Pacific West Health Medical Center Inc. Employees Retirement Trust et al ...ld Greenwich Group et al Doc. 99

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DITRICT OF NEW YORK

ANWAR, *et al* *Plaintiffs,* -against- FAIRFIELD GREENWICH LIMITED, *et al* *Defendants.* This document related to all actions	Master File No. 09-CV-0118 (VM)

AFFIDAVIT OF ROBERT MILES,Q.C.

I, Robert Miles, Q.C., of 4 Stone Buildings, Lincoln's Inn, London WC2A 3XT, make oath and say as follows:

1. I am a Queen's Counsel practising from barristers' chambers in London. I joined Lincoln's Inn and was called to the Bar of England and Wales in 1987. I joined 4 Stone Buildings, Lincoln's Inn, in 1988. 4 Stone Buildings is widely recognised as one of the leading company law barristers' chambers in England. I was appointed Queen's Counsel in 2002. I specialise in company, commercial and business law The Chambers and Partners Guide to the Legal Profession (2010 ed.), an independent directory, names me as a leading specialist in Company Law, Banking & Finance, Commercial Dispute Resolution, Commercial Chancery, Civil Fraud, and Restructuring/Insolvency. I have been appointed by the Lord Chancellor to sit as a Deputy Judge of the High Court in the Chancery Division (the Division which deals, among other things, with company law disputes). I am a joint Consultant Editor of a leading commentary on the English company legislation, "The Annotated

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Companies Acts" published by Oxford University Press. A copy of my CV is attached to this Affidavit in Appendix 1.

2. I am able to provide expert evidence about the law of the British Virgin Islands and Bermuda because the legal system of each of Bermuda and the BVI is based on the principles of English common law, and the Courts of each treat the decisions of the English courts as persuasive, particularly in specialist areas of law such as company law, where the body of local law is limited.

3. I have read the Second Consolidated Amended Complaint (the "Complaint") and the affidavits of Gerard St. C Farara QC, Rod S. Attride-Stirling and Guy Philipps QC. The definitions used in the Complaint are adopted for ease of reference in this affidavit.

<u>**Reflective loss**</u>

4. Mr. Farara and Mr Philipps refer to the principle of reflective loss. This is an exclusionary principle, applying where a shareholder in a company and the company itself have a claim for a wrong committed by a third party in respect of the same loss. Put broadly, where the loss of the company matches or "franks" the loss of the shareholder, the shareholder's claim is barred. I shall refine the statement of the principle further below. Some of what the defendants' experts say in general terms about the reflective loss principle, as a principle, is uncontroversial. However, as well as recognising the existence of the principle, it is important also to note its bounds and limits.

5. The reflective loss principle represents one strand of a series of decisions going back to <u>Foss v. Harbottle</u> (1843) 2 Hare 461 [1] That case established that the principle that where a company has been wronged, so that the cause of action is vested in it and it alone, only the company can sue for redress. There are established exceptions to that rule, under which a shareholder is able to bring a derivative action in the name of and on behalf of the company, but the

[1] Copies of the principal authorities referred to in this Affidavit are contained in Appendix 2 to this Affidavit

general position is that only the company may sue. That rule is what is generally known as the rule in Foss v. Harbottle.

6. Although deriving from the same line of cases, the reflective loss principle is concerned with a different problem, namely, where the plaintiff-shareholder has his own claim but the loss is franked by losses recoverable by the company of which he is a shareholder. Where it applies, it prevents a plaintiff who has his *own* claim from seeking damages. The question of reflective loss therefore needs to be considered separately from the rule in Foss v. Harbottle.

7. The reflective loss principle was restated by the House of Lords in Johnson v. Gore Wood [2002] 2 AC 1. The principle is that where a company, C, has suffered a loss at the hands of a wrongdoer, D, and as a result the value of the shares in C have fallen, if the loss in value of the shares merely reflects losses recoverable by the company, a shareholder, S, is prevented from claiming, even though he has his own cause of action against D.

