Singapore Journal of Legal Studies
[2022] 309–333

THE SPECTRE OF REFLECTIVE LOSS

CHUA RUI YUAN*

In *Marex* and *Miao Weiguo*, the majority of the UK Supreme Court and the Singapore Court of Appeal opted for simplicity in the form of a bright-line preclusion against recovery of reflective loss by shareholders, *ie*, losses taking the form of a diminution in the value of shareholding and/or distributions. This article examines the law prior to these significant decisions, sets out the key points and reasoning of the courts, and upon critical examination, respectfully suggests that the law is seeing something that does not exist: there is no such thing as an independent principle of 'reflective loss'.

I. INTRODUCTION

Consider the following hypothetical. *X* and *Y* do not like *Z*. As a result, they conspire to burn down *Z*'s house. It is uncontroversial that *Z* will have a cause of action in tort against *X* and *Y* for their arson of his house.

Now consider this alternate scenario where I replace *Z*'s house with *Z*'s minority shareholding in Company *A*. Again, *X* and *Y* do not like *Z*. However, they now conspire to spread falsehoods about Company *A*'s solvency which results in Company *A* losing several contractual opportunities and the value of its shares falling as market sentiment turns against it. The directors of Company *A* do not consider claims against *X* and *Y* worth pursuing for some *bona fide* reason, for example, because they consider that *X* and *Y* are not worth powder and shot. Here, does *Z* have a claim against *X* and *Y* for their conspiracy against him? For the purposes of determining whether *Z* has a claim against *X* and *Y*, is there any material distinction whether the type of property owned by *Z* is his house or his shareholding in Company *A*?

It appears that company law will answer the first question posed in the preceding paragraph in the negative and the second in the affirmative. *Z* has no claim against *X* and *Y* for the fall in the value of his shareholding in Company *A*, the necessary implication being that there *is* a material distinction between *Z*'s house and *Z*'s shareholding as a matter of whether he is able to sue for damage done to his property.

This result is the reflective loss principle's making. Broadly speaking, this principle operates to bar a personal claim brought by a claimant in respect of loss which is said to be merely a 'reflection' of the loss suffered by the company in which he is interested in *qua* shareholder or otherwise related to. Returning to the alternate

---

* LL.B (Candidate), National University of Singapore. I am thankful to the anonymous reviewer for instructive comments and feedback. I am extremely grateful to Chung Sohyun for her support. It goes without saying that all errors and views expressed are mine.

scenario involving *Z*'s shareholding, the loss of value of *Z*'s shareholding is merely a reflection of the loss suffered by Company *A* due to *X* and *Y*'s conspiracy. The result is that *Z* has no claim against *X* and *Y*. Only Company *A* has a suit against the conspirators.

The conceptual underpinnings and scope of the reflective loss principle has recently vexed enlarged panels of apex courts in two jurisdictions. First, it split the UK Supreme Court in *Marex Financial Ltd v Sevilleja*[1] by the narrowest of majorities. More recently, the Singapore Court of Appeal in *Miao Weiguo v Tendcare Medical Group Holdings Pte Ltd*[2] unanimously endorsed the majoritarian view in *Marex*.

In this article, I respectfully argue that both the majority in *Marex* and the Court of Appeal in *Miao Weiguo* have erred in their conclusions on the scope – and more fundamentally, the *existence* – of the reflective loss principle. Whilst both have rightly identified the source of the issue as the time-honoured rule in *Foss v Harbottle*,[3] their conclusions do not follow from this correct starting point. On the other hand, the position taken by the minority in *Marex* is the correct conclusion in principle.

This article is divided into two parts. Part II sets the background by offering a chronological overview of the development of the reflective loss principle, beginning with its genesis and ending with the most recent developments in *Marex* and *Miao Weiguo* themselves. Part III, on the other hand, embarks on an attempt to disprove the reflective loss principle by highlighting three difficulties with the existing state of the law. As an aside, I have endeavoured to write this article such that Part II and Part III can largely be consumed as a whole or separately. The reader can therefore choose which Part (or if at all) is appropriate for their purposes. As a general guide, owing to the nature of each Part, Part II takes a purely descriptive colour whereas Part III is evaluative.

II. The Historical Development of the Reflective Loss Principle

The history of the reflective loss principle can be broadly categorised, based on chronology, into three stages: (a) first, the origin of the principle; (b) second, the subsequent reconceptualisation and expansion of the principle; and (c) finally, a recent return to orthodoxy. Proceeding in this chronology, this section tracks the historical development of the reflective loss principle by highlighting and summarising the key authorities that characterise each of the three stages identified above.

A. *Origin*

The *locus classicus* of the reflective loss principle is generally accepted[4] to be the English Court of Appeal's decision in *Prudential Assurance Co Ltd v Newman*

[1] [2021] AC 39 (SC, UK) [*Marex*].
[2] [2022] 1 SLR 884 [*Miao Weiguo*].
[3] (1843) 67 ER 189 [*Foss*].
[4] See, *eg*, Andrew Tettenborn, "Less Law is Good Law? The Taming of Reflective Loss" (2021) 137 L Q Rev 16 at 17 [Tettenborn].

Industries Ltd (No 2).[5] In that case, the defendant directors of a company were alleged to have made fraudulent misrepresentations to the company's shareholders to induce their approval of certain transactions which the directors were themselves interested in. The claimant shareholder brought two actions: (a) a personal claim against the directors in the tort of unlawful means conspiracy; and (b) a derivative action in respect of the directors' breaches of duty.

The court gave short shrift to the personal action, briefly dismissing it as "misconceived" due to the reflective loss principle, a principle which it expressed in the following terms:

> [A shareholder cannot] recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a 'loss' is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss.[6]

According to the court, the rationale of this principle was the need to avoid the improper circumvention of the rule in *Foss v Harbottle*.[7] Taking a brief detour to unpack the rule in *Foss v Harbottle*, the rule was clearly stated as containing two subsidiary principles by the English Court of Appeal in *Edwards v Halliwell*:

> (a) First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association of persons itself.
>
> (b) Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for a simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio*.[8]

This statement of the rule in *Foss v Harbottle* was affirmed in both *Marex*[9] and *Miao Weiguo*.[10] In the latter, the Singapore Court of Appeal referred to the first aspect as "the proper plaintiff rule" and the second as the "corporate management principle". In the interest of consistency, I adopt the same terminology hereinafter.

---

5 [1982] Ch 204 [*Prudential*].
6 *Ibid* at 222–223.
7 *Ibid* at 224.
8 [1950] 2 All ER 1064 at 1066.
9 *Marex*, *supra* note 1 at [35], [96].
10 *Miao Weiguo*, *supra* note 2 at [116].

B. *Reconceptualisation and Expansion*

The next stage in the life of the reflective loss principle was kicked off at the turn of the century, some two decades after *Prudential*, by the House of Lords' decision in *Johnson v Gore Wood & Co*.[11] This decision represents a turning point whereby the reflective loss principle was reconceptualised,[12] which paved the way for the principle to embark on a process of "grow[th] like Jack's beanstalk".[13]

The dispute in *Johnson* initially arose out of allegations that the defendants, a firm of solicitors, had negligently caused a company that they had acted for to suffer loss. The company settled, after which the claimant, who was the managing director and effective sole shareholder of the company, brought a personal claim against the defendants on the basis of breach of duties owed to him personally.

The House of Lords held that the reflective loss principle operated to bar two heads of loss pleaded by the claimant relating to diminutions in value of (a) his shareholding in the company; and (b) a pension policy set up by the company for his benefit.

While their Lordships all purported to follow *Prudential*, it is evident that they saw what the principle was differently. In this regard, the two judgments warranting mention are those of Lord Bingham of Cornhill and Lord Millett.

