6-2023

Taming reflective loss – Miao Weiguo v Tendcare Medical Group Holdings Pte Ltd [2022] 1 SLR 884

Pey Woan LEE
Singapore Management University, pwlee@smu.edu.sg

TAMING REFLECTIVE LOSS

Case Comment:
Miao Weiguo v Tendcare Medical Group Holdings Pte Ltd

[2022] 1 SLR 884 / [2021] SGCA 116
Court of Appeal of Singapore
Sundaresh Menon CJ, Andrew Phang Boon Leong JCA,
Judith Prakash JCA, Quentin Loh JAD, Chao Hick Tin SJ
15 December 2021

LEE Pey Woan
Dean, Professor of Law
SMU Yong Pung How School of Law

I. Introduction

1 At common law, the "no reflective loss" ("**NRL**") principle bars a shareholder from bringing a personal action to recover any diminution in share value resulting from a wrong inflicted by a third-party wrongdoer on the company. Such reduction in value is not treated as the shareholder's personal loss as it is a "mere reflection" of the company's loss. And this is so even if the company does not seek to recover from the wrongdoer or settles with the wrongdoer for a sum well below its actual loss. Though endorsed by the highest courts, the NRL principle remains controversial by reason of its uncertain rationale and breadth. By prioritising the company's claim over that of shareholders, the principle simplistically assumes a direct correlation between the value of the company's assets and that of its shares. It also accords insufficient weight to the independent and personal character of the shareholders' causes of action. In practice, these criticisms are borne out by the principle's "will o' wisp"[1] character as courts struggle to distinguish between reflective and personal losses. Of further concern is the potentially expansive reach of the rule as some cases suggest that the principle prevents even creditors from enforcing personal claims against

[1] *Johnson v Gore Wood & Co (No 2)* [2003] EWCA (Civ) 1728 at [162].

wrongdoers,[2] threatening to "distort large areas of the ordinary law of obligations".[3]

2 In *Marex Financial Ltd v Sevilleja*[4] ("***Marex***"), a majority[5] of the Supreme Court judges affirmed the NRL principle but significantly narrowed its ambit: the principle should only exclude claims for diminution in shareholding value and other distributions due to shareholders but not creditor claims. This is in line with its rationale as a corollary to the rule in *Foss v Harbottle*:[6] it prevents the subversion of the proper plaintiff rule as well as the principle of majority rule.[7] It also "upholds the default position of equality among shareholders" and gives effect to their (implicit) common understanding that each shareholder's investment "follows the fortunes of the company".[8] At the same time, the majority judges made clear that the principle is not predicated on the avoidance of double recovery.[9] This clarification was crucial for reversing the alarming extension of the principle to bar creditors' personal claims.

3 The minority judges,[10] however, rejected even the attenuated form of the NRL principle supported by that majority. In a root and branch attack, the minority sought to demonstrate the false premises underlying the principle and contended for its complete abolition. Ultimately, both the majority and minority were unanimous as to the outcome of the case, *viz.*, that the NRL principle did not bar the claimant's personal action since he had sustained loss as a creditor (not shareholder) of the company. Nevertheless, the sharp division in judicial opinion between the majority and minority strongly hints at the complexities and uncertainties that will likely persist in this area of law.

4 In Singapore, the Court of Appeal has also comprehensively reviewed the NRL principle in *Miao Weiguo v Tendcare Medical Group*

---

2 See *e.g.*, *Gardner v Parker* [2004] 2 BCLC 554 at [70]; *Marex Financial Ltd v Sevilleja* [2019] QB 173.

3 A Tettenborn, "Creditors and Reflective Loss – A Step Too Far?" (2019) 135 LQR 182 at 182.

4 *Marex Financial Ltd v Sevilleja* [2020] 3 WLR 255.

5 Comprising Lord Reed, Lady Black and Lord Lloyd-Jones. Lord Hodge also agreed with Lord Reed's reasons but supplemented those reasons with additional comments.

6 *Foss v Harbottle* (1843) 2 Hare 461.

7 *Marex Financial Ltd v Sevilleja* [2020] 3 WLR 255 at [37] and [52]–[53]

8 *Marex Financial Ltd v Sevilleja* [2020] 3 WLR 255 at [108].

9 *Marex Financial Ltd v Sevilleja* [2020] 3 WLR 255 at [51].

10 Comprising Lord Sales, Lord Kitchin and Baroness Hale.

Holdings Pte Ltd[11] ("***Tendcare***"). Embracing the reasoning of the majority judges in *Marex*, the court in *Tendcare* affirmed the NRL principle as a rule of company law that prioritises the company's autonomy. The Court of Appeal also decisively overruled its earlier analysis in *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)*[12] ("***Townsing***"), rejecting the avoidance of double recovery as a foundation of the rule.

5 This article will recount the decision and reasoning in *Tendcare* to set the stage for examining the implications of the *Marex* decision. As *Tendcare*'s treatment of the law is similar to that of the majority's in *Marex*, the UK decisions following *Marex* are useful and relevant predictors of how the debate is likely to evolve in Singapore post-*Tendcare*. This article concludes that while *Marex* and *Tendcare* are welcome developments in so far as they have provided important clarification on this difficult area of law, the risks of injustice inherent in the NRL principle in precluding otherwise valid claims will continue to pose challenges for courts and ultimately raise questions about the legitimacy of the principle itself.

II. *Miao Weiguo v Tendcare Medical Group Holdings Pte Ltd*

A. Facts and trial decision

6 The dispute in *Tendcare* arose from a series of fraudulent transfers perpetrated by Gong on Tendcare Medical Group Holdings Pte Ltd ("**TMG**"). Initially, TMG was an investment holding company that owned and operated hospitals and other medical-related businesses. Gong was at all material times a director and majority shareholder of the company. In preparation for an Initial Public Offering ("**IPO**"), TMG was restructured to become the holding company, through its wholly owned subsidiary Tian Jian Hua Xia Medical Group (HK) Limited ("**TJHK**"), of a group of companies that purportedly held investments in medical facilities in China.

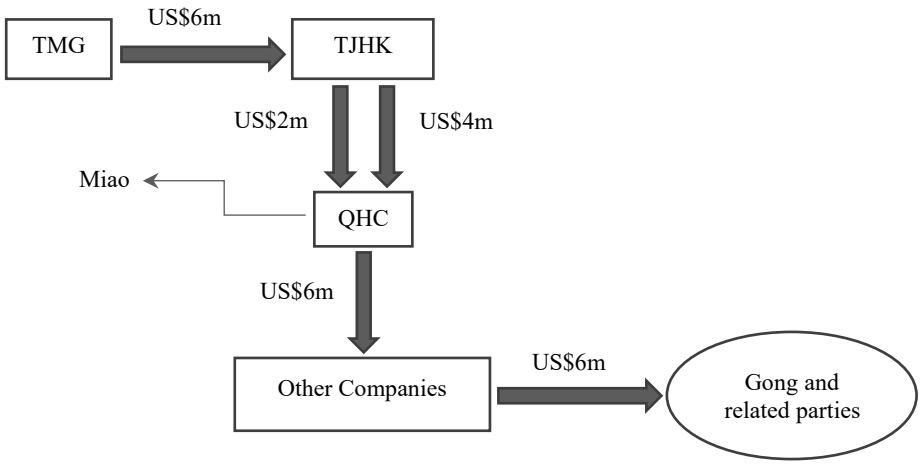
---

11 *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884.

