# Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation) [2007] SGCA 13

**Case Number** : CA 22/2006

**Decision Date** : 12 March 2007

**Tribunal/Court** : Court of Appeal

**Coram** : Chan Sek Keong CJ; Choo Han Teck J; Andrew Phang Boon Leong JA

**Counsel Name(s)** : Cavinder Bull and Chia Voon Jiet (Drew & Napier LLC) for the appellant; Rabi Ahmad (Rabi Ahmad & Co) for the respondent

**Parties** : Townsing Henry George — Jenton Overseas Investment Pte Ltd (in liquidation)

*Companies – Directors – Duties – Breach of statutory duties and fiduciary duties – Director making payment to chargee although charges not conferring such entitlement – Director of parent and subsidiary company and also of companies with conflicting interests – Whether director's actions amounting to breach of duty to act bona fide – Application of "actual conflict" rule*

*Companies – Directors – Duties – Breach of statutory duties and fiduciary duties – Director making payment to chargee although charges not conferring such entitlement – Whether court should rectify charges to reflect parties' common intentions when chargee not party to proceedings – Whether court should exercise equitable jurisdiction to rectify charges*

*Civil Procedure – Appeals – Company suffering loss as result of breach of fiduciary duties owing to it – Whether respondent company may recover such loss where argument regarding principle of reflective loss introduced by appellate court on its own initiative*

12 March 2007 Judgment reserved.

**Chan Sek Keong CJ (delivering the judgment of the court):**

1 This is an appeal against the decision of the High Court in *Jenton Overseas Investment Pte Ltd v Townsing Henry George* [2006] SGHC 31 ("the first instance judgment") which found the appellant director liable for breach of fiduciary duty to the respondent company ("Jenton"). The trial judge assessed the quantum of the appellant's liability in the amount of NZ$2,677,303. The appellant disputes the trial judge's findings on *both* liability and quantum.

2 Before we proceed to consider the legal issues in this appeal, we should make a minor correction to the amount that the appellant was ordered to pay to the respondent by the court below. It should be NZ$3.00 less, as the actual amount that the appellant paid out from Jenton's subsidiary, for which he was found liable, was NZ$2,677,300. We will hereafter refer to this, *ie*, the correct amount, as "the Relevant Sum".

## *Dramatis personae* and background facts

3 The claim in these proceedings arose out of the unbundling of a business venture between two parties. The first party, which we will refer to as the "Newmans Group", consists of Newmans Group Holdings Pty Ltd ("NGH"), its wholly-owned subsidiary, Jenton, and Jenton's wholly-owned subsidiary, NQF Ltd (formerly known as Newmans Quality Foods Limited) ("NQF"). These three companies were respectively incorporated in New Zealand, Singapore and Australia. NQF was the sole operating entity in the Newmans Group. Jenton had another subsidiary known as Newmans Quality Foods (S) Pte Ltd, but this subsidiary is not involved in the present proceedings.

4 The other party to this venture was headed by a company known as Normandy Finance & Investments Ltd ("Normandy UK"), which is incorporated in the United Kingdom. It has a subsidiary called Normandy Nominees Pte Ltd ("Normandy"), and another subsidiary called Normandy Finance & Investments Asia Ltd ("NFIA").

5 At all material times, the appellant was a director of NGH, Jenton and NQF. He was also a director of NFIA and the corporate representative of Normandy in the Newmans Group, vested with authority to attend any annual or extraordinary general meetings and vote on Normandy's behalf as well as to conduct all general correspondences and administrative duties regarding Normandy's affairs.[note: 1]

6 Apart from the appellant, one Wong Peng Koon ("PK Wong") and his son, one Wong Kuan Meng ("Mark Wong"), were also directors of each of the three companies in the Newmans Group. PK Wong and Mark Wong (collectively referred to as "the Wongs") were also shareholders of Jenton, and subsequently NGH when their shareholdings in Jenton were transferred to NGH following its incorporation as Jenton's holding company (see further [10] below).

7 By the time these proceedings were filed, both Jenton and NQF were under liquidation. According to Jenton's statement of affairs, its significant outstanding debts were as follows: (a) $474,548 owed to one Tay Thiam Song ("Tay"); (b) $1,138,000 owed to a company known as Chye Seng Tannery Pte Ltd ("Chye Seng"); (c) $94,500 owed to PK Wong; and (d) $2,995,597 owed to NGH.[note: 2] At the NQF level, leaving aside Normandy's claim to be a secured creditor, Jenton was NQF's only creditor. According to a demand that Jenton's liquidators issued to NQF, as at 30 June 2004, NQF owed Jenton an outstanding debt of $4,542,286.[note: 3]

***Normandy's involvement in the Newmans Group***

8 The entire chain of events commenced sometime in 2000, when Normandy decided to invest in the Newmans Group. At that time, the Newmans Group comprised only Jenton and NQF. Normandy initially wanted to subscribe for two million redeemable preference convertible shares ("the Convertible Shares") in Jenton for a consideration of $2m. On 30 April 2001, Normandy, Jenton and NQF signed a "Redeemable Convertible Preference Share Subscription Agreement" ("the Convertible Share Agreement") to give effect to this investment, whereupon the appellant was appointed as Normandy's nominee on Jenton's board of directors.

9 At the time the Convertible Share Agreement was signed, Jenton's existing creditors already included Tay and Chye Seng, who had respectively extended loans to Jenton in the amounts of $400,000 and $1m. Whilst Tay's loan was unsecured, the loan extended by Chye Seng was secured by a personal guarantee from PK Wong and one Nicholas Chia.

10 After Normandy paid Jenton $2m for the Convertible Shares but before their issue, it transpired that the financial statements of the Newmans Group contained various inaccuracies. As a result, Normandy decided to restructure its investment in the Newmans Group to assume the form of debt instead of equity by subscribing to convertible loan notes that were to be issued by NGH, a new company incorporated in Australia. NGH then became Jenton's holding company by acquiring all of Jenton's existing shares from its shareholders in exchange for an equal number of shares in NGH.

11 Normandy's purchase of these loan notes was implemented by way of a "Series 1 Notes Subscription Agreement" signed on 8 July 2002 ("the First Loan Agreement") by NGH, Jenton and Normandy. The First Loan Agreement dealt mainly with two matters. First, it terminated the Convertible Share Agreement, and extinguished Jenton's liability to refund Normandy its $2m

subscription fee in exchange for an undertaking by NGH to repay this sum. In return for NGH's assumption of Jenton's liability to repay Normandy, Jenton agreed to execute a debenture by way of a fixed and floating charge over all its assets *to secure its debts to NGH*, which included, *inter alia*, this $2m. Second, the First Loan Agreement provided that NGH was to issue $2m worth of redeemable convertible loan notes ("the Series 1 Notes") to Normandy. The consideration due from Normandy for these Notes would be set off against NGH's existing $2m debt to Normandy which it had taken over from Jenton. Each Series 1 Note bore interest at an annual rate and was redeemable by Normandy four years after its date of issue.

12 Normandy's investment in the Newmans Group did not stop at its purchase of the Series 1 Notes. Later that same month (July 2002), NGH decided to raise additional capital through a second notes issue by way of a "Series 2 Notes Subscription Agreement" ("the Second Loan Agreement"). The subscribers to the Second Loan Agreement included Normandy, PK Wong and some other members of his family. A total of $1m was raised by way of this second tranche of convertible loan notes ("the Series 2 Notes"), of which $431,844 represented the notes for which Normandy had subscribed.

***The security furnished for Normandy's loan***

13 Various securities were then issued by the Newmans Group to secure its debts to the relevant parties. The securities can generally be divided into three categories: (a) those relating to the Series 1 Notes; (b) those relating to the Series 2 Notes; and (c) those relating to Jenton's debt to NGH.

*The Series 1 Notes securities*

14 Under Condition 4.3 of the terms and conditions to the Series 1 Notes ("Condition 4.3"), NGH agreed "to execute security and such other documentation as required … in order to ensure that a *second ranking* Charge over the assets of *the Newmans Group Companies* is effective in New Zealand, Singapore and Australia" [emphasis added]. The term "Newmans Group" was in turn defined to include *NGH, Jenton and NQF*. The intended security over the assets of the Newmans Group was expressed as being "second ranking" and subject to prior encumbrances in favour of ASB Bank Limited ("ASB Bank"). ASB Bank's priority over these charges has no material significance for the purposes of the present proceedings.

15 Pursuant to Condition 4.3, NGH, Jenton and NQF each executed a deed of charge in Normandy's favour (referred to herein as "the NGH Charge", "the Jenton Charge" and "the NQF Charge" respectively). Each of these charges was expressed as being subject to a prior encumbrance in favour of ASB Bank. Clause 1.1(c)(i) of each of these charges provided that the charge in question secured, *inter alia*, the repayment of "any money which is now owing or hereafter becomes owing under the terms of the [First Loan] Agreement *between the Mortgagor and [Normandy]*" [emphasis added]. The term "the Mortgagor" was respectively defined in the NGH, Jenton and NQF Charges as referring to NGH, Jenton and NQF respectively.

*The Series 2 Notes securities*

16 In addition to the security regarding the Series 1 Notes, a charge was also executed by NQF securing its assets in favour of all holders of the Series 2 Notes including Normandy ("the Series 2 Charge"). The terms of the Series 2 Notes and the Series 2 Charge were expressed in materially the same manner as the equivalent documentation for the Series 1 Notes, save that the security for the Series 2 Notes was expressed as a third, instead of second, ranking charge subject to prior

encumbrances in favour of both ASB Bank *and Normandy*. In particular, Condition 4.3 (see above at [14]) and cl 1.1(c)(i) (see above at [15]) respectively appeared, *mutatis mutandis*, as terms in the Series 2 Notes and the Series 2 Charge.

