THE SHAREHOLDER'S PERSONAL CLAIM

Allowing Recovery for Reflective Losses

An absolute application of the no reflective loss principle can result in unfairness. As such, retaining judicial discretion in the area will do much to ensure that genuine causes are not denied remedy. However, even as our courts appear prepared to allow a shareholder to recover for reflective loss, it is important that corporate autonomy is accorded due respect, and not be obscured by an over-consideration of policy concerns. To ensure this, the courts should allow recovery only if the right asserted by the shareholder is one that is separate and independent of the company's right.

Pearlie **KOH**
LLB (National University of Singapore), LLM (University of Melbourne);
Advocate and Solicitor (Singapore);
Associate Professor of Law, Singapore Management University.

I. Introduction

1 The rule in *Foss v Harbottle*[1] decrees that where a wrong is done to a company, only the company may sue for any damage caused to it. This does not mean that the shareholders of the company do not suffer any loss, for any negative impact the wrongdoing may have on the company is likely to also affect the value of its assets, and hence the value of the shares of the company. It is, however, clear that the shareholders do not, by reason of that loss alone, acquire any direct cause of action against the wrongdoer.[2] As the cause of action belongs to the company, it is only right that the company alone is entitled to prosecute in respect of that wrong. This is a necessary corollary of the separate legal status of the company.

2 What then if the shareholder is able to establish a *personal* cause of action against the same wrongdoer? Is he entitled to recover all losses he suffered as a consequence of the wrong against him? The answer appears settled in England by the House of Lords in *Johnson v Gore*

1 (1843) 2 Hare 461. See also *Edwards v Halliwell* [1950] 2 All ER 1064; *Heng Mui Pheow v Tan Ting Koon* [1989] 1 SLR(R) 670; *Ng Heng Liat v Kiyue Co Ltd* [2003] 4 SLR(R) 218.

2 See also Companies Act 1993 (New Zealand) s 169(2) which specifically recognises this.

Wood & Co[3] ("*Johnson*"), which made it clear that where the *loss* suffered by the shareholder "merely reflected the diminution of the company's assets",[4] the shareholder is debarred from claiming such loss. This rule, in the words of Lord Millett, is "a matter of principle; there is no discretion involved".[5] If the loss is reflective, the shareholder cannot recover. Reflective losses cover not only loss manifested in the diminution of share value, but extends to all payments[6] which the company would have made to the shareholder had it not been deprived of its funds by the alleged wrong. The rule applies even if the claim made by the shareholder is in some *other* capacity apart from his capacity as shareholder. The shareholder's claim, whether *qua* employee or *qua* creditor, is therefore similarly debarred.

3 The Court of Appeal in Singapore had the occasion to comment on the no reflective loss principle in *Townsing v Jenton Overseas Investment Pte Ltd*.[7] Whilst the court overtly adopted[8] the no reflective loss principle as established by the English decisions of, *inter alia*, *Johnson* and *Gardner v Parker*,[9] it is apparent nonetheless that the Court of Appeal was prepared to accept a somewhat *less* rigid stance *vis-à-vis* the principle.[10] Specifically, the court was prepared to allow a plaintiff to adduce evidence or to take steps to *disapply* the no reflective loss principle by showing that there was no possibility or risk of double recovery.

4 In this article, it is argued that the Singapore Court of Appeal is, with respect, correct to eschew the rigid approach. A rigid rule, as Peter Gibson LJ observed in *Shaker v Al-Bedrawi*,[11] can "work hardship". Although an absolute approach does engender predictability and hence efficiency,[12] it can in some circumstances be at the expense of fairness and justice. As Chao Hick Tin JA opined in *Chwee Kin Keong v Digilandmall.com Pte Ltd*,[13] "[w]hile certainty is desirable, it is not an

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3 [2002] 2 AC 1. See generally C Mitchell, "Shareholders' Claims for Reflective Loss" (2004) 120 LQR 457; J Mukwiri, "The No Reflective Loss Principle" (2005) 26 *Company Lawyer* 304; J Lee, "Barring Recovery for Diminution in Value of Shares on the Reflective Loss Principle" (2007) 66 CLJ 537.

4 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 66, *per* Lord Millet.

5 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 62.

6 Including dividends, pension scheme contributions and also any repayment of debt: see *Gardner v Parker* [2004] 2 BCLC 554.

7 [2007] 2 SLR(R) 597.

8 *Townsing v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 at [77].

9 [2004] 1 BCLC 417.

10 *Townsing v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 at [86].

11 [2003] Ch 350 at [86].

12 E Ferran, "Litigation by Shareholders and Reflective Loss" (2001) 60 CLJ 245 at 247.

13 [2005] 1 SLR(R) 502 at [81].

object which should prevail in all circumstances, even against the dictates of justice".

5 However, it would be too simplistic an approach for the court to exercise its discretion to disapply the rule *whenever* the policy reasons that sustain it are not in issue. Adopting such an approach risks compromising the integrity of the company's separate legal status by according insufficient respect to the distinction between corporate (and hence derivative) and direct personal rights. If the losses claimed by the shareholder are presumptively reflective, before considering the policy concerns, the court should first satisfy itself that the shareholder's claim against the defendant can be *properly* classified, and therefore *should* be classified, as a personal claim. Only then should the court proceed to consider whether the policy concerns that support the rule may be adequately dealt with in the particular case. It is this author's view that adopting this approach will be in keeping with Lord Bingham's exhortation in *Johnson* for the court "to be astute to ensure that the party who has *in fact suffered loss* is not arbitrarily denied compensation"[14] [emphasis added].

6 We begin by considering the no reflective loss principle as developed by the English courts and the policy concerns that sustain it.

II. The non-recovery of "reflective" loss

7 The rule barring a shareholder's personal action to recover a reduction in the value of his shares applies only when there are overlapping claims by both the company and the shareholder against the same defendant. The genesis of this no reflective loss principle may be traced to the English Court of Appeal decision in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*[15] ("*Prudential Assurance*"). The plaintiff, an institutional investor which held approximately 3% of the shares in Newman, a public quoted company, claimed against two directors of Newman both derivatively and personally. The claims were in respect of Newman's purchase of certain assets at an overvalue which was allegedly procured by the directors fraudulently. The personal claim, brought in the plaintiff's capacity as shareholder, was premised on the misleading advice given to the shareholders by the directors in order to procure general meeting approval of the purchase as was required by stock exchange rules.

14 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 36.
15 [1982] Ch 204.

8 Overruling the lower court,[16] the Court of Appeal held that the personal claim against the directors was misconceived. Whilst recognising that the directors owed the shareholders a duty, when advising them to approve the transaction, to give such advice in good faith and not fraudulently, and which duty may have been breached, the plaintiff nevertheless could not succeed in its personal claim as it had not suffered any *personal* loss. The court said:[17]

> [The shareholder] cannot … 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.

9 This view of the nature of the shareholder's "loss" has been criticised as "indefensibly narrow".[18] Indeed, whilst it is a basic principle of company law that ownership of a share in a company gives the shareholder no interest as such in the assets of the company,[19] conferring on the shareholder only certain participation rights in connection with those assets whilst the company is a going concern and a *pro rata* interest in the net assets of the company upon its liquidation,[20] it is nevertheless incontrovertible that shares are items of property[21] belonging to the *shareholder* and to which a real monetary value may be ascribed.[22] Accordingly, although a shareholder can have no insurable interest in the assets of the company,[23] he certainly does have an

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16 Vinelott J accepted that as the alleged fraud committed against the company had resulted in the company paying more for the assets acquired, this would have resulted in a reduction in profit or net earnings, which must, in turn, have affected the prices at which the shares of the company changed hands. This, Vinelott J, accepted, was loss suffered by the shareholders: see *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1981] Ch 257 at 302–303.