12 *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 SLR(R) 597.

7 In anticipation of the IPO, TMG raised around US$130m in pre-IPO funds from investors. However, the IPO did not materialise and a significant portion of these funds was siphoned off soon after receipt. In particular, TMG transferred US$6m (in two tranches of US$2m and US$4m respectively) to TJHK which in turn transferred the said sums to another company, QHC (the "**TMG–TJHK–QHC transfers**"). QHC was owned and controlled by Miao (the appellant on appeal). QHC then paid the sums to other companies but the funds eventually found their way to Gong and persons related to him. A simplified pictorial representation of the relevant fund transfers is set out in Diagram 1.

Diagram 1: The TMG–TJHK–QHC Transfers



8 Unsurprisingly, TMG became insolvent and was placed under judicial management. Together with its judicial manager, TMG sued Gong, Miao and other defendants for fraudulent trading (in breach of section 340(1) of the Companies Act 1967), breach of fiduciary duties, dishonest assistance and unlawful conspiracy. At trial,[13] the High Court found (*inter alia*) Gong liable for fraudulent trading and breach of directors' duties owed to TMG. The court also found Miao liable for dishonestly assisting Gong's fiduciary breaches.

[13] *Tendcare Medical Group Holdings Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management) v Gong Ruizhong* [2021] SGHC 80.

B. Court of Appeal decision

9 Miao appealed against the trial judgment. He partially succeeded as the Court of Appeal found that he had the requisite dishonest intent only with respect to the US$4m tranche but not the US$2m tranche of the TMG–TJHK–QHC transfers. As such, his liability for dishonest assistance arose (if at all) only in respect of the US$4m transfer. However, Miao also argued that TMG's claim for dishonest assistance should be barred in its entirety. This was because, applying the NRL principle, TMG's loss was a mere reflection of TJHK's loss and hence irrecoverable.[14] This argument assumed that TMG's loss was one that would be remedied if TJHK recovered its loss from Miao. The Court of Appeal rejected this argument.

10 Before considering the appellate court's reasons, a preliminary difficulty in applying the NRL principle to these facts should be noted. In the typical case where the principle has been applied, the *company* must first have suffered a wrong and its shareholder then seek to maintain a personal cause of action against the wrongdoer in respect of the same incident. In other words, there must exist two parallel causes of action against the same wrongdoer—one belonging to the company and the other to the shareholder. Where only the shareholder has a cause of action but the company does not, the NRL principle would not apply even if the shareholder's loss is derived from the company's loss.[15] In *Tendcare*, it was unclear what cause of action TJHK had against Miao.[16] If Gong had also been a director of TJHK and authorised the wrongful transfer of funds to QHC, then TJHK could have had an action against Miao for dishonestly assisting Gong's breach of fiduciary duty *to TJHK*. Unfortunately, the judgments are silent on whether Gong owed such a duty to TJHK though Gong undoubtedly controlled TJHK through Tendcare. If TJHK did not have a cause of action against Miao, then TMG's loss could not have been barred by the NRL principle.

---

14 *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [111].

15 *George Fischer (Great Britain) Ltd v Multi Construction Ltd* [1995] 1 BCLC 260; *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443.

16 Phang JA alluded to the existence of TJHK's action but did not identify it: see *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [171].

11 Be that as it may, this factual uncertainty does not in any way detract from the significance of the Court of Appeal's analysis, which was clearly predicated on the paradigm situation where both the company and the shareholder (or claimant) have parallel causes of action in respect of a wrong inflicted on the company.[17] Delivering the judgment of the court, Phang JA embarked on a comprehensive review of the jurisprudence surrounding the NRL principle. He concluded, in agreement with the majority in *Marex*, that the NRL principle ought to be preserved as a rule of company law but its application should be confined only to claims for diminution of share value and other share-based distributions.

12 In Phang JA's view, the NRL principle is justified as a corollary to the rule in *Foss v Harbottle*.[18] The chief concern here is that a shareholder should not be allowed to undermine the proper plaintiff rule (that the company alone is the proper plaintiff in respect of a corporate wrong) and the corporate management rule (that corporate management is vested only in the company's decision-making organs) by bringing a personal action to recover reduction in share value directly caused by a wrong done to the company. Importantly, Phang JA emphasised that the NRL principle is a *general* rule—so that the company's claim *always* trumps the shareholder's personal claim for share value and distribution losses.[19] Hence, its application is not contingent on proof of actual intention to circumvent the rule in *Foss v Harbottle*. This conception of the principle (as a general rule) reflects the "unique nature of shares".[20]

13 Central to Phang JA's analysis is the conception of a share as a right to participate in a company. It confers on its owner no direct interest in the company's assets nor the right to control the company. A

---

17 See *e.g.*, *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [192], where Phang JA explicitly referenced the defence counsel's argument that the plaintiff's loss was one that would have been compensated if the company (TJHK) had "pursued *its own cause of action* and recovered against the wrongdoer." (emphasis added)

18 *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [199].

19 *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [130].

20 *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [200].

shareholder has no right to a dividend or a particular share or residual value only by reason of share ownership. These features reflect the essential basis of shareholding, *viz*., that a person who acquires shares effectively "[relinquishes] control over the business and, as such, the fate of the shareholder's investment to the company".[21] In practical terms, this means that shareholders accept that the value of their shares would rise and fall in tandem with changes in the company's fortunes. A reduction in share value that is caused only by a wrong inflicted on the company merely reflects a change in the company's fortune, since "wrongs done to the company are part and parcel of a company's fortunes—a part of the vicissitudes of corporate life".[22] Such changes are the precise risks that shareholders agree to bear when they acquire shares. It follows that the shareholder does not suffer a separate and distinct loss when a wrong is inflicted on the company, and should therefore be barred from recovering such loss even if the shareholder has a personal cause of action against the same wrongdoer.[23]

14 The denial of a shareholder's personal claim may appear unjust from a purely private law perspective, but this view wrongly presupposes that a person's private law interests can or should always be detached from his or her shareholder status.[24] In Phang JA's view, the shareholder's participation in a company is a matter for regulation by company law.[25] Those who acquire shares in a company must take the good with the bad, *i.e.*, they "cannot take the benefits [of the corporate form] without also assuming the burdens".[26] Moreover, shareholders whose private law claims have been barred by the NRL rule are not bereft of remedy. They do have recourse under sections 216 (the

[21] *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [118].