*NGH's security over Jenton's assets*

17 Apart from the various securities executed in *Normandy's* favour, Jenton also executed a deed of debenture in *NGH's* favour on 9 July 2002 ("the Jenton Debenture"). This Debenture was expressed as giving *NGH* a "first fixed charge [over] … the fixed property and assets" of Jenton as well as "a first floating charge [over] … the whole of the undertaking and all other property assets and rights" of *Jenton*. The moneys secured under the Jenton Debenture included the $2m liability that NGH had assumed for Jenton *vis-à-vis* Normandy's initial payment of $2m to Jenton under the Convertible Share Agreement.

18 Whilst the NGH, Jenton, NQF and Series 2 Charges were all duly registered under the respective laws of incorporation of NGH (Australia), Jenton (Singapore) and NQF (New Zealand), the Jenton Debenture was not registered in accordance with the Companies Act (Cap 50, 1994 Rev Ed) ("CA"). As will be seen later, this omission to register the Jenton Debenture presented a significant obstacle to one of the appellant's lines of argument before us.

***The purported enforcement of Normandy's security***

19 In February 2003, Chye Seng's lawyers sent Jenton a letter of demand to recall its $1m loan. This triggered a flurry of correspondence from the Wongs, alerting Jenton's directors of the urgent need to raise sufficient funds to meet Chye Seng's demand. The Wongs' perceived anxiety over this demand, coupled with the imminent sale of NQF's business, led Normandy to seek legal advice regarding its various securities over the assets of the Newmans Group. It was then discovered that some of the securities relating to the First and Second Loan Agreements were deficient in that they did not secure what was purportedly contemplated by the parties, *viz*, *NGH's* indebtedness to Normandy under the Series 1 and Series 2 Notes.

20 As a result of this discovery, Normandy was advised by its Australian lawyers to execute two deeds of rectification. These two suggested deeds respectively sought to rectify cl 1.1(c) of the NQF and Jenton Charges (see above at [15]) on the one hand,[note: 4] and the same clause in the Series 2 Charge on the other (see above at [16]),[note: 5] by extending it to secure liabilities owed *by NGH* to Normandy under the First and Second Loan Agreements respectively. The Wongs refused to execute the deeds, contending that they would have the effect of giving the holders of the Series 1 and Series 2 Notes "*additional* security" which amounted to an undue preference. According to the Wongs, the NQF, Jenton and Series 2 Charges, in their existing forms, only secured the respective chargor's *own* liability to Normandy.[note: 6] Normandy, through the appellant, in turn averred that the suggested deeds contained "nothing more than that which was agreed" at the time the Series 1 and Series 2 Notes were issued,[note: 7] and were "just clarifying what ha[d] been done".[note: 8]

21 Whilst this dispute between the Newmans Group and Normandy was going on, NQF continued to negotiate the sale of its business. In early May 2004, NQF sold its operating assets as a going concern to Delmaine Fine Foods Ltd ("Delmaine") for a total consideration of NZ$3,737,500 to be paid in two tranches of NZ$2,950,000 and NZ$787,500 respectively ("the NQF sale proceeds"). After making the relevant deductions for sales expenses and the like, the net amount receivable under the first tranche amounted to NZ$2,707,300. In preparation for the receipt of this sum, NQF set up a bank account with Westpac Bank in Tauranga, New Zealand ("the Tauranga account"). The appellant

and PK Wong were appointed joint signatories of this account.

22 Following the Wongs' refusal to execute the draft deeds of rectification (see above at [20]), Normandy sent various letters of demand to NGH, Jenton and NQF demanding payment of interest under the First and Second Loan Agreements. Jenton and NQF variously responded on each of these occasions, denying any liability to Normandy under either of these Agreements. On 4 June 2004, Normandy appointed one Derek Rowan Andrew and one Ronald Bentley Brown as receivers and managers of NGH pursuant to the NGH Charge ("the NGH Receivers"). Upon their appointment, the NGH Receivers immediately proceeded to effect various changes to the management of Jenton. First, they removed four of Jenton's five existing directors, including PK Wong and Mark Wong, and appointed one new director. The fifth (and only) director who was not removed was the appellant. Second, the appellant was appointed by Jenton as its corporate representative in NQF, with full power to vote on Jenton's behalf at all general meetings of NQF.

23 Following his appointment as Jenton's corporate representative in NQF, the appellant unilaterally passed three shareholders' resolutions at the NQF level. The first resolution removed the Wongs as NQF's directors, and left the appellant as NQF's only remaining director. The second resolution removed PK Wong as a joint signatory to the Tauranga account and appointed the appellant as the sole signatory to the account. The third and final shareholders' resolution established a cash management account in NQF's name with Westpac Bank in Auckland, New Zealand ("the Auckland account"), and again appointed the appellant as the *sole* signatory thereto. As the sole director of NQF, the appellant additionally passed two directors' resolutions which were identical to the second and third of these shareholders' resolutions.

24 All these changes to the management structure of the Newmans Group occurred on *the same date*, *ie*, 4 June 2004. This date coincided with the date when Delmaine was scheduled to pay the first tranche of the NQF sale proceeds. After passing the shareholders' and directors' resolutions referred to above (at [23]), the appellant deposited the cheques from Delmaine into the Tauranga account and directed Westpac Bank to immediately transfer these moneys from the Tauranga account to the Auckland account. He then instructed the bank to further transfer 63.2% of the Relevant Sum (amounting to NZ$1,692,054) to the UK bank account of Normandy UK and 36.8 % of the Relevant Sum (amounting to NZ$985,246) to the account of a New Zealand law firm, M/s Buddle Findlay. The total moneys so transferred amounted to the Relevant Sum in contention in the present proceedings, and left a residual sum of NZ$30,000 remaining on deposit in the Auckland account. Buddle Findlay was then appointed to act as stakeholder for the 36.8% of the Relevant Sum remitted to it.

25 According to the appellant, he transferred 63.2% of the Relevant Sum to the bank account of Normandy UK because this represented Normandy's ultimate entitlement to the Relevant Sum in the event that the NQF and Jenton Charges did not secure NGH's borrowings from Normandy and the Jenton Debenture was unenforceable for lack of registration under the CA. This percentage reflected NGH's estimated *pari passu* entitlement to the Relevant Sum *vis-à-vis* Jenton's other creditors, *ie*, Chye Seng and Tay (see above at [7]). *NGH's* entitlement in turn reflected *Normandy's* corresponding entitlement as Normandy would be able to assert a secured claim over NGH's moneys by way of the NGH Charge, which indisputably secured NGH's outstanding debt to Normandy.

26 On 17 June 2004, less than two weeks after the NGH Receivers were appointed, the appellant executed a deed of rectification on NQF's behalf, purporting to rectify the NQF Charge and the Series 2 Charge ("the Deed of Rectification"). Under this Deed, cl 1.1(c)(i) of the NQF and Series 2 Charges (see above at [15] and [16]) was amended to include "all debts and liabilities (contingent or otherwise) owed at any time" *by NGH*, and not NQF, to Normandy under the First and Second Loan

Agreements respectively. The purported amendment, if valid, had the effect of enabling Normandy to claim the Relevant Sum as a secured creditor of NQF. The very next day, the appellant wrote to Buddle Findlay on behalf of Jenton and NQF, authorising the firm to release the remaining sum of NZ$985,246 to Normandy UK. Buddle Findlay duly complied with these instructions.

27 After the Relevant Sum had been transferred to the bank account of Normandy UK, the appellant and the NGH Receivers then took steps to liquidate Jenton and NQF. On 9 July 2004, the appellant, in his capacity as Jenton's corporate representative, passed a special resolution to liquidate Jenton. Chee Yoh Chuang and Lim Lee Meng were appointed as liquidators ("the Jenton Liquidators"). On 29 July 2004, in exercise of its powers under the NQF Charge read with the Deed of Rectification, Normandy appointed the NGH Receivers and one Geoffrey Stewart Hatten as receivers and managers of NQF. This appointment was however short-lived. On 2 August 2004, the Jenton Liquidators passed a special shareholders' resolution at the NQF level on Jenton's behalf, liquidating NQF and appointing one Anthony John McCullagh as liquidator ("the NQF Liquidator").

28 The Wongs only realised that the Relevant Sum had been transferred out of the Tauranga account at or around the time when the Jenton Liquidators issued the notice of demand for NQF's purported debt of $4,542,286 on 14 July 2004 (see above at [7]). When confronted, the appellant refused to disclose the recipients of these moneys. His personal involvement in the disposal of the Relevant Sum only came to light on 20 August 2004, when the NQF Liquidator received a letter from Westpac Bank giving a statement of accounts and setting out the course of events.

**Jenton's claim in the High Court**

29 As a result of these events, the Jenton Liquidators commenced the present proceedings in the High Court against the appellant for breach of his fiduciary duty as a director of Jenton in causing NQF to pay the Relevant Sum to Normandy by transferring the said sum to the bank account of Normandy UK when Normandy and Normandy UK had no legal right to the payment as either creditors or chargees. Jenton also alleged that the appellant had given an undue and/or fraudulent preference to parties connected to himself at the expense of Jenton and its creditors. Jenton contended that as it was the sole shareholder of NQF, it was entitled to the Relevant Sum as such.

