in ANA Inc for Mr Shaker and Mr Adham, Mr Bedrawi was bound to account to them for 70% of all profits he was enabled to obtain by use of those shares and that the $6m out of the proceeds of sale represents such profits, for 70% of which he was bound to account. He argues that Mr Shaker has a cause of action quite independent of any which ANA Inc may have against Mr Bedrawi for breach of fiduciary duty in misappropriating its assets or in making an unlawful distribution. He says that the *Prudential* principle does not apply to a case such as this of a proprietary claim by a beneficiary under a trust to a profit obtained by a trustee through the use of trust property consisting of shares in a company even if the company may have a claim against the trustee for breach of fiduciary duty owed to it as a director in respect of the moneys constituting the claimed profit.

35 Mr Steinfeld argues that the claim against Steggles Palmer, based on their knowing assistance in a breach of trust by Mr Bedrawi as trustee, does not rely on any breach of duty owed by Mr Bedrawi to ANA Inc, and similarly the claim based on knowing receipt has nothing to do with ANA Inc. The claim in deceit, based on Steggles Palmer fraudulently misrepresenting to Mr Shaker's agents what had happened to that part of the $6m which Mr Shaker might have stopped being dissipated, he says, is not one which ANA Inc could assert

36 The one point on the pleadings with which those arguments are inconsistent is the absence of any reliance on the inclusion of the shareholding in ANA Inc in the trust. Mr Steinfeld applied on the second day of the appeal to amend Mr Shaker's statements of case in the first and third actions. His primary purpose in seeking to amend was to bring Mr Shaker's pleadings into line with what the judge had found in respect of ANA Inc The amendments he sought were (1) that the investment agreement included a term that Mr Bedrawi would be the sole legal proprietor of the shareholding in (further or alternatively to ANA Ltd) any corporation, not being itself a subsidiary company, utilised by Mr Bedrawi to own and operate the business, in the event ANA Inc, (2) the trust was of the beneficial entitlement in 70% of that shareholding, and (3) the duties owed to Mr Shaker and Mr Adham included a duty to account to them for their 70% share of any profit derived from any trust property.

37 Mr Steinfeld submits that four conditions must be satisfied for the *Prudential* principle to apply: (1) a claim is brought by or on behalf of a shareholder in a company; (2) the claim is for damages for loss to the shareholder; (3) the loss, through a diminution in value of shares or in distributable assets, is reflective of loss to the company; and (4) the company has its own cause of action to recover its loss.

38 Here, he submits, the conditions are not satisfied in relation to the primary claim against Mr Bedrawi. (1) The claim is by a beneficiary to recover from his trustee a profit for which the trustee is liable to account by reason of his use of trust property to obtain it. (2) The claim is not one for damages for loss in the diminution of the value of shares or distributable assets: it is a proprietary claim to the profit taken by the trustee. (3) What is claimed is not reflective of a loss to the company. The claim is for an account from the trustee. (4) The company has no cause of action to obtain such an account.

A 39 Mr Steinfeld stresses that no claim is or has been made that Mr Bedrawi was in breach of the fiduciary duty which as the sole director of ANA Inc he owed to it when he caused the payment of $6m to Qube. He says it is at least likely that part of that money was properly paid to Mr Bedrawi. Thus some money could have been taken as repayment of a loan to ANA Inc. In this context he points to the balance sheet in the B management accounts for the ten months ended 31 October 1993, which accounts were annexed to the sale agreement. That shows an item "advances from shareholders" of $3,514,602. Mr Bedrawi was in effect the sole shareholder. Further, it is said for Mr Shaker that the sale agreement is likely to have produced a substantial profit for ANA Inc from the $9m proceeds, and that part, at least, of that profit could have been taken by the sole shareholder as a dividend. Yet further, part of that profit could have C been taken by way of remuneration by Mr Bedrawi as director, such remuneration being authorised by himself as sole shareholder. To the extent that money was properly extracted from ANA Inc, there would be no breach of fiduciary duty owed to ANA Inc, but that would not defeat Mr Shaker's proprietary claim against Mr Bedrawi that he should account for that profit.

D 40 Mr Steinfeld, however, accepts, as he must, that there may be an overlap between what Mr Shaker claims and what ANA Inc might claim in respect of the payment of $6m to Mr Bedrawi for which Mr Shaker is seeking an account. He further accepts that ANA Inc's claim has primacy, so that if and to the extent that ANA Inc recovers in respect of that payment, Mr Shaker's claim will be reduced. But he argues that this is an E example of competing claims to a single fund. He submits that the possibility that the fund might be reduced or exhausted by the company's claim should not be treated as defeating the beneficiary's claim, based as it is on the principle that a trustee must account to the beneficiary for any profit from the trust.

41 In suggesting that Mr Bedrawi might have received at least part of the $6m as a distribution out of realised profits, Mr Steinfeld challenges the F judge's view that Mr Bedrawi would have been liable for making unlawful distributions, based as that view was on the application of the Companies Act 1985 to a Pennsylvania corporation. He submits that the judge was wrong to apply provisions of English company law implementing a European directive to a company not subject to such provisions.

42 The one point in respect of which Mr Steinfeld seeks to rely on G evidence not before the judge is Pennsylvania law. By an application dated 18 June 2002 Mr Shaker applied for permission to adduce the report of John G Harkins Jnr, a member of the Pennsylvania Bar. That report is said to show that the judge was wrong to assume that the *Prudential* principle is of universal application or is recognised by the Pennsylvania courts or that the English company law on distributions reflects general principles of corporate law of universal application so as to be applicable in Pennsylvania to a H Pennsylvania company. Mr Steinfeld submits that the admission of the new evidence would further the Civil Procedure Rules' overriding objective by resolving what he says is an issue on this appeal, viz, whether this was an appropriate case for the presumption of similarity between English and Pennsylvania law.

