Case Note

CAUSATION IN EQUITABLE COMPENSATION

The *Brickenden* Rule in Singapore

Then Khek Koon v Arjun Permanand Samtani
[2014] 1 SLR 245

The controversial rule in *Brickenden v London Loan & Savings Company of Canada* [1934] 3 DLR 465 was recently introduced into the local jurisprudence on equitable compensation for breach of fiduciary duty. In *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245, the High Court accepted *Brickenden* as authority for the proposition that if a fiduciary is in one of the well-established categories of fiduciaries and has committed a culpable breach of his core duties of honesty and fidelity, he is liable to pay equitable compensation even if but-for causation cannot be proved. This note critically reviews the importation and the interpretation of the *Brickenden* rule by the High Court.

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I. Introduction

1 The Privy Council case of *Brickenden v London Loan & Savings Company of Canada*[1] ("*Brickenden*") has long been a point of controversy in the law on equitable compensation for breach of fiduciary duty. The case is said to stand for the strict rule that an errant fiduciary who withheld material facts from his principal in a loss-making transaction cannot escape liability by arguing that his non-disclosure was irrelevant. In effect, this dispenses with the need for a causal link between the fiduciary's breach and the principal's loss. Unsurprisingly, *Brickenden* has been subject to considerable judicial and academic criticism in other jurisdictions.

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1 [1934] 3 DLR 465.

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2 *Brickenden* was accepted as good law in *Quality Assurance Management Asia Pte Ltd v Zhang Qing*[2] ("*QAM*") and *Then Khek Koon v Arjun Permanand Samtani*[3] ("*Then Khek Koon*"), both of which were presided over by the same learned judge.[4] In particular, in the later case of *Then Khek Koon*, Vinodh Coomaraswamy J accepted *Brickenden* as authority for the proposition that:[5]

> A fiduciary who is in one of the well-established categories of fiduciaries and who commits a culpable breach of his core duties of honesty and fidelity is liable to pay equitable compensation *even if the object of those duties is unable to prove but-for causation*. [emphasis added]

3 Whilst *Then Khek Koon* has clarified some points of uncertainty in *QAM* concerning the application of the *Brickenden* rule, this note argues that the importation of the *Brickenden* rule should in the first place be reconsidered, having regard to the specific context in which the said rule was developed as well as the developments in other common law jurisdictions. More importantly, it is suggested that the *Brickenden* rule as interpreted and applied in *Then Khek Koon* raises theoretical and practical problems.

II. Facts and judgment

4 The material facts of *Then Khek Koon* can be simply stated. Both defendants were members of the sale committee ("SC") in charge of the collective sale of a condominium ("Property"), while the plaintiffs were subsidiary proprietors of the Property who objected to the sale. Unbeknownst to other subsidiary proprietors, the defendants each purchased an additional unit in the Property before the collective sale process was formally launched through an extraordinary general meeting in April 2006.[6] This came to light only during the discovery process following the plaintiffs' objection to the collective sale application before the Strata Titles Board in May 2007.[7] On this newfound fact, the plaintiffs argued that the impetus for a hurried sale placed the defendants in a position of conflict,[8] thereby constituting one

2 [2013] 3 SLR 631.
3 [2014] 1 SLR 245.
4 For ease of reference, this note addresses his Honour as "Coomaraswamy J" when discussing both *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 and *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245, although his Honour wrote the judgment in the first case as a Judicial Commissioner.
5 *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 at [108].
6 *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 at [16]–[17].
7 *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 at [128]; *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109 at [18].
8 *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109 at [51] and [81].

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of several instances of bad faith on the SC's part in the collective sale process under s 84A(9)(*a*)(i) of the Land Titles (Strata) Act.[9]

5 The dispute went all the way up before the Court of Appeal. In *Ng Eng Ghee v Mamata Kapildev Dave*[10] ("*Ng Eng Ghee*"), the Court of Appeal ruled in favour of the plaintiffs and set aside the collective sale order. The Court of Appeal found that, generally, a sale committee owes fiduciary duties *qua* agent to the subsidiary proprietors of a strata development in a collective sale.[11] In this case, the SC had breached its duties as fiduciary by, *inter alia*, deciding to sell the property when the two defendants, being key members of the SC leading the collective sale process, acted in undisclosed potential conflicts of interest arising from their purchase of the additional units.[12]

