IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 116

Civil Appeal No 28 of 2021

Between

Miao Weiguo

… *Appellant*

And

(1) Tendcare Medical Group Holdings Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)

(2) Yit Chee Wah (judicial manager of Tendcare Medical Group Holdings Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management))

… *Respondents*

In the matter of Suit No 426 of 2018

Between

(1) Tendcare Medical Group Holdings Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)

(2) Yit Chee Wah (judicial manager of Tendcare Medical Group Holdings Pte Ltd (formerly known as Tian Jian Hua

Xia Medical Group Holdings Pte Ltd)
(in judicial management))

… Plaintiffs

And

(1) Gong Ruizhong
(2) Hua Xia Tian Jian Pte Ltd
(3) Jiang Fengai
(4) Kou Lu
(5) Li Jinsheng
(6) Zhang Shuai Shuai
(7) Miao Weiguo
(8) Hui Xiang Group Pte Ltd
(9) Hui Xiang Group (HK) Limited
(10) Qian Hui Capital Limited
(11) Wang Zhengqing
(12) Gong Luyi

… Defendants

And Between

Hua Xia Tian Jian Pte Ltd

… Plaintiff in counterclaim

And

Tendcare Medical Group Holdings Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd)
(in judicial management)

… Defendant in counterclaim

JUDGMENT

[Companies] — [Members]
[Trusts] — [Accessory liability]

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Miao Weiguo
v
Tendcare Medical Group Holdings Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management) and another

[2021] SGCA 116

Court of Appeal — Civil Appeal No 28 of 2021
Sundaresh Menon CJ, Andrew Phang Boon Leong JCA, Judith Prakash JCA, Quentin Loh JAD and Chao Hick Tin SJ
20 October 2021

15 December 2021 Judgment reserved.

Andrew Phang Boon Leong JCA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the High Court judge ("the Judge") in *Tendcare Medical Group Holdings Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management) and another v Gong Ruizhong and others* [2021] SGHC 80 ("the Judgment"), which held, *inter alia*, that the appellant, Mr Miao Weiguo ("Mr Miao"), was liable for a total sum of US$6m in respect of two transfers of US$2m and US$4m each, on the basis that he had dishonestly assisted Mr Gong Ruizhong ("Mr Gong"), the director of the first respondent, Tendcare Medical Group Holdings Pte Ltd ("Tendcare"), which is presently under judicial management, in breaching duties owed to Tendcare.

2 In addition to disputing the Judge's factual findings centring, in the main, on the element of dishonesty in the context of the allegation of dishonest assistance, Mr Miao raised, before this court, an important legal issue which he argued ought to result in the appeal being allowed even if the Judge's findings were upheld. This issue concerns the "no reflective loss" principle (or, for convenience, "the reflective loss principle"). More specifically, he argued that the reflective loss principle as set out in *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 SLR(R) 597 ("*Townsing*") operated in such a manner as to bar the respondents' claim. However, this particular conception of the reflective loss principle was – as Mr Miao rightly conceded – *directly at odds* with that of the *majority* of the UK Supreme Court (and, we might add, of the minority as well, albeit in different ways) in *Marex Financial Ltd v Sevilleja (All Party Parliamentary Group on Fair Business Banking intervening)* [2021] AC 39 ("*Marex*"). Not surprisingly, Mr Miao argued that the majority decision in *Marex* should not be followed.

3 It is apposite to note at the outset of this judgment that underlying the legal issue just set out are fundamental differences as to the approach this court should adopt in relation to the reflective loss principle. Broadly speaking, there is a tension between two possible rationales for the reflective loss principle – one being rooted in the more *specific* sphere of *company law* and the other centring around the prevention of double recovery. The majority decision in *Marex* is based on the former rationale (holding that where there is a diminution in the value of a shareholding or in distributions to shareholders that is merely the result of a loss suffered by the company arising from a wrong committed by the defendant, the proper plaintiff to bring a claim is the company and not the shareholder, because the law does not recognise the said diminution as loss

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suffered by the shareholders personally), while the minority decision is based on the latter rationale, which it then takes to the logical conclusion that the reflective loss principle does not exist as a principle of law. To pre-empt our analysis below slightly, the approach in *Townsing* attempted to bridge these two rationales but, as the differing approaches taken in *Marex* reveal, this was an attempt which we respectfully consider to be ultimately unsustainable and should no longer be followed.

4 In deciding which approach should be adopted, we will need to consider not only (competing) arguments of principle and policy but also the historical context from which the reflective loss principle emerged. In so far as this last-mentioned point is concerned, the reflective loss principle is of relatively recent vintage and may be traced to the decision of the English Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd and others (No 2)* [1982] Ch 204 ("*Prudential*"). It is, in our view, of note even at this early juncture that the reflective loss principle first laid down in *Prudential* was clearly rooted in the *specific* sphere of *company law*. It is also significant that subsequent cases, including *Townsing*, whilst purporting to elaborate upon the reflective loss principle, introduced a new (and more *general*) element centring on the prevention of double recovery – thus raising the issue as to whether or not this elaboration was correct or was conflating two incommensurable elements with the result of diluting or undermining the effect, as well as purpose, of the reflective loss principle itself.

5 As is immediately apparent, the legal issue facing this court raises fundamental questions. It might therefore conduce towards clarity if we state our conclusion right at the outset.

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6 In *summary*, we are of the view that the reflective loss principle is one that relates to the *specific* sphere of *company law* and *we therefore* ***endorse*** *the* ***majority*** *decision* in *Marex*. To the extent that it is undergirded by principle, inasmuch as it has a specific purpose and rationale, the reflective loss principle is one that ought to be retained and we therefore do *not* agree with the minority decision in *Marex*. It follows that the approach in *Townsing* (which was, in fact, rendered by way of *obiter dicta*) is *no longer the law in Singapore*. In our respectful view, the court in *Townsing*, inadvertently perhaps, ***conflated*** a *specific* principle of *company law* with the *general* principle proscribing double recovery – resulting in the dilution or undermining of what was an otherwise clear and specific rule that had a clear and coherent rationale in the context of company law.

7 We would also observe that our endorsement of the majority decision in *Marex* by no means ignores the general principle against double recovery. Indeed, as we shall elaborate upon below, courts in every jurisdiction would probably have legal mechanisms that would prevent double recovery. This proscription is in essence a clear and commonsensical principle that is rooted in fairness and that would be apparent to even a layperson. It is also important to note that the general principle against double recovery operates not only in relation to company law but also across the entire spectrum of the law in general. We note further that it is impossible, given the myriad of possible factual matrices that can give rise to double recovery, to set out a general *normative* principle that would enable courts to prevent double recovery. It is very much an exercise that takes place on a *descriptive and factual* basis. Looked at in this light, it is not surprising that the *minority* decision in *Marex*, being based on the principle against double recovery, endorsed the same *generally* and, *to this end*, *dispensed with* the *specific* reflective loss principle. From one perspective, it

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was correct that the minority in *Marex* did not (as was the case in *Townsing*) incorrectly *conflate* the *general* principle against double recovery with the *specific* reflective loss principle under company law. That having been said, it was respectfully a step backward to have dispensed with the reflective loss principle that serves a clear purpose and function. This may well be, again respectfully, a situation where the legal baby was inadvertently thrown out together with the bathwater. Indeed, we will elaborate upon this weakness in the minority decision in *Marex* below.

8 As we shall also elaborate upon below, there may be residuary situations where the operation of the reflective loss principle might *appear* to unjustly bar a shareholder from his or her claim. However, the force of this argument depends significantly on whether one adopts a purely private law perspective, which (broadly put) calls for a remedy for every wrong done and loss caused to private property, or a company law perspective, which recognises that company law may have something to say about the scope of recoverable loss for reasons specific to this area of law. In any event, whilst some injustice (at least when seen from a purely *private law* perspective) may be occasioned, there nevertheless remain legal mechanisms that would still afford a remedy (albeit by perhaps less convenient means) to an innocent party. In this last-mentioned regard, effectively deconstructing an otherwise coherent and specific principle of company law (here, the reflective loss principle) in order to address such residuary situations would be a clear example of the old adage of "hard cases making bad law". And this would be particularly inadvisable in light of the fact that (as we have just noted) the shareholder is not, in any event, without a possible remedy in law.

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9 I would add that I was in fact on the coram of *Townsing*. However, as I observed in a concurring judgment in *Iskandar bin Rahmat v Law Society of Singapore* [2021] 1 SLR 874 (at [96]):

> On a more general level, it might also be usefully observed that the law is seldom static and develops over time. Hence, what appears to be the settled position with respect to a particular legal issue at a previous point in time might change (and even radically at that) as, *inter alia*, new arguments not hitherto considered are proffered and considered by later courts (as is consistent with the very nature of an adversarial system such as ours). This is not only a natural process but is also desirable from the perspective of both logic and principle. Indeed, it is emblematic of the development of not only the principles of common law and equity but also of (as is the case here) the interpretation of statutory provision(s) as well. And this is all to the good as judicial humility as well as a concomitant openness to new arguments are true hallmarks of the judicial function which views the attainment of substantive and procedural justice as well as fairness as its overarching and, indeed, ultimate mission with respect to every case that arises for decision. It is in the spirit of such an approach that I now consider the issue before this court afresh in light of legal arguments that were not before this court in both the previous cases.

This is eminently one such situation to which the above observations wholly apply.

10 Before turning to our analysis and decision on the issue of reflective loss, however, it is important to remember that this issue has arisen within a *specific* factual matrix. It is Mr Miao's case that the Judge's factual findings were incorrect, and that the claims against him have no foundation. Even though Mr Miao argues that the reflective loss principle would apply to prevent the respondents' claims against him *regardless* of our views on the facts, it is appropriate for us to begin by considering his factual arguments first, not least because we ultimately disagree with Mr Miao's views on the reflective loss principle. The discussion of the factual issues will clarify the nature and scope

of Tendcare's claims against Mr Miao. In truth, the reflective loss principle is really relevant only if Tendcare has a cause of action against Mr Miao in the first place.

11 So much by way of a brief introduction. We turn, first, to the factual background and decision of the court below.

Facts

The parties

12 The first respondent, Tendcare, is a Singapore-incorporated investment holding company, which owned and operated hospitals and other medical-related business through direct and indirect subsidiaries incorporated in Hong Kong and the People's Republic of China ("PRC"). We follow the Judge in referring to Tendcare and its subsidiaries as the "Tian Jian Group". Tendcare was placed under judicial management on 11 September 2017, with the second respondent, Mr Yit Chee Wah ("Mr Yit"), appointed as judicial manager.

13 As the claims by Tendcare and Mr Yit centre on allegations against the first defendant, Mr Gong, and the seventh defendant (and appellant), Mr Miao, we set out the parties as they are related to each of these two individuals.

14 On the one hand were the parties related to Mr Gong. Tendcare had been incorporated by Mr Gong who, at the material time, held the majority of shares in Tendcare beneficially through a wholly-owned holding company, Gongs Global Investment Development Holdings Limited ("Gongs Global"). Mr Gong is also the sole director and shareholder of the second defendant, Hua Xia Tian Jian Pte Ltd ("HXTJ"), a Singapore-incorporated company. The 11th and 12th defendants are Mr Gong's wife ("Ms Wang") and daughter ("Ms Gong")

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respectively. Another company, which was not a party to the suit, but was closely related to Tendcare, is its wholly-owned subsidiary, Tian Jian Hua Xia Medical Group (HK) Limited ("TJHK"). TJHK has since been wound up.

15 On the other hand were the parties related to Mr Miao, a Singapore citizen. He is the sole director and shareholder of (a) the eighth defendant, Hui Xiang Group Pte Ltd ("HXG"), a Singapore-incorporated company; and (b) the tenth defendant, Qian Hui Capital Limited ("QHC"), a Hong Kong-incorporated company. QHC was wound up in Hong Kong in October 2020 upon the application of TJHK's liquidators. Mr Miao is also the sole director of the ninth defendant, Hui Xiang Group (HK) Limited ("HXG HK"), a Hong Kong-incorporated company which (until 31 March 2015) was wholly owned by HXG. Since that date, its owner has been Imperium Mining Company (incorporated in the Cayman Islands and of which Mr Miao is the sole director).

16 At the outset, we note that Mr Miao purports to appeal against the Judge's findings as they also relate to QHC. We do not think it is correct for him to do so. As noted above, QHC has already been wound up. Mr Miao's solicitors (who had previously been acting for QHC in the High Court) recognised, in a letter to court dated 7 May 2021, that by virtue of QHC's winding up, they no longer had authority to act for QHC. There has been no further development to suggest otherwise, and indeed, the appeal is filed only in Mr Miao's name. Unless some proof can be shown that the liquidators of QHC wish to take steps in the appeal, Mr Miao is entitled only to submit in respect of his own liability, not QHC's, and neither he nor his counsel can purport to represent QHC given the winding up order. As such, we will only consider Mr Miao's liability in this appeal.

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Background to the dispute

17 The dispute at trial centred on the events surrounding Tendcare's intended initial public offering ("the Tendcare IPO") which ultimately did not take place. On appeal, the central issue concerns Mr Miao's alleged dishonest assistance of Mr Gong's transfer of funds out of the Tian Jian Group, which took place in the context of these broader events. It follows that the arguments raised by Mr Miao are relatively circumscribed and touch on only a few key factual points. Further, as there is no cross-appeal by Tendcare and Mr Yit against the Judge's finding that Mr Miao was not liable for fraudulent trading, many of the other facts discussed by the Judge are no longer relevant to the appeal. For the purposes of our judgment, we set out the facts and findings only as they are relevant to the case against Mr Miao, whether directly or as a necessary part of the context.

Various agreements relating to the preparations for the Tendcare IPO

18 In September 2013, HXG – of which Mr Miao is the sole director and shareholder – became involved in the Tendcare IPO by way of a memorandum of understanding with Beijing Tianjian Huaxia Medical Investment Management Co Ltd ("BJTJ"). Mr Ryan Gwee Yuan Kerr ("Mr Gwee"), the Chief Executive Officer ("CEO") of HXG from 2011 to December 2014, signed on behalf of HXG. Mr Gong signed on behalf of BJTJ as BJTJ's legal representative and chairman. HXG was to engage two advisers to assist in the pre-IPO restructuring, fundraising and preparations, in return for a retainer, a success fee, and a shareholding in Tendcare to be transferred to Mr Miao, Mr Gwee, and a legal adviser, Mr Sim Mong Teck ("Mr Sim"). These terms were elaborated upon in a Letter of Engagement between HXG and BJTJ. Following this, work began on the Tendcare IPO.

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19 Subsequently, a share purchase agreement ("SPA") was entered into between companies that were owned by Mr Gwee and Mr Sim (Luxe Heritage Capital Management Limited and NYC Investments Limited, respectively) and Tendcare ("the NYC/Luxe SPA"). Further, Mr Gong, Mr Gwee and Mr Sim entered into a Memorandum of Understanding in 2014 ("the 2014 MOU") in respect of the NYC/Luxe SPA. It suffices to note here that the NYC/Luxe SPA and the 2014 MOU formed a central part of the respondents' case on fraudulent trading. A dispute subsequently arose between Mr Miao, Mr Gwee and Mr Sim arising out of the NYC/Luxe SPA and other agreements.

20 On 26 January 2015, in order to resolve that dispute, Mr Gong, Mr Miao, Mr Gwee and Mr Sim signed an agreement providing for the termination of the 2014 MOU and all related agreements, including the NYC/Luxe SPA. Subsequently, Mr Gong (on behalf of Tendcare) and Mr Miao (on behalf of HXG) entered into three agreements on 1 February 2015 ("the Post-Termination Agreements"): (a) a Success Fee Agreement for 5.5% of the pre-IPO funding raised; and (b) an IPO Shares Agreement and Retainer Agreement under which HXG agreed to provide assistance concerning the reorganisation of Tendcare's medical business.

Pre-IPO restructuring

21 As a result of the preparations for its IPO, Tendcare became the ultimate holding company of the Tian Jian Group. Until 29 June 2017 (when various steps were apparently taken to divest the Tian Jian Group of its various operating units (see the Judgment at [14])), the corporate structure was as follows:

(a) Tendcare held 100% of the shares in TJHK;

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(b) TJHK held 100% of the shares of Shanxi Tian Jian Hua Xia Business Trading Co Ltd ("Shanxi TJHX WFOE");

(c) Shanxi TJHX WFOE held 100% of the shares of BJTJ; and

(d) BJTJ held the equity in all operating units of the Tian Jian Group in the PRC.

Raising of funds from investors and creditors

22 In the course of the preparation for the Tendcare IPO, pre-IPO funds were raised from various investors and creditors. We summarise the results of these fund-raising efforts in the following table:

S/N	Investor/Creditor	Nature of investment	Document	Amount
1.	Atlantis China Star Fund Limited and EFG Atlantis China Pre-IPO Master Fund LP	Subscription for 174 and 521 new ordinary shares in Tendcare at US$28,776.98 per share	SPAs dated 3 June 2014	US$5,007,195,62 and US$14,992,805.48
2.	Easom Limited ("Easom")	Subscription for 1,686 new ordinary shares in Tendcare at US$29,648.60 per share	SPA dated 4 February 2015	US$49,987,539.60
3.	Mari Mundi III Limited ("MMIII")	Loan of US$40m to TJHK, secured by, *inter alia*, charges over Mr Gong's shares in Gongs Global and Tendcare's shares in TJHK	31 March 2015	US$40m

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S/N	Investor/Creditor	Nature of investment	Document	Amount
4.	OCA V Holdings Pte Ltd (“OCA”)	Convertible note subscription	Convertible Note Subscription Agreement (“OCA CNSA”) dated 10 September 2015	US$19,978,280

Transfers of pre-IPO funds

23 A key factual plank of the respondents’ case against the defendants below centred on the movement of the pre-IPO funds into and then *out of* the Tian Jian Group. As the Judge observed, the transfers out of the Tian Jian Group can be grouped into three categories: (a) transfers from Tendcare to HXTJ (“the HXTJ Transfers”); (b) transfers from Tendcare to QHC through TJHK (“the Tendcare-TJHK-QHC Transfers”); and (c) transfers from Tendcare to HXG HK (“the HXG HK Transfers”). These were referred to by the Judge as the “Disputed Transfers”, and they totalled US$45.29m and S$500,000. It is the Tendcare-TJHK-QHC Transfers which form the basis of the claim against Mr Miao.

24 The details of the Tendcare-TJHK-QHC Transfers are as follows:

(a) On 11 March 2015, US$2m was transferred from Tendcare’s bank account to TJHK’s bank account bearing an account number ending in 2247 (“TJHK 2247”). On 15 April 2015, US$2m was transferred from another of TJHK’s bank accounts, this one bearing an account number ending in 2220 (“TJHK 2220”), to QHC’s bank

account. We refer to this sequence of events broadly as the "US$2m Transfer".

(b) On 22 September 2015, US$4m was transferred from Tendcare's bank account to TJHK 2220. On 23 September 2015, US$4m was transferred from TJHK 2220 to QHC's bank account. We refer to this sequence of events broadly as the "US$4m Transfer".

25 In so far as the latter sum of US$4m was concerned, on 24 September 2015, HK$21,395,293.50 (the equivalent of US$2,765,000) was transferred from QHC to Mr Miao's personal bank account, and then paid from Mr Miao's account to one Asia Hausse Capital Limited ("Asia Hausse") by cheque. On the same day, US$1m was transferred from QHC to Hongjia International Holdings Co Ltd ("Hongjia"). Asia Hausse is a company incorporated in the British Virgin Islands and controlled by Mr Hanford Cheung Ho Fat ("Mr Cheung"), of MCL Capital Limited ("MCL"), one of the two advisers who had been engaged to assist in the preparations for the Tendcare IPO. Further, Mr Cheung had become CEO of QHC in around December 2014.

26 It is now not disputed that the sums transferred to Asia Hausse and Hongjia eventually made their way to Mr Gong's bank accounts (see also the Judgment at [145]). A diagram of the relevant transfers relating to Mr Miao can be found in Annex 1 to this judgment.

The parties' cases below

27 The claims against Mr Miao for dishonest assistance must be understood firstly in the context of the respondents' broader claim that the Tendcare IPO was part of a scheme of fraudulent trading perpetrated by Mr Gong *and* Mr Miao (see the Judgment at [29]). In gist, the respondents claimed that they

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had used the NYC/Luxe SPA to set a false "price floor" to induce investors to subscribe for shares at an inflated price, and had fraudulently caused Tendcare to incur debts to MMIII and OCA.

28 Although the scope of the appeal is narrower than the scope of the claims brought at trial, we set out all of the claims brought by Tendcare and Mr Yit briefly in the table below for context, and elaborate on only the pleadings as they relate to the claim against Mr Gong for breaches of fiduciary duties, and against Mr Miao for dishonestly assisting those breaches.

S/N	Claim brought by	Nature of claim	Claim brought against
1.	Tendcare	Breach of fiduciary duties	Mr Gong
2.		Deceit	Mr Gong
3.		Dishonest assistance/knowing receipt	HXTJ, Mr Miao, HXG, HXG (HK), QHC, Ms Wang, Ms Gong
4.		Restitution for unjust enrichment	Mr Gong, HXTJ, Mr Miao, HXG, HXG (HK), QHC
5.		Conspiracy	Mr Gong, HXTJ, Ms Wang, Ms Gong, Mr Miao, HXG, HXG (HK), QHC
6.	Mr Yit	Fraudulent trading under s 340(1) read with s 227X(*b*) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act")	Mr Gong, HXTJ, Ms Wang, Ms Gong, Mr Miao, HXG, HXG HK, QHC

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29 For a better understanding of Tendcare's pleadings, it may be noted that it had divided the transfers into three categories: (a) the "Fraudulent Transfers" were the transfers from Tendcare to HXTJ, as well as the transfers to TJHK and then onto QHC; (b) the "Subsequent Fraudulent Transfers" were the transfers onwards from HXTJ and QHC to Asia Hausse and its related entities, as well as to the eventual destination of the funds; and (c) the "Fraudulent HXG Transfers" were the transfers from Tendcare to HXG HK.

