

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

PASHA S. ANWAR, *et al.*,

Plaintiffs,

v.

FAIRFIELD GREENWICH LIMITED, *et al.*,

Defendant.

Master File No. 09-cv-118 (VM)

This Document Relates To: All Actions

**AFFIDAVIT OF ROBERT MILES, Q.C.**

# Exhibit 3

Court of Appeal

**Shaker v Al-Bedrawi and others**  
**Shaker v Masry and another**  
**Shaker v Steggles Palmer (a firm) and others**

[2002] EWCA Civ 1452

2002 July 8, 9, 11, 12, 15;  
Oct 18

Peter Gibson, Arden LJ and Buckley J

*Trusts — Trustee — Breach of trust — Trust assets shares in company — Director allegedly holding shares on trust for claimant — Claimant suing director as trustee for account of profits from sale of company subsidiaries — Company having possible cause of action against director for whole sum — Possibility of director having lawfully extracted part of sum from company — Whether rule precluding shareholder from recovering company's loss barring claim by beneficiary against director as trustee even though claim might extend to lawfully extracted moneys over which company had no claim*

The claimant claimed to be beneficially entitled to a substantial proportion of a company's shares which he alleged were held on trust for him by the company's sole director. He brought proceedings against the director and other defendants in respect of US\$6m which allegedly formed part of the proceeds of sale of two of the company's subsidiaries. When the proceedings came to trial the defendants sought determination of a preliminary issue. At that stage it was possible, though not yet proven, that the whole of the US\$6m had been misappropriated by the director or unlawfully distributed, in which case the company would have had a cause of action against the director for breach of fiduciary duty extending to the whole sum. It was equally possible, though again not proven, that at least some of the money had been properly extracted by the director from the company, in which case the company would have had no cause of action against the director in respect of that part of the sum. The defendants nevertheless contended that the claimant was barred from bringing his actions as he would be seeking to recover damages that were merely reflective of the company's loss, in respect of which the company itself had a cause of action. The judge accepted that contention. The claimant appealed on the basis that his case against the director was a claim for the director, as trustee, to account to the claimant, as beneficiary, for a due proportion of the US\$6m as a profit deriving from the use of the trust property.

On the claimant's appeal—

*Held*, allowing the appeal, that as the principle that a shareholder could not recover in respect of a claim that was purely reflective of the company's loss was an exclusionary rule denying a claimant what otherwise would be his right to sue, the onus was on the defendant to establish its applicability; that where a claimant brought an action not as a shareholder but as a beneficiary under a trust against his trustee the rule would preclude the claim only if the defendant could show that the whole of the claimed profit reflected what the company had lost and which it had a cause of action to recover; that it would not be right to bar the claimant's action unless the defendant could establish not merely that the company had a claim to recover a loss reflected by the profit, but that such claim was available on the facts; that, consequently, if the defendants could show that the US\$6m had been misappropriated from the company or unlawfully distributed so that the company was entitled to the whole of that sum, the rule would apply to bar the claimant's

- A proceedings; but that since those facts had not been, and could not be, shown without a trial, the rule should not be applied (post, paras 83–85)  
*Per curiam*. 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 (post, para 86).
- B *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, CA and *Walker v Stones* [2001] QB 902, CA considered.  
 Decision of Lawrence Collins J reversed.

The following cases are referred to in the judgment of the court:

- C *Attorney General for Hong Kong v Reid* [1994] 1 AC 324; [1993] 3 WLR 1143; [1994] 1 All ER 1, PC  
*Barrell Enterprises, In re* [1973] 1 WLR 19; [1972] 3 All ER 631, CA  
*Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853; [1966] 3 WLR 125; [1966] 2 All ER 536, HL (E)  
*Dunhill (Alfred) Ltd v Sunoptic SA* [1979] FSR 337, CA  
*Dynamit AG v Rio Tinto Co Ltd* [1918] AC 260, HL (E)  
*Foss v Harbottle* (1843) 2 Hare 461
- D *Gee, decd, In re* [1948] Ch 284; [1948] 1 All ER 498  
*Guepratte v Young* (1851) 4 De G & Sm 217  
*Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318, CA  
*Johnson v Gore Wood & Co* [2002] 2 AC 1; [2001] 2 WLR 72; [2001] 1 All ER 481, HL (E)  
*Ladd v Marshall* [1954] 1 WLR 1489; [1954] 3 All ER 745, CA  
*Ley v Hamilton* (1935) 153 LT 384, HL (E)
- E *Lucking's Will Trusts, In re* [1968] 1 WLR 866; [1967] 3 All ER 726  
*Macadam, In re* [1946] Ch 73; [1945] 2 All ER 664  
*Mercury Bell, The Ship v Amosin* (1986) 27 DLR (4th) 641  
*National Shipping Corp'n v Arab* [1971] 2 Lloyd's Rep 363, CA  
*Österreichische Länderbank v S'Elite Ltd* [1981] QB 565; [1980] 3 WLR 356; [1980] 2 All ER 651, CA  
*Phipps v Boardman* [1967] 2 AC 46; [1966] 3 WLR 1009; [1966] 3 All ER 721, HL (E)
- F *Precision Dippings Ltd v Precision Dippings Marketing Ltd* [1986] Ch 447; [1985] 3 WLR 812, CA  
*Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204; [1982] 2 WLR 31; [1982] 1 All ER 354, CA  
*Reddish, Ex p; In re Walton* (1877) 5 Ch D 882, CA  
*Swain v Law Society* [1982] 1 WLR 17; [1981] 3 All ER 797, CA; [1983] 1 AC 598; [1982] 3 WLR 261; [1982] 2 All ER 827, HL (E)
- G *Walker v Stones* [2001] QB 902; [2001] 2 WLR 623; [2000] 4 All ER 412, CA  
*Wilson v Liverpool Corp'n* [1971] 1 WLR 302; [1971] 1 All ER 628, CA