E The defendants' principal arguments

43 Mr Lyndon-Stanford, appearing with Mr Newey for Steggles Palmer, submits that Mr Shaker, having chosen before the judge to base his case on there being a trust of the business and having lost on that point should not be allowed to rely on a different case, not advanced before the judge, that of Mr Bedrawi being liable to account for a profit from a trust of the shares in ANA Inc when that is not even pleaded. Further he drew our attention to various statements made by counsel then appearing for Mr Shaker, disclaiming that Mr Shaker had any interest in ANA Inc. For similar reasons he opposed the application to amend. He said that if Mr Shaker were to be allowed to amend, Steggles Palmer would want to appeal against the judge's decision that the corporate vehicle in which Mr Shaker and Mr Adham were interested was ANA Inc; for that purpose, we were told, he would seek permission to appeal out of time.

44 Save for the decision that ANA Inc was the relevant corporate vehicle, Mr Lyndon-Stanford supports the reasoning and conclusions of the judge. In particular he argues for the applicability of the *Prudential* principle to the facts of this case. He relies in particular on the misappropriation by Mr Bedrawi of ANA Inc's assets and submits that Mr Shaker cannot be allowed to achieve the same extraction of assets from ANA Inc to the prejudice of the creditors of the company as Mr Bedrawi's misappropriation had done. He says that in laying claim to the misappropriated proceeds of sale, Mr Shaker is not merely seeking relief in respect of loss suffered by ANA Inc but is attempting by way of equitable relief to appropriate to himself money belonging to ANA Inc which, he maintains, it has always been Mr Shaker's case was stolen. Such money, he argues, cannot represent a profit acquired by Mr Bedrawi as trustee of shares in ANA Inc.

45 Mr Lyndon-Stanford submits that the claims of Mr Shaker against Steggles Palmer are essentially for loss and that is the same money as that which ANA Inc has lost. Accordingly he says the loss claimed against Steggles Palmer merely reflects the diminution in ANA Inc's assets.

46 Mr Lyndon-Stanford challenges Mr Steinfeld's assertion that it is an issue in the appeal whether in this case there is a presumption of similarity between English and Pennsylvania law in the absence of evidence to the contrary. He submits that the true rule is the rule of convenience stated in *Dicey & Morris, The Conflict of Laws*, 13th ed (2000), p 232, para 9-025: "where foreign law is not proved, the court applies English law." He submits that the judge was right to apply the 1985 Act when holding that Mr Bedrawi was liable for unlawful distributions because the court must, in the absence of evidence that the applicable foreign law is to the contrary, apply the rule of convenience so that the general English law is treated as governing the position mutatis mutandis.

47 Mr Lyndon-Stanford opposes the admission of new evidence. He relies on the many statements in this court since the Civil Procedure Rules came into force that the guidance in *Ladd v Marshall* [1954] 1 WLR 1489 on the conditions to be satisfied if new evidence is to be admitted continues to be relevant, and submits that none of those conditions is satisfied.

48 Mr Michael Roberts for Mr Bedrawi advances arguments supportive of the stance adopted by Mr Lyndon-Stanford. He opposes Mr Shaker being allowed to rely on a new case merely because there has been a change of

counsel. He says that it was assumed in the court below that money was misappropriated by Mr Bedrawi, and he points out that it is not part of Mr Bedrawi's case that he had some legal right to the proceeds of sale. Mr Bedrawi's defence takes the point, which has not yet been determined, that he was entitled under the investment agreement to invest the proceeds of sale in a further project. He argues that it follows from the finding by the judge that Mr Shaker's interest was in shares that there was a misappropriation of money due to ANA Inc. He says that the judge made a clear finding that there were unsatisfied creditors of ANA Inc and he submits that that cannot be reconciled with any submission that the moneys paid to Qube were taken out properly. He does not accept that any part of the $6m could be a profit for which Mr Bedrawi must account to Mr Shaker.

F Conclusions

New case

49 Commendable though the attempt was to secure a saving in time and costs through a preliminary issue at the commencement of a lengthy trial, this case provides an example of the difficulties inherent in such a course and of the complications which may result.

50 It is right to emphasise the limited nature of the exercise on which the judge was engaged and the limited factual inquiry which he undertook and for which he allowed oral evidence to be heard. His stated aim was to determine whether by reason of the *Prudential* principle Mr Shaker had no cause of action against the defendants. Whether he had such a cause of action was to be determined on the footing that the facts asserted in his statements of case, his witness statement and his answer to the notice to admit were true, and on the basis of such oral evidence as the judge allowed, in the event that of Mr Shaker alone and that only on the question whether the investment by him was in shares or in a business In fact the judge, having determined that the investment was not in the business but in shares, unsurprisingly went on to declare the company in which Mr Shaker had his interest. But the finding that the shares were those in ANA Inc when it was not part of Mr Shaker's pleaded case that he had an interest in the company has itself given rise to a problem in this court, and it is unfortunate that the question whether the pleadings should be amended to accord with the judge's conclusion was not raised below.

51 When Mr Shaker's application to amend in this court was opposed and countered with an application by Steggles Palmer to appeal out of time on the finding in relation to ANA Inc, which would have involved consideration of whether there was material before the judge to justify that conclusion, we indicated that we would not determine either application on this appeal hearing. We said that we would continue to hear the appeal on the same basis as the matter was before the judge, with the pleadings unamended, and that any application to amend should be made to the High Court. We left it to Steggles Palmer to choose whether to seek an extension of time to appeal against the finding on ANA Inc, it being noted that they had taken the point on this appeal.