6 Although the plaintiffs successfully resisted the collective sale, they failed to recover fully the substantial legal costs that were incurred in the protracted litigation. The plaintiffs therefore commenced fresh proceedings in *Then Khek Koon* to claim equitable compensation against the defendants, on the basis that the defendants' breach of fiduciary duty had caused the plaintiffs to oppose the collective sale which resulted in them suffering losses in the form of unrecovered legal costs.[13]

7 Coomaraswamy J dismissed the plaintiffs' claims. He first held that the judgment in *Ng Eng Ghee* was binding – the defendants owed the plaintiffs fiduciary duties[14] and had breached those duties.[15] The next question was whether the defendants' breach had caused the plaintiffs' losses. On this issue, Coomaraswamy J referred to his judgment in *QAM*, and proceeded to delineate three categories of claims based on the cases of *Bristol and West Building Society v Mothew*[16] ("*Mothew*"), *Brickenden* and *Target Holdings Ltd v Redferns*[17] ("*Target Holdings*"):[18]

> (a) Any fiduciary's liability for breaches of his duties of skill and care and of prudence and diligence are subject to the doctrines of foreseeability, causation and remoteness: *Mothew*.

9 Cap 158, 1999 Rev Ed. The said provision, which has since been amended to include the High Court in its ambit, provided that "[t]he Board shall not approve an application made under subsection (1) if the Board is satisfied that the transaction is not in good faith".

10 [2009] 3 SLR(R) 109.

11 *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109 at [104]–[169].

12 *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109 at [188]–[191] and [210].

13 *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 at [6] and [11]–[13].

14 *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 at [76].

15 *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 at [102].

16 [1998] Ch 1.

17 [1996] 1 AC 421.

18 *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 at [108].

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(b) A fiduciary who is in one of the *well-established categories of fiduciaries* and who commits a *culpable* breach of his *core duties of honesty and fidelity* is liable to pay equitable compensation *even if the object of those duties is unable to prove but-for causation: Brickenden*.

(c) A fiduciary who is in one of the well-established categories of fiduciaries and who causes loss to the trust property as a result of an innocent breach of his fiduciary duties is not liable to reconstitute the trust property unless the object of those duties is able to prove at least a but-for causal connection between the breach of fiduciary duty and the loss to the trust fund: *Target Holdings*.

[emphasis added]

8 The present case fell under category (c) for two reasons. First, the novel sale committee/subsidiary proprietors fiduciary relationship was not a well-established category of fiduciary relationship.[19] Second, since the defendants did not actively conceal their additional purchases, they had not committed a culpable breach of core fiduciary duty.[20] Accordingly, the plaintiffs were required to prove that but for the defendants' breach of fiduciary duty, their losses would not have occurred. The plaintiffs failed on this count as Coomaraswamy J found that they would have resisted the collective sale in any event.[21] In any case, the plaintiffs were barred from claiming their unrecovered costs from the defendants as equitable compensation, as the Court of Appeal in *Ng Eng Ghee* had already decided how the plaintiffs ought to be indemnified.[22]

III. Comments

A. *Clarification of* QAM

9 The preliminary observation to be made is that Coomaraswamy J's unequivocal judgment in *Then Khek Koon* helps to clarify some ambiguity in the earlier case of *QAM*. In *QAM*, a company successfully claimed, *inter alia*, equitable compensation against an ex-employee for losses caused by his wrongful diversion of business opportunities in breach of fiduciary duty. In the course of the judgment in *QAM*, it was stated that where *Brickenden* applies, it is still necessary for the principal to prove that the fiduciary's breach is "*in some way*

19 *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 at [117]. Without pursuing the point further, this appears to contradict the holding that category (c), just like category (b), is reserved for well-established categories of fiduciaries.
20 *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 at [115] and [117].
21 *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 at [121]–[150].
22 See *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 at [151] and [295].