The following additional cases were cited in argument:

- Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437; [2000] 3 WLR 1423; [2000] 4 All ER 221, CA
- H *Banks v Cox* (unreported) 17 July 2000; Court of Appeal (Civil Division) Transcript No 1476 of 2000, CA  
*Blakeslee v Sottile* (1922) 194 NYS 752  
*Bumper Development Corp'n v Comr of Police of the Metropolis* [1991] 1 WLR 1362; [1991] 4 All ER 638, CA  
*Carlton v Halestrap* (1988) 4 BCC 538

- Christensen v Scott* [1996] 1 NZLR 273 A  
*Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373  
*Eisner v Davis* (1951) 109 NYS 2d 504  
*El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717; [1994] 2 All ER 685, CA  
*Foskett v McKeown* [2001] 1 AC 102; [2000] 2 WLR 1299; [2000] 3 All ER 97, HL (E)  
*Gray v Kerslake* (1957) 11 DLR (2d) 225 B  
*Gruppo Torras SA v Al-Sabah* [1999] CLC 1469  
*Hali Garage (1964) Ltd, In re* [1982] 3 All ER 1016  
*Hamilton v Al-Fayed (No 2)* [2001] EMILR 394, CA  
*Hellens (falsely called Densmore) v Densmore* (1957) 10 DLR (2d) 561  
*Jameson v Smith* [2001] EWCA Civ 1264, CA  
*Keech v Sandford* (1726) Sel Cas Ch 61  
*MCC Proceeds Inc v Bishopsgate Investment Trust plc* [1999] CLC 417, CA C  
*Massie v Barth* (1982) 634 SW 2d 208  
*Pickering v Stephenson* (1872) LR 14 Eq 322  
*Purdum v A E Pavey & Co* (1896) 26 SCR 412  
*Regal (Hastings) Ltd v Gulliver (Note)* [1967] 2 AC 134; [1942] 1 All ER 378, HL (E)  
*Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378; [1995] 3 WLR 64; [1995] 3 All ER 97, PC  
*Salomon v A Salomon & Co Ltd* [1897] AC 22, HL (E) D  
*Schnaider v Jaffe* (1916) 7 CPD 696  
*Stein v Blake* [1998] 1 All ER 724, CA  
*Stewart v Engel* [2000] 1 WLR 2268; [2000] 3 All ER 518, CA  
*Tank of Oslo (A/S) and Agence Maritime L Strauss's Arbitration, In re* [1940] 1 All ER 40, CA  
*United States Surgical Corp'n v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766 E  
*Vierling v Baxter* (1928) 293 Pa 52

#### APPEAL from Lawrence Collins J

By a statement of claim dated 20 January 1999, amended 10 February 2000, the claimant, Ghassan Shaker, brought an action in the Chancery Division against Mohammed Al-Bedrawi, the first defendant. The claimant alleged that there was an agreement to create a "business" to provide a programming service for the Arab American population whereby he and a colleague, Kamal Adham, would advance moneys to Arab Network of America Holdings Ltd ("ANA Ltd") (incorporated in the Isle of Man) to allow Arab Network of America Inc ("ANA Inc") (a company incorporated in Pennsylvania) to trade. Mr Al-Bedrawi was manager and controller of ANA Inc and sole legal proprietor of the shareholding in ANA Ltd. It was alleged, inter alia, that he held the beneficial entitlement to 70% of the shares in ANA Ltd on trust for the claimant and Mr Adham and that his duties as trustee included a duty to account to the shareholders for their 70% share of the profits of the business and of any proceeds of any sale of trust property including the shares in ANA Ltd. The claimant also alleged by amendment that Mr Al-Bedrawi held a trust of 70% of the business in their favour. Mr Al-Bedrawi acting on behalf of ANA Inc entered into a sale agreement with MBC Ltd and Dr Abdullah Masry to purchase two subsidiary companies of ANA Inc. The claimant sought a share of the proceeds of sale which Mr Al-Bedrawi failed to pay in full. He alleged that the defendant

A acted dishonestly and in breach of duties to the beneficiaries under the trust. He claimed an account of all Mr Al-Bedrawi's dealings with the trust property, an account of the true sum raised by Mr Al-Bedrawi and ANA Inc under the sale agreement and as to the proportion of the sale price payable to the claimant, an order for payment of the sums found due, damages for breach of trust/or contract and equitable compensation for breach of  
 B fiduciary duty. The claimant joined Dr Masry as second defendant and Steggle Palmer, a firm of solicitors, as third defendant, to obtain an order for disclosure of documents relating to the sale of the two subsidiary companies.

