SUPREME COURT OF QUEENSLAND

CITATION:	*Thomas v D'Arcy & Ors* [2005] QCA 68
PARTIES:	**GRAHAM ARNOLD PRANCE THOMAS** (plaintiff/appellant) **v** **IAN KENNETH D'ARCY** (first defendant/first respondent) **ALEXANDER MACGILLIVRAY** **CRAIG DOUGLAS GREEN** **LYNDEN ELIZABETH STONE** **JACQUELINE KNOWLMAN** (second defendants/second respondents)
FILE NO/S:	Appeal No 7736 of 2004 SC No 740 of 1995
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 March 2005
DELIVERED AT:	Brisbane
HEARING DATE:	1 March 2005
JUDGES:	McPherson and Williams JJA and White J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed costs** **2. Plaintiff given leave to deliver within 28 days such further amended statement of claim as he may be advised**
CATCHWORDS:	CORPORATIONS – CORPORATE FINANCE – SHARES – OTHER MATTERS – order striking out parts of statement of claim – application of rule that shareholder in a company is not entitled to claim or receive damages for a loss consisting of a diminution in the value of shares resulting from loss or injury to the assets of the company *Corporations Act* 2001 (Cth), s 236 *Property Law Act* 1974 (Qld), s 85(1) *Christensen v Scott* [1996] 1 NZLR 273, distinguished *Gould & Anor v Vaggelas* (1985) 157 CLR 215, applied *Johnson v Gore Wood & Co* [2002] 2 AC 1, applied *Macaura v Northern Assurance Company Limited & Others*

[1925] AC 619, cited
Metyor Inc v Queensland Electronic Switching Pty Ltd [2003] 1 Qd R 186, [2002] QCA 269, cited
Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204, applied
Roberts v Coventry Corporation [1947] 1 All ER 308, cited
Salomon v A Salomon & Company Limited & Others [1897] AC 22, cited

COUNSEL: D A Savage SC, with R J Anderson, for the appellant
A M Pomerenke for the respondents

SOLICITORS: Abbott Tout for the appellant
Brian Bartley & Associates for the respondents

[1] **McPHERSON JA:** In this appeal against orders striking out parts of the statement of claim as amended, the appellant is Graham Thomas. He is the plaintiff in an action in the Supreme Court against members of the defendant firm of solicitors (of whom the first defendant is one) for damages for breach of their retainer or negligence in performing it. In his statement of claim the plaintiff alleges that he retained the defendants as his solicitors in November 1987 to provide advice "in relation to the management of [his] business interests and his personal affairs": para 3(a). Although it does not in terms say so, para 3(a) is, I think, to be understood as alleging that it was legal rather than any other advice that the defendants were retained to provide.

[2] What follows here is a summary of allegations in the statement of claim or their effect. At relevant times, the plaintiff was the owner of half of the issued shares in Movado Pty Ltd and half of the issued shares in Meadowbury Pty Ltd, both companies incorporated in Australia. Movado owned all the issued shares in another Australian company Carphone Company of Great Britain Pty Ltd ("Carphone"), as well as certain registered land at Oakey known as "Dunshane". In or about 1987 the first defendant was instructed that the plaintiff was a director of The Carphone Group plc incorporated in Britain, and that he himself was the registered proprietor of residential property at Moon's Lane, Brookfield. The defendants agreed to provide legal services to The Carphone Group, to Carphone and to the plaintiff personally: para 3(b)(iv), (v) and (vii).

[3] The Carphone Group of companies was seeking to establish a branch in Australia, and in 1989 and 1990 the National Australia Bank provided loans to Movado, Meadowbury, and Carphone secured by company charges over the assets of those companies, as well as by registered mortgages over the Moon's Lane property and the Dunshane land, and guarantees from the plaintiff and his wife. The agreement with the Bank was that, if it realised its securities, the plaintiff, or so it is alleged in para 8(f) of the statement of claim, would be entitled after satisfying the secured indebtedness to retain any surplus remaining from:

"(i) *The plaintiff's shareholding in Movado;*
(ii) *The plaintiff's shareholding in Meadowbury; and*
(iii) The plaintiff's interest in the Moon's Lane property".