52 It is not in doubt that this court has a discretion whether to allow a new point to be taken on appeal. It is the settled practice not to allow such a point if it depends on further evidence or, if the point had been taken below

other evidence would have been called or sought to be elicited in cross-examination which was not called or sought to be elicited. But this is not such a case. Mr Lyndon-Stanford drew our attention to a number of authorities: *Ex p Reddish; In re Walton* (1877) 5 Ch D 882, *Ley v Hamilton* (1935) 153 LT 384, *Wilson v Liverpool Corpn* [1971] 1 WLR 302 and *In re Barrell Enterprises* [1973] 1 WLR 19. But we intend no discourtesy to him when we say that we did not derive much assistance from them. None is comparable to the present case. Each case turns on its own facts and in each the court must exercise its discretion to do what is just in all the circumstances, having regard to the overriding objective.

53 There is no doubt but that the thrust of the argument for Mr Shaker below was that his interest was in the business and not in shares and that thereby the *Prudential* principle was avoided. That argument is not repeated in this court, and so Mr Shaker's appeal would fail if he were not permitted to put his case in any other way. However, in considering whether it is just to allow Mr Shaker's case in this court to be put as Mr Steinfeld urges, it is relevant to see to what extent that case is a new one.

54 Subject only to the point that the relevant company was ANA Inc and not ANA Ltd, Mr Steinfeld in his primary argument does not rely on any fact, nor make any claim, which is not within Mr Shaker's statement of case. Mr Shaker's claim is as a beneficiary under a trust against the trustee, Mr Bedrawi, who is liable to account for the profit he has taken from the sale of ANA TV and ANA Radio. On this point we do not regard the failure to plead that the trust extended to the shares of ANA Inc as a weighty consideration against Mr Steinfeld being allowed to advance his primary argument. For the defendants' arguments on the preliminary issue, it was immaterial whether ANA Inc or ANA Ltd was the relevant company and, for the purpose of arguing the trustee's liability to account to his beneficiary for a profit, it matters not whether the company was ANA Inc or ANA Ltd.

55 A more difficult point arises from Mr Steinfeld's argument that the $6m paid to Qube could have been lawfully extracted by Mr Bedrawi. That argument, the defendants say, was not merely not put to the judge but it was accepted by Mr Shaker that the moneys were misappropriated. That the moneys were stolen was forcefully argued for some of the defendants. Further the judge appears to have thought that Mr Shaker's case was to that effect. Thus, as appears from the transcript for 27 June 2001, the judge put to counsel for Mr Shaker: "The whole basis of your case is that Mr Bedrawi was stealing the money from the company and hiding that fact from the claimant." Counsel did not challenge that suggestion. There are passages in the judge's judgments (including a judgment on 29 June 2001 on whether amendments to Mr Shaker's pleadings should be allowed) which show that he was proceeding on the footing that there had been a misappropriation by Mr Bedrawi of the assets of ANA Inc for which he was answerable to the company.

56 However, we have not been able to see where in fact that point was put as any part of Mr Shaker's case. It is not in Mr Shaker's pleadings. In paragraph 34 of the first statement of claim it is pleaded that Mr Bedrawi acted in breach of fiduciary duty to the beneficiaries in that (a) by "diverting the sum of US$6m out of the proceeds of the sale to Qube and concealing that fact from the beneficiaries, Mr Bedrawi made a secret profit from the

A sale to his own benefit and to the detriment of the beneficiaries". That is clearly an allegation of misappropriation of what should have gone to the beneficiaries and says nothing about a breach of duty to ANA Inc. In the answer to the notice to admit facts it is denied that ANA Inc has any claim against Mr Bedrawi. Nor have we been shown any clear statements that Mr Shaker was alleging misappropriation from the company. In the B judgment the judge assumes in section X that Mr Shaker is right in his claims that Mr Bedrawi misappropriated the proceeds of sale. But Mr Shaker's claim was that the misappropriation was from Mr Shaker and Mr Adham. The judge says that "On the assumed facts, there can be no doubt that ANA Inc would have claims for breach of fiduciary duty against Mr Bedrawi", but there is no finding that there was a misappropriation by Mr Bedrawi of the company's moneys, nor could there be given that the C judge had expressly limited himself to the finding of fact he was making.

57 Mr Lyndon-Stanford also argued that this point was not covered by Mr Shaker's grounds of appeal in his appellant's notice. We do not agree. The grounds include the following:

> "(2) The judge was wrong in law or misdirected himself or took into account irrelevant facts . . . (e) in assuming that there has been an D unlawful distribution of assets of ANA Inc in breach of its director's fiduciary duty under Pennsylvanian law, despite the absence of any pleading or admissible evidence of any facts relating to such distribution or breach of such law."

58 There could of course be costs consequences for Mr Shaker if he is allowed to pursue his primary argument and succeeds on this appeal on that E argument when it was not argued before the judge. Mr Steinfeld accepts that. In our judgment, in all the circumstances, to deal with this case justly it is appropriate to exercise the discretion to allow the primary argument, heralded in the pleadings, to be advanced on this appeal.