C By a second statement of claim dated 27 October 1999, amended 10 February 2000, Mr Shaker alleged that the first defendant, Dr Masry, and the second defendant, MBC Ltd, fraudulently misrepresented to the claimant and Mr Adham the sale price of the two subsidiary companies of ANA Inc, conspired with Mr Al-Bedrawi to enable him to make a secret profit and dishonestly assisted him in breach of the trust of the claimant's and Mr Adham's 70% shareholding in ANA Ltd and of the trust of their 70% of the shareholding in the business.

D By a third statement of claim dated 11 February 2000, Mr Shaker commenced an action against Steggle Palmer, the first defendant, and five former partners Mr Peter Edwin Steggle, Mr Christopher Anthony Major Henniker, Mr Geoffrey Edward Morris, Mr John Boyd Quibbell and Mr Gregory Paul Lunnon, the second to sixth defendants, alleging that they knowingly received trust property in the form of fees retained out of the proceeds of the sale of the two subsidiary companies; that they knowingly  
 E participated or dishonestly assisted in Mr Al-Bedrawi's breach of trust or breach of fiduciary duty and that they were guilty of deceit.

F On 26 July 2001 Lawrence Collins J in the Chancery Division determined as a preliminary issue that Mr Shaker was precluded from bringing all three actions against any of the defendants. By notice of appeal dated 14 September 2001 Mr Shaker appealed, with permission of the judge, on the grounds, inter alia, that the judge erred in holding that the principle in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 applied to bar his claim, and that the judge was wrong in law or misdirected himself or took into account irrelevant facts. On 4 July 2002 Mr Shaker withdrew his appeal against Dr Masry (the second defendant in the first action and the first defendant in the second action) and MBC Ltd (the second defendant in the second action). The remaining respondents to  
 G the appeal were Mr Al-Bedrawi (the first defendant in the first action), Steggle Palmer (the third defendant in the first action and the first defendant in the third action) and its five former partners (the second to sixth defendants in the third action).

The facts are stated in the judgment of the court.

H *Alan Steinfeld QC and Adrian Francis* (neither of whom appeared below) for the claimant. The principle in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, as explained in *Johnson v Gore Wood & Co* [2002] 2 AC 1, applies where a claim is brought by or on behalf of a shareholder of a company, the claim is for damages for loss to the shareholder, the loss (through a diminution in value of shares or

distributable assets) is reflective of loss to the company, and the company has its own cause of action to recover the loss. A

The primary claim is to recover from Mr Al-Bedrawi as trustee profit taken from sale of trust property for which he is liable to account: see *Walker v Stones* [2001] QB 902; and contrast *Stein v Blake* [1998] 1 All ER 724. The claims against the Steggle Palmer defendants flow from that claim. A trustee is prohibited from taking a secret profit derived from use of trust property and must account to the trust beneficiaries for any profit so taken: see *Phipps v Boardman* [1967] 2 AC 46; *Regal (Hastings) Ltd v Gulliver (Note)* [1967] 2 AC 134; *Keech v Sandford* (1726) Sel Cas Ch 61; *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. A person who dishonestly assists a breach by a trustee or fiduciary of his duty is liable to account as constructive trustee: see *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378. A person who knowingly receives money applied in breach of trust is also liable as a constructive trustee: see *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437. B C

The claims are thus not claims for damages for the diminution of the value of shares or distributable assets; they are proprietary claims to the profit taken by the trustee. They are for an account from the trustee. The company has no cause of action to obtain such an account. [Reference was made to *In re Lucking's Will Trust* [1968] 1 WLR 866; *Salomon v A Salomon & Co Ltd* [1897] AC 22; *Foskett v McKeown* [2001] 1 AC 102; *Carlton v Halestrap* (1988) 4 BCC 538 and *In re Halt Garage (1964) Ltd* [1982] 3 All ER 1016.] Accordingly, the claims are not barred by the *Prudential* principle, even assuming the company has its own cause of action. In any case, the judge was wrong to assume that Pennsylvania company law governing distributions to shareholders was identical to the Companies Act 1985 and that under Pennsylvania law the *Prudential* principle applied: see *Precision Dippings Ltd v Precision Dippings Marketing Ltd* [1986] Ch 447; *Carl Zeiss Stiftung v Rayer & Keeler Ltd (No 2)* [1967] 1 AC 853; *Alfred Dunhill Ltd v Sunoptics SA* [1979] FSR 337; *Guépratte v Young* (1851) 4 De G & Sm 217; *Österreichische Länderbanke v S'Elite Ltd* [1981] 1 QB 565; *The Ship Mercury Bell v Amosin* (1986) 27 DLR (4th) 614; *Purdon v AE Pavey & Co* (1896) 26 SCR 412; *Hellens (falsely called Densmore) v Densmore* (1957) 10 DLR (2d) 561; *Gray v Kerslake* (1957) 11 DLR (2d) 225; *Schnaider v Jaffe* (1916) 7 CPD 696; *Pickering v Stephenson* (1872) LR 14 Eq 322 and *Christenson v Scott* [1996] 1 NZLR 273. [Reference was also made to *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373; *United States Surgical Corp'n v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766; *Vierling v Baxter* (1928) 293 Pa 52; *Massie v Barth* (1982) 634 SW 2d 203; *Eisner v Davis* (1951) 109 NYS 2d 504 and *Blakeslee v Sotille* (1922) 194 NYS 752.] The court should allow the introduction of fresh evidence to rebut the judge's assumptions: see *Ladd v Marshall* [1954] 1 WLR 1489 and *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318. D E F G H

*Michael Roberts* for Mr Al-Bedrawi. The suggestion that the claims are similar to those in *Walker* and *In re Lucking* is erroneous. The wrong is against the company and it is the company's right to recover the assets. The

A claimant is at best entitled to a dividend from the company once it has met all liabilities: see *Johnson v Gore Wood & Co* [2002] 2 AC 1.