30 Tendcare pleaded that Mr Gong had breached the fiduciary and statutory duties he owed to it by making or procuring the Fraudulent Transfers, the Subsequent Fraudulent Transfers and the Fraudulent HXG Transfers (*ie*, the Disputed Transfers as defined above). Tendcare alleged that this amounted to stealing and misappropriating moneys from Tendcare, and that the transfers were not arms-length transactions, but were "made or procured to be made by [Mr] Gong and [Mr] Miao to or for the benefit of [Mr] Gong or to entities owned or ultimately controlled by himself, [Mr] Gong's family and/or [Mr] Miao".

31 As for Mr Miao's involvement, the following was pleaded by Tendcare:

> 31. … HXTJ, [QHC] and Miao knowingly received the Fraudulent Transfers and dishonestly assisted Gong in assisting or procuring the Subsequent Fraudulent Transfers. …
>
> …
>
> 32A. Miao knew or should have known at all material times in the course of designing and implementing and/or participating in the Fraudulent Transfers, Subsequent Fraudulent Transfers, and the Fraudulent HXG Transfers, that they had been procured by, or caused to be procured by, Gong in breach of his duties to Tendcare as pleaded in paragraphs 21 to 22 above. Further, Miao (through, and/or with the dishonest assistance of the 8th to 10th Defendants) knowingly received the Fraudulent Transfers, dishonestly assisted Gong to procure the Subsequent Fraudulent Transfer, knowingly received the Fraudulent HXG Transfers and dishonestly assisted Gong in

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> concealing the Fraudulent HXG Transfers. In this regard any knowledge held by Miao should be attributable to the 8th to 10th Defendants for all purposes of this claim.
>
> …

We note here that, strictly speaking, the pleaded claim against Mr Miao for dishonest assistance in relation to the Tendcare-TJHK-QHC Transfers only pertained to the Subsequent Fraudulent Transfers, *ie*, from QHC onwards, rather than for the Fraudulent Transfers themselves, *ie*, the transfers from Tendcare to QHC *via* TJHK. However, no issue has been taken on the pleadings either below or on appeal, and we proceed as the Judge did to analyse the claim against Mr Miao as dishonest assistance for the Tendcare-TJHK-QHC Transfers.

32 In his defence, Mr Miao pleaded that the Tendcare-TJHK-QHC Transfers were made pursuant to two loan agreements: (a) one dated 14 April 2015 (with a loan extension on 14 June 2015) for the sum of US$2m at 7% interest per annum to be repaid by 13 June 2016 (the "US$2m QHC Loan"); and (b) one dated 22 September 2015 for US$4m at 7% interest per annum to be repaid by 21 September 2016 (the "US$4m QHC Loan"). He claimed that the latter loan arrangement was conceived by Mr Cheung and one Mr Eric Sin ("Mr Sin") to get funds to Mr Gong in the PRC for the latter to purchase hospitals in the country. As such, after QHC received the US$4m, US$1m was transferred to Hongjia, and US$2,765,000 was transferred to Mr Miao's bank account and then to Asia Hausse. In addition, Mr Miao pleaded that any loss was suffered by TJHK and not Tendcare. Further, or in the alternative, Tendcare and Mr Yit were precluded from recovery against the seventh to tenth defendants as any loss was reflective of the loss suffered by TJHK or allowing them to recover may result in multiple recovery due to claims that could be brought against TJHK.

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Decision below

33 We begin by summarising the Judge's key findings in respect of all of the claims in the suit below, before turning to the Judge's findings as they relate to Mr Gong's breaches of fiduciary duties in relation to the Tendcare-TJHK-QHC Transfers and Mr Miao's alleged dishonest assistance of these breaches. We emphasise the Judge's findings on liability in bold in the table below.

S/N	Nature of claim	Claim brought against	Judge's decision
1.	Breach of fiduciary duties	Mr Gong	**Mr Gong had breached his fiduciary duties in relation to the HXTJ Transfers and the Tendcare-TJHK-QHC Transfers, but not the HXG HK Transfers (see the Judgment at [144]–[147]).**
2.	Deceit	Mr Gong	The Judge only considered alternative claim of deceit in relation to HXG HK Transfers, but found no deceit (see the Judgment at [150]).
3.	Dishonest assistance / knowing receipt	HXTJ, Mr Miao, HXG, HXG (HK), QHC, Ms Wang, Ms Gong	**HXTJ was liable for dishonestly assisting with the HXTJ Transfers (see the Judgment at [153]).** **Mr Miao and QHC were liable for dishonest assistance in relation to the Tendcare-TJHK-QHC Transfers (see the Judgment at [154]).** The claim was dismissed in relation to the remaining parties (see the Judgment at [155]). It was not necessary to consider HXTJ, Mr Miao or QHC's liability for knowing receipt in relation to the HXTJ and Tendcare-TJHK-QHC Transfers (see the Judgment at [157]). All the other claims were dismissed (see the Judgment at [158]).

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S/N	Nature of claim	Claim brought against	Judge's decision
4.	Restitution for unjust enrichment	Mr Gong, HXTJ, Mr Miao, HXG, HXG (HK), QHC	It appeared that Tendcare and Mr Yit had abandoned their claim on this point (see the Judgment at [163]).
5.	Conspiracy	Mr Gong, HXTJ, Ms Wang, Ms Gong, Mr Miao, HXG, HXG (HK), QHC	Where the claim for fraudulent trading failed, the claim for unlawful means conspiracy would fail as well (see the Judgment at [160]). It was not necessary to consider the claim in conspiracy against Mr Gong and HXTJ, and against Mr Miao and QHC in relation to the HXTJ and Tendcare-TJHK-QHC Transfers respectively (see the Judgment at [162]).
6.	Fraudulent trading under s 340(1) read with s 227X(*b*) of the Companies Act	Mr Gong, HXTJ, Ms Wang, Ms Gong, Mr Miao, HXG, HXG HK, QHC	**Mr Gong and HXTJ were liable for fraudulent trading (see the Judgment at [81]).** The claim against Mr Miao was not made out, and similarly, the claims against HXG, HXG HK and QHC were not made out (see the Judgment at [105]). The claims against Ms Wang and Ms Gong were not made out (see the Judgment at [106]).

34 The Judge found that Mr Gong was liable for fraudulent trading (see the Judgment at [73]–[81]), but that Mr Miao was not involved in or aware of this scheme, and did not know about the Disputed Transfers apart from the Tendcare-TJHK-QHC Transfers (see the Judgment at [105]). As for Mr Gong's breaches of director's duties, the Judge found that Mr Gong did owe the duties pleaded by the respondents (see the Judgment at [142]), and that those duties were breached.

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(a) First, the Judge found that the HXTJ Transfers represented a "misapplication of Tendcare's funds", and therefore were "custodial breaches of Mr Gong's fiduciary duties" (see the Judgment at [144]).

(b) Second, the Judge found that the Tendcare-TJHK-QHC Transfers, *ie*, a scheme of transferring the US$6m from Tendcare to QHC via TJHK, and ultimately to Mr Gong's personal bank account, "amounted to dealing with the funds in a manner inconsistent with Tendcare's interests", and Mr Gong was therefore in breach of his fiduciary duties. In this regard, the Judge repeated his view stated in the Judgment at [101] that he did not accept the explanation for the transfers offered by Mr Miao, finding that the funds were ultimately transferred to Mr Gong's personal bank account and that there was no satisfactory explanation concerning how they were dealt with thereafter (see the Judgment at [145]).

(c) Third, however, as the HXG HK Transfers were part payment of success fees owed to HXG HK, they were legitimate payments and Mr Gong did not breach his duties in causing them to be made (see the Judgment at [146]).

35 As for the claim in dishonest assistance, the Judge found Mr Miao liable for dishonest assistance. He reiterated his view stated at [101] and [145] of the Judgment that he did not accept Mr Miao's explanation for why the sham loan agreements were used to transfer money (noting that Mr Miao had agreed to employ such "irregular means" of transferring funds). The Judge also did not accept the purported purpose for which the funds were remitted to the PRC, as the moneys ended up in Mr Gong's personal bank account, and their subsequent use was opaque. These facts called into question "the *bona fides* of the

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transactions and indeed also of Mr Miao". The Judge found that Mr Miao had facilitated Mr Gong's breaches of fiduciary duties. Mr Miao knew that the funds were not being remitted for the purpose of the Tian Jian Group's business or the Tendcare IPO, or, at the very least, he was reckless. Mr Miao's knowledge was attributable to QHC, and hence, both Mr Miao and QHC were liable for dishonest assistance in relation to the Tendcare-TJHK-QHC Transfers (see the Judgment at [154]). As there was no evidence that Mr Miao or QHC were involved in the HXTJ Transfers, however, the other claims for dishonest assistance against these parties were dismissed (see the Judgment at [155]).

36 Therefore, the Judge found that Mr Gong, Mr Miao and QHC were jointly and severally liable for the Tendcare-TJHK-QHC Transfers. The Judge then noted that the sum of US$4m in relation to the US$4m Transfer fell within both the proceeds of the loan provided by OCA (see S/N 4 at [22] above; relevant to liability for fraudulent trading) and the Tendcare-TJHK-QHC Transfers (relevant to liability for breach of director's duties and dishonest assistance). To address this, the Judge deducted US$4m from both Mr Gong and HXTJ's liability for fraudulent trading, as well as Mr Gong's, Mr Miao's, and QHC's liability for the Tendcare-TJHK-QHC Transfers, and instead made Mr Gong, HXTJ, Mr Miao and QHC jointly and severally liable for US$4m (see the Judgment at [166]). Therefore, relevant to Mr Miao are the following orders *viz*, that:

(a) Mr Gong, Mr Miao and QHC were jointly and severally liable for the sum of US$2m; and

(b) Mr Gong, HXTJ, Mr Miao and QHC were jointly and severally liable for the sum of US$4m.

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Parties' cases on appeal

Appellant's case

37 At the outset of his case, Mr Miao observes that the Judge did not distinguish between the US$2m Transfer and the US$4m Transfer. Mr Miao first argues that the Judge had erred in finding that Mr Gong was in breach of his fiduciary duties in respect of the US$2m Transfer, as the respondents had not established their pleaded case that the US$2m transferred was in fact from Tendcare or the pre-IPO funds. Further, and in any event, Mr Miao argues that the Judge had erred in finding that Mr Miao had accepted that the US$2m QHC Loan was a sham, and hence had erred in his conclusion that Mr Miao had dishonestly assisted Mr Gong.

38 Mr Miao also submits that the Judge had erred in finding that Mr Miao and QHC had dishonestly assisted Mr Gong in respect of the US$4m Transfer. The Judge had erred in not accepting Mr Miao's unchallenged evidence on the purpose of the transfer of the US$4m. Mr Miao relied on Mr Cheung who had told him about the need for funds to purchase hospitals in the PRC, and the US$4m QHC Loan was the means to that end. There was no reason why Mr Miao would do anything to jeopardise the Tendcare IPO given that he would stand to gain substantially from a successful IPO. This is consistent with the fact that Mr Miao did not retain any part of the US$4m.

39 Mr Miao further submits that the Judge had failed to consider his argument below that the respondents should not be allowed to recover moneys that were channelled through or incurred by Tendcare's direct and indirect subsidiaries due to the reflective loss principle. We set out Mr Miao's arguments on reflective loss in more detail when we turn to consider that principle.

Respondents' case

40 The respondents first take the position that the reflective loss principle does not apply, and that there is no concern about double recovery. In essence, they argue that the claim by Tendcare was for its own cause of action and for its own loss. Once again, we set out the arguments in more detail when we address this particular question of law.

41 On the substantive merits of the claims, the respondents argue that the evidence is sufficient to justify the Judge's decision, and also highlight a number of grounds additional to those relied on by the Judge. In relation to the US$2m Transfer, they submit that Mr Miao's objection that they have not established that this sum of money was derived from Tendcare or the pre-IPO funds is incorrect – the claim against Mr Gong and Mr Miao is not a proprietary claim to recover assets, but a claim that Mr Gong had acted against Tendcare's best interests, in particular, by procuring the further transfer out of TJHK to QHC, and this also amounted to a breach of fiduciary duties owed to Tendcare. An inference can be drawn that the US$2m paid from Tendcare to TJHK was related to the subsequent transfer of the same sum from TJHK to QHC.

42 The respondents accept that the Judge had erred in finding that Mr Miao had admitted that the US$2m QHC Loan was a sham. However, this was a "simple slip". The Judge did not ultimately believe Mr Miao's argument that this was a genuine loan. Mr Miao was also unable to explain why the loan was needed and there were inconsistencies in his evidence that reflected poorly on his credibility. If it was not a genuine loan, then it followed that Mr Miao had "guilty knowledge that the funds he had received were the fruits of [Mr] Gong's

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breach of duties". Mr Miao's conduct "fell far short of the ordinary standards of honesty".

43 In relation to the US$4m Transfer, the respondents first point out that Mr Miao was in fact challenged on his evidence concerning the purpose of the transfer. Further, the facts and Mr Miao's admissions establish that Mr Miao must have known that he was assisting Mr Gong in his wrongdoing. Indeed, the respondents submit that Mr Miao was not a credible witness in his attempts to exonerate himself.

Issues to be determined

44 Based on the parties' arguments, there are two key issues before this court:

(a) First, did the Judge err in finding Mr Miao liable for dishonest assistance in relation to the US$2m and US$4m Transfers? Specifically, this raises the following issues:

(i) In relation to the US$2m Transfer,

(A) whether Mr Gong had breached his fiduciary duties owed to Tendcare; and

(B) if so, whether Mr Miao was dishonest in assisting Mr Gong in the breach of those fiduciary duties.

(ii) In relation to the US$4m Transfer, whether Mr Miao was dishonest in assisting Mr Gong in the breach of his fiduciary duties.

(b) Second, if not, are the respondents prevented from claiming against Mr Miao on the basis of the reflective loss principle?

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Dishonest assistance

Applicable law

45 The elements of the cause of action for dishonest assistance are not in dispute. As the Judge rightly identified, there are four elements to this cause of action: (a) the existence of a trust or fiduciary obligation; (b) a breach of trust or a fiduciary obligation; (c) assistance was rendered for the breach; and (d) the assistance was dishonest (see the High Court decision of *Banque Nationale de Paris v Hew Keong Chan Gary and others* [2000] 3 SLR(R) 686 ("*BNP*") at [136]). As this court observed in *George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 ("*Zage*") at [22]:

> … [F]or a defendant to be liable for knowing assistance, he must have such knowledge of the irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them. …

46 As Judith Prakash J (as she then was) elaborated in the High Court decision of *M+W Singapore Pte Ltd v Leow Tet Sin and another* [2015] 2 SLR 271 ("*M+W*") at [42], the analysis is a two-stage one: (a) first, what did the defendant know of the transaction; and (b) second, does participation in the transaction with this knowledge offend ordinary standards of honesty? The former is a subjective analysis, while the latter is objective. In our view, this distinction between the two stages is helpful – often, the question of dishonesty when taken in the abstract can cloud the inquiry as to what the defendant actually knew about the transaction. It is important to begin with the *facts* about what a person knew about a particular transaction before turning to evaluate whether the person was dishonest in proceeding to participate in that transaction.

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The US$2m Transfer

47 It is not disputed that Mr Gong owed fiduciary duties to Tendcare. On appeal, the parties join issue as to whether there was in fact a breach of those fiduciary duties in respect of the US$2m Transfer, and whether any assistance for the breach was dishonest.

Did Mr Gong breach his fiduciary duties owed to Tendcare?

48 Mr Miao takes the position that (a) the respondents' pleaded case is limited to Mr Gong causing Tendcare to transfer the pre-IPO funds raised from the investors out of the Tian Jian Group; but (b) the respondents cannot establish that the US$2m transferred from TJHK to QHC originated from Tendcare or the pre-IPO funds; and (c) as such, the respondents cannot establish that Mr Gong had breached his fiduciary duties owed to Tendcare.

49 This argument is based on the fact that the transfer from Tendcare to TJHK relied on by the respondents was in fact *to* a *different* bank account than the one *from which* the US$2m was paid from TJHK to QHC. As we observed above at [24], the US$2m was first transferred from Tendcare's bank account to TJHK 2247 on 11 March 2015, and only later, on 15 April 2015, was US$2m transferred from TJHK 2220 to QHC's bank account. These facts are not disputed by the respondents.

50 It is true that the respondents' pleaded case was that the funds transferred out of Tendcare were "from and traceable to the moneys paid into it by the Investors", and that the pleaded case turns on whether Mr Gong breached fiduciary duties owed specifically to Tendcare, and not any other company. Notwithstanding this, however, Mr Miao's objections are not sustainable. We agree with the respondents that their case is not one that requires a strict

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application of the rules relating to tracing in law or in equity as the claim is not a proprietary claim over the sum of US$2m.

51 The relevant claim against Mr Gong is one for breach of fiduciary duties in procuring transfers of money out of Tendcare. The first leg of the transfer, from Tendcare to TJHK 2247, amounted to such a breach of duty. The respondents' claim is that the second leg of the transfer, from TJHK 2220 to QHC, was also a breach of duty owed to Tendcare as it was contrary to Tendcare's interests, not only continuing Mr Gong's misappropriation in the first leg but also preventing Tendcare from recovering the misappropriated sum.

52 In this regard, we must clarify Tendcare's case. Counsel for the respondents, Mr Lee Eng Beng SC ("Mr Lee"), argued before us that their case was that the whole *scheme* of transferring funds out of Tendcare, which would include both the first and second legs referred to above, was a breach of fiduciary duty owed by Mr Gong to Tendcare. This is a plausible characterisation of Tendcare's case *as against Mr Gong*. But we must pay attention to how the respondents themselves have characterised their case *against Mr Miao* – the respondents' own argument is that Mr Miao's assistance in this scheme was restricted to the *second* leg of transfer from TJHK to QHC. As the respondents summarise at para 40 of their Respondents' Case:

> Had the funds simply stayed in [TJHK], [Mr] Gong's breach of duties would have been of minor import. He would simply have been ordered to procure the transfer of the US$2 million back to Tendcare. But [Mr] Gong's wrongdoing – *and this is where [Mr] Miao was **properly** found liable for assisting him* – was additionally in ensuring that [TJHK] itself was denuded of funds. This is not simply a breach of fiduciary duties owed to [TJHK] (although it clearly is), but also to Tendcare. Fundamentally, all funds raised by Tendcare and [TJHK] had to be applied for the benefit of the business of Tendcare. … It follows that any improper transfer of funds out of [TJHK] would

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> amount to a breach of fiduciary duties owed to Tendcare. [emphasis added in italics and bold italics]

Elsewhere, the respondents also state the gist of Tendcare's complaint as follows:

> To put it another way, if [Mr] Gong had not procured the sham loan agreement, assisted by [Mr] Miao and [QHC], the US$2 million would have remained with [TJHK] and could have been returned to Tendcare.

53 We find that this characterisation of Tendcare's case is more accurate when it comes to *Mr Miao's* involvement. Indeed, no argument has been (and, in our view, can be) made to show how Mr Miao had *assisted* in the first leg of the US$2m Transfer from Tendcare to TJHK. It is telling that the respondents' original pleaded case was in fact that Mr Miao was liable in *knowing receipt* for the Tendcare-TJHK-QHC Transfers (see [31] above), suggesting that, on its view of the facts, Mr Miao's involvement was limited to latter part of the US$2m Transfer. These extracts from the respondents' arguments show, and we accept, that Mr Miao's assistance was rendered in terms of helping Mr Gong take the US$2m out of Tendcare's reach. Hence, in this instance, our attention should be focused on the *second* leg of the transfer.

54 With that clarification in mind, we consider that Mr Gong's breach of duty in relation to the second leg of the US$2m Transfer does not require that the US$2m transferred from TJHK 2220 to QHC's bank account be identical to or traceable in law or equity to the US$2m transferred into TJHK 2247, since no proprietary claim is being asserted over this sum. The respondents rightly note that it becomes a question of *fact* whether the two transactions are linked in such a way as to ground a finding of breach of fiduciary duties, since the issue is whether Mr Gong, as director of Tendcare, had acted in such a manner as to breach those duties.

55 On the facts, the Judge was satisfied that the US$2m transferred in the first leg from Tendcare to TJHK and the sum transferred in the second leg from TJHK to QHC could be so linked (see the Judgment at [26(b)] and [145]). This is an entirely reasonable inference given: (a) the exact sums of money transferred; and (b) the timing of the transfers (the first being on 11 March 2015 and the second being on 15 April 2015), which were not so far apart as to render the link tenuous. On the contrary, apart from the objections based on the two separate bank accounts, there is no evidence to suggest that this inference should not be drawn. This finding is not against the weight of evidence and we would not disturb the Judge's finding in this regard. It follows that Mr Miao's argument that the respondents have not established Mr Gong's breach of duty to Tendcare in relation to the second leg of the US$2m Transfer does not succeed.

Dishonest assistance

56 Mr Miao then invites us to hold that the Judge erred in concluding that he was dishonest in assisting Mr Gong in the latter's breaches of fiduciary duties. As noted above at [46], we deal with this in two steps: (a) first, determining what Mr Miao knew about the transaction; and (b) second, determining if Mr Miao's participation in the transaction with this knowledge offended ordinary standards of honesty.