Lord Bingham's judgment is considered to be consistent and faithful to *Prudential*, and in light of this fidelity, we need not consider it in any detail. However, what is more controversial and does require examination is the judgment of Lord Millett, whose judgment was the aforementioned turning point.[14]

Although Lord Millett also relied on a range of other rationales[15] to explain the reflective loss principle, by far the most problematic was that of double recovery. His Lordship explained that, where the shareholder and company have concurrent causes of action against the same wrongdoer, there is a possibility of double recovery, thus requiring one claim to yield to the other.[16] In order to prevent an improper transfer of wealth from the company's creditors to the shareholders[17] – which would result if the recovered amounts accrue to the individual shareholder as opposed to the company[18] – the double recovery conundrum had to be resolved by allowing the company's claim to the exclusion of the shareholder's.[19]

---

[11] [2002] 2 AC 1 [*Johnson*].

[12] *Marex*, *supra* note 1 at [51]; *Miao Weiguo*, *supra* note 2 at [132].

[13] Tettenborn, *supra* note 4 at 17.

[14] *Marex*, *supra* note 1 at [51].

[15] See *Marex Financial Ltd v Sevilleja* [2019] QB 173 (CA, Eng) [*Marex* (CA)] at [32], where Flaux LJ identified four rationales for the reflective loss principle from Lord Millett's judgment in *Johnson*: (a) avoidance of double recovery; (b) causation; (c) public policy considerations of avoiding conflicts of interests; and (d) preservation of company autonomy and avoiding prejudice to the company's creditors.

[16] *Johnson*, *supra* note 11 at 62.

[17] *Ibid* at 63; see also, *Stein v Blake* [1998] 1 All ER 724 at 730.

[18] Pearlie Koh, "The Shareholder's Personal Claim: Allowing Claims for Reflective Loss" (2011) 23 Sing Acad LJ 863 at [18] [Pearlie Koh].

[19] *Johnson*, *supra* note 11 at 62. See also, Victor Joffe *et al*, *Minority Shareholders: Law, Practice and Procedure*, 6th ed (Oxford: Oxford University Press, 2019) at [3.104]–[3.106] [Joffe].

SJLS A0164

The double recovery rationale was problematic as it paved the way for the subsequent development of other glosses to the reflective loss principle, of which I highlight two in particular.

First, shortly after *Johnson* was decided, the English Court of Appeal decided *Giles v Rhind*,[20] where it carved out an exception to the reflective loss principle by holding that if the wrongdoing had disabled the company from being able to pursue its cause of action, the shareholder's personal claim could proceed.[21] The *Giles v Rhind* exception was consistent with Lord Millett's double recovery rationale since there was obviously no prospect of double recovery where the company was unable to pursue its claim.

Second, and the most problematic of all developments,[22] was the extension of the reflective loss principle's scope to include barring claims by persons claiming in capacities other than shareholders. Whereas the rule in *Foss v Harbottle* as the only rationale would have squarely confined the reflective loss principle's application only to shareholders, double recovery was broad enough to justify the principle applying to any loss taking the form of payments which the claimant might have received from the company but for the wrongdoing committed against the company.[23] Thus, in subsequent decisions,[24] including the judgment below of the English Court of Appeal in *Marex* itself,[25] it was held that the reflective loss principle could operate against creditors.

Turning away from English law, we return home to consider the status of the reflective loss principle in Singapore prior to the most recent decisions in *Marex* and *Miao Weiguo*. Fortunately, only one decision needs be mentioned: the decision of the Court of Appeal in *Townsing Henry George v Jenton Overseas Investment Pte Ltd*.[26]

Townsing fits within the second stage of the expansionary approach to the reflective loss principle as it was a decision in the aftermath of the House of Lords' decision in *Johnson*. As I refer to *Townsing* only for the purpose of highlighting how Singapore law stood at the close of the second stage, its rather convoluted facts need not be rehearsed here.[27]

The pith of *Townsing* is readily summarisable as being twofold. First, the Court of Appeal authoritatively confirmed the reflective loss principle as part of Singapore law in its endorsement of *Johnson*. In this regard, Lord Millett's decision was particularly influential in informing the court's thinking.[28] Second, following in the footsteps of *Giles v Rhind* to make inroads into the principle, the Court of Appeal saw fit to develop its own *general* exception to the reflective loss principle by allowing it to be disapplied if it could be shown that the rationales underlying the principle

[20] [2003] Ch 618.
[21] *Ibid* at [34].
[22] As noted by Lord Reed in *Marex*, *supra* note 1 at [60].
[23] *Johnson*, *supra* note 11 at 66.
[24] See, *eg*, *Gardner v Parker* [2004] EWCA Civ 781 at [70].
[25] *Marex* (CA), *supra* note 15 at [33].
[26] [2007] 2 SLR(R) 597 [*Townsing*].
[27] For a summary of the facts, see *Miao Weiguo*, *supra* note 2 at [142]–[144].
[28] *Townsing*, *supra* note 26 at [77].

A0164.indd 313 11-24-22 17:48:42

were not extant concerns on the facts.[29] The legal position laid down in *Townsing*, therefore, consisted of a general rule coupled with a general exception. These were neatly summarised by the Court of Appeal in *Miao Weiguo* as the "Preventive Rule" and the "Policy Exception" respectively:

> (a) ***The Preventive Rule*****:** 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, 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.
>
> (b) ***The Policy Exception*****:** However, a shareholder may be allowed to do so by adducing evidence or taking 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).[30]
>
> [internal citations omitted]

C. *Return to Orthodoxy*

The third and final stage of the reflective loss principle's life refers to the most recent developments, marked by the landmark decisions in *Marex* and *Miao Weiguo*. These decisions saw a ruthless repudiation of the entire second stage and a reversion to the first stage and the orthodoxy of the *Prudential* case itself.[31] This section outlines, in order, the decisions of the majority and minority in *Marex*, before turning to *Miao Weiguo*.

1. *The Majority in* Marex

The majority in *Marex* consisted of Lord Reed PSC, with whom Lord Lloyd-Jones and Lady Black JJSC agreed, and Lord Hodge DPSC, who issued a short concurring judgment.

The majority conceptualised the reflective loss principle as a rule operating against:

> … claims brought by a shareholder in respect of loss which he has suffered in that capacity, in the form of diminution in share value or in distributions, which

[29] *Ibid* at [79] (affirming *Hengwell Development Pte Ltd v Thing Chai Chong* [2002] 2 SLR(R) 454 at [22]), [85]–[87].

[30] *Miao Weiguo*, *supra* note 2 at [149].

[31] Tettenborn, *supra* note 4 at 18.

> is the consequence of loss sustained by the company, in respect of which the company has a cause of action against the same wrongdoer.[32]

According to Lord Reed, this was a bright-line rule of company law premised on a legal fiction that is observed as a result of the unique nature of shareholding in a company.[33] Whilst a shareholder certainly suffers loss as a matter of fact where there is a diminution in the value of his shareholding in a company and/or distributions by the company, as a matter of law, such a loss is deemed to be irrecoverable as a loss not separate and distinct from the loss suffered by the company.[34]

The majority's reasoning can be digested into three separate categories: (a) first, as an affirmation of *Prudential* by relying on the rule in *Foss v Harbottle* as the central justification for the existence of the reflective loss principle; (b) second, the pragmatic advantages of a bright-line rule; and (c) third, a discreditation of all the rationales raised by Lord Millett in *Johnson*, including double recovery. Each is considered in turn.

