

Hazardous hypotheticals: reflections on *Sevilleja v Marex*

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This article sets out some reflections on the decision of the Supreme Court in *Sevilleja v Marex Financial Limited* [2020] UKSC 31 from July 2020 which clarifies the scope of the so-called ‘reflective loss’ rule. The first instance judgment raised some comment-worthy issues regarding the economic torts which were not the subject of any appeal. The case serves to illustrate a wider point, too, about the unforeseen consequences which can follow when judges explore hypotheticals which do not require to be decided to resolve the case before them, and which have not been the subject of detailed argument.

Sevilleja concerned a technical rule of company law called the ‘reflective loss’ rule. This common law rule served to bar shareholders from bringing claims for losses which they suffer but which are merely ‘reflective’ of the company’s loss, where the company suffers a loss and that causes the value of its shares to fall, or causes it to pay a lower dividend.

In *Sevilleja* two BVI companies were ordered to pay a sum of money to an unsecured creditor. To prevent the creditor getting what was due, the man who owned and controlled the companies emptied the companies’ accounts, transferring all the money to himself. He then placed the company into liquidation and paid the liquidator to procure that the liquidator took no steps to recover the companies’ missing assets for the benefit of the creditor.

The judgment creditor brought a claim against the companies’ owner in England, claiming the owner had committed two ‘economic torts’ of (i) procuring a breach by the company of its obligation to pay the creditor, and (ii) causing the creditor loss by unlawful means (i.e. by the unlawful means of taking the companies’ money, in breach of the fiduciary duties he owed to his companies). The court at first instance had no difficulty finding for the creditor.

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