*Michael Lyndon-Stanford QC* and *Guy Newey QC* for the Steggles Palmer defendants. This is an attempt to take new points on appeal when the settled practice is to allow such a point if it depends on further evidence or if other evidence might have been called or sought to be elicited below: see  
 B *Ex p Reddish; In re Walton* (1877) 5 ChD 882; *Ley v Hamilton* (1935) 153 LT 384; *Wilson v Liverpool Corp'n* [1971] 1 WLR 302; *In re Barrell Enterprises* [1973] 1 WLR 19 and *Stewart v Engel* [2000] 1 WLR 2268. The Prudential point does apply. On the assumed facts, the company would have a claim against both Mr Al-Bedrawi and the other defendants and the claimant is in effect attempting to appropriate to himself property belonging  
 C to the company. The money involved in the trustee profit claim is the same money that would be involved in the company's claim—the one is reflective of the other. It is irrelevant that the company has not itself brought proceedings: see *Johnson v Gore Wood & Co* [2002] 2 AC 1, 35F–G and 66E. In any event the claim against the Steggles Palmer defendants is for loss rather than profits: see *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378; *Grupo Torras SA v Al-Sabah* [1999] CLC 1469. The claimant cannot  
 D make good his claim for knowing receipt: see *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685.

The court has to apply English law if foreign law is not pleaded and proved: see *Dynamit AG v Rio Tinto Co Ltd* [1918] AC 260; *In re Tank of Oslo (A/S) and Agence Maritime L Strauss's Arbitration* [1940] 1 All ER 40; *MCC Proceeds Inc v Bishopsgate Investment Trust plc* [1999] CLC 417 and  
 E *Bumper Development Corp'n v Comr of Police of the Metropolis* [1991] 1 WLR 1362; and contrast *Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337 and *Guépratte v Young & De G & Sm* 217. The court is bound to apply the default rule unless (say) the hearing is interlocutory and it would be unfair to do so. Here, it should apply because the issue was heard at the start of the trial and Part VIII of the Companies Act 1985 is potentially of some degree  
 F of universality. It is the substantial provisions of the *lex fori* which are applied pragmatically *mutatis mutandis*: *The Ship Mercury Bell v Amosin* 27 DLR(4th) 641, 650, 652.

Special grounds must be shown to introduce fresh evidence: see *Jameson v Smith* [2001] EWCA Civ 1264; *Banks v Cox* (unreported) 17 July 2000; Court of Appeal (Civil Division) Transcript No 1476 of 2000 and *Hamilton v Al Fayed (No 2)* [2001] EMLR 394. The introduction of new evidence  
 G relating to Pennsylvania law is not permissible under the principles in *Ladd v Marshall* [1954] 1 WLR 1489

*Steinfeld QC* replied.

*Cum adv vult*

H 18 October. PETER GIBSON LJ handed down the following judgment of the court.

#### *A Introduction*

1 In *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, 210 this court (Cumming-Bruce, Templeman and

Brightman LJJ) referred to “the elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C”. The court said that C was the proper plaintiff because C was the party injured and therefore the person in whom the cause of action was vested. This, the court said, was sometimes referred to as the rule in *Foss v Harbottle* (1843) 2 Hare 461 when applied to corporations but commented that it had a wider scope and was fundamental to any rational system of jurisprudence. The court added, at pp 222–223:

“But what [a shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a ‘loss’ is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only ‘loss’ is through the company, in the diminution in the value of the net assets of the company . . .”

2 This principle (“the *Prudential* principle”) has recently been affirmed and further explained by the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1. This appeal is concerned with the applicability, asserted by the defendants but denied by the claimant, of the *Prudential* principle to the particular facts of this case.

3 It is an appeal by Ghassan Shaker, the claimant in three actions arising out of a business venture into which he and a friend entered with Mohammed Al-Bedrawi (“Mr Bedrawi”), the first defendant in the first action. The appeal is from the order of Lawrence Collins J on 26 July 2001 determining as a preliminary issue that the *Prudential* principle precluded Mr Shaker proceeding against any of the defendants in any of the three actions. The appeal is brought with the permission of the judge after hearing the points which leading counsel other than the counsel who had argued the case for Mr Shaker before the judge wished to take on the appeal. Originally it was brought against all the defendants. But as against two defendants it has now been withdrawn: Dr Abdullah Masry, who is the second defendant in the first action and is the first defendant in the second action, and MBC Ltd (“MBC”), the second defendant in the second action.

