had a cause of action for the loss and that this was because of facts within the *Giles v. Rhind* exception. The defendant relied on this for saying that the reflective loss claim had in any event been settled. Neuberger LJ summed up his view of that exception at para [57] and treated this issue as being a matter of fact, where the claimant failed for lack of evidence (at para [61]):

> "*57. The reasoning in **Giles**, 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 double recovery from the defendant, and if the company cannot sue, the defendant is not exposed to such a risk...

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 [company B] by Mr Parker, let alone that Scoutvale was prevented from pursuing Mr Parker because of its impecuniosity, or even that such impecuniosity had been caused by the wrongdoing alleged in the re-amended statement of claim against Mr Parker."

45. The second subsequent decision which is to be considered, and for which this court waited, since at first instance it was relied on by the plaintiffs, is *Marex Financial Ltd v. Carlos Sevilleja Garcia* [2018] EWCA Civ 1468 ("***Marex***"). Three issues arose: one was whether the reflective loss doctrine applied to bar creditors as well as shareholders of a company; a second was whether the *Giles v. Rhind* exception applied in that case; the third was whether the reflective loss doctrine applied to intentional torts. As to the first issue, which did not figure in our appeal, the English court of appeal held that the doctrine applied to creditors as well as shareholders. As to the second issue, the court of appeal held that the exception was a narrow exception which applied only where the company's claim was barred by law, rather than merely prevented on the facts, as a result of a defendant's wrongdoing. As to the third issue, which also arises in the present appeal, the court held that the doctrine did apply. The judge, Knowles J, held that the doctrine did not apply, but on appeal the claimant did not seek to uphold his judgment in this respect, but rather relied on the *Giles v. Rhind* exception, which the judge had said that he did not need to decide.

46. The claimant Marex had sued on a judgment for US$ 5 million. Following the judgment, the judgment debtor, as was alleged, had been stripped by the defendant of its assets, prior to the obtaining of a freezing order against it. The company had thus been rendered

impecunious by its alleged despoliation by the defendant, something which was also alleged to be a tort deliberately aimed at the claimant as judgment creditor.

47. The court of appeal said that it agreed with counsel's analysis to the effect that the reflective loss doctrine rested on four considerations, viz (at para [32]):

> *"(i) the need to avoid double recovery by the claimant and the company against the defendant...(ii) causation, in the sense that if the company chooses not to claim against the wrongdoer, the loss to the claimant is caused by the company's decision not the defendant's wrongdoing...(iii) the public policy of avoiding conflicts of interest particularly that if the claimant had a separate right to claim it would discourage the company from making settlements...; and (iv) the need to preserve company autonomy and avoid prejudice to minority shareholders and other creditors..."*

48. The court then applied the last consideration (which might perhaps be said to be the first, and to combine two separate considerations) as determining that the doctrine applied to bar creditors as well as shareholders, reasoning as follows (at para [37]):

> *"If the creditor were able to pursue a claim in relation to the asset stripping of the company such as in the present case, that would bypass and subvert the pari passu principle, applicable to the unsecured creditors of the company in the event of liquidation, that the assets of the company be distributed rateably. On this hypothesis, if a creditor were able to pursue a claim for reflective loss, it could make a full recovery of its debt against the wrongdoer to the prejudice of the other creditors, whereas if the liquidator were to pursue the company's claim against the wrongdoer and thereby replenish its assets, they would be available for distribution to the general body of the creditors."*

49. As for the *Giles v. Rhind* exception, the court rejected the claimant's submission that it applied "*wherever it was legally or factually impossible for the company to pursue proceedings against the wrongdoer*" (at para [55]), and held that there had to be a causal connection between the wrongdoing and the impossibility (at para [56]). Whether or not the claimant's submission intended to evade, rather than assume, that causative requirement, Flaux LJ also held that "*the impossibility or disability must be a legal one and what might be described as factual impossibility is insufficient*" (at para [57]). He added:

> *"Although, in the passage at [79] of his judgment in* ***Giles v. Rhind*** *which I have quoted at para 47 above, Chadwick LJ referred to "[the company] being forced to abandon its claim by impecuniosity attributable to the wrong which has been done to it", he cannot have intended that every case where the impecuniosity of the company is attributable to the wrongdoing would fall within the exception. If that were what Chadwick LJ was saying, given that, in many cases where the rule against reflective loss is in play, the company's assets have been abstracted by the wrongdoer, so that without an injection of funds, for example from a shareholder or creditor, it is not possible for the company to bring a claim, the exception would risk becoming the rule...[58]...If, through an injection of funds by a third party shareholder or creditor, it is possible for the company to bring a claim against the wrongdoer (as in the decision of Birss J* ***in Peak Hotels and Resorts Ltd v. Tarek Investments Ltd*** *[2015] EWHC 3048 (Ch) where the company could have brought a derivative claim) or the third party can take an assignment of the company's claim, then impossibility which would bring the exception into play is simply not made out."*

50. Whether a legal impossibility be necessary or not, however, Flaux LJ went on to find (at para [60]) that neither legal nor factual impossibility was made out, because:

"there is no evidence that there is anything preventing a claim against Mr Sevilleja by the present or another liquidator or preventing Marex from taking an assignment of the Companies' claim."