Beginning with the rule in *Foss v Harbottle* as the justification for the reflective loss principle, Lord Reed's explanation of the justificatory link can be summarised as follows:

(a) The proper plaintiff rule prescribes that where a wrong is committed against the company, the proper plaintiff to remedy the wrong is the company. The shareholder's loss in the form of a diminution in value of his shareholding or distributions is merely a "knock-on effect"[35] of, and therefore not separate and distinct from, the company's loss.[36] As the 'true' sufferer of loss as a result of the wrong in law is the company, the proper plaintiff is the company.

(b) The corporate management principle prescribes that if a majority of the company's decision-making organs (validly) decides that the company will not pursue the company's cause of action in respect of the wrong committed against it, that decision is binding on *all* the shareholders of the company. By entering into the company, the shareholder "accepts the fact that the value of his investment follows the fortune of the company"[37] and cannot subvert majority rule by pursuing a personal claim. If he is dissatisfied with the management of the company, his remedies are a derivative action or an unfair prejudice (*ie*, oppression) claim.[38]

On the other hand, the "pragmatic advantages" envisioned by the majority lay in how the reflective loss principle as a bright-line rule "establish[ed] a clear principle, rather than leaving the protection of creditors and other shareholders of the

32 *Marex*, *supra* note 1 at [79].
33 *Ibid* at [9].
34 *Ibid* at [28].
35 *Ibid* at [32].
36 *Ibid* at [58], [85].
37 *Ibid* at [35], [107], citing *Prudential*, *supra* note 5 at 224.
38 *Ibid* at [36].

company to be given by a judge in the complexities of a trial".[39] This would allow for claims to be swiftly resolved as the bright-line rule could be applied at the interlocutory stage to strike out claims caught within the reflective loss principle's ambit *in limine*.[40]

Finally, double recovery was discredited on the basis that it only arose where there was a perfect correspondence between the assets of the company and the value of the company's shares,[41] as it was only in such conditions that there would in turn be a perfect correspondence between the shareholder's loss in the form of a diminution in the value of his shareholding and the company's loss, so that recovery by the company would *ipso facto* remedy the shareholder's loss.[42] Since these conditions were not always present (indeed, it would be far more the exception than the norm that they were), the concern of double recovery would not necessarily arise in every case, and therefore, the avoidance of it could not justify the reflective loss principle.[43] Furthermore, the fact that the law barred the claim of the shareholder even in cases where the company had stayed its hand and not pursued its cause of action against the wrongdoer (such that there was no risk of double recovery), again, showed that double recovery could not be the main concern.[44] Finally, Lord Reed pointed to how the reliance on double recovery as the rationale had resulted in the illogical extension of the reflective loss principle's application to non-shareholders, when it was apparent from *Prudential* that the court had only had in mind the claims of shareholders being precluded.[45]

2. *The Minority in* Marex

Turning to the other side in *Marex*, the minority of the UK Supreme Court spoke in one voice in the judgment of Lord Sales JSC, with whom Lord Kitchin JSC and Baroness Hale of Richmond agreed.

The minority's position, in substance, was that there was no independent principle barring recovery of 'reflective loss'. In their view, there was no objectionability *per se* in a shareholder suing on a personal cause of action in respect of a diminution in the value of his shareholding or distributions from the company save that there was a need to manage the possibility of double recovery.[46] Their position is summarised in the following statement by Lord Sales:

> In principle … if a person has a cause of action against another he is entitled to bring proceedings to vindicate his rights. He may proceed as quickly as he

---

[39] *Ibid* at [38].

[40] See, *eg*, *Burnford v Automobile Association Developments* [2022] EWHC 368 (Ch), where HHJ Paul Matthews rejected a submission that the reflective loss principle was too complex to be appropriately dealt with in a strike out application: see [77]–[82].

[41] *Marex*, *supra* note 1 at [31].

[42] *Ibid* at [32].

[43] *Ibid* at [33].

[44] *Ibid* at [34], [55].

[45] *Ibid* at [60].

[46] *Marex*, *supra* note 1 at [118]–[119].

> chooses and with a view to maximising his prospects of securing recovery from the defendant. If he is a shareholder with a personal cause of action, nothing in the articles of association constitutes a promise by him that he will not act to vindicate his own personal rights against a defendant against whom the company also has its own cause of action; and there is no other obligation to that effect arising out of his membership of the company.[47]

Lord Sales reasoned that the cases which had taken *Prudential* – and possibly *Prudential* itself – as having set out a general rule of company law had erred by conflating (a) the "undoubtedly correct" proposition that a company having suffered damage does not, *per se*, create a cause of action for the shareholder with (b) the "highly questionable" proposition that a shareholder cannot recover a sum equal to the diminution in the value of his shareholding as such loss is reflective of, and hence not separate and distinct from, the company's loss.[48]

To his Lordship's mind, the rule in *Foss v Harbottle* – which the majority had relied upon as the basis of the reflective loss principle – supported the "undoubtedly correct" proposition (a) above but not the "highly questionable" proposition (b). This was because the rule in *Foss v Harbottle* only prevents a shareholder from suing on the company's cause of action and does not prevent him from suing on his own personal cause of action against the wrongdoer if one were to arise.[49]

Taking the same point made by the majority, albeit in the opposite direction, Lord Sales criticised the reflective loss principle as being based on the "false premise" of a perfect correspondence between the value of a share in a company and the company's assets[50] (the infamous 'cash box' hypothetical[51] used by the court in *Prudential* being the paradigmatic example of this). Since it was only in such conditions that remedying the company's loss would remedy the shareholder's loss, there would certainly be cases where, due to there being no such correspondence on the facts, the shareholder's loss was clearly distinct from the company's in that recovery by the company would not remedy his loss.[52] Having a bright-line rule that purported to bar the shareholder's claim in every case, regardless of whether there was such a

[47] *Marex*, *supra* note 1 at [150].

[48] *Ibid* at [143].

[49] *Ibid* at [123], [150].

[50] *Ibid* at [122], [132], [179]–[180].

[51] *Prudential*, *supra* note 5 at 223:

> 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 to 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 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.

[52] *Marex*, *supra* note 1 at [160].

perfect correspondence meant that there would be cases where shareholders would suffer injustice by suffering loss that would not be remedied.

Finally, addressing the "pragmatic advantages"[53] cited by the majority, Lord Sales' riposte was that such advantages were only the consequence of the majority's subscription to a legal fiction which was unsustainable in principle.[54] It was no longer simplification of a difficult issue, but an oversimplification that was disconnected with reality. His Lordship thus powerfully commented that "[t]he law has to address the real world, not an imaginary one",[55] and therefore, if the price to pay for straightforwardness was a rule far removed from reality, that was too high a price.

3. *The Singapore Court of Appeal in* Miao Weiguo

We come now to the final and most recent decision, that of the Court of Appeal in *Miao Weiguo*. Much of what has been said above regarding the majoritarian view in *Marex* applies equally here given the Court of Appeal's decision to follow the approach of the majority in *Marex*,[56] and it is therefore unnecessary to repeat the bulk of it here at length save for the court's own inputs.

The Court of Appeal began by diagnosing what it perceived to be the conceptual issues plaguing its earlier position in *Townsing*. On this point, it identified two ailments which *Townsing* was supposedly stricken with. The first was an irreconcilable tension between the rationales underlying the Preventive Rule and the Policy Exception respectively, producing the result that the latter had swallowed the former.[57] Andrew Phang Boon Leong JCA, delivering the judgment of the court, had this to say:

> [T]he 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, while Lord Sales was able to draw support for the minority's approach from another part. Having attempted to integrate *both* the rationale 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 pulling in two different (and opposite) directions. These rationales are fundamentally incommensurable, since they deal with entirely different concepts and wholly different concerns.[58]
>
> [emphasis in original]

[53] *Ibid* at [38], [109].
[54] *Ibid* at [167].
[55] *Ibid* at [153].
[56] *Miao Weiguo*, *supra* note 2 at [193].
[57] *Ibid* at [169].
[58] *Ibid* at [170].