17 *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 at 222–223.

18 C Mitchell, "Shareholders' Claims for Reflective Loss" (2004) 120 LQR 457 at 459. See also M J Sterling, "The Theory and Policy of Shareholder Actions in Tort" (1987) 50 MLR 468 at 470–471.

19 As Evershed LJ observed in *Short v Treasury Commissioners* [1948] 1 KB 116 at 122: "Shareholders are not, in the eye of the law, part owners of the undertaking. The undertaking is something different from the totality of the share-holdings."

20 See, *eg*, *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 at 223; *Peters' American Delicacy Co Ltd v Heath* (1939) 61 CLR 457 at 503–504: "Primarily a share in a company is a piece of property conferring rights in relation to distributions of income and of capital."

21 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 61–62; *Peters' American Delicacy Co Ltd v Heath* (1939) 61 CLR 457. See also Companies Act (Cap 50, 2006 Rev Ed) s 121: "The shares or other interest of any member in a company shall be movable property, transferable in the manner provided by the articles, and shall not be of the nature of immovable property."

22 On valuation of shares, see, *eg*, *Short v Treasury Commissioners* [1948] 1 KB 116, affirmed [1948] AC 534.

23 *Macaura v Northern Assurance Co* [1925] AC 619.

insurable interest in the value of his shares in the company.[24] Necessarily, therefore, when the value of the shares decline, this is a real loss suffered by the shareholder personally. This was recognised and accepted by the New Zealand Court of Appeal in *Christensen v Scott*,[25] where Thomas J opined as follows:[26]

> The fact that the loss may also be suffered by the company does not mean that it is not also a personal loss to the [shareholder]. Indeed, the diminution in the value of [the claimants'] shares in the company is by definition a personal loss and not a corporate loss.

10 Contrary to the view of the court in *Prudential Assurance*, Lord Millett accepted,[27] in *Johnson*, as did Lord Hutton,[28] that a diminution of share value is a personal loss for the shareholder. But this, as Lord Millet said, is not the point:[29]

> The point is that [the loss] merely reflected the diminution of the company's assets. The test is not whether the company could have made a claim in respect of the loss in question; the question is whether, treating the company and the shareholder as one for this purpose, the shareholder's loss is franked by that of the company. If so, such reflected loss is recoverable by the company and not by the shareholders.

11 As pointed out earlier, the concept of reflective loss to which the bar applies extends beyond the diminution of share value. Lord Bingham in *Johnson* stated that where the loss claimed "would be made good if the company had enforced its full rights against the party responsible",[30] that loss would be merely a reflection of the loss suffered by the company. This would clearly include such other payments which the company would have made to the plaintiff, whether or not *qua* shareholder, if it had not been deprived of its funds by the defendant's wrongdoing.[31] For example, in *Johnson*, the House of Lords struck out claims for lost salary and pension contributions, which the shareholder had sustained in his capacity as employee. And, in *Gardner v Parker*,[32]

24 *Wilson v Jones* (1867) LR 2 Exch 139. See also M J Sterling, "The Theory and Policy of Shareholder Actions in Tort" (1987) 50 MLR 468 at 472.

25 [1996] 1 NZLR 273.

26 *Christensen v Scott* [1996] 1 NZLR 273 at 280.

27 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 66.

28 Lord Hutton thought that it was a "more realistic assessment" that the loss suffered by a shareholder through the diminution in the value of his shareholding is a personal loss: *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 54.

29 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 66.

30 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 36.

31 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 67.

32 [2004] 2 BCLC 554.

a shareholder's claim as creditor for the loss of its ability to recover on a loan made to the company was similarly held barred by the principle.[33]

12 If "reflective losses" are by definition personal losses suffered by the shareholder, why then should the shareholder not be entitled to recover for that loss? The non-recovery is dictated on policy grounds. Lord Millett alluded to these when he stated as follows:[34]

> 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.

13 The first major reason thus resides in the court's concern with preventing double recovery by the plaintiff shareholder. A closely related concern is that the defendant should be protected from being exposed to multiple actions in respect of the same acts.[35] However, as many have already observed, there is little inherently objectionable about allowing double recovery against a defendant who had assumed separate responsibilities to different parties.[36] And even if "justice to the defendant" requires that the shareholder does not recover twice over, there are a number of ways in which this may be achieved. In *Christensen v Scott*, Thomas J noted the possibility that the company and the shareholder may seek to hold the same party liable for the same loss. Whilst affirming that double recovery cannot be permitted,

33 Neuberger LJ went further and observed, by way of *dicta*, that the rule would apply even to the claim of a creditor *simpliciter*, *ie*, one who was not a shareholder. His Honour stated (*Gardner v Parker* [2004] 2 BCLC 554 at [71]): "Indeed, it is hard to see why the rule should not apply to a claim brought by a creditor (or indeed, an employee) of the company concerned, even if he is not a shareholder … it is hard to see any logical or commercial reason why the rule against reflective loss should apply to a claim brought by a creditor or employee, who happens to be a shareholder, of the company, if it does not equally apply to an otherwise identical claim by another creditor or employee, who is not a shareholder in the company."

This view has been criticised: see V Yeo, "Creditors and the Principle of Reflective Loss" (2007) 19 SAcLJ 385; P W Lee, "Creditors' Claims for Reflective Loss" [2008] JBL 479.

34 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 62.

35 This is also a rationale for the rule in *Foss v Harbottle* (1843) 2 Hare 461.

36 Lord Goff stated, in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 195 as follows: "I for my part cannot see why in principle a party should not assume responsibility to more than one person in respect of the same activity."

See also P Watts, "The Shareholder as Co-Promisee" (2001) LQR 388 at 390–391; C Mitchell, "Shareholders' Claims for Reflective Loss" (2004) 120 LQR 457 at 464.

Thomas J proceeded to enunciate the different options that the court may adopt to deal with the problem of double recovery. On the facts before him, his Honour was of the view that the problem did not arise as the company had chosen to settle its claim.[37] His Honour observed as follows:[38]

> No doubt, such a possibility [of double recovery] is most likely with smaller private companies where the interrelationship between the company, the directors and the shareholders may give rise to independent duties on the part of the professional advisers involved. But the situation where one defendant owes a duty to two persons who suffer a common loss is not unknown in the law, and it will need to be examined in this context. It may be found that there is no necessary reason why the company's loss should take precedence over the loss of the individuals who are owed a separate duty of care. To meet the problem of double recovery in such circumstances it will be necessary to evolve principles to determine which party or parties will be able to seek or obtain recovery. A stay of one proceeding may be required. Judgment, with a stay of execution against one or other of the parties, may be in order. An obligation to account in whole or in part may be appropriate. The interest of creditors who may benefit if one party recovers and not the other may require consideration.

14 Clearly then, the English position is driven by more than concerns with preventing double recovery. Lady Justice Arden, in *Day v Cook*,[39] expressed the position thus:

> It will thus be seen from the speeches in *Johnson v Gore Wood* 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. Accordingly the court has no discretion. The claim cannot be entertained.* [emphasis added]

37 The professional advisers had accepted a compromise in the knowledge that the shareholders' claim remained outstanding. Thomas J thought, however, that an allowance might need to be made for the amount already paid to the liquidator in settlement of the company's claim: *Christensen v Scott* [1996] 1 NZLR 273 at 280. But see Lord Millett's view of this in *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 66. See also Mitchell's discussion of the point in (2004) 120 LQR 457 at 468ff.