That allegation simply expresses the normal expectation that prevails with respect to surplus assets, if any, as stated in s 88(1) of the *Property Law Act 1974*, apart from any agreement to the contrary.

[4] In 1990 default was made under the securities given to the Bank, which entered into possession of the property and affairs of Carphone and Meadowbury, and presumably (although the pleading does not say so) of Movado as well. The Bank appointed Mr Ebbage as "its agent", as it is alleged in para 11(c), for the purpose of realising the secured assets, which he proceeded to do in 1990 and 1991. Acting on the advice of Mr Ebbage, the Moon's Lane property belonging to the plaintiff and the Dunshane property belonging to Movado were sold by the Bank as mortgagee in 1991. Paragraph 13 of the statement of claim alleges that, in disposing of these assets, Ebbage acted in wilful or reckless disregard of the plaintiff's interests and in breach of the duty imposed by s 85(1) of the *Property Law Act 1974* of taking reasonable care to ensure that the secured assets were sold at market value. Against the first and other defendants, the allegation is that they negligently or in breach of their retainer failed to advise the plaintiff of steps he could have taken to restrain Ebbage and the Bank from acting in that way; and, in particular, that "the … companies" might issue proceedings to restrain Ebbage or to obtain damages against him: para 26(b). In consequence, the plaintiff is alleged in para 30(b) to have suffered loss and damage in that, "but for" that failure:

> "(b) *The plaintiff could have retained all or a part of the value of his shareholding in Movado and Meadowbury*."

[5] Douglas J, before whom the defendants' application came, ordered that the allegations in para 8(f)(i) and (ii) (which are those in italics above) as well as those in italics in para 30(b) be struck out. His Honour also ordered that the following italicised parts of para 44(a) be struck out:

> "44. The loss and damage suffered by the plaintiff, by reason of all matters set out therein, consists of:
>
> (a) The value of *the plaintiff's shareholding and/or* the Moon's Lane property as set out in paragraph 30*(b) and* (c) hereof, not being less than *$1,300,000;*".

In addition, he struck out the italicised part of the plaintiff's claim in the prayer for relief against the first and second defendants:

> "1. Damages (representing all or part of the value of the plaintiff's personal property, *namely his shareholding [in] Movado and Meadowbury*, and of the Moon's Lane property) on the basis of the claim set out in paragraphs 1 to 28."

The plaintiff's appeal is brought against the orders striking out those parts of the statement of claim.

[6] The basis for striking out, and the justification relied on by his Honour in doing so, is the rule, as it is submitted to be, that a shareholder in a company is not entitled to claim or recover damages for a loss consisting of a diminution in the value of his shares resulting from loss of or injury to the assets of the company. Such a loss or depletion of corporate assets merely reflects or is "reflective of" the loss suffered by the company, as to which the company itself is the only proper claimant or plaintiff. A rule to that effect was adopted and applied by the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, 222-223, and by

the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1. In the first of these two cases the learned Lords Justices, in a passage which was referred to with approval by the High Court of Australia in *Gould v Vaggelas* (1985) 157 CLR 215, said that what a shareholder in a company 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 per cent 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."

[7] In *Johnson v Gore Wood & Co* [2002] 2 AC 1, 35-36, Lord Bingham stated the relevant principles in the form of three 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 or failed to make good that loss. So much is clear from *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, particularly at pp 222-223, *Heron International*, particularly at pp 261-262, *George Fischer*, particularly at pp 266 and 270-271, *Gerber* and *Stein v Blake*, particularly at pp 726-729.
>
> (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. This is supported by *Lee v Sheard* [1956] 1 QB 192, 195-196, *George Fischer* and *Gerber*.
>
> (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. I take this to be the effect of *Lee v Sheard*, at pp 195-196, *Heron International*, particularly at p 262, *R P Howard*, particularly at p 123, *Gerber* and *Stein v Blake*, particularly at p 726. I do not think the observations of Leggatt LJ in *Barings* at p 435B and of the Court of Appeal of New

> Zealand in *Christensen v Scott* at p 280, lines 25-35, can be reconciled with this statement of principle."