30 Jenton's claim that Normandy and Normandy UK had no claim or right to the Relevant Sum was founded on the contention that the NQF and Jenton Charges were expressed in terms that secured the payment of only their *respective* liabilities to Normandy and not the liabilities of NGH. Hence, since neither NQF nor Jenton owed any money to Normandy or Normandy UK, both charges had nothing to bite on. We pause to note that there was another ground based on Normandy misrepresenting its place of incorporation, which we will not need to consider in this appeal as the appellant has chosen not to challenge, quite rightly, the trial judge's finding that it was entirely unmeritorious.

31 The appellant's defence was that he was not in breach of his duties as he was justified in paying Normandy the Relevant Sum since Normandy was entitled to this money as creditor and/or chargee under various loan and security agreements with NGH, Jenton and NQF. The basis of his defence was first that the Jenton and/or NQF Charges, properly construed, had effectively secured *NGH's* debts to Normandy under the Series 1 Notes. In the alternative, the appellant argued that Normandy was in any event entitled to rectification of these charges to reflect the parties' common intention that NGH's liabilities to Normandy were to be secured by the *entire* assets of *the Newmans Group*. Finally, the appellant argued that the Deed of Rectification with respect to the NQF Charge (to secure NGH's indebtedness to Normandy) put the issue beyond dispute.

32 At the conclusion of the trial, the trial judge found that the NQF Charge, as properly construed, only secured *NQF's* liabilities to Normandy and did not extend to include NGH's debts: see the first instance judgment ([1] *supra*) at [121]. Based on these and other reasons, the trial judge concluded that the appellant, as a director of NQF, had breached his fiduciary duty to NQF by paying Normandy the Relevant Sum: see the first instance judgment at [136]. Her Honour found that the appellant could not rely on the Deed of Rectification to justify his actions because the Deed had only been executed *after* the moneys had been transferred out of the Tauranga account: see the first instance judgment at [137]. She also found that the appellant's actions had breached s 329 of the CA read with ss 99, 100 and 101 of the Bankruptcy Act (Cap 20, 2000 Rev Ed) by conferring on Normandy an undue preference over Jenton's other creditors: see the first instance judgment at [144]. Similarly, she also found that the Deed of Rectification amounted to an unfair preference that was void or voidable at the option of the Jenton Liquidators: see the first instance judgment at [148]. For all these reasons, the trial judge found the appellant liable for breach of fiduciary duty to Jenton.

**The issues arising in this appeal**

33 In this appeal, the appellant contends that he cannot be liable to Jenton for paying the Relevant Sum to Normandy because Normandy was entitled to this money as a chargee thereof. In the words of the appellant's counsel, "the [a]ppellant cannot be in breach of fiduciary duty for paying a secured creditor what that secured creditor [was] legally entitled to". Save for this defence, he concedes that he owed fiduciary duties to Jenton and that he was responsible for transferring the Relevant Sum out of NQF. Implicit in this concession is the admission that but for Normandy's alleged entitlement as a chargee of the Relevant Sum, the appellant was in breach of duty as a director of Jenton. We will now consider these arguments and the counter-arguments of the respondent.

***The appellant's submissions***

34 The appellant advances three *discrete and alternative* lines of argument to establish Normandy's entitlement to the Relevant Sum. Each line of argument relates to Normandy's purported status as a secured creditor of the Relevant Sum *vis-à-vis one of the three* members of the Newmans Group, *ie*, Jenton, NQF and NGH respectively. The arguments are as follows:

(a) First, Normandy was a secured creditor *of NQF* because it was entitled to rectify the NQF Charge to secure *NGH's* outstanding debt to it. Contrary to the trial judge's finding, the NQF Charge *is* supported by valid consideration and is hence enforceable by Normandy over the Relevant Sum.

(b) Second, Normandy was also a secured creditor of Jenton because it was entitled to rectify the Jenton Charge so as to charge Jenton's assets with the payment of *NGH's* debts to Normandy. The result would be that if and when the Relevant Sum flowed upwards to Jenton, Normandy would have a valid charge over it.

(c) Third, Normandy could have enforced a secured claim to the Relevant Sum *vis-à-vis NGH* through the cumulative operation of the Jenton Debenture and the NGH Charge (the validity of this charge not being in dispute). Even though particulars of the Jenton Debenture had not been registered as required by the CA, the debenture was a valid security either (i) *qua* an equitable charge; or (ii) because Jenton, and through it, the Wongs, were precluded from relying on their *own* failure to comply with the requirements of the CA as a ground for invalidity.

35 It is necessary at this juncture to put on record two matters. First, the appellant did *not*, in this appeal, seek to rely on the Deed of Rectification to support Normandy's claim to the Relevant

Sum as against NQF. Counsel for the appellant conceded in the course of his oral submissions that the appellant's execution of the Deed would have *itself* amounted to a breach of his fiduciary duties if Normandy did not *otherwise* have a pre-existing right to rectify the NQF Charge. Second, the appellant has not raised any specific grounds of appeal against the trial judge's finding of undue preference, and accepts that his case on this issue stands or falls on whether or not Normandy was a *secured* creditor over the Relevant Sum.

36 The appellant has also relied on a fallback argument, which is that even if the NQF and Jenton Charges and the Jenton Debenture were of no effect, the greatest possible *extent* of his liability would be 36.8% of the Relevant Sum or NZ$985,246. This figure represents the difference between the Relevant Sum and the amount which NGH would have been entitled to *if it was nothing more than an unsecured creditor of Jenton* (see above at [25]). Had the Relevant Sum come into Jenton's hands as Jenton claims it should have, a *pari passu* distribution of this sum among Chye Seng, Tay and NGH would have given NGH a dividend of NZ$1,692,054 or 63.2% of the Relevant Sum. This sum would then have been passed directly from NGH to its only secured creditor, Normandy, by way of the NGH Charge. That being the case, the appellant avers that he is only liable to compensate Jenton for the difference between what Normandy did in fact receive (via the transfer to the bank account of Normandy UK), *ie*, the *entire* Relevant Sum, and the proportion of the Relevant Sum which it would in any event have received even without the appellant's intervention.

***Jenton's submissions***

37 Jenton's reply is that all the appellant's arguments have no merit. Its rebuttal arguments are as follows:

(a) Normandy's purported right to rectify *the NQF and Jenton Charges* is irrelevant to a consideration of the appellant's liability as Jenton's fiduciary. The right of rectification belongs, if at all, to Normandy, which is not a party to this action. In any event, the court should not exercise its equitable jurisdiction to grant rectification since neither Normandy nor the appellant has come to court with "clean hands".

(b) The appellant did not plead the Jenton Debenture as a defence to Jenton's claim. Further, it is not disputed that the Debenture was void against the Jenton Liquidators as no particulars thereof had been registered with the Registrar of Companies. Finally and in the further alternative, it is argued that this Debenture was *not* within the appellant's contemplation when he paid the Relevant Sum to Normandy.

38 For the above reasons, counsel for Jenton submits that the trial judge's finding that the appellant had breached his duty to Jenton in paying the Relevant Sum to Normandy should be upheld by this court. He should not have done so as he was fully aware of the ongoing dispute between the Newmans Group and Normandy as to whether the NQF and Jenton Charges could be rectified. On the facts, it was clear that the appellant's only concern was to ensure that the Relevant Sum would be paid to Normandy and that he had no concern for the interests of Jenton or its creditors.

**The decision on the appellant's submissions**

***Was Normandy a secured creditor of NQF and/or Jenton?***

39 As is apparent from our summary of the appellant's arguments, his defence rests entirely on the proposition that Normandy was a secured creditor of NQF and/or Jenton, *not* because of the actual terms of the NQF Charge and/or the Jenton Charge (which did not so provide), *but* because

Normandy was *entitled* to have the said charges rectified to so provide. Normandy's entitlement to rectification is in turn founded on the common intention of the parties that Normandy should be such a secured creditor, as PK Wong had affirmed in his evidence. However, other than asserting that one's entitlement to a right is in law equivalent to his exercise of that right, counsel has not explained to us the legal basis of his assertion or why the court should accept it as a matter of law in order to dismiss Jenton's claim against the appellant in these proceedings.

40 Before we consider whether there is any merit in the appellant's arguments, we shall first consider Jenton's arguments. As set out above, Jenton argues that the court should not consider the issue of rectification at all as Normandy is not a party to these proceedings. The underlying basis of this argument is not simply an issue as to joinder of parties, but goes to the very nature and purport of the right to rectify. The right of rectification, if any, belonged to Normandy and not to the appellant, and therefore, if Normandy has not applied to the court for rectification of the NQF Charge and the Jenton Charge, there is no legal justification or reason for the court to do this on behalf of a non-party to the charges. The second argument advanced by Jenton is that even if Normandy were to apply for rectification, it might not succeed as it would not be coming to court with clean hands. Implicit in both arguments, although they have not been articulated as such, is the contention that the NQF Charge and the Jenton Charge should not, and legally may not, be regarded as having been rectified until they have actually been rectified.