38 *Christensen v Scott* [1996] 1 NZLR 273 at 280.

39 [2001] EWCA Civ 592, [2002] 1 BCLC 1 at [38]–[40].

15 This brings us to the second of Lord Millett's policy concerns – that of the need to protect the interests of the company's shareholders and creditors. From the perspective of the shareholders as a whole, litigation through the company benefits all shareholders rateably as it prevents an individual shareholder from recovering at the expense of the rest. This policy is most compelling where *all* the shareholders possess the same rights against the defendant and possess the same opportunity to recover by means of a corporate claim against the wrongdoer, as was indeed the case in *Prudential Assurance* itself. It will be recalled that the personal cause of action asserted by the plaintiff shareholder in that case was premised on misleading advice which was given to the shareholders of Newman in order to secure their approval to a wrongful scheme. If the defendants were in breach of a duty owed to the plaintiff shareholder, they would equally have been in breach of the same duties owed to every other shareholder in the company. The plaintiff shareholder's personal claim is therefore not unique to that shareholder, and the policy concern is clearly of relevance on these facts.

16 On the other hand, the need to protect the interests of other shareholders does not arise where either all the other shareholders are themselves defendants, or in the case of a company with only one shareholder. In these situations, the logic of the policy is far from persuasive.

17 The more important concern then is the need to protect creditors. Lord Bingham expressed it as follows:[40]

> The court must respect the principle of company autonomy, [and] ensure that the company's creditors are not prejudiced by the action of individual shareholders …

18 The rule ensures that any recovery for wrongs against the company goes into the company's coffers, so as to ultimately benefit the company's creditors. The argument is that if the individual shareholder action was allowed to proceed, this would leave the creditors of the company without access to the recovered amounts as these inure solely for the benefit of the shareholder. The pool of corporate assets that *should* be available for the satisfaction of creditors' claims is thus, by that account, reduced. As Millett LJ explained in *Stein v Blake*:[41]

> If this action were allowed to proceed and the plaintiff were to recover for the lost value of his shareholding from the first defendant, this would reduce his ability to meet any judgment which might thereafter be obtained by the liquidators, or by any of the old companies which were not in liquidation, to the prejudice of their creditors. The

40 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 36.
41 [1998] 1 All ER 724 at 730.

> plaintiff would have obtained by a judgment of the court the very same extraction of value from the old companies at the expense of their creditors that the first defendant is alleged to have obtained by fraud and deceit.

19 This concern is especially acute where the company is insolvent or near insolvency. However, even under these circumstances, creditors are, in any case, only entitled to collect from or claim against assets which rightfully *belong* to the company. And the question when this is the case can only be answered by examining the particular right the shareholder is asserting against the defendant. Where the cause of action being pursued rightfully belongs to the shareholder as an *individual* and not as a member of a class of shareholders, the argument that the shareholder's personal right ought to be subordinated so as to protect the interests of the company's creditors would seem somewhat less compelling. Ironically, it is the very need to, in Lord Bingham's words, "respect the principle of company autonomy" that demands the recognition that shareholders are separate from the company, which in turn forms the premise upon which rights and obligations of shareholders are *distinguished* from those of the corporate entity. If indeed the right of the shareholder is an independent personal right, the fact that the loss suffered is reflective of the company's loss should not lead to a destruction of that right. The critical inquiry, therefore, is the determination of the nature of the plaintiff shareholder's personal claim against the defendant. In any case, if the company decides not to proceed against the defendant, it is *this* decision that affects the pool of company assets against which the creditors may enforce their rights.

20 Where the concern, on the other hand, is with the finite ability of the common defendant to make good his liability to both the company and the shareholder, this may be adequately dealt with by focusing on ensuring that there is no double recovery. In recognising that the shareholder could proceed with his claim for *consequential* losses[42] against the defendant, the court in *Johnson* was clearly not particularly concerned with the defendant's ability to meet *other* claims

42 In *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 36, the House of Lords allowed Johnson's claim for "enhancement of the value of Mr Johnson's pension if the payments had been duly made". Lord Millett observed at 67–68 as follows: "Mr Johnson's claim in respect of the enhancement of his pension is a different matter. The problem here is one of remoteness of damage, not reflective loss, for the loss (or strictly the net loss) is one which the company could not have sustained itself. Had Mr Johnson carried on business in his own name instead of through the medium of the company, then (subject only to the question of remoteness) he would have been entitled to recover a sum representing the lost increase in the value of his pension after giving credit for the amount saved in respect of the contributions and interest. Such loss is separate and distinct from the loss suffered by the company …".

the shareholder may have, which may compete to a similar extent for the defendant's funds.[43]

21 In the case of a financially healthy and *solvent* company, the interests of its creditors are really not under any real threat at all.[44] The risk of non-payment to the creditors is abstract and any fear of adverse consequences for the company's creditors is merely theoretical.[45]

22 From the above discussion, it is clear that the policy concerns and grounds that sustain the no reflective loss principle are not always relevant nor are they incapable of being adequately met by appropriate orders of court. It is perhaps because of this that the English position has been described as "drastic".[46] At this juncture, it is important to note that there is at least one situation in which reflective losses, in spite of their being such, may be recovered by the shareholder. Lord Bingham described this situation as follows:[47]

> 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.

23 His Lordship cited, *inter alia*, *Fischer (George) (Great Britain) Ltd v Multi Construction Ltd*,[48] as authority for the proposition. There, a holding company had contracted with the defendant for the supply and installation of certain equipment on the premises of its wholly-owned subsidiaries. The equipment was defective and this resulted in losses being suffered by the subsidiaries. The holding company was held entitled to claim damages for what were effectively reflective losses as the subsidiaries had no claim themselves against the defendant.

24 In the later decision of *Giles v Rhind*,[49] the English Court of Appeal extended the concession to a situation where the inability of the company to pursue its cause of action against the defendant was the result of the very wrong done to the company by the defendant. Waller LJ stated as follows:[50]

> One situation which is not addressed is the situation in which the wrongdoer by the breach of duty owed to the shareholder has actually

43 See P Watts, "The Shareholder as Co-promisee" (2001) 117 LQR 388 at 391.
44 C Mitchell, "Shareholders' Claims for Reflective Loss" (2004) 120 LQR 457 at 464–465.
45 To paraphrase Finkelstein J in *Re CSR Ltd* (2010) 265 ALR 703 at [88].
46 R P Austin & I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis, Online Ed) at para 11.237.
47 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 35.
48 [1995] 1 BCLC 260.
49 [2003] Ch 618. See also *Perry v Day* [2005] 2 BCLC 405.
50 *Giles v Rhind* [2003] Ch 618 at [34].

> disabled the company from pursuing such cause of action as the company had. It seems hardly right that the wrongdoer who is in breach of contract to a shareholder can answer the shareholder by saying, 'The company had a cause of action which it is true I prevented it from bringing, but that fact alone means that I the wrongdoer do not have to pay anybody.'

25 Although this decision has been applauded as being "policy-sensitive",[51] it has been criticised as wrongly decided by Lord Millett, sitting as a non-permanent judge in the Court of Final Appeal of the Hong Kong Special Administrative Region in the decision of *Waddington Ltd v Chan*.[52] Nonetheless, *Giles v Rhind* was more recently confirmed by the Court of Appeal in *Webster v Sandersons Solicitors*[53] in which Lord Clarke MR observed[54] that it remained binding unless overruled by the Supreme Court of the UK.