51. I turn next to the second question raised at para [38] above, namely whether the reflective loss doctrine bars a claim where no loss has as yet occurred, but might be prevented by means of an injunction.

52. A recent decision relied on by Lord Goldsmith QC, counsel for the respondents, as being relevant to this question is *Peak Hotels and Resorts Ltd v. Tarek Investments Ltd* [2015] EWHC 3048 (Ch). This was a dispute between two shareholders in a joint venture company, pursuant to a shareholders' agreement. Birss J found that the reflective loss doctrine applied to strike out certain damages claims made in that case, but went on to consider a claim for an injunction. The injunction there claimed was a mandatory injunction to restore property to the company concerned. It was based on a claim in fraudulent conspiracy and unlawful interference with contract. Birss J reasoned as follows:

"68. Mr Howard submits that if the court could grant an injunction of the kind being considered then the very same point could have been taken in the ***Prudential*** *case and in particular in the example given about the strongbox.*

69. I must say I can see the sense in that, but nevertheless it seems to me that the key problem with reflective loss is double recovery. It makes sense to me that if a company's shareholder takes the damages, there is a possibility of defrauding the company's creditors and, for that matter, its other shareholders. Maybe defrauding is the wrong word to use and it might be better to speak in terms of the potential for the shareholder to act in a way that damages company's creditors and the other shareholders, but in

any case the problem does not arise with an injunction to restore property to the company...

72. *Is it relevant that I have struck out the claim for reflective loss? I do not believe that it is relevant that I have left behind a claim for non-reflective losses. I will assume that there are no damages claimed at all. The question is: will the court still entertain the claim for the injunction to restore property to the company?*

73. *The most significant point that troubles me is that in the reflective loss cases this same point could have been taken. Nonetheless, I have not had my attention drawn to any authority which has considered this issue. It may be the reason why not is because the point is so obviously bad that no one has entertained it and I recognise that this is an area in which many others have more experience than I do. Nevertheless, for the reason already given, it seems to me that a claim for an injunction raises different considerations to a claim for damages. If the defendant owes a duty to claimant and has breached that duty, and it is otherwise appropriate, I cannot see why an injunction is not capable of being an appropriate remedy. There is no problem with double recovery and so no problem of the kind considered in* ***Johnson v. Gore Wood*** *about creditors. I will accordingly refuse to strike out the injunction claim."*

53. *Peak Hotels* was considered by Teare J in *Latin American Investments Limited v. Maroil Trading Inc* [2017] EWHC 1254, another case relied on by Lord Goldsmith, where specific performance was sought of a claim that moneys be paid *to* a company. It was accepted that the moneys claimed were reflective of a loss suffered by the company, but the claim was not that the claimant be paid but that the company be paid. Teare J regarded such a claim for specific performance to be really in the nature of a claim for

damages. However, he regarded such a claim as arguable and potentially sustainable, and reasoned as follows:

> "22. *However, payment to the Joint Venture Companies of such sum as is found due on account of the Settlement Agreement being concluded without authority and in conflict of interest does not appear to be an order for specific performance but appears to be an order, at the suit of the Claimant, that the Defendants pay damages to the Joint Venture Companies. If the remedy of specific performance is available, as arguably it is, where the Claimant has its own cause of action under the Shareholders Agreement I find it difficult to see why the remedy of damages should not also be available. Of course, if either remedy breached the reflective loss principle it would not be available but neither remedy appears to do so because in both cases the order is that payments be made to the Joint Venture Companies. Such orders are consistent with the principle of company autonomy (because they recognise that the payee is the company and not the shareholder), do not prejudice creditors of the company (because the sums are paid to the company) and do not enable a shareholder to recover compensation for a loss suffered by the company (because the compensation is payable to the company). At any rate there appears to be a good arguable case that these propositions are correct.*
>
> 23. *Mr Shah's case is not supported by authority but neither is there authority which states in terms that it is wrong. Mr Foxton relied on the statement of the "general rule" in* ***Prudential Assurance v. Newman Industries*** *[1982] Ch 204 at p.201 that A cannot bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured and therefore the person in whom*

the cause of action is vested". But it is not apparent that that statement of principle was applicable to the case where, as here, the shareholder has his own cause of action (though the reflective loss principle is of course applicable in such a case as was held in ***Johnson v Gore Wood****).*

24. Like Birss J in ***Peak Hotels*** *I am troubled that this point could have been made in previous cases on reflective loss but was not. Nevertheless, I have reached the conclusion that there is a good arguable case that the Claimant's pleaded case and the remedies sought are available to it and are not caught by the reflective loss principle."*

54. We were told at the hearing that *Latin American Investments* was under appeal. Indeed, it appears that permission to appeal was granted by Lewison LJ. However, it also appears that the claim was settled before the appeal was heard. There will therefore be no appeal.