4 The preliminary issue arose because the defendants took the point that Mr Shaker had no claim against them by reason of the fact that his interest in the business venture was in a corporate vehicle established by Mr Bedrawi. The defendants applied for a number of preliminary issues to be determined, principally relating to the applicability of the *Prudential* principle. The master declined to order a preliminary issue and there was no appeal from his decision. At the commencement of the trial the defendants took the point that the judge should determine as a preliminary issue whether the *Prudential* principle applied to defeat Mr Shaker’s claims. Counsel then appearing for Mr Shaker opposed that application on the ground that there were three matters giving rise to disputed questions of fact requiring resolution at the trial: (1) the scope of the investment agreement; (2) whether the alleged loss to Mr Shaker and Mr Kamal Adham was reflective of the loss suffered by ANA Inc; (3) what causes of action might be open to ANA Inc. The judge thought it plain that the second and third



A questions were essentially questions of law. On the investment agreement the defendants were content for the purpose of the preliminary issue to accept Mr Shaker's evidence in the documents and to argue the legal consequences, and the judge said that he retained a discretion to order oral evidence should it be necessary. He pointed out that if the preliminary issue were decided in favour of the defendants there would be an enormous saving in costs for all parties and in court time. He therefore ordered a preliminary issue in these terms: whether in the light of (a) Mr Shaker's statements of case in the three actions, (b) his witness statement dated 6 April 2001 and (c) an answer in May 2001 to a notice to admit facts, Mr Shaker could proceed against the defendants or any of them in relation to the proceeds of sale referred to in those statements of case.

B  
C  
D 5 Unusually for a preliminary issue, some oral evidence was heard by the judge. But the only application for oral evidence was from Mr Shaker and the only evidence which the judge heard was that of Mr Shaker and that was limited to the question whether the investment by him was in shares of a company or in a business. The judge said that the nature of the investment was the only matter he had to decide on the facts. He held that the investment was in shares, and there is no appeal from that decision. The facts therefore set out in section B of this judgment are those assumed by the judge for the purposes of the preliminary issue. We emphasise that there has been no trial to determine whether the assumed facts are true

*B The facts*

E 6 Mr Shaker is a national of Saudi Arabia and a distinguished businessman and diplomat. He collaborated with a friend, Mr Adham, who had been the head of Saudi external intelligence, in a number of business ventures. Mr Bedrawi is Mr Adham's nephew. In about June 1989 Mr Adham contacted Mr Shaker to ask if he would be interested in investing in a business project which Mr Bedrawi was setting up. Mr Shaker and Mr Adham then met Mr Bedrawi who invited them to provide funding for a satellite/cable television and radio station business in the USA providing a programming service for the Arab American population and catering for Arabic-speaking consumers ("the business"), the proposal being that F Mr Shaker and Mr Adham would provide all the capital while Mr Bedrawi would manage and control the business. Mr Adham and Mr Shaker were supportive but made clear that they did not want an active role in the business and would not serve as directors of any company through which the business was operated. Mr Bedrawi by letter dated 19 June 1989 sent G Mr Shaker a draft subscription agreement which referred to two companies being set up: ANA Holdings Ltd ("ANA Ltd"), an Isle of Man company, and ANA Inc, an American company. ANA is the acronym for Arab Network of America. ANA Ltd was said to be the holding company and ANA Inc was to be the operating company. The draft subscription agreement formed the basis for the parties' subsequent negotiations. After a number of meetings in H June and July 1989 they entered into an oral agreement on the lines proposed by Mr Bedrawi. There is a dispute, which the judge found unnecessary to resolve, as to whether Mr Shaker and Mr Adham took a 70% interest, as Mr Shaker claims, or only 37.5%, as Mr Bedrawi asserts, in the business.

7 Mr Shaker and Mr Adham advanced in total US\$3,840,000, the earlier payments being to ANA Ltd, and from 1990 onwards the remainder to ANA Inc, a company incorporated on 24 April 1989 in Pennsylvania. Mr Shaker's pleadings in the three actions suggest that ANA Ltd was the holding company of ANA Inc and it may be that initially ANA Inc was owned by ANA Ltd, Mr Bedrawi as late as 1991 telling Coopers & Lybrand that ANA Inc was a subsidiary of ANA Ltd. But the shares in ANA Inc are held by Mr Bedrawi and his wife as his nominee and he has at all material times been the sole director.

8 ANA Ltd was struck off the Isle of Man companies' register and dissolved on 24 August 1992. ANA Inc began radio broadcasting in September 1989 and television broadcasting in March 1992. It had two wholly-owned subsidiaries incorporated in Virginia on 29 September 1993, ANA Radio Network Ltd ("ANA Radio") and ANA Television Network Inc ("ANA TV"), through which ANA Inc's business thereafter was operated.

9 MBC ran a business called Middle East Broadcasting Centre of which Dr Masry was the chief executive. In 1993 Mr Bedrawi had discussions with MBC for the sale of ANA Inc to MBC. MBC offered \$10m. In September 1993 a letter of intent was signed for an agreement in principle for the sale of ANA Inc for \$9m. Ultimately it was agreed that MBC would buy from ANA Inc ANA Radio and ANA TV, to which the relevant parts of ANA Inc's business were hived down in anticipation of the sale. In the sale agreement of 25 November 1993 ("the sale agreement") between ANA Inc and the purchaser, ANA Holdings Inc, which is an associated company of MBC, the ostensible price was \$3m; but a side-letter of the same date evidenced the purchaser's payment to ANA Inc of an additional \$6m in consideration of what ANA Inc was granting to the purchaser under the sale agreement. Mr Bedrawi signed the side-letter on behalf of ANA Inc. Further, \$1m was paid to an undisclosed agent, later said by Mr Shaker to be Dr Masry.