[8] With the substance of these propositions and their application to the facts of that case, Lord Millett, as I read his speech in that case ([2002] 2 AC 1, 61-67), agreed. Lord Goff, in turn agreed ([2002] 2 AC 1, 41) with Lord Millett's analysis of *Prudential Assurance v Newman Industries (No 2)*, and specifically with his conclusion (at 67D) that:

> "On the assumption which we are bound to make for the purpose of this appeal, which is that the firm was in breach of a duty of care owed to Mr Johnson personally, he is in principle entitled to recover damages in respect of all heads of non-reflective consequential loss which are not too remote".

Lord Cooke and Lord Hutton, who were the other two Law Lords, concurred in the result of the case, although not perhaps without some misgivings about the "reflective loss" principle adopted in *Prudential Assurance v Newman Industries*.

[9] There is no doubt that as a general proposition the company, and not any of its members or shareholders, is the only proper plaintiff in proceedings to redress a wrong done to it. This is a direct consequence of the decision in *Salomon v Salomon & Co* [1897] AC 22 that a corporation is in law a distinct entity from the members or shareholders who comprise it. It follows that a shareholder has no proprietary or insurable interest in the assets of a company of which he is a member: *Macaura v Northern Assurance Company* [1925] AC 619. Consistently with the principle, a shareholder in a company has no right to compensation for losses she sustained by the company arising from the compulsory acquisition of land of which it is the tenant: see *Roberts v Coventry Corporation* [1947] 1 All ER 308. The fact that the value of her shares is consequently depreciated "does not give her a right to claim in respect of a loss which the company will suffer" (Lord Goddard CJ, at 309); to allow it to do so would be to "break in on a rule … that a corporator in a company has no direct claim as a corporator in respect of a loss which the company makes" (Croom-Johnson J, at 310).

[10] There are, of course, exceptions to this rule. Perhaps the best known is that a corporator may sue "derivatively" for what is called a fraud on the minority (more accurately a fraud on the company: see K W Wedderburn, in [1958] *Cambridge Law Journal* at 93-94) to recover corporate property or assets misappropriated by directors or controlling shareholders: *Burland v Earle* [1902] AC 83, 93. In such proceedings, the corporation must be joined as a party both to ensure it is bound by the judgment and also that any assets recovered or their value are accounted for to it and not to the individual shareholder: *Spokes v Grosvenor Hotel Co* [1897] 2 QB 124, 128-129. Otherwise it would in substance sanction payment to that shareholder of an unauthorised dividend or distribution of capital. One of the criticisms of the decision in *Prudential Assurance* made by Mr Sterling in (1987) 50 *Modern L Rev* 468, 479-480, is that under the general law the concept of fraud on the minority and the proceedings available for redressing it are inadequate. That deficiency has now been remedied in Australia by s 236 of the *Corporations Act 2001*; but, where it is sought to recover corporate assets by proceedings under s 236, the requirement of joinder remains: *Metyor Inc v Queensland Electronic Switching Pty Ltd* [2003] 1 Qd R 186, 192-193. It bears some resemblance to, and historically may have been derived from, the analogous rule that a beneficiary suing in his own name for a wrong done to trust assets in which he is interested is required to join the trustee as

defendant: see *Ramage v Waclaw* (1988) 12 NSWLR 84, 89-93. Unless this is done, the principle, at least before the Judicature Act, was that, in respect of assets to which the trustee had the legal title, the beneficiary had no standing to sue: *ex p Middleton* [1983] 1 Qd R 170, 173-174; cf also *Alexander v Perpetual Trustees WA Ltd* (2004) 78 ALJR 411, 420-421. Just as the beneficiary must join the trustee, so a shareholder must join the company in proceedings brought to vindicate its right to recover corporate assets or their equivalent in money.