55. It also appears that *Peak Hotels* was cited to the court of appeal in *Marex* and relied on by the court in that case (see at its para [58] cited herein above at [49]). *Peak Hotels* was therefore cited by the English court of appeal with approval, albeit on another aspect from that concerning the upholding of the injunction claim, but without any suggestion that that authority was in some serious manner suspect in this context.

56. Nevertheless, it was submitted on behalf of the appellants that *Peak Hotels* and *Latin American Investments* were decided *per incuriam*, because of the failure to cite *Heron International Ltd v. Lord Grade* [1983] BCLC 244 (CA) to the court. (I note, however, that *Heron* was cited within the extracts from *Johnson v. Gore Wood* set out in *Latin American Investments*.) Mr Stephen Atherton QC, counsel on behalf of the appellants, submitted that *Heron* demonstrates that an injunction could not be given in support of a claim barred by the reflective loss doctrine.

57. *Heron* is not an easy case to interpret. It is discussed by Lord Millett in *Johnson v. Gore Wood* (at 64). He there distinguishes between the potential reflective loss and the potential personal non-reflective loss identified in *Heron*. He also observed that "*[t]he Court of Appeal granted the shareholders injunctive relief*" (at 64E). In that, however, he was, as I think with respect, mistaken, because the court refused an injunction on the facts with respect to the first type of loss, the potential reflective loss, and dealt with the second type of loss, the potential personal loss, by means of declarations rather than injunctions (*Heron* at 271i-272a). However, Lord Millett might have said that the court expressed itself willing in theory to grant injunctions. So far at any rate, Lord Millett's review of *Heron* provides no support for Mr Atherton's submission.

58. Mr Atherton nevertheless submitted that *Heron* stands for the proposition that an injunction to prevent a non-reflective loss was refused as being impossible in law. On behalf of the plaintiffs, Lord Goldsmith QC on the other hand submitted that that was a misreading of the court's judgment in *Heron*.

59. The critical passages in *Heron* are as follows:

> "*4.2 It follows from these assumptions that the allegedly reckless decision of the directors, if implemented, will cause losses in two directions. First, ACC will suffer a loss to the extent that its shares in Central are depreciated in value. That is a loss exclusively to the coffers of ACC. It is not a loss to the pocket of the shareholders in ACC, although it might, in theory, cause the market value of ACC shares to fall. No shareholder in ACC could sue the directors for a diminution in the value of his shares on that account for the reason given by this court in Prudential...The other direction in which loss would be suffered is the loss to the pockets of the shareholders because they are deprived of the opportunity of realising their shares to greater advantage. That is a loss suffered exclusively to the pockets of the shareholders, and is in no sense a loss to the coffers of the company, which remain totally unaffected.*

4.3 *It is only the first type of injury to which the rule in* ***Foss v Harbottle*** *is directed...If, therefore, the Bell takeover is implemented, as a result of the allegedly reckless decision of the Board, the position will be that ACC can in theory sue the directors responsible for the depreciation in value of the Central shares, and any one or more of all the former shareholders in ACC can seek to sue such directors to recover for the benefit of their own individual pockets the difference between the takeover value per share which they are constrained to accept and the higher takeover value which they lost the chance of accepting.*

4.5 *[sic] The situation in the present case has not however got as far as that. The allegedly reckless decision of the Board has not been carried into effect. Therefore, on the assumptions we have made (a) ACC can stop the implementation of the Bell takeover and the consequent depreciation in the value of ACC's shares in Central: and, if ACC does not itself sue to prevent such loss, any shareholder can sue on behalf of ACC unless prevented by the operation of the rule in* ***Foss v Harbottle****; and (b) the shareholders in ACC, or any one or more or all of them, can stop the implementation of the Bell bid and the consequent loss to their individual pockets, provided that such plaintiffs can establish the existence of a cause of action against the directors...*

4.6 *We are bound to accept the unchallenged evidence that the IBA conditions engrafted on the Bell offer will, if implemented, have a depreciatory effect on the value of ACC's shares in Central. But the evidence is silent as to the potential quantum of loss, and for all we know it may be insignificant or purely theoretical. In the state of the evidence as it stands, we would think it quite wrong to injunct the defendants at the instance of shareholders purporting*

to sue in right of ACC, merely to prevent ACC suffering this unknown loss, against the background of the fact that precisely the same loss may apparently be suffered by ACC if the projected Heron takeover comes about. In any event, the alleged loss to ACC arising from the diminution in the value of the Central shares seems to us only a device to bolster the plaintiffs' attempts to prevent the occurrence of the real loss of which the plaintiffs understandably complain: namely, the loss to their individual pockets through being deprived of the chance of benefitting from the Heron bid.