The second disease which *Townsing* was labouring under was an excessively broad Preventive Rule. In order to accommodate the Policy Exception, the court had to adopt Lord Millett's refashioned rationale of avoiding double recovery. Echoing the same point made by the majority in *Marex*, Phang JCA noted the consequence of the rule having been taken out of context to apply even to claims by creditors.[59] Needless to say, following this observation, the Court of Appeal went on to discredit the double recovery rationale for the same reasons as the majority in *Marex*.[60]

After concluding that the position in *Townsing* was untenable, the Court of Appeal went on to endorse[61] the view of the majority in *Marex* despite acknowledging the "significant force" behind the minority's position.[62] A summary of the court's reasons is as follows:

(a) ***The unique position of a shareholder* vis-à-vis *the company*:** The "primary difficulty" with the minority's view was its underlying assumption 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".[63] As the shareholder's participation in the company is regulated by company law, the shareholder is not in the same position as the ordinary litigant who does not carry such a status and is entitled to act in whatever way which suits his interests.[64]

(b) ***The unique nature of shares as a form of property*:** The minority's position was premised on viewing a share in a company as just another type of property by focusing on its financial value. However, such a view fails to consider that "the fundamental nature of a share does not lie in [its] market value, but in the right that it represents to participate in the company", and that "[t]he scope of the shareholder's remedies is [therefore] necessarily tied to company law principles".[65]

(c) ***The rule in* Foss v Harbottle:** Following the majority in *Marex*, the Court of Appeal endorsed the proper plaintiff rule as the basis for the reflective loss principle. In doing so, it agreed that both the proper plaintiff rule and the corporate management principle led to the conclusion that the company's claim is to the exclusion of the shareholder's.[66] "Wrongs done to the company are part and parcel of the company's fortunes", and therefore, the corporate management principle prescribes that the shareholder's only ability to influence the company's fortunes is through the exercise of his voting rights.[67] An aggrieved shareholder has recourse to the remedies of a derivative action or oppression (*ie*, unfair prejudice) action which

59 *Ibid* at [172]–[174].
60 *Ibid* at [185].
61 *Ibid* at [193].
62 *Ibid* at [194].
63 *Ibid* at [197].
64 *Ibid.*
65 *Ibid* at [198].
66 *Ibid* at [199].
67 *Ibid* at [200].

company law legislatively prescribes as exceptions to the rule in *Foss v Harbottle*.[68]

(d) ***Practical benefits of a clear rule*:** Also following the majority in *Marex*, the Court of Appeal endorsed the practical benefits of a bright-line rule.[69]

III. Disproving the Reflective Loss Principle

Having comprehensively set out the historical development of the reflective loss principle, we turn to the critique of the current state of the law. As mentioned at the outset of this article, it is argued that the positions adopted by the majority in *Marex* and the Court of Appeal in *Miao Weiguo* are unsatisfactory. Rather, it is hoped that the position of the minority in *Marex* would be reconsidered favourably in the future.

This article raises three points. First, the rule in *Foss v Harbottle*, relied upon as the central premise in support of the reflective loss principle, in fact does not provide any such support. The rule in *Foss v Harbottle* contemplates only a much narrower preclusion than the reflective loss principle. Second, the derivative action and oppression action are inadequate to fill the void left by the shareholder's personal claim that is precluded by the reflective loss principle. The result is that there is a real possibility that the shareholder would be left without a remedy. Third, regardless of the unique nature of shares as a form of property, the fact that they are property nonetheless means that it is impossible to ignore their economic value. Injuries to the economic value of the shares should, as with damage to the economic value of any of the shareholder's other property, *prima facie* lead to a claim for a remedy.

A. *What Does the Rule in* Foss v Harbottle *Lend Support For?*

We begin with the rule in *Foss v Harbottle*. To recap, it consists of two aspects, *viz*, the proper plaintiff rule and the corporate management principle. Considering each in turn, this section argues that neither supports the conclusions of the majority in *Marex* and the Court of Appeal in *Miao Weiguo*.

1. *The Proper Plaintiff Rule*

I first address the claim that the reflective loss principle is necessary to prevent the proper plaintiff rule from being undermined or subverted.[70] It is submitted that this is a false premise, as a shareholder pursuing a personal cause of action does not, in any way, subvert the proper plaintiff rule.

In order to determine whether the proper plaintiff rule is subverted, it is first necessary to identify its scope. In this regard, our starting point should be the rule itself.

---

[68] *Ibid* at [202], [204].

[69] *Ibid* at [205].

[70] *Marex*, *supra* note 1 at [37]; *Miao Weiguo*, *supra* note 2 at [199].

It will be recalled that the proper plaintiff rule prescribes that the proper plaintiff in respect of a wrong done to the company is the company itself. The correctness of this proposition is unquestionable, and indeed, Lord Sales for the minority in *Marex* did not purport to challenge it.[71]

However, our focus for present purposes should be on how the rule self-defines its own scope of application: it applies where a wrong is *done to the company*. Although seemingly straightforward, when one takes into account the existence of the shareholder in the picture, one must understand that this factual condition manifests in two different variants: (a) first, where a wrong is done to the company, but not to the shareholder; and (b) second, where a wrong is done to the company and *also* to the shareholder.[72]

That a wrong done to the company can simultaneously amount to a wrong done personally to a shareholder of the company is an uncontroversial proposition that our courts have accepted.[73] The alternate hypothetical which I provided at the beginning of this article – involving *X* and *Y*'s scheme to injure *Z* through the medium of his shares – is one example: there, *X* and *Y* have committed torts against Company *A and Z*. Indeed, that such an overlap can occur is mechanistically recited in almost every recent local decision on oppression following the landmark decision of the Court of Appeal in *Ho Yew Kong v Sakae Holdings Ltd*,[74] as the court there laid down a framework for the very purpose of distinguishing between personal wrongs and corporate wrongs in an oppression action.[75]

One should read the proper plaintiff rule with the distinction (and overlap) between corporate wrongs and personal wrongs in mind. The result is that the proper plaintiff rule only operates to bar claims by shareholders for corporate wrongs but not personal wrongs, since the proper plaintiff to redress a corporate wrong is the company, whilst the proper plaintiff to redress a personal wrong is the shareholder. The point is clearer if we abandon the slippery word 'wrongs' in favour of the more pointed language of 'causes of action'. If so, the same point, put differently, is that the proper plaintiff rule prevents a shareholder from suing on a cause of action vested in the company. It has nothing to say about a cause of action vested personally in the shareholder, as such a cause of action falls outside its scope altogether.[76]

On this interpretation, the proper plaintiff rule is nothing more than a rule of *locus standi*.[77] It is a restatement of the self-evident logic that a shareholder does not have *locus standi* to sue on a cause of action vested in the company. It is in this sense that the company is the proper plaintiff to redress wrongs done to it. This is illustrated by *Foss v Harbottle* itself. The case was, in short, one involving a breach of directors' duties. This simplification is drawn from Wigram VC's summary of the case as "a suit by *cestui que trusts* complaining of a fraud committed or alleged to

---

[71] *Marex*, *supra* note 1 at [142].

[72] See Charles Mitchell, "Shareholders' Claim for Reflective Loss" (2004) 120 L Q Rev 457 at 466 [Mitchell].

[73] See, *eg*, *Ong Heng Chuan v Ong Teck Chuan* [2021] 2 SLR 262 at [33]; *Teelek Realty Pte Ltd v Ng Tang Hock* [2021] 2 SLR 719 at [62].

[74] [2018] 2 SLR 333 at [115] [*Ho Yew Kong*].