41 We agree with both lines of argument advanced by Jenton. As a matter of principle, we cannot see how a court in these proceedings can consider any right of rectification that Normandy might claim to have unless it is a party to the proceedings. If a court were to order rectification, it would be tantamount to allowing the appellant to exercise Normandy's right to rectify. We are not persuaded that we should entertain litigation by proxy in an adversarial system of justice. If *Normandy* has taken no steps at all to rectify the NQF and Jenton Charges, there is no reason why the court should allow *the appellant* to do so by way of a defence to a personal claim against him by Jenton. Furthermore, there is authority to show that until rectified, documents remain binding in their current form: see, for example, *Stansfield v Stansfield* [1985] 3 NZFLR 385; *R v Croydon and District Rent Tribunal* [1948] 1 KB 60. As Sugden LC said in *Law v Warren* (1843) Dr t Sugd 31 at 41, "so long as [the document] remains uncorrected, it is no defence to say, that it does not truly ascertain the real contract of the parties".

***What was Normandy's entitlement to rectification?***

42 There is another reason why the issue of Normandy's entitlement to rectification is irrelevant to these proceedings. Even if Normandy were joined as a party to these proceedings, it would not have an enforceable right of rectification against either NQF or Jenton. Furthermore, NQF is also not a party to these proceedings.

43 The reason why Normandy has no claim of rectification against NQF or Jenton is found in Condition 4.3 of the Series 1 and Series 2 Notes. Although PK Wong had agreed under cross-examination that the relevant parties had intended that Normandy's investment by way of the said notes would be secured by the assets of the *entire* Newmans Group, Condition 4.3 is only binding on NGH, and no other party, "to execute security and such other documentation as required in respect of the Notes in order to ensure that a second ranking Charge over the assets of the Newmans Group Companies is effective in New Zealand, Singapore and Australia". It was NGH, and NGH alone, which undertook to procure the Newmans Group to provide security for NGH's borrowings. The subsidiaries themselves did not give any undertaking. Furthermore, Condition 4.3 refers in general terms to the provision of security, and not specifically to any corporate guarantee to discharge NGH's indebtedness to Normandy. In short, Normandy was not an existing creditor of NQF or Jenton, nor did it have a

contractual right against either company to rectify the NQF Charge or the Jenton Charge.

***Discretionary nature of rectification***

44 With regard to Jenton's argument on the "clean hands" principle, it is our view that the principle is particularly apt in the circumstances of this case, having regard to the egregious conduct of the appellant who, as a director of NQF and of Jenton, chose to act entirely in the interest of Normandy, whose subsidiaries he also owed duties to. His counsel has prudently avoided giving any explanation to the court to defend or condone the conduct of the appellant except only to the extent that Jenton would have suffered no loss if the court were to accept his argument that NGH was a secured creditor for the reasons which we have now rejected. He has put his client's case in a fair and responsible manner in reliance on a legalistic argument which, we believe, he probably did not believe in but which, as an advocate, he had to put to the court because he was given an empty hand of cards to play with.

45 On the evidence before the court, it is clear to us that after Normandy came to know the following facts, *viz*, (a) Chye Seng's recall of its $1m loan to Jenton; (b) the ineffectiveness of the NQF and Jenton Charges, and especially the former, in securing its loans to NGH under the Series 1 Notes; and (c) the Wongs' unequivocal refusal to rectify the NQF and Jenton Charges, it made a decision to gain control of the Newmans Group through its rights under the NGH Charge in order to ensure that the Relevant Sum would be paid to it (Normandy). The appellant has not explained to us why Normandy did not immediately take court action against NGH to accomplish what he now, for all intents and purposes, wants this court to accomplish, *viz*, rectify the NQF Charge and/or the Jenton Charge. We can only surmise that the problem might have been one of timing, *ie*, the fear that it would otherwise be too late to prevent the undue preference rule in the law of insolvency from operating, and/or one of lack of trust in the Wongs. Whatever the reason was, Normandy decided to unilaterally acquire possession of the Relevant Sum by putting the appellant in a position of absolute control in the boards of Jenton and NQF respectively so that he could in turn gain control of the Relevant Sum and pay it to Normandy. The manner in which this entire series of events unfolded was so systematic, precise and timely that the trial judge was rightly moved to observe that the whole plan was conceived and executed with "military precision": see the first instance judgment at [132].

46 What the observation of "military precision" implies, and we fully agree with it, is that the appellant acted solely and exclusively in the interests of Normandy in paying the Relevant Sum to Normandy. There was no question of his having had *any* regard for the rights of NQF or of Jenton or of their creditors as the plan to take the Relevant Sum was blatantly conceived to disregard any other competing interests. It is not difficult for this court to imagine why, as an investor, Normandy acted as it did, given that it *should and would* have been entitled to the Relevant Sum as a chargee had NGH performed its covenanted obligations. Accordingly, it would have reasoned: "Fairness and justice are on our side, so let's take what is due to us first, and we can sort out the legal issues later." Whilst this attitude might be comprehensible, if not understandable, it is neither acceptable nor condonable in a court of law. In the present case, a mistake was clearly made with regard to the manner in which the NQF and Jenton Charges were structured. Regardless of who made this mistake, Normandy, as the intended beneficiary, bore the ultimate responsibility of ensuring that the mistake was validly rectified before attempting to exercise any of its rights thereunder. It was not for Normandy or the appellant to take the law into their own hands before an actual order of rectification had been made. Unfortunately, instead of acting within the law as a responsible corporate citizen should have, Normandy decided that possession was nine-tenths of the law. Aided and abetted by the appellant, Normandy was able to achieve its objective.

47 In these proceedings, the appellant has not sought a declaratory order that Normandy was a

secured creditor of NQF at the material time. It would be too late to do so as all the companies in the Newmans Group are now under liquidation. Rectification is a discretionary remedy. A court of equity will not exercise its discretion to rectify a defective charge if it affects third party rights or if it is in violation of some principle of law, such as conferring an undue preference on third parties in contravention of the law, or where the applicant does not deserve the assistance of the court, for instance, where he comes to court with unclean hands. If Normandy were to apply today to have the NQF Charge rectified, no court would exercise its discretion to grant the order on the evidence before this court. Had Normandy applied for rectification *before* taking the Relevant Sum, the court might well have some sympathy for its position. Even then, however, the court would have had to consider whether the claims of the other creditors in the Newmans Group would have been prejudiced if such an order were made.

*Non-applicability of maxim "equity regards as done that which ought to have been done"*

48 Hence, the appellant's argument is not that Normandy is entitled to a declaratory order that it was a secured creditor of NQF at the material time, but that it *was by operation of law* a secured creditor *because* it was entitled to rectify the NQF Charge. Equity may not be past the age of childbearing but, with respect, this is one case where the conception of such a principle in this context is impossible. Counsel for the appellant has not explained why and how in the circumstances of this case, an entitlement to rectification is in law equivalent to rectification itself. Indeed, this line of argument conflates a claim to a right with the very exercise of the right itself. Notably, counsel has not prayed in aid, and rightly so, the equitable maxim that "equity regards as done that which ought to have been done" in support of his submissions on rectification.

49 In any event, whether or not the proper parties are before the court, this court, in the exercise of its equitable jurisdiction, would find it judicially impossible to find for the appellant on this argument. The appellant, in doing what he did, had no regard whatsoever for the law but only for his own personal interest and that of Normandy when he paid the Relevant Sum to Normandy. There is no question of this court condoning it. We cannot help but observe that the appellant's arguments amounted to nothing more than the contention that the end justifies the means. To accept it in the context of this case would subvert the legislative framework that has been put in place by Parliament to resolve differences of this nature before a court of law.

***Cumulative operation of the Jenton Debenture and the NGH Charge***

50 Apart from his arguments on the NQF and Jenton Charges, the appellant further argues that Normandy was entitled to the Relevant Sum through the cumulative operation of the Jenton Debenture and the NGH Charge. Although it is not necessary for us to deal with the appellant's third argument (see above at [34]), we are of the view that his submissions on this point must also fail on the ground that the charge created by the Jenton Debenture was void against the Jenton Liquidators for non-compliance with the registration requirements of the CA. The assertions mounted against the Wongs could have no legal effect since the administration of Jenton and its affairs are now in the hands of the liquidators. To equate Jenton with the Wongs, as the appellant has done, unjustifiably ignores the claims of the other third party creditors at the Jenton level (see above at [7]). Hence, Normandy could not have had any claim against the assets of Jenton, and through it NQF, by way of the NGH Charge and the Jenton Debenture.

***Was Normandy entitled to 63.2% of the Relevant Sum through NGH?***

51 On the issue of quantum, counsel for Jenton did not specifically take issue with the appellant's averment that even if the NQF and Jenton Charges and the Jenton Debenture were put

aside, at least 63.2% of Jenton's net assets would flow up to NGH by way of a *pari passu* distribution of Jenton's assets (see above at [36]). Nevertheless, we do not accept the appellant's argument that his liability should be capped at 36.8% of the Relevant Sum. This case is *not* about the taking of accounts between Normandy and the Newmans Group *as a whole*. It is about the appellant's duties as a director of Jenton and the losses which he has caused to Jenton indirectly. The question of whether Normandy would, in any event, have been entitled to 63.2% of the Relevant Sum *vis-à-vis* NGH is, strictly speaking, irrelevant. The legal issue involved is not a complex issue, but it has been obfuscated and unnecessarily complicated by counsel's ingenuity in dressing it up as an accounting issue.

**The appellant's breach of fiduciary duties**

52 Notwithstanding our rejection of each of the appellant's specific grounds of appeal, given the general way in which the trial judge dealt with the appellant's breach of duties to Jenton, we think it desirable that we clarify the exact nature of his breach of duties as a director on the present facts.