4.7 We therefore lay ***Foss v Harbottle*** *aside and proceed to examine the claim that, on the facts of this case as pleaded and presented in evidence, a shareholder in ACC is entitled to the assistance of the court to prevent the directors of ACC, acting on behalf of ACC, carrying into effect a transaction to which no reasonable board of directors would have committed ACC..."*

60. Mr Atherton submits that, where reflective loss is concerned, a claim for injunctive relief must fail *a fortiori*, citing *Heron* in the passage set out above. His skeleton argument (at paras 48 and 50) states:

> "*The position is a fortiori where a shareholder seeks an injunction to prevent a loss occurring to the shareholder which is merely reflective of the loss which the company would suffer if the threatened action was not restrained. This much is plain from...Heron...which decision was approved by Lord Bingham and Lord Millett in Johnson...On this issue, the Court held that the shareholders were <u>not</u> entitled to an injunction to prevent loss being suffered which was merely reflective of the loss that would be suffered by ACC itself.*"

61. In my judgment, however, this submission is mistaken. The injunction to prevent ACC's loss was refused only on the facts. If the threatened loss had been real and not merely theoretical, then, as the court expressed it "*unless prevented by the rule in **Foss v Harbottle***", an injunction would have been available to any shareholder purporting to sue in right of ACC (see paras 4.5 and 4.6). It was because the claim for an injunction to prevent the first type of loss failed on the facts, that the court said that "*[w]e therefore lay **Foss v Harbottle** aside...*". In para 4.7, the court went on to consider the shareholders' remedy to prevent the second type of loss, their personal, non-reflective, loss.

62. There is therefore no decision in *Heron* that the plaintiffs' claim for an injunction to prevent loss to a company in which the plaintiffs held shares failed or had to fail as a matter of law because of the reflective loss doctrine. I reject the submission that *Peak Hotels* and *Latin American Investments* were decided *per incuriam*. In any event, those two cases were not considering an injunction to *prevent* loss, but a mandatory injunction or specific performance designed to secure a defendant's repayment, of a loss which had already occurred, to the company which had already suffered the loss.

63. The second question raised at paras [38] and [51] above still requires an answer: Where the wrongdoer defendant is in control of a company which has suffered loss, can the shareholder really be prevented from suing that defendant when *ex hypothesi* the company, controlled by him, will not do so?

64. At least one answer, even if it were to be the only answer, lies in the derivative action, where a shareholder, even a minority shareholder, sues in the right of the company in which it owns shares. *Prudential Assurance* is itself authority for this, in a passage cited by Birss J in *Peak Hotels* at para 30, referring to a passage in *Prudential Assurance* commencing at 210D and concluding as follows:

> "*(1) There is an exception to the rule [in **Foss v. Harbottle**] where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to*

bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue."

65. It may be (but I am uncertain, because that court did not have to continue its analysis) that it was this, or some analogy to this, that the court in *Heron* had in mind in the passage cited from *Heron* above.

66. If so, I do not see how, other than perhaps in terms of pure formalism which has not been argued before us in this case, the present claim differs from the claim in *Heron* or from a derivative action. Here the alleged 100% beneficial shareholder in Dorsey claims an injunction to prevent harm being done to Dorsey. Although, on the basis that the harm has not been prevented, there is also a claim to damages, expressed as the plaintiffs' damages, I do not see why the case cannot be regarded, as Lord Goldsmith in effect invited us by reference to *Heron* to do so, as a claim by Mr Xie as shareholder on behalf of Dorsey and/or in right of Dorsey to prevent harm, loss and injury to Dorsey. Dorsey of course would not sue because Dorsey was at that time controlled by Ms Li as its sole director. Nevertheless, Dorsey has been made a party to the case, so that it is bound by it.

67. Mr Atherton also relied for his *per incuriam* submission on *Humberclyde Finance Group Ltd v. Hicks* (unreported, 14 November 2001) where Neuberger J held that the (counter-)claimant's willingness to agree to limit his claim to what he would have recovered as a shareholder in the company, had the company recovered its losses through its liquidator, was of no assistance to him. The judge rejected that on the facts (on the basis that the company had no claim), but also on the basis that the reflective loss doctrine is one of principle and "*Mr Hicks cannot get round it by the sort of device proposed by Mr Cogley, even though that device has inherent practical attraction*" (at para 40). Mr Atherton submitted that the claims for a mandatory injunction or for specific performance adopted

in *Peak Hotels* and *Latin American Investments* were similar illegitimate devices to get round the reflective loss doctrine.

68. However, the doctrine has always been propounded as arising in terms of a reflective loss suffered by a company, and an injunction which seeks to prevent a loss would seem prima facie to lie outside its ambit. Even in *Humberclyde,* Neuberger J spoke of an "*inherent practical attraction*" in the claimant's offer. There is no attraction whatsoever in extending the reflective loss doctrine in order to delegitimise an attempt to prevent a threatened loss, *a fortiori* threatened dishonesty, from taking place.

69. As it is Neuberger J rightly described the reflective loss doctrine (at para [33]) as "*this perplexing and developing area*".

70. Mr Atherton also relied for his submission of *per incuriam* on *Day v. Cook* [2001] EWCA Civ 592, [2003] BCC 256, where Lady Justice Arden said (at para [38]) that "*[t]he company's claim, if it exists, will always trump that of the shareholder*" and (at para [39]) that "*[a]ccordingly the court has no discretion. The claim cannot be entertained.*" However, that case was not concerned with a claim for an injunction, which, if it is permissible in theory will necessarily involve an element of discretion. I observe in passing that Arden LJ went on to refer to "*limits*" to the doctrine, mentioning two and adding that "*[t]here may well be others*" (at para [41]). I also observe that in *Johnson v. Gore Wood (No 2)* [2003] EWCA Civ 1728 at para [162] Arden LJ also described the doctrine as having a "*will o' the wisp*" character which needed clarification, a remark cited by Flaux LJ in *Marex* at para [12].