8 As already mentioned, this is an exclusionary rule. It is important that, as an exclusionary rule, it is confined within its proper limits. The rule has no application in the following circumstances: (a) where S suffers loss as a result of a wrong committed by C; (b) where S suffers a loss as a result of a wrong committed by D but C has no cause of action against D; or (c) where S suffers a loss which is separate and distinct from that suffered by C. These limits follow from the formulation of the rule by Lord Bingham at p.35, and Lord Millett at p.62-63 of Johnson.

9. As to limitation (a), it is self-evident from the notion of "reflective" loss that the principle cannot apply where S has a direct claim against C. The only loss in such a case is suffered by S and, by definition, C suffers no loss. Such a claim would arise where, for instance, a shareholder is fraudulently induced by a company to acquire shares in the company. Though the jurisprudence of the English, BVI and Bermudan courts in securities fraud cases is less developed than that of the United States, under English law a shareholder may make a claim for fraudulent misrepresentation against the company in which he holds

or held shares. While the cases have been developed in the cases of fraudulent inducement to acquire shares, in my view, a claim in deceit (fraudulent misrepresentation) is also available in a case where a company fraudulently induces a holder of shares to retain (or not to redeem) those shares. A company will be held responsible for information published by it or in its name; for representations made by its officers or agents; or where its officers, knowing that a person is making representations on its behalf with a view to inducing others to take a particular course favourable to the company, allow such representations to be made.

10. As to the measure of damages for such a claim, where he has been fraudulently induced to retain shares, the shareholder would be entitled under English law *prima facie* to recover all the losses flowing from the wrong, including the fall in the value of the shares from the date of the wrong for the period while the fraud remained operative.[2] In such a case, the reasons for the fall in the value of the shares would be immaterial.

11. As to limitation (b), Lord Bingham explained in point (2) of his formulation on p.35 of Johnson that the principle can have no application where S has suffered a loss at the hands of D, and C has no cause of action in respect of the loss. Lord Millett made the same point at p.62. An example of such a case may arise where D has fraudulently induced S to purchase or retain shares in C, which subsequently fall in value. If, as may well be the case, C has no claim against D in respect of such loss, there is no question of any "reflective loss" capable of matching or "franking" S's losses.

12. As to limitation (c), Lord Bingham explained in point (3) of his formulation on p.35 of Johnson that the principle can have no application where the losses claimed by S are "separate and distinct" from those suffered by C. See also Lord Millett at p.67C-D.

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[2] Cf. Smith New Court Securities v. Scrimgeour Vickers (Asset Management) Ltd [1997] AC 254.

13. Developing this point, in Giles v. Rhind [2003] 1 BCLC 1 the Court of Appeal drew a distinction between the value of the shares to the shareholder and the amount which the company could recover by way of damages. Waller LJ held that the damages available to the company were unlikely adequately to compensate the shareholder for the loss of value of is shareholding – the wrongdoing involved the misappropriation of the company's major contract, something which could not be recovered for the company, making the shareholding less saleable and valuable. The company's prospects were seriously harmed in a way which damages could not compensate. Thus "*the diminution in value of the shareholding contained different elements one of which would be categorised as a purely personal loss*" (¶37). Chadwick LJ also made the point that it is important to distinguish between the nature of the loss claimed and the circumstances in which it arose. Thus it will frequently be the case that a loss claimed by a shareholder will arise out of the same circumstances giving the company a claim. However, it will not always be the case that this makes all of the shareholder's losses reflective of the company's.

14. Moreover, as an aspect of the requirement that claims for "distinct and separate" losses are not barred, the exclusionary principle applies only to the extent that the shareholder's loss is matched, in amount, by the company's claim. This follows from the expression of the principles in Johnson, and was made clear in Gardner v. Parker [2004] 2 BCLC 554 and in Shaker v. Al-Bedrawi [2003] Ch 350.

    (a) In Johnson Lord Bingham said:

    "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."