[22] *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [200].

[23] *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [204].

[24] *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [197].

[25] *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [197].

[26] *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [197].

oppression remedy) and 216A (the statutory derivative action) of the Companies Act 1967. Even if these remedies are deficient, it is for Parliament, rather than the courts, to implement reform or devise exceptions to the cardinal principles that undergird shareholding.[27]

15 Having located the principle's justification in the unique status of shareholders, Phang JA went on to categorically reject the avoidance of double recovery as a policy justification of the NRL rule. The learned judge cited three reasons. First, it is not necessary to fashion a specific principle for this purpose because the avoidance of double recovery is a general concern throughout the law.[28] As such, courts already have at their disposal a wide range of (both substantive and procedural) rules to prevent double recovery.[29] Secondly, the avoidance of double recovery does not explain why the NRL principle is formulated as a blanket prohibition against recovery even in circumstances when there is no risk of double recovery.[30] Finally, the double recovery rationale is, in any case, premised on the mistaken assumption of a linear correlation between a company's share value and its asset value.[31] In reality, share values are determined by a variety of factors (often based on future income streams or sentiments of such prospects) in addition to, or in place of, asset values. As such, a loss in asset may not translate into a commensurate loss in share value. Conversely, the company's recovery against the wrongdoer may not restore the shareholder's loss. Moreover, the focus on double recovery is unhelpful as it could overextend the principle to bar all instances of overlapping losses, rendering its scope "uncontrollable", the effect of which is to "[undermine] the whole law of obligations in so far as companies are concerned."[32]

---

27 *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [204].

28 *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [176].

29 *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [186].

30 *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [187].

31 *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [188].

32 *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [189].

16 In adopting this position, Phang JA decisively departed from the Court of Appeal's earlier analysis in *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)*.[33] In that case, the court had justified the bar against reflective loss as a corollary or variant of the rule in *Foss v Harbottle* but also accepted that an exception could be made if there was no risk of double recovery. Phang JA considered this an untenable attempt to straddle two distinct rationales (of *Foss v Harbottle* on the one hand and avoiding double recovery on the other) that pull in opposite directions. If an exception is permitted whenever there is no risk of double recovery, the exception would swallow up the general prohibition.[34] The net result of combining the two rationales is then to empty the NRL principle of content, reducing it to a rule about avoiding double recovery.

17 Once it is appreciated that the NRL principle is founded on the unique status of shareholders, it becomes clear that the rule should only bar claims *qua* shareholders and not those brought in other capacities. Specifically, following the majority approach in *Marex*, "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."[35]

18 Conceiving the rule as such made it apparent that the NRL principle was irrelevant to the claimant's cause of action in *Tendcare*. In this case, TMG (the claimant) had sought (inter alia) to recover the sums that were fraudulently transferred by Gong in breach of his fiduciary duty to TMG. At trial, it was further established that Miao had dishonestly assisted with Gong's breach. Thus, TMG's action against Miao was to recover the loss of its *own* funds that were unlawfully dissipated by Gong, not damages for loss in shareholder value or other distributions relating to its shareholding in TJHK.[36]

---

33 *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 SLR(R) 597.

34 *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [150], [169]–[170].

35 *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [206].

36 *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [207].

19 *Tendcare* is a welcome development that restores the NRL principle to its roots in *Foss v Harbottle*. The decision has not only clarified a previously muddled area of law but also placed the principle on a rational footing. Nevertheless, it is also clear that the rule is still in a state of development. In particular, the courts in both *Marex* and *Tendcare* had left unresolved specific aspects of the rule so their resolution will necessarily require further judicial attention. Litigants will also continue to test and contest the rule to optimise or weaken (as the case may be) its potency as a strike-out tool. Hence, even while the existence of the rule and its rationale are no longer in doubt, challenges of the rule's application will persist. Indeed, these challenges have already occurred in the UK, where the rule has continued to be litigated post-*Marex*. The discussion below will trace some of these developments. It will also consider the issues that remain and canvass possible resolutions of these issues.

III. Settled issues

A. The test for reflective loss

20 A party resisting the application of the NRL rule will typically seek to demonstrate that the recovery in question relates to a loss that is "separate and distinct" from that sustained by the company. Prior to *Marex*, a common approach to distinguishing between reflective and non-reflective (or separate and distinct) losses was to ask: would the shareholder's loss be restored if the company recovered its loss through a successful suit against the wrongdoer?[37] The shareholder's loss is separate and distinct if it would not be so restored. In *Johnson v Gore Wood*[38] ("***Johnson***"), this understanding appeared to have been at work when Lord Bingham drew a distinction between two types of losses: the first was the lost contributions that the company would have made to the claimant's pension funds but for the defendant's negligence, and the second was the enhancement to the value of that fund had the contributions been made. His Lordship struck out the former as reflective loss but considered the latter unobjectionable.[39] The reason, presumably, was that even if the company had subsequently been able to pay for the arrears in pension contributions (following a successful

37 *Johnson v Gore Wood & Co* [2001] 2 WLR 72 at 94.
38 *Johnson v Gore Wood & Co* [2001] 2 WLR 72.
39 *Johnson v Gore Wood & Co* [2001] 2 WLR 72 at 95.

suit against the defendant), that would still not make up for the loss in enhancement value arising from the delayed investment.

21 However, it is now clear that this "make good the loss" approach is mistaken either because it assumes a direct correlation between the company's assets and its share value, or that it was erroneously motivated by concerns of double recovery. As the majority clarified in *Marex*, the NRL rule is not confined to situations where there exists an exact correlation between the company's and the shareholder's loss.[40] While a shareholder's reflective loss is necessarily derived from the company's loss, whether or not it is also replenished when the company recovers from the wrongdoer is not critical. What really matters is the *capacity* in which the shareholder sustained the loss. In *Primeo Fund (in official liquidation) v Bank of Bermuda (Cayman) Ltd*[41] ("***Primeo***"), the Privy Council unpacked the new test for distinguishing between reflective and non-reflective losses by focusing on the "following the fortunes" justification that underlies the rule. The touchstone is whether the loss claimed is part and parcel of the "bargain" that the claimant subscribed to when it acquired shares in the company.