71. In sum, I do not regard the *Peak Hotels* and *Latin American Investments* cases as having been decided *per incuriam.* They seem at least well arguably to fall outside the limits of the reflective loss doctrine. Save for the fact that in those cases the complained of loss had already occurred and been suffered by the company, they illustrate the use of an equitable remedy to recoup the company's own losses. The present case, however, seems to me to be *a fortiori,* for here the loss has not yet occurred, and an injunction is not used to *recoup,* but to *prevent* loss. In any event, both those cases and this one reflect a need to

see the company maintained whole, and in doing so they also reflect good sense, justice and fairness, as well as the situation considered but not resolved in *Heron*, and the exception and rationale in favour of a derivative action spoken of in *Prudential*.

General matters concerning the grant of injunctions

72. Mr Atherton also submitted that the injunctions granted by the judge should have been refused by her as a matter of general principle regarding the granting of injunctions (i.e. going beyond the particular context of the reflective loss doctrine) and as a matter of the proper exercise of discretion. He also submitted that the installation of the replacement directors was in any event a change of circumstances which entitled this court to exercise a new discretion of its own.

73. Thus Mr Atherton submitted that there was no need for an injunction in the light of the resignation of Ms Li and her appointment of alternative directors, first in the form of the original directors and next in the form of the replacement directors pursuant to the protocol entered into between her and Mr Xie. Ms Li disputed that the original directors had been starved of information. In any event the protocol should ensure that the replacement directors were properly provided for in their roles. He also submitted that an injunction was unnecessary in the light of Ms Li's undertaking not to forfeit Dorsey's assets, and/or in the light of the Hong Kong injunctions.

74. Mr Atherton further submitted that there was no call for a permanent injunction, and that no interlocutory injunction could be given save in support of an arguably good cause of action, something which the reflective loss doctrine prevented. In this respect, he referred to *Kazakhstan Kagazy Plc v. Arip* [2014] EWCA Civ 381 and to *Khorasandjian v. Bush* [1993] QB 727 (CA) at 732, and thus to the law deriving from *The Siskina* [1979] AC 210 (HL).

75. Finally, he submitted that no injunction was called for, since damages would be an adequate remedy.

76. In my judgment, however, these submissions all fail. There is at least a good arguable case that Mr Xie is entitled to claim injunctions to *prevent* the successful exercise of fraud: either in circumstances which lie wholly outside the reflective loss doctrine, since no reflective or any loss has yet been caused but the claim is to the court to prevent any loss; or because his claim can be regarded as, or as equivalent or analogous to, a derivative claim by a shareholder on behalf of a potentially injured company. In this connection it is in any event to be borne in mind that the reflective loss doctrine does not remove a shareholder's own cause of action (see *Gardner v. Parker*, cited at para [43] hereof above) even if it trumps it.

77. Such circumstances to my mind fully meet the requirements of *The Siskina*, as developed in subsequent leading cases, that an interlocutory injunction may be granted, where appropriate, *quia timet* in support of a legal or equitable claim.

78. This is quite unlike the situation in *Kazakhstan Kagazy*, where the claim for a *freezing* injunction, not an injunction to prevent injurious action, was entirely dependent on a claim for loss which, in the case of at any rate one claimant (but not other claimants) in that case, was a reflective loss.

79. The rest is a matter of discretion, which the judge had in mind, save for the latest events of the appointment of the replacement directors. I can find no error to upset the exercise of the judge's discretion. The judge was entitled to think, as I do, that all that Ms Li has done she has done in reaction to the claims made against her: and that only the threat of these proceedings has led her to the consequent moves of resigning her own directorship, or of appointing directors (or replacement directors), or offering to give undertakings to the court. There is no sufficient reason (outside the reflective loss doctrine), in a case where there are serious issues of dishonesty and very large assets potentially at stake, for the court to refrain from granting its *quia timet* protection to the plaintiffs.

80. As for the latest move of appointing the replacement directors pursuant to the protocol agreed between Ms Li and Mr Xie, it remains to be seen how satisfactory that arrangement is. That would be a matter of going back to the judge on appropriate

evidence, rather than, as Mr Atherton attempted to do, of merely informing the court of pending, even overnight, developments. Although the protocol gives the replacement directors the remit of requesting information from XiO GP, there is nothing in the protocol itself to ensure that adequate information will be provided (see its clauses 4 and 7.1). If necessary, I suppose, Mr Xie could, through those directors, take an assignment from Dorsey of its claims; or could finance a claim by Dorsey, in the hands of those directors, in protection of its own interests. Ultimately these are matters of form rather than substance in circumstances where Mr Xie does not, as I understand it, so much wish to claim for himself (as against other shareholders or creditors) what belongs to Dorsey, as to protect Dorsey's assets (and the rights which flow from them) from the alleged dishonesty of its erstwhile controllers.