***The specific nature of the appellant's duties to Jenton***

53 It is trite law that a director owes fiduciary duties to his company. However, as Frankfurter J wisely observed in *Securities and Exchange Commission v Chenery Corp* 318 US 80 (1943) at 85–86:

> [T]o say that a man is a fiduciary only begins [the] analysis; it gives direction to further inquiry. … What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?

54 As Bryson JA stated in *Blythe v Northwood* [2005] NSWCA 221 at [211]:

> Designation of a relationship as fiduciary is not a signal for exercise of judicial bounty. Fiduciaries characteristically have areas of responsibility which have boundaries, and *are free to act in their own interests in all matters outside those boundaries*. [emphasis added]

In this appeal, we must hence distinguish between the various fiduciary duties that the appellant variously owed to NQF and to Jenton, as well as his concurrent duty and interest as the corporate representative of Normandy.

55 Jenton's statement of claim avers that the appellant owed it the following duties: (a) to act honestly in the discharge of his duties as a director of Jenton ("the duty of honesty"); (b) to act *bona fide* in the interests of Jenton ("duty to act *bona fide*"); (c) to "act for the proper purpose" in relation to Jenton's affairs ("the proper purpose duty"); and (d) as a trustee of NQF's assets, which were beneficially owned by Jenton ("the duty of trusteeship"), and that the appellant breached all these duties in paying the Relevant Sum to Normandy.

56 Whilst these duties are well-established examples of a director's fiduciary obligations, their application to the unusual circumstances of the present case is somewhat more novel. In the present case, as the appellant was a director of both NQF and Jenton, he owed similar but distinct duties to both these companies, which could potentially have conflicting interests, even though one is a wholly-owned subsidiary of the other. In this appeal, we are not concerned with whether the appellant breached his duties to *NQF*, although it would appear that by paying the Relevant Sum to Normandy, which had no claim to it as against NQF, the appellant was in breach of all the four duties enumerated above to NQF. It is not for us to speculate why Jenton, rather than NQF, has sued the appellant.

*Duty of trusteeship*

57 Reverting to the duties which Jenton has specifically pleaded, it is clear that the duty of trusteeship has no application here. In the absence of an agency or trust relationship, a holding company is not the owner of the subsidiary's assets: *Farrar's Company Law* (John H Farrar & Brenda M Hannigan eds) (Butterworths, 4th Ed, 1998) at p 530. That being the law, the appellant would not be in breach of his duty of trusteeship to *Jenton* for the manner in which he handled the Relevant Sum in NQF's possession.

*Duty of proper purpose*

58 That leaves the other three duties for consideration. In our view, it is probable that the appellant's proper purpose duty *vis-à-vis Jenton* did not apply to his wrongful payment of the Relevant Sum to Normandy. The appellant paid the money in the exercise of his powers as a director of NQF and not of Jenton. Hence, the question of proper purpose did not arise.

*Duty of honesty and duty to act bona fide*

59 In our view, the appellant's duty of honesty and duty to act *bona fide* may be regarded as a composite obligation. The appellant's duty of honesty, which is said to require him to "act honestly in the discharge of his duties as a director", appears to be a reference to the statutory duty imposed on directors under s 157(1) of the CA. This duty is the statutory *equivalent* of the duty to act *bona fide* which exists at common law: see *Cheam Tat Pang v PP* [1996] 1 SLR 541 at 548, [19]; *Lim Weng Kee v PP* [2002] 4 SLR 327 at [32]; *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR 162 at [14]. These two duties impose *a unitary* obligation to act "*bona fide* in the interests of the company *in the performance of the functions attaching to the office of director*" [emphasis added]: see *Marchesi v Barnes* [1970] VR 434 at 438, affirmed locally in *Multi-Pak Singapore Pte Ltd v Intraco Ltd* [1994] 2 SLR 282 at 287, [22].

*Duty of loyalty and the no conflict rule*

60 One important facet of the duty of honesty (or the duty to act in good faith) is a director's duty of loyalty to his company. In the present case, the appellant owed a duty of undivided loyalty to both Jenton and NQF. This could put him in a potential position of conflict with respect to any dispute between the two companies, although as between a holding company and a wholly-owned subsidiary, there should normally be a considerable coincidence of interests, particularly as against a third party like Normandy. In the present case, both NQF, as owner of the Relevant Sum, and Jenton, as the sole creditor and shareholder of NQF, had an interest in the Relevant Sum. This would mean that any wrongful dissipation of the assets of NQF by the appellant would inevitably result in damage to the interests of Jenton as NQF's creditor and shareholder. Consequently, if the appellant had breached his duty to NQF in paying the Relevant Sum to Normandy, he would inevitably commit a concomitant breach of duty to Jenton in failing to protect Jenton's interest.

61 In *Re Dominion International Group plc (No 2)* [1996] 1 BCLC 572, Knox J had to decide whether the acts of an individual ("Mr Lewinsohn") *qua* a director of a subsidiary ("DIFE") were relevant to an application to disqualify him based on his conduct as a director *of the parent company* ("DIG"). According to Knox J at 634:

> [T]he court has to consider Mr Lewinsohn's conduct *as a director of DIG* to determine whether it makes him unfit to be concerned in the management of a company. The question is whether that justifies the process of identifying in what capacity Mr Lewinsohn did the acts complained of,

and, if it is found that they were done primarily as a director of DIFE, ignoring them altogether in assessing whether Mr Lewinsohn has been shown to be unfit to be concerned in the management of a company. … [Counsel for Mr Lewinsohn] submitted … that the Secretary of State [the party applying for the disqualification order] cannot rely on Mr Lewinsohn's conduct as a director of DIFE. But that presupposes that acts of Mr Lewinsohn can be put into watertight compartments as acts by a director of a particular company even though the human being in question was at the material time a director both of the subsidiary whose assets are being dealt with and of the holding company of that particular subsidiary. That was of course Mr Lewinsohn's position since he was chairman and director of both DIFE and DIG at the material times.

*I do not accept that it is right to categorise activities as necessarily belonging exclusively to the directorship of the company whose asset is being dealt with*. I do accept that there may very well be many cases where that will be the correct analysis of the activities of a director of a subsidiary company even if he is also a director of the subsidiary company's holding company. But equally where an individual who is a director of both takes steps which seriously affect the interests of both companies, it strikes me as artificial to ignore his duties as a director of one of the two companies and attribute his actions solely to the directorship of the company whose asset is dealt with. *Put baldly, the question is whether a director of a subsidiary company, who is also a director of its holding company, is in breach of his fiduciary duty to the holding company, if he improperly gets rid of an asset of significant value of the subsidiary. It is clear that that conduct inflicts harm on the holding company because it reduces the value of its investment in the subsidiary. In my view a director in such a position is in breach of his duty to both the holding company and the subsidiary company.*

[emphasis added]

62 In *Gardner v Parker* [2004] 1 BCLC 417 ("*Gardner*"), the court similarly eschewed a rigid compartmentalisation of a director's conduct *vis-à-vis* a subsidiary and its parent company. In that case, the individual in question ("Parker") was a director of both a company known as Scoutvale Ltd ("Scoutvale") as well as a company ("BDC") which held 9% of Scoutvale's shares. BDC was at the same time a substantial creditor of Scoutvale in the amount of £799,000. Parker effected a transfer of Scoutvale's 80% shareholding in another company ("Old Hall") to a company ("Bweralley") which Parker owned and controlled. One of the issues that arose was whether the facts and matters pleaded were capable of amounting to a breach by Parker of his fiduciary duties owed to *BDC* as its director: see *Gardner* at [9]. The claimant alleged that Parker, in procuring the transfer of the Old Hall shares from Scoutvale to Bweralley, had breached his fiduciary duties to BDC by causing its 9% shareholding in Scoutvale and its debt from Scoutvale to be reduced to a negligible value: see *Gardner* at [14]. In response, counsel for Parker submitted that when procuring the transfer, Parker had not been exercising his powers as a director of BDC but of Scoutvale and hence, was accountable to *Scoutvale* and not BDC for anything improper in the transfer: see *Gardner* at [15]. Blackburne J rejected this latter submission, holding (at [16]–[23]):

In my judgment, while Mr Parker's liability to Scoutvale on the assumed facts is not in question, this is to look too narrowly at the matter.

*At the time of the transfer Mr Parker was also a director of BDC. Knowing, as a director of BDC with a duty to safeguard BDC's assets,* including in particular its 9% shareholding in Scoutvale and its £799,000 debt, that the transfer would impact adversely upon Scoutvale's value and, therefore, upon BDC's 9% shareholding in Scoutvale and the recoverability of the £799,000 debt (in that the transfer was of Scoutvale's shares in Old Hall which represented a substantial proportion of Scoutvale's assets), *Mr Parker could not, consistently with his duties to BDC,*

*simply sit back and do nothing in the face of the impending transfer. In respect of the transfer he was as much in a position of conflict as a director of BDC (as between his duty to that company and his personal interest through Bweralley as the proposed transferee of the shares) as he was as a director of Scoutvale*.

…

[I]t cannot seriously be said in the instant case that the breaches of fiduciary duty alleged against Mr Parker as a director of BDC were not consciously committed. Mr Parker was the prime mover in the transfer. He procured it. …

On the basis of the pleaded allegations it is simply not credible to suppose that as a director of BDC his silence over the transfer was accidental or the result merely of negligence. *I am satisfied therefore that, on the assumed facts, Mr Parker as a director of BDC was in breach of the pleaded fiduciary duties which he owed to BDC*.