57 It is common ground that the Judge was mistaken in his view that Mr Miao had conceded that (a) the US$2m QHC Loan was a sham; and (b) that his case was that this sum of money was intended to be used for the purchase of hospitals in the PRC. We agree that the Judge had conflated the US$2m and the US$4m Transfers, and in that regard, did not, with respect, apply his mind to the specific facts relating to the US$2m Transfer. This court is therefore faced

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with the task of assessing the case on the US$2m Transfer for itself based on the relevant facts.

(1) What did Mr Miao know?

58 In the first place, the Judge's findings concerning Mr Miao's involvement in the fraudulent trading scheme are important, as it was the respondents' primary case that Mr Gong and Mr Miao were *both* carrying on the fraudulent trading scheme outlined at [27] above. The respondents' pleaded case had assumed that Mr Miao was involved at all times with Mr Gong's fraudulent trading scheme, meaning that Mr Miao would also be fixed with knowledge of the source of the moneys QHC had received and the purposes for which the moneys were being transferred. Indeed, this was the *focus* at trial, and the respondents initially sought to rely on many of the factors that went towards the allegations of fraudulent trading to support their argument that Mr Miao had also dishonestly assisted in Mr Gong's breaches of fiduciary duties. The Judge, however, was not convinced that Mr Miao was a party to the fraudulent trading scheme. In the light of this finding, the exact scope of the Judge's findings becomes important in assessing the respondents' claim of dishonest assistance.

59 In our view, the following findings that the Judge made, which are not the subject of any cross-appeal by the respondents, are significant:

(a) The respondents were unable to "point to any instance where any of the Disputed Transfers were retained by Mr Miao" except for the HXG HK Transfers (see the Judgment at [85]).

(b) The respondents did not put forward cogent evidence to show that Mr Miao was aware of the scheme of fraudulent trading, or that the Disputed Transfers were not applied for their intended purpose, except

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for the Tendcare-TJHK-QHC Transfers (see the Judgment at [90]). The evidence was that Mr Miao was *not* kept apprised of important matters in relation to the Tendcare IPO, in particular, in relation to the NYC/Luxe SPA (see the Judgment at [91]).

(c) Mr Miao's falling out with Mr Gwee and Mr Sim (see [19] above) did not indicate that he was a participant in the fraudulent trading, but the more reasonable inference was that he was motivated by "opportunistic self-interest" (see the Judgment at [93]). The Post-Termination Agreements were not "tools to siphon monies to Mr Miao" (see the Judgment at [95]). Mr Miao had sufficiently explained how the Tendcare IPO would be profitable for HXG (see the Judgment at [98]).

(d) Mere involvement in the Disputed Transfers was not sufficient to ground a finding of liability for fraudulent trading. Mr Miao had to know that the Disputed Transfers were not meant for the business of the Tian Jian Group or the expenses for the Tendcare IPO, but this was not established (see the Judgment at [100]). There were, however, questions raised by the Tendcare-TJHK-QHC Transfers (see [84] below).

(e) The Judge found that the HXG HK Transfers were in fact part payment of a success fee that HXG HK was entitled to (see the Judgment at [104]).

60 The respondents' arguments on appeal are framed primarily around showing that Mr Miao's case concerning the US$2m QHC Loan could not be believed, that there was no proper purpose for the loan, and that, as it was not a genuine loan, it "follow[s] that [Mr] Miao had guilty knowledge that the funds he had received were the fruits of [Mr] Gong's breach of duties". We turn to assess the specific aspects of Mr Miao's knowledge that are in dispute, namely,

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his belief as to the genuineness of the US$2m QHC Loan, and his knowledge of the source of the funds and the uses to which the funds could properly be put.

(A) DID MR MIAO BELIEVE THAT THE US$2M QHC LOAN WAS A GENUINE LOAN?

61 In analysing this issue, we begin with the factors that most strongly support Mr Miao's claim that he believed that the US$2m QHC Loan was genuine.

62 First, Mr Miao testified that the US$2m was needed for QHC's operations and expenses. This is consistent with the fact that the respondents have not been able to follow this money into the hands of Mr Gong or his associates – the money was not transferred out of QHC after it was transferred in on 15 April 2015. At the same time, as the Judge noted, there is no evidence that QHC or Mr Miao "retained" any money (see the Judgment at [85]). It follows that the money must have been spent rather than kept to Mr Miao's advantage.

63 Second, to emphasise this point, the US$2m Transfer differed from all of the other Disputed Transfers in significant respects. First, as noted above, the money was not transferred out of QHC to any of the Asia Hausse entities and/or the entities related to Mr Gong. Second, unlike for the other Disputed Transfers, Mr Cheung was not involved, and he has given no evidence about the US$2m Transfer. Indeed, Mr Cheung's own evidence was that he approached Mr Miao only in *September 2015* with the proposal for QHC's and Mr Miao's accounts to be used to transfer payments from Tendcare to Mr Gong's personal bank account. There is therefore *no evidence* that Mr Miao had been approached to help Mr Gong to transfer money out of the Tian Jian Group as of *April* 2015, when the US$2m QHC Loan was entered into.

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64 Third, the loan documentation itself suggests that there was an actual loan. Although this has not been highlighted by parties, it is telling that the loan documentation consisted of an initial loan agreement dated 14 April 2015 which provided that the loan was to be repaid by 14 June 2015, with a subsequent loan extension agreement dated 14 June 2015, by which the loan was extended for one more year, with a maturity date of 13 June 2016. It is not clear what purpose this latter agreement would have served if the loan agreement was not genuine, since nothing in the respondents' case would suggest that there is any significance about the period from 14 June 2015 to 13 June 2016 covered by the loan extension agreement.

65 The respondents' primary issue with the alleged US$2m QHC Loan lies with the difficulties arising from Mr Miao's own evidence. However, we find that these apparent difficulties are ambivalent and that they can be otherwise explained, or do not lead to the inference sought by the respondents. In any event, the burden lies on the respondents to establish the facts on which they base their case of dishonesty, and we do not ultimately find that they have discharged this burden.

66 First, the respondents take issue with Mr Miao's explanation for the loan at para 48 of his affidavit of evidence-in-chief ("AEIC"), which we quote in full here:

> [QHC] has not returned [TJHK] this US$2,000,000 loan because [Mr] Gong and his companies still owe HXG the balance sum of US$2,860,000 in success fee. At the time the US$2m Loan Agreement was entered into, [Mr] Gong was having cash flow problems and could not pay this balance sum in success fee to HXG in full. Therefore, [TJHK] lent [QHC] the sum of US$2,000,000 by way of the US$2m Loan Agreement first.

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The respondents highlight two aspects of this evidence. First, they take issue with Mr Miao's evidence in cross-examination relating to the "balance sum" of US$2.86m referred to in para 48, arguing that Mr Miao gave inconsistent evidence as to whether the US$2.86m was owed at the time of the US$2m QHC Loan. Second, they argue that it made no sense for TJHK to *loan* US$2m to QHC, and for QHC to take that loan, when QHC believed that it was owed money by Mr Gong and his companies.

67 In relation to the "balance sum", we find that the apparent confusion over the US$2.86m referred to in para 48 of Mr Miao's AEIC can be explained. Mr Miao clarified during cross-examination that he did not believe that Mr Gong and his companies owed HXG a balance sum of US$2.86m *at the time* of the US$2m QHC Loan. As Mr Miao noted in cross-examination, the US$2.86m in truth referred to the success fees payable on the total of the pre-IPO funds raised and the statement in the AEIC may have been a drafting mistake. The sum of US$2.86m was arrived at by way of the following calculation: (a) the total sum raised from the pre-IPO investors was around US$130m; (b) 5.5% of the pre-IPO funds was around US$7.15m; (c) HXG HK had received a total of US$4.29m on 27 February 2015 and 10 April 2015; and (d) this left the balance of US$2.86m. However, this was based on the *total* pre-IPO funds raised, whereas not all of the pre-IPO funds would have been raised by the time that the US$2m QHC Loan was entered into.

68 In our view, Mr Miao was correct to say under cross-examination that para 48 of his AEIC was incorrect or misleading, and that the US$2.86m was the balance owed at a later date. Indeed, this is *corroborated* by the respondents' own submission at para 63 of the Respondents' Case. The respondents rightly note that the calculation referred to above, based on US$130m of pre-IPO funds, must have included around US$20m that was raised from OCA in *September*

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2015, months after the US$2m QHC Loan was entered into in April 2015. Hence, at the time of the US$2m QHC Loan, the success fees would only have amounted to around US$6.05m (5.5% of US$110m), and the balance owing to HXG at the time would have been US$1.76m, not US$2.86m. The respondents' argument here, which we consider correct on the facts, in fact *supports* Mr Miao's evidence at trial that para 48 of this AEIC was incorrect and had confused the US$2.86m balance due at the end of the process with the balance that was due at around the time of the US$2m QHC Loan. We therefore conclude that this alleged problem with Mr Miao's evidence does not diminish his credibility, and certainly does not support the respondents' case.

69 We turn to the respondents' argument that Mr Miao's evidence on the loan contradicted his own evidence that Mr Gong and his companies faced cash flow problems. The respondents argue that if Mr Miao believed that Mr Gong and his companies owed money to Mr Miao's companies at the time *and* had cash flow problems, then it made little sense for Mr Miao to take a *loan* from TJHK, one of Mr Gong's companies, and even less sense for the loan to carry a 7% interest rate. While we acknowledge that this raises some questions about the US$2m QHC Loan, we are unable to accord it as much weight as the respondents urge us to.

70 As noted above, after Mr Miao's correction of his evidence, the state of affairs was that Mr Gong's companies owed around US$1.76m as the balance of the success fees at around the time of the US$2m QHC Loan. This is consistent with Mr Miao's apparent view that the money that Mr Gong owed "was very little … [i]t was not a lot," at least relative to the other sums of money involved in this case. Given this clarification, the loan arrangement becomes more plausible. If Mr Gong and his companies owed Mr Miao and his companies US$1.76m at the time, it was not inconsistent for QHC to then take

a loan of *US$2m* from TJHK, as that was *more* than what QHC would have been entitled to at the time. As for the alleged cash flow problems faced by Mr Gong that Mr Miao alluded to at para 48 of his AEIC, Mr Miao also clarified at trial that the cash flow problems had been somewhat alleviated by the time the loan was extended. Viewed in this light, we do not find the respondents' arguments so convincing as to justify a finding that Mr Miao did not believe that the US$2m QHC Loan was genuine.

71 Second, the respondents argue that Mr Miao had no proper explanation for the use of the loan. Although he referred to operations and expenses, Mr Miao testified that he could not recall exactly what the money was used for. The respondents suggest that if there had been a legitimate reason for the loan, Mr Miao would have been able to testify as to the specific use of the money. However, we do not think that the respondents' argument can be taken that far. Mr Miao's evidence was that the sums were used for operations and expenses. The nature of that kind of expenditure is such that it is entirely plausible for Mr Miao, who was the director and shareholder but not in charge of the operations of QHC, to be unable to specify the exact outlays years after the fact.

72 For completeness, we make clear that, contrary to Mr Miao's arguments, we do not rely on the facts relating to the successful winding up petition brought against QHC in Hong Kong by TJHK's liquidators based, at least in part, on the US$2m QHC Loan. Even if the winding-up petition was brought by the liquidators on the basis that the US$2m QHC Loan was genuine, this is equivocal given that the success of the petition would have depended on what arguments were put forward by QHC in those proceedings. Further, the liquidators of TJHK may not have been privy to the facts underlying the loan. Those facts are, in our view, neutral, and do not persuade us one way or the other on this issue.

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73 At the hearing before us, after we had questioned Mr Lee on the various weaknesses in the respondents' claim concerning the US$2m Transfer, he attempted to put forward an alternative case that even if the US$2m QHC Loan was genuine, that would still amount to dishonest assistance of Mr Gong's breach of fiduciary duties, because the loan would have been for an improper purpose. We are unable to accept this argument. First, this was not the respondents' pleaded case. Mr Lee referred us to the particulars in para 25(b) of the Statement of Claim (Amendment No 2), specifically at sub-para (a)(iiiB), the last line of which reads: "There was no proper or legitimate basis whatsoever for a loan to be extended to [QHC]". However, this strikes us as simply being an *element* of the respondents' primary case that the US$2m QHC Loan and US$4m QHC Loan were shams, rather than being an alternative basis upon which to find a breach of Mr Gong's fiduciary duties and Mr Miao's dishonest assistance of the same. Indeed, this specific pleading was in support of the more general point that Mr Gong and Mr Miao had "orchestrated or perpetrated … the fraudulent transfer and theft of", *inter alia*, the US$2m, a description which does not accurately describe a breach of duty on the basis that a *genuine* loan was extended for an improper purpose. Second, as we will observe in more detail below at [79], it was never put to Mr Miao that he was dishonestly assisting Mr Gong by entering into a genuine loan agreement which was nevertheless not for a proper purpose, when assessed from Tendcare's perspective.

74 For the foregoing reasons, we find that even if parts of the US$2m Transfer may raise questions, the respondents have not shown, on a balance of probabilities, that Mr Miao knew or believed that the US$2m QHC Loan was not a genuine loan agreement.

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(B) KNOWLEDGE OF THE SOURCE OF THE FUNDS AND THE PROPER USE OF THE FUNDS

75 The next substantial area of dispute concerns Mr Miao's knowledge of the source of the US$2m and the proper use of Tendcare's funds. The respondents appear to accept Mr Miao's contention that there is no evidence that he knew that the US$2m was derived from Tendcare or the pre-IPO funds, as their response is to say that this contention is not necessary. We think this is an appropriate concession to make. There is no evidence that Mr Miao knew of the transfer of US$2m from Tendcare to TJHK on 11 March 2015 (*ie*, the first leg of the Tendcare-TJHK-QHC Transfer). Although it cannot be disputed that Mr Miao knew that Tendcare was raising funds for the IPO, and that TJHK was also involved in the fund raising process, the inference cannot be made that Mr Miao knew *specifically* that the sums of money that QHC received were linked to the pre-IPO funds. Such an inference would be justified only if the respondents could show that Tendcare and TJHK had no other sources of funds and that Mr Miao knew this to be the case.

76 The respondents instead argue that: (a) Mr Miao knew that Tendcare and TJHK were both controlled by Mr Gong; (b) he knew that the purpose of Tendcare and TJHK was to raise funds for the investment in Tendcare's medical business and that lending money to QHC was inconsistent with that purpose; and (c) Mr Miao could have found out more from Mr Cheung but he did not do so. We can accept point (a) as a matter of fact. The other two points, however, are more problematic.

77 Point (c) is difficult to accept because, as we observed at [63] above, there is no evidence that Mr Cheung was in fact involved in the US$2m Transfer. Indeed, Mr Cheung did not give *any* evidence concerning this transfer whether in his AEIC or his testimony at trial. This is not surprising

given that the US$2m was not ultimately transferred out of QHC to any of the companies in which Mr Cheung was involved.

78 Point (b) requires us to make the inferential leap that *because* Mr Miao knew that the purpose of Tendcare's and TJHK's existence was to raise funds for the investment in the medical business, Mr Miao would have known that lending money to QHC was inconsistent with that purpose. We see no reason why we should make this leap. The loan was a commercial agreement under which QHC would have to pay interest for the use of the borrowed funds. Further, while Tendcare and TJHK were in the process of raising funds, the respondents have not shown that they were not allowed to enter into other arrangements or that Mr Miao knew about any such restrictions.

79 Indeed, in the cross-examination of Mr Joshua James Taylor (the person in charge of investigations on behalf of Mr Yit, the judicial manager), counsel for Mr Miao, Mr Andrew Chan ("Mr Chan"), who also appeared before us, highlighted para 1.1(c) of the ordinary share subscription agreement with Easom that suggested that Tendcare was allowed to use a certain percentage of the funds for "general corporate purposes". Further, apart from putting it to Mr Miao that the transfers were for Mr Gong's personal benefit, Mr Lee did not put the case on the lower footing that Mr Miao knew that the loan was generally inconsistent with the purpose of the Tendcare IPO. This is a sufficiently different point, on which Mr Miao may have had a specific explanation as to whether the loan was inconsistent with the purpose for which the pre-IPO funds were raised, such that it should have been put to him in cross-examination as a matter of fairness (see the decision of this court in *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 ("*Sudha Natrajan*") at [48]). Therefore, we are not satisfied that we should draw the inference that Mr Miao knew that the

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US$2m QHC Loan was derived from the pre-IPO funds and that the loan was inconsistent with the purpose for which the funds were raised.

(2) Did participation in the transaction with the said knowledge offend ordinary standards of honesty?

80 Based on the above, Mr Miao's position in relation to the transaction can be summarised as follows: (a) he did not know generally about the fraudulent trading scheme and was not involved in any of the other Disputed Transfers at that time; (b) it has not been shown that Mr Miao did not believe that the US$2m QHC Loan was genuine; and (c) although he knew that Tendcare and TJHK were controlled by Mr Gong, and that funds were raised for the Tendcare IPO, the respondents have not established that he knew that the loan would be inconsistent with the Tendcare IPO or the proper use of those funds. Given the state of Mr Miao's knowledge, it is not possible to conclude that his participation in the transaction would offend ordinary standards of honesty.

81 We therefore conclude that the case against Mr Miao for dishonest assistance in relation to the US$2m Transfer is not made out, and reverse the Judge's finding of liability in relation to this particular sum.

The US$4m Transfer

82 The dispute in relation to the US$4m Transfer turns on Mr Miao's knowledge of the purpose of the transfer of this sum into QHC's account and then, in respect of one part, to Hongjia directly, and in respect of the other part, to Mr Miao and subsequently to Asia Hausse. Mr Miao's case is that he had relied on Mr Cheung, and believed that the moneys were being transferred into the PRC so that Tendcare could purchase hospitals there. The respondents, on

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the other hand, argue that Mr Miao knew that the moneys were going to Mr Gong.

83 At the outset, we clarify that the nature of the respondents' case against Mr Miao appears to be the same for the US$4m as it was for the US$2m, in that the focus is on Mr Miao's dishonest assistance of Mr Gong's breach of duties *in transferring funds out of TJHK*, *ie*, the second leg of transfers out of TJHK to QHC and beyond, rather than the first leg of transfers from Tendcare to TJHK (see [52]–[53] above and para 40 of the Respondents' Case). In our view, this must follow from the fact that there is no evidence at all that Mr Miao had assisted in the first leg of the transfer from Tendcare to TJHK. The case against Mr Miao should be circumscribed according to the actual scope of his assistance.

84 The Judge had found that Mr Miao had accepted that the US$4m QHC Loan was a sham "in that [it did] not represent genuine loans from TJHK to QHC". Mr Miao did not adequately explain why a sham loan agreement was necessary to circumvent fund transfer restrictions in the PRC for the purchase of hospitals there. Tendcare had raised funds for the purpose of, *inter alia*, the Tian Jian Group's business in the PRC, and so arrangements would likely have already been put in place to remit funds legitimately. As HXG was involved in the Tendcare IPO, it, and by extension, Mr Miao as its owner and controller, would at the very least have been able to ascertain if there were any such arrangements in place before agreeing to the US$4m QHC Loan. The Judge concluded that "given that sham loan agreements were being used, Mr Miao must have known that the Tendcare-THJK-QHC Transfers were not for the business of the Tian Jian Group or the expenses of the Tendcare IPO. At the very least, he was reckless as regards the purpose for which the transfers were made. This was *prima facie* evidence of dishonesty" (see the Judgment at

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[101]). The Judge repeated essentially the same reasoning at [145] and [154] of the Judgment.

85 As above, we proceed to analyse, first, what Mr Miao knew, and second, whether his participation in the transaction with that knowledge offended ordinary standards of honesty.

What did Mr Miao know?

86 It is common ground that Mr Miao did not consider the US$4m QHC Loan to be a "genuine loan agreement". Mr Miao also conceded that by the time he had given approval for the transfer of US$2.765m out of his bank account to Asia Hausee, he knew that the transaction was part of the US$4m Transfer from TJHK, that the transfer was to Asia Hausse, and that Asia Hausse was under Mr Cheung's control and was not part of the Tian Jian Group. The dispute essentially turns on whether Mr Miao knew that the transfer of US$4m to QHC and then to Hongjia and Asia Hausse, was ultimately for Mr Gong's benefit, or whether Mr Miao should be believed when he claims that he thought that the transfers were for the purchase of hospitals in the PRC.

87 There were essentially two aspects of Mr Miao's explanation that the Judge found difficulty with. The first pertained to the alleged use of the loan agreement to circumvent fund transfer restrictions in the PRC. The second pertained to the alleged purpose of purchasing hospitals in the PRC. We deal with each in turn.

88 In the first place, the Judge found Mr Miao's explanation incredible on the basis that there would likely have been proper channels for transferring funds into the PRC other than relying on such a sham loan agreement (see the Judgment at [101]). Mr Miao argues that it was incumbent on Mr Cheung, the

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respondents' witness, to give evidence as to why the sham loan agreement was needed to circumvent the restrictions, and whether any arrangements had been made to legitimately remit funds into the PRC. Further, the Judge had erred in finding that Mr Miao would have been privy to any such arrangements.