22 In this case, the claimant (Primeo) was a Cayman Islands company that managed an open-ended mutual investment fund. Most of its funds were invested in BLMIS, a Bernard Madoff vehicle that purported to invest in listed securities and treasury bills. Initially, Primeo held the bulk of its BLMIS investments directly, with only a small portion invested through two Cayman domiciled feeder funds, Herald and Alpha. In 2007, however, Primeo transferred all of its direct investments in BLMIS to Herald in exchange for shares issued by Herald (the "**Herald Transfer**") and so ceased to hold any direct investment in BLMIS. Shortly thereafter, it came to light that BLMIS was an instrument for Bernard Madoff's massive Ponzi scheme. BLMIS promptly collapsed, bringing down with it investors such as Primeo. In the present dispute, Primeo sued its custodian and administrator, R1 and R2, for various breaches of duties. It argued that if R1 and R2 had properly performed their duties as custodian and administrator, Primeo would have discovered the true value of the BLMIS investments and avoided the fatal losses. At trial, the defendants successfully resisted the

[40] *Marex Financial Ltd v Sevilleja* [2020] 3 WLR 255 at [42].
[41] *Primeo Fund (official liquidation) v Bank of Bermuda (Cayman) Ltd* [2022] 1 BCLC 151.

claims on the ground (*inter alia*) that Primeo's claims infringed the rule against reflective loss since Herald and Alpha had separately instituted actions against them to recover losses that could overlap with those of Primeo. The Cayman Islands Court of Appeal affirmed this decision. Primeo appealed to the Privy Council.

23 Allowing the appeal, the Privy Council held that Primeo's claims for the losses incurred in connection with its (initial) direct BLMIS investments were not barred because the NRL principle is "forward-looking [and] not backward-looking"[42] —it did not apply to losses incurred personally by Primeo *before* it held shares in Herald. Unbeknownst to itself, Primeo had sustained a loss each time it invested directly in BLMIS.[43] These losses were therefore suffered in its personal capacity, which was not altered by the fact that it subsequently became a shareholder of Herald. In the Board's view, understanding the principle as a forward-looking rule is entirely consistent with its underlying "bargain" justification. A shareholder agrees to "follow the fortunes of the company" and to entrust the resolution of corporate wrongs to the company's management but *only in so far as these are wrongs suffered by the company after it became a shareholder*. The NRL rule does not operate to deprive shareholders of personal rights that have accrued to them prior to their membership in the company.[44] This is so even if the company subsequently acquires legal rights against the same wrongdoers that, if successfully prosecuted, would have the effect of restoring the claimant's loss. [45] This was so on the facts because Herald had, by the time of Primeo's claims, also instituted actions against R1 and R2 for, inter alia, restitution of lost assets. The Board noted that even if Herald's success could potentially restore Primeo's losses, that in itself would still not have rendered the NRL principle operative since Primeo's claims had arisen as distinct, personal claims. This clarification marks a clean break from the "make good the loss" approach that tended to rely on the effects of recovery as a strong indicium of reflective loss. The more pertinent controlling concept, as *Primeo* helpfully demonstrates, is the capacity in which the loss was sustained.

---

42 *Primeo Fund (in official liquidation) v Bank of Bermuda (Cayman) Ltd* [2022] 1 BCLC 151 at [66].

43 *Primeo Fund (in official liquidation) v Bank of Bermuda (Cayman) Ltd* [2022] 1 BCLC 151 at [54]–[55].

44 *Primeo Fund (in official liquidation) v Bank of Bermuda (Cayman) Ltd* [2022] 1 BCLC 151 at [67].

45 *Primeo Fund (in official liquidation) v Bank of Bermuda (Cayman) Ltd* [2022] 1 BCLC 151 at [60].

B. Former shareholders and loss of share values

24 In both *Marex* and *Tendcare*, the courts had addressed the conventional paradigm involving claims by *existing* shareholders for diminution in share value and loss of share-related distributions. That left open the question whether the NRL rule would similarly bar a claim for diminution in share value by *former* shareholders.

25 There are suggestions in earlier cases that a former shareholder is not prevented by the NRL principle from claiming for diminution in share value. In *Johnson*, for example, Lord Millett appeared to have contemplated that ex-shareholders who sold their shares at a discount after the defendant's wrongdoing would not be barred by the NRL principle.[46] The reason is traceable back to the "make good the loss" conception of reflective loss that predated *Marex* and *Tendcare*: that a shareholder who has crystalised its loss by selling its shares has suffered a separate and distinct loss because it would not be restored even if the company should subsequently make a full recovery from the defendant. As we have seen, however, this reasoning cannot now stand in light of the reasoning in *Marex* and *Tendcare*.

26 Post-*Marex*, this issue has arisen for consideration in a number of UK decisions. In *Nectrus Ltd v UCP plc*[47] ("***Nectrus***"), the claimant (UCP) had sold its shares in a wholly owned subsidiary at a discount to reflect the value lost allegedly as a result of the defendant's (Nectrus) breach of contract. The claimant then sought to recover the discount in purchase price from the defendant. The trial judge ruled in favour of the claimant, holding that the discount was not precluded by the NRL rule. The English Court of Appeal affirmed this view. Faux LJ, the sole presiding judge, held that the applicability of the NRL principle should be determined at the time when the claim was made and not at the time when the breach occurred.[48] On that reasoning, an ex-shareholder would not be claiming in the capacity of a shareholder, for it had sold its shares by the time proceedings were brought, such that the "unity of economic interests" between the company and the shareholder had ceased as a result.[49]

---

46 *Johnson v Gore Wood & Co* [2001] 2 WLR 72 at 123. Lord Millett cited *Heron international Ltd v Lord Grade* [1983] BCLC 244 to that effect.
47 *Nectrus Ltd v UCP plc* [2021] EWCA Civ 57.
48 *Nectrus Ltd v UCP plc* [2021] EWCA Civ 57 at [43].
49 *Nectrus Ltd v UCP plc* [2021] EWCA Civ 57 at [50].

27 In *Primeo*, however, the Board of the Privy Council rejected *Nectrus* as wrongly decided. In its view, the character of the loss suffered by the shareholders has to be assessed at the time when the wrong was committed rather than the time when the proceedings were brought.[50] To hold otherwise would lead to odd results. It would mean that a shareholder could easily circumvent the NRL rule simply by selling its shares. That would also subvert the purposes of the rule, for a wrongdoer would hesitate to settle with the company for fear that shareholders could subsequently seek to recover their losses in share value after the sale of shares.[51] For the Board, then, the patently correct view was that "[a]shareholder which suffers a loss in the form of a diminution in value of its shareholding which is not recoverable as a result of the application of the reflective loss rule cannot later convert that loss into one which is recoverable simply by selling its shareholding."[52]

28 As a decision of the Privy Council, *Primeo* is not binding on English courts. Nevertheless, subsequent English decisions have endorsed its reasoning. This is perhaps unsurprising since the Board in *Primeo* comprised entirely of judges[53] who formed the enlarged quorum in *Marex*.[54] Thus, the English Court of Appeal confirmed in *Allianz Global Investors GMBH v Barclays Bank plc* that "[it] is now established by *Primeo* that losses arising from diminution in value of the shareholding, for which there is no claim, cannot be converted into actionable loss by the subsequent action of selling the shares."[55] It would make no difference if, instead of selling shares, the shareholder ceased to be a shareholder by reason of a share redemption by the company. *Primeo* was also followed in *Breeze v The Chief Constable of Norfolk Constabulary*[56] ("***Breeze***"), which held that a loss in share value was not a separate and independent loss even though claim was brought after the

---

50 *Primeo Fund (in official liquidation) v Bank of Bermuda (Cayman) Ltd* [2022] 1 BCLC 151 at [61]–[62].