Accounting for a profit

F 59 Mr Steinfeld, in submitting that a trustee is prohibited from taking a secret profit derived from the use of trust property, has referred us to a number of cases including *Phipps v Boardman* [1967] 2 AC 46, *In re Macadam* [1946] Ch 73, *In re Gee, decd* [1948] Ch 284, *Swain v Law Society* [1982] 1 WLR 17 and *Attorney General for Hong Kong v Reid* [1994] 1 AC 324. He argues that by virtue of Mr Bedrawi's holding of 70% G of the shares in ANA Inc as trustee for Mr Shaker and Mr Adham, he was the sole director and in sole control of ANA Inc's affairs and able to take $6m in Qube. We did not understand Mr Lyndon-Stanford to submit that, if there was a trust of the shares of ANA Inc, Mr Bedrawi would not be liable to account to Mr Shaker for any profit to the extent that the $6m was not stolen from the company but was lawfully taken by Mr Bedrawi. Mr Lyndon-Stanford's stance was that the moneys were stolen and that equity would not H allow a beneficiary to make a claim to share in the stolen proceeds. Mr Steinfeld's riposte was that if a bribe had to be accounted for as in the *Reid* case, there was no reason why the trustee should not be required to account to a beneficiary for stolen moneys It is unnecessary to resolve that dispute. It is sufficient to say that we accept Mr Steinfeld's submission that

to the extent that Mr Bedrawi took at least part of the $6m without being in breach of any fiduciary duty to ANA Inc, he would have to account to his beneficiary for that profit, referable as it was to the trust holding of shares in ANA Inc.

Unlawful distribution

60 If the correct characterisation of the payment by ANA Inc is that it constituted a breach of duty owed by Mr Bedrawi to ANA Inc (whether because it was an unlawful distribution or because he stole the money from ANA Inc), then under English law ANA Inc would have a right of action against Mr Bedrawi for the whole of the loss which Mr Shaker seeks to recover in this action from Mr Bedrawi and the *Prudential* principle would apply. However, as already explained, it was not part of Mr Shaker's case that the abstraction by Mr Bedrawi from ANA Inc of $6m was in breach of his duty to ANA Inc or an unlawful distribution or otherwise involved a breach of duty by Mr Bedrawi to ANA Inc. Accordingly, the defendants had to satisfy the court that it was the inevitable conclusion from the facts which were admitted or agreed to be assumed for the purposes of the preliminary issue that the abstraction of funds was a breach of duty by Mr Bedrawi to ANA Inc and that it was appropriate for the court to apply English law as there was no evidence of Pennsylvanian law, being the law which would otherwise apply to the question whether a director of ANA Inc had acted in breach of duty to it

61 At this stage, the legal basis for the abstraction of the $6m is neither admitted nor the subject of an agreed assumption. One possibility is that the $6m was a distribution of profits arising on the sale of assets to MBC. The judge considered this possibility but, as there was no evidence as to the law of Pennsylvania, he applied provisions of Part VIII of the Companies Act 1985. Part VIII applies to companies registered in England under the Companies Acts (and thus not to companies which are incorporated here but not under the Companies Acts). Part VIII re-enacts certain provisions of the Companies Act 1980 which (in relation to public companies) were designed to implement provisions of the Second EC Directive on Company Law (77/91/EEC) (reprinted in *Buckley on the Companies Acts*, looseleaf ed, vol III, division U, A[11]). The Second Directive was a harmonisation measure which was required to be implemented into the domestic law of the member states and represented the minimum safeguards to be given to members and creditors. Member states could therefore extend these safeguards.

62 The incorporation of the provisions of the Second Directive relating to distributions into domestic law made a number of changes to English law. In particular, distributions could in general only be made out of net "realised" profits (see now section 263(3) of the 1985 Act) whereas prior to 1980 companies could in general pay dividends out of unrealised profits subject to certain conditions. Moreover, after the Companies Act 1980 came into force, public companies could not make a distribution out of current trading profits if there was a deficit on reserves (see now section 264 of the 1985 Act). This is contrary to the position prior to 1980. Furthermore no distribution could be made unless there were accounts (called relevant accounts) which showed that the company had the requisite

A profits and complied with certain statutory requirements. The requirements are mandatory and if a distribution is made in breach of these requirements it is no answer to show that the company could have drawn up accounts which complied with the requirements: see *Precision Dippings Ltd v Precision Dippings Marketing* Ltd [1986] Ch 447. This is a harsh consequence and a matter on which different legal systems might take a B different view. Previously, under English law it had not been necessary to have "relevant" or any accounts.

63 The judge applied the provisions of the 1985 Act, in particular the provision requiring companies to have "relevant accounts" before making any distribution. He held that this was a generally applicable rule. The inevitable result of the application of Part VIII was that (if the $6m was not otherwise stolen from ANA Inc) it must have been an unlawful distribution. C Was the judge correct to apply English law and specifically these provisions?

64 According to *Dicey & Morris, The Conflict of Laws*, 13th ed, p 232, para 9-025, where a party adduces no evidence or insufficient evidence of foreign law, the court applies English law and there is only one true exception to this principle, that is in a trial for bigamy where the first marriage was contracted abroad. In the opinion of *Dicey & Morris*, it is not D clear that there is a further exception where the question is purely one of statute law. However, it is apparent that there are other exceptions apart from those which *Dicey & Morris* cites. For instance, the court does not apply English law to a foreign transaction to which it would not otherwise be applicable simply because a party fails to prove the applicable foreign law in a situation where English law creates some special institution: see the obiter dictum of Roskill LJ in *Österreichische Länderbank v S'Elite Ltd* E [1981] QB 565, 569 (fraudulent preference). Nor does the principle apply in prosecutions generally in respect of acts committed abroad where the acts in question may be lawful under the law of the place of performance. Nor need the principle be applied in proceedings for summary judgment: *National Shipping Corpn v Arab* [1971] 2 Lloyd's Rep 363. In certain circumstances, the court does not apply the principle where it is asked to construe a F document governed by foreign law. These authorities show that the principle is not applied inflexibly. For a discussion of the exceptions generally, see *Fentiman, Foreign Law in English Courts* (1998), chapters III and IV, and Trevor C Hartley, "Pleading and Proof of Foreign Law: The Major European Systems Compared" (1996) 45 ICLQ 271. We further note that in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, G 970 Lord Wilberforce described the principle as one "never more than a fragile support" in the context of an issue as to the effect of a foreign judgment where its effect under foreign law was not proved.