26 The position in England is therefore relatively clear – the no reflective loss principle presents a significant hurdle for shareholder litigation.

III. A limited recovery of reflective loss

27 The Singapore Court of Appeal considered the no reflective loss principle in *Townsing v Jenton Overseas Investment Pte Ltd*[55] ("*Jenton*"). The facts of *Jenton* may be briefly stated. The plaintiff and its wholly-owned subsidiary NQF were part of a group of companies which owed a sum of money to Normandy. Townsing was a director of both the plaintiff and NQF, having been appointed to the respective boards as Normandy's nominee. The plaintiff sued Townsing for breach of directors' duties in making a payment out of NQF's funds to Normandy. As Normandy had no legal right to the payment, Townsing was held to be in breach of his fiduciary duties to both the plaintiff and NQF. The question of the applicability of the no reflective loss principle was raised as Townsing's impugned act related, not to the plaintiff's assets, but to the assets of NQF, the misapplication of which resulted in the insolvency of NQF. Although the principle was not pleaded by Townsing, the Court of Appeal invited counsel for the parties to submit arguments on the same.

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51 C Mitchell, "Shareholders' Claims for Reflective Loss" (2004) 120 LQR 457 at 472.
52 [2008] HKEC 1498, [2009] 2 BCLC 82 at [85]. See also *Gardner v Parker* [2004] BCLC 554; *Webster v Sandersons Solicitors* [2009] 2 BCLC 542.
53 [2009] 2 BCLC 542.
54 *Webster v Sandersons Solicitors* [2009] 2 BCLC 542 at [36].
55 [2007] 2 SLR(R) 597. See V Yeo, "Creditors and the Principle of Reflective Loss" (2007) 19 SAcLJ 385; P W Lee, "Creditors' Claims for Reflective Loss" [2008] JBL 479.

28 Against this background, the court held that the plaintiff's losses, manifested in its inability to recover its loan from NQF and in the reduction in value of its shareholding in NQF, were clearly reflective of NQF's losses. Hence, if the no reflective loss principle had been raised at trial, it would have precluded the plaintiff's claims.[56] The court considered the divergent[57] approaches adopted in *Christensen v Scott* and in *Johnson*, and expressly preferred the English approach.[58] However, the court accepted that had the principle been pleaded at trial, the plaintiff could have had the opportunity to adduce evidence or to take steps to *disapply* the no reflective loss principle.[59] The Chief Justice observed as follows:[60]

> We may reasonably assume that Jenton would have been able to procure NQF to give an undertaking to the court not to sue the appellant in order to continue with its claim against the appellant since NQF was a wholly-owned subsidiary of Jenton. Also, NQF had no creditor other then Jenton … Such an undertaking would have disapplied the principle of reflective loss as there would be no possibility of double recovery.

29 This, of course, differs markedly from the English approach which, as we have seen, insists on an absolute approach – a company's claim, if it exists, will *always* trump that of the shareholders.[61]

30 *Jenton* is not the first local case in which the issue of recovery of reflective loss was considered. In the earlier decision of *Hengwell Development Pte Ltd v Thing Chiang Ching*,[62] the Singapore High Court similarly eschewed absolutism. The plaintiff in that case was a 51% shareholder in a joint venture company ("JVC"), the only other shareholder being FEP. JVC's sole business activity was through its wholly-owned Chinese subsidiary, QZH. By the joint venture agreement, the running of QZH was left in the hands of executives appointed by FEP. A dispute arose between the joint venture partners, with the plaintiff alleging that the executives of QZH appointed by FEP had breached their fiduciary duties to QZH. The plaintiff applied under

56 *Townsing v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 at [74].

57 In *Christensen v Scott* [1996] 1 NZLR 273, the New Zealand Court of Appeal placed emphasis on the fact that a *separate duty* was owed by the defendants to the shareholders (at 280). In contrast, the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 66, focused on the *loss* which the shareholder is claiming. If this loss is merely reflective of the company's loss, the shareholder cannot recover that loss against the defendant, *notwithstanding* a separate duty or obligation owed by the defendant to the shareholder.

58 *Townsing v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 at [77].

59 *Townsing v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 at [85].

60 *Townsing v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 at [85]–[86].

61 *Day v Cook* [2001] EWCA Civ 592, [2002] 1 BCLC 1 at [40], *per* Lady Justice Arden.

62 [2002] 2 SLR(R) 454.

s 216A of the Singapore Companies Act[63] seeking the court's leave to commence legal action against the executives in the name of and on behalf of JVC. The executives raised the no reflective loss principle, contending that the alleged losses suffered by JVC, being effectively the diminution in the value of its shareholding in QZH, were merely reflective of QZH's losses. Evidence was adduced that Chinese company law did not provide for a statutory derivative action similar to Singapore's s 216A, and in a situation such as the present where the shareholders were deadlocked, the company would be unable to enforce its rights against any alleged wrongdoers.

31 Lai Kew Chai J considered that, as the company, QZH, was unable to prosecute its claims against the errant executives, the case fell within Lord Bingham's second proposition.[64] Accordingly, the application should therefore be allowed so that the shareholder, JVC, could bring an action to recover its losses, notwithstanding that these were reflective losses. Lai J stated:[65]

> A litigant is not to be lightly turned away from bringing a genuine cause before our courts. *A fortiori*, if there is no risk of double recovery and there is no prejudice to the creditors or shareholders of the company, which has no remedy in any event under Chinese law, the policy reasons behind the decision in *Johnson v Gore Wood & Co* do not apply.

32 The Singapore courts are not alone in recognising the shareholder's personal claim for reflective losses. This is the position in New Zealand too, where the governing principles were established in the decision of the Court of Appeal in *Christensen v Scott*. In that case, the only shareholders of a company were allowed to claim against professional advisers, who were also advisers to the company, for damages representing the reduction in value of their shareholding arising from breach of duties owed to them personally. In the court's view, the fact that the company itself had suffered loss as a result of a breach of duty owed to the company by the defendants did not necessarily exclude the claim of a party who also happened to be a member of the company. As Thomas J explained:[66]

> Where such a party, irrespective that he or she is a member, has personal rights and these rights are invaded, the rule in *Foss v Harbottle* is irrelevant … The loss arises not from a breach of the duty owed to the company but from a breach of duty owed to the

63 Cap 50, 1994 Rev Ed.

64 It is not clear from the facts whether QZH had no cause of action under Chinese law, or whether in fact it did have a cause of action but that there was no person with the necessary authority to prosecute it.

65 *Hengwell Development Pte Ltd v Thing Chiang Ching* [2002] 2 SLR(R) 454 at [22].

66 *Christensen v Scott* [1996] 1 NZLR 273 at 280.

> individuals. The individuals [*sic*] is simply suing to vindicate his own right or redress a wrong done to him or her giving rise to a personal loss.

33 In the US, a version of the English rule in *Foss v Harbottle* applies. Thus, where a shareholder suffers a fall in the value of his shares as a result of a wrong to the company, the "non-conductor principle"[67] applies to preclude the shareholder from bringing a personal claim, insisting instead on the action being brought *derivatively*. Similar reasons justify this course. In *Durham v Durham*,[68] for example, the New Hampshire court stated:

> Courts generally require a shareholder to bring a derivative, as opposed to a direct, suit against corporate officers to redress injuries to the corporation because the derivative proceeding:
>
> (1) prevents a multiplicity of lawsuits by shareholders;
>
> (2) protects corporate creditors by putting the proceeds of the recovery back in the corporation;
>
> (3) protects the interests of all shareholders by increasing the value of their shares, instead of allowing a recovery by one shareholder to prejudice the rights of others not a party to the suit; and
>
> (4) adequately compensates the injured shareholder by increasing the value of his shares.

