COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2017/CLE/gen/00585

BETWEEN

ZONAMERICA LTD.

Plaintiff

AND

(1) FERDINAND HUTS (aka FERNAND HUTS)
(2) KARL HUTS

Defendants

Before Hon. Mr. Justice Ian R. Winder

Appearances: **Brain Moree QC with Erin Hill for the Plaintiff**
Roy Sweeting with Glen Curry for the Defendants

22 and 23 November 2018, 29 March 2019 and 29 January 2020

JUDGMENT

WINDER, J

This is a claim by the plaintiff against the defendants alleging breach of their fiduciary duty as directors of the plaintiff and for unlawful interference with the plaintiff's economic interests, which the plaintiff says has caused it to suffer loss.

1. The agreed statement of facts provides an adequate background to this dispute. The agreed statement provides:

   (1) The Plaintiff, Zonamerica Ltd. is a company incorporated in the Commonwealth of The Bahamas under the provisions of the International Business Companies Act, 2000.

   (2) The Plaintiff is the owner of 100% of the shares in (i) Zonamerica S.A. and (ii) Inversiones Zonamerica S.A. (formerly Vipunen S.A.) ("Inversiones"), two companies incorporated in Uruguay (collectively, the "Subsidiaries").

   (3) At the material time, the shareholders of the Plaintiff were (i) America Real Estate Investments Limited, a company incorporated in the Bahamas owning 56.5% of the shares and (ii) Siena Enterprise, S.A. ("Siena"), a company incorporated in Panama owning 43.5% of the Shares.

   (4) Ferdinand Huts, is the ultimate beneficiary of 100% of the shares of Siena.

   (5) The Defendants were directors of the Plaintiff from 20 July, 1998 and 30th March, 2006 respectively until 26 February, 2010, and then again form 19 April, 2010 until 27 December, 2013.

   (6) In 2012 representatives of the Plaintiff and the Subsidiaries were in discussions with DEG – Deutsche Investitions- und Entwicklungsgesellschaft mbH ("DEG") with regard to a proposed subordinated loan in the amount of up to US$20 million (the "DEG Subordinated Loan").

   (7) On 7 May, 2012 DEG issued a letter of intent (the "Letter of Intent") setting out the proposed terms and conditions of the DEG Subordinated Loan and stating, *inter alia*, that *"... clearance in principle has been approved for a DEG long term financing to Zonamerica S.A. ..."*. Pursuant to the Letter of Intent, the Plaintiff was to be a "co-guarantor and/or co-borrower" of the DEG Subordinated Loan. The last paragraph on page 2 of the Letter of Intent reads as follows:

      > *"Please note that this indication is not a binding offer and does not form the basis of any obligation on the part of DEG. As you will appreciate, our current information does not permit us to give you a more detailed or binding indication of the terms for a possible financing. The indication made is therefore subject to change as we further evaluate the Project. Any commitment to finance by DEG is subject to the satisfactory evaluation of the commercial, environmental and development effects and any other relevant aspects of the Project. It is also subject to the relevant approvals by our management and board and to the execution of legally binding contracts."*

(8) The Defendants were not personally involved in the negotiations relating to the DEG Subordinated Loan.

(9) On 18 May, 2012 Federico Perez, the Administrative and Finance Manager of Zonamerica S.A., sent an e-mail to the Second Defendant, attaching a copy of the Letter of Intent. In that e-mail, Mr. Perez stated, *inter alia*, that *"[w]e are in the process of negotiation and we hope that after the Due Diligence that will be done soon, we will see if we can improve some conditions (for example, to obtain some reduction in the rate)"*

(10) On 21 May 2012 the Defendants, in their capacity *" as representatives of Siena Enterprises shareholder of 43.5% of Zonamerica Ltd as directors of Zonamerica Ltd."* sent a letter to DEG following terms:

> *"I refer to the [Letter of Intent] in copy, concerning a 20 mio usd financing of Zonamerica.*
>
> *We are writing [to] you as representatives of Siena Enterprises, shareholder of 43.5% of Zonamerica Ltd and as directors of Zonamerica Ltd.*
>
> *[On] Friday 18/05/2012, Federico Perez, CFO of the Zonamerica group, phoned us and sent us a mail containing the aforementioned letter. To our great surprise, he told us that Zonamerica had signed a LOI with DEG, regarding long term financing of the group, and that representatives of DEG would be coming over for a due diligence in a matter of days.*
>
> *We have not been consulted in this matter, neither as shareholders nor as directors. Neither are we aware of a board decision concerning long term financing or of a decision giving [a] mandate to the management to start looking for such a financing. In our opinion there is a serious breach of the corporate governance of the company.*
>
> *Furthermore we cannot agree with the terms and conditions you are offering for the financing. For good order, we notify you that we will use all means available to us to block this loan or the repayment thereof."*

(11) On 22 May 2012 Isabel Thywissen of DEG sent an email to the Second Defendant stating that:

> *"We are not aware of the fact that our discussion with Zonamerica Ltd for a long term loan were not known to you as shareholder and director.*
>
> *Naturally we would only proced with the evaluation of a possible financing if there is a consensus among all shareholders and directors… "*

(12) On the same dated the Plaintiff wrote a letter to DEG enclosing a copy of the Plaintiff's Amended and Restated Articles of Association.

(13) Between 28 May, 2012 and 30 May, 2012, there was an exchange of e-mails between Jaime Miller (a representative of the Plaintiff) and Benoit Jacques (a representative of the Defendants) whereby Mr. Miller provided Mr. Jacques with further information regarding the DEG Subordinated Loan.

(14) In April 2013 the Plaintiff and the Subsidiaries negotiated a loan from Banco Itaú Uruguay S.A. ("Itau") and Banco Bilbao Vizcaya Argentaria Uruguay S.A. ("BBVA") for an aggregate amount of up to US$20 million, with a 2 year grace period, a 5 year repayment schedule and an interest rate of 7% (the "Itau/BBVA Loan").

(15) The Defendants were not involved in the negotiations relating to the Itau/BBVA Loan. However, they received copies of the Joint and Several Guarantees after they had been executed by the Plaintiff on 1 April, 2013.

(16) The Defendants also received documents in connection with the Itau/BBVA Loan:

(17) On 7 June, 2013, the Defendants, in their capacity *"... as representatives of Siena Enterprises, shareholders of 43,5% of Zonamerica Ltd and as directors of Zonamerica Ltd."*, sent a letter to the general manager of Itau stating, *inter alia*, that *"... we cannot agree with the terms and conditions you are offering for the financing"* and *"[f]or good order, we notify you that we will use all means available to us to block this loan or the repayment thereof"*. The Defendants sent a similar letter to BBVA.

(18) At a meeting of the Plaintiff's shareholders held on 27 December 2013, with the affirmative vote of the majority shareholder America Real Estate Investments Limited, the Defendants were not elected to be directors of the Plaintiff going forward.