51 *Primeo Fund (in official liquidation) v Bank of Bermuda (Cayman) Ltd* [2022] 1 BCLC 151 at [62].

52 *Primeo Fund (in official liquidation) v Bank of Bermuda (Cayman) Ltd* [2022] 1 BCLC 151 at [61].

53 *Viz.*, Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Kitchin and Lord Sales.

54 Which also included lady Black and Baroness Hale of Richmond. In *Breeze v The Chief Constable of Norfolk Constabulary* [2022] EWHC 942 (QB), Master Stevens explicitly cited (at [85]) the constitution of the Board of the Privy Council as a strong reason for endorsing *Primeo*.

55 *Allianz Global Investors GMBH v Barclays Bank plc* [2022] EWCA Civ 353 at [47].

56 See *Breeze v The Chief Constable of Norfolk Constabulary* [2022] EWHC 942 (QB) and *Burnford v Automobile Association Developments Limited* [2022] EWCA Civ 1943.

company's dissolution (and so the claimant was no longer, by definition, a shareholder). In a similar vein, the English Court of Appeal struck out an attempt to recover damages for the loss of contractual rights to sell shares in *Burnford v Automobile Association Developments Limited*.[57] Newey LJ ruled that this was, in substance, a loss in share value and therefore caught by the NRL principle.[58]

29 These cases have helpfully clarified the law in three ways. First, reflective losses are determined by reference to circumstances existing at the time of the loss. Claimants cannot seek to alter the nature of the loss by reference to events subsequent to the occurrence of the loss. Second and consequently, a shareholder cannot circumvent the NRL rule simply by selling or redeeming or otherwise disposing of its shares. Third, a loss is of a reflective nature if it is one that relates to the underlying value of shares. Relabelling or reclassifying such losses (for example, as a loss of proceeds of sale or loss of contractual rights) will not convert them into distinct and independent losses.

IV. Unresolved issues

A. Indirect shareholders

30 One question that has arisen in recent cases concerns the applicability of the NRL rule to indirect shareholders. For example, if A is a majority shareholder of B, B is a majority shareholder C and C is a majority shareholder of D, and A and D have concurrent claims against W for a wrong inflicted on D but which results in the diminution of A's shares in B, is A then barred by the NRL rule from claiming against W? In this example, B and A would be indirect shareholders or respectively "second degree" and "third degree" shareholders. The possible application of the rule to such circumstance is termed the "Russian doll" effect.

31 In *Broadcasting Investment Group Ltd v Smith*[59] ("***BIG***"), Andrew Simmonds QC held that the NRL rule does not bar the claims of indirect shareholders. The learned judge cited four reasons. First, the

[57] *Burnford v Automobile Association Developments Limited* [2022] EWCA Civ 1943.
[58] *Burnford v Automobile Association Developments Limited* [2022] EWCA Civ 1943 at [50].
[59] *Broadcasting Investment Group Limited v Smith* [2020] EWHC 2501 (Ch).

majority judges in *Marex* had expressed the rule as one that applied to *shareholders*. Second, the majority reasoning in *Marex* had emphasised the limited and exceptional nature of the rule and is therefore "antipathetic to any incremental extension of the rule to non-shareholders, whatever policy justifications may be advanced for such an extension."[60] Third, extending the rule to second or third degree shareholders would unacceptably "ignore the separate legal personality of the companies which form the intervening links in the chain between the claimant and the loss-suffering company."[61] Finally, the rationale of the rule has no application to indirect shareholders because, not having acquired shares in the loss-making company, they cannot be said to have *agreed* to follow its fortunes.

32 The decision in *BIG* was reversed on a different ground on appeal. Consequently, the English Court of Appeal did not have to consider the Russian doll argument.[62] However, Arnold LJ, one of the appeal judges, did nevertheless observe (*obiter*) that it was "well arguable that the rule in *Prudential* can apply to indirect shareholders in appropriate circumstances."[63] Citing a hypothetical example where the indirect shareholder is linked through a wholly-owned subsidiary to the loss-suffering company, Arnold LJ found it "difficult to see why, on those hypotheses, the rule should not apply."[64] This same sentiment was subsequently echoed in *Breeze*, where Master Stevens thought it "very dubious whether claims made by the claimants as indirect shareholders, in wholly owned subsidiaries would survive post-*Marex*."[65]

33 Extending the NRL principle to indirect shareholders appears logical when one considers that its rationale is to protect a company's ability to manage its rights of action free from shareholder interferences. If shareholders up the ownership chain were not caught, then the rule can easily be circumvented by interposing intermediate companies in between. Indeed, these shareholders are not without remedy if multiple

60 *Broadcasting Investment Group Limited v Smith* [2020] EWHC 2501 (Ch) at [64].
61 *Broadcasting Investment Group Limited v Smith* [2020] EWHC 2501 (Ch) at [64].
62 *Broadcasting Investment Group Limited v Smith* [2021] EWCA Civ 912 at [63].
63 *Broadcasting Investment Group Limited v Smith* [2021] EWCA Civ 912 at [66].
64 *Broadcasting Investment Group Limited v Smith* [2021] EWCA Civ 912 at [66].
65 *Breeze v The Chief Constable of Norfolk Constabulary* [2022] EWHC 942 (QB) at [87].

derivative actions are permitted,[66] thus strengthening the case for extension to indirect shareholders.[67] More generally, the exclusion of direct redress for shareholders further up the line may be justified as the "price" for the benefit of limited liability—often the chief reason for organizing businesses as corporate groups. It is true that to prohibit any form of direct (particularly contractual) redress by shareholders up the line for losses flowing from wrongs done to their investee companies will likely contradict the reasonable expectations of businesses. But that is a criticism of the NRL rule itself and not merely of its extension to indirect shareholders. Applying the rule up the line of ownership is therefore defensible as a coherent development of the principle in light of its modern justification.