81. As for the submission that the defendants, through the Fund, are well able to meet any claim in damages, and that an injunction is therefore unnecessary and discordant with principle: it seems to me that in its essence, and despite the pleading of (anticipated) loss and damage which I do not overlook, this claim is not so much about the compensation of loss but about its prevention. Moreover, if ultimately the loss was not prevented but was incurred, and, despite the good arguable case that the claim to prevent is not within the reflective loss doctrine, it were to be held that a loss once incurred was a reflective loss which could not be claimed in this action, then damages would not be an adequate remedy.

82. In these circumstances, it is unnecessary to decide whether clause 20.1(a) of the Amended and Restated Limited Partnership Agreement does or does not grant an exemption from liability to Ms Li. It provides:

> *"None of the General Partner, the Manager, any of their respective Affiliates and any of their respective officers, directors, employees, agents or delegates (each an "**Indemnified Person**") will have any liability for any loss incurred by the Partnership or the Limited Partner howsoever arising in connection with the provision of services by it under this Agreement..."*

83. In my judgment, however, there is clearly an arguable case that it does provide the exemption from liability there stated, even if it is also clearly arguable that such an exemption does not cover dishonest, as distinct from merely unlawful but not dishonest conduct.

84. As for the submission that the Hong Kong injunctions, in support of the Hong Kong arbitration, suffice, it seems to me that the plaintiffs are entitled to the protection of these courts, which is where the Fund and its partners are to be found (*a fortiori* in circumstances where Ms Li disputes the Entrustment Agreement, which is where the provision for Hong Kong arbitration is to be found). In any event, clause 13.1 of the protocol says that it is to have effect only "*until a final, binding determination in either the Hong Kong arbitration or the Cayman Proceedings...*" (emphasis added). Therefore, if these Cayman proceedings were to end, the protocol would cease to have effect, and such protection as was available from the replacement directors and the protocol would vanish.

85. I therefore conclude that the appellants' submissions under this head fail.

Intentional torts

86. The plaintiffs submitted that intentional torts, aimed at the shareholder, were not within the reflective loss doctrine. However, *Marex* decides otherwise. The point was decided in favour of the claimant by Knowles J in *Marex*, but it was not supported by the claimant respondent on appeal, and the court of appeal said that that concession was rightly made, and that the judge's decision could not be reconciled with *Gardner v. Parker* (see also *St Vincent European General partner v. Robinson* [2017] EWHC 3267 (Comm) at para [61]).

87. In the circumstances, there is no merit in that point.

Decision

88. In the light of the discussion of the jurisprudence above, I can state my decision on the two major issues raised by this appeal quite briefly.

89. Mangatal J maintained the injunctions, as varied, on two bases, first that there was a serious issue to be tried that the case of an injunction to prevent loss was outside the scope of the reflective loss doctrine, and secondly that there was a serious issue to be tried that the claims were in any event within the *Giles v. Rhind* exception.

90. As for the latter, it seems to me that the decision of the English court of appeal in *Marex*, subsequent not only to the hearing before Mangatal J but also to the hearing before this court, renders that basis for the judge's decision difficult. *Marex* has said that the *Giles v. Rhind* exception is to be narrowly confined to cases of only legal impossibility. It interpreted the situation in *Giles v. Rhind* itself to be one of legal impossibility, possibly controversially given the width of the dicta in that case and the approach of the court of appeal in *Gardner v.Parker* (see paras [43]-[44] hereof above), but it nevertheless did so.

91. As for the former issue, I consider that for the reasons stated above, there is at least a serious issue to be tried that the reflective loss doctrine does not reach the case where a claimant does not sue to recover a loss, but to prevent one. It may also or alternatively be possible to regard Mr Xie's action herein as the equivalent of or analogous to a derivative action, or at any rate to be such an action as the English court of appeal in *Heron* contemplated could possibly survive the rule in *Foss v. Harbottle*.

92. It is of course true that derivative actions are carefully controlled. In the UK, they are controlled by section 260 of the Companies Act 2016 and in the Cayman Islands by GCR O.15, r.12(A)(2). Under section 260, a derivative action is an action brought by a shareholder in respect of a cause of action vested in a company. It may only be brought "*under this Chapter*" of the Act (and there are other limitations concerning the nature of the cause of action, see sub-section (3)) and the shareholder must apply to the court for permission to continue it, and must do so within 21 days (unless that period is extended).

Nevertheless, it is a procedure designed to ensure that a company is not harmed by those in control of it. In the Cayman Islands O.15, r.12(A)(2) describes a derivative action as an action by one or more shareholders where the cause of action is vested in the company "*and relief is accordingly sought on its behalf*". Again, leave to continue must be sought from the court within 21 days.