10 From about 1992 Mr Bedrawi had English solicitors, Steggle Palmer, acting for him. They are the third defendants in the first action, and they and five former partners are the defendants to the third action. Steggle Palmer on his instructions caused Qube Investments Ltd ("Qube") to be incorporated in the British Virgin Islands. The \$6m was paid to Qube on 2 December 1993.

11 Mr Shaker claimed that Mr Bedrawi falsely represented the sale price as \$3m when the \$6m referred to in the side-letter was also paid, as was \$1m paid to Dr Masry as a bribe. Mr Shaker also claimed that the sale proceeds were dissipated, partly by being invested in a graphics business run by Hot Source Media Inc ("Hot Source"), 85% of whose shares were owned by another British Virgin Islands company established on Mr Bedrawi's instructions, Arabica Communications Ltd ("Arabica"), and partly by payments to Mr Bedrawi and others. Of \$9,200,000 (including interest) generated from the sale proceeds, \$1m went to Dr Masry, up to \$2,920,000 was invested in Hot Source and expended in legal fees and other miscellaneous expenditure, but the balance went through Qube for Mr Bedrawi's personal expenditure and other payments not satisfactorily explained. Hot Source is in Chapter XI bankruptcy in the USA.

12 Mr Shaker heard of the sale in early 1994 and wrote to Mr Bedrawi, seeking his share of the investment plus profits. Despite many promises,

A Mr Bedrawi failed to account to Mr Shaker and Mr Adham for their investment or any part of the sale proceeds. On 31 January 1995 Mr Bedrawi agreed to pay \$250,000 to Mr Shaker. On 15 May 1995 Mr Bedrawi signed an undertaking to the effect that the share of Mr Shaker and Mr Adham of the sale proceeds was \$6m, that Mr Bedrawi would pay that sum (less the \$250,000 already paid) in two tranches, that Mr Shaker and Mr Adham would receive two-thirds of the shares of Arabica and that they would have a nominee director appointed to the board of Hot Source.

B 13 The promised payments were not made and subsequent cheques were dishonoured and a share certificate for less than the promised two-thirds of Arabica's shares was delivered.

C 14 On 6 July 1996 Mr Adham assigned to Mr Shaker his right to bring proceedings against Mr Bedrawi in relation to the recovery of his beneficial entitlement to what he claimed to be the trust property of which Mr Bedrawi was the trustee. Mr Adham has since died.

D 15 In 1996 Mr Shaker commenced an action at law against Mr Bedrawi in the Virginia state court for the sums due pursuant to the undertaking of 15 May 1995 and also a further chancery action alleging breach of fiduciary duty in failing to account for the proceeds of sale. Judgment in the action at law was entered for \$5,750,000 plus interest. The chancery action was dismissed "without prejudice", thereby reserving to Mr Shaker the right to bring a further action if he wished.

E 16 On 20 January 1999 proceedings in this jurisdiction were commenced by Mr Shaker against Mr Bedrawi in the Queen's Bench Division to enforce the Virginia judgment. In July 1999 Master Ungley gave judgment to Mr Shaker for nearly \$8m, and an appeal by Mr Bedrawi was dismissed by consent. Bankruptcy proceedings were brought by Mr Shaker against Mr Bedrawi and a trustee in bankruptcy was appointed on 3 May 2001.

F 17 Also on 20 January 1999 Mr Shaker commenced what we have called the first action in the Chancery Division. The original pleadings were as follows. ANA Ltd was described as a holding company and ANA Inc was called "the subsidiary US operating company of ANA Ltd". An agreement ("the investment agreement") was concluded between Mr Shaker, Mr Adham and Mr Bedrawi in late June to early July 1989 under which Mr Shaker and Mr Adham would advance moneys to ANA Ltd so that ANA Inc could trade, and Mr Bedrawi would manage and control ANA Inc and would be the sole legal proprietor of the shareholding in ANA Ltd. In consideration for the sums advanced by Mr Shaker and Mr Adham, each would have a beneficial entitlement to 35% of that shareholding; in consideration for services rendered, Mr Bedrawi would have a beneficial entitlement to 30% of that shareholding; and upon Mr Shaker and Mr Adham making the payments, a trust would be constituted. Mr Bedrawi would hold the beneficial entitlement to 70% of the shares in ANA Ltd on trust for Mr Shaker and Mr Adham. Mr Bedrawi's duties as trustee included a duty to account to Mr Shaker and Mr Adham for their 70% share of the profits of the business and of any proceeds of sale of any trust property including the shares in ANA Ltd. Mr Bedrawi, purporting to act on behalf of ANA Inc, entered into the sale agreement, but Mr Shaker only became aware of the sale in early 1994, when he asked Mr Bedrawi to account to

Mr Shaker and Mr Adham for their share of the proceeds of sale. Save for \$250,000 paid in February 1995, Mr Bedrawi failed to pay that share. Mr Bedrawi acted dishonestly and in breach of his duties under the trust. Mr Shaker suffered loss and damage and Mr Bedrawi was liable to account for Mr Shaker's and Mr Adham's shares of the proceeds of sale. Mr Bedrawi in breach of fiduciary duty to Mr Shaker and Mr Adham invested the proceeds of sale in Arabica or elsewhere and held the sums invested on a constructive trust for them. Mr Shaker claimed against Mr Bedrawi an account of all Mr Bedrawi's dealings with the trust property, an enquiry as to the true sum realised by Mr Bedrawi and/or ANA Inc under the sale agreement and as to the proportion of the sale price payable to Mr Shaker, an order for payment of the sums found due to Mr Shaker, damages for breach of trust and/or contract and equitable compensation for breach of fiduciary duty. Dr Masry and Steggle Palmer were also joined to obtain an order against them for disclosure of documents and information about the sale and proceeds of sale of the shares in ANA Radio and ANA TV.

