<u>I. The Reflective Loss Doctrine since *Marex*</u>

Essentially the case restricts the doctrine to a narrow compass, namely where

(1) The claimant is a shareholder in the relevant company X Ltd.
(2) The loss claimed must (i) be based on facts demonstrating a wrong to X Ltd, and (ii) have no other basis than prejudice to his rights as a shareholder due to the effect of that wrong on the company.

(1) Limitation to shareholders, and confirmation in respect of them

It is (a) right to apply the doctrine to shareholders (contrary to the view of the minority), and (b) correct to limit it to them.

As regards (a), if you buy shares in X Ltd you entrust the management of its assets – including now yours – to the relevant corporate officers, in exchange for the rights of indirect control and profit share attaching to your shares in it. That rightly prevents you founding a claim directly on a harm to the company, even if technically there was a breach of duty owed to you as well.

On (b), the point is that the above argument only applies to shareholders. If you become an employee or a creditor of X Ltd, or merely someone else whose wealth depends on X Ltd's continued wellbeing, it is true that your own wealth is parasitic on that of X Ltd; but here there is no element of giving up of any rights to the company or its management. Hence in so far as you can show a breach of a duty owed to you personally, there is no reason to deprive you of your rights to sue.

Hence there is no problem with the *Marex* facts themselves, which involved a judgment creditor.

It also seems to justify the subsequent holding that only the immediate shareholder is barred: see *Broadcasting Investment v Smith* [2020] EWHC 2501 (Ch).

The decision It also removes the cloud over a number of other rules, which had previously been difficult to square with reflective loss. A case in point was actions against receivers and mortgagees who sold security at an undervalue. A series of cases, developing separately from *Prudential* and *Johnson v Gore Wood*, developed the rule that such a person might be liable not only to the company, but also to third parties, such as a subsequent incumbrancer who got less, or a guarantor who had to pay more, than he ought.

There was also the problem of the difference between companies and natural persons. Had Sevilleja's companies been natural persons whom he had denuded of assets in order to prevent Marex being paid, the Court of Appeal's solution would have allowed Marex to recover, an anomaly that the Court of Appeal noted but could not do anything about. This difficulty now disappears.

(2) Claims based on damage to the company

This again is important. Imagine A conducts his business through a company X Ltd in which he owns virtually all the shares. Accountants B LLP, owing a duty of care both to A and to X, fail to spot a manager of X Ltd with his fingers in the till, causing the company to lose £1 million and A to lose the chance of sacking the manager and maintaining the value of his investment.

> If A sues for the simple depreciation of his shareholding due to the theft, he will lose: *Prudential v Newman.* (But there is a possible workaround: if A's injection into company was by loan capital, then it seems to follow logically that he can sue B).
>
> But if A sues because as a result of the failure to warn him, he lost the opportunity to take steps to sack the manager and sell his interest in X Ltd to a purchaser then interested, he will now quite likely succeed.

<u>II. The big remaining problem: double recovery</u>

Marex still leaves a problem of potential double recovery. Imagine a couple of counterfactuals:

(1) Marex recovers from Sevilleja (as happened), and then the company ("X Ltd") also sues Sevilleja.

(2) X Ltd recovers from Sevilleja for being asset-stripped. Marex then sues Sevilleja.

(1) The case where Marex recovers first

Solution 1. An application of subrogation.

The argument runs thus. By paying Marex under compulsion of suit, Sevilleja has also by a side-wind discharged X Ltd's liability to Marex; this is a benefit to X; hence Sevilleja gets a claim in unjust enrichment against X Ltd, based on subrogation to Marex's discharged claim. Sevilleja can then use that as a set-off against his own liability to X Ltd if X Ltd sues him (as suggested in Australia by *Gould v Vaggelas* (1984) 157 C.L.R. 215, 229, 258–259).

> *Attractive; but there is a possible objection that Marex's claim against X is in debt, and is unaffected by any recovery in tort against Sevilleja, even if the latter was based on the loss of the ability to collect against X.*

Solution 2. Race to the courthouse; so X Ltd loses its cause of action.

Looks outlandish: it seems unprincipled that X Ltd should lose its right to sue because of the activities of a third party over whom it had no control. But in practice this may not be too much of a problem.

(a) This approach is not entirely unknown in the law: it applies in bailment cases (*O'Sullivan v Williams* [1992] 3 All E.R. 385) and certain other cases of property damage (*Alfred McAlpine Construction Ltd v Panatown* [2001] 1 A.C. 518, 595 (Lord Millett); *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2008] EWHC 6 (TCC); [2008] P.N.L.R. 17 at [132]–[135] (Ramsey J)).

(b) Where this is the case, there may well be an inherent jurisdiction in the court to ensure the monies go where they should, via an application under CPR 19.2(b). See the Singapore decision in *Townsing v Jenton Overseas Investment Pte Ltd* [2007] SGCA 13; [2007] 2 S.L.R.(R.) 597 at [82]-[84]; and cf also *The Liverpool (No 2)* [1963] P. 64, 84-87).

(2) The case where X Ltd recovers first

Solution 1. Plea of "no loss" against Marex.

This may work in many cases: if X Ltd is actually put in funds to pay Marex, then Marex cannot now sue Sevilleja for making it judgment-proof.

> *But there could be problems if X recovers and then becomes insolvent without paying Marex, since then Marex has suffered a loss.*

Solution 2. Race to the courthouse. See above.