89 We are of the view that Mr Miao's arguments miss the point. The Judge was entitled to conclude that it was likely that proper arrangements would have been put in place for the transfer of funds into the PRC, given the involvement of advisers and the fact that at least some of the pre-IPO funds were raised for the purpose of transactions in the PRC. If the transactions were legitimate and for the purposes of the Tendcare IPO, those arrangements should have been used. This inference is amply supported by the available evidence concerning the conditions on the use of pre-IPO funds raised from the various investors: (a) Easom had specified that the "Business Plan" was to include the development and expansion of a number of hospitals in the PRC; (b) MMIII had specified that the loan to TJHK was to be on-lent to Shanxi TJHX WFOE for the conversion of two hospitals to limited liability companies, for the Tian Jian Group's capital expenditure, and to acquire hospitals for the Tian Jian Group; and (c) OCA had specified that the proceeds from the subscription of convertible notes were to be used, *inter alia*, for the acquisition or cooperation with a hospital in Beijing or with other hospitals within Greater China. If these conditions were attached to the use of these funds that were raised, it is a very plausible inference that there would have been legitimate arrangements made for funds to be transferred into the PRC for these purposes.

90 The question then is what Mr Miao would have known about these arrangements. Although he left much of the work to others like Mr Gwee, Mr Sim, and, later, Mr Cheung, Mr Miao was involved in the preparations for the Tendcare IPO. For example, in his AEIC, Mr Miao stated that he made "at

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least two trips to China" to help Mr Gong, and one of those trips involved meeting Mr Ma Xiaowei, the investment manager of OCA which eventually extended a loan to Tendcare. HXG was involved throughout with the IPO process. Further, although the Judge also found at [91] of the Judgment that Mr Miao was kept in the dark about important matters relating to the Tendcare IPO, a careful perusal of that paragraph and its context shows that the Judge's emphasis was on the alleged arrangements relating to the fraudulent trading scheme, not more generally as to the Tendcare IPO. We consider that the Judge's inference that Mr Miao would have known or could have found out about any such arrangements is not against the weight of evidence. This was an inference of fact that the Judge was entitled to make based on investment arrangements and HXG's involvement in the Tendcare IPO, and the Judge cannot be said to have erred in relying on this inference in his assessment of Mr Miao's defence.

91 While Mr Miao pointed us to Mr Cheung's evidence that fund transfer restrictions may be one reason why various companies were used to effect transfers into the PRC, and that "there are always certain companies that [they] would use for the transfer," that evidence must be read in context. The Judge's inference was that *legitimate* transfers of funds into the PRC would have been effected through the proper channels, while Mr Cheung's evidence was given in relation to transfers that were, in large part, established to have been for Mr Gong's personal purposes and not the legitimate purposes of the Tendcare IPO. Indeed, Mr Cheung testified that the transfers he was involved in were *not* for the purposes of the Tendcare IPO. Mr Cheung's evidence in this regard is therefore of limited relevance to assessing the Judge's inference as to the arrangements for *legitimate* transfers.

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92 Mr Miao then takes issue with the second plank of the Judge's reasoning, in which the Judge disbelieved Mr Miao's claim that he believed the transfer was for the purpose of purchasing hospitals in the PRC. Mr Miao's evidence in his AEIC concerning the purpose of the transfer was as follows:

> 51. At that time, Gong needed funds to purchase hospitals in China, but could not transfer money directly into China for that purpose due to fund transfer restrictions in China. Therefore, Hanford [*ie*, Mr Cheung] and Eric [*ie*, Mr Sin, CFO of HXG until 2016] came up with the US$4m Loan Agreement as a means to get money to Gong in China for him to purchase hospitals. …

93 In cross-examination, Mr Miao's evidence was that Mr Cheung and Mr Sin had approached him telling him that Mr Gong "urgently required the sum of money to be transferred to China for the purchase of hospitals". Mr Miao testified that he did not know what fund transfer restrictions were in place, and he agreed that he "basically relied" on what he alleged Mr Cheung had told him. In essence, Mr Miao's case is that he believed that the transfers were for the purpose of purchasing hospitals *because* he was told this by Mr Cheung and Mr Sin.

94 On appeal, Mr Miao has argued that his evidence concerning the purpose of the transfer (and, hence, his belief as to that purpose) was not challenged by the respondents. We disagree. Mr Lee had in fact challenged Mr Miao's evidence by putting it to him that as at 22 September 2015 (the date of the loan agreement for the US$4m QHC Loan), he "knew that Mr Gong was taking out or misappropriating money from Tendcare" and that the transfers were for Mr Gong's personal benefit. Further, it was put to Mr Miao that he caused QHC to enter into the US$4m QHC Loan "with the knowledge and intention that it would help Mr Gong achieve his purpose", which Mr Lee clarified as referring to "Mr Gong's taking of money from Tendcare for his own

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personal benefit". Later, in summing up his case, Mr Lee also put to Mr Miao that he knew that he was providing assistance to Mr Gong "on the transfer of funds out of the Tendcare Group for the personal benefit of Mr Gong and [himself]". It is clear that the respondents did not accept Mr Miao's explanation that the US$4m Transfer was for the purpose of purchasing hospitals in preparation for the Tendcare IPO – Mr Miao's account was directly contradictory to the case put to him that the transfer was for Mr Gong's and his personal benefit.

95 Given that Mr Miao's case is that he was told of the purpose of the transfer by Mr Cheung and Mr Sin, their evidence would be particularly important for assessing Mr Miao's account. As Mr Sin did not give evidence, Mr Cheung's evidence is of central importance here.

96 The most relevant part of Mr Cheung's evidence was introduced as an amendment to his AEIC at trial, which included the following two paragraphs:

> 7(a). With respect to the transfers of funds described in paragraphs 8 to 21 of my statutory declaration, I wish to add that Miao Weiguo and Gong are very close friends and business partners. From my dealings and discussions with Miao, I understand he was aware I was assisting Gong in the transfer of funds.
>
> 7(b). In particular, sometime in September 2015, Eric told me Gong would like me to assist in transferring certain funds from Tendcare and its subsidiaries to Gong's personal bank account in the PRC. I approached Miao with Eric's proposal, and Miao agreed to use [QHC's] bank account and his personal account to assist the transfer. Miao's agreement was necessary, as payments from [QHC] required his personal approval and payments from his personal bank account had to be issued by him personally.

97 Mr Cheung testified under cross-examination that he suspected throughout that the moneys he was assisting Mr Gong to transfer were in fact Tendcare's money, and that he understood that the "transfers ha[d] nothing to

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do with the IPO". Specifically regarding the transfers involving QHC, Mr Cheung clarified that he did know that these were Tendcare's moneys. He admitted that he and his company earned "transaction fees or commissions for the transfers" performed for Mr Gong. In relation to the *purposes* of the transactions in September 2015, Mr Cheung did not commit to a particular answer:

> Q. … When you agreed to facilitate this particular transfer from now what you admit is Tendcare or Tendcare's subsidiaries' monies when you agreed to the transfer, did you think that such a transfer was for Gong's personal purposes and not Tendcare's purposes, or you simply don't know?
>
> A. For the answer of the purposes, I would say I don't know.
>
> Q. So it could be that you left open the possibility. Let me ask the question. Did you leave open the possibility that these monies could well be for Tendcare's purpose?
>
> A. I have never thought that way.

98 However, when cross-examined on Mr Miao's account that the transfers were for the purpose of purchasing hospitals in the PRC, Mr Cheung testified that he did not know of any such purpose:

> Q. … 'At that time …'
>
> Meaning September 2015 or thereabouts, Gong needed funds for the purchase of hospitals.
>
> And you can either agree or disagree or you can say 'don't know'. All right? …
>
> A. I don't know for the – until the time therefore that – Gong needs the funds to purchase hospitals. I would say I don't know.
>
> Q. So sentence number 1, you don't know. Okay.
>
> A. Yeah.

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As we pointed out to Mr Chan at the hearing of this appeal, and as he rightly conceded before us, Mr Cheung was not asked specifically whether he had *told* Mr Miao that the US$4m Transfer was for the purpose of purchasing hospitals in the PRC.

99 On the evidence before us, we are unable to agree with Mr Miao that the Judge had erred in disbelieving his claim as to the purpose of the US$4m Transfer. First, if Mr Miao's case (as stated at trial) was that Mr Cheung had told him that the US$4m Transfer was for the purpose of purchasing hospitals in the PRC, we would have expected Mr Cheung, who had been called by the respondents as their witness, to have been cross-examined by Mr Miao's counsel on that allegation. This is particularly so because Mr Cheung had already given positive evidence *contradicting* Mr Miao's case, at para 7(b) of his AEIC as amended (see [96] above):

> … In particular, sometime in September 2015, Eric told me Gong would like me to assist in transferring certain funds from Tendcare and its subsidiaries *to Gong's personal bank account in the PRC*. I *approached Miao with Eric's proposal*, and Miao agreed to use [QHC's] bank account and his personal account to assist the transfer. … [emphasis added]

100 A plain reading of this paragraph indicates that Mr Cheung had approached Mr Miao with the proposal to use QHC's and his personal bank accounts to transfer funds from Tendcare and its subsidiaries *to Mr Gong's personal bank account*. At trial, Mr Chan appears to have been aware of this implication as well, as he had asked Mr Cheung whether his reference to what Mr Miao knew (at para 7(a) of the AEIC), related to this arrangement in para 7(b). Mr Cheung confirmed that he was saying that Mr Miao was aware of the arrangement described in para 7(b). Viewed in this light, Mr Cheung's evidence in his AEIC contradicted Mr Miao's defence as to the purpose of the transfer *and* asserted, instead, that Mr Cheung had *told* Mr Miao of the true

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purpose of the proposed arrangement, namely, to transfer funds to Mr Gong's personal bank account. Despite this clear contradiction in evidence, Mr Cheung was not cross-examined on this point. Even apart from the question of the rule in the House of Lords decision of *Browne v Dunne* (1893) 6 R 67 (see also *Sudha Natrajan* at [48]), it is unsatisfactory that the point was not pursued, and in the absence of that cross-examination, there is very little on which Mr Miao can convince us to prefer his account over Mr Cheung's.

101 Second, the way that Mr Miao's account developed at trial suggests that his specific claim that Mr Cheung had *told* him that the US$4m Transfer was for the purpose of purchasing hospitals in the PRC was an afterthought. Mr Miao's pleaded case was that the "US$4m Loan Agreement was conceived by [Mr Cheung] and Eric Sin as a means to get funds to [Mr] Gong in China, for [Mr] Gong to purchase hospitals in China". This is reflected in Mr Miao's AEIC at para 51 (see [92] above). However, no mention was made of how he had arrived at this understanding. It was only during the cross-examination of Mr Miao that the claim emerged that *Mr Sin and Mr Cheung had told him* that "Mr Gong urgently required the sum of money to be transferred to China for the purchase of hospitals". By the time of this cross-examination, Mr Cheung had already given his evidence and had been cross-examined, yet Mr Cheung had not been confronted with what he had allegedly told Mr Miao. Mr Miao's specific claim that he was told of this purpose by Mr Cheung seems to us to have been a belated afterthought, which is yet another reason for us not to disturb the Judge's findings on appeal.

102 Third, in the light of these two points, we consider that Mr Cheung's evidence sufficiently establishes that he had told Mr Miao that the transfers were for moneys to be sent to Mr Gong's personal bank account and, in fact,

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that Mr Cheung did not know that the purpose of the transfers was for the purchase of hospitals (as alleged by Mr Miao).

103 We conclude that, on a balance of probabilities, Mr Miao *did not* believe that the US$4m Transfer was for the purpose of purchasing hospitals in the PRC. He has not provided any other explanation for the transfer. In the light of the evidence relating to (a) the use of the sham loan agreement; (b) Mr Miao's knowledge of the fund transfers (as testified to by Mr Cheung); and (c) the subsequent transfer of funds into companies related to Mr Gong, it is clear that Mr Miao knew about severe "irregular shortcomings" (see *Zage* at [22]) in the transaction, including the fact that it was Tendcare's moneys and that it was being transferred for no legitimate purpose relating to the Tendcare IPO.

Did participation in the transaction with that knowledge offend ordinary standards of honesty?

104 In our judgment, Mr Miao's participation in the transaction with that knowledge did offend ordinary standards of honesty. We refer again to guidance given in *Zage* at [22], where the question is phrased as whether "ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query [the irregular shortcomings]" (see also Lord Nicholls of Birkenhead's guidance in the Privy Council decision (on appeal from the Court of Appeal of Brunei Darussalam) of *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 2 AC 378 at 390–391 (cited in *BNP* at [141])).

105 We highlight two points in particular. First, despite the absence of any apparently legitimate purpose for the transaction, Mr Miao willingly let QHC's and his own bank accounts be used for transfers of significant sums of money. He was told that the transfers were going to end up with Mr Gong and yet failed

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to raise any issue with the arrangement. Second, a sham loan agreement had to be used to disguise the transaction, which, given the inferences that the Judge was entitled to draw (see [89]–[91] above), was suggestive of impropriety in the transfers. It is abundantly clear to us that ordinary people would consider Mr Miao to have fallen short of the standards of honest conduct in continuing to participate in the transaction.

106 Mr Miao's counterarguments are not ultimately convincing. His arguments based on his supposed belief that the funds were for the purchase of hospitals cannot be sustained in the light of the above analysis. In this regard, Mr Miao's attempt to rely on *BNP* can be easily distinguished on the facts – in that case, the High Court was satisfied that the third parties were in fact duped and had relied entirely on the fiduciary (see *BNP* at [159]–[162]), whereas in this case, Mr Miao has not even been able to establish that Mr Cheung had in fact told him that the purpose of the transfers was proper (*ie*, to purchase hospitals in the PRC).

107 Mr Miao then argues that because Mr Cheung testified that he had acted honestly in effecting all the transfers ordered by Mr Gong, we should also find that Mr Miao had acted honestly in relying on Mr Cheung. Before us, Mr Chan repeatedly referred to the fact that Mr Cheung, as a professional, testified that he was comfortable with the arrangements. Two points may be made in response. First, for the reasons we have already discussed, we are not satisfied that Mr Miao has established that he really did rely on Mr Cheung. Indeed, Mr Miao has not established that Mr Cheung had *also* told him that he, as a professional, was comfortable with the arrangement. Second, in any event, Mr Cheung's own subjective belief (if his testimony is accepted) as to his honesty has little relevance to the present inquiry in relation to Mr Miao. Whatever Mr Cheung believed, and whether a claim could have been properly

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brought against Mr Cheung *as well*, is separate and distinct from the issue of *Mr Miao's* liability for his own dishonest assistance of Mr Gong's breaches of duties.

108 Finally, Mr Miao's argument that there was no reason for him to agree to the US$4m QHC Loan and the US$4m Transfer does not take him far enough. Although it is true that Mr Miao stood to gain from the success of the Tendcare IPO, given that his 3% shareholding was contingent on the success of the IPO, this in itself is not sufficient to displace the factors above which show that Mr Miao was dishonest in entering into the arrangement for the US$4m Transfer. Mr Miao could have had a variety of motivations. It is sufficient to note here that this inference sought to be drawn by Mr Miao is not the only one, and is not even the most likely one, given the surrounding evidence.

109 We are therefore satisfied that the Judge did not err in finding that the cause of action in dishonest assistance against Mr Miao in relation to the US$4m Transfer is made out.

Reflective loss

110 In the result, Mr Miao may be held liable for the US$4m Transfer by reason of his dishonest assistance of Mr Gong's breaches of duties owed to Tendcare in relation to that sum. However, Mr Miao raises an additional argument that, even if he could be held liable for dishonest assistance, Tendcare is not allowed to claim the sum of US$4m from him because of the reflective loss principle. We note for completeness that although this issue was pleaded and canvassed before the Judge, he did not address it in the Judgment.

Parties' positions

111 Mr Miao's position is that the reflective loss principle applies – where Tendcare's loss is reflective of the loss suffered by its subsidiaries, the subsidiaries may seek to recover such losses, and the respondents are not allowed to commence a claim for the same losses. In particular, Mr Miao relies on this court's judgment in *Townsing* at [68], which applied the reflective loss principle to the detriment suffered by a shareholder *qua* creditor. Mr Miao argues that we should prefer the principle as stated in *Townsing* over that arrived at by the majority in *Marex*. In this case, Tendcare's loss is not separate and distinct from the losses suffered by TJHK, being based on a wrong to TJHK. Further, and in any event, procedural mechanisms were needed to prevent the risk of double recovery, but TJHK was never joined by the respondents and no undertaking has been provided that TJHK would not pursue its claims against Mr Miao and QHC. In addition, no mechanisms have been put in place to protect the interests of TJHK's creditors.

112 The respondents argue in response that the reflective loss principle, rightly understood, has no application in this case. *Townsing* should be departed from, and this court should adopt the position of the majority in *Marex* because (a) the approach of the majority comports with the jurisprudential basis of the principle; (b) not every case of double recovery should engage the reflective loss principle; and (c) there is no policy reason to extend the scope of the reflective loss principle beyond the majority approach in *Marex*.

Our approach to this issue

113 As we began this judgment by observing, the question of how the reflective loss principle should operate in Singapore is one that requires close consideration of the conceptual underpinnings of that principle. Different

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rationales have been proposed for that rule, and it falls to us to determine how the reflective loss principle should be justified and applied in this jurisdiction. In order to do so effectively, we must grapple not just with the competing arguments of principle and policy, but also with the *historical* development of these arguments, in full recognition of the fact that in a common law jurisdiction like ours, the development of principle occurs in *particular* cases in *particular* contexts. For these reasons, we will analyse the question as to how the reflective loss principle should be applied (if at all, in recognition of the possibility raised by the minority in *Marex*) in the following manner:

(a) First, we will begin with a brief consideration of some material principles of company law and the nature of *shares* and *shareholding* in particular.

(b) Second, we will consider the development of the reflective loss principle in England and in Singapore from a historical perspective, up to and including the recent decision in *Marex*.

(c) Third, having regard to the reasoning of the majority and minority in *Marex*, as well as our discussions under the headings above, we will attempt to identify the *proper* basis for the reflective loss principle in Singapore. Having done so, the *scope* of the reflective loss principle will also become clear.

Company law and the nature of shares

114 The starting point of modern company law is the separate legal personality of the company. This has been described as the "bedrock of company law not just in Singapore but also throughout the common law world" (see the decision of this court in *Goh Chan Peng and others v Beyonics*

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Technology Ltd and another and another appeal [2017] 2 SLR 592 at [75]). This fundamental principle of company law was confirmed as early as the seminal House of Lords decision in *Aron Salomon v A Salomon and Company, Limited* [1897] 1 AC 22 – as Lord Herschell put it: "the company is ex hypothesi a distinct legal persona" (at 42). It follows that a company's members cannot be *personally* held liable for contracts entered into by the company or for wrongs done *by* the company, unless some exception to the principle of separate legal personality can be found.

115 The principle of the separate legal personality of the company brings with it a number of implications. One important implication, which is particularly relevant to the issue we have to consider in this appeal, is that a shareholder owns no interest, legal or equitable, in any of the company's assets by virtue of holding shares in the company (see the House of Lords decision of *Macaura v Northern Assurance Company, Limited and others* [1925] AC 619 ("*Macaura*") at 626–627). This principle has been endorsed and applied in Singapore (see the High Court decision of *Jhaveri Darsan Jitendra and others v Salgaocar Anil Vassudeva and others* [2018] 5 SLR 689 at [35]–[36]). Similarly, as established in the English Court of Appeal decision of *Short and others v Treasury Commissioners* [1948] 1 KB 116 at 122: "Shareholders are not, in the eye of the law, part owners of the undertaking". As Lord Porter stated in the House of Lords decision in *Short v Treasury Commissioners* [1948] AC 534 at 545, affirming that principle:

> … [I]n the case of land the owner possesses a tangible asset whereas a shareholder has no direct share in the assets of a company, he has such rights as the memorandum and articles [and, we might add, the legislation] give him and nothing more …

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116 The separate legal personality of the company also leads to the rule established by the Court of Chancery in *Foss v Harbottle* (1843) 2 Hare 461 ("*Foss v Harbottle*"). We might also note that the separation between *management* and *ownership* which is characteristic of modern company law is also part of the justification for the rule in *Foss v Harbottle*. It suffices for us to quote from Lord Reed's exposition of the two aspects of this rule in *Marex* at [35]:

> … The rule, as stated in *Edwards v Halliwell* [1950] 2 All ER 1064 and restated in *Prudential* at pp 210–211 has two aspects. The first is that 'the proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation'. As was explained in *Prudential* at p 210, one of the consequences of that aspect of the rule is that a shareholder cannot, as a general rule, bring an action against a wrongdoer to recover damages or secure other relief for an injury done to the company. The second aspect of the rule is that:
>
>> 'Where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, cadit quaestio [the question falls]; or, if the majority challenges the transaction, there is no valid reason why the company should not sue.'
>
> The second aspect of the rule reflects the fact that the management of a company's affairs is entrusted to the decision-making organs established by its articles of association … When a shareholder invests in a company, he therefore entrusts the company—ultimately, a majority of the members voting in a general meeting—with the right to decide how his investment is to be protected. …

117 In addition, in most instances (save for the specific category of unlimited companies), the limitation of members' liability is a key advantage of the corporate form. For a company limited by shares, the constitution of the company must provide that the liability of its members is limited, which means that the liability is limited to the amount, if any, unpaid on the shares held by

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the shareholder (see s 22(1)(*b*) read with s 22(3) of the Companies Act). If the company is unable to meet its debts, the creditors are restricted to the assets of the company and any contributions that must be made by the shareholders, and no more. The corollary of this (for the protection of creditors) is that a company is *not* allowed to issue dividends except out of its profits (see s 403(1) of the Companies Act), and, if the company is liquidated, the shareholders are only entitled to payment of any sums left over after all the creditors have been satisfied. Numerous other rules have been put in place in order to prevent a company from getting around this fundamental restriction, including the rules on financial assistance for the procurement of shares (see s 76 of the Companies Act) and the rules on the reduction of share capital (see ss 78A–78K of the Companies Act). In effect, except for specific situations authorised by legislation, a shareholder is not entitled to any returns on the investment from the company as a matter of right. This point also arises from the principle in *Macaura* that the shareholder does not, by virtue of holding shares in the company, obtain a right in any of the company's assets.