18 By the second action commenced on 27 October 1999 Mr Shaker alleged that Dr Masry and MBC fraudulently misrepresented to Mr Shaker and Mr Adham the sale price, conspired with Mr Bedrawi to enable him to make a secret profit and dishonestly assisted him in his breach of trust.

19 On 3 February 2000 Mr Shaker gave notice of an application, to be heard on 10 February 2000, to amend his pleadings in the first action to add eight former partners of Steggle Palmer and to make substantive allegations against Steggle Palmer and those partners. Steggle Palmer, by a letter dated 9 February 2000 from their solicitors, indicated their opposition to the application. One objection taken was that the draft amendments took no account of the *Prudential* principle. Another was that on Mr Shaker's case the proceeds of sale of ANA Radio and ANA TV could not be held on trust for him or Mr Adham. The application on 10 February 2000 did not proceed.

20 Instead, Mr Shaker commenced the third action on 11 February 2000 against Steggle Palmer and five former partners. He alleged that (i) Mr Bedrawi was a trustee of 70% of the Business, as well as of the shares in ANA Ltd, for Mr Shaker and Mr Adham, (ii) the aggregate price for ANA Radio and ANA TV was not less than \$10m which included payment of \$6m to Qube (described as being at all material times Mr Bedrawi's nominee or creature), (iii) Mr Bedrawi's breach of fiduciary duty owed to Mr Shaker and Mr Adham included diverting \$6m out of the proceeds of sale to Qube and concealing that fact from Mr Shaker and Mr Adham and thereby making a secret profit from the sale and to the detriment of Mr Shaker and Mr Adham, (iv) Steggle Palmer were informed by Mr Bedrawi or were aware that the proceeds of sale were at least \$9m and that at least \$6m would be paid to Mr Bedrawi or for his own benefit and the balance dissipated to pay US debts and taxes, and (v) Mr Bedrawi informed Steggle Palmer that each of Mr Shaker and Mr Adham was a beneficiary of the proceeds of sale in the sum of at least \$1m. Three specific charges are made against Steggle Palmer: (1) they knowingly received from Qube between February 1994 and January 1996 for their own benefit trust property in the form of their fees retained out of the proceeds of sale, (2) they knowingly participated and/or dishonestly assisted in Mr Bedrawi's breach

A of trust and/or fiduciary duty, and (3) they were guilty of deceit. That deceit was in making a statement on 20 January 1995 to Mr Shaker's agents that the proceeds of sale paid in the USA had been dissipated and the remainder of the proceeds had been invested in Hot Source. Mr Shaker claimed that in fact Steggles Palmer after 20 January 1995 received into their own client account from Qube \$1,595,000, and that Qube at that date still retained  
B some \$1,600,000 out of the proceeds of sale. Mr Shaker sought accounts and inquiries, equitable compensation and damages for deceit.

21 Amendments to the pleadings in the first and second actions were then made by Mr Shaker so as to bring them into line with the pleadings in the third action, in particular by alleging a trust of 70% of the business in addition to the already pleaded trust of 70% of the shareholding in ANA Ltd and pleading a breach of fiduciary duty by Mr Bedrawi making a secret  
C profit.

22 In his reply in May 2001 to a notice to admit facts, Mr Shaker admitted that the proceeds of sale of ANA Radio and ANA TV were due to ANA Inc. Asked whether ANA Inc had a cause or causes of action against Mr Bedrawi if he caused or procured the misappropriation or any breach of trust in respect of any part of the proceeds of sale from or in respect of  
D ANA Inc, Mr Shaker said it was not capable of admission as a fact and took the point that ANA Inc was the creature of and alter ego of Mr Bedrawi and would not have authorised the commencement of any claim against him.

23 The defences of the defendants in the three actions all enabled the point that the *Prudential* principle applied to be asserted.

E C *The judgment*

24 The full and careful judgment of the judge reflected the way in which the matters in dispute were argued before him. Notwithstanding the pleading that the trust for Mr Shaker and Mr Adham was of 70% of the shareholding of ANA Inc, the arguments before the judge concentrated on whether the trust was of a share of the business, as counsel then appearing  
F for Mr Shaker contended, or of a share of the shareholding in a corporate vehicle, as the defendants argued, and for this purpose it mattered not whether the vehicle was ANA Ltd as pleaded or ANA Inc. If the interests of Mr Shaker and Mr Adham were in a shareholding, then the question of the applicability of the *Prudential* principle arose. Although no express allegation was made in Mr Shaker's pleadings that Mr Bedrawi had  
G misappropriated any proceeds of sale which belonged to ANA Inc, counsel for Mr Shaker appear not to have argued that Mr Bedrawi did not misappropriate money out of the proceeds of sale in causing \$6m to be paid to Qube.