65 Mr Lyndon-Stanford relied on a large number of authorities to show that the court had to apply English law if foreign law was not pleaded and proved, for instance *Dynamit AG v Rio Tinto Co Ltd* [1918] AC 260, 294, 300, 301. He submitted that, in cases where the courts had declined to apply H this "default" rule, there was some explanation on the particular facts of the case, as in *Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337 (issue as to whether threat of passing off abroad), and *Guépratte v Young* (1851) 4 De G & Sm 217 (appeal from master's finding as to French law). Apart from the dictum of Roskill LJ referred to above, no English authority was

cited to us by Mr Lyndon-Stanford (or by other counsel) dealing with the question whether, under the "default" rule, the court can apply a purely domestic statute of the lex fori which would otherwise have no application. However, Mr Lyndon-Stanford relied on authorities from other jurisdictions, including *The Ship Mercury Bell v Amosin* (1986) 27 DLR (4th) 641, a decision of the Federal Court of Appeal of Canada. In that case, the court recognised the undesirability of applying purely local legislation to disputes having no connection with the jurisdiction. It rejected any simple division between the common law and statute law and held that domestic statute law could be applied under the "default" rule where the statute potentially had some degree of universality. In the present case, the parties were content for this court to proceed on the basis that that was also a requirement of the English "default" rule. Indeed the judge proceeded on that basis as well. Mr Lyndon-Stanford submitted that the court was bound to apply the "default" rule unless the result was unfair, as on an interim application. However, he contended that the court was bound to apply the "default" rule in the present case, even though the court was deciding a preliminary issue only, because the issue was heard at the start of the trial. In our judgment, the trial of the preliminary issue in this case was more akin to an interim application than to the trial itself, since it was heard on a factual basis agreed for the purpose of that preliminary issue only.

66 Furthermore, in the present situation, the 1985 Act cannot be applied literally to the Pennsylvanian company since Part VIII is only applicable to companies registered under the Companies Acts, and the statutory requirement to produce "relevant accounts" in a particular form (such as, in the case of the annual accounts, in the form required by Part VII of the 1985 Act) cannot apply to it. Mr Lyndon-Stanford accepts that Part VIII can only apply in an adapted form, meaning that if to satisfy Part VIII ANA Inc would have to produce accounts in a particular form ANA Inc would have to produce whatever accounts Pennsylvanian law required. But what if, for instance, Pennsylvanian law has no such requirement? How is English law then to be applied? Mr Lyndon-Stanford's submissions leave that point unresolved and it is an Achilles' heel in his argument. We find it difficult to accept that if English law is to be applied as the lex causae it can be applied in a form adapted to the degree necessary on Mr Lyndon-Stanford's argument. Either it applies to a Pennsylvanian company or it does not so apply. The fact (if it be the case) that the provision which would have to be adapted does not apply in this particular instance would be immaterial since Part VIII is a composite set of rules Moreover it seems to us to be inconsistent with the notion that English law is the lex causae that it should take account of Pennsylvanian law in this way.

67 The starting point must be that not every English statute is to be applied to a transaction because a party has either chosen not to prove or failed to prove the law which is otherwise applicable. On the face of it, Part VIII is inapplicable to a company not registered under the Companies Acts. Thus the judge was correct to seek to satisfy himself that Part VIII did not represent some merely domestic rule of English law. He did so by asking whether the requirements of Part VIII with which he was concerned represented a generally applicable rule of company law. As we have said,

A Mr Lyndon-Stanford has made his submissions on the basis that this requirement has to be met and we are content also to accept that as the test in the circumstances of this case. However if a rule of English statute law has to be adapted in the way explained above before it can apply, then, although it is not necessary to express a final view on this point on this appeal, it may well be that that factor alone is a sufficient indication that the case falls B within the class of case where English statute law creates some special institution and thus cannot be applied simply because a party has failed to prove the relevant foreign law.

68 We doubt if the question whether (as Mr Lyndon-Stanford admitted was the position regarding the requirement for relevant accounts) it is realistic to expect a foreign law to contain a provision found in English law is a relevant consideration in deciding whether to apply English law as the lex C causae in default of proof of foreign law. If it were, our view is that it is probably unrealistic to expect the law of Pennsylvania, which is a common law jurisdiction, to have a provision derived from the civilian systems of the European Community, viz, that before a distribution is made the company must have accounts which show the requisite level of profit There is no evidence to suggest that the provisions of Part VIII represent requirements of D company law generally recognised outside the European Community, and Mr Lyndon-Stanford did not seek so to suggest.