The rather more difficult question to my mind is the correct identification of the nature of the breach of fiduciary duty and, with it, an identification of the consequences of the breach.

*… To my mind, it is questionable whether the nature of Mr Parker's breach of duty to BDC lay in procuring the transfer rather than in failing to take steps to prevent the transfer from being effected.* The procurement by him of the transfer occurred, as [counsel for Mr Parker] pointed out, in his capacity as a director of Scoutvale, not of BDC. *His failure, as a director of BDC, was in allowing the transfer to take place.* The distinction may seem somewhat fine given Mr Parker's involvement both as a director of BDC and as the director (or one of them) of Scoutvale responsible for the transfer, the making of which, according to the re-amended statement of claim, was calculated to vest a valuable asset at a substantial undervalue in a company controlled by himself, namely Bweralley.

At the end of the day, the distinction may not much matter, except possibly as a matter of accurate pleading, since the consequence must arguably be to render him, in his capacity as a director of BDC, as much liable for the consequences of the transfer as he is, in his capacity as a director of Scoutvale, for having procured the execution by Scoutvale of the offending transfer. *In short it is at the very least arguable that he is liable in his capacity as director of BDC as if in that capacity he had procured the transfer*.

[emphasis added]

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

64 In so doing, the appellant fell foul of the "no conflict rule" as a director of NQF and Jenton. In *Bristol and West Building Society v Mothew* [1998] Ch 1, Millett LJ divided this rule into various sub-categories which he called "the double employment rule", "the duty of good faith", "the no inhibition principle" and "the actual conflict rule". According to Millett LJ at 18–19:

***A fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty;*** he puts himself in a position where his duty to one principal may conflict with his duty to the other: see Clark

> Boyce v Mouat [1994] 1 AC 428 and the cases there cited. This is sometimes described as ***"the double employment rule"***. Breach of the rule automatically constitutes a breach of fiduciary duty. ***But this is not something of which the society can complain. It knew that the defendant was acting for the purchasers when it instructed him.*** …
>
> …
>
> That, of course, is not the end of the matter. Even if a fiduciary is properly acting for two principals with potentially conflicting interests he must act in good faith in the interests of each and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other … I shall call this ***"the duty of good faith"***. But it goes further than this. He must not allow the performance of his obligations to one principal to be influenced by his relationship with the other. He must serve each as faithfully and loyally as if he were his only principal.
>
> ... [T]he principle which is in play is that the fiduciary must not be inhibited by the existence of his other employment from serving the interests of his principal as faithfully and effectively as if he were the only employer. I shall call this ***"the no inhibition principle"***. Unless the fiduciary is inhibited or believes (whether rightly or wrongly) that he is inhibited in the performance of his duties to one principal by reason of his employment by the other his failure to act is not attributable to the double employment.
>
> Finally, the fiduciary must take care not to find himself in a position where there is an *actual* conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligations to the other: see *Moody v Cox and Hatt* [1917] 2 Ch 71; *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453. If he does, he may have no alternative but to cease to act for at least one and preferably both. The fact that he cannot fulfil his obligations to one principal without being in breach of his obligations to the other will not absolve him from liability. I shall call this ***"the actual conflict rule"***.
>
> [emphasis added in bold italics]

65 In the present case, Millett LJ's "double employment" rule has no application because the appellant's concurrent employment in Normandy and the Newmans Group was undertaken with the knowledge and consent of all the parties. The "no inhibition" rule is similarly inapplicable because there has been no evidence suggesting that the appellant had the *subjective* perception that he was inhibited from performing his duties to Jenton because of his concurrent appointment as NQF's director or *vice versa*. On the contrary, he deliberately disregarded Jenton's interest in the Relevant Sum in order to give preference to his obligations as an employee of Normandy.

66 In our view, it is clear that the appellant's conduct regarding the Relevant Sum breached *both* "the duty of good faith" and "the actual conflict rule". He not only placed himself in a position where Normandy's and Jenton's interests were clearly and directly *in conflict*, but additionally *consciously and unequivocally preferred* Normandy's interests over those of Jenton. This is abundantly confirmed by the series of actions he took to secure the Relevant Sum for Normandy *at all costs*. We agree entirely with the trial judge's observation that the appellant had planned the entire chain of events with "military precision": see above at [45].

**The principle of reflective loss**

67 After reserving judgment in this appeal, we invited the counsel for both parties to submit

written arguments on whether the principle of reflective loss is applicable in the present case and, if so, whether it bars Jenton's claim against the appellant for damages for breach of fiduciary duty to both Jenton and NQF. Predictably, counsel for the appellant submitted that the principle applies to the facts of this case to bar Jenton from suing him for breach of fiduciary duty, and counsel for Jenton contended otherwise. We should mention, by way of background, that the appellant neither pleaded nor relied on the principle of reflective loss as a defence to Jenton's claim. Jenton has, in its written submissions, provided a number of reasons why it is much too late in the day for this court to consider this issue. In order to appreciate the force of these arguments, it is necessary that we give a short outline of the principle of reflective loss and the relevant public policy considerations.

***Outline of the principle***

68 The genesis of this principle is commonly traced to the English Court of Appeal decision in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 ("*Prudential Assurance*"). This case involved, *inter alia*, a shareholder's claim against two directors for breach of fiduciary duty and conspiracy. The plaintiff shareholder brought the action in both its personal capacity as a shareholder and as a representative of the company. On the former count, the plaintiff pleaded that the directors had breached their duties *owed to it as a shareholder* by conspiring to obtain the shareholders' approval for the company to purchase certain assets at an inflated price. The first instance judge allowed the plaintiff's personal claim, with damages to be assessed. According to the judge, the directors' improper conduct caused a reduction in the company's net profits, which must have in turn caused some damage to the plaintiff by negatively affecting the quoted price of the company's shares. This decision was overturned on appeal. According to the joint judgment of the Court of Appeal (at 222–223):

> *In our judgment the personal claim is misconceived*. It is of course correct, as the judge found … that [the directors], in advising the shareholders to support the resolution approving the agreement, owed the shareholders a duty to give such advice in good faith and not fraudulently. … *But [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. His only "loss" is through the company*, in the diminution in the value of the net assets of the company, in which he has (say) a 3 per cent shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. *The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property*. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company. A simple illustration will prove the logic of this approach. Suppose that the sole asset of a company is a cash box containing £100,000. The company has an issued share capital of 100 shares, of which 99 are held by the plaintiff. The plaintiff holds the key of the cash box. The defendant by a fraudulent misrepresentation persuades the plaintiff to part with the key. The defendant then robs the company of all its money. The effect of the fraud and the subsequent robbery, assuming that the defendant successfully flees with his plunder, is (i) to denude the company of all its assets; and (ii) to reduce the sale value of the plaintiff's shares from a figure approaching £100,000 to nil. *There are two wrongs, the deceit practised on the plaintiff and the robbery of the company. But the deceit on the plaintiff causes the plaintiff no loss which is separate and distinct from the loss to the company. The deceit was merely a 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*. [emphasis added]

69 The principle of reflective loss has been considered and approved in a number of English cases, such as *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 ("*Gerber*"), and was authoritatively discussed in the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1 ("*Johnson*"). Whilst there were various nuances between each of the judicial opinions expressed in *Johnson*, the general tenor of the majority of their Lordships' *dicta* underscores the broad ambit which the "no reflective loss" principle generally encompasses: but *contra Johnson* at 42–48, *per* Lord Cooke of Thorndon. According to Lord Bingham of Cornhill (see *Johnson* at 35), this principle has the general effect of dictating that "[a] claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss". In a similar vein, Lord Millett (see *Johnson* at 66), with whom Lord Goff of Chieveley agreed, regarded recoverability as turning on the simple question of "whether … the shareholder's loss is franked by that of the company". Lord Hutton in turn chose to express the principle in a positive manner (see *Johnson* at 51) through the proposition that:

> [A] shareholder … is not debarred from recovering damages because the defendant owed a separate and similar duty of care to the company, *provided that the loss suffered by the shareholder is separate and distinct from the loss suffered by the company*. [emphasis added]

70 The scope of this principle extends beyond a shareholder's claim that his shares have been devalued, and includes "all other payments which the shareholder might have obtained from the company if it had not been deprived of its funds": see *Johnson* at 66, *per* Lord Millett. *In particular, the detriment suffered by a shareholder* qua *creditor of the company is also caught by this bar against recovery*. This proposition is supported by judicial *dicta* in the case of *Gardner* ([62] *supra*), the facts of which have already been outlined earlier in this judgment. In that case, Blackburne J held that even though the defendant, Parker, had breached his fiduciary duties to both Scoutvale and BDC as their director, BDC could not recover its losses by virtue of the "no reflective loss" rule. As BDC was a shareholder and creditor of Scoutvale, the losses caused to it by the defendant's wrongdoing were largely a reflection of Scoutvale's diminution in assets.