[75] *Suying Design Pte Ltd v Ng Kian Huan Edmund* [2021] 2 SLR 221 at [30].

[76] *Marex*, *supra* note 1 at [165].

[77] See, *eg*, *Universal Project Management Services Ltd v Fort Gilkicker Ltd* [2013] 3 Ch 551 at [16].

have been committed by persons in a fiduciary character".[78] As his Lordship went on to say, this begged the question of "who are the *cestui que trusts* in this case?", the answer to which he was under no doubt: "the corporation … is undoubtedly the *cestui que trust*".[79] As a natural consequence of the separate legal personality of the company, "the corporation and the members of the corporation are not the same thing", and the latter could therefore not "assume to themselves the right of suing in the name of the corporation".[80] In other words, the shareholders could not sue because they had no cause of action and therefore no *locus standi* – only the company had *locus standi* as it was the beneficiary of the directors' obligations and thus the person with a cause of action when said obligations were breached.

The logical disconnect between the proper plaintiff rule and a preclusion against the shareholder's personal action emerges from *Prudential* itself. The court appeared to be under a misapprehension about the scope of the proper plaintiff rule. It described the effect of the proper plaintiff rule as follows: "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*" [emphasis added].[81]

The focus, for the present purposes, should be on the second sentence which I have placed in emphasis – "[n]o cause of action vests in the shareholder". It is significant because it is not just *a* possible consequence of the sentence preceding it but *simultaneously an assumption*. It is an assumption that the type of wrongdoing – whether a breach of contract or a tort committed against the company – is one which has created only a cause of action for the company and not the shareholder. Where a cause of action *does* vest in the shareholder – that is to say, this assumption does not hold true – that entire statement is out of context save to the extent that it suggests that the shareholder's cause of action is strictly the result of the legal wrong committed *against him* and not merely derivative of the legal wrong committed against the company, even if both involved the same act in fact.

It appears that the court in *Prudential* failed to appreciate the significance of the assumption just identified. If it had, it ought to have realised that the existence of a personal cause of action meant that the proper plaintiff rule would be disapplied and rendered irrelevant.[82] The proper plaintiff rule would only be subverted if the shareholder did not have a personal cause of action and was trying to sue on the company's cause of action.

The same can be said about the court's treatment of its own 'cash box' hypothetical.[83] The court, surprisingly, began on the right foot, recognising that "[t]here are two wrongs, the deceit practised upon the [shareholder] and the robbery of the company".[84] It then went on to identify, also correctly (albeit subject to qualification in light of *Marex*[85]), that the problem that arises is that the law cannot allow

[78] *Foss*, *supra* note 3 at 203.

[79] *Ibid* at 494.

[80] *Ibid* at 490.

[81] *Prudential*, *supra* note 5 at 224.

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

[83] I have already set out the 'cash box' hypothetical in full above, *supra* note 53.

[84] *Prudential*, *supra* note 5 at 223.

[85] The necessary qualification is that the 'cash box' hypothetical presupposes a perfect correspondence between the value of the assets of the company and the value of the company's shares. If there was no

both the shareholder and company to recover the same amount in damages as that would amount to double recovery.[86] Faced with this, counsel for the shareholder proceeded, quite logically, to argue that if there was no prospect of double recovery, the shareholder should be allowed to recover. The problem arises from the court's response to this argument, which it put in the form of a rhetorical question: "how can the failure of the company to pursue its remedy against the robber entitle the shareholder to recover for himself?"[87]

With respect, the answer to the court's confusion is in its own words earlier – the shareholder is entitled to recover for himself because "[t]here are two wrongs", one of which is a personal wrong (*viz*, the deceit) against the shareholder, from which a personal cause of action arises.[88] The existence of said personal wrong *ipso facto* removes any possibility of the proper plaintiff rule being subverted, since the shareholder *is* the proper plaintiff to vindicate a personal wrong. It is not a case of a shareholder attempting what is, in substance, reverse-piercing of the corporate veil to take the company's property – *viz*, its cause of action – and to use it as his own. That would certainly be the case, if, for instance, one modifies the facts to remove the deceit practiced on the shareholder to obtain the key to the cash box such that the case becomes one of a robbery *simpliciter*.[89] Although the 'cash box' hypothetical is not such a case, the court nevertheless treats it as such, by appearing to subsume the deceit – the personal wrong – within the corporate wrong – the robbery – so as to preclude the shareholder from recovering. This is evident from expressions used by the court such as the deceit being "merely a step in the robbery", or that the "deceit … does not affect the shares; it merely enables the defendant to rob the company".[90] This illustrates the problem of the reflective loss principle, as its effect is to elide the distinction between corporate and personal wrongs. If the wrongdoer has chosen to execute his scheme by committing wrongs against two persons rather than one, then he has made his bed that way and must lie in it as it is. The law should not intervene to artificially rewrite the facts of a case into something that is materially different from that which it is in reality.

I turn now to *Marex*. The majority, with respect, shared the same misconception as the court in *Prudential* that a personal cause of action would subvert the proper plaintiff rule. This emerges from the following summary of the *ratio* in *Prudential* by Lord Reed:

such correspondence, there would not necessarily be double recovery as the company's recovery of its loss would not automatically restore the shares to their value prior to the wrongdoing.

86 *Prudential*, *supra* note 5 at 223.

87 *Ibid*.

88 See M J Sterling, "The Theory and Policy of Shareholder Actions in Tort" (1987) 50 Mod L Rev 468 at 471–472 [Sterling].

89 In which case, only a cause of action – *eg*, in tort for conversion or in unjust enrichment – would vest in the company, since a shareholder does not have any proprietary interest in the company's assets: see *Macaura v Northern Assurance Co Ltd* [1925] AC 619.

90 *Prudential*, *supra* note 5 at 223. It has been rightly commented that this analysis of causation is hardly convincing, since a far more natural conclusion is that *both* the deceit and the robbery were operative causes of the shareholder's loss: see Sterling, *supra* note 88 at note 16.

> *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.[91]
>
> [emphasis added]

Ironically, this excerpt, in its literal terms, actually contains what I consider to be a correct statement of principle due to the qualifying phrase which I have placed in emphasis. The shareholder is not entitled to recover where his loss "is *merely* the result of a loss suffered by the company in consequence of a wrong done to it" [emphasis added]. The keyword here is "*merely*" – the shareholder's loss is "*merely*" the result of a wrong done to the company where the assumption stated above holds true, *ie*, where the company has a cause of action but the shareholder does not. In this circumstance, it is true to say that the shareholder suffers no loss "separate and distinct from the damage suffered by the company", for the reason that he has no cause of action respecting his loss.

Unfortunately, Lord Reed appears to read the statement as it would be if the word "*merely*" did not exist. This omission changes the character of the sentence from being an orthodox restatement of the proper plaintiff rule, to becoming a preclusion that is different and much wider than the proper plaintiff rule. The effect of omitting the "merely" is that instead of the rationale of the preclusion against the shareholder's recovery being the lack of *locus standi* due to only the company having a cause of action, it becomes the fact that the shareholder's loss is the result of the loss suffered by the company, regardless of whether the shareholder has a cause of action or not.

Since his Lordship was summarising the *ratio* of *Prudential*, it is unsurprising that one can trace the same error back into *Prudential* itself, thereby explaining how, in the first place, the law got to where it is now. In the rule-creating extract that has been quoted in full above,[92] one finds the same error in substance as that of Lord Reed, albeit committed in a different manner. Whereas Lord Reed's mistake is via omission, the court in *Prudential* in this extract commits a mistake via false equivalence between the first sentence, which represents the proper plaintiff rule, and the second sentence, which represents the reflective loss principle. Although parallelism in sentence structure may suggest that the second is merely a different way of putting the point in the first sentence, this is either a red herring, or if intended to convey such a meaning, wrong as a matter of principle. Although both sentences purport to lay down preclusions against the shareholder recovering, the reason for each preclusion is different – the first is a restatement of the proper plaintiff rule (*ie*, that the shareholder cannot recover without a cause of action[93]), whilst the second is a preclusion based on the causative relationship between the company's loss and the shareholder's loss. The result of this false equivalence, as Lord Sales astutely

---

91 *Marex*, *supra* note 1 at [39].