118 The rights of a shareholder are limited in yet another way. When a shareholder becomes a member of a company, the shareholder does not thereby gain *control* of the company, but is taken to submit to the constitution of the company and the rules relating to its decision-making processes, and has the rights provided for in those instruments. A shareholder is not entitled to direct control of the company – a company makes its decisions according to the proper organs and procedures, and not otherwise – but is only entitled to exercise the specific rights attached to the shares, which is primarily limited to participation and voting in the company's general meetings. It can be seen that a fundamental aspect of shareholding is the relinquishing of *control* over the business and, as such, the fate of the shareholder's investment to the company, *ie*, primarily its

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managers (the directors, in most instances, or the persons with delegated powers) or the majority of shareholders.

119 Indeed, in these and other respects, we might also observe that a shareholder becomes bound by all manner of rules provided for in the company's constitution and in legislation. Many of these rules are intended to govern the various conflicts that may arise between different parties interested in a company. While a significant benefit of modern company law is the division between the management of the company and ownership of the company by the members (through, in most instances, shares), this division brings with it a number of possible conflicts between management and shareholders. Furthermore, as we have noted briefly above, a tension may arise between the interests of creditors and the interests of shareholders. In addition, among shareholders, conflicts may arise between different categories of shareholders, especially between majority and minority shareholders. Company law, in this sense, is an area of law with its own particular set of problems and solutions, and we would do well to pay heed to this context when addressing the question of reflective loss.

120 This brief, and by no means exhaustive, survey of the general principles relating to modern company law and shareholding sufficiently establishes the unique status of a shareholder *vis-à-vis* the company. As we shall see, the legal question in this appeal can be understood, in one sense, to turn on the emphasis that we ought to place on this unique status.

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The development of the reflective loss principle

121 Having considered the company law background against which this legal question must be considered, we set out the historical development of the reflective loss principle.

The emergence of the principle

122 The reflective loss principle is one of relatively recent vintage, and can be traced to the decision of the English Court of Appeal in *Prudential*. The plaintiffs, Prudential Assurance Co Ltd, were shareholders in the first defendant company, Newman Industries Limited ("Newman"). The second defendant was the chairman and chief executive of Newman, and the third defendant was a non-executive director and vice-chairman of the same. The second defendant was also the non-executive chairman of the fourth defendant company ("TPG"), and the third defendant was TPG's vice-chairman and chief executive. TPG faced financial difficulties, and entered into agreements with Newman pursuant to which Newman was to buy TPG's holdings in two companies for a total of £231,000, of which Newman paid £215,950. These agreements were not disclosed to Newman's board.

123 The second defendant then prepared a memorandum (the "strategy document") which recommended that the board of Newman should purchase all of TPG's assets save for TPG's holdings in Newman and a loan from another company owing to Newman, while assuming TPG's liabilities and paying TPG the sum of £350,000. An auditor's report was obtained, but the above agreements were not disclosed to the auditors, resulting in a valuation of TPG's assets at £325,000. An agreement was signed for Newman to purchase TPG's assets for £325,000. A circular was prepared recommending to the shareholders to vote in favour of the proposed purchase, and referred to a

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payment of £216,000 as advance payment. Despite protests from, *inter alia*, the plaintiffs, a resolution was passed approving of the purchase of TPG's assets.

124 The plaintiffs commenced an action against the defendants for declaratory relief and damages, both in a direct capacity on behalf of Newman in a derivative action and in a representative capacity representing shareholders of Newman. At first instance, after a trial of the action, Vinelott J held that the second and third defendants had conspired to injure Newman, and indirectly, its shareholders, and that the plaintiffs as minority shareholders should be permitted to maintain the derivative action. He also held that the personal action would succeed. The second and third defendants appealed.

125 The English Court of Appeal upheld the finding of conspiracy and fraudulent conduct only on the more narrow basis that the second and third defendants had concealed the agreements and payments referred to at [122] above, and in including a misleading statement in the circular about the purpose of the payments, thus causing the assets purchased by Newman to be overvalued by £45,000 (see *Prudential* at 232B–D and 234). As for the question of company law which most concerns us here, we would observe that most of the judgment concerned the derivative action. On appeal, Newman had indicated that if the finding of fraud stood against the second and third defendants, "it would accept the benefit of the order made in its favour" (see *Prudential* at 220F). As the court noted, this was the end of the matter in so far as the rule in *Foss v Harbottle* was concerned, and the English Court of Appeal was willing to proceed on the basis that the derivative action could be sustained. The *personal* action, *ie*, the action brought as representative of Newman's shareholders, which is where the reflective loss principle is engaged, was dealt with relatively briefly. We set out the court's reasoning in some detail, in order to make some observations on its scope.

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126 The court began by stating its conclusion that the personal claim was "misconceived". It recognised that *duties* were owed by the second and third defendants in advising the shareholders to support the resolution approving the agreement, and that a shareholder could claim for any personal *loss* incurred for a meeting that is convened on the basis of a fraudulent circular, including the expense of attending the meeting. However, no shareholder could claim on the basis simply that *the company* had suffered loss (see *Prudential* at 222H–223B):

> … But what he cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a 'loss' is merely a reflection of the loss suffered by the company. *The shareholder does not suffer any personal loss.* His only 'loss' is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3 per cent. shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company. … [emphasis added]

127 Having said that, the court provided an illustration, which has proven to be controversial since (see *Prudential* at 223C):

> … A simple illustration will prove the logic of this approach. Suppose that the sole asset of a company is a cash box containing £100,000. The company has an issued share capital of 100 shares, of which 99 are held by the plaintiff. The plaintiff holds the key of the cash box. The defendant by a fraudulent misrepresentation persuades the plaintiff to part with the key. The defendant then robs the company of all its money. The effect of the fraud and the subsequent robbery, assuming that the defendant successfully flees with his plunder, is (i) to denude the company of all its assets; and (ii) to reduce the sale value of the plaintiff's shares from a figure approaching £100,000 to nil. There are two wrongs, the deceit practised on the plaintiff and the robbery of the company. But the deceit on the plaintiff causes the plaintiff no loss which is separate and distinct from the loss to the company. The deceit was merely a

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> step in the robbery. The plaintiff obviously cannot recover personally some £100,000 damages in addition to the £100,000 damages recoverable by the company.

128 In response to this, counsel for the plaintiffs sought to argue that where there was no risk of double recovery, for example, if the company does not pursue its cause of action, then the personal action could be sustained. The court rejected this argument (see *Prudential* at 223E–F):

> … But how can the failure of the company to pursue its remedy against the robber entitle the shareholder to recover for himself? What happens if the robbery takes place in year 1, the shareholder sues in year 2, and the company makes up its mind in year 3 to pursue its remedy? Is the shareholder's action stayed, if still on foot? Supposing judgment has already been recovered by the shareholder and satisfied, what then?

At the risk of pre-empting our analysis below, we would highlight that the English Court of Appeal's response here appears to be a rejection of an attempt to carve out exceptions to the reflective loss principle on the basis of the rationale of double recovery. When faced with the proposal that a claim could be sustained if there was no risk of double recovery, the court responded that (a) this was not correct in principle as the mere fact that the company chose not to pursue its remedy could not entitle the shareholder to claim what it would not otherwise be entitled to claim; and (b) in any event, any such exception would be impracticable given the myriad factual situations in which the issue could arise.

129 The court provided a further reason for refusing to allow a personal action in such instances as follows (see *Prudential* at 223G–H):

> A personal action could have the most unexpected consequences. If a company with assets of £500m, and an issued share capital of £50m. were defrauded of £500,000 the effect on dividends and share prices would not be discernible. If a company with assets of £10m. were defrauded, there would be no effect on share prices until the fraud was discovered; if it

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> were first reported that the company had been defrauded of £500,000 and subsequently reported that the company had discovered oil in property acquired by the company as part of the fraud and later still reported that the initial loss to the company could not have exceeded £50,000, the effect on share prices would be bewildering and the effect on dividends would either be negligible or beneficial.

This, in our view, is an additional *practical* concern that the reflective loss principle addresses, even if it is not the basis or rationale for the principle itself. The court here was recognising the fact that share prices could be affected by wrongdoing causing loss to a company in a wide variety of ways. Rather than allow shareholders to raise all manner of arguments to show that their loss was independent of the company's, the reflective loss principle drastically simplifies matters by treating the company's loss as primary and the shareholder's loss (in terms of diminution of share prices or in distributions) as merely reflective, *ie*, not loss which the law treats as recoverable by the shareholder. In saying this, we are cognisant that this is not, in and of itself, a justification for the reflective loss principle, as the simplification of claims is not, by itself, a very strong principled or normative basis for barring recovery. However, this is an instance where perhaps principle and practical realities go hand in hand.

130 The clearest statement of company law principle in *Prudential* can be found at 223H–224D:

> The plaintiffs in this action were never concerned to recover in the personal action. The plaintiffs were only interested in the personal action as a means of circumventing the rule in *Foss v. Harbottle*. The plaintiffs succeeded. A personal action would subvert the rule in *Foss v. Harbottle* and that rule is not merely a tiresome procedural obstacle placed in the path of a shareholder by a legalistic judiciary. The rule is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When

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> the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting. The law confers on him the right to ensure that the company observes the limitations of its memorandum of association and the right to ensure that other shareholders observe the rule, imposed upon them by the articles of association. If it is right that the law has conferred or should in certain restricted circumstances confer further rights on a shareholder the scope and consequences of such further rights require careful consideration. In this case it is neither necessary nor desirable to draw any general conclusions.

In this regard, although it is true that the court's observations were couched in terms of the plaintiffs' clear attempt to circumvent the rule in *Foss v Harbottle*, nothing in the court's reasoning suggests that the court should, in every instance, decide for itself whether there was an intentional (or even unintentional) attempt to subvert the rule before rejecting the personal action. Certainly, the English Court of Appeal considered that the plaintiffs *were* attempting to circumvent the rule, but the *response* of the court was not directed to those specific facts. Instead, the court emphasised a ***general*** rule which was grounded in the nature of shareholding in a company. In any event, it is clear that the reflective loss principle emerged in the specific sphere of ***company*** law.

131 An issue that emerged in *Marex* was whether the court in *Prudential* was purporting to lay down a rule of law that a shareholder in such instances was deemed to have suffered no loss of his own that could be recovered (the position of the majority (see *Marex* at [25])) or whether the court was merely concluding that in such circumstances, the shareholder did not *in fact* suffer any loss (the position of the minority (see *Marex* at [118])). With respect to Lord Sales, we think that the majority has the better of this argument. The language of the court in *Prudential* suggests strongly to us that the court was setting out a principle of company law, rather than coming to a conclusion based simply on the facts.

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This is perhaps clearest in the passage quoted at [129] above from *Prudential* at 223G–H, where the court clearly countenanced the possibility that the market price of shares could fluctuate in a way that did not necessarily bear a strong, direct connection with the loss caused. Instead, the court's reasoning was primarily concerned with the nature of shareholding (see [130] above). As for the scope of the decision in *Prudential*, we respectfully agree with Lord Reed's summary in *Marex* at [39]:

> In summary, therefore, *Prudential* decided that a diminution in the value of a shareholding or in distributions to shareholders, which is merely the result of a loss suffered by the company in consequence of a wrong done to it by the defendant, is not in the eyes of the law damage which is separate and distinct from the damage suffered by the company, and is therefore not recoverable. Where there is no recoverable loss, it follows that the shareholder cannot bring a claim, whether or not the company's cause of action is pursued. The decision had no application to losses suffered by a shareholder which were distinct from the company's loss or to situations where the company had no cause of action.

The extension of the principle

132 The next major development in the reflective loss principle was the decision of the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1 ("*Johnson*"). The defendants were a firm of solicitors, who acted for the plaintiff as well as his companies, in particular, one Westway Homes Limited ("WWH"). The underlying dispute concerned the defendants' alleged negligence in the exercise of an option for the purchase of real property. WWH sued the defendants, and the claim was settled (see *Johnson* at 18C). The plaintiff, Mr Johnson, who was the owner and director of WWH, then brought a personal action against the solicitors alleging breach of duties owed to him personally. Mr Johnson's claim was struck out as an abuse of process – Mr Johnson appealed, and the defendants also cross-appealed on the basis that certain heads

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of loss were suffered only by the company and could not be recovered by Mr Johnson (see *Johnson* at 34H).

133 In arriving at his decision, Lord Bingham of Cornhill summarised the reflective loss principle in the following three propositions (see *Johnson* at 35F–36B):

> … (1) Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss. … (2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding. … (3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by a breach of a duty independently owned to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other. …

We observe here that this summary was approved by the majority in *Marex* at [67].

134 For present purposes, it is unnecessary for us to consider each of the speeches in detail, given that the subsequent jurisprudence has highlighted where the fault-lines, so to speak, can be found. Signs of dissatisfaction with the reasoning in *Prudential* can be seen, for example, in Lord Hutton's speech (see *Johnson* at 54E–54H). What is particularly noteworthy in *Johnson* is the association of the rule in *Prudential* with the broader policy concern of preventing double recovery. As *Lord Millett's* speech has been taken as the

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basis for further extensions of the principle, we pay particular attention to his reasoning in this particular regard.

135 Lord Millett began by observing that a company is a separate legal entity from its shareholders. It follows that the company's cause of action is the company's asset, and apart from a derivative action, no shareholder can sue on that cause of action. The company's shares are the property of the shareholder, and if the shareholder suffers loss as a result of a wrong done to him, he alone can sue. However, although the share is property belonging to the shareholder, "it also represents a proportionate part of the company's net assets, and if these are depleted the diminution in its assets will be reflected in the diminution in the value of the shares" (see *Johnson* at 62A–B). As we will return to later at [189] below, this starting point may have been the root of the problems with Lord Millett's reasoning. The learned judge continued to reason that where both the company and shareholder have duties owed to them and those duties are breached, the shareholder cannot claim for the loss measured by the diminution in the value of his shareholding or loss of dividends (see *Johnson* at 62E–G):

> … In such a case, the shareholder's loss, in so far as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and 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. …

This *dicta* formed the basis of subsequent extensions of the reflective loss principle *beyond* its initial, narrow scope as a principle in the sphere of company law.

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136 Later in his speech, Lord Millett identified the gist of reflective loss as follows (see *Johnson* at 66C):

> … 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. [emphasis added]

137 As for the situation when a company *chooses not to bring the action*, the shareholder's claim is still barred on the basis of causation – "the loss is caused by the company's decision not to pursue its remedy and not by the defendant's wrongdoing" (see *Johnson* at 66E). This is further justified by reasons of policy (at 66E–G):

> … In my opinion, these preclude the shareholder from going behind the settlement of the company's claim. If he were allowed to do so then, if the company's action were brought by its directors, they would be placed in a position where their interest conflicted with their duty; while if it were brought by the liquidator, it would make it difficult for him to settle the action and would effectively take the conduct of the litigation out of his hands. …

138 Lord Millett proceeded to conclude that the reflective loss principle extended beyond the diminution in the value of shares, but also to loss of dividends "and all other payments which the shareholder might have obtained from the company if it had not been deprived of its funds" (see *Johnson* at 66H–67B):

> … All transactions or putative transactions between the company and its shareholders must be disregarded. Payment to the one diminishes the assets of the other. In economic terms, the shareholder has two pockets, and cannot hold the defendant liable for his inability to transfer money from one pocket to the other. In principle, the company and the shareholder cannot together recover more than the shareholder would have recovered if he had carried on business in his own name instead of through the medium of a company. On the

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> other hand, he is entitled (subject to the rules on remoteness of damage) to recover in respect of a loss which he has sustained by reason of his inability to have recourse to the company's funds and which the company would not have sustained itself.

This was a clear innovation when compared to the English Court of Appeal's decision in *Prudential*, which was concerned only with the status of the shareholder in relation to the company.

139 Subsequently, the strictures of the reflective loss principle were loosened somewhat by the English Court of Appeal in *Giles v Rhind* [2003] BCC 79 ("*Giles v Rhind*"), which developed an exception to the reflective loss principle where the actions of the wrongdoer had disabled the company from pursuing its cause of action against the said wrongdoer (at 100, *per* Waller LJ; and at 110–112, *per* Chadwick LJ).

140 In cases subsequent to *Johnson*, the English courts have taken a broad view of the reflective principle, encouraged in large part by portions of Lord Millett's speech in *Johnson*. In the English Court of Appeal decision of *Gardner v Parker* [2004] 2 BCLC 554 ("*Gardner*"), Neuberger LJ (as he then was) considered (at [70]):

> It is clear from those observations [by Lord Millett], and indeed from that aspect of the decision, in *Johnson's* case that the rule against reflective loss is not limited to claims brought by a shareholder in his capacity as such; it would also apply to him in his capacity as an employee of the company with a right (or even an expectation) of receiving contributions to his pension fund. On that basis, there is no logical reason why it should not apply to a shareholder in his capacity as a creditor of the company expecting repayment of his debt. 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. …

141 As Lord Reed notes in *Marex* at [77], the subsequent cases have adopted the broad approach stated in *Gardner*:

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> … The supposed 'reflective loss' principle has been treated as being based primarily on the avoidance of double recovery and the protection of a company's unsecured creditors, and as being applicable in all situations where there are concurrent claims and one of the claimants is a company. So understood, the 'reflective loss' principle, as Sir Bernard Rix JA observed in *Xie Zhikun* at para 95, 'seems to be extending its scope wider and wider'. Sir Bernard added at para 96 that 'a number of distinguished judges have commented on the uncertainties and difficulties of the reflective loss doctrine'. Professor Andrew Tettenborn has rightly warned that 'Today it promises to distort large areas of the ordinary law of obligations': 'Creditors and Reflective Loss: A Bar Too Far?' (2019) 135 LQR 132. …

Indeed, the English Court of Appeal in *Marex* had extended the principle to a party who was only a creditor of the company. But, before we turn to *Marex*, we must consider the reception of the reflective loss principle in Singapore.

The development of the principle in Singapore

142 The reflective loss principle was first considered by this court in *Townsing*. The essential facts, as they relate to the reflective loss principle, can be summarised as follows. In that case, two groups had entered into a business venture. On one side was the Newmans Group, consisting of Newmans Group Holdings Pty Ltd ("NGH"), its wholly-owned subsidiary, Jenton Overseas Investment Pte Ltd ("Jenton"), and Jenton's wholly-owned subsidiary, NQF Ltd ("NQF"). On the other side was Normandy Finance & Investments Ltd ("Normandy UK"), its subsidiary, Normandy Nominees Pte Ltd ("Normandy"), and another subsidiary, Normandy Finance & Investments Asia Ltd ("NFIA"). Mr Townsing represented Normandy's side of the investment.

143 Various disputes arose over the extent of security provided by the various parties in the Newmans Group for loans due to Normandy. At some point, NQF sold its business to Delmaine Fine Foods Ltd ("Delmaine"). Mr Townsing then executed a series of manoeuvres to take control of Jenton

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and NQF. When the first tranche of the sale proceeds was paid by Delmaine for its purchase of NQF's business, Mr Townsing deposited the cheques into NQF's bank account, before transferring these moneys to another of NQF's accounts (which Mr Townsing had set up after taking control). A portion of these moneys ("the Relevant Sum") was then transferred out and eventually made their way to Normandy UK. Subsequently, Jenton was liquidated, and the liquidators of Jenton ("Jenton Liquidators") liquidated NQF. According to a demand that the Jenton Liquidators issued to NQF, NQF owed S$4,542,286 to Jenton as at 30 June 2004 (see *Townsing* at [7]).

144 The Jenton Liquidators commenced proceedings in the High Court against Mr Townsing for breach of duties as Jenton's directorh in causing NQF to pay the Relevant Sum to Normandy by transferring the funds to Normandy UK's account. The High Court judge found that Mr Townsing was liable for breaches of director's duties. On appeal, this court dismissed the various specific challenges raised by Mr Townsing, which turned largely on his (or Normandy's) alleged right to rectification of the various security documents. Most relevant for present purposes are the court's observations concerning Mr Townsing's director's duties owed to Jenton. First, this court rejected the claim based on the duty of trusteeship, as, without more, a holding company does not own its subsidiary's assets, meaning that Mr Townsing could not breach a duty of trusteeship owed to *Jenton* for handling the Relevant Sums, which were held by NQF (see *Townsing* at [57]). Second, the court considered that the duty of proper purpose did not arise as Mr Townsing was exercising his powers as NQF's director, and not Jenton's director (see *Townsing* at [58]). Third, in respect of the duty of loyalty and the no conflict rule, this court considered that any wrongful dissipation of NQF's assets would damage

Jenton's interests as shareholder and creditor of NQF (see *Townsing* at [60]). This court concluded (at [63]):

> In the light of these principles, it is plain that the appellant [*ie*, Mr Townsing] breached his duty to Jenton when he paid the Relevant Sum wrongfully to Normandy. Instead of so acting, he should have paid the money to Jenton, as the sole creditor of NQF, rather than to Normandy, who had no existing claim whatsoever, whether as a chargee or an unsecured creditor.

By doing so, Mr Townsing had placed himself in a position where Normandy's and Jenton's interests were in conflict, and he had preferred Normandy's interests over Jenton's, leaving him in breach of the duty of good faith and the actual conflict rule (see *Townsing* at [66]).