93. In *Nurcombe v. Nurcombe* [1985] 1 WLR 370 at 378 Lord Justice Browne-Wilkinson said this about the juristic basis of such actions:

> "*The Juristic basis of this principle...is not clear...In the United States it has apparently been rationalised by saying that a minority shareholder's action is in fact two actions...I do not think it is necessary to adopt such analysis in the present case. Since the wrong complained of is a wrong to the company, not to the shareholder, in the ordinary way the only competent plaintiff in an action to redress the wrong would be the company itself. But, where such a technicality would lead to manifest injustice, the courts of equity permitted a person interested to bring an action to enforce the company's claim. The case is analogous to that in which equity permits a beneficiary under a trust to sue as plaintiff to enforce a legal right vested in trustees (which right the trustees will not themselves enforce), the trustees being joined as defendants.*"

94. Browne-Wilkinson LJ could also perhaps have illustrated the doctrine by reference to the means by which an equitable assignee can claim, even where the assignor will not, making the assignor a defendant.

95. These considerations, but also the concern that such procedures should not be abused, have led to the present enactment under section 206 and its equivalent in the Cayman Islands. At the same time, the development of the reflective loss doctrine generally, which in the light of *Marex* seems to be extending its scope wider and wider, puts me in mind that the basis of the doctrine is ultimately as much a procedural as a substantive matter, so as to ensure that the claim is procedurally sound, and that the remedy of any

recovery of funds goes through the company and not through an outsider, such as a shareholder or (see now *Marex*) a creditor. However, the autonomy of a company is not sacrosanct, where there is a good case that those in control of it are acting dishonestly, as the derivative action (and indeed the Companies Act 2006 section 994 procedures and their equivalent as well) illustrate.

96. In the present case, as the judge has found, there is a serious issue to be tried that Dorsey was, when these proceedings commenced, being abused. Because of the request for the injunctions, the court has been in control of the litigation from almost its outset. The judge therefore acted, originally *ex parte* but again after hearing lengthy *inter partes* argument, to prevent the alleged dishonesty being developed. The alleged abuser has sought to distance herself from the control of Dorsey by her resignation as director and the appointment of first the original and then replacement directors, but the concern as to the underlying situation remains. In the present state of jurisprudence relating to the reflective loss doctrine, I do not consider that it would be just to strike out these proceedings (even if, in the fullness of time, some alteration to its procedural status were to turn out to be necessary). In this context I bear in mind that a number of distinguished judges have commented on the uncertainties and difficulties of the reflective loss doctrine, in observations which I have mentioned in passing in this judgment. I also bear in mind that the English court of appeal itself, unusually, gave permission to appeal to the UK Supreme Court in *Marex*.

97. On behalf of the appellants, Mr Atherton has urged us in this case to reach a definitive decision as to the effect of the reflective loss doctrine as a matter of pure law on the proceedings herein, and so to strike them out. I would resist that call. In circumstances where in my judgment this action should proceed to a trial on the merits, where the *Peak Hotels* decision has been cited without disapproval by the English court of appeal in *Marex*, and where the UK Supreme Court will be looking at the modern development of the reflective loss doctrine anew, it would in my judgment be dangerous and premature either to strike out this action or to rule definitively one way or the other as to its effect on these proceedings. I would prefer to say that on the allegations made against the defendants the court should hold the ring for a trial on the merits on the basis that there is

at least a serious issue to be tried that the action is (or could be) well founded. But if I had to take a decision (which I do not take), I would have preferred to say that the reflective loss doctrine does not reach as far as requiring the striking out of an action to prevent by injunction the development of alleged dishonest wrongdoing which a three day hearing by the judge below has ruled presents serious issues to be tried.

Fortification

98. I therefore proceed to the question of fortification of the Plaintiffs' cross-undertaking in damages. The judge has ruled that such fortification may be provided by letters of credit issued in favour of the defendants by the East West Bank, of California USA. It is however submitted by Mr Atherton on behalf of the appellants that that was an illegitimate exercise of the judge's discretion since the law compelled such security by way of fortification to be from a party with presence and/or assets within the jurisdiction, and the East West Bank had neither presence nor assets here.

99. In this connection Mr Atherton referred to two cases on security for costs, one in England and one in the Cayman Islands, namely *Porzelack KG v. Porzelack (UK) Ltd* [1987] 1 WLR 420 (CA) and *Caribbean Islands Development Limited v. First Caribbean International Bank* [2014] (2) CILR 220.

100. In *Porzelack*, the English law regarding security for costs was in a state where it still reflected the earlier law which was that it was a sufficient reason to ground a claim for security that a plaintiff was foreign. This law then began to run into trouble where plaintiffs were based in other countries in what was then called the EEC. In *Porzelack* no security was ordered against the West German plaintiff. It was said, nevertheless, (at 422H) that:

> *"The purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this court against which it can enforce the judgment for costs. It is not, in the ordinary case,*

in any sense designed to provide a defendant with security for costs against a plaintiff who lacks funds."

101. In other words, it was a *special rule*, not concerned so much with *security* for costs but with a *home asset* of the foreign plaintiff against which a costs order could be enforced at home. In the light of the EEC situation, however, the English court recognised that an ability more easily to enforce an order for costs against a foreign EEC plaintiff in its home country was a reason capable of changing the normal discretionary English rule of requiring English assets (*Porzelack* at 426B/C). Therefore, even though the litigant there was foreign, the court of appeal did not require any security in that case.