[11] These are among the considerations which, in my respectful opinion, justify Lord Millett's description in *Johnson v Gore Wood & Co* [2002] 2 AC 1, of the "principle" (at 62) that disallows the shareholder's claim for "reflective loss" as one "driven by policy considerations" (at 66). The company, his Lordship said (at 61), is a legal entity separate from its shareholders, with its own assets and liabilities and its own creditors. Accordingly, his Lordship continued, "where a company suffers loss as a result of an actionable wrong done to it, the cause of action is vested in the company and the company alone can sue …". Of course, no one doubts that a shareholder may sue and recover for a loss he has suffered arising out of a separate legal wrong done to him or her but not to the company. As his Lordship said in *Johnson v Gore Wood & Co* [2002] 2 AC 1, 62:

> "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" his Lordship went on (at 62):

> "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 the 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."

[12] In *Johnson v Gore Wood & Co*, the plaintiff Mr Johnson was held entitled to recover against the defendant firm of solicitors for losses he sustained through their negligence in performing his and his company's joint retainer of the firm to exercise an option on the company's behalf to acquire land for development purposes. In proceedings to recover his losses, the House of Lords refused to strike out his claims for (1) losses associated with investment advice concerning other companies; (2) but with some qualification, the personal cost incurred by the plaintiff in making borrowings; (4) the loss of 14.5% of the plaintiff's shareholding in the company; and (5) his additional personal tax liability. These were items in respect of which the plaintiff and not the company could validly make his own claim. However, item

(3), consisting of a claim for the diminution in value of his majority holding in the company was struck out because it was "merely a reflection of the company's loss". See [2002] 2 AC, at 37-38 (Lord Bingham); at 41-42 (Lord Goff); at 50 (Lord Cooke); at 55-56 (Lord Hutton); and at 67-68 (Lord Millett).

[13] Accepting the principles adopted by Lord Bingham, Lord Goff and Lord Millett in *Johnson v Gore Wood & Co*, the question here is to identify the category into which the relevant allegations fall. There can be and is no argument about the Moon's Lane property. It was property of which the plaintiff was personally the registered proprietor, and any loss suffered in respect of it produced by the defendants' alleged breach of retainer was sustained by him and not by any of the companies. That is why it was not sought to strike out para 8(f)(iii), which is the subparagraph not italicised above, of the plaintiff's statement of claim. Likewise, there can be no doubt about the plaintiff's right to sue the defendants to recover damages for their failing to carry out his instructions to defend proceedings brought against him in England resulting in a judgment against him personally for a large sum of money, or to take steps to set aside it or the bankruptcy notice based on it in Australia: paras 31 to 41 of the statement of claim. The loss flowing from this negligence on the defendants' part is, if established by the plaintiff, a wrong suffered by him personally and not by any of the companies of which the plaintiff is a shareholder. They do not form any part of the allegations struck out by his Honour in this case.

[14] On the other hand, the allegations in sub-paras (i) and (ii) of para 8(f) stand on a different plane. They refer to the plaintiff's shareholdings in the balance or surplus that might have enured from the companies Movado and Meadowbury, which the plaintiff claims he would, as against the Bank, have been entitled to retain after satisfying the secured indebtedness, and which he alleges he would have received "but for" the defendants' negligence in failing to advise about the steps he could have taken to restrain Ebbage and the Bank. Paragraph 30(b), which sets out to expound these allegations is, like some others in the statement of claim, not very happily pleaded; but its meaning is clear enough. What is alleged is that "but for" the defendants' negligence the plaintiff could or would have received and retained the whole or part of the value of his shares in those two companies. To that extent it is being alleged that he suffered loss and damage comprising the value of his shareholding: para 44(a); and in the prayer for relief para 1 he claims damages representing the value of the plaintiff's shareholding in those companies Movado and Meadowbury. Together with Movado's subsidiary Carphone, they owned all the corporate assets secured in favour of the Bank that were lost or damaged as a consequence of the defendants' alleged professional ineptitude or inactivity in breach of their retainer.