145 At the invitation of this court, the parties submitted on whether the principle of reflective loss applied, even though it was not pleaded or relied on by Mr Townsing (see *Townsing* at [67]). This court identified the origin of the reflective loss principle to be the decision in *Prudential*, and also went on to endorse the view expressed in *Johnson* that the reflective loss principle extended beyond the value of shares or the loss of dividends, but to "all other payments which the shareholder might have obtained from the company if it had not been deprived of its funds" (see *Johnson* at 66, *per* Lord Millett), and in particular, extended to "the detriment suffered by a shareholder *qua* creditor of the company" (see *Townsing* at [70]). This court also observed that this was supported by the decision in *Gardner*. Further, the principle applied even where the company had settled its claim against the alleged wrongdoer. However, a shareholder would be allowed to recover damages for his loss where the wrongdoer has disabled the company from pursuing the cause of action, citing *Giles v Rhind* at [34] (see *Townsing* at [73]).

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146 In relation to the *rationale* for the reflective loss principle, this court adopted the following position:

(a) The reflective loss principle can be understood as a variant of the "proper plaintiff" rule (see *Foss v Harbottle*) which "seeks to ensure that wrongs against a company are efficiently and fairly disposed of by regulating the category of persons who can recover what is effectively the company's loss" (see *Townsing* at [78]).

(b) The policy consideration underlying this principle was explained by Lord Millett in *Johnson* at 62 as being the prevention of double recovery at the expense of the defendant (the alleged wrongdoer) or recovery at the expense of the company and its creditors and other shareholders (see *Townsing* at [75]).

147 This court considered that if the reflective loss principle were to be applied, it would prevent Jenton from recovering from Mr Townsing (see *Townsing* at [74]), as "[t]he losses suffered by Jenton mirrored an equivalent loss by NQF", and Jenton's inability to recover the Relevant Sum (whether as dividends or repayment of its loan) was a consequence of the diminution in NQF's assets. It is clear to us that the court in *Townsing*, despite approving the company law basis of the reflective loss principle (see [146(a)] above), ultimately endorsed the broad view of the reflective loss principle in Lord Millett's speech in *Johnson* (see [146(b)] above). Even though, as we shall see, this was *obiter dicta*, we will need to revisit the pronouncements of this court in *Townsing* if we are to develop a different approach to the reflective loss principle.

148 Given how the case had developed, however, this court declined to apply the principle, recognising the prejudice that would have been caused to Jenton as the principle was not pleaded or relied upon by Mr Townsing earlier. In particular, this court noted that Jenton had thereby lost the opportunity to "adduce evidence or to take steps to disapply the principle of reflective loss", in particular, by procuring NQF to give an undertaking to the court not to sue Mr Townsing. If such an undertaking had been given, there was nothing preventing the court from accepting it. As NQF had no other creditors and was wholly owned by Jenton, this would have prevented both double recovery and any prejudice to other creditors or shareholders (see *Townsing* at [85]). Alternatively, Jenton could have applied to join NQF as a party to the proceedings, or could have withdrawn its action and left it to NQF to commence the action against Mr Townsing (see *Townsing* at [87]). There was also indication that Mr Townsing had financially disabled NQF, making it fair for Jenton to claim directly against him (see *Townsing* at [88]). The court hence declined to apply the principle and dismissed Mr Townsing's appeal.

149 The approach reflected in this court's decision in *Townsing,* as has been applied in subsequent cases, can be summarised as follows:

(a) The reflective loss principle prevents shareholders from claiming for any loss, whether suffered as a shareholder or in any other capacity, including for "all other payments the shareholder might have obtained if the company had not been deprived of its funds" (see *Johnson* at 66, *per* Lord Millett), if the company has an actionable claim in respect of the same loss, *ie*, if the shareholder's loss would be made good "if the company's assets were replenished by an action against the person responsible for the loss" (see *Johnson* at 35, *per* Lord Bingham of Cornhill). We refer to this as the "Preventive Rule".

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(b) However, a shareholder may be allowed to do so by "adduc[ing] evidence or tak[ing] steps to disapply the principle of reflective loss", by establishing that the public policy concerns underlying the Preventive Rule, *ie*, the need to prevent double recovery or prejudice to other shareholders or creditors, do not apply at all (or, arguably, only apply with reduced force): see *Townsing* at [85]; the decision of this court in *Beckett Pte Ltd v Deutsche Bank AG and another and another appeal* [2009] 3 SLR(R) 452 ("*Beckett*") at [85]; and the High Court decision of *MCH International Pte Ltd and others v YG Group Pte Ltd and others and other suits* [2019] SGHC 43 at [229] (this point was not considered on appeal: see *MCH International Pte Ltd and others v YG Group Pte Ltd and others and other appeals* [2019] 2 SLR 837). We refer to this as the "Policy Exception".

150 As we will elaborate below, we are, with respect, of the view that this attempt to straddle the company law principle and the policy against double recovery ultimately fails. The juxtaposition of the Preventive Rule and the Policy Exception was not, in truth, a peaceful co-existence, but had effectively let the exception swallow the rule. Further, in *Townsing*, the justification of the reflective loss principle on the basis of double recovery was linked to the adoption of Lord Millett's broader formulation of the reflective loss principle, which we no longer find sustainable.

The restriction of the principle in England

151 Before elaborating on our views in respect of the difficulties with the position stated in *Townsing,* we return to the English jurisprudence. The final step in the development of the reflective loss principle thus far comes in the form of the UK Supreme Court's decision in *Marex*. In that case, the claimant

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had obtained judgment against two companies for sums due under a contract. The companies' assets were insufficient to meet the judgment debt, and the companies went into liquidation. The claimant alleged that the defendant, who was the ultimate beneficial owner and controller of these companies, had stripped the companies of their assets and placed them out of the claimant's reach. The claimant was given leave to serve the claim form on the defendant out of the jurisdiction. The defendant applied to set aside service, arguing, *inter alia*, that the liquidators of the companies could pursue the claim against him and the rule against reflective loss thereby barred the claimant's claim. The trial judge rejected the argument and dismissed the application. As we had alluded to earlier, the English Court of Appeal allowed the appeal, holding that the reflective loss principle was not restricted to a shareholder's claims, but also precluded a claim by an unsecured creditor (who was not also a shareholder) where the creditor and company each had its own cause of action against the alleged wrongdoer in respect of the same wrongful conduct.

152 The matter came before seven members of the UK Supreme Court. Three judgments were issued, one by Lord Reed PSC (with Lady Black and Lord Lloyd-Jones JJSC concurring) ("the plurality"), one by Lord Sales JSC (with Lord Kitchin JSC and Baroness Hale of Richmond concurring) ("the minority"), and one by Lord Hodge DPSC (agreeing with Lord Reed). The learned judges all agreed on the result, that the appeal should be allowed and service not be set aside, on the basis that the reflective loss principle was no bar to the claimant's claim against the defendant. However, the *reasoning* of each judgment differs, and we turn now to summarise the approach taken in each judgment.

153 The plurality was of the view that the rule established in *Prudential* was a "rule of company law, applying specifically to companies and their

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shareholders in the particular circumstances" where the shareholder's claim was "in respect of a diminution in the value of his shareholding, or a reduction in the distributions which he receives by virtue of his shareholding" (see *Marex* at [9]). This rule is "distinct from the general principle of the law of damages that double recovery should be avoided" (see *Marex* at [10]) – this is apparent given that the reflective loss principle would apply even if the company does not pursue its own right of action. Instead, the rationale of *Prudential* is that "where it applies, the shareholder does not suffer a loss which is recognised in law as having an existence distinct from the company's loss". Lord Reed supported this interpretation of *Prudential* with a number of arguments:

(a) First, as Lord Reed observed, it is "unrealistic" to claim that the shareholder does not suffer *any* personal loss as a matter of *fact* – the reasoning is hence better explained on the basis that *the law* does not *recognise* any loss that is not "separate and distinct from the loss sustained by the company" (see *Marex* at [28]). As such, the proper plaintiff to bring the claim is the company, not the shareholder.

(b) Second, the rule in *Prudential* could not be explained on the basis of double recovery, as there is no axiomatic relationship between the value of a share and the loss caused to a company, noting especially the case of larger public companies whose shares are traded on the stock market (see *Marex* at [32]–[34]). Hence, the prevention of double recovery could not be the basis for the reflective loss principle, as not every case where a company suffers loss would result in a diminution of the value of shares, and not every case where a company recovers for its loss would result in a corresponding increase in that value.

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(c) Third, the rule also addresses the problem of the management of a company. If the company compromises a claim, or chooses not to pursue a cause of action, and that opinion is shared by the majority of shareholders, then the company is entitled to proceed in that manner. If a shareholder is dissatisfied and in the minority, he has remedies available to him in company law. However, in cases where there is no such remedy (because no wrong is done or the conditions laid out in the law are not satisfied), the decision in *Prudential*, based on the rule in *Foss v Harbottle*, clearly prevents a minority shareholder from proceeding on a personal action. In this regard, the rule in *Foss v Harbottle* contains two aspects, first, that the proper plaintiff in respect of a wrong done to a company is the company, and second, that no individual member can bring an action in respect of a matter that a company (by its majority) chooses not to pursue (see *Marex* at [35]).

(d) Further, the principle has a pragmatic advantage in that it establishes clear rules "rather than leaving the protection of creditors and other shareholders of the company to be given by a judge in the complexities of a trial" (see *Marex* at [38]).

154 Lord Reed observed that some of the reasoning in *Johnson* (in particular, Lord Millett's) went beyond the circumstances which *Prudential* was concerned with (see *Marex* at [11]). Lord Reed endorsed, instead, Lord Bingham of Cornhill's summary of the reflective loss principle in *Johnson* at 35–36 (see [133] above), noting that the third proposition articulated by Lord Bingham reflected the position that the rule in *Prudential* was concerned only with a fall in the value of the shareholding or in distributions received (at [47]). In relation to Lord Millett's reasoning, Lord Reed made the following remarks:

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(a) Lord Millett reasoned that a share "represents a proportionate part of the company's net assets, and if these are depleted the diminution in its assets will be reflected in the diminution in the value of the shares" (see *Johnson* at 62; see [135] above). However, Lord Reed observed that this premise was not an axiomatic truth, and that the rule in *Prudential* "is not premised on any *necessary* relationship between a company's assets and the value of its shares (or its distributions)" (at [49]).

(b) Lord Millett identified the rationale for the rule as the prevention of double recovery. However, Lord Reed reasoned that it was not a satisfactory explanation, and it was in fact the "unique position in which a shareholder stands in relation to his company" that "is a critical part of the explanation". Lord Millett's identification of prevention of double recovery as the basis for the rule "paved the way for the expansion" of the rule beyond that stated in *Prudential* (at [51]). One problem with the rationale of preventing double recovery is that "it is therefore possible for a shareholder to bring a personal action based on a loss which would fall within the ambit of the decision in *Prudential*, and to obtain a remedy which that decision would have barred to him, provided the relief that he seeks is not an award of damages in his own favour" (at [52]). This, however, undermined the proper plaintiff rule – instead, the proper approach in such cases would have been a derivative action (at [53]). To summarise, Lord Reed identified the two central issues with basing the principle on the avoidance of double recovery (at [55]):

> The most obvious difficulty with the avoidance of double recovery, as an explanation of the judgment in *Prudential*, is perhaps its unrealistic assumption that there is a universal and necessary relationship between changes in a company's net assets and changes in its share value. Another serious problem is its inability to explain why the shareholder cannot be permitted to

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> pursue a claim against a wrongdoer where the company has declined to pursue its claim or has settled it at an undervalue, and the risk of double recovery is therefore eliminated in whole or in part.

(c) Lord Reed then went on to reason that Lord Millett's responses to this issue (see [137] above) based on causation (see *Marex* at [56]), and policy considerations (at [58]–[59]) were not persuasive.

(d) Lord Millett's views on claims brought on the basis of losses suffered otherwise than as shareholders (for example, as employees or creditors) went "further than was necessary for the decision of the appeal" and were "mistaken" (see *Marex* at [63]). Where the risk of double recovery materialises, it must be addressed, "but that possibility is no reason for barring the creditor's claim" (at [63]). This is equally important where the claim against the wrongdoer is based on tort.

155 Lord Reed turned then to the other cases after *Johnson*. In particular, the learned judge considered the decision in *Giles v Rhind* which established an exception to the rule where the wrongdoer's acts had prevented the company from pursuing an action (see *Marex* at [69]–[71]). We pause to note that this exception is not squarely before us in this case, and we do not intend to settle in this judgment the question of whether this exception should be maintained. We see great force in Lord Reed's view that if the reflective loss principle is one that is concerned with whether the law *recognises* certain heads of loss as separate and distinct from the company's loss, then, in principle, the *Giles v Rhind* exception cannot be maintained – it is unclear why the company's circumstances would, in certain cases, mean that the law should *then* recognise the existence of separate and distinct loss, in order to achieve certain ends, laudable as those ends may be. However, in recognition of the fact that Lord Hodge did not comment on this exception and of the concerns raised by

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commentators over the plurality's rejection of this exception (see, for example, Ivan Sin, "The 'no reflective loss' principle in *Marex v Sevilleja:* one step forward and one step back" [2021] JBL 285 ("*Ivan Sin*") at p 293; and Stephen Laing, "Reflective loss in the UK Supreme Court" [2020] CLJ 411 at p 414), we prefer to resolve this in a case where the *Giles v Rhind* exception is raised directly for our decision on the facts.

156 As a consequence of re-situating the reflective loss principle squarely in the company law sphere and the unique position of the shareholder, Lord Reed was clearly of the view that the extension of the principle to claims by shareholders for other forms of losses, or even to creditors who were not shareholders, was impermissible. Hence, cases such as *Gardner* were overruled (see *Marex* at [75]–[77]).

157 Lord Reed summarised the plurality's views at [79]–[89] of *Marex.* We do not propose to quote these paragraphs here, as these paragraphs deserve to be read in full and merit close consideration. We would highlight simply that Lord Reed *consistently* maintained that the reflective loss principle was a *rule of law* pertaining to the nature of the shareholder's loss, and that concerns of *double recovery* were separate and distinct, which could be dealt with by other means. In conclusion, the learned judge stated (at [89]):

> I would therefore reaffirm the approach adopted in *Prudential* [1982] Ch 204 and by Lord Bingham in *Johnson* [2002] 2 AC 1, and depart from the reasoning in the other speeches in that case, and in later authorities, so far as it is inconsistent with the foregoing. It follows that *Giles v Rhind* [2003] Ch 618, *Perry v Day* [2005] 2 BCLC 405 and *Gardner v Parker* [2004] 2 BCLC 554 were wrongly decided. The rule in *Prudential* is limited to claims by shareholders that, as a result of actionable loss suffered by their company, the value of their shares, or of the distributions they receive as shareholders, has been diminished. Other claims, whether by shareholders or anyone else, should be dealt with in the ordinary way.

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On the facts of *Marex*, the rule in *Prudential* had no application as the case did not involve a shareholder. The appeal was therefore allowed (at [92]), with Lord Reed observing that if issues of double recovery arose, they would have to be considered separately.

158 In a concurring judgment, Lord Hodge focused his attention on his view that "the problems and uncertainties which have emerged in the law have arisen because the 'principle' of reflective loss has broken from its moorings in company law" (see *Marex* at [95]). Lord Hodge's reasoning emphasised the specific sphere of company law: "it is a rule of company law arising from the nature of the shareholder's investment and participation in a limited company and excludes a shareholder's claim made in its capacity as shareholder" (at [100]). As Lord Hodge considered (at [102]):

> In my view, the Court of Appeal's articulation of the rule in the *Prudential* case was a principled development of company law which should be maintained. Investment in or conducting a business through the medium of a limited company brings advantages to the shareholder, principally in the form of limited liability, which is a consequence of the separate personality of the company: *Saloman v A Salomon & Co Ltd* [1897] AC 22. As the Court of Appeal stated in *Prudential* [1982] Ch 204, 224, 'The company is liable for its contracts and torts; the shareholder has no such liability'. The company owns its assets and the shareholders have no legal or equitable interest in and are not part owners of those assets: *Macaura v Northern Assurance Co Ltd* [1925] AC 619, 626, 630, 633, per Lord Buckmaster, Lord Sumner and Lord Wrenbury; *Short v Treasury Comrs* [1948] 1 KB 116, 122, per Evershed LJ.

159 Lord Hodge went on to explicate the rights given to shareholders, and advantages of investment through shareholding, as well as the disadvantages related to shareholding, especially as a minority shareholder (see *Marex* at [103]–[107]). Lord Hodge placed particular emphasis on the "default rule of equality among shareholders and the postponement of the shareholders'

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entitlements on a winding up to the claims of the company's creditors" (at [108]). The learned judge summarised the legal position as follows (at [108]):

> … Against this background, the law's refusal to recognise the diminution in value of a shareholding or the reduction or loss of a distribution, which is the consequence of the company suffering loss as a result of wrongdoing against it, as being separate and distinct from the company's loss is a principled development of company law. It excludes the possibility of double recovery. It avoids a scramble between shareholders to establish their private claims against a wrongdoer in case the wrongdoer does not have sufficient accessible assets to meet those claims. It thereby upholds the default position of equality among shareholders in their participation in the company's enterprise: each shareholder's investment follows the fortunes of the company'. It maintains the rights of the majority of the shareholders, as the Court of Appeal stated in *Prudential* [1982] Ch 204, 224. And it preserves the interests of the company's creditors by maintaining the priority of their claims over those of the shareholders in the event of a winding up.

In this regard, we do not read Lord Hodge's references to these various consequences of the rule as suggesting that these constitute the *basis* for the rule, but consider that the learned judge was merely identifying the salutary *consequences* of the rule in many cases. For example, double recovery is not the *basis* of the rule, but in certain cases, the rule may help, *incidentally*, to prevent double recovery. Similarly, the rule applies even for a solvent company when there is no question of the priority of the creditors' claims over shareholders' entitlements, or even where there is a single shareholder and no issue of competition between shareholders arises. However, the rule may have specific *benefits* where these concerns *do* arise. Instead, the basis of the rule is a principled one concerning the nature of shareholding, as Lord Hodge clearly states elsewhere.

160 We turn then to Lord Sales's judgment for the minority. The minority took a different approach, reasoning that the English Court of Appeal in *Prudential* did not in fact set out a rule of law and did not purport to do so.

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Instead, the court in *Prudential* had only reasoned that the shareholder in such a case suffered no loss *as a matter of fact*. However, Lord Sales considered that this reasoning could not be supported, and there were "clearly … some cases where the shareholder does suffer a loss which is different from the loss suffered by the company" (see *Marex* at [118]). In the learned judge's view, "the issue of double recovery is of importance in relation to shareholder claims as well as in relation to creditor claims" (at [119]). We might say that the gist of the minority's approach is that there is ***no*** principle of reflective loss, and all that the court is concerned with is the prevention of double recovery.

161 In so far as *Prudential* was concerned, Lord Sales considered that the English Court of Appeal had "conflated the rationale for the rule in *Foss v Harbottle* with the rationale for the reflective loss principle", and that it had failed to consider the possibility that the shareholder could have a personal cause of action on the basis of facts that was not relevant to the company's cause of action (see *Marex* at [142]). Further, the English Court of Appeal had also conflated the correct proposition that a shareholder cannot recover damages merely because the company he is interested in has suffered damage (because the mere fact that the company suffered damage would not give the shareholder a cause of action), with the "highly questionable" proposition that a shareholder "cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend" (at [143]). Lord Sales then addressed the issue of what losses a shareholder may suffer, considering the nature of the value of shares to the shareholder (at [145]–[147]). On the facts of *Prudential*, the plaintiff had failed to establish that there had been a fall in the market value of its shares, and the English Court of Appeal was therefore correct to find, on the facts, that there was no loss that was distinct from that suffered by the company (at [148]). In the learned judge's view, a shareholder is entitled

to vindicate his rights, and nothing in the articles of association amounts to a promise not to do so against a wrongdoer when the company also has a cause of action against the same person (at [149]–[150]).

162 Lord Sales rejected the counterargument based on causation (which posits that the loss suffered by the shareholder is not caused by the wrongdoing but by the decision of the company not to sue to recover for its losses) (see *Marex* at [151]−[152]), and observed that there is no "necessary correspondence between the loss to a shareholder and the loss to the company which follows from a wrong done to the company which also forms part of a parallel wrong done to the shareholder" (at [153]). We would highlight that these propositions were also adopted by the majority (see *Marex* at [55]–[57], *per* Lord Reed). When the shareholder has its own cause of action, the company cannot control the shareholder's conduct, and if the company recovers for its losses, that may affect the scope of the shareholder's recovery in that the shareholder's losses may be mitigated, but may also not eliminate it (at [154]).

163 Lord Sales then turned to the issue of double recovery against a wrongdoing defendant (see *Marex* at [155]), noting that there are ways in which the loss caused to the shareholder can be quantified (at [156]–[158]) to avoid these issues. If there remains an issue with a defendant potentially being made to pay twice over, Lord Sales expressed a preference for "giving priority to protecting the interests of the innocent claimant rather than to giving priority to protecting the interests of the wrongdoing defendant" (at [159]).

164 Where the loss suffered by a company and the loss suffered by the shareholder are more directly connected, (a) the shareholder may still have a separate cause of action, and (i) if the company chooses not to pursue the claim, any concern of double liability is removed; or (ii) if the company chooses to do

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so, the shareholder may still have suffered a separate loss that is not eliminated by the company's recovery due to the company's decision not to distribute the money recovered given the change in circumstances (see *Marex* at [160]); and (b) the court can address the coincidence of claims by procedural means (at [161]). In this regard, Lord Sales touched upon this court's judgment in *Townsing*. While the learned judge observed that the proper plaintiff principle and the principle of unity of interests could not justify the reflective loss principle in so far as it related to a distinct loss suffered by the shareholder who had a separate cause of action, he considered, approvingly, this court's recognition that the issue of double recovery and prejudice to shareholders and creditors could be met through procedural means. In Lord Sales's view, this court's approach in *Townsing* was that "[t]he reflective loss principle was not treated as a rule of law which had the effect of stipulating that the shareholder could not be regarded as suffering any loss at all" (at [164]).