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connected to the loss, even if it was simply to set the occasion for the loss"[23] [emphasis added]. Immediately thereafter, however, it was held that even if the loss would occur *in the absence* of the fiduciary's breach, liability would attach under the *Brickenden* rule.[24] The issue became further clouded by suggestions elsewhere in *QAM* that *Brickenden* does *not* nullify the requirement of but-for causation.[25] Indeed, even though *Brickenden* was avowedly applied "with full stringency" on the facts of *QAM*,[26] Coomaraswamy J proceeded to undertake a close analysis to determine if the defendant had caused the plaintiff's losses on a but-for basis.[27]

10 In any event, the more important questions at hand are whether the *Brickenden* rule should, in the first place, be imported into Singapore law, and if so, whether the formulation of the *Brickenden* rule in *Then Khek Koon* is sensible. It is to these questions that this case note now turns.

B. Examining the **Brickenden** *rule*

(1) Context in Brickenden

11 To begin with, is the *Brickenden* rule really an inflexible principle which applies regardless of the context? The Privy Council's precise holding in *Brickenden*, out of which the *Brickenden* rule is said to arise, is as follows:[28]

> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.

23 *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [43].

24 *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [43].

25 See *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [52] and [60]–[61]. It is also stated in the judgment's headnote that:

> … [t]his case lay at the core, not the boundaries, of the *Brickenden* principle. Accordingly, the *Brickenden* principle did and should apply with full stringency, *with the proviso that the legal burden of proving 'but for' causation remained on the plaintiff throughout*. [emphasis added]

26 *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [56].

27 See *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [68]–[70], [85], [95], [106] and [111].

28 *Brickenden v London Loan & Savings Company of Canada* [1934] 3 DLR 465 at [16].

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12 Notwithstanding the broad phraseology used, this key passage needs to be read in the light of the specific facts in the *Brickenden* litigation. In the Privy Council's condensed judgment, the given facts are that the respondent finance company advanced a loan to a mortgagor on the advice of the appellant solicitor without knowing that the appellant benefited personally from the transaction, in that the mortgagor was to use part of the loan to repay debts that he separately owed to the appellant. On the mortgagor's default, the respondent sought to recover its loss by claiming that the appellant breached his fiduciary duty in not disclosing his personal interest in the transaction. This account omits a piece of information which sheds important interpretive light on the Privy Council's holding: the Supreme Court of Canada had earlier doubted that the transaction could have been executed without the complicity of the respondent's directors, but the appellant had, curiously, refused to provide any evidence, whether to exculpate himself or to inculpate other parties.[29]

13 This may explain why the Privy Council specifically emphasised its refusal to "speculate" on what the respondent company would have done if the appellant had disclosed his personal interest.[30] The appellant's breach was indispensable in the chain of causation, and only the directors' defaults could constitute *novus actus interveniens* – in this regard, however, no evidence was available before the court. Against this background, care should be taken when applying *Brickenden* where there is clear evidence that the fiduciary's disclosure would *not* have averted the principal's loss anyway.[31]

(2) Current status of Brickenden *in other jurisdictions*

14 Compared to the position in *Then Khek Koon*, the courts in other jurisdictions have received *Brickenden* in much less stringent forms, albeit to varying degrees. In Australia, a precise and consistent formulation of the *Brickenden* rule – assuming one can indeed be distilled from the Privy Council's judgment – remains elusive, but it is at least clear that the courts eschew a strict reading of *Brickenden*.[32] It was

29 See *Biggs v London Loan & Savings; London Loan & Savings Co v Brickenden* [1933] SCR 257 at [13], [19] and [20].

30 This point was made in *Beach Petroleum NL v Abbott Tout Russell Kennedy* [1999] NSWCA 408 at [438]–[446] and *Nationwide Building Society v Balmer Radmore* [1999] PNLR 606 at 662–663.

31 *Nationwide Building Society v Balmer Radmore* [1999] PNLR 606 at 663. See also Jamie Glister, "Equitable Compensation" in *Fault Lines in Equity* (Jamie Glister & Pauline Ridge eds) (Hart Publishing, 2012) ch 7, at p 161.

32 Matthew Conaglen, "Remedial Ramifications of Conflicts between a Fiduciary's Duties" (2010) 126 LQR 72 at 82.

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roundly held in *Beach Petroleum NL v Abbott Tout Russell Kennedy*[33] that:[34]

> *Brickenden* is not … authority for the general proposition that, in no case involving breach of fiduciary duty, may the court consider what would have happened if the duty had been performed.