71 According to Blackburne J (at [61]):

> The fact that the debt is 'actionable' [by BDC] … is not in issue: subject to questions of limitation, the debt is actionable, ie an action may be brought to recover it against the debtor, Scoutvale. But that is not the claim that is advanced. *The claim is against Mr Parker, not to recover the debt (Mr Parker is not the debtor), but for compensation in equity because, as a result of the breach of duty owed by him to BDC, Scoutvale (the debtor) has been disabled from repaying the debt*. Without that assumption, [the plaintiff's] case, whether in respect of the 9% shareholding or in respect of the £799,000 debt, cannot get off the ground. *Once the assumption is made, there is no reason why the no reflective loss principle should not apply*. The £799,000 debt is in truth no different in this respect from the 9% shareholding. Both are items of property belonging to BDC and enforceable (subject to questions of limitation and the like) against Scoutvale. [emphasis added]

72 Blackburne J's approach was affirmed on appeal by the English Court of Appeal: see *Gardner v Parker* [2004] 2 BCLC 554 ("*Gardner (CA)*"). According to Neuberger LJ (at [68]–[74]), with whom the other two members of the court concurred:

> [T]he rule against reflected loss bars any claim by BDC for the loss of its ability to recover on the loan, just as much as any loss it suffered in respect of its shares in Scoutvale …
>
> …

*It is clear… that the rule against reflective loss is not limited to claims brought by a shareholder in his capacity as such*; it would also apply to him in his capacity as an employee of the company with a right (or even an expectation) of receiving contributions to his pension fund. *On that basis, there is no logical reason why it should not apply to a shareholder in his capacity as a creditor of the company expecting repayment of his debt.* …

…

However, if a creditor (or employee) whose claim is barred by the rule against reflective loss is not repaid, he is not without remedies. If the company concerned is solvent, he can sue the company for his loss. If the company is insolvent, the creditor (or employee) can put the company into liquidation (if that has not already happened) and can either fund a claim by the liquidator against the defendant or, as [the plaintiff did in the present case], he can take an assignment of the company's claim. Indeed, the creditor (or employee) could probably take an assignment of the company's claim without seeking to wind it up.

[emphasis added]

73 Apart from applying to losses suffered by a shareholder in his *other* capacities if the company *decides not to exercise its rights*, the principle also applies where the company has settled its claim against the alleged wrongdoer: see, for example, *Johnson* ([69] *supra*) at 66, *per* Lord Millett approving the observation of Hobhouse LJ in *Gerber* ([69] *supra*) at 471; *Prudential Assurance* ([68] *supra*) at 223. The shareholder will, however, be permitted to recover damages for his loss where the wrongdoer, by the breach of duty owed to the shareholder, has actually disabled the company from pursuing such cause of action as the company had: see *Giles v Rhind* [2003] Ch 618 at [34] *per* Waller LJ, and *Gardner (CA)* at [60] *per* Neuberger LJ.

7 4 *If* applied to the facts in this case, the "no reflective loss" rule, as established by these English decisions, would have the effect of precluding Jenton from recovering its losses from the appellant. Jenton's losses, in relation to its inability to recover its loan of $4,542,286 from NQF and the diminution of its 100% shareholding in NQF, as a result of the appellant wrongfully paying the Relevant Sum (NQF's asset of NZ$2,677,300) to Normandy, are merely reflective of the loss suffered by NQF. The losses suffered by Jenton mirrored an equivalent loss by NQF. Jenton's inability to recover the Relevant Sum from NQF, whether in the form of share dividends or as repayment of its loan, was clearly a consequence of the corresponding diminution in *NQF's* assets. The principle dictates that NQF, rather than Jenton, should be the one entitled to recover damages from the appellant. To use Lord Bingham's test in *Johnson* (at 35), Jenton cannot recover any damages from the appellant because its losses would be adequately compensated by NQF's recovery of damages against the appellant (see above at [69]). This conclusion also finds direct support in *Gardner* ([62] *supra*) and *Gardner (CA)* ([72] *supra*).

***Policy considerations behind the principle***

75 The policy considerations behind the principle of reflective loss are clearly explained by Lord Millett in the following passage from his judgment in *Johnson*, at 62:

The position is, however, different where the company suffers loss caused by the breach of duty owed both to the company and to the shareholder. In such a case the shareholder's loss, in so far as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. *If the shareholder is allowed to recover in respect such loss, then either there*

> *will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved.* Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder. [emphasis added]

Notwithstanding Lord Millett's statement that the principle of reflective loss admits of no discretion, Waller LJ was able to carve out an exception to it in *Giles v Rhind* ([73] *supra*), where he said, at [34]:

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

This exception was accepted by the Court of Appeal in *Gardner (CA)*: see Neuberger LJ at [54]–[56].

***Whether this court should adopt the principle***

76 The threshold question here is whether this court should adopt the principle of reflective loss as established by the English cases. In *Christensen v Scott* [1996] 1 NZLR 273 ("*Christensen*"), the New Zealand Court of Appeal declined to apply it. In that case, two shareholders sought damages for the diminution in the value of their shares which was caused by the negligence of the defendant accountants and solicitors. The New Zealand Court of Appeal refused to strike out the claim, holding that the prohibition against recovery might not apply where the defendant owed a *separate* duty to the claimant. According to Thomas J (at 280–281), who delivered the judgment of the court:

> We do not need to enter upon a close examination of the [*Prudential Assurance*] decision. It has attracted not insignificant and, at times, critical comment. … It may be accepted that the Court of Appeal was correct, however, in concluding that a member has no right to sue directly in respect of a breach of duty owed to the company or in respect of a tort committed against the company. … But this is not necessarily to exclude a claim brought by a party, who may also be a member, to whom a separate duty is owed and who suffers a personal loss as a result of a breach of that duty. Where such a party, irrespective that he or she is a member, has personal rights and these rights are invaded, the rule in *Foss v Harbottle* is irrelevant. Nor would the claim necessarily have the calamitous consequences predicted by counsel in respect of the concept of corporate personality and limited liability. *The loss arises not from a breach of the duty owed to the company but from a breach of duty owed to the individuals. The [individual] is simply suing to vindicate his own right or redress a wrong done to him or her giving rise to a personal loss*.
>
> *We consider, therefore, that it is certainly arguable that, where there is an independent duty owed to the plaintiff and a breach of that duty occurs, the resulting loss may be recovered by the plaintiff. The fact that the loss may also be suffered by the company does not mean that it is not also a personal loss to the individual*. Indeed, the diminution in the value of [the claimants'] shares in the company is by definition a personal loss and not a corporate loss …
>
> In circumstances of this kind the possibility that the company and the member may seek to hold the same party liable for the same loss may pose a difficulty. Double recovery, of course, cannot

be permitted. The problem does not arise in this case, however, as the company has chosen to settle its claim. …

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

…

We are not prepared to hold at this stage that [the plaintiffs] do not have an arguable case to recover damages for the breach of an acknowledged duty.

[emphasis added]

7 7 *Christensen* was rejected by the majority of the House of Lords in *Johnson* ([69] *supra*). In our view, there are sound and compelling reasons to support the English approach as expounded in *Prudential Assurance* ([68] *supra*) and *Gardner* ([62] *supra*). In such cases, the apparent separability of a shareholder's and his company's losses is but a consequence of the artificial construct created by a company's separate legal personality. The prohibition against reflective loss recognises the unity of economic interests which bind a shareholder and his company, and gives effect to the unique position which a shareholder stands in *vis-à-vis* his company. In the words of Lord Millett in *Johnson* at 66–67:

*In economic terms, the shareholder has two pockets, and cannot hold the defendant liable for his inability to transfer money from one pocket to the other.* In principle, the company and the shareholder cannot together recover more than the shareholder would have recovered if he had carried on business in his own name instead of through the medium of a company. [emphasis added]

78 From a doctrinal point of view, the "no reflective loss" rule can be seen as a variant of the "proper plaintiff" rule that has previously been applied in the realm of company law: see, for example, *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189 and *Edwards v Halliwell* [1950] 2 All ER 1064. This rule seeks to ensure that wrongs against a company are efficiently and fairly disposed of by regulating the category of persons who can recover what is effectively the company's loss. The need to regulate such claims is an unavoidable consequence of the corporate venture which a company represents. The various and diverse interest groups that are potentially affected when a wrong is suffered by a company create the need to ensure that these losses are remedied in an orderly manner, *ie*, through the company as the claimant.

79 The principle of reflective loss has in fact been accepted as good law in Singapore by Lai Kew Chai J in *Hengwell Development Pte Ltd v Thing Chiang Ching* [2002] 4 SLR 902. In that case, the plaintiffs were the majority shareholders of a joint venture company ("JVC"). They sued the directors and officers of the JVC's wholly-owned Chinese subsidiary for breach of fiduciary duties to the JVC. The defendants argued that the principle of reflective loss applied to the plaintiffs' claim, citing *Johnson,* as the loss suffered by the JVC as a result of the alleged breach of duties of the defendants was simply a reduction in value of its shareholding in the JVC. Lai J, after a careful examination of *Johnson*, allowed the plaintiffs to proceed with their action as there was no possibility of double recovery against the defendants, nor would the claim prejudice the creditors and shareholders of the JVC. The judge found, on the evidence of an expert opinion from a Chinese lawyer which was not challenged by the defendants, that under Chinese law, the courts would not give any consideration to a company's claim against its debtors if there was a deadlock situation in the company which disabled it from passing a resolution to sue. Lai J found that the facts of the case fell within propositions (2) and (3) of Lord Bingham's summary of the scope of the principle of reflective loss in *Johnson* at 35 and said (at [22]):

> A litigant is not to be lightly turned away from bringing a genuine cause before our courts. A fortiori, if there is no risk of double recovery and there is no prejudice to the creditors or shareholders of the company, which has no remedy in any event under Chinese law, the policy reasons in [*Johnson*] do not apply. Accordingly, the joint venture company as the sole shareholder of [the Chinese subsidiary] has the right and title to bring the action to recover the claims.