[15] According to what was said by Lord Millett in the passage quoted from *Johnson v Gore Wood & Co* [2002] 2 AC 1, 62, the point of principle is that a shareholder will not be permitted to recover damages for a loss caused by a breach of duty owed both to the company and the shareholder where the shareholder's loss reflects the diminution in the value of his shareholding. In the present instance, it is evident that some effort has been made to plead the plaintiff's case in a form that presents it as a claim by him against the defendants rather than by the companies Movado, Meadowbury and Carphone. However, from time to time it emerges that the plaintiff is really seeking to enforce a claim to recover a loss that was suffered by the companies. According to the combined effect of sub-paras (iv), (v) and (vi)

of para 3(b), the defendants agreed to provide legal services to the Carphone Group and Carphone as well as the plaintiff. The defendants' breach of duty is expressed in para 26(b) as a failure to advise the plaintiff that the *companies* or the plaintiff might issue proceedings immediately to restrain Mr Ebbage in wasting the "assets" as they are described in para 26(a) and para 27(a).

[16] It has already been acknowledged that, as regards the Moon's Lane property, the plaintiff is entitled to recover the losses he himself has suffered. The same may well be true of any loss he has suffered in his capacity as guarantor of the indebtedness of the companies. However, as regards the losses sustained by the companies through sales at undervalue by the Bank or its agent Ebbage, it is clear law that the companies themselves are the only proper plaintiffs. The duty on which that claim is founded is formulated under s 85(1) of the *Property Law Act 1974* as:

> "… the duty of a mortgagee, in the exercise … of a power of sale conferred by the instrument of mortgage or by this or any other Act, to take reasonable care to ensure that the property is sold at the market value."

It is this statutory provision that forms the basis of the duty alleged in para 13 of the statement of claim "to see that the assets were sold at market value". The alternative duty of the Bank to act in good faith, which is alleged in para 13(a), is the duty recognised by the general law, which cannot be wider, and is generally considered as being if anything narrower, than that imposed by s 85(1) of the Act.

[17] The duty created by s 85(1) is owed by the mortgagee to the mortgagor, which is not to say its benefit is necessarily confined to the mortgagor. Once a breach of that duty is committed by the mortgagee, there may be others who may sue to enforce it. Against a mortgagee exercising power of sale, a remedy in damages is conferred by s 85(3) of the Act on a person "damnified" by the breach of that statutory duty. It is capable of extending beyond the mortgagor himself to persons like guarantors who have, to the extent of their loss, an interest in the due performance of the statutory duty and a claim for damages for breach of it. The plaintiff as guarantor of the companies' indebtedness to the Bank has a personal interest in seeing that the statutory duty is carried out and no doubt a corresponding interest in and claim under that duty against the mortgagee. One would expect that loss to be distinct and different in quantum from the loss sustained by the principal debtor, which in this case are the companies; but, to the extent that the loss is the same, and is measured by the diminution in value of the plaintiff's shareholding in those companies, it reflects the loss suffered by the companies and so falls within the exclusionary principle recognised by Lord Millett in *Johnson v Gore Wood & Co* [2002] 2 AC 1, at 62. The plaintiff and the companies cannot both recover from the Bank or its agent Ebbage the amount of the same loss where, in the case of the plaintiff suing as a shareholder, his loss is the reduction or diminution in value of his shareholding or shareholdings in the companies Movado or Carphone and Meadowbury.