Likewise, it was categorically stated in *Watson v Ebsworth & Ebsworth*[35] that *Brickenden* "does not negative the requirement for some proof of causation".[36] Even when *Brickenden* is purportedly accepted, the courts are quick to append the qualifier that *Brickenden* does not derogate from the need for the plaintiff to prove causation.[37]

15 In England, after some earlier misgivings,[38] it is now accepted that *Brickenden* has not changed the fact that "[t]here is no equitable by-pass of the need to establish causation" in claims for equitable compensation.[39] As held in *Then Khek Koon*, *Target Holdings* has established a but-for test[40] that applies "*regardless of whether the breach was innocent, negligent, or fraudulent*"[41] [emphasis added]. Even the apparent prohibition against speculation has diminished in theoretical

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33 [1999] NSWCA 408.

34 *Beach Petroleum NL v Abbott Tout Russell Kennedy* [1999] NSWCA 408 at [444], cited in *Rigg v Sheridan* [2008] NSWCA 79 at [56].

35 [2010] VSCA 335.

36 *Watson v Ebsworth & Ebsworth* [2010] VSCA 335 at [165].

37 See, *eg*, *Short v Crawley (No 30)* [2007] NSWSC 1322 at [427]–[441]; *Hydrocool Pty Ltd v Hepburn* [2011] FCA 495 at [464]–[466]; and *Hodgson v Amcor Ltd* [2012] VSC 94 at [1653]–[1661].

38 In *Swindle v Harrison* [1997] 4 All ER 705 at 717, Evans LJ had held that:

> … the stringent rule of causation or measure of damages [in *Brickenden*] does not apply as regards breaches of equitable duties *unless the breach can properly be regarded as the equivalent of fraud* [emphasis added].

For a critique of this decision, see Yeo Tiong Min & Hans Tjio, "Limited Liability for Breach of Fiduciary Duty" (1998) 114 LQR 181 at 182–185 and Charles Rickett, "Compensating for Loss in Equity – Choosing the Right Horse for Each Course" in *Restitution and Equity Volume One: Resulting Trusts and Equitable Compensation* (Peter Birks & Francis Rose eds) (Mansfield Press, 2000) ch 10, at pp 183–184.

39 *Swindle v Harrison* [1997] 4 All ER 705 at 733. See *Snell's Equity* (John McGhee QC gen ed) (Sweet & Maxwell, 32nd Ed, 2010) at para 7-051 and Philip H Pettit, *Equity and the Law of Trusts* (Oxford University Press, 12th Ed, 2012) at p 510.

40 See, however, Peter Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214 at 225–227 and Peter Millett, "Proprietary Restitution" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) ch 12, at pp 310–311, where Lord Millett wrote extra-judicially that *Target Holdings Ltd v Redferns* [1996] 1 AC 421 should be rationalised as a case which concerned the accounting of trust property and which therefore raised no question of causation.

41 *Underhill and Hayton: Law Relating to Trusts and Trustees* (David Hayton gen ed) (LexisNexis, 18th Ed, 2010) at para 87.29. See also *Collins v Brebner* [2000] Lloyd's Rep PN 587 at [53]–[64].

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and practical importance, as it has come to be recognised that, plainly, a defence is not mere speculation once evidence is adduced.[42] On this view, contrary to the far-reaching interpretation adopted in *Then Khen Koon*, *Brickenden* did not lay down any absolute rule at its core – even though the opportunity was not taken up by the appellant on the unusual facts of *Brickenden*, it remains open for a defendant to convince the court to make reasonable hypotheses on the effect of disclosure through cogent evidence.[43] This interpretation of *Brickenden* was judicially accepted in *Nationwide Building Society v Balmer Radmore*,[44] where Blackburne J stated that:[45]

> … nothing in the authorities compels [the court] to disregard any inference which, on the evidence, can properly be drawn as to what would have happened if the fiduciary had performed his duty.