    (b) Similarly, in Johnson, Lord Millett, in discussing Prudential v Newman, referred to the fact that the shareholder's action was barred in that case because:

    "the plaintiff's own loss would be *fully remedied* by the restitution to the companies of the value of the misappropriated assets" (emphasis added).

(c) In Gardner, Neuberger LJ described (in paragraph 33) the principle as barring the recovery of:

> "(1) a loss claimed by a shareholder which is merely reflective of a loss suffered by the company i.e. *a loss which would be made good* if the company had enforced *in full* its rights against the defendant wrongdoer is not recoverable by the shareholder save in a case where, by reason of the wrong done to it, the company is unable to pursue its claim against the wrongdoer"[3] (emphasis added).

(d) See the discussion in Shaker v. Al-Bedrawi [2003] Ch 350 at ¶¶83 and 84.

15. It is therefore necessary in any given case where the reflective loss argument is invoked to scrutinise with care whether the losses suffered by S are the same as, and for the same amount as, those suffered by and recoverable by C. In Johnson, which was a strike out case, Lord Bingham said that the court should be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied compensation (p 36c-d). This will involve a close scrutiny of the pleaded case with any reasonable doubt resolved in favour of the claimant - the result of Johnson was that the 4 of the claimant's 5 heads of loss survived the application to strike them out The need to be clear before a head of loss is struck out was also emphasised by Waller LJ in Giles v. Rhind at ¶17.

16. The Court of Appeal in Shaker v. Al-Bedrawi (¶83) made it clear that the burden lies on the defendant to show that the rule against reflective loss applies; and this requires it to show that the company has a claim against the same defendant for the same losses as are claimed by the plaintiff-shareholder.

17. More generally, though procedural questions would, under English private international law, be a matter of the law of the forum, it may assist in this context to mention the following principles of English law applicable to a motion by a Defendant to strike-out a claim:

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3 The qualification in italics is derived from the decision in Giles v. Rhind (which remains good law in England as confirmed in Webster v. Sandersons [2009] EWCA 830), notwithstanding the criticisms of it made by Lord Millett sitting in the Final Court of Appeal of Hong Kong in Waddington v. Chan Chun Hoo Thomas.

(a) The claim will not be struck out if the claimant has a "realistic" as opposed to "fanciful" prospect of success. It is for the defendant applying to strike-out a case to demonstrate the claimant does not have the requisite prospects of success (see for example Lord Woolf MR in Swain v. Hillman [2001] 1 All ER 91 at page 92).

(b) The court is not entitled to and will not conduct a "mini-trial" on the documents without disclosure or cross-examination of witnesses. Thus a claim will only be struck-out on the facts if it is clear beyond question that the claimant will not be able to establish the facts on which he relies (Swain v. Hillman).

(c) The Court will be especially cautious of striking out a claim in an area of developing jurisprudence because in such areas decisions on novel points of law should be decided on real rather than assumed facts (see for example Wetherspoon v. Van Den Berg [2007] EWHC 1044 at ¶4vii).

18 As I understand it, the Plaintiffs allege that (i) they were induced to purchase and then to retain shares in the Funds by fraudulent misrepresentations, alternatively negligent misrepresentations, made by a number of the Defendants; (ii) they were owed fiduciary duties by the Fairfield Defendants, who include the directors of and investment managers to the Funds; (iii) they have rights under various contracts entered into between the Funds and certain of the Fairfield Defendants on the basis that those contracts were intended to benefit them; (iv) they have unjust enrichment claims and/or mistake claims against the Defendants who received substantial fees in relation to the management of the assets of the Funds; (v) they were owed a duty of care by a number of the other Defendants involved with the Funds, including their auditors and custodians.

19. Two points arise.

(a) First, as already explained, the reflective loss principle has no application in respect of a given defendant unless the Funds also have a

cause of action against such defendant. If they do not, there is no question of reflective loss arising as against the Defendants who could not be subject to an action by the Funds.