[18] In attempting to escape the reach of this rule, the plaintiff has sought to couch his claim in this action not as one against the Bank or Ebbage, but against the defendants for negligence or breach of their retainer. It was submitted that it was, legally speaking, a claim for the value of the chance or opportunity, which the plaintiff has lost through the defendants' breach of retainer or negligence, of preventing mismanagement or sale of corporate assets at undervalue, and it was not

to be confused with the value of the lost assets themselves. It may be remarked that this is not the form in which the claim is pleaded, and that what is alleged to have been lost by the plaintiff corresponds precisely to what has been lost in the value of the shares. But in any event and with due respect to Mr Savage SC, this is a form of legal legerdemain. The prima facie measure of the value of the lost chance is the value of the lost assets themselves discounted to the extent necessary to make allowance for the uncertainties and risks of the proceedings which the plaintiff claims the defendants should have advised him to bring against the Bank or Ebbage in order to protect those assets. In so far as they were or are corporate assets, the measure of the loss which the plaintiff seeks to recover from the defendants is the diminution in value of the shares that he holds in the companies or which they in turn hold in others. The damages he claims are merely a reflection of the loss sustained by the companies, although in this action he seeks to recover from the defendants rather than from the Bank or Ebbage.

[19] My conclusion therefore is that, applying the principle in *Johnson v Gore Wood & Co* [2002] 2 AC 1, 62, the plaintiff's claim for damages representing the loss in value of his shareholdings in Movado and Meadowbury is in law not sustainable. The question is whether and to what extent this represents the law of Australia. In *Gould v Vaggelas* (1985) 157 CLR 215, Gibbs CJ (at 219-220), Wilson J (at 245) and Dawson J (at 269) indorsed the rule laid down in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, 222-223, that a shareholder cannot recover damages comprising a diminution in the value of his shareholding which are a mere reflection of a loss suffered by a company of which he is a member. On the other hand, he is entitled to recover damages for a loss suffered by him personally that is separate and distinct from the loss suffered by the company. In *Gould v Vaggelas* a majority of their Honours, Dawson J dissenting, held that the loss sued for was of the latter character. It arose because the plaintiff shareholders, Mr and Mrs Gould, were induced by the fraudulent representations of the defendant Mr Vaggelas to part with assets which they owned personally and to incur personal liabilities, which they would not have done had it not been for the deceit practised upon them. The fraudulent representations related to the profitability of a tourist resort which was purchased by a company Gould Holdings Pty Ltd which was formed for that purpose and whose liabilities they satisfied by transferring their own assets and providing supporting guarantees.

[20] No one in *Gould v Vaggelas* questioned that the Goulds' recoverable personal loss consisted of a sum to be measured by the difference on one hand between the value of what they had parted with together with the liabilities incurred and, on the other, the value of what they had received: *Toteff v Antonas* (1952) 87 CLR 647, 650; that is to say, "the price paid less the actual value of the property acquired": see Gibbs CJ (at 220), Murphy J (at 232), Wilson J (at 241-243), Brennan J (at 257-258), and Dawson J (at 265). The majority were prepared to treat the shares in Gould Holdings and its right of action against that company as "valueless", so that the Goulds were entitled to recover the difference as a direct consequence of their acting in reliance on the false representations. However, Dawson J (at 268-269) considered that the only direct loss was suffered by Gould Holdings as purchaser of the resort, and that only it could sue for and recover in respect of it. His Honour's conclusion on this point cannot assist, but is directly opposed to, the claim made by the plaintiff in the present case. It is not suggested here that the plaintiff has sustained loss by any alleged breach of duty on the part of the defendants in the course of his acquiring shares in Movado, Meadowbury or Carphone, or parting

with his assets, or by personally underwriting the liabilities of those companies. The loss, if any, sustained by him is alleged to have resulted from and by virtue of acts done or left undone by the defendants after he acquired those shares and undertook those liabilities as guarantor to the Bank.

[21] The result in my opinion is that the plaintiff here is seeking to recover a loss sustained by companies of which he is a shareholder consisting of a diminution in the value of his shareholding. This is a "reflective" loss of the kind considered and discussed in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, 222-223, *Gould v Vaggelas* (1985) 157 CLR 215, and *Johnson v Gore Wood & Co* [2002] 2 AC 1, which those authorities show is not recoverable by him. To the extent that the decision of the New Zealand Court of Appeal in *Christensen v Scott* [1996] 1 NZLR 273 suggests (as I consider it does) that such a loss may be recovered by the shareholder rather than the company itself, I would, with respect, decline to follow it.