92 *Prudential, supra* note 6.

93 *Marex*, *supra* note 1 at [143].

identified, is that the court in *Prudential* "… conflated the rationale for the rule in *Foss v Harbottle* with the rationale for the reflective loss principle, and assumed as correct what was actually in question (namely, whether a personal action would in fact subvert the [proper plaintiff] rule)".[94]

It is appropriate to close off this section on the proper plaintiff rule – the first aspect of the rule in *Foss v Harbottle* – by redefining what the implications of the above analysis are in respect of the scope of the reflective loss principle. The answer is simple. There is no independent 'reflective loss principle': there is only the rule in *Foss v Harbottle*, specifically here, its subsidiary proper plaintiff rule. The shareholder cannot claim on the company's cause of action – where he attempts to do so, his loss is merely 'reflective' of the company's cause of action. 'Reflective loss' ought not to be a substantive concept in itself, but merely a *description* of the effect of the proper plaintiff rule. A shareholder's loss is 'reflective' where it is caused by the company's loss and on the facts only the company has a cause of action against the wrongdoer.

The problem with the so-called reflective loss principle is that it does not only describe this situation where it naturally exists, but actively sets out to create this situation even when the case at hand is not such a case. It does so by precluding the shareholder's personal claim in order to make his loss reflective, when, in principle, the existence of such a claim should instead mean that the shareholder's loss is not reflective. We have seen one example of how this rewriting of the facts occurs in the 'cash box' hypothetical above.

Of course, it does not follow from the foregoing analysis that a shareholder is home free when he has a personal cause of action, such that he will invariably be able to recover for himself. The existence of a personal cause of action means that there would be a situation where the same wrongdoer is liable to two different persons holding concurrent causes of action in respect of loss which *may* be overlapping, thus creating the need for the court to manage the possibility of double recovery on the facts.[95]

2. *The Corporate Management Principle*

I turn now to the second aspect of the rule in *Foss v Harbottle* to consider the corporate management principle. Again, it is submitted that just as its brother proper plaintiff rule does not support the reflective loss principle, neither does the corporate management principle.

The corporate management principle provides that if a majority of the company's decision-making organs decide in accordance with the company's articles of association not to pursue a claim in respect of the wrong, the shareholder is bound by that decision. This is premised on the divorcing of the ownership and management of the company: while the shareholders own the company, the directors (and other persons with delegated powers) manage it.[96] The consequence of the shareholders' parting

94 *Marex*, *supra* note 1 at [142].

95 *The Halcyon Skies* [1977] QB 14 at 32; *Marex*, *supra* note 1 at [3].

96 *Miao Weiguo*, *supra* note 2 at [116].

with the management of the company is that the shareholder's ability to influence the management of the company's affairs is limited to the exercise of their voting rights.[97] Hence the oft-cited mantra that the shareholder "accepts the fact that the value of his investment follows the fortune of the company",[98] or, as the court in *Townsing* referred to it, "the unity of economic interests which bind a shareholder and his company".[99]

According to the majority in *Marex* and the Court of Appeal in *Miao Weiguo*, a shareholder's personal claim against the wrongdoer would subvert the corporate management principle by undermining majority rule. With the greatest respect, this is incorrect for the same core reason highlighted in the discussion on the proper plaintiff rule above. Where the shareholder is prosecuting a personal cause of action, majority rule is strictly irrelevant as "there is no reason why it should be subjected to the collective decision-making procedures which apply when the company decides what to do in relation to any cause of action *it* may have" [emphasis added].[100]

There is perhaps a slightly more convincing alternative explanation offered by the majority in *Marex* and *Miao Weiguo* based on the company's autonomy to deal with its cause of action. The argument is that, even if the personal cause of action is not *per se* subject to majority rule, its existence may nevertheless compromise the company's ability to deal with its cause of action in the manner that is in its best interests.[101] The example deployed was where the company wished to compromise its claim, but was hampered from doing so by the shareholder's refusal to enter into a settlement with the wrongdoer.[102]

However, the difficulty with this view is that it appears to assume that the company's autonomy entails not only being entitled to *attempt* to obtain whatever result that it wishes, but also to being *guaranteed* whatever result which it wishes. This is, in substance, what the example above suggests – since the shareholder's claim is hampering the company from achieving its goal of compromise, the law should artificially remove the obstacle for the company so that it will be able to obtain a compromise.

There is no reason why the company should have such wide-ranging priority. In *Marex*, Lord Hodge made much of the point that a shareholder cannot take the benefits of separate legal personality without taking the disadvantages.[103] It is submitted that the same can be said of the company – it cannot approbate and reprobate its separate legal personality. The obstacle that is the shareholder's personal cause of action which stands between the company and its desired compromise is a consequence of the separate legal personalities of the company and its shareholders. If the company wishes to obtain a compromise and the wrongdoer is only willing to compromise if the compromise includes the shareholder, then the onus is on the company to co-opt the shareholder appropriately. And if the shareholder simply

[97] *Ibid* at [118].
[98] *Prudential*, *supra* note 5 at 224.
[99] *Townsing*, *supra* note 26 at [77].
[100] *Marex*, *supra* note 1 at [165].
[101] *Marex*, *supra* note 1 at [37]; *Miao Weiguo*, *supra* note 2 at [202].
[102] *Marex*, *supra* note 1 at [37].
[103] *Marex*, *supra* note 1 at [102].

refuses to play ball, then that is entirely *his* prerogative as a holder of a legal right personal to himself. The company should not be given a 'free pass' to treat the shareholder's claim like it does not exist. As Lord Sales rightly pointed out, to say that the shareholder is not allowed to vindicate his own cause of action due to his position as shareholder is to erode the separate legal personalities of company and shareholder.[104]

3. *Summary on the Rule in* Foss v Harbottle

In this section, I have argued above that the rule in *Foss v Harbottle* does not sustain the reflective loss principle formulated by the majority in *Marex* and the Court of Appeal in *Miao Weiguo*. The gist of the argument was that the rule in *Foss v Harbottle* is irrelevant to the shareholder's personal cause of action. All the rule in *Foss v Harbottle* does is to prevent the shareholder from claiming against the wrongdoer in the situation where the company has a cause of action against the wrongdoer but the shareholder does not. By failing to recognise this, the current state of the law has eroded the distinction between the separate legal personalities of the shareholder and the company.

B. *The (In)adequacy of Other Remedies*

As we have just considered the corporate management principle, it is convenient to turn to consider the adequacy of other remedies available to the shareholder, since one consequence of the corporate management principle, according to the courts in *Marex* and *Miao Weiguo*, is that the aggrieved shareholder is confined to the remedies of a derivative action or an unfair prejudice/oppression claim.[105] It is submitted that these remedies are inadequate and leave a real prospect that, if the reflective loss principle were to bar the shareholder's personal claim and the company were to refuse to pursue its own claim, he would be left without any remedy.

1. *The Derivative Action*

We first consider the derivative action. It is trite that in Singapore law the derivative action exists in both its common law and statutory[106] variants.[107] I do not propose to set out in detail the elements of these actions,[108] but wish only to point to relevant

---

[104] *Ibid* at [165].

[105] *Marex*, *supra* note 1 at [34], [103].