B. Giles v Rhind

34 Prior to *Marex*, *Giles v Rhind*[68] ("***Giles***") was widely seen as an attempt to mitigate the potential overreach of the NRL rule. The case stood for the proposition that the NRL rule would not apply in circumstances where a defendant had by his own wrongdoing prevented or disabled the company from seeking recovery. The exception evolved as an extension of the *Gerber Garment*[69] category of cases where the companies in question have no cause of action of their own. Barring the shareholder's action in such situations would be unjust because that would effectively leave the wrongdoer with no liability to account to anyone for its breach.[70] However, the exception was controversial as it threatened to undermine the rule in *Foss v Harbottle* by permitting the claimant to recover from the wrongdoer at the expense of the company and its creditors.[71] Consequently, subsequent English decisions have tended to construe the exception narrowly. Indeed, the English Court of

---

66 The position in Singapore is not entirely clear although there are suggestions that indirect shareholders could qualify as a "proper person" with standing to seek leave for directive actions under section 216A of the Companies Act 1967: see H Tjio, P Koh & PW Lee, "Corporate Law" (Academy Publishing, 2015) at [10.041]–[10.043]; and A Koh, D Puchniak & CH Tan, "Company Law" (2019) 20 SAL Ann Rev 198 at [9.39]–[9.41], citing *Ganesh Paulraj v A&T Offshore Pte Ltd* [2019] SGHC 180.

67 See D Foxton & YH Goh, "The No Reflective Loss Principle in England, Singapore and Elsewhere", presented at the Singapore Academy of Law on 9 January 2019, accessible at <https://files.essexcourt.com/wp-content/uploads/2019/01/08152749/The-No-Reflective-Loss-Pr1inciple-int-English-and-Singapore-Law-002.pdf>.

68 *Giles v Rhind* [2003] 2 WLR 237.

69 *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443.

70 *Giles v Rhind* [2003] 2 WLR 237 at [34]–[35].

71 *Waddington Ltd v Chan Chun Hoo* [2009] 4 HKC 381 at [85].

Appeal portended its demise when it held in *Marex Financial Ltd v Sevilleja*[72] that the exception would only apply where it is *legally impossible* for the company to prosecute a claim against the wrongdoer whose action had caused the impossibility.[73] Foxton and Goh observed that this re-interpretation effectively "narrow[ed] the exception out of existence".[74]

35 In the UK, the rejection of *Giles* is now complete as the Supreme Court in *Marex* has since overruled the case as wrongly decided. In Lord Reed's view, this exception is misconceived because a company's inability to sue the wrongdoer cannot alter the law's characterisation of the loss in share value as an irrecoverable loss.[75] For shareholders whose personal claims are denied in such circumstance, the proper redress is found in the derivative action.[76] Yet those who consider this a "regrettable" development have suggested that *Giles* may remain binding on lower courts since Lord Reed's observations of the case were not essential to the disposal of the issues before the court.[77] In *Breeze*, however, Master Stevens rejected this suggestion in no uncertain terms. The learned judge pointed out that the *Giles* exception was determined by the Supreme Court after hearing full arguments on both sides, and that Lord Reed's remarks were "intrinsic to the whole structure of the judgment".[78] There was, therefore, no sense in which the issue had been "leftover" for determination by future courts.[79] *Giles* is thus "dead for all intents and purposes on any straightforward interpretation of *Marex*."[80]

---

72 *Marex Financial v Sevilleja* [2019] QB 173 at [57].

73 In *St Vincent European General Partner Ltd v Robinson* [2019] 1 BCLC 706, Males J opined (at [94]) that "the test [of impossibility] is not satisfied when a derivative action is possible, even where the wrongdoer remains in control of the company".

74 D Foxton & YH Goh, "The No Reflective Loss Principle in England, Singapore and Elsewhere", presented at the Singapore Academy of Law on 9 January 2019, accessible at <https://files.essexcourt.com/wp-content/uploads/2019/01/08152749/The-No-Reflective-Loss-Pr1inciple-int-English-and-Singapore-Law-002.pdf>.

75 *Marex Financial Ltd v Sevilleja* [2020] 3 WLR 255 at [70].

76 *Marex Financial Ltd v Sevilleja* [2020] 3 WLR 255 at [71].

77 S Laing, "Reflective Loss in the UK Supreme Court" (2020) CLJ 411 at 413–414.

78 *Breeze v The Chief Constable of Norfolk Constabulary* [2022] EWHC 942 (QB) at [49].

79 *Breeze v The Chief Constable of Norfolk Constabulary* [2022] EWHC 942 (QB) at [49].

80 *Breeze v The Chief Constable of Norfolk Constabulary* [2022] EWHC 942 (QB) at [51].

36 In Singapore, the fate of the *Giles* exception remains to be clarified as Phang JA had in *Tendcare* explicitly left this issue open for future determination. Although his Honour saw "great force"[81] in Lord Reed's view that the company's circumstances should not change the law's classification of what losses are recoverable, he also acknowledged the concerns expressed by commentators, which he thought would be better examined when the issue is squarely before the court. It is submitted that this caution is warranted since it is not a foregone conclusion that the bright-line approach of *Marex* and *Tendcare* should never admit of exceptions. For one, it is not in dispute that reflective losses *can* be recovered in the *Gerber Garment*[82] type of cases where the company that directly suffered losses has no cause of action. Although a company that has never had a cause of action is not in the same position as one that is prevented by circumstances from prosecuting an available cause of action, the fact remains that the shareholder seeking recovery has incurred the loss in its capacity as shareholder, and the loss in question reflects the company's loss. Allowing recovery in such circumstances would effectively prioritise the claimant over other shareholders and creditors, which is precisely the mischief that the NRL rule seeks to address.

37 More pertinently, the reasoning in both *Marex* [83] and *Tendcare*[84] is premised on the not insignificant assumption that any prejudice caused by the NRL principle may be redressed by the statutory derivative action. It assumes, in other words, that the shareholder would generally have access to statutory (or even common law) derivative actions. Yet, it is common knowledge that there exist powerful dis-incentives that deter minority shareholders from bringing derivative actions.[85] In *Tendcare*, Phang JA noted this difficulty but thought that any deficiency in the statutory mechanism was better remedied by

---

81 *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [155].

82 *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443.

83 *Marex Financial Ltd v Sevilleja* [2020] 3 WLR 255 at [34], [36], [54], [71].

84 *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [204].

85 I Sin, "The No Reflective Loss Principle in *Marex v Sevilleja*: One Step Forward, One Step Back" (2021) JBL 285 at 292–293; S Laing, "Reflective Loss in the UK Supreme Court" (2020) CLJ 411.

legislative (rather than judicial) reform.[86] However, that overlooks the fact that the NRL principle is itself a judicial formulation so it is well within the court's remit to delineate its boundary by carving out exceptions.