2. The plaintiff's claim, as set out in the statement of claim provides, at paragraphs 17 to 20 as follows:

> THE DEFENDANTS' CONDUCT CONSTITUTED A BREACH OF THEIR FIDUCIARY DUTIES AND AN UNLAWFUL INTERFERENCE WITH THE PLAINTIFF'S ECONOMIC INTERESTS, WHICH CAUSED THE PLAINTIFF LOSS AND DAMAGE
>
> 17. By their conduct described in paragraphs 10 and 15 above, the Defendants (i) acted in fundamental and/or willful breach of their fiduciary duties to the Plaintiff; (ii) acted in breach of their common law duties as directors of the Plaintiff; (iii) acted in breach of their statutory duty to the Plaintiff under section 55 of the IBC Act; and/or (iv) unlawfully interfered with the Plaintiff's economic interests with the object, purpose, intent and effect of causing damage to the Plaintiff.
> 18. In particular, the Defendants unlawfully and wrongfully interfered with the Plaintiff's negotiation of the DEG Subordinated Loan by sending the Defendants' Letter, which was intended to and did cause DEG to decline to make the DEG Subordinated Loan. The Defendants failed to exercise any independent judgment when sending the Defendants' Letter and failed to consider properly, or at all, how such letter would be in the Plaintiff's best interest.
> 19. As a result of the Defendants' actions, the Plaintiff has suffered loss and damage. The said loss and damage was caused by the Defendants' (i) wilful breaches of their fiduciary duties; (ii) breaches of their common law duties of care; (iii) breaches of their statutory duty of care under the IBC Act; and/or (iv) unlawful interference with the Plaintiff's economic interests.
>
> THE LOSS AND DAMAGE SUSTAINED BY THE PLAINTIFF AND THE SUBSIDIARIES
>
> 20. As a direct result of not receiving the DEG Subordinated Loan, the Plaintiff and the Subsidiaries suffered loss and damage.
>
> Particulars of loss

(1) The underlying businesses of the Plaintiff were deprived of the use of the proceeds of the DEG Subordinated Loan in the sum of US$20 million dollars, which caused the Plaintiff and the Subsidiaries to:
    (i) restructure the transaction relating to the construction and rental of the office building for Trafigura PTE Ltd.; and
    (ii) transfer the Amedrugs building and the Merck building to third parties,
in each case causing the Plaintiff's underlying business to lose rental income.

(2) As the 100 percent shareholder in each of the Subsidiaries, loss occasioned to the value of the Plaintiff's shareholding in each of those companies.

(3) Loss of profits resulting from the diminution in the Subsidiaries' profits.

AND THE PLAINTIFF CLAIMS:

1) Damages and/or equitable compensation for breach of fiduciary duty and/or breach of common law duty and/or breach of statutory duty;
2) Damages for unlawful interference with the Plaintiff's economic interests;
3) A declaration that the Defendants are jointly and severally liable to the Plaintiff for the damages due and payable under paragraphs 1) and 2) above;

...

3. The main thrust of the defence is contained in paragraph 14 of the amended defence which provides that:

> 14. Further, the Defendants aver that if the alleged losses particularized in paragraph 20 of the Statement of Claim were suffered, which is not admitted, those losses were not suffered by the Plaintiff but by the subsidiaries, Zonamerica S.A. and Inversiones S.A. and that the Plaintiff cannot seek to recover losses which it has not directly suffered. Specifically, the losses described in paragraph 20, sub-paragraph (1) through (3) as having been suffered by the Plaintiff are, as described, merely reflective of losses actually allegedly suffered by the subsidiaries, neither of which is a party hereto.

4. The plaintiff's reply to the defence is set out in the Amended Reply which provides at paragraphs 11 and 12 as follows:

> 11. With regard to paragraph 14 of the Amended Defence, the Plaintiff contends that its loss was a direct loss on the basis that:
> (i.) the Plaintiff was to be a "co-guarantor and/or co-borrower" of the DEG Subordinated Loan;
> (ii.) the proceeds derived from such loan were intended to finance the plaintiff's underlying business operations involving the construction of rental and buildings; and

(iii.) as a direct result of the Defendant's Letter, the Plaintiff's underlying businesses were deprived of the use of the proceeds of the DEG Subordinated Loan.

12. Alternatively, even if the loss claimed by the Plaintiff is reflective of the losses suffered by the Subsidiaries, which is not admitted, the Plaintiff is not barred from recovering such loss as:
    (i.) the Defendants were directors of the Plaintiff only, but not of the subsidiaries;
    (ii.) As such the Defendant owed fiduciary duties, common law duties of care and statutory duties of care to the Plaintiff only, but not to the subsidiaries;
    (iii.) The subsidiaries have no cause of action against the Defendants for the breach of such duties or for unlawful interference, as the unlawful means for the purpose of that tort consist of the breach of such duties;
    (iv.) the Plaintiff has an independent cause of action of its own against the Defendants; and
    (v.) the Plaintiff and the Subsidiaries do not have co-existing causes of action against the Defendants.