[106] *Companies Act* (Cap 50, 2006 Rev Ed), s 216A [*Companies Act*].

[107] *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2016] 2 SLR 1022 at [69] [*Petroships*]; *MCH International Pte Ltd v YG Group Ltd* [2017] SGHCR 8 at [25] [*MCH International*].

[108] For the common law derivative action, see, *eg*, *MCH International*, *ibid* at [29]–[35]. For the statutory derivative action, see *Companies Act*, *supra* note 106, s 216A(3).

aspects which illustrate that there are cases where the derivative action is not available to the shareholder.

An example of such a case is the hypothetical example provided at the outset of this article on *X* and *Y*'s conspiracy to injure the value of *Z*'s shares in Company *A*. Due to the directors of Company *A* having a *bona fide* reason for their refusal to pursue litigation against *X* and *Y*, neither the common law nor statutory derivative action will be available to *Z*, since where the directors make such a decision (*ie*, in good faith), the corporate management principle dictates that the shareholder is bound by such a decision.

Beginning with the common law derivative action, its *raison d'être* is to allow a claim to be brought by the company (at the instance of the minority shareholder) against the wrongdoers where the very same wrongdoers are in control of the company and stifling the company's action against themselves.[109] To use more archaic terms from a distant past, it is where there has been a "fraud on the minority".[110] In the hypothetical example above, the common law derivative action will not be available since the required element of wrongdoer control is absent – *X* and *Y* are not in control of the company, nor are the directors of Company *A* complicit in the wrongdoing.

Turning to the statutory derivative action, whilst wrongdoer control is no longer a strict requirement, *Z* would likely face difficulty in establishing certain statutory requirements. Assume that the *bona fide* reason which has animated the directors to decline to pursue Company *A*'s action against *X* and *Y* to be that the loss suffered by Company *A* is out of all proportion to *X* and *Y*'s ability to pay. Company *A* would make a net loss as its legal costs would exceed the value which *X* and *Y* can deliver up to it. To use an extreme example, Company *A*'s loss is in the billions of dollars and *X* and *Y* are near impecunious. On the other hand, let us consider *Z*'s position. Assume that *Z* holds only a small stake in Company *A*, such that the loss in the value of his shares is still substantial but within the range where *X* and *Y* would have the financial means to compensate him.

Z would likely face two obstacles in establishing to the court's satisfaction that a statutory derivative action is warranted. First, there may be concerns about *Z*'s good faith[111] as the court may possibly perceive that *Z* is "so motivated by vendetta … that his judgment will be clouded by purely personal considerations that may be sufficient for the court to find a lack of good faith".[112] Second, and far more problematic, is *Z*'s (in)ability to establish that an action against *X* and *Y* would be in Company *A*'s interests.[113] In *Jian Li Investments Holding Pte Ltd v Healthstats International Pte Ltd*, Ang Cheng Hock JC (as he then was) observed that, in order for a shareholder to obtain leave to commence a derivative action:

---

[109] *Petroships*, *supra* note 107 at [64]–[65].

[110] *Prudential*, *supra* note 5 at [210]–[211].

[111] *Companies Act*, *supra* note 106, s 216A(3)(*b*).

[112] *Pang Yong Hock v PKS Contracts Services* [2004] 3 SLR(R) 1 at [20]. It is acknowledged, however, that some leeway is accorded by the courts as it is accepted, as a matter of reality, that there would almost inevitably be some hostility between the parties in the context of a derivative action: see *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 at [30]; *Chong Chin Fook v Solomon Alliance Management Pte Ltd* [2017] 1 SLR 348 at [3].

[113] *Companies Act*, *supra* note 106, s 216A(3)(*c*).

> … the claim must be such that if it is proved, *the company will stand to gain substantially in money or money's worth. The expected benefit to the company must be real to justify the costs and effort of pursuing the action when the company itself had not proceeded with it*. Therefore, the applicant must not only identify causes of action, he must also show that the company has sustained or may sustain real loss or damage as a result of the failures and that *there are some prospects of obtaining relief or redress through the proposed action*.[114]
>
> [internal citations omitted; emphasis added]

In the conditions proposed above, Ang JC's statement is likely to sound a death knell for *Z*'s ability to establish Company *A*'s action against *X* and *Y*, for the reason that the claim is not worth the costs.

Accordingly, neither the statutory or common law derivative action is of assistance to *Z*, and he will be left out of pocket without a remedy unless the oppression remedy fills the remedial void. It is argued in the following section that it does not.

2. *The Oppression Action*

It is settled law that the purpose of the oppression action is to provide the shareholder with "relief from mismanagement", rather than a "remedy for misconduct".[115] The former is much narrower than the latter, as it limits the potential defendants to an oppression action to insiders of the company such as the majority shareholders or the directors. This accordingly restricts the availability of the oppression action based on whether the wrongdoer is an insider or outsider of the company.

Where the wrongdoer that has caused loss to the shareholder is such an insider, there will be no remedial lacuna, since the oppression action will provide a viable alternative to the shareholder whose personal action is barred by the reflective loss principle. A case with similar facts as *Prudential*, involving a deceit practised by the directors on the shareholders in order to enable the directors to plunder the company's assets, is an example. It is uncontroversial that the abuse of their positions and powers by the directors is a paradigmatic example of commercial unfairness,[116] since commercial unfairness refers to a breach of the commercial agreement between the shareholders and the company,[117] and it is an implied understanding within this agreement that the directors would duly comply with the fiduciary duties that they owe to the company.[118]

However, where the wrongdoer is an outsider, the oppression remedy is unlikely to be available. The hypothetical involving *X* and *Y*'s conspiracy against *Z* provides an example. If *Z* is to pursue an oppression action against the directors, his argument

[114] [2019] 4 SLR 825 at [49].

[115] *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760 at 784; *Ho Yew Kong*, *supra* note 74 at [99].

[116] *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 18, 31.

[117] *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [88]; *Ho Yew Kong*, *supra* note 74 at [172].

[118] Joffe, *supra* note 19 at [6.86]; *Leong Chee Kin v Ideal Design Studio Pte Ltd* [2018] 4 SLR 331 at [65].

would likely have to be along the lines that the directors' decision not to pursue an action against *X* and *Y* is oppressive against him. However, this is almost certain to fail since the directors' decision can hardly be considered oppressive. It is difficult to see how *Z* will be able to establish any mutual understanding or legitimate expectation between himself and the directors that they should prosecute claims that are of little benefit or even detrimental to the company's interests. Indeed, one does not even have to go that far. Even if the shareholder can establish that the claim against *X* and *Y* has some benefit to the company, the directors can refuse to pursue it purely as a legitimate exercise of their majority power over the conduct of litigation. As Lord Wilberforce stressed in *Re Kong Thai Sawmill (Miri) Sdn Bhd*: "The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough."[119]

His Lordship went on to say that what the claimant must show is "… something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure" [internal citation omitted].[120]

Hence, one can hardly say that a *bona fide* decision taken by the directors to not pursue the company's claim can be considered oppressive of *Z*.

3. *Conclusion*

The foregoing analysis has used a specific scenario – the hypothetical conspiracy of *X* and *Y* against *Z* – to illustrate how there will be cases where the derivative action and oppression remedy will not be available to the shareholder. Certainly, not all cases are like the hypothetical employed, and there may well be cases where the preclusion of a shareholder's personal claim will not leave him without a remedy. However, the point of employing the hypothetical is to show that there *will* be cases where the reflective loss principle creates a remedial lacuna by allowing a victim to go without a remedy, and a wrongdoer to escape scot-free.