38 Perhaps even more concerning is the fact that *Giles* will typically be pleaded in cases where the company is insolvent. In this situation, shareholders will have no incentive to bring derivative actions since any recovery (short of reversing insolvency) will be used to pay the company's debts. Moreover, it is clear that a shareholder will not be permitted to bring a derivative action once the company is placed in liquidation. In *Petroships Investment Pte Ltd v Wealthplus Pte Ltd*[87] ("***Petroships***"), the Singapore Court of Appeal held that a derivative action can neither be brought under section 216A of the Companies Act 1967 nor at common law when a company has gone into liquidation.[88] So claimants in cases such as *Giles* are essentially bereft of remedy if their personal claims are barred by the NRL principle. In *Waddington Ltd v Chan Chun Hoo*,[89] Lord Millett suggested that the court could direct the receiver to enforce the company's claim if shareholder was prepared to fund it. Yet, again, there is no incentive for shareholders to do so since they will rank behind preferred and other general creditors in recovery even if the action is successful.[90]

39 In essence, therefore, *Giles* recognised that the NRL principle should not apply when the practical realities do not conform to the

---

86 *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [204].

87 *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2016] 2 SLR 1022.

88 This court found that the text of the statute and its legislative history made it clear that Parliament had intended the provision to apply only to companies that were a going concern: see *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2016] 2 SLR 1022 at [56] and [63]. It also took the view that the position at common law could not be different since it would be odd to permit one form of derivative action but not another in the context of liquidation: *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2016] 2 SLR 1022 at [72]. Another reason why the action will not succeed at common law is that the wrongdoer would no longer be in control once the company's management power is vested in the liquidator: see *Waddington Ltd v Chan Chun Hoo* [2009] 4 HKC 381 at [86].

89 *Waddington Ltd v Chan Chun Hoo* [2009] 4 HKC 381 at [86].

90 A shareholder may recover in priority to creditors if the funding is structured as an *acquisition* of the company's cause of action: see *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597. Section 204 of the Insolvency, Restructuring and Dissolution Act 2018 does envisage that *creditors* who have provided indemnity for costs of litigation may be granted priority in recovery but this provision has no application to shareholders who are not creditors.

assumptions underlying the principle. The supposition that shareholders denied of their personal claims can seek relief through statutory derivative actions is not always true. In fact, the statutory action is out of reach once insolvency sets in. In addition, the principle cannot be justified by the need to protect the company's autonomy over management decisions when the company is too impoverished to pursue the wrongdoer. In these cases, the company simply has no recourse by reason of its impecuniosity. For these reasons, it is not obvious that *Giles* is necessarily incongruent with the justifications that underlie the NRL principle. On the contrary, retaining the exception could improve the company's position by enabling it to secure a settlement with the wrongdoer on the coattails of the shareholder's personal action. Thus, the question whether *Giles* ought to be retained would be better determined when our court has the opportunity to consider the relevant arguments in full.

C. Specific reliefs

40 Another interesting issue that was not considered by the Court of Appeal in *Tendcare* concerns the application of the NRL principle to shareholder actions to seek specific reliefs (instead of damages) against the wrongdoer. In *Marex*, Lord Reed clearly thought that the NRL principle would equally bar shareholder claims for specific reliefs.[91] His Lordship reasoned that if the NRL principle was designed to prevent the subversion of the rule in *Foss v Harbottle*, *viz.*, to ensure the corporate decisions are vested in the company's decision organs, then this purpose must prevail even if the shareholder were seeking reliefs other than damages. Allowing a claimant to obtain a corporate remedy through a personal action would undermine the rule in *Foss v Harbottle* and the strictures that govern derivative actions.

41 Lord Reed cited several cases to illustrate the subversive effects of shareholder actions for specific reliefs if not barred by the NRL principle. In *Peak Hotels and Resorts Ltd v Tarek Investments Ltd*[92] ("***Peak Hotels***"), for example, Birss J held that a shareholder-claimant could not seek damages for loss in share value but was allowed to seek a mandatory injunction requiring the defendants to restore *to the company* assets that had been wrongfully disposed. In drawing a

[91] *Marex Financial Ltd v Sevilleja* [2020] 3 WLR 255 at [52]–[54].
[92] *Peak Hotels and Resords Ltd v Tarek Investments Ltd* [2015] EWHC 3048 (Ch).

distinction between damages and an injunction, the judge thought it significant that the NRL principle was chiefly a rule concerning damages and the prevention of double recovery.[93] Likewise, in *Latin American Investments Limited v Maroil Trading Inc*,[94] ("***Maroil***") Teare J thought it arguable that the NRL principle would not apply if a shareholder seeks an order for *the company* to be compensated for its losses even though the shareholder was suing on a shareholders' agreement. A third instance is *Xie, Fortune Favors Holdings Ltd v Xio GP Ltd*[95] ("***Xie***"), a decision of the Cayman Islands Court of Appeal. Here, the claimant had sued the former director of a company for breach of director's duties, dishonest assistance and unlawful conspiracy. In addition to seeking damages, he sought to injunct the defendants from dissipating the assets of the company. Rix JA considered it arguable, on the authority of *Peak Hotels* and *Maroil*, that a claim for an injunction falls outside the ambit of the NRL principle.[96] And if that were right, then the case for not applying the NRL principle is *a fortiori* when the shareholder is seeking an injunction to *prevent the company's loss*.[97]

42 It is noteworthy that in all three cases, the shareholder-claimants had sought specific reliefs *for the company* whilst prosecuting legal actions personal to themselves. As Teare J noted in the *Maroil* case, such orders do not seem to fall foul of the NRL principle as they "do not prejudice creditors of the company (because the sums are paid to the company) and do not enable a shareholder to recover compensation for a loss suffered by the company (because compensation is payable to the company)."[98] However, all of these cases predate *Marex* and they assumed that the NRL principle was based, at least in part, on the need to prevent double recovery. Now that the principle is firmly grounded on the protection of the company's autonomy in decision-making, it would seem logical for it to prohibit even shareholder actions seeking specific reliefs for the company. If it did not, shareholders will be able to bring derivative actions by the backdoor.[99] A personal action that

93 *Peak Hotels and Resords Ltd v Tarek Investments Ltd* [2015] EWHC 3048 (Ch) at [69], [73].

94 *Latin American Investments Ltd v Maroil Trading Inc* [2017] EWHC 1254 (Comm).

95 *Xie, Fortune Favors Holdings Ltd v Xio GP Ltd* [2018] (2) CILR 508.

96 *Xie, Fortune Favors Holdings Ltd v Xio GP Ltd* [2018] (2) CILR 508 at [71].

97 *Xie, Fortune Favors Holdings Ltd v Xio GP Ltd* [2018] (2) CILR 508 at [71].

98 *Latin American Investments Ltd v Maroil Trading Inc* [2017] EWHC 1254 (Comm) at [22].