16 Interestingly, this is also how *Brickenden* has been interpreted in Canada even though *Brickenden* was an appeal from that jurisdiction. In *Hodgkinson v Simms*,[46] *Brickenden* was simply cited as authority for:[47]

> … the long-standing equitable principle that where the plaintiff has made out a case of non-disclosure and the loss occasioned thereby is established, the onus is on the defendant to prove that the innocent victim would have suffered the same loss regardless of the breach.

For this purpose, La Forest J held that "mere 'speculation' on the part of the defendant will not suffice", but "concrete evidence" would.[48]

17 Finally, a similar interpretation of *Brickenden* is, in principle, also adopted in New Zealand,[49] although a stricter approach prevails there in so far as a defendant must satisfy a higher standard of proof to establish that the plaintiff's loss would have occurred in any event.[50] This

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42 J D Heydon, "Causal Relationships between a Fiduciary's Default and the Principal's Loss" (1994) 110 LQR 328 at 332. See also Denis S K Ong, *Ong on Equity* (The Federation Press, 2011) at p 419.

43 Yeo Tiong Min & Hans Tjio, "Limited Liability for Breach of Fiduciary Duty" (1998) 114 LQR 181 at 185.

44 [1999] PNLR 606.

45 *Nationwide Building Society v Balmer Radmore* [1999] PNLR 606 at 671.

46 [1994] 3 SCR 377.

47 *Hodgkinson v Simms* [1994] 3 SCR 377 at [76].

48 *Hodgkinson v Simms* [1994] 3 SCR 377 at [76]. See also Jeff Berryman, "Equitable Compensation for Breach by Fact-Based Fiduciaries: Tentative Thoughts on Clarifying Remedial Goals" (1999) 37 *Alberta Law Review* 95 at 108 and Jamie Glister, "Equitable Compensation" in *Fault Lines in Equity* (Jamie Glister & Pauline Ridge eds) (Hart Publishing, 2012) ch 7, at pp 165–167.

49 See, *eg*, *Everist v McEvedy* [1996] 3 NZLR 348 at 355; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 at 687; and *Maruha Corp v Amaltal Corp* [2007] 3 NZLR 192 at [30].

50 Jamie Glister, "Equitable Compensation" in *Fault Lines in Equity* (Jamie Glister & Pauline Ridge eds) (Hart Publishing, 2012) ch 7, at p 162, citing *Everist v McEvedy*

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became more pronounced following *Premium Real Estate v Stevens*,[51] where Elias CJ expressly disagreed with the majority of the Supreme Court of New Zealand that the effect of *Brickenden* is to reduce the "escape route" of a defendant to a "narrow" one.[52] Be that as it may, the need for causation between the fiduciary's breach and the principal's loss remains.

C. Formulation of the **Brickenden** *rule in* **Then Khek Koon**

(1) Parameters of the rule: Presumption and assumption

18 It can therefore be seen that by removing even the need for but-for causation, Singapore has ascribed the strictest effect to *Brickenden* amongst the common law jurisdictions. The application of *Brickenden* here, however, is limited to a defined class of cases: it applies only if (a) the fiduciary is in one of the *well-established categories of fiduciary relationships*; (b) he commits a *culpable* breach; and (c) he breaches an obligation which stands at the *very core* of the fiduciary relationship.[53] Presumably, where the fiduciary is a non-trustee fiduciary, equity should be more forbearing.[54] Underlining the formulation is also the assumption that a defaulting fiduciary might not be morally blameworthy.[55]

19 This manner of moderating the impact of *Brickenden* is unique to Singapore. Its genesis is interesting: when *Brickenden* was first accepted in *QAM*, Coomaraswamy J had referred to[56] a comment made[57] by the majority of the High Court of Australia in *Maguire v Makaronis*[58] ("*Maguire*") to the effect that the strict rule under *Brickenden* may be appropriate when the fiduciary relationship in question is an indisputable one. However, it appears that save for one instance where it was mentioned fleetingly,[59] this part of *Maguire* has not been accorded any weight in later cases across the common law jurisdictions. On the

[1996] 3 NZLR 348 at 356 and *Taylor v Schofield Peterson* [1999] 3 NZLR 434 at 445–446, where the courts held, respectively, that the defendant fiduciary has only a "*narrow* escape route" [emphasis added] and that he must prove that the principal would have "acted in *precisely* the same manner" [emphasis added]. See also Jamie Glister, "Breach of Fiduciary Duty: *Brickenden* Lives On" (2011) 5 *Journal of Equity* 59.