[22] The plaintiff in the present case complained that an objection of this kind should not be allowed or given effect in an application to strike out parts of the statement of claim at a stage when the facts, as they may turn out to be, have not yet been determined. Ordinarily I would be disposed to think that a submission to that effect might well have weight, as indeed it did in *Harris v Milfull* (2002) 43 ACSR 542. But here the statement of claim is, in the respects identified, unusually clear about what is being claimed. Paragraphs 8(f)(i) and (ii) and 30(b), and the italicised parts of para 44(a) and the prayer for relief leave no doubt that the plaintiff is suing for damages for losses consisting of the diminution in the value of his shareholdings in companies which, if there has been any breach of the duty to them by virtue of the defendants' retainer, are losses for which only those companies and not the plaintiff himself is entitled to recover. The discretion possessed by the learned judge was exercised in favour of striking out those allegations, and nothing has been shown to persuade me that in doing so he exercised his discretion wrongly.

[23] I would therefore dismiss the plaintiff's appeal. We were asked that, if we reached this conclusion, the plaintiff should be given leave to deliver a further amended statement of claim. The following orders should be made:

1. Dismiss the appeal with costs.
2. Give leave to the plaintiff to deliver within 28 days such further amended statement of claim as he may be advised.

[24] **WILLIAMS JA**: I have had the advantage of reading the reasons for judgment of McPherson JA and I agree with all that he has said therein. However, I do wish to make some additional observations of my own. I will adopt the terminology used in his Honour's reasons.

[25] There is no doubt that a person A may owe duties to another person B and to companies with which B is associated, which are similar, if not identical. But that does not mean that the damages for breach of those duties recoverable by B and the companies will be the same. Each of B and the companies would have to establish the separate recoverable loss sustained by each. The facts of and reasoning in *Gould v Vaggelas* [1985] 157 CLR 215 provide a good illustration of that.

[26] As McPherson JA has recorded, in the present case the respondents were retained by the appellant to provide legal services to the appellant and to companies with

which he was associated. It would appear clear, if in the end only by inference, from the statement of claim that on or about 18 June 1990 the appellant sought specific advice from the respondents on his own behalf and on behalf of the companies with respect to the realisation of properties by the receiver. In giving advice with respect thereto the respondents owed duties both to the appellant and to the companies and a breach of those duties would give rise to separate and distinct causes of action.

[27] As I understand the submissions on behalf of the appellant, one important allegation, not referred to by McPherson JA in his reasons for judgment, is that the National Australia Bank represented to the appellant, and the appellant expressly made that representation known to the respondents, that the Bank "would exhaust any remedies available to it against the Securities other than the sale of the Moons Lane property, before having recourse to the Moons Lane property".

[28] When the appellant consulted the respondents on or about 18 June 1990 one of his concerns was that the receiver proposed selling the Moons Lane property prior to attempting to satisfy the debt by the sale of the other securities. The contention of the appellant is that in failing to advise that steps could be taken to hold the Bank to that representation the respondents were negligent and the appellant suffered the loss of some or all of the Moons Lane property (which he individually owned).

[29] As already noted the respondents owed a duty to the appellant separate and distinct from the duty owed to the corporations. The critical question is not so much with respect to the duty, but with respect to the damages recoverable consequent upon its breach. In so far as the appellant can establish some loss consequent upon the circumstances in which the Moons Lane property was sold then that may be recoverable in this action (subject, of course, to the appellant bringing into account the sum of money he has received on settlement of the action against the Bank and the receivers alleging sale of Moons Lane at an undervalue). It may well be that if the sale of Moons Lane was only necessary because the other securities were sold at an undervalue the appellant would be able to recover in this action the value of the Moons Lane property thereby lost; but it is not necessary to finally decide that point on the hearing of this appeal.