99 In *Xie, Fortune Favors Holdings Ltd v Xio GP Ltd* [2018] (2) CILR 508, Rix JA noted (at [66]) that the shareholder's action was in substance no different from a derivative action but regarded this as a reason for allowing such actions.

seeks reliefs for wrongs inflicted on the company is in all but name a derivative action absent the usual statutory safeguards. That would explain why Lord Reed had in *Marex* castigated these cases as illegitimate circumvention of the *Foss v Harbottle* rule.[100]

43 On the other hand, extending the NRL principle to bar even specific reliefs is worrying as it further erodes the personal rights of shareholders. This concern was palpable in *Xie*, where Rix JA was at pains to restrict the NRL principle to situations where the company had *suffered* loss. Stressing that the doctrine had always been invoked in contexts where loss had already occurred, the learned judge saw no merit in extending it to situations where shareholders were seeking to *prevent* a threatened harm.[101] Pragmatic good sense underpins this distinction between situations where loss has occurred and where it has not. Where the company has suffered no loss and the shareholder is not seeking to recoup losses in priority to creditors and other shareholders, an injunction to prevent a potentially harmful act would benefit everyone involved. Disallowing the action in such a scenario would unfairly deprive the shareholder of a personal remedy *and* deny the company of an opportunity to avert harm. It is true, of course, that the company's interests can still be protected if the shareholder could bring a derivative action. In this vein, Foxton suggests that an alternative solution to the situation in *Xie* is to grant an interim injunction to the claimant until such time when the derivative action has been considered by the court.[102] Even so, it is not clear that the shareholder should be deprived of the opportunity to defend its own interests, which may often include the opportunity to avoid losses that are separate and distinct from those of the company.

44 So despite the clarification of its rationale, the tension between the company's autonomy and the shareholder's legitimate personal interests persists. While Lord Reed's reasoning in *Marex* may suggest that the former should take precedence, the full implications of that approach were not considered in that case. That may be why the English Court of Appeal had, in the more recent case of *BIG,*[103] declined to take a definitive stance on this issue. Noting that the issue (whether claims

[100] *Marex Financial Ltd v Sevilleja* [2020] 3 WLR 255 at [52]–[54].
[101] *Xie, Fortune Favors Holdings Ltd v Xio GP Ltd* [2018] (2) CILR 508 at [68].
[102] D Foxton, "Reflections on Reflective Loss" (2019) LMCLQ 170 at 176.
[103] *Broadcasting Investment Group Limited v Smith* [2021] EWCA Civ 912.

for specific performance also falls within the NRL principle) was "complex", Asplin LJ thought it should be addressed in a case in which it is essential to determine the issue.[104] Equally, Singapore courts will have to consider the issue afresh when it arises for resolution.

D. Contractual workarounds

45 An obvious practical implication of the decisions in *Marex* and *Tendcare* is that parties entering into shareholders' (or equivalent) agreements will now have to recalibrate the protection that such agreements offer. Conventionally, investors who desire more protection than that provided at general law would contract for such higher levels of protection. For example, a shareholders' agreement may contain an undertaking by directors to act *bona fide* in the best interests of the company thereby conferring on shareholders a direct right of action against directors in the event of breach. However, if the shareholder's loss is reflective in nature, the NRL principle will effectively render such undertakings ineffectual. Cases such as *Giles*, *Peak Hotels* and *BIG* were all instances where the shareholder had sought to enforce a breach of a shareholders' (or equivalent) agreement and it was assumed in those cases that the contractual claims would have been barred if the relief sought offended the NRL rule. Thus, it is incumbent on lawyers to caution their clients that their legal recourse for breach of a shareholders' agreement is qualified by the NRL principle.

46 Parties who are eager to avoid the application of the doctrine may seek to include provisions in their contracts that expressly exclude it. For example, a shareholders' agreement may contain an explicit undertaking not to invoke the NRL principle. However, it is unclear if such an undertaking will be enforceable as (to the best of this author's knowledge) the efficacy of such devices has yet to be tested in courts. On one view, the explication of the principle as a corollary of the rule in *Foss v Harbottle*, which is in turn a "rule of company law",[105] would suggest that principle cannot be excluded by contract. In *Tendcare*, the Singapore Court of Appeal repeatedly emphasised that the NRL was a "rule of company law",[106] which may be understood as a fundamental

[104] *Broadcasting Investment Group Limited v Smith* [2021] EWCA Civ 912 at [62].
[105] *Marex Financial Ltd v Sevilleja* [2020] 3 WLR 255 at [9].
[106] *Miao Weiguo v Tendcare Medical Holdings Group Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management)* [2022] 1 SLR 884 at [193], [206].

tenet of company law governing shareholders-company relationship that cannot be contractually displaced. As against that, however, there is nothing in private law that prevents one party from subordinating its claim to another so it is arguable that such contractual exclusions may be upheld although the company's promoters or directors will be answerable if the arrangement is made in breach of their duties to the company. Once again, the issue calls for the mediation of the tension between company law doctrines and personal autonomy.

47 Of course, lawyers have always been able to devise creative solutions for their clients when confronted by legal barriers. If direct contractual exclusions are not possible, other contractual mechanisms will likely emerge. Shareholders may, for example, insist on indemnities from persons related to counterparties to broaden the class of defendants against which contractual rights may be enforced. Or they may structure their agreements to include payments in certain contingencies, thereby sidestepping the damages-for-breach analysis. Whether such workarounds will succeed remains to be seen.

V. Conclusion

48 The modern rationalisation of the NRL principle, as expounded in *Tendcare* and *Marex*, places considerable weight on the shareholder's (implicit) agreement to "follow the fortunes of the company". In common usage, the expression is descriptive in function. It helpfully depicts the risks and rewards inherent in share investment: one who acquires shares may expect to prosper if the company prospers but also suffer as its fortune wanes. Remarkably, the analyses in *Tendcare* and *Marex* have elevated this descriptive expression to a prescriptive status. By endorsing the NRL principle in its current form, both decisions effectively laid down a rule of law that obliges shareholders to follow the company's fortunes to the exclusion of certain personal rights of action. Although the prioritisation of the company's claim is generally defensible in the light of *Foss v Harbottle*, its operation becomes increasingly problematic when it leads to the denial of personal recovery in circumstances where the shareholder has no other effective remedy or where the shareholder is rendered powerless to prevent harm to its own interests. Moreover, the assumption that shareholders agree to follow the company's fortunes to the exclusion of other personal remedies does not comport with commercial reality. In practice, share investors do

routinely devise complex collateral contractual arrangements to secure their investments. Extending the NRL principle to defeat these arrangements may, as Lord Sales predicted, "[exemplify] the dissonance between the rule and practical justice on the facts" of each case.[107] It is important to bear these concerns in mind as the rule develops, or this area of law will continue to breed controversy and debate.

[107] *Marex Financial Ltd v Sevilleja* [2020] 3 WLR 255 at [212].