(b) Secondly, even if the Funds do also have a cause of action, the reflective loss principle does not bar the Plaintiffs from claiming for losses which are separate and distinct from those of the Funds; and this includes the requirement that the Funds' claims must be for (at least) the same amounts as the Plaintiffs' claims

20. As to the first point above I should also point out that the English courts have not yet had to consider the position where there is a good defence to the company's claims against a wrongdoer which would not apply to the shareholder's claims against that wrongdoer. This could include situations in which the company's claims are barred (a) by limitation, (b) by reason of an exclusion clause or (c) because the knowledge of the wrongdoer is imputed to the company preventing it from complaining of the wrongdoing (the defence of *in pari delicto*). On balance, my view is that in such cases the Court would allow the claim by the shareholder on the basis that the Company did not have a viable claim. In relation to the latter case (item (c)), the company's claim would effectively have been stifled by the actions of the wrongdoer, making it unjust to bar the shareholder from recovering on any personal cause of action (compare Giles v. Rhind).

21. At ¶14 Mr. Farara concludes that "a BVI court would conclude that the rule in Foss v. Harbottle would bar the entire Plaintiffs' state law claims".

22. I do not think that such a broad statement is justified Indeed, I do not think that the rule in Foss v. Harbottle in the usual sense (which is explained above) applies here. The reason for this is that the claims brought by the Plaintiffs are their own claims, not those of the Funds. The Plaintiffs' claims do not engage the rule in Foss v. Harbottle, which is that, subject to a number of exceptions, a shareholder may not sue on a cause of action which belongs to the company in which he holds shares

23 So, under Count 1 in the Complaint, the Plaintiffs say that the Fairfield Fraud Claim Defendants knowingly and recklessly made false representations to them upon which they relied in purchasing shares. This claim for fraudulent misrepresentation is one which can only belong to the Plaintiffs as the parties to whom the misrepresentations are alleged to have been made It is not a cause of action of the Funds. The real question who owns the claims; it is whether the losses claimed are reflective losses (see further below).

24. At ¶24 Mr. Farara concludes with the statement that "Breach of fiduciary duty claims and other claims of mismanagement belong to the corporation." This statement is only correct in so far as the claim is for breach of a duty owed exclusively to the corporation. If the relevant fiduciary duty is also owed to a third party (such as a shareholder), the rule in Foss v. Harbottle would not itself prevent that third party from suing for breach of the duty which it was owed In the present case, it is alleged (in Count 8) that the Fairfield Defendants owed fiduciary duties to the Plaintiffs. Thus, assuming the claims to be well founded, it is the Plaintiffs who would have standing to bring claims for breaches of these duties.

25. Further, in so far as Mr. Farara characterises the Plaintiffs' claims as being for mismanagement of the Funds, he does not separately address what appears to be an essential aspect of the Complaint, namely, that the Plaintiffs were fraudulently induced to become and remain investors. There are no English or BVI decisions of which I am aware directly on point and therefore the question is to be considered from first principles. In my view, English Court would approach things as follows. It would ask, first, was there an actionable fraudulent misrepresentation which induced the shareholder to purchase or retain his shares? Such a fraudulent misrepresentation is alleged here. Second, and if so, it would ask: what was his loss? The answer is, *prima facie*, the fall in the value of the shares in the period while the fraud was operative. Third, it would ask: is that loss merely reflective of a loss recoverable by the company of which he is a shareholder? That is a question which would require careful scrutiny on the particular facts of the case, as Lord Bingham explained in Johnson The burden of demonstrating that the losses are the

same and for (at least) the same amounts as the Plaintiffs' claims is on the defendants.

26. Mr. Farara goes on in ¶25-40 to consider the exceptions to the rule in Foss v. Harbottle. However, these exceptions are only relevant if the rule itself would otherwise apply and, as I have already explained, I do not consider that it has any application. As I understand the Complaint, the claims that the Plaintiffs have pleaded are their own claims.