5. At trial Isidoro Hodara gave evidence on behalf of plaintiff and Rodrigo Ribero was called as an expert witness on its behalf. Ferdinand Huts and Karl Huts both gave evidence in their defence.

6. The issues to be determined in this action are the following:
    (1) Whether the defendants breached their duties as directors to the plaintiff?
    (2) Whether by their conduct and the actions taken by them, the defendants unlawfully interfered with the plaintiff's economic interests, with the object, purpose, intent and effect of causing damage to the plaintiff?
    (3) Whether or not the plaintiff has actually suffered a loss and, if so, whether the recovery thereof is barred by the no reflective loss principle.

7. The plaintiff contend that the writing of the letters by the defendants caused DEG to rescind the Letter of Intent and constituted a breach of their fiduciary duties as directors of the plaintiff. They also contend that the acts which constitute the defendants' breaches of duty are the same acts which constitute the unlawful means for the purpose of the unlawful interference tort.

8. The leading case on this tort of unlawful interference with economic interest is the House of Lords case of ***OBG Ltd and another v. Allan and others*** **[2007] UKHL 21, [2007] 4 All ER 545.** In OBG Ltd the House of Lords considered three appeals principally concerned with claims in tort for economic loss caused by intentional acts. In the first appeal, the defendants were receivers purportedly appointed under a floating charge which was admitted to have been invalid. In that capacity the defendants took control of the claimant company's assets and undertaking. The claimant brought proceedings contending, inter alia, that that was an unlawful interference with its contractual relations. The judge at first instance upheld that claim but the Court of Appeal allowed the defendants' appeal. The claimants appealed. In the second appeal, the magazine OK! contracted for the exclusive right to publish photographs of a celebrity wedding. A rival magazine, Hello!, published photographs which it knew were surreptitiously taken by an unauthorised photographer. It was contended, inter alia, that that was interference by unlawful means with its contractual or business relations. At first instance the judge, whilst allowing damages for loss of profit, rejected the claim for interference by unlawful means. The Court of Appeal dismissed OK!'s cross-appeal on the ground that Hello! had not had the requisite subjective intention to cause harm. OK! appealed. In the third appeal, two employees of a property company, in breach of their contracts, diverted a development opportunity to a joint venture in which they were interested. The defendant, knowing of their duties but wrongly thinking that they would not be in breach, facilitated the acquisition by providing finance. The company claimed that he was liable for the tort of wrongfully inducing breach of contract. The judge found that whilst the employees had been in breach of contract, the defendant had not intended to procure such a breach, and therefore dismissed the claim. That finding was upheld by the Court of Appeal. The company appealed.

9. The House of Lords held that the tort of causing loss by unlawful means differed from the tort of inducing breach of contract, the ***Lumley v Gye*** principle, as originally formulated, in at least four respects:

(1) Unlawful means was a tort of primary liability, not requiring a wrongful act by anyone else, while ***Lumley v Gye*** created accessory liability, dependent upon the primary wrongful act of the contracting party.

(2) Unlawful means required the use of means which were unlawful under some other rule (independently unlawful), whereas liability under *Lumley v Gye* required only the degree of participation in the breach of contract which satisfied the general requirements of accessory liability for the wrongful act of another person.

(3) Liability for unlawful means did not depend upon the existence of contractual relations; it was sufficient that the intended consequence of the wrongful act was damage in any form, for example, to the claimant's economic expectations. Under *Lumley v Gye* the breach of contract was of the essence. If there was no primary liability, there could be no accessory liability.