69 Mr Lyndon-Stanford's submission was that it was sufficient that the requirement for relevant accounts is recognised in the European Community. We accept that in some circumstances it may be appropriate to infer that a requirement of a harmonisation measure emanating from the E European Community reflects some generally accepted rule of law so that it should be applied even if it is only to be found in a domestic statute which is not applicable to the transaction in question. We will for the purposes of the argument assume that the Second Directive, *within its field of operation,* does show that there is a generally applicable principle of company law that a company should have accounts before it makes a distribution (though the fact that harmonisation was necessary suggests that it was not previously the F universal rule). However the measure in point here (the Second Directive) in effect applies only to public companies; it does not apply to private companies in the United Kingdom or their equivalent in other member states. The judge did not assume and could not assume that ANA Inc was a public company Should the court accept the Second Directive as sufficient to show that that principle of company law is generally applicable not just to G public companies but also to private companies? The law of other member states regarding private companies may be the same, but equally it could also be different, just as the common law was different (in relation to both public and private companies) in this country prior to 1980. In our judgment, because of the particular context in which this issue arises, namely that the court is dealing with a preliminary issue only and the question is the application of the *Prudential* principle which, if applicable, would constitute H an absolute bar in limine to Mr Shaker's claim, the court should not accept at this stage the Second Directive as showing that the requirement for relevant accounts is one which is generally applicable to private companies and thus should be applied to ANA Inc. The distinction may be thought to be a fine one, but the safeguards which the law requires for members and

creditors of private companies are often less than those required for members and creditors of public companies and it is common to recognise that private companies are often run with more informality than public companies

70 However, on the assumption that at trial there is an issue as to the legality of a distribution made by Mr Bedrawi, if at trial Mr Shaker fails to prove the applicable foreign law, and the court is not satisfied that the requirement for relevant accounts in Part VIII is some special institution of English law so far as private companies are concerned, then the *Prudential* principle will apply. That conclusion is not however one which was open to the judge on this preliminary issue on the material which is before the court.

71 If in those circumstances Mr Shaker fails to prove foreign law, and Part VIII is inapplicable, the court will still be able to apply the common law rule that a dividend must be paid out of profits. This rule remains part of English law even in relation to companies to which Part VIII applies: see section 281 of the 1985 Act. There would not seem to be any doubt but that it is a generally recognised principle of company law that a distribution to members must be made out of profits. However if, in this case, the proceeds of sale are written back into the last available management accounts, there would clearly have been sufficient distributable profits, on the basis of the figures in these accounts, to make a distribution of $6m. The judge states later in his judgment that the evidence suggested that judgment creditors were unpaid. There are, however, no findings on this nor as to the amount of any such creditors. On the evidence available it is not possible to reach the conclusion that the amount of such creditors would inevitably eliminate any question of profit.

72 Further, as Mr Steinfeld submitted, it is possible that there are two other ways in which at least part of the $6m might have been lawfully extracted from ANA Inc, that is to say as a repayment of a debt and as remuneration. That possibility cannot be dismissed as fanciful. We do not accept Mr Roberts's submission that the judge made a clear finding that there were unsatisfied creditors of ANA Inc. What the judge said was that the evidence suggested that ANA Inc was in a poor financial condition prior to the sale and that thereafter there were unsatisfied judgment creditors. But he went on to say that these would have been matters which would have required investigation if, as did not happen, the point had been pleaded and pursued. It is in our view plain that the judge made no finding on the point. These are matters of fact and law which may have to be gone into at trial if this appeal is allowed.

Applicability of the Prudential principle

73 The question which therefore arises is whether the *Prudential* principle also applies in circumstances where a beneficiary with an equitable interest in a company's shares which are held in trust by a trustee sues the trustee for an account of the profit taken by the trustee, that profit being moneys in respect of which the company may have a prior claim against the trustee in his capacity as a director of the company for breach of fiduciary duty. Or to put it the other way round, does the *Prudential* principle debar the beneficiary's claim when the possibility cannot be excluded that the

A claim may extend to moneys lawfully extracted in respect of which the company can have no claim against the trustee director?

74 The broadest way in which Mr Steinfeld puts his case is that a claim by a beneficiary against his trustee, holding shares in a company on trust, to account for a profit, being a claim different in nature from any claim which the company could properly bring against the trustee, is not caught by the B *Prudential* principle. Mr Steinfeld relied on two cases.

75 The first was *In re Lucking's Will Trusts* [1968] 1 WLR 866. In that case the majority shareholding in a private company was held by the trustees of a will. One of the trustees, Mr Lucking, was a director of the company. He was aware that the managing director was making substantial withdrawals from the company but failed to supervise those drawings, none of which the company was able to recover. A beneficiary brought an action C against the trustees for breach of trust. Although the company would appear to have had a cause of action against Mr Lucking for breach of fiduciary duty to the company, Cross J did not regard that as any bar to an action by the beneficiary against the trustees. Cross J said, at p 873:

> "The claim is for breach of trusts alleged to have been committed by D both trustees as holders of 70% of the shares in the company, not a claim against Mr Lucking for breach of his duty to the company as one of its directors."

And at p 875:

> "He was in the position he was partly as a representative of the trust E and if and so far as he failed in his duty to the company he also failed in his duty to the trust To hold this is not, as I see it, inconsistent with [*Salomon v A Salomon & Co Ltd* [1897] AC 22]."

Cross J held Mr Lucking liable for breach of trust.