25 The judge reviewed the authorities on the *Prudential* principle. He quoted the following statement by Lord Bingham of Cornhill in *Johnson v Gore Wood & Co* [2002] 2 AC 1, 35–36:  
H

“(1) Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that

merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if a company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss . . . (2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding . . . (3) Where a company suffers loss caused by breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other.”

26 The judge expressed his conclusion on the questions for him in the light of the authorities in this way:

“Consequently the first question is whether the claimant has a personal cause of action against the defendant. In particular, a shareholder does not normally have a direct cause of action against a wrongdoing director who has misappropriated company assets. If the claimant does not have a personal cause of action, then no further questions arise. If the claimant has a cause of action, but the company does not, then there is no bar to an action by the claimant. If each has a cause of action, the shareholder may sue to recover damages in respect of all heads of non-reflective consequential loss which are not too remote, i e loss which is separate and distinct. So, for example, even if a deceit is practised on the claimant shareholder and reliance on the false representation makes the shares worthless, he cannot sue if the company has a cause of action for the same damage which deprives the shares of all value . . .”

27 The judge noted what he described as the acceptance that the principal questions which would determine the preliminary issue were: (1) whether Mr Shaker had an interest in the shares of ANA Ltd and/or ANA Inc; (2) whether the loss claimed was reflective of a loss suffered by ANA Inc; (3) whether ANA Inc had a cause of action in respect of that loss.

28 On the first question the judge had no doubt that Mr Shaker intended to invest in and receive interests in corporate vehicles established by Mr Bedrawi and did not intend to have an interest in a business: paragraph 108 of his judgment. After reviewing the evidence and noting the attitude adopted by Mr Shaker in the American and in the English proceedings, the judge held that the company in whose shares Mr Shaker and Mr Adham had a beneficial interest was ANA Inc.

29 The judge then proceeded to consider the consequences on the assumption that Mr Shaker was right in his claim that (a) Mr Bedrawi misappropriated the proceeds of sale, (b) Dr Masry took a \$1m bribe, (c) MBC, Dr Masry and Steggle Palmer dishonestly assisted Mr Bedrawi's breaches of fiduciary duty and (d) Steggle Palmer were guilty of deceit and had grounds for knowing that funds which they received had been misappropriated. The judge held that on the assumed facts ANA Inc would have claims for breach of fiduciary duty against Mr Bedrawi and wholly

A adequate causes of action in dishonest assistance and knowing receipt against the other defendants. The judge said that Mr Bedrawi would also have been liable for making unlawful distributions. He noted that ANA Inc was a Pennsylvania company, but said

B “there is no pleading or evidence that Pennsylvania law is substantially different, and although it may seem rather artificial to apply the provisions of the Companies Act 1985 to a foreign company, the relevant provisions reflect general principles of corporate law.”

He said that ANA Inc had no distributable reserves and that the misappropriation of \$6m was an unlawful distribution which was prohibited by Part VIII of the Companies Act 1985, ultra vires and could not be ratified.

C 30 The judge said that Mr Shaker in principle would not have a cause of action against Mr Bedrawi for the misappropriation of ANA Inc’s assets unless Mr Shaker were able to establish independent duties in contract, tort or equity which Mr Bedrawi owed him. Accordingly Mr Shaker would have no basis for the claim against Mr Bedrawi for an order for payment of a proportion of the sale price or equitable compensation for breach of fiduciary duty in diverting the funds to Arabica and elsewhere, and even if D Mr Shaker had a cause of action on the principal claims, the proceedings would still be barred on the basis that the damages were purely reflective of ANA Inc’s loss.

E 31 The judge further said that, in principle, therefore, in view of the finding that Mr Shaker and Mr Adham had only interests in shares, Mr Shaker had no cause of action against Mr Bedrawi for an account or in constructive trust which would enable him to develop the accessory liability of the other defendants. The judge pointed out that the reality of the proceedings was to make the other defendants liable, nothing having been recovered from the judgment against, and bankruptcy of, Mr Bedrawi. The judge then rejected the claims against Dr Masry and MBC for reasons into which it is unnecessary to go in view of the abandonment of the appeal F against them. He said of the claim against Steggles Palmer for knowing receipt and knowing assistance that it was not available to shareholders where the accessory liability is claimed to be the liability of a director for breach of duty. The claim in deceit, he found, was specifically related to the residue of the \$6m and reflected the damage to ANA Inc.

G 32 The judge accordingly concluded that the answer on the preliminary issue was that Mr Shaker could not proceed against the defendants or any of them in relation to the proceeds of sale.

*D Mr Shaker’s principal arguments on appeal*

H 33 On this appeal Mr Steinfeld and Mr Adrian Francis, neither of whom appeared before the judge, represent Mr Shaker. The arguments which are now advanced differ from those advanced before the judge though, subject to one point, they are not inconsistent with Mr Shaker’s pleaded case; nor, subject to a further point, do they rely on evidence not before the judge.

34 What is now argued is this. Mr Steinfeld says that the case against Mr Bedrawi is essentially a claim that, as trustee of 70% of the shareholding