27. In ¶42 Mr. Farara refers to the "rule of reflective loss". As I have already explained, as well as understanding the exclusionary principle, it is important to understand the limitations of the exclusionary principle, which I have set out above. He also appears to say that any claim by S for a diminution of the value of shares is automatically reflective of the losses suffered by C. That is, in my view, far too sweeping a statement. It is clear from the authorities on reflective loss already referred to (see, in particular, Johnson itself) that a shareholder who has a cause of action against a wrongdoer is entitled to bring a claim for the loss in value of his shareholding arising from the wrong ***unless*** his loss is "merely reflective" of a loss which the company has a claim to recover (in the sense and subject to the limitations already discussed). The question is not simply whether the plaintiff's loss arises from the fall in value of the shareholding; it is whether the loss is "merely reflective" of a loss recoverable by the company, in the sense explained above.

28. As already explained, the Court has to investigate whether this is the true position as a matter of fact. This may be simple where the claims by S and by C are based on the same factual circumstances, as was the case in Johnson, which resulted in the comment by Lord Millett quoted in ¶44 of Mr. Farara QC's affidavit.

29. However, in my opinion it may be different where the claims of S and C arise from differing circumstances and where the measure of loss is different for each. Thus, if S demonstrates that he was induced to purchase shares in C by a fraudulent misrepresentation and the shares now have no value, his loss is,

prima facie, the entirety of his investment. By contrast any loss recoverable under C's cause of action for mismanagement may be different (and less than) this amount. The difference may be a separate and distinct loss suffered by S which is not reflective loss

30. This investigation is more complicated where a claim involves multiple claimant shareholders and multiple defendants against whom differing allegations are made. The English courts have not yet considered the application of the principles in Johnson to such multi-party cases (or more specifically to a securities fraud class action). I would expect the Court to consider the detail of each of the particular claims which the Funds could bring against each of the various defendants and then compare and contrast those (and their value) with each of the claims which the individual plaintiffs or, if appropriate, various classes within them, are actually bringing against each of the defendants.

31. As I have explained above, the question which the Court is trying to answer – namely, whether the company's losses and the shareholder's losses are separate and distinct - will turn on the particular facts. The broad assertion in ¶45 of Mr. Farara's affidavit that the Plaintiffs' loss is not separate and distinct from that of the company (i.e. the Funds), is not supported by reasoning, and fails to take into question whether the losses are the same or different, i.e. separate and distinct in the sense identified above. Such a difference would take them outside of the rule against reflective loss. This is a matter of fact which would have to be investigated by the Court trying the claim.

32. In ¶47-59 of his affidavit Mr Farara considers the circumstances in which a BVI court may grant permission for a shareholder to bring a derivative action on behalf of the company in which he is a shareholder. I have not commented on these paragraphs, as my understanding of the Complaint is that the Plaintiffs are not seeking to bring a derivative action (i.e. an action on behalf of the Funds), but are bringing personal actions based on wrongs alleged to have been done to them

33. Mr. Philipps's opinion on this issue (¶11-17) consists in the main of quotations from the two leading cases on the issue of reflective loss which are uncontroversial. As to his conclusion in ¶17, the question is, as I have already explained, whether the Funds have claims against the same defendants as the Plaintiffs, and whether the losses suffered by the Plaintiffs (i.e. their investment) are separate and distinct from those suffered by the Funds. This involves an application of the principles and limitations set out above.

Fiduciary duty owed to shareholders

34. The affidavits of Mr Farara and Mr. Attride-Stirling also deal with the existence of fiduciary duties between Plaintiffs and the Fairfield Greenwich Defendants.

35. Mr. Farara states in ¶60 that the Plaintiffs were not owed any fiduciary duties by the Fairfield Greenwich Defendants on the basis that, as a matter of BVI law, directors and/or officers of a company do not owe fiduciary duties to individual shareholders. He also says that an investment adviser to a fund owes no fiduciary duties to the shareholders of the fund. Mr. Attride-Stirling echoes this in relation to directors and officers of a Bermuda company in ¶13. He says that such persons owe a duty only to their company. I do not agree that the law of England (or so far as I am aware the BVI or Bermuda) would support such broad propositions.