102. With the passing of time, however, it is no longer the law in England that the foreignness of a plaintiff is a sufficient reason by itself for invoking the security for costs jurisdiction. Therefore, the special rule has fallen into abeyance. It may well be normal practice in modern days for an order for security for costs to involve either a payment into court or a bank guarantee of a first-class London bank, but that is simply a matter of a discretionary attitude to what is reasonable security.

103. Thus, in *Versloot Dredging BV v. HDI Gerling Versicherung AG* [2013] EWHC 658 (Comm), Christopher Clarke J said this (at para [10]):

> "*In my view, it is necessary to take a pragmatic view, or as the Master of Rolls expressed it in* ***Shlaimoun and Anor v. Mining Technologies International Inc.*** *[2012] EWCA Civ 772, a realistic view. There is no magic in the provision of security from a first-class London bank. The essential question for the court in deciding on what form of security is acceptable is whether what is promised does indeed provide real security. This it may do if it amounts to a promise which would in all likelihood be honoured, given an entity with the wherewithal to pay and against whom enforcement can readily be obtained; in short, if given a truly creditworthy entity."*

104. In *Caribbean Islands*, Smellie CJ expressed himself in agreement with that citation (at para [39]). However, he pointed out that the security in *Versloot* was available in London, and he went on to rule that London security from the same otherwise entirely reputable and creditworthy insurance company (ie the same as was proposed in *Versloot*) was insufficient, solely on the ground that the company was not present in the Cayman Islands. He said (at para [44]):

> *"I think it must be regarded as settled principle that the purpose of an order for security for costs is "to ensure that a successful defendant will have a fund available within the jurisdiction of [the] court against which it can enforce the judgment for costs" – see* ***In re Cybervest Fund*** *2006 CILR 80, at para 22), applying* ***Porzelack KG v. Porzelack (UK) Ltd.****"*

105. *In re Cybervest* was an earlier decision of Smellie CJ. In *Cybervest*, the petitioner was an agency of the state of Kuwait, a foreign litigant. Security for costs was requested against it under GCR O.23, r.1, which still contained the rule allowing for security for costs against a foreign plaintiff. Therefore, what was said in *Porzelack* remained relevant. The first sentence from the passage from *Porzelack* which I have cited above at para [100] hereof was cited, but not the second sentence. That was at para [22] of *Cybervest*. However, contrary to the suggestion at para [44] of *Caribbean Islands*, there was nothing in *Cybervest* itself to state that it must be regarded as a matter of settled principle that the purpose of any order for security for costs is to ensure a fund within the jurisdiction. Indeed, in *Cybervest*, no security at all was ordered, as none had been ordered in *Porzelack*. Moreover, in *Caribbean Islands*, the claimant was, I think, not a foreign company at all, but a company within the Cayman Islands, but a company in liquidation. Moreover, Smellie CJ himself stated (at para [24] of *Cybervest*) that:

> *"I would simply add that discretion is to be exercised on a case-by-case basis, as the rule states, having regard to all the circumstances of the case."*

106. In these circumstances, I would hold that there is no "*settled principle*" either in English law, or in Cayman law, that where security is awarded it has to be available from an entity or from assets available within the jurisdiction. That may be a common practice, but it is not a matter of law or a settled principle. It is ultimately a matter of discretion as to what in *Versloot* Christopher Clarke J called "*real security*".

107. In the present case, Mangatal J has found that letters of credit from the East West Bank would provide real security (see para [33] hereof above). That was an exercise of her discretion, and I can find nothing wrong with it as a matter of law. There was evidence before her that enforcement of a Cayman judgment in California was a simple procedure, under California's US Uniform Foreign-Country Money Judgments Recognition Act. See also *Elliot v. Health Services Authority* 2007 CILR 163, a decision on the Florida enactment of this model statute. Moreover, the letters of credit are subject to the non-exclusive jurisdiction of the Cayman Islands courts, so that the establishment of jurisdiction here would present no difficulty, and they are governed by Cayman Islands law. The appellants also complain that the letters of credit are of limited duration, but that is normal and they may be extended; and if they are not, then that may have other consequences.

108. In my judgment, therefore, there is no ground in law for upsetting or departing from the decision on fortification of the judge.

Conclusion

109. I would therefore dismiss this appeal. On the present state of the authorities, and subject to anything further from the UK Supreme Court, I would accept that claims in respect of any losses which Dorsey may already have suffered are not within the *Giles v. Rhind* exception, because of the decision in *Marex* in the English court of appeal: but even so I would hold, on the alternative ground debated, that the *quia timet* injunctions against the defendants to prevent future loss should be maintained until trial, since there is at least a serious issue that they fall outside the reflective loss doctrine, and it is just that they be

maintained. In the circumstances, it is unnecessary to decide whether the claim to personal damages incurred by the plaintiffs as a result of the cost of investigations and such like falls outside the reflective loss doctrine, for I would not consider those losses to be significant enough in themselves to support the injunctions. I would reject the appeal as to the insufficiency of the security offered as fortification for the plaintiffs' cross-undertaking in damages.

Sir Alan Moses JA

110. I agree.

Sir John Goldring P

111. I also agree.