(4) Although both were described as torts of intention, the results which the defendant had to have intended were different. In unlawful means the defendant had to have intended to cause damage to the claimant (although usually that would be a means of enhancing his own economic position). Because damage to economic expectations was sufficient to found a claim, there need not have been any intention to cause a breach of contract or interfere with contractual rights. Under *Lumley v Gye* an intention to cause a breach of contract was both necessary and sufficient. Whilst there was no reason why the same facts should not give rise to both accessory liability under *Lumley v Gye* and primary liability for using unlawful means, that did not make them the same tort. Moreover, the distinction between direct and indirect interference that had arisen was unsatisfactory. It was time for the unnatural union between the *Lumley v Gye* tort and the tort of causing loss by unlawful means to be dissolved and the two causes of action restored to independence.

10. ***Lord Hoffman***, who gave the leading opinion, of the court, stated at paragraph 47 of the decision as follows:

> The essence of the tort therefore appears to be (a) a wrongful interference with the actions of a third party in which the claimant has an economic interest and (b) an intention thereby to cause loss to the claimant.

In this case therefore the plaintiff must show that:

a) the defendants' wrongfully interfered with the actions of DEG in seeking to provide a loan facility to the Subsidiaries;
b) which actions the plaintiff had an economic interest; and,
c) the defendant intended to cause loss to the plaintiffs.

11. I am not satisfied that the action of the defendants, even if in breach of their duties as directors, are unlawful for the purposes of the tort of unlawful interference. The plaintiff contends that the court ought to adopt the wider interpretation of "unlawful means", as enunciated by Lord Nicholls at paragraph [162] in ***OBG Ltd***, where he stated:

> For these reasons I accept the approach of Lord Reid and Lord Devlin and prefer the wider interpretation of 'unlawful means'. In this context the expression 'unlawful means' embraces all acts a defendant is not permitted to do, whether by the civil law or the criminal law.

I am unable to accept this submission, not only because it was a minority view in ***OBG Ltd.*** but because I am persuaded that the majority view in ***OBG Ltd.*** is more reasonable. That majority view, expressed by Lord Hoffmann, (with whom Lord Walker of Gestingthorpe, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood agreed) was that:

> [51] Unlawful means [for the purposes of the tort of causing economic loss by unlawful means] consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant. It does not in my opinion include acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant

Further, acts against a third party constituted unlawful means only if they were actionable by that third party, or would have been so actionable had that third party suffered loss.

12. According to the definition laid down by Lord Hoffman, for the defendants' actions against DEG to be "wrongful or unlawful", so as to constitute the basis of the tort, the actions must have been actionable by DEG, or would have been actionable by DEG *had DEG suffered some loss as a result*. I have not been directed to the nature of the action which DEG may have had against the defendant. More importantly, in my view, having examined the witnesses as they gave their evidence, I am not satisfied that, even if I accepted that there was a breach of duty, I can find that there was an intention to cause loss or damage to the plaintiff. According to Lord Hoffman in ***OBG Ltd.*** at paragraph 62:

> [62] Finally, there is the question of intention. In the *Lumley v Gye* tort, there must be an intention to procure a breach of contract. In the unlawful means tort, there must be an intention to cause loss. The ends which must have been intended are different. *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1905] AC 239, [1904–7] All ER Rep 211 shows that one may intend to procure a breach of contract without intending to cause loss. Likewise, one may intend to cause loss without intending to procure a breach of contract. But the concept of intention is in both cases the same. In both cases it is necessary to distinguish between ends, means and consequences. One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's actions.

Certainly this is not the usual case, described in ***OBG Ltd.***, of enhancing their own economic interest on the backs of the plaintiff. The defendants, through their holding company Siena, were effectively the minority shareholders of the plaintiff. Although the relationship between them and the majority shareholder were acrimonious, and the defendants felt excluded from the business, they in my view, genuinely felt, rightly or wrongly, that the loan was bad for the company and that it should be blocked. The evidence of the first defendant in particular was that the loan was bad and had to be blocked in order to improve the loan conditions. Harming the plaintiff in this case, meant harming themselves and I did not find that this was their intention, but rather to obtain better terms for the loan. According to ***OBG Ltd.***, the defendants would not be liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of their actions.