165 Having established that a shareholder could in fact suffer loss separate and distinct from the company's, Lord Sales found that there were no policy reasons for eliminating a shareholder's cause of action in favour of the company's (see *Marex* at [165]–[166]). While the learned judge recognised the value of a bright line rule, he considered that it came at too great an expense of denying the existence of loss (which existed) and denying a cause of action (which a shareholder would have in common law) (at [167]). This, in our view, is the normative crux of the minority's position – if a loss is suffered in relation to an asset, then in the absence of a strong reason otherwise, the claim for that loss should be allowed to proceed.

166 Turning to *Johnson*, Lord Sales subjected the various speeches in the House of Lords to criticism. A repeated theme throughout is the fact that the learned judges in *Johnson* had proceeded on the assumption that *Prudential* was

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correctly decided (see *Marex* at [177]–[179]), although Lord Sales also levelled further criticisms against Lord Millett's reasoning (at [179]–[187]). In summary, the learned judge would not follow the reasoning in *Johnson* in so far as it endorsed the reflective loss principle preventing shareholders from recovering personal loss which is different from the loss suffered by the company (at [194]). On the facts of the case, given the rejection of *Johnson* and the reflective loss principle generally, the minority agreed that the appeal should be allowed.

The proper basis for the reflective loss principle in Singapore

167 We turn then to the question of how the reflective loss principle should operate (if at all) in Singapore.

Difficulties with the present law in Singapore

168 We begin by diagnosing the issues with the present law in Singapore. In our judgment, the present approach represented by the framework in *Townsing* is ripe for reform. There are broadly two categories of issues arising from *Townsing*: (a) issues relating to the *co-existence* of the Preventive Rule and the Policy Exception; and (b) issues relating to the *scope* of the Preventive Rule.

169 The first category of issues arises from a tension between two principles underlying the reflective loss principle. On the one hand, it has been affirmed that the reflective loss principle is a corollary and variant of the "proper plaintiff rule" found in *Foss v Harbottle* (see *Townsing* at [78]; see also the decisions of this court in *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 at [92]–[93] and *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [61]). On the other hand, the reflective loss principle has been justified on the grounds of double recovery or prejudice to other

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creditors and shareholders (see *Townsing* at [75] and *Beckett* at [85]). These two principles undergird the Preventive Rule and the Policy Exception, respectively. However, this gives rise to the following inconsistencies:

(a) On the one hand, the Preventive Rule is said to apply even when the company compromises the claim or chooses otherwise not to pursue the claim (see *Townsing* at [73]). On other hand, in these situations, there is no risk of double recovery or prejudice to other shareholders or creditors, and there is therefore no reason why the Policy Exception should *not* apply. The Policy Exception would therefore appear to undermine a central aspect of the Preventive Rule. This contradiction between the two rationales was also identified by Lord Reed in *Marex* at [55].

(b) On the one hand, the Preventive Rule would prevent entire *categories* of losses from being claimed, including any diminution of the value of shareholding or distributions from the company, or the loss of any sums of money that the shareholder would otherwise have been entitled to receive from the company even in another capacity. On the other hand, in so far as the risk is of double recovery is concerned, Lord Reed has, in our view convincingly, demonstrated how the assumption that there would be double recovery in every such instance is flawed (see *Marex* at [32]–[33]). As for whether there is prejudice to other shareholders and creditors, this must, similarly, be a question of fact in each case. When the scope of double recovery and prejudice is properly considered, the Policy Exception appears to dictate the scope of the Preventive Rule, rather than simply being an exception to the rule. Indeed, it appears that the Policy Exception cannot help but end up as the minority's approach in *Marex*, which does not put in place any

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Preventive Rule but leaves it to the court to manage risks of double recovery and prejudice on the facts of each case. This explains Lord Sales's approval of *Townsing* in *Marex* at [164] (see [164] above).

(c) On the one hand, the Preventive Rule is said to be one of principle rather than discretion (see *Townsing* at [75]). On the other hand, the Policy Exception appears to introduce a significant degree of discretion into the decision-making process, as it turns on whether the court concerned is satisfied that the public policy concerns have been sufficiently addressed.

170 In our view, the existing jurisprudence sits uneasily between two principles – one strand of thinking points to a strict application of the Preventive Rule, while the other strand would slip away from the Preventive Rule and towards a more flexible approach based on actual risk of double recovery and prejudice. Indeed, this chameleon-like quality of the decision in *Townsing* explains why Lord Reed was able to quote approvingly from one part of the judgment (see *Marex* at [37]), while Lord Sales was able to draw support for the minority's approach from another part (see *Marex* at [164]). Having attempted to integrate *both* the rationales based on company law and based on double recovery into the framework by the combination of the Preventive Rule and the Policy Exception, however, the court in *Townsing* had regrettably left the law in an unstable state, with two strands of thinking pulling in two different (and opposite) directions. These rationales are fundamentally incommensurable, since they deal with entirely different concepts and wholly different concerns. With respect, this risk was not considered by the court in *Townsing*, and, with the benefit of hindsight and more recent developments (in particular, the decision in *Marex*), we think that it is time to reform this area of law.

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171 We would highlight here that although the majority and minority in *Marex* arrived at diametrically opposite conclusions in relation to the reflective loss principle, both sides of the debate were in fact operating in a very similar way (if only in method, not in substance). Both the majority and the minority have kept rigorously to their respective characterisations of the reflective loss principle. Because the majority was of the view that the reflective loss principle was a rule of company law predicated on the unique status of the shareholder, it followed that the principle had no application to claims brought otherwise than as a shareholder for loss suffered in respect of the value of shares or distributions. The majority took this consistent position even in the face of the admittedly weighty normative concerns that undergird the *Giles v Rhind* exception. On the other side, because the minority was of the view that the reflective loss principle was not in truth a principle of law but was merely a reflection of the *fact* that in some cases, a shareholder would not be able to prove personal loss, it followed that there was no place for any such bar against recovery, and any other concerns, primarily that of double recovery, could be adequately dealt with by procedural mechanisms and rules.

172 The second category of issues we identify relates to the *scope* of the Preventive Rule. We consider that the Preventive Rule stated in *Townsing* is too broad. In truth, even within the formulation of the scope of the Preventive Rule was an attempt to hold both the company law principle and the policy concern of preventing double recovery together – as noted at [135] above, it is Lord Millett's restatement of the rationale as being one of preventing double recovery and prejudice to other creditors and shareholders that *underlies* the extension of the rule to claims for loss other than the diminution in the value of shares or distributions from the company. We find in the breadth of the rule as stated in *Townsing* yet another reason for reform. First, the breadth of the

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Preventive Rule is likely to lead to significant distortions all throughout the law of obligations. We respectfully quote from Lord Reed at [77] of *Marex*:

> … Professor Andrew Tettenborn has rightly warned that 'Today it promises to distort large areas of the ordinary law of obligations': 'Creditors and Reflective Loss: A Bar Too Far?' (2019) 135 LQR 182. The decision of the Court of Appeal in the present case, applying the approach laid down by Lord Millett in *Johnson* and by the Court of Appeal in *Gardner v Parker*, confirms that threat. It is the first case in this jurisdiction in which the 'reflective loss' principle has been applied to a claimant which is purely a creditor of a company. The extension of the principle to such cases has the potential to have a significant impact on the law and on commercial life. The possibility of the further extension of the principle to creditors of natural persons, which the Court of Appeal considered, indicates the extent to which it has become difficult to confine. As the scope of the principle has expanded, so have the volume of litigation and the level of uncertainty.

While the jurisprudence in Singapore has not developed as far yet, there is no *principled* reason why it would not. In particular, we observe that this court in *Townsing* had approved of the English Court of Appeal's decision in *Gardner*. Tellingly, in that very case, Neuberger LJ had observed at [70] that:

> … [I]t 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.

173 Indeed, the present case is an apt illustration of the possible scope of the Preventive Rule. If we were to apply the *dicta* in *Townsing* to these facts, we would have considered it very arguable that the reflective loss principle prevented Tendcare from recovering against *Mr Miao*, in particular, for dishonestly assisting in the second leg of the transfers (see [83] above) from TJHK onwards to QHC. Broadly speaking, this is a case where the loss suffered by Tendcare of the US$4m "would be made good if the company's assets were

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replenished through action against the party responsible for the loss" (see *Johnson* at 35 and *Townsing* at [69]) – Tendcare would then be able to recover its money from TJHK. The loss of US$4m suffered by Tendcare is therefore "reflective" of the loss of US$4m suffered by TJHK, which sum was wrongfully transferred out of TJHK by Mr Gong, who was dishonestly assisted by Mr Miao. Further, if the views in *Townsing* are to be maintained, we see no reason to distinguish between a creditor who holds a debt owing by the company and a potential claimant who has a *chose in action* against the company. While we do not need to conclusively determine if the law in *Townsing* would bar Tendcare's claim against Mr Miao, we note here that it is certainly arguable and the risk of such extension of the reflective loss principle is a reason against maintaining the position taken in *Townsing*.

174 The breadth of the Preventive Rule also leads to confusion and difficulty in its application. The broader the Preventive Rule is, the less it is tied to the nature of a shareholder's participation in a company, and the harder it is to grasp why so-called "reflective" loss cannot be recovered. Once the Preventive Rule is said to apply to obligations owed to shareholders *qua* creditors or some other legal capacity, the reasons for preventing a claim from being brought become less clear. When the boundaries of a rule exceed the scope of its underlying principle and rationale, this will lead to problems in its application given its apparent artificiality. The exchange between the Judge and Mr Chan in the court below on this issue, quoted extensively by the respondents in their Respondents' Case at para 18, is illustrative of the difficulties of an overly broad and seemingly artificial Preventive Rule.

175 For the foregoing reasons, we are not inclined to maintain the law as stated in *Townsing*. The question for us now is *how* we should depart from *Townsing*.

Concerns of double recovery

176 Before we consider the possible routes that we may take, we address the policy concern of preventing double recovery, which has taken up much of the discourse surrounding the reflective loss principle since Lord Millett's decision in *Johnson*. We do so here primarily to establish that even *apart from* the reflective loss principle, the law has always found ways to deal with double recovery, which is a ***general concern*** throughout the law. This means that, in truth, double recovery does not *need* to concern us *at all* when we consider the basis of the reflective loss principle – we respectfully agree with both the majority and minority in *Marex* that the law already has many means of preventing double recovery from occurring.

177 The concern of preventing double recovery is, as we alluded to in our introduction, a matter of fairness. It is "axiomatic" (see the High Court decision of *Compañia De Navegación Palomar, SA and others v Koutsos, Isabel Brenda* [2020] SGHC 59 at [46]). Any lawyer and, we would add, any layperson would consider it intolerable if a wrongdoer is made to pay twice over for a single wrongful act, or if a party who has suffered wrong is allowed to receive more than what had been lost. We find that throughout our jurisprudence, whenever there is a risk of double recovery, the courts are keen to prevent that unjust outcome with whatever tools there are at their disposal. Without intending to provide an exhaustive account of how the law addresses these concerns, we highlight a few instances when the court has addressed its mind to the risk of double recovery, in recognition of the fact that, as the High Court stated in *Oxley Consortium Pte Ltd v Geetex Enterprises Singapore (Pte) Ltd* [2020] SGHC 235 at [186], "the court is no stranger to the risk of double recovery" (this particular point was not considered on appeal in *Oxley Consortium Pte Ltd v Geetex Enterprises Singapore (Pte) Ltd and another matter* [2021] 2 SLR 782).

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178 Double recovery is sometimes relevant at the interlocutory stage, when parties seek to challenge the jurisdiction of the Singapore court, or to seek stays of proceedings in favour of arbitration or of proceedings in other jurisdictions. Where there are multiple proceedings, the court will consider the exact scope of what is claimed, the progress in the various proceedings, and how the remedy sought in the present proceedings can be crafted to avoid double recovery (see, for example, the High Court decision of *Raffles Education Corp Ltd and others v Shantanu Prakash and another* [2020] SGHC 83 at [89] (in the context of an application for a stay of a suit in Singapore on the grounds of *forum non conveniens*)). The risk of double recovery or the safeguards against double recovery would be a relevant factor in the natural forum analysis, to determine the weight to be given to the risk of overlapping proceedings in multiple jurisdictions (see the decision of this court in *Ivanishvili, Bidzina and others v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [113(a)]).

179 Where multiple actions are brought one after the other, courts may rely on doctrines like issue estoppel and the extended doctrine of *res judicata* to prevent re-litigation and potential double recovery (see, for example, the High Court decision of *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and others* [2020] 5 SLR 665 at [112]). Where a further action would result in double recovery, it may be characterised as a collateral attack on a prior settlement agreement which would be prevented by the extended doctrine of *res judicata* (see the High Court decision of *Manas Kumar Ghosh v MSI Ship Management Pte Ltd and others* [2021] 4 SLR 935 at [60]–[61]).

180 In terms of the substantive claims, the question of double recovery is sometimes dealt with at the stage of determining the scope of duties owed, for example, when the court is faced with an attempt to extend duties in tort to certain other parties when duties are already owed to another (see the decision

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of this court in *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd* [2010] 4 SLR 1089 at [52]).

181 Perhaps most commonly, double recovery is dealt with in terms of remedies and damages. Double recovery is the underlying rationale for the principle of election between alternative remedies (see the High Court decision of *Main-Line Corporate Holdings Ltd v United Overseas Bank Ltd and another (First Currency Choice Pte Ltd, third party)* [2010] 1 SLR 189 at [24] (appeal allowed in *Main-Line Corporate Holdings Ltd v United Overseas Bank Ltd* [2010] 2 SLR 986 (albeit not in relation to this particular point)) and the decision of this court in *Parakou Investment Holdings Pte Ltd and another v Parakou Shipping Pte Ltd (in liquidation) and other appeals* [2018] 1 SLR 271 at [131]). The law on agency and the rules relating to the recovery of damages by an agent are premised on the prevention of double recovery (see the decision of this court in *Family Food Court (a firm) v Seah Boon Lock and another (trading as Boon Lock Duck and Noodle House)* [2008] 4 SLR(R) 272 at [61] and the High Court decision of *Wartsila Singapore Pte Ltd v Lau Yew Choong and another suit* [2017] 5 SLR 268 at [102]). Similarly, the laws of subrogation have been formulated, in part, to address the concerns of double recovery (see the decision of this court in *Seagate Technology Pte Ltd and another v Goh Han Kim* [1994] 3 SLR(R) 836 at [51]).

182 Courts have a variety of tools at their disposal to prevent double recovery when awarding damages. A court may obtain, or even require, an undertaking from a party in order to eliminate the risk of double recovery (see the decision of this court in *Minichit Bunhom v Jazali bin Kastari and another* [2018] 1 SLR 1037 at [85(a)] and the High Court decision of *Super Group Ltd v Mysore Nagaraja Kartik* [2019] 4 SLR 692 at [178]). This may extend to undertakings not to seek double recovery in Singapore and *another* jurisdiction

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(see the decision of this court in *Offshoreworks Global (L) Ltd v POSH Semco Pte Ltd* [2021] 1 SLR 27 at [51]).

183 Damages will not be awarded twice over for what is substantially the same claim (see the decision of this court in *Raffles Town Club Pte Ltd v Tan Chin Seng and others* [2005] 4 SLR(R) 351 at [45]; see also the High Court decision of *Tan Shi Lin v Poh Che Thiam* [2017] SGHC 219 at [46] (in the context of damages for pain and suffering in a personal injury action)). In so far as there remains the risk of double recovery, orders can be made for sums to be refunded in the event of double recovery: see the High Court decision of *Tjong Very Sumito and others v Chan Sing Eng and others* [2012] 3 SLR 953 at [300(e)] (appeal allowed in part in *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 (albeit not in relation to this particular point)), or the orders made can be stated to be in the alternative to each other: see the High Court decision of *Lyu Yan v Lim Tien Chiang and others* [2020] SGHC 145 at [50] (appeal dismissed in *Ang Jian Sheng Jonathan and another v Lyu Yan* [2021] 1 SLR 1091). More simply, the court may simply award damages subject to the prohibition against double recovery (see the High Court decision of *Zhou Weidong v Liew Kai Lung and others* [2018] 3 SLR 1236 at [101] and the decision of this court in *Low Tuck Kwong v Sukamto Sia* [2014] 1 SLR 639 at [118]). The principle applies even for different causes of action: see the High Court decisions of *Thode Gerd Walter v Mintwell Industry Pte Ltd and others* [2010] SGHC 33 at [17] (where there were two judgments, one for breach of contract and the other for misrepresentation in tort) and *Grande Corp Pte Ltd v Cubix Group Pte Ltd and others* [2019] SGHC 146 at [21] (appeal allowed in part in *Toh Wee Ping Benjamin v Grande Corp Pte Ltd* [2020] 2 SLR 308 (albeit not in relation to this particular point)). Indeed, in the court below in this particular case, the Judge accounted for the risk of double

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recovery in respect of the US$4m by adjusting the combinations of parties who were made jointly and severally liable for the various sums (see the Judgment at [166]).

184 Taking a broader perspective, we are also satisfied that in most, if not all, jurisdictions, measures do exist to prevent double recovery. We say this because in many instances of company-related litigation, the cross-border element may be prominent. We are willing to assume for present purposes that if a claim is brought in Singapore which may involve double recovery elsewhere, once judgment is rendered in Singapore, no injustice will ultimately be caused since other jurisdictions will have their own rules for preventing double recovery (this, of course, is subject to any evidence to the contrary in particular cases that may come before our courts). Hence, we see no reason why, even if there is an international element to the dispute, we should not simply leave this to be resolved according to the usual rules of private international law, the recognition of our judgments in foreign jurisdictions, and any rules that those other jurisdictions would have to prevent injustice in enforcement proceedings.

185 Having established that the policy against double recovery is of general application throughout the law and that multiple tools are at the court's disposal to prevent such double recovery, we turn to the relevance of double recovery to the reflective loss principle. We agree with both the majority and minority in *Marex* that double recovery is not a *justification* for the reflective loss principle.

186 In the first place, as a matter of principle, the concern to prevent double recovery is not sufficient to justify a blanket prohibition against recovery. The issue of principle may be stated as follows (see Andrew Phang, "The Crumbling Edifice? The Award of Contractual Damages for Mental Distress" [2003] JBL

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341 at p 343; quoted in the High Court decision of *Kay Swee Pin v Singapore Island Country Club* [2008] SGHC 143 at [61]):

> … [T]here is no reason why one avenue of legal redress must necessarily be precluded simply because another exists. Justice demands that there be no double recovery but beyond this, there is no compelling reason for maintaining artificial barriers.

Put another way, double recovery as a concern is adequately addressed by many means, largely in the realm of procedure and the assessment of damages. Viewed in that light, it lacks sufficient normative weight, in and of itself, to justify the exclusion of a particular head of claim entirely. This, we find, applies to the present issue as well. The question, as we will see, is whether there is *a separate normative basis* for precluding recovery by a shareholder in such instances.

187 Second, we respectfully agree with the learned judges in *Marex* that double recovery cannot explain the contours of the reflective loss principle as it has emerged in the jurisprudence. The reflective loss principle applies to bar a shareholder's claim even if the company chooses not to bring an action – if the concern is purely that of preventing double recovery, then as there is no risk of double recovery in such a case, there should be no issue with the shareholder making a claim. Yet, the reflective loss principle has repeatedly been stated to apply even in such a situation (see *Marex* at [34] and [55]).

188 Third, to base the reflective loss principle on the prevention of double recovery in the case of a shareholder's personal claim, one must *assume* that there is always an overlap between the loss caused to the company and the loss suffered by the shareholder. This is not a realistic assumption to make in many cases. As Lord Reed observes in *Marex* at [32]:

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> Where a company suffers a loss, that loss may affect its current distributions or the amount retained and invested in order to pay for future distributions (or, if the company is wound up, the surplus, if any, available for distribution among the shareholders). Since the value of a company's shares is commonly calculated on the basis of anticipated future distributions, it is possible that a loss may result in a fall in the value of the shares. That is, however, far from being an inevitable consequence: companies vary greatly, and the value of their shares can fluctuate upwards or downwards in response to a wide variety of factors. …

A similar point is made by Lord Sales at [145]–[147] and [153] of *Marex*. Of course, the majority and minority take this point in two *different* directions – the majority accepts that the decline in the value of shares may not reflect the loss suffered by the company and concludes that the reflective loss principle *deems* that the loss suffered by the shareholder is not separate and distinct from the company's loss for other reasons of principle, whereas the minority concludes that this is a reason for abandoning the reflective loss principle entirely, and to allow the mechanisms of double recovery to resolve the issue if such a risk does eventuate. The point here is that, in reality, there may not be a risk of double recovery in many instances that would be covered by the reflective loss principle, and the prevention of double recovery therefore cannot be a *justification* for that principle.