34 However, where the shareholder is able to establish the infringement of a direct personal right, he is generally entitled to pursue a direct action for personal recovery. The difficult issues that arise in distinguishing between individual and derivative actions occur in cases where the shareholder does *not* have an obvious independent personal claim. Even in such cases, the courts have allowed personal recovery if the action may be classified as a direct, as opposed to a derivative, one.[69] Different tests exist to determine whether a shareholder may sue directly, and there appears to be no single approach that has been

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67 *Donnell v Herring-Hall-Marvin Safe Co* 208 US 267 (1908) at 273.

68 871 A 2d 41 (NH 2005) at 45.

69 Contrast Lord Bingham's second proposition in *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 35: "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." [emphasis added] See also *Ellis v Property Leeds (UK) Ltd* [2002] EWCA Civ 32, [2002] 2 BCLC 175 where Mantell LJ reiterated the need for the plaintiff shareholders to have an independent cause of action against the defendant: at [11].

universally adopted across the different states.[70] Additionally, the American Law Institute has proposed a special rule that applies to closely held corporations. A closely held corporation is essentially one with few shareholders, all or a majority of whom participate in the management of the corporation, and whose shares are not freely transferable.[71] This rule allows the court discretion to treat an action raising derivative claims as a direct action. It states as follows:[72]

> In the case of a closely-held corporation, the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.

35 Some states have adopted this rule as law.[73] This lack of consensus notwithstanding, what is clear about the position in the US is that the fact that the loss suffered by the shareholder is reflective of the company's loss would not, of and by itself, preclude a direct action by the shareholder.

IV. The corporate/personal distinction

36 It will be recalled that in *Jenton*, the company had only one shareholder, as it was a wholly-owned subsidiary of the plaintiff, and further that the company had no creditor apart from the plaintiff. Given

70 See generally E J Thompson, "Direct Harm, Special Injury, or Duty Owed: Which Test Allows for the Most Shareholder Success in Direct Shareholder Litigation?" (2009–2010) 35 *Journal of Corporation Law* 215.

71 See generally B Gitlin, Annotation, "When is Corporation Close, or Closely-Held, Corporation under Common or Statutory Law" (2004) 111 *American Law Reports 5th* 207. This is similar to the concept of the quasi-partnership under English and Singapore law. In *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, Lord Wilberforce listed (at 380) the following characteristics of a quasi-partnership: "(i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere." See also *Chua Kien How v Goodwealth Trading Pte Ltd* [1992] 1 SLR(R) 870.

72 American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* (1994) para 7.01(d). Lady Justice Arden made reference to this rule in *Day v Cook* [2001] EWCA Civ 592, [2002] 1 BCLC 1 at [40].

73 See generally D S Kleinberger, "Direct *versus* Derivative and the Law of Limited Liability Companies" (2006) 58 *Baylor Law Review* 63.

these specific circumstances, the court concluded that there was "no principle of law that would have prevented the court from accepting [the undertaking] since it would ensure that there would be no double recovery or prejudice to other shareholders or creditors in allowing Jenton to proceed with its claim".[74] In a factual situation such as that presented in *Jenton*, it is arguably of little *practical* import whether the suit proceeds at the instance of the sole shareholder or of the company. In such companies, the injury suffered by the company is practically indistinct from the injury suffered by its sole shareholder, and it would therefore be artificial, particularly in the absence of any external creditor interests, to insist that any remedial action be taken through the company. The focus of the court was, therefore, on ensuring there was no double recovery.[75]

37 However, it should be appreciated that, when seizing upon the fact that the company in question was wholly owned, the fact that it was nonetheless a *separate* legal entity, with its own rights and obligations, may be readily obscured. The *Saloman*[76] principle, that an incorporated company has a separate legal existence of its own, is a fundamental tenet of company law. The fact that a company is wholly owned by a single shareholder does not change this fact.[77] Accordingly, even as our courts are prepared to adopt a pragmatic approach in the area of individual recovery for reflective losses, respect for corporate autonomy dictates that individual recovery should only be allowed where the right asserted by the plaintiff is indeed an *independent* legal right that the plaintiff is entitled to assert. This is arguably *especially* so where the company is wholly owned or substantially wholly owned, for an independent legal right does not vest in the controlling shareholder by that fact alone. The English decision of *Ellis v Property Leeds (UK) Ltd*[78] usefully illustrates the point.

38 The plaintiffs were directors of a small group of companies known as the Cross Lane Group, the shares of which were either held by the plaintiffs themselves or on trust for them. They were presented with an opportunity to purchase for development a substantial building site

74 *Townsing v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 at [85].

75 See also the earlier Singapore High Court decision in *Hengwell Development Pte Ltd v Thing Chiang Ching* [2002] 2 SLR(R) 454.

76 See *Saloman v A Saloman and Co Ltd* [1897] 1 AC 22.

77 See *Adams v Cape Industries plc* [1990] Ch 433 at 536 where Slade LJ stated as follows: "Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities." The position is the same in Singapore: see, *inter alia*, *Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd* [1999] 2 SLR(R) 24 and *The "Andres Bonifacio"* [1993] 3 SLR(R) 71.

78 [2002] EWCA Civ 32, [2002] 2 BCLC 175.

which was being sold by the receivers of a failed housing association. To that end, they commissioned and relied on a valuation from the defendant surveyors in making the purchase, which was made through one of the companies in the group. The valuation was grossly inaccurate, and the venture failed, resulting in the collapse of several companies within the group. The plaintiffs claimed personally against the defendant alleging negligent or fraudulent misrepresentation in the valuation, seeking compensation for, *inter alia*, the destruction of the value of their shares in the companies. The claim was dismissed on the basis of the no reflective loss principle. The court concluded that the valuation was addressed to the companies, who would therefore be the rightful parties to rely on the same. The plaintiffs had acted on the valuation as directors of the companies. At trial, Rougier J made the following observations:[79]

> [The valuation] was sent to Mr Ellis as director of the various companies within the group, and insofar as he or Mr Clayton took action in reliance on that valuation, they did so as directors of the various companies who became embroiled to their disadvantage. I do not think it can be sensibly argued in any other way.

39 As the defendant had dealt with the plaintiffs as representatives of the companies, the plaintiffs had no right to recover the reflective losses despite being practically the sole shareholders of the companies. The victims of any misrepresentation contained in the valuation were the companies, in which companies the cause of action against the defendant necessarily vested.

40 The case of *Johnson* may be similarly analysed. It will be recalled that Johnson conducted his various businesses through a number of wholly-owned or substantially wholly-owned companies. He carried on the business of property development through WWH Ltd, in which he held all but two of the issued shares, and was also its managing director. As Lord Bingham put it, WWH Ltd was the "corporate embodiment"[80] of Johnson. The defendant was a firm of solicitors which acted, on occasion, for Johnson personally. In this instance, however, the defendant had been instructed by Johnson, in his capacity as managing director of WWH Ltd,[81] in connection with a proposed purchase of land for development. As a result of the firm's negligence in connection with the exercise of the option for the purchase, which was held by WWH Ltd, WWH Ltd was embroiled in protracted litigation. By the time this was concluded, the property market had collapsed, which in combination with all the other events kick-started by the defendant's negligence,

79 *Ellis v Property Leeds (UK) Ltd* [2002] EWCA Civ 32, [2002] 2 BCLC 175 at [12]. The Court of Appeal agreed with the judge's observations.
80 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 17.
81 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 17.

resulted in WWH Ltd suffering substantial loss. The partners of the firm settled the company's claim for breach of duty. Johnson then claimed against the defendant for breach of a separate duty owed to him personally, for, *inter alia*, the diminution in value of his pension and majority shareholding in WWH Ltd. The House of Lords struck out these claims as the losses were reflective of the WWH Ltd's loss.