It is submitted that such a lacuna is undesirable. The law has always had a general disinclination towards allowing such injustice to occur – *ubi jus*, *ibi remedium*. One can readily find examples from various areas of the law where courts have devised new principles or carved out exceptions to existing ones to provide a remedy where there was none before. One such example is the 'narrow ground' exception that circumvents privity of contract.[121] The sentiment underlying the exception is the law's refusal to allow a wrongdoer who breaches his contract with another to fortuitously escape due to the loss being suffered by a third party instead of his contractual partner.[122] However, perhaps the best example is the decision in *Giles v Rhind*. Although *Giles v Rhind* was disavowed by the majority in *Marex* and does not appear to have a promising future in Singapore either, it was nevertheless a valiant attempt to fashion

[119] [1978] 2 MLJ 227 at 229.
[120] *Ibid*.
[121] *Family Food Court v Seah Boon Lock* [2008] 4 SLR(R) 272.
[122] *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* (1982) SC (HL) 157 at 177.

an exception to the reflective loss principle itself. The intuitive justice of the case there, in preventing a wrongdoer from escaping justice due to his own wrongdoing, is self-evident.

As Lord Sales has foretold, so long as the reflective loss principle remains part of the law, "cases like *Giles v Rhind* exemplifying the dissonance between the rule and practical justice on the facts will continue to arise".[123] It is hoped that this statement proves to be prescient, and that there would come a future case with striking enough facts to prompt a reevaluation of the reflective loss principle and its consequences.

C. *Are Shares a Special Type of Property?*

I turn to a third reason cited, in particular, by the Court of Appeal in *Miao Weiguo*. To recap, the court emphasised the unique nature of a share as a form of property, stating that the minority's view in *Marex* was premised on it seeing a share in a company as simply its market value. This, it was said, failed to consider that "the fundamental nature of a share does not lie in [its] market value, but in the right it represents to participate in the company".[124] Is there truly something so 'special' about shares which warrants them being treated differently from some other property owned by the shareholder?

It is submitted that the answer is 'no'. The Court of Appeal's reasoning based on the "fundamental nature of a share" is neither here nor there and does not justify a preclusive rule against the shareholder's personal claim. There is no reason why a share cannot *both* be a right of participation in a company *and* a property of value equally, a point that has been repeatedly made by commentators.[125] As long as one accepts that shares are a form of property – which I think is not seriously disputable – the only conclusion is that a shareholder suffers a personal loss from a diminution in the value of his shares.[126]

The Court of Appeal was unimpressed with this argument, and considered that to think of shares (solely, or at least focally) as rights of participation was "a principled view of the value of shares from a company law perspective."[127] With the greatest respect, this conclusion seems to be unsound due to confusion as to what constitutes 'participation in the company'.

The court was undoubtedly correct in saying that (at least one aspect of) a share is the right to participation in the company. It was also correct in saying that "participation in a company as a shareholder is a matter for regulation by company law".[128] However, it does not follow that the causing of damage to that right of participation does not entitle the shareholder to mount a personal claim in respect of the damage against the wrongdoer who is responsible. Where a shareholder

[123] *Marex*, *supra* note 1 at [212].
[124] *Miao Weiguo*, *supra* note 2 at [198].
[125] Pearlie Koh, *supra* note 18 at [9].
[126] Mitchell, *supra* note 72 at 459; *Christensen, supra* note 82 at 280.
[127] *Miao Weiguo, supra* note 2 at [201].
[128] *Ibid* at [197].

attempts to make such a claim – *ie*, on a personal cause of action directly against the wrongdoer – *that is not an activity which answers to the description of "participation in a company"*. The shareholder is acting as a private owner of property; it is therefore an entirely private law concern and contrary to what the court suggested, not a matter for regulation by company law.

In the opening of this article, the question was posed as to whether there was a material distinction between *Z*'s house and *Z*'s shareholding, such that when *X* and *Y* intentionally injure both, he is only entitled to recover for the former and not the latter. The Court of Appeal answered this question in the affirmative and referred to the "unique nature of shares".[129] It has been argued above that, insofar as *Z* sues on a personal cause of action against the wrongdoers who have caused damage to his shares, there is nothing so unique about shares that warrants them being treated differently from his house.

D. *The Unacceptable Cost of Simplicity*

Finally, we briefly address the weakest reason animating *Marex*'s majority and *Miao Weiguo*. Both sets of judges lauded the "pragmatic advantages"[130] and "practical benefits"[131] of the bright-line rule respectively. It is submitted that while certainty and simplicity are most laudable goals which the law should strive for, it cannot ruthlessly pursue them at the cost of sound principle.[132]

It is always desirable that the law is straightforward, and if the courts can bring that into a *principled* existence, they ought to do so. However, as the late Lord Toulson JSC stated in *PJS v News Group Newspapers Ltd*,[133] "[t]he court must live in the world as it is and not as it would like it to be". Lord Sales said the same in *Marex* when expressing his disapproval of the legal fiction perpetuated by the majority's approach.[134]

According to Phang JCA, complex issues of double recovery "are all issues that a court *can* resolve" [emphasis in original] and there is certainly no doubt that the courts, composed of the most eminent legal minds, have such capability in spades.[135] If that is the case, then there is no reason why the courts should shrink from the task. Furthermore, technical issues relating to the valuation of shares are not foreign to our courts, who are often aided by expert evidence on such points.[136] Indeed, his Honour's own concise restatement of the variety of tools at the court's disposal is itself a useful starting point.[137]

---

[129] *Ibid* at [200].
[130] *Marex*, *supra* note 1 at [38].
[131] *Miao Weiguo*, *supra* note 2 at [200].
[132] *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 at [81].
[133] [2016] AC 1081 at [86].
[134] *Marex*, *supra* note 1 at [153].
[135] *Miao Weiguo*, *supra* note 2 at [205].
[136] See, *eg*, *Kiri Industries Ltd v Senda International Capital Ltd* [2021] 3 SLR 215.
[137] *Miao Weiguo*, *supra* note 2 at [176]–[184].

SJLS A0164

IV. Conclusion

Professor Andrew Tettenborn has pithily summarised *Marex* (and *Miao Weiguo*) as decisions that "[l]ess law is good law".[138] This article has argued that the way forward is *even less* law – more accurately, none at all – and that the courts have not been ruthless enough. Put simply, in clinging to a principle of 'reflective loss', the law is giving form to something that does not exist independently, as this so-called principle, as explained above, is merely a descriptor for the effect of the rule in *Foss v Harbottle*. The danger of the continued reliance on the superfluous notion of 'reflective loss' is that the law is prone to fall prey, as it currently has, to the allure of turning what is really a descriptive term into a substantive principle in its own right.

Nevertheless, despite their flaws, one commentator has rightly pointed out that *Marex* and *Miao Weiguo*, *overall*, do not constitute retrograde steps, but rather, take "one step forward, but also one step back".[139] Despite not arriving at (what I have submitted to be) the correct conclusion, both the UK Supreme Court and the Singapore Court of Appeal have taken the important first step by finding the correct starting point in the rule in *Foss v Harbottle*. Credit is also due for them having emphatically drawn one correct conclusion: that the rule does not apply to anyone who is not a shareholder.

In any event, the Malaysian Court of Appeal has recently remarked that "it cannot be denied that this area of company law is undergoing a dramatic re-thinking" and that "*Marex* indicates that change is in the air".[140] Given the issues which this article has endeavoured to engage with, it is hoped that we have not yet heard the last word that the courts have to say on the reflective loss principle.

---

[138] Tettenborn, *supra* note 4 at 17.

[139] Ivan Sin, "The Reflective Loss Principle in *Marex v Sevilleja*: One Step Forward, One Step Back" [2021] J Bus L 285 at 296.

[140] *Lee Yee Wuen v Lee Kai Wuen* [2020] MLJU 1902 at [98].

A0164.indd 333 11-24-22 17:48:43