13. A further requirement emerges from the authorities, and which all parties accept, is that of proving that loss has been occasioned by the plaintiff. This raises the third issue identified in paragraph 6 above. That issue is whether, even if the defendants have breached their duty as directors and or unlawfully interfered with the plaintiff's economic interest, recovery thereof would be barred by the no reflective loss principle?

14. The rule against reflective loss is simply the embodiment of the basic company law tenet of separate legal personality, i.e. the company is separate and distinct from its directors or members. The tenet, which is of ancient vintage and is as old as company law itself, is reflected in the more important company law decisions going back to ***Saloman v Saloman*** and through the line of cases including ***Foss v Harbottle***. The emergence of the rule against reflective loss has been traced to the English Court of Appeal decision in ***Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204.*** In ***Prudential Assurance***, the court stated at page 222,

> [W]hat [the shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a 'loss' is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only 'loss' is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3% shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company.

15. Lord Bingham, in ***Johnson v Gore Wood & Co (A Firm)*** **[2002] 2 A.C. 1,** set out the rule against reflective loss in this way:

> 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 or failed to make good that loss.

Lord Bingham, after identifying this as the general rule, went on to summarize the rule in three propositions, which he said derived from earlier authorities. He stated the propositions as follows:

(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 or failed 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…

16. At 62, Lord Millet explained the matter further:

> Where the company suffers loss as a result of a wrong to the shareholder but has no cause of action in respect of its loss, the shareholder can sue and recover damages for his own loss, whether of a capital or income nature, measured by the diminution in the value of his shareholding. He must, of course, show that he has an independent cause of action of his own and that he has suffered personal loss caused by the defendant's actionable wrong. Since the company itself has no cause of action in respect of its loss, its assets are not depleted by the recovery of damages by the shareholder.
>
> The position is, however, different where the company suffers loss caused by the breach of a duty owed both to the company and to the shareholder. In such a case the shareholder's loss, in so far as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, 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." (emphasis added)

17. In the English Court of Appeal case of ***Day v Cook [2002] 1 BCLC 1*** at [38] – [39], Arden LJ said:

> [38] It will thus be seen from the speeches in *Johnson v Gore Wood & Co* [2001] 1 BCLC 313, [2001] 2 WLR 72 that where there is a breach of duty to both the shareholder and the company and the loss which the shareholder suffers is merely a reflection of the company's loss there is now a clear rule that the shareholder cannot recover. That follows from the graphic example of the shareholder who is led to part with the key to the company's money box and the theft of the company's money from that box. It is not simply the case that double recovery will not be allowed, so that, for instance if the company's claim is not pursued or there is some defence to the company's claim, the shareholder can pursue his claim. The company's claim, if it exists, will always trump that of the shareholder.
>
> [39] Accordingly the court has no discretion. The claim cannot be entertained…
>
> (emphasis added)

18. The most recent application of the rule against reflective loss is found in the English Court of Appeal decision in ***Marex Financial Ltd v. Sevilleja [2018] 3 WLR 1412.*** Marex accused Mr Seviella of stripping two BVI companies of their assets, after judgments were made against them, such that they were unable to pay debts due to it. He, it was alleged, transferred moneys from the bank accounts in the UK into his personal control thereby committing a tort of *"knowingly induced and procured the companies to act in wrongful violation of its rights under the judgment" and/or had intentionally caused the Plaintiff loss by unlawful means by dissipating the assets of the companies after the judgment"*. The companies were placed into voluntary liquidation in the BVI. Leave was sought to serve proceedings out of the jurisdiction against Mr Seviella, who was resident in Dubai. The validity of the service was challenged on the basis that the rule against reflective loss barred Marex from showing a completed cause of action in tort. Notwithstanding this was a non-shareholder/unsecured creditor claim rather than a shareholder's claim, the Court of

Appeal agreed with Mr. Serviella that Marex was indeed barred on the basis of the rule against reflective loss.