51 [2009] 2 NZLR 384.

52 See *Premium Real Estate v Stevens* [2009] 2 NZLR 384 at [38] and [86].

53 *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [56].

54 *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [52].

55 *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [52]; *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 at [108].

56 See *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [53].

57 See *Maguire v Makaronis* (1997) 188 CLR 449 at 474.

58 (1997) 188 CLR 449.

59 See *O'Halloran v R T Thomas & Family Pty Ltd* [1998] 45 NSWLR 262 at 281.

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contrary, the courts have stressed that *Maguire* expressed no concluded view on the authority and scope of *Brickenden*,[60] in recognition of the proviso in *Maguire* itself that *Maguire* "does not provide any occasion for testing the reasoning in *Brickenden*"[61] since causation was not a live issue.[62]

(2) Some conceptual and practical difficulties

20 Leaving aside the different position in other jurisdictions, it is respectfully submitted that the formulation of the *Brickenden* rule in *Then Khek Koon* raises some conceptual and practical problems. First, why should "well-established" categories of fiduciary relationships be distinguished from those that are presumably not, given that they are all fiduciary relationships? It was emphasised in both *QAM* and *Then Khek Koon* that categories of fiduciaries are not closed, and the point seems to be that a defendant who unexpectedly finds himself in a fiduciary capacity deserves to be treated more leniently. However, whether the stringency of equity is warranted would already be determined when deciding whether fiduciary obligations should be imposed in the first place. Elsewhere, it has been said that fiduciary duties may arise either out of particular relationships *per se* or specific conduct between two parties[63] (which is slightly different from inquiring how "novel"[64] a fiduciary relationship is), but no remedial consequence turns on the distinction. Moreover, although much emphasis was placed on the differences between the sale committee/subsidiary proprietor and

60 See, *eg*, *O'Halloran v R T Thomas & Family Pty Ltd* [1998] 45 NSWLR 262 at 276; *Aequitas Ltd v AEFC Leasing Pty Ltd* [2001] NSWSC 14 at [447]; and *BigTinCan Ltd v Ramsay* [2013] NSWSC 1248 at [92].

61 *Maguire v Makaronis* (1997) 188 CLR 449 at 471.

62 The impugned transaction in *Maguire v Makaronis* (1997) 188 CLR 449 was liable to be rescinded from the outset: see *Maguire v Makaronis* (1997) 188 CLR 449 at 467 and 472. Unlike claims for equitable compensation, which are loss-based, causation is irrelevant for the equitable remedy of rescission – the latter operates on the basis that the fiduciary was disabled from entering into the impugned transaction in the first place: *Snell's Equity* (John McGhee QC gen ed) (Sweet & Maxwell, 32nd Ed, 2010) at para 7-051. Ironically, it has been argued that *Brickenden v London Loan & Savings Company of Canada* [1934] 3 DLR 465 ("*Brickenden*") applies only where the claimant is seeking rescission or an account of profits: see, *eg*, *Swindle v Harrison* [1997] 4 All ER 705 at 726; *Gwembe Valley Development v Thomas Koshy* [2003] EWCA Civ 1048 at [144]–[147]; *Murad v Al-Saraj* [2005] EWCA Civ 959 at [101]–[110]; *White v Illawarra Mutual Building Society Ltd* [2002] NSWCA 164 at [142]–[144]; and *Ibrahim v Pham* [2005] NSWSC 246 at [295]. However, this requires a strained reading of *Brickenden* given that the remedy sought and awarded in the case was compensation for loss: see Matthew Conaglen, "Remedial Ramifications of Conflicts between a Fiduciary's Duties" (2010) 126 LQR 72 at 83–84.