36. As regards directors and officers, it is correct that generally they do not owe duties to shareholders simply by virtue of occupying such office, and without more. That general proposition is a reflection of the separate legal personality of companies, and of the position of a company's officers as agents of the company. However, English law recognises that they can owe duties to shareholders in special circumstances and that this is question of fact in each case: see, for instance, the discussion in Peskin v. Anderson [2001] 1 BCLC 372. This reflects the fact that the question of whether one person is another's fiduciary will depend on the factual nature of the relationship and whether there is a sufficient relationship of trust and confidence.

37. An example of the special circumstances can be found in the case where directors supply information to shareholders in relation to an offer for the purchase of their shares or where they express a view as to whether or not such a take-over offer should be accepted: see Dawson International plc v Coats Paton plc (1988) 4 BCC 305 and the earlier New Zealand case of Coleman v Myers [1977] 2 NZLR 297. In the latter case, one factor of particular importance was the high degree of inside knowledge of the directors.

Miscellaneous points

38. Provisions of the IMAs: Mr. Attride-Stirling deals in ¶28-47 with the exculpatory provisions of the Investment Management Agreements.

39. Mr. Attride-Stirling appears to suggest in ¶29 that the IMA provisions would bar all of the claims against the Fairfield Greenwich Defendants even if (contrary to his primary argument) it is found that the Fairfield Greenwich Defendants owed contractual or tortious duties to the Plaintiffs. Earlier in his affidavit (at ¶¶18-20), he has concluded that any such tortious duty would not be wider than the contractual duty under the IMA

40 As a matter of principle, the IMA provisions would, if the relevant limitations within the provisions themselves do apply, bar claims by the Funds against the parties to the IMA for breach of the IMA or other breaches of a concurrent tortious duty arising from the entry into the IMA. This would also apply to claims by any other party for breach of the IMA.

41 I would also agree that where the only fact relied on as giving rise to a tortious duty is the entry into a contract, the tortious duty will generally not be broader than the contractual duty (as discussed in the cases cited by Mr. Attride-Stirling: Tai Hing Ltd. and Henderson). In such cases, exculpatory contractual provisions will generally apply to a claim under the concurrent duty.

42. However, this does not address the situation where the duty relied on arises not merely from entry into the contract, but from other circumstances over and above that mere fact. As I understand the Complaint, the majority of the claims by the Plaintiffs against the Fairfield Greenwich Defendants are not for breach of the IMA or for a concurrent tortious duty said to arise merely out of entry into the IMA.

43. In fact, as pleaded, as I understand the Complaint, the claims arise out of facts which are separate from the IMA and go beyond the mere fact that the IMA has been entered into. They are based on representations and conduct of the various Defendants directly towards the Plaintiffs which are said to give rise to various forms of liability pleaded.

44. For example, the Complaint includes claims by shareholders in the Funds against the Fairfield Greenwich Defendants for negligent or fraudulent misstatements made directly to the shareholders and for breaches of fiduciary duties alleged to have been owed by the Fairfield Greenwich Defendants directly to the shareholders.

45. In these circumstances, I do not believe that Mr. Attride-Stirling's broad proposition about the effect of the IMA on the Plaintiffs' contractual and tortious claims is correct or that the claims referred to in the paragraph above could be barred by provisions of the IMAs, however they are construed. The provisions of the IMA have no application to such independent claims for negligent or fraudulent misstatement or breach of fiduciary duty.

46. Further and in any event, the Court would have to determine whether the conduct complained of falls within the exclusion or exculpation clauses. It is well established that such clauses cannot exclude liability for fraud, which is alleged in the present case. Moreover, the Complaint in the present case alleges, in relation to the claims for breach of the IMAs, that FGBL and FGL breached the IMAs by "grossly failing to meet the obligations of these agreements ..." (Count 9). If proven, this case would fall within the exception to the exculpatory clause. I note also that the Complaint makes allegations

against the Fairfield Defendants of gross negligence in Count 7 and fraud in Counts 1 and 2. Again, even if the exculpatory provisions of the IMAs were relevant to these non-contractual claims, they would not bar such claims, as those exculpatory provisions contain exceptions for gross negligence and wilful misfeasance and bad faith.