76 The second authority was the decision of this court in *Walker v Stones* [2001] QB 902. The facts assumed to be true in that case were that F two trustees, Mr Stones and one other, held all the shares in a holding company, which in turn held a controlling interest in another company, Jasaro. Jasaro owned the equity in two further companies, Holt and SHL. Mr Stones on behalf of the trustees guaranteed a bank loan to Jasaro, charging the trust's shares in Jasaro to the bank. Jasaro became insolvent, the guarantee was called in and the bank took control of the holding G company. The beneficiaries under the trust sued the trustees for breach of trust in causing or allowing the value of the shares in the holding company to be diminished by causing or allowing the assets of the holding company and of subsidiaries of the holding company to be dissipated by improper diversions or use of assets. The trustees applied to strike out the claim and the beneficiaries applied to amend their pleading to allege that Mr Stones had been guilty of dishonest breaches of trust and had dishonestly H acquiesced in and assisted in concealing the wrongful diversion of funds from Jasaro and its subsidiaries Rattee J held that the *Prudential* principle applied to prevent the beneficiaries' bringing claims in respect of the diverted funds. This court allowed the beneficiaries' appeal on that point. Sir Christopher Slade (with whom Nourse and Mantell LJJ agreed) reviewed

the authorities and expressed his views on the conditions to be satisfied if the *Prudential* principle was not to apply, at pp 932–933: A

> "the *Prudential* . . . . principle will not operate to deprive a plaintiff of an otherwise good cause of action in a case where (a) the plaintiff can establish that the defendant's conduct has constituted a breach of some legal duty owed to him personally (whether under the law of contract, torts, trusts or any other branch of the law) *and* (b) on its assessment of the facts, the court is satisfied that such breach of duty has caused him personal loss, separate and distinct from any loss that may have been occasioned to any corporate body in which he may be financially interested." (Emphasis added) B

That statement was quoted with approval by Lord Hutton in *Johnson v Gore Wood & Co* [2002] 2 AC 1, 51 when subsequently it reached the House of Lords. C

77 Sir Christopher Slade found that on the assumed facts both conditions were satisfied. He said that the beneficiaries suffered loss quite separate and distinct from any loss which may have been suffered by Jasaro, Holt and SHL because (1) the causes of action against the trustees were quite different in nature and would be based on different types of misconduct from those on which any of the three companies would rely in seeking to recover their lost assets, (2) the principal defendants in any claim by the companies could not be the trustees who could be open to attack, if at all, only as accessories, and (3) while there would be some overlap between the amounts potentially recoverable by the beneficiaries and those recoverable by each company, those amounts would not necessarily be the same, having regard to the very different nature and origins of the claims. More generally, Sir Christopher Slade expressed the view that policy considerations pointed against the *Prudential* principle always affording a defence to a trustee guilty of a breach of his duty to supervise trust investments including a controlling interest in a company, when the company has a claim against a director or manager who has mismanaged its corporate affairs. He followed the decision in *Lucking's* case [1968] 1 WLR 866 in holding that the *Prudential* principle did not bar the beneficiaries' claims against the trustees. We have been told that the House of Lords has granted the trustees permission to appeal on this and other points. D E F

78 However the House of Lords did not grant such permission on another point on which this court refused the beneficiaries' application to amend. The beneficiaries applied to join a Mr Hemingway as a defendant. He was not a trustee of the trust, nor a director of any company in which directly or indirectly the trustees had an interest. The beneficiaries sought to allege that he had participated in the breaches of trust on the part of the trustees in dishonestly assisting the wrongful diversion of Jasaro's moneys and that he had thereby become a constructive trustee. Rattee J held that the *Prudential* principle applied to bar the claims against him, and this court agreed. Sir Christopher Slade said that on the assumption that Mr Hemingway dishonestly assisted Mr Stones in dishonest breaches of trust which were at least a partial cause of the losses of the three companies, those companies would themselves have a cause of action against Mr Hemingway for dishonestly assisting Mr Stones's conduct which caused the losses, G H

A thereby exposing himself to liability as a constructive trustee. The causes of action of the beneficiaries would be the same as those of the companies, being based on the same facts, and the proper claimants would be the companies. The claims for recoverable loss would entirely overlap.

79 Mr Steinfeld submitted that Mr Shaker's claim in the present case was a fortiori that of the beneficiaries in the *Walker* case [2001] QB 902
B claiming against the trustees. In the *Walker* case there were stronger grounds for saying that the loss claimed by the beneficiaries was reflective of loss suffered by the companies in which the trust had an interest. In the present case, he argued, in seeking an account of a profit taken by the trustee, Mr Bedrawi, Mr Shaker had a good claim even if there was no breach of any duty owed by Mr Bedrawi to ANA Inc. He further submitted that that part of the decision in the *Walker* case which related to Mr Hemingway was of no
C assistance because Mr Hemingway was not a trustee.

80 Mr Steinfeld argues from these cases that where a beneficiary has a proprietary claim against the trustee director to moneys for which an account is sought, the *Prudential* principle can have no application, and that instead the court should recognise that the potential claim of the company against the director to those moneys gives rise to competing claims to a
D single fund, and that to the extent that the company's claim does not succeed the beneficiary's claim should prevail. Otherwise, he submits, the delinquent trustee would succeed in profiting from his trust.

81 Mr Lyndon-Stanford points to the fact that the *Lucking* [1968] 1 WLR 866 and *Walker* [2001] QB 902 cases were decided prior to the decision of the House of Lords in *Johnson's* case [2002] 2 AC 1, and to the
E view of the judge in the present case that at least part of the reasoning in the *Walker* case cannot stand with *Johnson*'s case. We agree with Mr Lyndon-Stanford that if the claim by Mr Shaker for an account is in substance a claim to moneys to which ANA Inc has a claim against Mr Bedrawi, then consistently with the reasoning in *Johnson's* case the *Prudential* principle would bar Mr Shaker's claim for what in effect reflects part of the loss suffered by ANA Inc, and it matters not that the causes of
F action of Mr Shaker and ANA Inc are different. Nor does it matter that ANA Inc has not yet brought proceedings against Mr Bedrawi: the *Prudential* principle still bars a claim reflective of the company's loss: see *Johnson*'s case at p 35 per Lord Bingham and at p 66 per Lord Millett.