189 Indeed, we might say that the view that there is inevitably double recovery in such cases is based on certain assumptions that *contradict* basic company law principles. This can be clearly seen in Lord Millett's speech in *Johnson*. The reason why, we respectfully venture to suggest, Lord Millett was of the view that the reflective loss principle was intended to meet the concern of double recovery was his starting point that a share "represents a proportionate part of the company's net assets, and if these are depleted the diminution in its assets will be reflected in the diminution in the value of the shares" (see *Johnson*

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at 62A). If that is the starting assumption, then one can see how – even if there is no complete correspondence between the loss in the value of shares and the loss caused to the company (see *Johnson* at 62B) – the emphasis would be on ensuring that the same loss is not compensated for twice over by the wrongdoer. However, as Lord Reed and Lord Sales both note (see *Marex* at [49] and [122]), this is not correct either as matter of company law (in the light of *Macaura*) or practical reality (in terms of how companies are actually valued).

190 Furthermore, if the rationale is indeed to prevent double recovery, the scope of the principle begins to become uncontrollable, and, as we noted earlier, risks undermining the whole law of obligations in so far as companies are involved. The problem, we respectfully think, lies in Lord Millett's focus on the *fact of loss* rather than the principled reasons for why a *shareholder's loss* in the form of a diminution of the value of shares or of distributions is treated differently. This can clearly be seen in the statements made by Lord Millett quoted at [136]–[138] above, and are encapsulated in these sentences (see *Johnson* at 66C):

> … 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. [emphasis added]

191 As Lord Reed noted in *Marex* at [61], taking this statement together with Lord Millett's view in *Johnson* at 66H–67B, Lord Millett's view elided the distinction between the shareholder and the company. Taken to its logical conclusion, this reasoning would apply to any and all payments that a shareholder could expect to receive from the company in whatever capacity. Furthermore, if the emphasis is on whether the "loss is franked by that of the company", then the principle has an even further reach. We may accept as a

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matter of fact that if a wrongdoer misappropriates the company's funds, and a creditor loses the ability to seek repayment of its debt from the company, there is a factual overlap between the company's loss and the creditor's loss, such that if the company sues for the wrong and recovers from the wrongdoer, the creditor's loss would be, in some respect, "franked". But this mere *factual* link does not answer the more important, and logically anterior, question of *why* any overlap is significant enough for the law to institute a bar against recovery *in limine*. Indeed, the mere fact of loss is not legally significant apart from the specific context in which the loss arises and the causes of action that can be brought for that loss – this elision of different causes of action may explain why Lord Millett's *dicta* lent itself easily to barring claims by *creditors* even though such claims are on an entirely different footing from the *company's* or even the *shareholder's* claim against the wrongdoer.

192 Mr Chan's arguments before us were based essentially on the following line of argument – that because a plaintiff's claim against the wrongdoer was based on a loss that would be compensated for if the company pursued its own cause of action and recovered against the wrongdoer, the plaintiff's claim would be barred by the reflective loss principle. With respect, Mr Chan never did answer the question, which we posed to him at the outset of the hearing, why we should focus on the fact of loss rather than the distinction in the causes of action held by the company and the shareholder. The mere fact of overlapping loss is not unique to this area of law, and if there are distinct causes of action, some better, normative reason must be found for barring recovery entirely. Relatedly, as already noted above, this focus on the mere fact of loss meant that Mr Chan's arguments could not account for the different capacities in which claims might be brought against a wrongdoer. Furthermore, although Mr Chan may be correct in a purely factual and descriptive sense that in such instances,

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the loss suffered by the plaintiff is franked by the company's loss, he did not engage with the *normative* question as to why that overlap should be barred by a *principle of law* rather than be merely dealt with as an aspect of double recovery generally. Indeed, adopting this perspective, Mr Chan argued before us that the reflective loss principle could not be restricted to company law, but also extended to other "corporate" bodies (in the looser sense of the word) such as partnerships and statutory boards. This, we accept, was a logical development from Mr Chan's premise, but far from persuading us of the merits of his position, it clearly demonstrated the dangers of the approach based on double recovery.

The specific sphere of company law

193 The policy against double recovery therefore does not and cannot *justify* the reflective loss principle. We are faced, then, with a choice. Do we accept that, as a consequence, there is no basis for the reflective loss principle as an absolute rule preventing recovery, and hold instead that any concerns of double recovery are more properly addressed by other means? Or is there some other more principled justification on which to base the principle that a shareholder's loss in the form of a diminution of the value of shares or of distributions should not be allowed? Having considered the merits of both the majority's and minority's positions in *Marex*, we choose to affirm the existence of the reflective loss principle as a rule of ***company law***, following *the majority* in *Marex*.

194 We begin by acknowledging that the minority's position has significant force. First, and perhaps the strongest *normative* argument, is the respect that it accords to causes of action that are personal to shareholders. Given the separate legal personality of a company, the shareholder's claim and the company's

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claim are not the same, and if a wrong is done to the shareholder, that is done personally to him. In the absence of any obligation on the shareholder's part to stay his hand, the minority reasons that the shareholder should not be prevented from making any claim (see *Marex* at [122]–[125]). Any issues of double recovery can be dealt with in the assessment of damages and via procedural mechanisms (at [153]–[164]). The bright line rule would "produce simplicity at the cost of working serious injustice in relation to a shareholder who (apart from the rule) has a good cause of action and has suffered loss which is real and is different from any loss suffered by the company" (at [167]). To say that a derivative action or minority oppression action would be sufficient would, as some commentators have argued, be unrealistic given the hurdles to be crossed in such actions, and the fact that recovery under those actions would not likely to yield the same amounts as the amounts that could be recovered in a personal action, in addition to the fact that there are significant practical barriers in the context of a derivative action (see *Ivan Sin* at p 293).

195 Second, the minority's approach accords with the reality of the value of the shares to the shareholder. The plurality had recognised that the value of shares to the shareholder does not necessarily equate with the assets in a company, and any loss caused to the company therefore does not necessarily correspond to the reduction in the value of the shares. Lord Sales also recognises this fact (see *Marex* at [153]–[159]). Where the majority and minority diverge is in terms of what implication should be drawn from this fact. Lord Reed reasoned that because of this lack of correspondence, the reflective loss principle needed to be based on something other than the prevention of double recovery, hence the emphasis on the rule in *Foss v Harbottle*. Lord Sales, however, finds in this reality a reason not to have the reflective loss principle at all. This approach has its attractions. It fully recognises the reality of how shares

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(in particular, publicly traded shares) are valued and the importance of the monetary value of shares to shareholders. It accords weight to the fact that shares are, in the eyes of many, simply assets with a value, in respect of which a claim should exist if a wrong is done affecting such value (see *Marex* at [147]; see also Pearlie Koh, "The Shareholder's Personal Claim: Allowing Recovery for Reflective Loss" (2011) 23 SAcLJ 863 at para 9).

196 Third, the minority's approach has the attraction of being sensitive to the facts of each case. This is the opposite of the bright line rule, inasmuch as the minority's approach calls for a more fact-sensitive approach to each and every case to determine if a certain loss can be recovered and, if so, whether certain procedural mechanisms need to be put in place to prevent double recovery. The court in *Townsing* appears to have favoured this approach given the emphasis given to the Policy Exception, which, as we have observed above, leads naturally (as well as ultimately) to the minority's approach in *Marex*.

197 However, we are ultimately of the view that despite the *prima facie* attractiveness of these arguments, they do not go so far as to justify the abandonment of the reflective loss principle. With respect, our primary difficulty with these arguments is the assumption underlying each of these points that the private law claims held by the shareholder are and should be kept entirely distinct from the shareholder's unique status under company law. In other words, it is assumed that a shareholder's private law interest (in the shares *qua* assets) either exists entirely separately from or even trumps the shareholder's status in company law (arising from the nature of shares in a corporate entity). We do not think that this assumption is warranted. We respectfully agree with Lord Hodge that participation in a company as a shareholder is a matter for regulation by company law – a person who becomes a shareholder takes advantage of the corporate form, but should also take its

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disadvantages (see *Marex* at [102]–[107]). Put simply, a shareholder cannot take the benefits without also assuming the burdens. While Lord Sales assumes that a shareholder should be free to act in whatever way suits his interests, even in respect of the value of his shareholding, and that the only relevant constraints should be any *obligation* undertaken by the shareholder to other shareholders or to the creditors of the company, this does not account sufficiently for the fact that the law also steps in to regulate the scope of a shareholder's rights and duties in many other respects (see [117]–[119] above), and that it may prevent shareholders from acting in such a way as to undermine or otherwise contradict the rules of company law. In this regard, a rule against claims on the basis of loss of value in shareholding or distributions from a company could be well-justified on the basis of the policy of company law even if the denial of recovery appears unjust from a purely private law perspective – indeed, despite difficulties that the learned authors of *Gower: Principles of Modern Company Law* (Paul L Davies, Sarah Worthington and Christopher Hare eds) (Sweet & Maxwell, 11th Ed, 2021) perceived in the majority's views in *Marex*, they ultimately recognised too that "there is something in these shareholder claims that merits the discriminatory response now provided by the reflective loss principle" (at para 14–011).

198 We return to the company law context with which we began our analysis. While shares are now treated in many ways as merely assets that have a specific market value to their shareholders, especially for shares that are publicly traded, the fundamental *nature* of a share does not lie in that market value, but in the right it represents to participate in the company (see *Marex* at [31]). The company carries on the business, while the shareholder subscribes for or purchases shares in the hope of receiving a distribution of the profits (see also [117] above). The financial value of a share to the shareholder is not its

primary property, even if, in lay terms, it is often treated as such. When the only question is a shareholder's claim against a wrongdoer for loss caused directly to the shareholder and not to the company, there is no doubt that the shareholder can claim even for a diminution in the value of his shares as if the shares were any other property. But we are dealing here with the specific relationship between the shareholder and the company, in which a loss is caused to the company and a shareholder wishes to claim against the wrongdoer as a consequence of that loss. In this context, we find that the company law perspective prevails: a share, first and foremost, is a particular instrument that gives particular rights in the company. The scope of the shareholder's remedies is necessarily tied to company law principles.

199 The reflective loss principle, in our judgment, is justified by the particular company law context from which it emerges, specifically in relation to the rule in *Foss v Harbottle*. As noted above at [116], that rule consists of two aspects: (a) first, the proper plaintiff in a wrong done to the company is, *prima facie*, the company (*ie*, the proper plaintiff rule); and (b) second, the principle that the management of a company's affairs is entrusted to the decision-making organs of the company (we refer to this as the "corporate management principle"). The reflective loss principle prevents the proper plaintiff rule and the corporate management principle from being undermined. The rule in *Foss v Harbottle*, in turn, is based on the "unique position in which a shareholder stands in relation to his company", which is a "critical part of the explanation" (see *Marex* at [51]).

200 The reflective loss principle is the corollary of the proper plaintiff rule as it properly situates the shareholder's loss in the context of the company's loss. This follows from the unique nature of shares, which, in its essence, gives the shareholder the right to participate in the company (see *Marex* at [31]). The

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company is enabled to carry on a business by the pooling together of more resources than an individual could muster, and the corporate structure offers a way for shareholders to reap the benefits of a successful business while protecting them from the consequences of debts owed or wrongs done by the company. As a consequence, however, the shareholder has also joined the fate of his investment to that of the company – as the English Court of Appeal put it, the shareholder "accepts the fact that the value of his investment follows the fortune of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting" (see *Prudential* at 224B). Notably, the shareholder does not have a *right* to a dividend (which is subject to the rules on distributions and the decision of the company), nor to a right to a particular *value* of shares (any such right, for example, under a guarantee or an option, arises not from the shares but from contract) (see also [117] above). The shares also do not represent a proportionate part of the company's assets (see *Macaura*), and a shareholder is not entitled to payment upon liquidation unless there is a surplus. Simply put, what the shareholder ultimately receives from the company is subject entirely to the company's fortunes. Wrongs done to the company are part and parcel of a company's fortunes – a part of the vicissitudes of corporate life, as it were. A shareholder who invests in a company bears that risk, just as it bears the risk of any business failure to the limited extent of the shareholding. We consider that when that risk eventuates, the shareholder cannot be heard to complain about a loss caused to the value of his investment. In so far as the intrinsic value of the shares is concerned, any reduction in the value of the shares is a consequence of the change in the fortunes of the company. In fact, this also extends to the value of the shares considered in terms of the price that the shareholder would be able to obtain for those shares – in so far as the change in price can be attributed to a wrongdoer's actions, that is merely a reflection of the change in

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the company's fortunes and the market's sentiment *about* that change in fortune (see also *Prudential* at 223G–H, quoted at [129] above), and in so far as the change is not so attributable, then the claim against the wrongdoer cannot be sustained in any event as a matter of causation.

201 Indeed, it is in this context that this court had previously referred to the "unity of economic interests which bind a shareholder and his company" in *Townsing* at [77]. Hence, when a wrong is done to the company which causes the company loss, even when this results in a diminution in the value of the shares or a reduction in distributions, this is not ultimately a loss that the law recognises as being suffered by the shareholder *personally*. It is the company's loss, and the company is the proper plaintiff to pursue the claim. Far from being an "indefensibly narrow" view (see *Marex* at [147], quoting Charles Mitchell, "Shareholders' Claims for Reflective Loss" (2004) 120 LQR 457 at p 459), we think this is a *principled* view of the value of shares from a company law perspective.

202 The reflective loss principle also ensures that the corporate management principle is maintained. To allow shareholders to claim for diminution in the value of their shareholdings or in the distributions from a company would undermine the corporate management principle as it would prevent the company from dealing with the wrongs done to it in the manner that it deems fit (see also Andrew Tettenborn, "Less law is good law? The taming of reflective loss" (2021) 137 LQR 16 at p 19). Even if the minority's approach does not, in and of itself, contradict the corporate management principle, it would certainly restrict a company's potential actions, give greater leverage to individual shareholders over a company's management, complicate the company's decision-making process, and, in doing so, diminish the corporate management principle, if not in theory, then in practice (see also the Privy Council decision

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(on appeal from the Court of Appeal of the Cayman Islands) of *Primeo Fund (in Official Liquidation) v Bank of Bermuda (Cayman) Ltd and another (Cayman Islands)* [2021] UKPC 22 at [63]). In so far as any shareholders are dissatisfied, they have to take the matter up with the management of the company through the proper channels, which would involve legal rules that have been designed to balance the interests of the majority and minority in corporate management (see [119] above). Otherwise, once again, they have to accept "that the value of [their] investment follows the fortunes of the company" (see *Prudential* at 224), in recognition of "the unity of economic interests which bind a shareholder and his company" (see *Townsing* at [77], as quoted in *Marex* at [37]).

203 We recognise that there may be some meritorious claims that shareholders may wish to bring against wrongdoers. However, we make two observations in this regard. First, in so far as the view of what a "meritorious" claim is predicated on an essentially *private law* view of the shareholder's remedy for losses caused to an asset, *viz*, the shares, that is an entirely different assumption than the one upon which we base the reflective loss principle. Even if, from a purely descriptive perspective, there is some loss suffered by the shareholder, the normative and legal significance of that loss is a matter for the law's determination. In this context, we must have due regard to the principles of company law in examining whether the losses claimed by a shareholder can be properly treated as being separate and distinct from the company's – if the conclusion is that such loss is not separate and distinct, then, in truth, there is no "meritorious" claim, in a legal sense, to begin with.

204 Second, we think that the appropriate mechanisms for such claims have been legislatively prescribed, in the form of the derivative action under s 216A of the Companies Act and the oppression claim under s 216 of the same Act.

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Even if it is argued that these procedures are burdensome and/or cumbersome, or that the claims are ultimately insufficient to compensate the shareholder, that is a matter either for the reform of these rules or the introduction of some other legislation to alter the law's assumptions as to the nature of shareholdings and the value of shares, in order to enable a claim to be made in instances where the reflective loss principle would otherwise bar recovery. We point out that the mechanisms that are legislatively prescribed seek, as far as they can, to *balance* the competing interests in a company while ensuring that the company's operation is not hindered. Further, the myriad situations in which the issue may arise means that any attempt to formulate exceptions to the reflective loss principle judicially will, ultimately, be self-defeating. It is not for us, sitting in a court of law, to attempt to prescribe a scheme by which claims may be made, notwithstanding the principles that we have discussed above. As alluded to earlier, this would be a prime example of the adage that "hard cases make bad law". If such a scheme is desirable (and we are not sure that it is), that is a matter for Parliament to consider. Our task is to discern the effect of the laws prescribed for companies in keeping with the principles undergirding this area of law. Having done so here, our view is that where an actionable wrong is done to a company that causes loss to the company, a shareholder cannot be said to have suffered any loss that is separate and distinct from the company's loss, and so cannot recover for such loss even if the shareholder has a personal cause of action against the same wrongdoer.

205 While we have seen that the reflective loss principle is ultimately a rule of *principle* of company law, it is apposite to note that adopting a bright line rule has significant *practical* benefits which further prevent the rule in *Foss v Harbottle* from being undermined. A detailed exposition of these benefits can be found in *Marex* at [38]. We would highlight one particular aspect of this

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argument that has a great deal of force in response to the minority's approach in *Marex*. This has to do with *when* a shareholder's claim may be considered to be impermissible. Even under the minority's approach, a certain allowance must be made for the possibility of the company making a recovery for its loss. This is apparent from Lord Sales's judgment at [156]–[157] of *Marex*. However, to properly determine the scope of what the shareholder *can* claim will then necessarily involve many questions of the proper valuation of the company and/or the shares, and an assessment of the likelihood of the company choosing to bring an action, as well as the likelihood of success in that event. The variety of types of corporations, especially having regard to the distinction between publicly listed companies and private companies, will inevitably lead to a great deal of complexity in terms of how these questions are resolved. While these are all issues that a court *can* resolve, they are better reserved for determination after trial and the hearing of witnesses and, more likely than not, experts. The majority's approach in *Marex* has the distinct advantage of being a clear rule preventing *any* claim based on the diminution of the value of shares or distributions, and would permit claims to be struck out at an earlier stage of the proceedings (or, perhaps even better, to discourage them from being brought at all). Further, the certainty that the reflective loss principle provides would better facilitate the company's decision-making and ability to manage its own claim in keeping with the corporate management principle, without having to deal with the variety of claims that its shareholders may then bring.

206 Having come to this conclusion, that the reflective loss principle is a rule of company law specifically arising from the unique status of shareholders, it is clear that the *scope* of the rule extends only to shareholders claiming *qua* shareholders. The rationale identified above is based entirely on the specific nature of shares, and cannot extend to any other claims made, even by

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shareholders in *other* capacities. To put it positively, the rule is only that claims by shareholders for the diminution in the value of their shareholdings or in distributions they receive as shareholders as a result of actionable loss suffered by their company cannot be maintained. Save for the question of whether the *Giles v Rhind* exception exists (which we leave for determination in a suitable case), we adopt the law as stated by the majority in *Marex*.

Application to the present appeal

207 It follows that the reflective loss principle, rightly understood, has no application in the present appeal. Tendcare's claim is not as a shareholder of TJHK for the diminution in the value of its shareholding or in distributions from TJHK. Its claim is against Mr Miao for dishonestly assisting in a wrong done directly to it, and the basis of the claim is the sum of money which it claims it has been prevented from recovering by reason of Mr Gong's wrong and Mr Miao's dishonest assistance of that wrong.

208 There remains, as there always does, the issue of double recovery. Mr Miao claims that in any event, there is a risk of double recovery which has not been mitigated by Tendcare, given that the liquidators of TJHK have commenced proceedings in Hong Kong against QHC on the basis of the loan agreements. The respondents argue instead that no issue of double recovery arises which justifies the present claim being barred.

209 We agree with the respondents that the risk of double recovery has *not* been established. First, we note that the parties in these proceedings and in the Hong Kong proceedings are different. QHC is a separate legal person and is no longer active in these proceedings – indeed, it cannot be as it has been wound up. Mr Miao is not the defendant in the Hong Kong proceedings, as the winding

up application is against QHC, and is not a personal action against him. Hence, whatever is recovered in Hong Kong is not, in fact, due from Mr Miao. There is no risk that Mr Miao will be made to pay damages twice over – indeed, the separate legal personality of QHC and the protection of its shareholders/directors from personal liability (save for certain exceptions) is one of the central advantages of possessing corporate personality.

210 Second, no evidence has been provided to show how much TJHK has been or will be able to recover from QHC, *and* how much Tendcare would be able to recover from TJHK, if at all. *If* Tendcare wishes to proceed against TJHK after receiving payment of the US$4m in full from Mr Miao, we are content to leave it either to the Hong Kong court to determine how best to resolve the issue of double recovery (see [184] above) or to a future application in Singapore. In the absence of clear evidence of the problem arising *now*, we are not in a position to make any orders in that regard. We also trust that counsel for the respondents will advise them accordingly if any such problem of double recovery does, in fact, arise.

Conclusion

211 For the foregoing reasons, Mr Miao's appeal is allowed in part. The Judge's finding that Mr Miao is liable for the US$2m Transfer is reversed. Mr Miao, however, remains liable for his dishonest assistance in relation to the US$4m Transfer, and the principle of reflective loss does not bar Tendcare's recovery of this sum from Mr Miao. Hence, of the orders against Mr Miao made by the Judge, only the order that Mr Gong, HXTJ, Mr Miao and QHC are jointly and severally liable to the respondents for the sum of US$4m remains (see the Judgment at [169]).

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212 In this case, the respondents have succeeded substantially on two of the three main issues (the US$4m Transfer and the reflective loss issue). Therefore, they should be awarded the costs of the appeal, albeit with a reduction as Mr Miao has succeeded in relation to the US$2m, which was a significant part of the appeal. We order Mr Miao to pay the sum of S$65,000 (all-in) to the respondents as the costs of the appeal. The usual consequential orders will apply.

Sundaresh Menon
Chief Justice

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Quentin Loh
Judge of the Appellate Division

Chao Hick Tin
Senior Judge

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Annex 1