[30] What the appellant cannot do, suing on the breach of the separate duty owed to him, is recover by way of damages losses which in reality are, or are reflective of, the losses sustained by the companies. So much follows from the reasoning in *Prudential Assurance Co Ltd v Newman Industries Ltd (No. 2)* [1982] Ch 204, *Gould v Vaggelas*, and *Johnson v Gore Wood & Co* [2002] 2 AC 1. In so far as by the statement of claim the appellant seeks to recover by way of damages the loss in value of his shareholding in the companies that is not sustainable. If there was a sale of assets of the company at an undervalue then the company had a right to sue to recover that loss; that right is vested in the company and not in the appellant as a shareholder. The company could recover its loss against the receiver if there was a sale at an undervalue, or against its legal advisers if negligent advice resulted in that loss; of course, the same loss could not be recovered twice. Clearly on the statement of claim as presently drafted the appellant is seeking to recover, by relying on the breach of the specific duty owed to him by his legal advisers, a loss which in reality was a loss by the companies for which the companies could have sued to recover damages. However one endeavours to dress up the nature of the claim, it remains reflective of the losses of the companies.

[31] The New Zealand Court of Appeal in *Christensen v Scott* [1996] 1 NZLR 273 correctly pointed out that the professional advisers owed a duty of care both to the company and to the Christensens, the sole shareholders in the company. After referring to *Prudential Assurance* the court stated that it could be taken as correct that a member of a company has no right to sue directly in respect of a breach of duty owed to the company or in respect of a tort committed against the company. (at 280). But the court, in my respectful view, erred in concluding that the individual shareholders had a cause of action against the advisers to recover the lost value of their shareholding because the duty in question was owed not only to the company but also to them as individuals. As noted above, in my opinion, there may in circumstances such as those under consideration here be a duty, in similar or identical terms, owed to both the company and the shareholders. But when it comes to the question of recoverable damages, the law precludes the individual from recovering diminution in value of the shareholding; that must always be reflective of a loss suffered by the company with respect to which the company alone has a cause of action.

[32] Given that here, at least prima facie, the respondents owed a duty of care to the appellant individually, the appellant may recover his losses flowing therefrom against the respondents, subject to not recovering twice because of the settlement in the proceedings against the Bank and the receiver, and subject to the consideration that losses being losses of the company, or reflective thereof, cannot be recovered.

[33] It follows that those parts of the statement of claim which purport to identify recoverable damages being the loss in value of shareholdings, the allegations are bad in law and must be struck out.

[34] Effectively the learned judge at first instance struck out only those parts of the statement of claim which alleged that the appellant could recover damages representing the diminution in value of his shareholding. In so far as the statement of claim seeks to recover damages for professional negligence being loss in value of shares in the company, the claim was rightly struck out.

[35] It may well be, as contended for by counsel for the appellant, that in striking out the parts of the statement of claim which he did, the learned trial judge may have inadvertently struck out a right to recover damages with respect to the failure by the respondents to enter a defence in the English proceedings. If leave to deliver an amended statement of claim is given that matter can be attended to.

[36] I agree with the orders proposed by McPherson JA.

[37] **WHITE J**: I have had the advantage of reading the reasons for judgment of McPherson JA and Williams JA and I agree with them. Where separate duties are owed to a company and an individual who happens to be a shareholder in the company it is the nature of the damages sought to be recovered which is important. If, no matter how pleaded, the damages are merely reflective of losses sustained by the company they may not be recovered by the individual. It is that characteristic which will be determinative.

[38] The New Zealand Court of Appeal in *Christensen v Scott* [1996] 1 NZLR 273, as Williams JA has pointed out, concluded, erroneously in my view, that there need only be an independent duty owed to a shareholder to permit recovery of damages even if identical to the loss suffered by the company. Notwithstanding that Lord

Cooke of Thorndon sought to explain *Christensen v Scott* (he was a member of that Court) in *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 45 by suggesting that the language of the judgment is guarded and provisional it is difficult to see how the reasoning in *Christensen v Scott* can stand with that in *Johnson v Gore Wood* or, for that matter, *Gould v Vaggelas* (1985) 157 CLR 215.

[39] I agree with the orders proposed by McPherson JA.