41 The case had proceeded on the basis that the firm owed Johnson an independent duty in respect of this loss. However, it was, as Waller LJ observed in *Giles v Rhind*,[82] not entirely obvious that such an independent duty in fact existed. Indeed, at least in respect of the particular complaint of professional negligence raised, the contrary could very well be true, for it was reasonably clear that Johnson had dealt with the defendant firm as the representative of and on the company's behalf in respect of the subject matter of the complaint. The negligence, if any, would have been in connection with the firm's obligation to the company. Under such circumstances, the wrong alleged must be fundamentally corporate. Johnson was therefore rightly precluded from recovering the reflective losses suffered. Additionally, the settlement agreement between WWH Ltd and the firm had been agreed to by Johnson on the company's behalf. As Lord Millett pointed out, "Johnson cannot be permitted to challenge in one capacity the adequacy of the terms he agreed in another".[83]

42 The distinction between corporate rights and individual rights is complicated by the unique[84] position in which a shareholder stands *vis-à-vis* his company. Part of the difficulty lies in the manner in which companies operate in general. It is trite that a company necessarily acts through its constitutional organs and through individuals as its agents. A shareholder is a constituent member of the general meeting, and when he is acting as such a constituent member, his individual act, taken together with the acts of the rest of the general meeting, *transmutates* into an act of the company. An apparently separate shareholder right that arises under these circumstances, therefore, is really not separate at all, but is, to use Chan CJ's phrase, a consequence of the artificial construct created by the company's separate legal personality.[85]

43 The facts of *Prudential Assurance* is illustrative. It will be recalled that the personal claim was premised on certain misrepresentations

82 [2003] 1 Ch 618 at [28].

83 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 66.

84 *Townsing v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 at [77], *per* Chan CJ.

85 *Townsing v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR 597 at [77]. Chan CJ had observed that the apparent separability of a shareholder's loss and his company's loss is a consequence of the artificial construct created by the company's separate legal persona.

made by the defendants to the plaintiff, not in its separate capacity as an investor, but in its capacity as a member of the general meeting for the purpose of securing general meeting approval for the company's purchase of certain assets at an overvalue. The misrepresentation was therefore essentially addressed to the company, and received in this instance by the company in general meeting. The plaintiff's right, if it existed, was therefore *not* a separate and independent *personal* right.

44 Personal rights often arise out of contracts, and where the shareholder has an independent contractual right against the defendant *vis-à-vis* the subject matter of the suit, there should be little objection to allowing personal recovery provided concerns over double recovery and creditor interests are addressed. Where, however, the contract is one to which the company is also party, such as a shareholders' agreement, it becomes necessary to examine the contract in question in order to determine if the *shareholder* should indeed be accorded a direct claim with respect to the reflective losses. This, in essence, is an attempt to distinguish between corporate rights and personal rights. Although the distinction can be difficult to draw, it is not an exercise that is unknown in company law. As is well known, identical allegations of fact are capable of supporting both a personal complaint in respect of the statutory action for oppression or unfair prejudice,[86] as well as a corporate action, whether brought derivatively or otherwise. In *Re Charnley Davies Ltd (No 2)*,[87] Millett J (as Lord Millett then was) considered the overlap between the personal and corporate actions and opined that the distinction does not lie in the particular acts or omissions of which complaint is made, but in the nature of the complaint and the remedy necessary to meet it. The question was what "the whole gist"[88] of the complaint was.

45 In a similar manner, in considering whether to allow the shareholder to proceed personally to recover what are effectively reflective losses, the court should consider the nature of the complaint. If the particular wrong alleged is primarily the result of a breach of duty or an infringement of a right that runs directly to the company, then the shareholder should not be entitled to recover in a personal action reflective losses, even if the policy concerns do not obtain. On the other hand, if the action is premised on a primary or personal right that belongs directly to the shareholder, then he should be entitled to maintain an action in his own right, provided the policy concerns may

86 See Companies Act (Cap 50, 2006 Rev Ed) s 216; Companies Act 2006 (c 46) (UK) s 994; Corporations Act 2001 (Cth) (Australia) s 232; Companies Ordinance (Cap 32) (Hong Kong) s 168A.

87 [1990] BCLC 760. See also *Re Chime Corp Ltd* (2004) 7 HKCFAR 546 and *Waddington Ltd v Chan* [2008] HKEC 1498; [2009] 2 BCLC 82.

88 *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760 at 783.

be adequately addressed. This exercise requires an analysis of the nature of the particular right the shareholder is asserting. Consider the facts of *Giles v Rhind*.[89]

46 Giles and the defendant Rhind were directors and the founding shareholders of SHF, each then holding approximately 50% of the issued shares. The company was successful and Apax, a venture capital firm, invested £1.285m in the company in exchange for shares and loan stocks. The shareholding of Giles and Rhind were correspondingly reduced. Giles was appointed managing director of SHF, while Rhind was appointed the commercial director. The terms of Apax's investment in SHF were enshrined in a subscription and shareholders' agreement between all the parties, including SHF. It was a term of the agreement that each of the parties agreed to "keep secret and confidential and not to use disclose or divulge to any third party or to enable or cause any person to become aware of (except for the purposes of the company's business) any confidential information relating to the company". The agreement also restricted Giles and Rhind from being involved in other businesses after cessation of their employment by SHF. These latter restrictions were expressed to be for the specified purpose of protecting Apax's investment in the business. Matching provisions in substantially similar terms were contained in the service agreements entered into by Giles and Rhind with SHF. Subsequently, the relationship between Giles and Rhind broke down and after Rhind's resignation, he diverted the company's most lucrative contract to his own company using confidential information in relation to SHF in breach of the covenant in the shareholders' agreement. SHF brought an action against Rhind, but, after going into administrative receivership, was unable to put up security for Rhind's costs and consequently had to discontinue the action. Giles then brought a personal action against Rhind, claiming damages for the loss of value of his shares in the company as well as for loss of remuneration he would otherwise have earned.

47 Although Giles was a party to the contract, a closer look at the agreement will suggest that the particular covenant was not, contrary to his allegations, intended to protect his investment in SHF. The covenant imposed the no-disclosure obligation in respect of confidential information relating to the company not only on Rhind, but also on Giles himself. Any disclosure must be for the purposes of the company. Read in context, therefore, it seems reasonably clear that the no-disclosure obligation was intended to protect the company and its business. Any protection accorded by the covenant over the investment interests of the shareholders must necessarily be indirect and wrought *through* the company. This particular wrong, and hence the complaint, was therefore more likely to be primarily corporate. Seen from this

89 [2003] Ch 618.

perspective, the decision to allow Giles to bring a personal claim may, with respect, have been incorrect,

48 On the other hand, how the court should deal with a breach of the post-employment restrictions imposed on Rhind and Giles may well be different. These restrictions were, by the terms of the shareholders' agreement, expressed as being intended to protect Apax's investment. It is not clear from the facts whether Rhind's acts would have been in breach of these restrictions. If so, *Apax* could arguably have had an independent personal right to enforce the covenant. If Apax had pursued the action, it should, it is submitted, be entitled to recovery of reflective losses subject to the policy concerns being adequately addressed.