47. Mr. Attride-Stirling appears to say in relation to these claims that the Complaint lacks sufficient particularity (¶36 and 42). This is a procedural question and, were English principles to be relevant, it would be governed by the law of the forum trying the claim. But, in any case, I consider that it would be unusual for an English Court (or a Bermudan court) to strike out a claim purely on the grounds that it was not properly particularised, particularly where particulars can be sought under the relevant rules of court. Further and in any event, I note that sections D to J of the Complaint set out in some detail the factual case which is made against the Fairfield Defendants and in particular the false representations and the red flags which were said to have been ignored.

48. I note also that Mr. Attride-Stirling states in ¶28 that no duty at all (whether fiduciary or otherwise) was owed to the Plaintiffs, although in the earlier part of his affidavit he deals only with the issue of the existence of a fiduciary duty. I have dealt with fiduciary duties above. In so far as Mr Attride-Stirling is saying that there was no duty of care, it is well established that if a party, A, provides information to another party, B, in circumstances where it is reasonably foreseeable that party B will rely on it, party A will come under a duty of care in relation to the accuracy of such information: see <u>Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.</u> [1964] A.C. 465; <u>Henderson v. Merrett Syndicates Ltd.</u> [1995] 2 A.C. 145. The <u>Henderson</u> case shows that a duty may arise even though there is a concurrent contractual duty. It also shows that the duty may arise even though there is no direct contractual or other relationship between A and B. The duty arises from the fact that the information is provided in circumstances where A knows that B is likely to rely on it.

49. The Complaint alleges that the Fairfield Fraud Claim Defendants made fraudulent representations to the Plaintiffs (Counts 1 and 2) and that the Fairfield Defendants made negligent misstatements to the Plaintiffs (Counts 5 and 6). If these allegations are established, they would give rise to a cause of action in the first case in deceit and in the second case for negligent misrepresentation under the Hedley Byrne principle

50. In Coulthard v. Neville Russell (a firm) [1998] BCC 359 the Court of Appeal dismissed an application to strike out a claim based on the allegation that professionals (accountants) owed a duty to the directors of a company. Chadwick LJ reviewed the authorities including Hedley Byrne and Henderson and concluded at p. 369B:

> *"In my view the liability of professional advisers, including auditors, for failure to provide accurate information or correct advice can, truly, be said to be in a state of transition or development As the House of Lords has pointed out, repeatedly, this is an area in which the law is developing pragmatically and incrementally. It is pre-eminently an area in which the legal result is sensitive to the facts. I am very far from persuaded that the claim in the in the present case is bound to fail whatever, within the reasonable confines of the pleaded case, the facts turn out to be That is not to be taken as an expression of view that the claim will succeed, only as an expression of my conviction that this is not one of those plain and obvious cases in which it could be right to deny the plaintiffs the opportunity to attempt to establish their claim at a trial "*

51. Tort of aiding and abetting breach of fiduciary duty: In ¶18-23 Mr. Philipps deals with the claim against PwC Canada for aiding and abetting breach of fiduciary duty.

52. I agree with Mr. Philipps that English law does not recognise a tort of aiding and abetting breach of fiduciary duty and with his general comments about when a person, A, will be liable for the tort of another person, B.

53. English law does recognise accessory liability in the form of knowing assistance in a breach of trust. The constituent elements of such liability are (i) a breach of a trust, which may arise from a breach of fiduciary duty and (ii)

dishonest assistance by the alleged wrongdoer in that breach of trust: Royal Brunei Airlines v Tan [1995] 2 AC 378.