19. The rule bars a person which has suffered loss through a reduction in value of their interest in a company directly against a person which has caused loss to the company, rather than causing the company to make the claim. The rationale behind the rule is that the company has the direct cause of action as opposed to the shareholders who are one level removed. Clearly the rule will prohibit a multiplicity of actions and a win by the company would deal with the issue of the loss to all of the shareholders. In fact, the rule has elsewhere been termed the rule against double recovery.

20. The plaintiff's case, with respect to the rule against reflective loss, is two-fold and is set out in paragraph 110 of its written submissions:

> 110. Based on the above, the Plaintiff respectfully submits that:
> (i) the Plaintiff's Loss is a direct loss on the basis that the Plaintiff was to be a "co-guarantor and/or co-borrower" of the DEG Subordinated Loan;
> (ii) alternatively, as this case falls into an exception to the Principle, the Plaintiff is not barred from recovering its loss.

21. The defendants say

a) The losses alleged to have been occasioned by the Defendants' actions were not suffered by the Plaintiff. According to *the Plaintiff's own expert report*, these alleged losses were suffered by either or both of the Plaintiff's subsidiary companies, neither of which is a party to these proceedings. The losses alleged by the Plaintiff were therefore not its own and for the Plaintiff to recover them would offend against the long-established common law rule against reflective loss.

b) The Plaintiff cannot avoid the effect of the rule against the recovery of reflective loss by relying on the fact that it was intended to be a "co-guarantor and/or co-borrower" in respect of the initial loan. The relevant question is which entity suffered the loss, not who would have been liable to repay the loan.

c) Nor does it assist the Plaintiff to claim that the subsidiary companies had no cause of action against the Defendants, because the Defendants owed them no

fiduciary, statutory or common law duties. The Plaintiff's Amended Reply to the Amended Defence artfully pleads that "the unlawful means for the purpose of [unlawful interference] consist of the breach of such duties." This will be discussed at greater length below, but suffice it to say that the case law does not support the Plaintiff's pleading and that if the Defendants' actions in writing the letters was wrongful and calculated to harm the economic interests of the subsidiaries, the subsidiaries would have a cause of action against the Defendants.

22. Lewison LJ, in ***Marex***, stated that ***Johnson v Gore-Wood*** established that *a claim brought by a shareholder, even if not in his capacity as such, is barred by the rule against reflective loss, if the loss, that he himself has suffered, would have been made good by restoration of the company's assets.* The plaintiff is a mere holding company, it has no business of its own and it could not suffer any loss *directly*. I must therefore accept the defendants' submissions as the very same loss complained of by the plaintiffs is the loss occasioned by either or both of the subsidiary companies. It only registers as a loss to the plaintiff by virtue of its first being registered as a loss to the subsidiary companies. It is a parasitic loss, in other words, it is the subsidiary companies' loss which in turn affects the plaintiff as the parent of the subsidiary companies. There is no direct loss to the plaintiff, and such loss as impacts it is merely reflective of the losses occasioned by the subsidiary companies.

23. I did not find any merit in the first of the plaintiff's submissions that it's loss is a direct loss because it was to be a "co-guarantor and/or co-borrower" of the DEG Loan. The evidence was clear that if the plaintiff was to become a co-guarantor or co-borrower that position afforded the plaintiff liability only and not any financial gain. It is difficult to attribute the loss of the opportunity to stand as guarantor as a direct loss or that the rescission of the DEG Loan to the subsidiary companies occasioned a loss to the plaintiff which was other than reflective of the losses in the subsidiary companies.