49 Apart from contract, personal rights may also arise out of duties that are imposed by law. *Gardner v Parker*[90] involved precisely such a right, a right which arose out of a breach of the director's fiduciary duty to avoid a conflict of interests. The plaintiff was beneficially entitled to 15% of the shares in the company BDC, while the defendant held the remaining 85%. BDC's two largest assets were 9% of the issued share capital of S Ltd and a debt of £799,000 owed to it by S Ltd. The defendant, who was essentially the sole director of both BDC and S Ltd, owned the remaining 91% of S Ltd's issued shares. The defendant procured the transfer, at a substantial undervalue, by S Ltd, of an asset it owned to a company which the defendant controlled. BDC subsequently went into liquidation and its liquidator assigned to the plaintiff the benefit of BDC's rights of action in respect of its 9% shareholding in S Ltd and the £799,000 debt. The plaintiff then brought proceedings against the defendant for breach of director's duties to BDC, seeking to recover the loss that BDC had suffered as a result of the transfer. Although the defendant's wrongful act was in connection with an asset of S Ltd, the trial judge, Blackburn J,[91] eschewed too narrow an approach in connection with the defendant's duties as a director of BDC. His Honour stated:[92]

> At the time of the transfer Mr Parker was also a director of BDC. Knowing, as a director of BDC with a duty to safeguard BDC's assets, including in particular its 9% shareholding in [S Ltd] and its £799,000 debt, that the transfer would impact adversely upon [S Ltd's] value and, therefore, upon BDC's 9% shareholding in [S Ltd] and the recoverability of the £799,000 debt …, Mr Parker could not, consistently with his duties to BDC, simply sit back and do nothing in the face of the impending transfer. In respect of the transfer he was as much in a position of conflict as a director of BDC (as between his

90 [2004] 2 BCLC 554.
91 *Gardner v Parker* [2004] 1 BCLC 417.
92 *Gardner v Parker* [2004] 1 BCLC 417 at [17] and [20].

> duty to that company and his personal interest through Bweralley as the proposed transferee of the shares) as he was as a director of S Ltd … I am satisfied therefore that, on the assumed facts, Mr Parker as a director of BDC was in breach of the pleaded fiduciary duties which he owed to BDC.[93]

50 However, this direct personal right notwithstanding, the rigid no reflective loss principle as established in *Johnson* precluded the plaintiff's claim. On appeal, counsel for the plaintiff had questioned the justice of applying the principle on the facts of the present case, but as Neuberger LJ observed:[94]

> That challenge, it seems to me, is not consistent with the principle established in *Johnson*'s case, and perhaps most clearly expressed by Lord Millett … The approach suggested by Mr Steinfeld (counsel for the plaintiff) appears to me to be more consistent with that of Thomas J in *Christensen v Scott* … discussed in *Johnson*'s case … with disapproval by Lord Millett, and, indeed, discussed by Lord Cooke of Thorndon … As with many points relating to reflective loss, Mr Steinfeld's arguments in this connection appear to me to be not without force, although not without difficulties either. However, in light of the decision and reasoning in *Johnson*'s case, as subsequently applied in this court, those arguments could only be determined in the House of Lords, and then only if it was appropriate for their Lordships to reconsider the rule against reflective loss.

51 This conclusion may be contrasted with the stance taken by the Singapore Court of Appeal in *Jenton*, which, as we saw earlier, involved a similar situation. In Singapore, the duty to act *bona fide* in the company's interests is imposed statutorily by s 157 of the Companies Act.[95] As a director of Jenton, Townsing owed Jenton the duty to act honestly in connection with his performance of his functions as such a director. The Court of Appeal considered that the fact that Townsing's wrongful act was in connection with an asset of the *subsidiary* did not alter the fact that his acts also harmed the holding company, Jenton. Chan CJ observed that courts have generally refused an inflexible

93 The Court of Appeal agreed with this finding: *Gardner v Parker* [2004] 2 BCLC 554 at [19].

94 *Gardner v Parker* [2004] 2 BCLC 554 at [75] (references omitted).

95 Companies Act (Cap 50, 2006 Rev Ed) s 157(1) provides as follows: "A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office." The local courts have interpreted the requirement to "act honestly" as a statutory mirror of the fiduciary duty to act *bona fide* in the interests of the company at general law: see *Cheam Tat Pang v PP* [1996] 1 SLR(R) 161 at [19]; *Lim Weng Kee v PP* [2002] 2 SLR(R) 848 at [32]; *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR(R) 162 at [14]; *Townsing v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 at [59].

compartmentalisation of the director's acts,[96] which could indeed allow an errant director to *escape* liability. The court thus found, consistently with the position taken in *Gardner v Parker*, that Townsing's conduct, in paying the funds of the subsidiary NQF to his appointor Normandy, was in breach of the duties he owed *to Jenton*. This right that Jenton had against Townsing was therefore a direct personal right. The court was, with respect, absolutely correct to allow the recovery of reflective losses subject to there being no double recovery and no intervention of creditors' rights.

52 The statutory right conferred on shareholders to petition for an order to remedy oppression[97] or unfair prejudice[98] in the conduct of the company's affairs is clearly a personal claim. Whilst not all complaints of oppression will involve wrongs against the company, it is not uncommon to find a petition founded upon facts which also disclose a concurrent wrong against the company, usually a breach of directors' duties.[99] Indeed, these "corporate" wrongs provide the very means by which the oppression is inflicted by the majority on the complaining shareholders. Given overlapping claims, therefore, is the no reflective loss principle relevant to oppression petitions? The statutory provision confers a wide jurisdiction on the court to "make such order as it thinks fit". As orders are made with a view to "remedying the matters complained of",[100] it is not inconceivable that some element of reflective loss might have been, by the order, addressed. Where a buyout order is made, for example, the court has a "very"[101] wide discretion in valuing the shares so as to effect justice in the particular circumstances of the case.[102] Thus, as the Singapore Court of Appeal has noted, "the court has the discretion to enhance the share value in a minority oppression

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96 *Townsing v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 at [61]–[62]. See also *Re Dominion International Group plc (No 2)* [1996] 1 BCLC 572; *Gardner v Parker* [2004] 1 BCLC 417; affirmed [2004] 2 BCLC 554.

97 Companies Act (Cap 50, 2006 Rev Ed) s 216.

98 Companies Act 2006 (c 46) (UK) s 994.

99 See, *eg*, *Kumagai Gumi Co Ltd v Zenecon Pte Ltd* [1995] 2 SLR(R) 304; *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] 4 SLR(R) 745; *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354; *Re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420; *Clark v Cutland* [2004] 1 WLR 783. See also H C Hirt, "In What Circumstances Should Breaches of Directors' Duties Give Rise to a Remedy Under ss 459–461 of the Companies Act 1985?" (2003) 24 *Company Lawyer* 100; S Griffin, "Shareholder Remedies and the No Reflective Loss Principle – Problems Surrounding the Identification of a Membership Interest" [2010] JBL 461 at 470–471.

100 Companies Act (Cap 50, 2006 Rev Ed) s 216(2). The phrase used in the UK is "giving relief in respect of the matters companies of": Companies Act 2006 (c 46) (UK) s 996(1).

101 *Re Bird Precision Bellows Ltd* [1985] BCLC 493 at 669, *per* Oliver LJ.