***Whether the principle should be applied in the present case***

80 In its written submissions, Jenton has argued that the jurisdiction of an appellate court to hear a new issue that has not been canvassed in the court below is subject to the principle stated in the House of Lords decision of *The Tasmania* (1890) 15 App Cas 223 and the Privy Council decision of *Connecticut Fire Insurance Company v Kavanagh* [1892] AC 473, which was followed by this court in *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] 4 SLR 571. In summary, the principle is: First, the court must be satisfied beyond doubt that it has all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at the trial; and next, no satisfactory explanation could have been offered by those whose conduct was impugned if an opportunity for explanation had been afforded them when in the witness box: see Lord Herschell in *The Tasmania* at 225. In *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 404 ("*Hoecheong Products*"), the Privy Council held that the same principle applied where the new issue or point of law was introduced by the appellate court on its own initiative. At 408–409, Lord Mustill said:

> The principles which inhibit the parties from raising new points on appeal, particularly where the facts have not been investigated at the trial, are so well established that it is unnecessary to quote from authorities such as *Tasmania (Owners of) v. City of Corinth (Owners of)* (1890) 15 App. Cas. 223, *Connecticut Fire Insurance Co. v. Kavanagh* [1892] A.C. 473 and *Esso Petroleum Co. Ltd. v. Southport Corporation* [1956] A.C. 218. These principles apply equally where it is the court, rather than the parties, which seek to introduce the new legal issue. … It does, of course, happen from time to time that a court comes to learn of a statute or authority bearing importantly on an issue canvassed in argument but, through an oversight, not then brought forward. The court may wish to take the new matter into account. Before doing so it should always ensure that the parties have an opportunity to deal with it, either by restoring the appeal for further oral argument, or at least by drawing attention to the materials which have come to light and inviting written submissions upon them. … The occasions when an appellate

court would find it proper even to contemplate such a course after the conclusion of the arguments must be rare, but if it were ever to do so the first step must always be to have the matter thoroughly explored by adversarial means, as regards not simply the merits of the new question but also the propriety of entering upon it at all. If this had happened here, the sellers should have had little difficulty in showing that that the case had proceeded too far to enable the question to be taken into account. The judgment would then have proceeded on the basis of the issues which had been in existence throughout, although the court could, if it had wished, have kept the point open for consideration in some future case by emphasising that it had not been argued and did not form part of the decision.

81 In the light of these authorities, Jenton has argued that if this court is of the view that Jenton could or would possibly have introduced fresh evidence or taken any procedural step or done anything in connection with its claim against the appellant in the action below to effectively answer the new legal issue or address the concerns raised in connection thereto had they been raised by the appellant earlier in the action, then we should decline to make a ruling on this new legal issue or, alternatively, keep the same open for consideration in some future case involving a similar fact situation so as not to prejudice Jenton in the present case: see Lord Mustill's observations in *Hoecheong Products.*

82 We recognise the force of Jenton's argument on this procedural point. We turn now to consider the matters that Jenton has raised in this connection. It is Jenton's case that if the appellant had raised the plea of reflective loss in the court below, then:

(a) Jenton would have been able to address this objection by adducing evidence and/or an undertaking from NQF's liquidator that he would not pursue NQF's claim for NZ$2,677,300 against the appellant; this court might readily infer that such evidence and/or undertaking would have been produced to the court below had the appellant pleaded this defence;

(b) the appellant would not have been able to plead by way of defence that the Relevant Sum belonged to Normandy, as the two pleas were mutually inconsistent; accordingly, this court should not even consider entertaining this point in the light of the appellant's pleaded case in the court below and in this court;

(c) Jenton could easily have responded to the objection by joining NQF as a party to the action against the appellant; and

(d) Jenton could have shown that the appellant disabled NQF financially from proceeding against him. The appellant did this by depleting all of NQF's ready funds and by working with the receivers of NGH to effectively block the second tranche payment of about NZ$768,872.71 to NQF by placing it in a joint bank account with Normandy pending the determination of the New Zealand proceedings between NQF and Normandy.

83 With respect to the principle itself, Jenton argues that Jenton's loss, in so far as it could not apply the Relevant Sum to reduce NQF's debt of $4,452,286, was not a reflective loss but a separate and personal loss to Jenton. It is urged upon this court that on this issue, we should follow *Giles v Rhind* ([73] *supra*) rather than *Gardner (CA)* ([72] *supra*). The latter decision should not be followed because in that case there was a possible risk of double recovery whilst in the present case there was no such risk.

84 Counsel for the appellant, in his written submissions, has made three main points: (a) the principle of reflective loss applies to the claim of Jenton against the appellant for the reasons we have

outlined in [74] above; (b) NQF was not financially disabled by the appellant paying the Relevant Sum to Normandy as NQF was able to engage in litigation in New Zealand against Normandy; and (c) Jenton was able to provide the security for costs ordered by the court. Furthermore, counsel has pointed out that, even now, NQF is not prevented from suing the appellant to recover the Relevant Sum. The implication of this last argument is that there is no reason not to dismiss Jenton's claim against the appellant on the basis of the principle of reflective loss, since NQF is able to commence a new action against the appellant for the recovery of the Relevant Sum.

***The decision on the application of the principle***

85 In our view, Jenton has the better case on whether or not this court should consider the application of the principle of reflective loss in this case. There is much force in many of the arguments made by Jenton, which we have summarised in [82]. The strongest arguments are those that concern Jenton's loss of opportunity to adduce evidence or to take steps to disapply the principle of reflective loss, if it had been pleaded earlier by the appellant. We may reasonably assume that Jenton would have been able to procure NQF to give an undertaking to the court not to sue the appellant in order to continue with its claim against the appellant since NQF was a wholly-owned subsidiary of Jenton. Also, NQF had no creditor other than Jenton. If NQF had offered such an undertaking, we can see no principle of law that would have prevented the court from accepting it since it would ensure that there would be no double recovery or prejudice to other shareholders or creditors in allowing Jenton to proceed with its claim. In this connection, it may be noted that in *Christensen* ([76] *supra*), the court was prepared to deal with the problem of double recovery in several ways, such as staying one proceeding or staying execution against one or other of the parties.

86 In the present case, these solutions are unnecessary. No stay would have been required if NQF had been given the opportunity to give the court an undertaking not to sue the appellant for the Relevant Sum. Such an undertaking would have disapplied the principle of reflective loss as there would be no possibility of double recovery. It is arguable that there would have been no reason why the court would not have accepted such an undertaking since NQF was a wholly-owned subsidiary of Jenton and no third party had a claim to the Relevant Sum as a creditor or shareholder.

87 The other point of substance raised by Jenton is that if the appellant had pleaded the principle of reflective loss as a defence, Jenton could have applied to join NQF as a party to the proceedings to ensure that there would be no double recovery against the appellant. Alternatively, Jenton could have withdrawn its action and left it to NQF to start a new action against the appellant. It is clear to us that allowing the appellant to rely on the principle of reflective loss at this stage of the proceedings would be highly prejudicial and unjust to Jenton.

88 With respect to the argument that the appellant had financially disabled NQF, we are also of the view that Jenton has a better case than the appellant. It is true that NQF did engage in litigation in New Zealand, but that was only because it had been sued by Normandy. NQF was not a claimant but a defendant, and it had no choice but to defend the action by Normandy as otherwise judgment would have been entered in default on a claim that the Relevant Sum belonged to Normandy. This was a good reason for the Wongs to fund the New Zealand litigation as NQF had no funds, having been prevented by the appellant from receiving the proceeds of sale of the only asset it had. But, of course, if the appellant had raised the principle of reflective loss against Jenton at an early stage of the action, the question of NQF's impecuniosity would have been irrelevant because the Wongs would probably have agreed to finance NQF to sue the appellant since, by virtue of such a plea, Jenton's claim would either have been struck out or have been bound to fail if it had gone to trial.

89 For the above reasons, we agree with Jenton's submission that it would be highly unfair and prejudicial to Jenton if this court were to apply the principle of reflective loss to Jenton's action. It is much too late in the day for this to be done.

**Conclusion**

90 For the reasons given above, the appeal is dismissed with costs and the usual consequential orders.

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[note: 1] See *Written Resolution of the Directors of Normandy Nominees Ltd dated 21 May 2003*, Record of Appeal, Volume IV (Part F) at 3576.

[note: 2] See "Schedule G - Unsecured Creditors" attached to Jenton's Statement of Affairs, Record of Appeal, Vol IV (Part H) at 1036.

[note: 3] See Letter from Chio Lim & Associates dated 14 July 2004, Record of Appeal, Vol IV (Part H) at 1038.

[note: 4] See Proposed "Deed of Rectification", Record of Appeal, Vol IV (Part F) at 3634 to 3644.

[note: 5] See Proposed "Series II Deed of Rectification", Record of Appeal, Vol IV (Part F) at 3645 to 3651.

[note: 6] See e-mail from Mark Wong to John Sharman, PK Wong and Henry Townsing, Record of Appeal, Vol IV (Part F) at 3632.

[note: 7] See e-mail from Henry Townsing to PK Wong dated 12 August 2003, Record of Appeal, Vol IV (Part G) at 3669.

[note: 8] See e-mail from Henry Townsing to Mark Wong dated 22 July 2003, Record of Appeal, Vol IV (Part F) at 3633.