54. Dishonesty for these purposes is judged by an objective standard. A person is honest if he fails to attain the standard which would be observed by an honest person placed in those circumstances: Royal Brunei Airlines v Tan [1995] 2 AC 378 and Barlow Clowes International v Eurotrust International [2006] 1 WLR 1476. It may also consist of suspicion coupled with a deliberate decision not to make inquiries which might result in knowledge (that the transaction is not one in which the person can honestly participate).

55. In Barlow Clowes Lord Hoffmann giving the judgment of the Privy Council said:

> "In summary, [the Judge] said that liability for dishonest assistance requires a dishonest state of mind on the part of the person who assists in a breach of trust. Such a state of mind may consist in knowledge that the transaction is one in which he cannot honestly participate (for example, a misappropriation of other people's money), or it may consist in suspicion combined with a conscious decision not to make inquiries which might result in knowledge... Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree."

SWORN at London)
)
this 19th day of March 2010)
before me: Dominic De Bono)
)

Robert Miles QC

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DITRICT OF NEW YORK

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APPENDIX 1 TO THE AFFIDAVIT OF ROBERT MILES,Q.C.

This is Appendix 1 referred to in the Affidavit of Robert Miles QC sworn on 19 March 2010

4 Stone Buildings

Robert Miles QC

Called: 1987
Silk: 2002

Practice

Robert Miles QC is a leading advocate and adviser with special expertise and experience in complex financial and commercial disputes He has unrivalled experience as an adviser and advocate in capital and security markets disputes He has for many years been ranked in Chambers and Partners and the Legal 500 as a leading financial chancery and commercial silk

Chambers (2010) ranks Robert in 6 practice areas **(Banking and Finance; Commercial litigation; Company; Commercial Chancery; Fraud; Restructuring/Insolvency)** It says 'a great choice of silk particularly for trustee and bond-related banking matters; he fights well and works hard for his clients'; 'a formidable advocate'; 'the number one choice for clients with particularly tricky high-value cases ; he exudes competence and instils calm in those he represents ; always on top of his game'; 'approachable and conscientious and completely lacking in airs and graces'; 'highly commercial in his approach and great at finding practical solutions'; 'diplomatic with clients and gets on well with the judiciary

Earlier editions have described him as 'a real class act'; 'immensely gifted ; 'a fantastic advocate he builds up a great rapport with judges'; at the top of his game'; 'clear meticulous and persuasive; a commanding courtroom presence; 'an exceptionally clever calm authoritative figure who is not afraid to come to his own conclusions'; 'fantastically bright ; and 'one of the cleverest men at the Bar'

Cases of Interest

Robert has been involved in many high profile cases including Atlantic Computers the Maxwell litigation the BCCI affair Bermuda Fire and Marine Barings Equitable Life the Icelandic banking crisis the Elektrim litigation and Lehmans

Overseas Qualifications

Admitted in the Isle of Man Bermuda and the Cayman Islands for specific cases

Academic

MA(Oxon) BCL (Oxon) Diploma in Law (City University)

Professional

Robert is a member of the Commercial Bar Association and the Chancery Bar Association
He is a Deputy High Court Judge and a Bencher of Lincoln s Inn

Publications

Consultant Editor of Annotated Companies Acts (OUP)

Areas of Practice

- Banking and finance
- Company
- Commercial litigation
- Commercial Chancery
- Restructuring and Insolvency
- Commercial and financial fraud

Notes

Leading advocate and adviser in complex financial and commercial cases

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendant. This Document Relates To: All Actions	Master File No. 09-cv-118 (VM)

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2. Johnson v. Gore Wood [2002] 2 AC 1
3. Shaker v. Al-Bedrawi [2003] Ch 350
4. Giles v. Rhind [2003] 1 BCLC 1
5. Gardner v. Parker [2004] 2 BCLC 554
6. Swain v. Hillman [2001] 1 All ER 91
7. Coulthard v. Neville Russell (a firm) [1998] BCC 359
8. Royal Brunei Airlines v. Tan [1995] 2 AC 378
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