102 *Yeo Hung Khiang v Dickson Investment (Singapore) Pte Ltd* [1999] 1 SLR(R) 773 at [71].

case".[103] Where the value of the shares is adjusted to take account of the wrongful acts,[104] the petitioning shareholder would have effectively recovered a sum that is reflective of the corporate loss.[105] The issue was raised and considered in *Atlasview Ltd v Brightview Ltd*.[106]

53 The issued capital of the company comprised A and B shares. The petitioners were interested in a majority of the B shares, whilst the respondents were interested in a majority of the A shares. The petitioners brought an unfair prejudice action on the basis that the respondents, in breach of an investment agreement between them, had caused the company to enter into a loan agreement with an A shareholder on terms which placed the company in a financially precarious position. This ultimately resulted in the business of the company being sold to a company controlled by the A shareholders, depriving the B shareholders of their financial stake in the company. The relief sought by the petitioners included an order that the A shareholders and their nominee directors pay "damages"[107] to the petitioners. The respondents applied to strike out the petition on the ground, *inter alia*, that as the claim for monetary compensation was based on the alleged breaches of fiduciary duty by the nominee directors, the proper claimant should be the company. Any diminution in the value of the petitioners' shares as a result of the breaches was purely reflective of the company's loss. Mr Jonathan Crow, sitting as a deputy judge of the High Court, held that the petition could not be struck out on this basis, and opined as follows:[108]

> It would … fly in the face of common sense to suggest that the court, in exercising its discretion under s 459,[109] would necessarily decline any relief in such a case, and would require the minority shareholders instead to bring a derivative action, seeking payment to be made to the company in respect of the entire loss it had suffered: by that route, the defendant transferees would be having to make a payment to the transferor company, the bulk of which they would then recover in their capacity as majority shareholders. That hardly seems like a desirable route for compensating those who have in fact suffered the

103 *Yeo Hung Khiang v Dickson Investment (Singapore) Pte Ltd* [1999] 1 SLR(R) 773 at [71].

104 As in *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] 4 SLR(R) 745 at [92].

105 See generally J Payne, "Sections 459–461 Companies Act 1985 in Flux: The Future of Shareholder Protection" (2005) 64 CLJ 647 at 670 and 673.

106 [2004] 2 BCLC 191.

107 The judge, Mr Jonathan Crow, sitting as a deputy judge of the High Court, did not doubt that the court had jurisdiction to make a compensatory award to the petitioner under Companies Act 1985 (c 6) (UK) s 459, but observed (*Atlasview Ltd v Brightview Ltd* [2004] 2 BCLC 191 at [55]) that the term "damages" may not be the best label for such an award as "that word connotes the financial award a court makes pursuant to a common law cause of action in tort or contract".

108 *Atlasview Ltd v Brightview Ltd* [2004] 2 BCLC 191 at [62]–[63].

109 This is the predecessor to Companies Act 2006 (c 46) (UK) s 994.

> loss. For these reasons, the 'reflective loss argument' does not provide a bar to any of the relief sought in the petition. The fact that the impugned conduct might give rise to a cause of action at the suit of the company does not mean that it is incapable also of giving rise to unfair prejudice.

54 The correctness of the deputy judge's holding was considered "highly questionable" by Lord Scott, sitting as a non-permanent judge in the Court of Final Appeal of the Hong Kong Administrative Region in the decision of *Re Chime Corp Ltd*.[110] His Lordship opined:[111]

> An order for payment or transfer of a part of the company's assets to the petitioning shareholders is, I would think, an order that could only properly be made in a winding-up of the company, or as a distribution of the company's profits, or as part of a reduction of the company's capital … Otherwise the interests of the company's creditors would be at risk.

55 With respect, such a rigid application of the no reflective loss principle to the oppression remedy will, as the deputy judge pointed out,[112] denude the statutory remedy of much of its intended purpose and utility. As pointed out earlier, majority shareholders who abuse their power and position in a company often do so through acts that will almost always also involve wrongs to the company. Where, as is often the case, the companies involved in such cases are quasi-partnerships,[113] and the impugned acts, whether of mismanagement or misuse of corporate resources, benefitted the very wrongdoers themselves, it would quite literally "fly in the face of common sense" to dictate that any action in respect of these wrongs must be mediated through the company.

56 However, if following *Jenton*, discretion is retained by the Singapore court to allow recovery notwithstanding an element of reflective loss being present in the remedy sought, the court could address the concerns of double recovery and creditor protection by adjusting the order appropriately. On this point, Deputy Judge Crow made the following observations in *Atlasview Ltd v Brightview Ltd*:[114]

> In deciding on the appropriate form of relief, the trial judge will no doubt be astute to ensure that the B shareholders do not achieve double recovery by receiving financial compensation directly from the A shareholders and also retaining their B shares in Brightview in circumstances where the company is able (if it is) to recover in respect of the same loss: indeed, it seems to me most likely that the trial judge would, if the petition succeeded, order the respondents to acquire the

110 [2004] 3 HKLRD 922 at [46].
111 *Re Chime Corp Ltd* [2004] 3 HKLRD 922 at [46].
112 *Atlasview Ltd v Brightview Ltd* [2004] 2 BCLC 191 at [61].
113 See n 71 above.
114 [2004] 2 BCLC 191 at [63].

> [petitioners'] shares, valued on the basis that there had been no transfer to Freshbox, rather than making an award of damages (however described). But that is a matter for his discretion, if and when it comes to considering the appropriate form of relief. It is not a ground for summarily striking out the petition, or any particular head of relief currently pleaded in it.

57 Such an approach would, it is submitted, maintain consistency in the application of policies across shareholder actions generally.[115] It should also be noted that s 216 provides specifically for the court, by its order, to "authorise civil proceedings to be brought in the name of or on behalf of the company by such person or persons and on such terms as the Court may direct".[116] Thus, if the complaint is, on final analysis, primarily corporate, justice to all affected may be better served by litigating through the company by means of a derivative action.

V. Conclusion

58 Undoubtedly, the no reflective loss principle, as laid down in *Prudential Assurance* and as clarified in *Johnson*, is driven by sound policy reasons. However, these policy reasons are not always applicable nor are they in themselves unassailable. As the task of any court should be to achieve justice and fairness on the particular facts before it, there is much to be said for retaining discretion over whether to allow a personal suit or not. Justice is necessarily context-driven. To apply a rigid rule regardless of context, therefore, raises the real risk of denying the wronged party appropriate remedy. Whilst consistency and predictability are important in law, pursuing these should not be at the expense of justice. As Lai Kew Chai J stated in *Hengwell Development Pte Ltd v Thing Chiang Ching*:[117]

> A litigant is not to be lightly turned away from bringing a *genuine* cause before our courts. [emphasis added]

59 However, to ensure that the cause brought by a shareholder is indeed *genuine*, the asserted claim must, in the first place, be one that can properly be classified as a personal one, taking account of the source

115 See also S Griffin, "Shareholder Remedies and the No Reflective Loss Principle – Problems Surrounding the Identification of a Membership Interest" [2010] JBL 461 at 468 where the observation was made that the oppression remedy, being a statutory provision, is not subject to the constraints of the common law. This notwithstanding, in the interests of consistency of policies, the court could, in exercising its discretion to order an appropriate remedy, take account of the policy concerns raised by the no reflective loss principle. See also B Hannigan, "Drawing Boundaries between Derivative Claims and Unfairly Prejudicial Petitions" [2009] JBL 606.

116 Companies Act (Cap 50, 2006 Rev Ed) s 216(2)(*c*).

117 [2002] 2 SLR(R) 454.

and nature the right asserted. Only then should the court entertain the shareholder's claim and proceed to consider whether the policy concerns that support the rule may be adequately dealt with in the particular case.