

BULLETIN

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A will o' the wisp recedes: the rule against reflective loss applies to claims by an unsecured creditor

Carlos Sevilleja Garcia v Marex Financial Limited [2018] EWCA Civ.1468

David Lewis QC and Richard Greenberg report on a significant judgment concerning the rule against reflective loss (the “RL Rule”).

The Court of Appeal has resolved the “as yet undecided question whether the [RL Rule] applies to claims by unsecured creditors who are not shareholders of the relevant company” [1]. The RL Rule now applies to claims by any unsecured creditor of a company.

Key points

- The rule against reflective loss bars claims against wrongdoers by any creditors of a company where their loss reflects the company’s loss.
- The rule applies irrespective of the creditors’ cause of action against the wrongdoer, instead focusing on the nature of the loss.
- The only exception to the rule is where the wrongdoer has directly caused it to be impossible for the company to bring a claim against the wrongdoer.

The facts

In 2013, the Respondent (“Marex”) brought claims against two companies, Creative Finance Limited and Cosmorex Limited (“the Companies”), for sums due on account between Marex as broker and the Companies as clients in respect of forex trading.

Following a Commercial Court trial, Field J released a draft judgment (on 19 July 2013) showing that Marex had succeeded against the Companies for over US\$5 million.

In the present proceedings, Marex alleged that, after the draft judgment was released, the Appellant (“Mr Sevilleja”) dishonestly asset-stripped the Companies of some US\$9.5 million in order that they would be unable to pay the judgment debt.

The final judgment of Field J was handed down on 26 July 2013. The Companies went into liquidation in the BVI in December 2013.

In 2016, Marex obtained permission to serve English proceedings on Mr Sevilleja out of the jurisdiction under the tort gateway, claiming damages from him corresponding to the sums unpaid by the Companies. Mr Sevilleja challenged the jurisdiction of the English Courts. For the purposes of his challenge, Marex’s factual case had to be taken at its highest. Mr Sevilleja’s opportunity to contest the facts would come at a later stage.

The decision

Following a detailed exposition of the origins of the RL Rule and the key authorities [13-31], as well as the

underlying rationale [32], Flaux LJ (with whom Lewison and Lindblom LJJ agreed) held that Marex’s claim to recover the judgment debt (plus interest and costs) from Mr Sevilleja was barred by the RL Rule [62].

The Court decided that the RL Rule applies to claims by all unsecured creditors of a company where the loss claimed is a reflection of the loss suffered by the company as a consequence of the wrongdoing of the defendant.

The Court went on to hold that the (controversial) exception to the rule in *Giles v Rhind* [2002] EWCA Civ 1428 was not engaged. Marex could not establish that the wrongdoing of Mr Sevilleja had caused it to be impossible for the Companies to pursue a claim against him [60].



Not all of Marex's claims, however, were barred by the RL Rule. Its subsidiary claim for the costs incurred seeking to enforce the judgment of Field J in various jurisdictions survived as a distinct personal loss not reflective of the Companies' loss [63-65].

Permission to serve out was allowed to stand solely in relation to that claim.

Discussion

By resolving the "as yet undecided question" [1] of whether the RL Rule applies to claims by unsecured creditors, the judgment "will increase certainty in this area of the law" [12] and finally address the hope expressed by Arden LJ in *Johnson v Gore Wood* (No. 2) [2003] EWCA Civ 1728 at [162] that: "the current will o' the wisp character of the no reflective loss principle will be clarified before long".

The decision is consistent in principle with earlier authorities, especially *Johnson v Gore Wood* (No. 1) [2002] 2 AC 1 and *Gardner v Parker* [2004] 2 BLCL 554. Flaux LJ reasoned that "it is difficult to see why a claim by a creditor who has one share in a company should be barred by the rule against reflective loss whereas a claim by a creditor who is not a shareholder is not. That point is well illustrated by the example of a creditor who owns shares in the company, whose claim is initially barred by the rule, but, on this hypothesis, if he sells the shares, the rule no longer bars his claim. That makes no logical or legal sense at all" [33].

The judgment has also put to bed the suggestion that the RL Rule does not apply to certain causes of action. The applicability of the RL Rule depends on the nature of the loss, irrespective of the cause of action [28].

The decision on the *Giles v Rhind* exception is also noteworthy, Flaux LJ emphasising the narrowness of the exception, only applicable "where as a consequence of the actions of the wrongdoer, the company no longer has a cause of action and it is impossible for it to bring a claim or for a claim to be brought in its name by a third party such as Marex in the present case" [57].

At least two points do, however, remain unresolved. The first goes to the correctness of two first instance decisions that the RL Rule can be side-stepped by the shareholder or creditor seeking injunctive relief or specific performance in favour of the company: see *Peak Hotels and Resorts Ltd v Tarek Investments Ltd and Ors* [2015] EWHC 3048 (Ch.) and *Latin American Investments Ltd v Maroil Trading Inc & Anr* [2017] EWHC 1254 (Comm.). The second point, touched upon by Flaux LJ [38], is whether the RL Rule, with its origins in company law, might nonetheless also apply to an individual's creditor pursuing a claim for loss which is, on analysis, for diminution of the individual's assets caused by the wrongdoer.

The views and opinions expressed in this article are those of the authors and do not necessarily reflect the position of other members of 20 Essex Street.



David Lewis QC

David specialises in advocacy and advisory work across a wide range of general commercial and private international law disputes.

His areas of expertise include energy and natural resources, civil fraud, shipping and commodities.



Richard Greenberg

Richard has a broad commercial practice, with a particular focus on civil fraud, international trade and finance, insolvency and company law and private international law. He has experience of being led in complex, high-value litigation and arbitration, but also regularly appears as sole counsel in the High Court.

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For further information about this bulletin contact: dking@20essexst.com

LONDON

20 Essex Street London WC2R 3AL
Tel +44 (0)20 7842 1200
Fax +44 (0)20 7842 6770

SINGAPORE

Maxwell Chambers, #02-09
32 Maxwell Road, Singapore 069115
Tel (+65) 62257230
Fax (+65) 62249462

clerks@20essexst.com