24. The plaintiff's second proposition was that this case falls within the exception to the general rule against reflective loss as extracted by Lord Bingham in ***Johnson v Wood.*** In particular the plaintiff says, at paragraphs 107-109 of its submissions:

> 107. The present case is factually very similar to all of the authorities cited above, and the Plaintiff contends that it falls within Lord Bingham's second proposition, which gives a shareholder the right to sue on a loss suffered when the company does not have a cause of action.
> 108. The Plaintiff's causes of action against the Defendants for breach of fiduciary duty, common law duty of care, statutory duty of care pursuant to section 55 of the IBC Act and unlawful interference with its economic interests are not available to the Subsidiaries as, during the relevant time period, the Defendants were not directors of the Subsidiaries. Accordingly, the Defendants did not owe the Subsidiaries any fiduciary duties, common law duties of care or statutory duties of care.
> 109. With regard to the unlawful interference cause of action, it is submitted that the unlawful means for the purpose of that tort would consist of the breach of fiduciary duties, common law duties of care and/or statutory duties of care. As the Defendants did not owe the Subsidiaries any of those duties during the relevant time period, a breach thereof does not arise. Consequently, the Defendants' actions cannot be unlawful vis-à-vis the Subsidiaries.

25. In ***Day v Cook***, Arden LJ explained the limits to the application of the no reflective loss principle at paragraph [41] as follows:

> [41] However, it is apparent that there are limits to the application of the no reflective loss principle. The principal limit is that the no reflective loss principle does not apply where the company has no claim and hence the only duty is the duty owed to the shareholder (Lord Bingham's proposition (2)). Likewise it does not apply where the loss which the shareholder suffers is additional to and different from that which the company suffers and a duty is also owed to the shareholder: see Lord Bingham's proposition (3) and see Heron International Ltd v Lord Grade [1983] BCLC 244, as explained by Lord Millett in Johnson v Gore Wood. There may well be other limits." (emphasis added) I do not accept that Whether

26. Cases which have applied the exception are rare and usually involve some action on the part of the wrongdoer in disabling the company from recovering its losses. **In *Giles v Rhind* [2002] EWCA Civ 1428,** the English Court of Appeal applied the exception where the minority shareholder was permitted to seek compensation for such 'reflective' loss where the company itself is unable to pursue an action against the wrongdoer and that inability was caused by the wrongdoer. The English Court rejected the applicability of ***Giles*** in ***Gardner v Parker*** **[2004] EWCA Civ 781**, holding

that the company's administrative receivership "*did not, of itself, prevent that company from starting an action, for a court order to avoid transactions at an undervalue under Section 423 Insolvency Act 1986 and that there was not enough evidence to show that any such impecuniosity had been caused by the wrong doing alleged.*" The English Courts have since made a re-evaluation of the *Giles* exception in ***St. Vincent European General Partner Ltd v Robinson and others*** **[2018] EWHC 1230** where the English High Court most recently cited the case of ***Waddington Ltd v Chan Chun Hoo*** **[2008] 11 HKCFAR** a decision of the Court of Final Appeal in Hong Kong. The High Court criticised the applicability of ***Giles***, reiterating that the *"rule against recovery of reflective loss* [as set down by ***Johnson***] *involves no exercise of discretion*"

27. In this case the alleged wrongdoers were not in control of the company nor has anything which was done by them disabled the subsidiary companies from pursuing any remedy which would otherwise be available to them.

28. Further, based upon Lord Hoffman's definition in ***OBG Ltd.***, of what is unlawful means, I am unable to determine that the fact of defendants' position as directors of the plaintiff (and not the subsidiary companies) brings it within the exception to the general rule. The primary question is *whether the acts complained of was intended to cause loss to the plaintiff by interfering with the freedom of DEG in a way which is unlawful as against DEG and which is intended to cause loss to the plaintiff.* It seems clear that the "unlawfulness" or "wrongfulness" of the conduct is wholly unaffected by the existence or breach of directors' or fiduciary duties. More pointedly the presence of director's duties do not empower the plaintiff any more than does it empower the subsidiary companies to pursue a claim for unlawful interference with their economic interests.

29. In all the circumstances I am not satisfied that this is an appropriate case for the application of the exception to the rule against reflective loss and the general rule ought to prevail.

30. For the reasons set out herein I dismiss the plaintiff's claim. Unless the plaintiff submit otherwise costs ought to follow the event and the defendants shall have their reasonable costs to be taxed if not agreed.

Dated the 29th day of January 2020

Ian R. Winder

Justice