82 Mr Lyndon-Stanford relies on that part of the decision of this court in *Walker's* case which pertained to Mr Hemingway, particularly in view of
G the refusal by the House of Lords of permission to appeal on that aspect. But whilst we can see how an analogy can be drawn between Steggles Palmer dishonestly, as it is alleged, assisting Mr Bedrawi in a breach of duty causing loss to ANA Inc and Mr Hemingway dishonestly assisting Mr Stones as trustee in breaches of duty which caused loss to Jasaro, Holt and the holding company, this does not throw any light on what seems to us to be the crucial point in the present case, viz whether Mr Shaker has a sustainable claim to
H moneys to which ANA Inc is not entitled because they were properly extracted from ANA Inc by Mr Bedrawi.

83 In our judgment the *Prudential* principle does not preclude an action brought by a claimant not as a shareholder but as a beneficiary under a trust against his trustee for a profit unless it can be shown by the defendants that

the whole of the claimed profit reflects what the company has lost and which it has a cause of action to recover. As the *Prudential* principle is an exclusionary rule denying a claimant what otherwise would be his right to sue, the onus must be on the defendants to establish its applicability. Further, it would not be right to bar the claimant's action unless the defendants can establish not merely that the company has a claim to recover a loss reflected by the profit, but that such claim is available on the facts. If in the present case it could be shown that the $6m was misappropriated from ANA Inc or unlawfully distributed so that ANA Inc was entitled to the whole of the $6m, we would accept that the *Prudential* principle applied to bar Mr Shaker's action.

84 However, for the reasons already given, that has not been, and cannot without a trial be, shown. It is possible that at least part of the $6m was lawfully taken by Mr Bedrawi. Accordingly we respectfully disagree with the conclusion of the judge that the *Prudential* principle applies to prevent Mr Shaker proceeding against Mr Bedrawi in relation to the proceeds of sale

85 Similar considerations apply in relation to the main part of the claim against Steggles Palmer, that of dishonestly assisting in Mr Bedrawi's breach of trust. The applicability of the *Prudential* principle to the knowing receipt claim, which is restricted to the small extent to which Steggles Palmer's fees were paid from the $6m, also turns on whether the moneys were lawfully extracted. As for the deceit claim, only Mr Shaker had a cause of action in deceit and we do not agree with the judge's view that the relevant alleged conduct would have amounted to dishonest concealment, for which ANA Inc would have had a cause of action. However, as the complaint is that Mr Shaker was deceived by Steggles Palmer into not taking action to preserve that part of the $6m which was still capable of being preserved in Steggles Palmer's or Qube's hands, the applicability of the *Prudential* principle to this claim again turns on the question of the lawful or unlawful extraction from ANA Inc of the $6m. In our judgment for the reasons already given, the *Prudential* principle does not bar the proceedings against Steggles Palmer.

86 We confess that we are the happier to reach this conclusion in view of the improbability that ANA Inc would now bring an action against Mr Bedrawi when it has not done so for over eight years since the payment of the $6m to Qube. In circumstances where the *Prudential* principle applies to bar a viable claim on the footing of the company's cause of action which it does not assert, the application of the principle can work hardship. Moreover in this case the application of the principle might serve to leave the trustee holding a profit without being accountable for it to his beneficiary, and that may run counter to a basic equitable principle.

Application for new evidence

87 These conclusions, reached without the new evidence which Mr Shaker sought to adduce, would have rendered it strictly unnecessary to consider the application referred to in para 42 above. But we indicated in the course of the hearing that we refused that application for reasons which we would give in the judgment, and we give those reasons briefly now.

A 88 Under CPR r 52.11(2)(b) evidence not before the lower court is not to be admitted on an appeal unless the court otherwise orders. The rule does not use the language found in the Rules of the Supreme Court which only allowed the admission of new evidence if there were special circumstances present, and the decision of this court in *Ladd v Marshall* [1954] 1 WLR 1489 laid down the three familiar conditions that needed to be satisfied for
B such special circumstances to be present. However, since the introduction of the Civil Procedure Rules this court has repeatedly stated that the conditions of *Ladd v Marshall* continue to be relevant in deciding whether it is appropriate to order that the new evidence be admitted, though this discretion, like every discretion under the rules, must be exercised having regard to the overriding objective: see, for example, *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318. It will be a rare case where the
C *Ladd v Marshall* conditions are not satisfied but the court will nevertheless admit new evidence on the appeal.

89 In our judgment this application fails on the first of the *Ladd v Marshall* conditions, that the evidence could not have been obtained with reasonable diligence for use at the trial. Contrary to normal practice, no evidence has been led to explain why it would not have been possible to
D obtain the new evidence for use at the trial by the exercise of reasonable diligence. Mr Shaker was put on notice that the defendants were taking the *Prudential* principle point by way of defence as long ago as 9 February 2000 and yet it appears that he did nothing to obtain evidence for the trial to prove that under Pennsylvania law there would be no such defence To refuse to admit such evidence now entirely accords with the overriding objective. It would not have been fair on the defendants to have to meet this new
E evidence adduced so shortly before the appeal hearing. For these reasons the application was refused.

Appeal allowed
Permission to appeal refused.

F *Solicitors: Amhurst Brown Colombotti; Dawsons; Lovells.*

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