63 See *LAC Minerals Ltd v International Corona Resources Ltd* [1989] 61 DLR (4th) 14 at [90].

64 See *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 at [77] and [117].

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trustee/beneficiary relationships,[65] it is not immediately clear why any resemblance or lack thereof between the two is *ipso facto* pivotal – the trustee is the paradigm of a fiduciary, but the former does not in and of itself constitute any criteria in establishing a fiduciary relationship.[66] For one, company directors are not trustees,[67] but their fiduciary position *vis-à-vis* the company is irrefutable. In any event, it might be questioned if concerns over the novelty of a fiduciary relationship are warranted, given its distinctive hallmarks[68] and the courts' guardedness against the imposition of fiduciary obligations in commercial transactions.[69]

21 As a matter of practical application, it is not clear what the existing well-established categories of fiduciary relationships are, other than the employer/employee, trustee/beneficiary, director/company, principal/agent, solicitor/client relationships and that between partners.[70] Assuming that the list is not immutable, it is also unclear when a fiduciary relationship can be said to have become well established. For instance, is the sale committee/subsidiary proprietor relationship now in a well-established category after being affirmed in one more Court of Appeal judgment after *Ng Eng Ghee*?[71] A variety of relationships, which have not yet been considered locally, have been found to constitute fiduciary relationships in other jurisdictions[72] – how should these categories be regarded by local courts?

22 Further, how should one distinguish between "innocent" and "culpable" breaches of the fiduciary duties of *honesty* and *fidelity*? By definition, breach of these duties entails dishonesty and infidelity – short of exceptional situations such as judicious breaches of trust,[73] the

65 See *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 at [114]. See also *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [52].
66 See *Hospital Products Ltd v United States Surgical Corp* (1984) 55 ALR 417 at 488.
67 *Regal (Hastings) v Gulliver* [1967] 2 AC 134 at 159; *Bairstow v Queens Moat Houses plc* [2001] EWCA Civ 712 at [50].
68 For instance, the element of trust and confidence: see, *eg*, *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310 at [104]; *Bristol and West Building Society v Mothew* [1998] 1 Ch at 18; and Robert Pearce *et al*, *The Law on Trusts and Equitable Obligations* (Oxford University Press, 5th Ed, 2010) at p 912.
69 See Tsun Hang Tey, "Fiduciaries, Third Parties and Remedies – Singapore's Perspectives and Contribution" (2010) 24 TLI 234 at 236–237.
70 See *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [24].
71 See *N K Rajarh v Tan Eng Chuan* [2014] 1 SLR 694 at [40]–[44].
72 See, *eg*, *O'Sullivan v Management Agency & Music Ltd* [1985] QB 428 (manager and musician); *Norberg v Wynrib* [1992] 92 DLR (4th) 449 (doctor and patient); and *Mathew v TM Sutton Ltd* [1994] 1 WLR 1455; [1994] 4 All ER 793 (pawnbroker and pawnor).
73 See *Armitage v Nurse* [1997] Ch 241 at 251.

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fiduciary's conscience would necessarily be impugned.[74] In the present case, it was emphasised that the defendants did not actively hide the fact of their additional purchases,[75] which led to the conclusion that the defendants had merely committed "an innocent breach at the lower end of the scale of culpability".[76] However, one might question if active concealment and passive non-disclosure could be meaningfully distinguished in those circumstances – the defendants' failure to disclose sufficed all the same to hide the fact of their additional purchases from the other subsidiary proprietors. It was stressed that the defendants had sought and relied on their solicitors' advice,[77] but while Coomaraswamy J interpreted this fact favourably towards the defendants, it could just as well be construed as an indicator that the defendants were aware of the impropriety of their non-disclosure in the circumstances.[78] In any case, most of the evidence used to determine the culpability of the breach will often be supplied by the fiduciaries themselves in practice – could the evidence, no matter its abundance, reliably resolve the issue?

23 No doubt, plaintiffs suing for breach of fiduciary duty will now be eager to rely on the *Brickenden* rule as formulated in *Then Khek Koon* to circumvent the causation requirement. By their very nature, these claims will invariably involve allegations of iniquitous conduct on the part of the defendants. So long as the defendant is a well-established fiduciary – a requirement that will certainly be satisfied in the usual claims against company directors for breach of fiduciary duties – a judge who finds a breach made out may need to resort to some degree of artificial reasoning as to the defendant's state of mind to bring the case out of the *Brickenden* category.

24 Finally, another reason for Coomaraswamy J's strict interpretation of *Brickenden* is the perceived need to enforce equity's

74 See Charles Rickett, "Compensating for Loss in Equity – Choosing the Right Horse for Each Course" in *Restitution and Equity Volume One: Resulting Trusts and Equitable Compensation* (Peter Birks & Francis Rose eds) (Mansfield Press, 2000) ch 10, at p 186. *Cf Murad v Al Saraj* [2005] EWCA Civ 959 at [82] and [121], where Arden and Parker LJJ suggested that honest and dishonest fiduciaries can be distinguished through fact-sensitive inquiries.

75 *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 at [115].

76 *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 at [117].

77 *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 at [116].

78 See *Bhullar v Bhullar* [2003] EWCA Civ 424 at [41]:

> The anxiety which the appellants plainly felt as to the propriety of purchasing the property through Silvercrest without first disclosing their intentions to their co-directors – anxiety which led Inderjit to seek legal advice from the company's solicitor – is, in my view, eloquent of the existence of a possible conflict of duty and interest.

See also Matthew Conaglen, "Strict Fiduciary Loyalty and Accounts of Profits" (2006) 65 CLJ 278 at 280–281.

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central tenets of prophylaxis and deterrence against errant fiduciaries.[79] As it is, however, *Target Holdings* and *Mothew* have established a two-tiered approach in establishing liability for a fiduciary's breach of duties.[80] In this regard, the but-for test under *Target Holdings* already constitutes a "plaintiff-friendly"[81] rule which gives effect to the view that "breach of fiduciary obligations ought to be treated with especial severity".[82] In considering whether a stricter third category under the rubric of *Brickenden* is necessary or desirable, it may be prudent to bear in mind that, as one commentator astutely cautioned, "it is one thing to strip a fiduciary of profit without much inquiry; it is another to hold him accountable for all loss without inquiry into relative causes".[83]

IV. Conclusion

25 As attested to by the judicial and academic ink that has been spilt in other jurisdictions, *Brickenden* is a perplexing authority. This case note has argued that the importation of *Brickenden* into Singapore law and the formulation of the *Brickenden* rule in *Then Khek Koon* should, with respect, be reconsidered. It is understood that *Then Khek Koon* is going on appeal. As the law on equitable compensation in

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79 *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [41]–[42] and [59].

80 See Joshua Getzler, "Am I My Beneficiary's Keeper? Fusion and Loss-Based Fiduciary Remedies" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) ch 10, at p 251. However, this dualist approach is itself an issue of some controversy. For instance, it has been criticised for relaxing the prophylactic pressures on the duties of skill, care and diligence: see Joshua Getzler "Equitable Compensation and the Regulation of Fiduciary Relationships" in *Restitution and Equity Volume One: Resulting Trusts and Equitable Compensation* (Peter Birks & Francis Rose eds) (Mansfield Press, 2000) ch 13, at pp 255–257; J D Heydon, "Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) ch 9, at p 185.

81 Charles Rickett, "Compensating for Loss in Equity – Choosing the Right Horse for Each Course" in *Restitution and Equity Volume One: Resulting Trusts and Equitable Compensation* (Peter Birks & Francis Rose eds) (Mansfield Press, 2000) ch 10, at p 183.

82 Joshua Getzler "Equitable Compensation and the Regulation of Fiduciary Relationships" in *Restitution and Equity Volume One: Resulting Trusts and Equitable Compensation* (Peter Birks & Francis Rose eds) (Mansfield Press, 2000) ch 13, at p 244.

83 J D Heydon, "Causal Relationships between a Fiduciary's Default and the Principal's Loss" (1994) 110 LQR 328 at 332. The Court of Appeal in *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847 at [13] affirmed that an account of profits, in contradistinction to equitable compensation, "is unrelated to whether the fiduciary's conduct has caused any loss to the principal". See Tan Ruo Yu, "Equitable Allowance in Account of Profits: *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2013] SGCA 63" *Singapore Law Watch Commentary* (February 2014) at pp 5–6.

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Singapore has been in an unsettled state for some years,[84] it is hoped that the Court of Appeal will provide an authoritative re-examination of this area of the law.

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84 See Tan Sook Yee & Kelvin Low Fatt Kin, "Equity and Trust" (2004) 5 SAL Ann Rev 260 at 271, para 12.34.

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