In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
2018: 44

BETWEEN:

WONG, WEN-YOUNG

-and-

(1) GRAND VIEW PRIVATE TRUST COMPANY LIMITED
(2) TRANSGLOBE PRIVATE TRUST COMPANY LIMITED
(3) VANTURA PRIVATE TRUST COMPANY LIMITED
(4) UNIVERSAL LINK PRIVATE TRUST COMPANY LIMITED
(5) THE ESTATE OF HUNG, WEN-HSIUNG (DECEASED)
(6) OCEAN VIEW PRIVATE TRUST COMPANY LIMITED

RULING

Plaintiff's application for trial of points of law as preliminary issues-opposed by First to Fourth and Sixth Defendants-principles governing ordering trial of preliminary issues

Date of hearing: November 30, December 3, 2018
Date of Ruling: January 4, 2019

Mrs Elspeth Talbot-Rice QC and Mr Dakis Hagen QC of counsel and Mr Rod S. Attride-Stirling and Mrs Cratonia Thompson, ASW Law Limited, for the Plaintiff

Mr Jonathan Adkin QC of counsel and Mr Christian Luthi of Conyers Dill & Pearman Limited, for the First to Fourth and Sixth Defendants

Introductory

1. The Plaintiff's counsel in advancing the case for the trial of preliminary issues essentially sought to encourage the Court to deploy its undoubtedly flexible case management powers like a "bold spirit". The First to Fourth and Sixth Defendants' counsel, in contrast, conjured up images of a $10 billion case becoming embarrassingly derailed and essentially contended that the correct approach to the present application was that of a "timorous soul". A synthesis of the principles supported by the comprehensive array of authorities placed before the Court on the ordering of trials of preliminary issues clearly demonstrated the soundness of the following thesis. Case management is ultimately a practical tool designed to ensure that civil cases are fairly, efficiently and expeditiously tried. The Court's broad case management powers may in some cases require a bold approach and in others a cautious stance, depending on the particular considerations which are raised on the facts of each case. But case management should ordinarily be guided by a 'safety first' approach with the trial judge piloting the litigation aircraft with the care of a commercial airline pilot rather than with the adrenaline of a dare-devil stunt pilot.

2. The present litigation is high-value litigation where there is no suggestion that the Court needs to take active steps to ensure a level playing field because of a disparity of financial resources between the parties. The notorious concerns with the judicial management of large-scale litigation centre on efficiency, in terms of time and costs. The classic remedies for these concerns are all directed at avoiding the spectre of proceedings being overly expensive and prolix because of excessive time and resources being expended in unfocussed litigation at the pre-trial and trial phases. David Steel J's description of the mission of the English Commercial Court, over 10 years ago in the Foreword to the '*Report and Recommendations of The Commercial Court Long Trials Working Party*' (December 2007), applies with equal force to the role of this Court:

> "*The Commercial Court was founded to deal with the disputes of the international commercial community as effectively and expeditiously as possible.*"

3. The present application, putting aside its merits narrowly construed, has served to minimise the risk of the present proceedings being conducted in an unfocussed and wasteful manner by identifying at an early stage, with a clarity which is difficult to replicate without adversarial argument, what the key issues in dispute are.

The Plaintiff's Summons

4. The Plaintiff's Summons as amended sought the trial of the following questions as preliminary issues:

> "*1. That the Court determines the following questions by way of a preliminary issue in this claim.*
>
> *A. Whether each or any of:*
>
> *(1) The Wang Family Trust created by Declaration of Trust dated 10 May 2001;*
>
> *(2) The China Trust created by Declaration of Trust dated 24 June 2002;*
>
> *(3) The Vantura Trust created by Declaration of Trust dated 9 May 2005;*
>
> *(4) 'The Universal Link Trust created by Declaration of Trust dated 9 May 2005;*
>
> *(5) The Ocean View Trust created by Declaration of Trust dated 8 March 2013 (collectively "the Purpose Trusts");*
>
> *is void at common law and/or under the Trusts (Special Provisions) Amendment Act 1998 ("the 1998 Act").*
>
> *B. Whether the Court has jurisdiction to direct a scheme (whether under s. 12B(2) of the Trusts (Special Provisions) Act 1989 or pursuant to its inherent jurisdiction) to amend or vary the purposes of the Purpose Trusts so as to render them sufficiently certain to allow the trusts to be carried out."*

5. The Summons sought supplementary directions including listing the preliminary issues for trial without evidence for a 4 day hearing and a stay of all proceedings pending that trial. In the course of argument Mrs Talbot-Rice QC indicated that a stay was not necessary. The first question sought to determine the Plaintiff's primary case; the second question, added by way of amendment to the Summons, sought to determine the First to Fourth and Sixth Defendants' primary counterclaim (and initial answer to why the first issue was not worth trying as a preliminary issue).

Governing principles

6. Section 6(8) of the Bermuda Constitution lays down the overarching fair hearing rights of civil litigants in the following terms:

> "*(8) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.*" [Emphasis added]

7. Both plaintiffs and defendants have a fundamental right to civil proceedings which are finally determined within a reasonable time. Order 1A of the Rules of the Supreme Court 1985 is designed to confer case management powers on the Court which will give effect to the umbrella rights of the parties to civil litigation to a fair hearing within a reasonable time. Rule 1 defines the overriding objective in the following terms:

> "*(1) These Rules shall have the overriding objective of enabling the court to deal with cases justly.*
>
> *(2) Dealing with a case justly includes, so far as is practicable—*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) saving expense;*
>
> *(c) dealing with the case in ways which are proportionate—*
>
> *(i) to the amount of money involved;*
> *(ii) to the importance of the case;*
> *(iii) to the complexity of the issues; and*
> *(iv) to the financial position of each party;*
>
> *(d) ensuring that it is dealt with expeditiously and fairly; and*
>
> (e) *allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*"

8. The Plaintiff's counsel invited the Court to have regard to its positive duty to manage cases under Order 1A rule 4, which like Order 1A as a whole, must be borne in mind whenever the Court is exercising any power conferred by the Rules:

> "*(1) The court must further the overriding objective by actively managing cases.*
>
> *(2)Active case management includes—*
>
> *(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;*
>
> *(b) identifying the issues at an early stage;*
>
> *(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;*
>
> *(d) deciding the order in which issues are to be resolved;*
>
> *(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;*
>
> *(f) helping the parties to settle the whole or part of the case;*
>
> *(g) fixing timetables or otherwise controlling the progress of the case;*
>
> *(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;*
>
> *(i) dealing with as many aspects of the case as it can on the same occasion;*
>
> *(j) dealing with the case without the parties needing to attend at court;*
>
> *(k) making use of technology; and*
>
> *(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.*"

9. Order 1A rule 4(2)(d), in force since January 1, 2006, might be viewed as making Order 33 rule 3 of the Rules somewhat redundant. It provides:

> "*(3) The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.*"

10. Most of the case law cited in argument was illustrative of how the broad discretion to order the trial of preliminary issues has been exercised in various different circumstances. There was no disagreement as to the core principles which governed the exercise of this discretionary power. In *Steele-v-Steele* [2001] CP Rep 106, Neuberger J (as he then was) identified ten questions which may conveniently be asked when considering an application such as this. Hildyard J in *Wentworth Sons Sub-Debt SARL-v-Lomas* [2017] EWHC 3158 (at paragraph 32) summarised those questions as follows:

> "*(1) First, would the determination of the preliminary issue dispose of the case or at least one aspect of it?*
>
> *(2) Second, would the determination of the preliminary issue significantly cut down the cost and time involved in pre-trial preparation or in connection with the trial itself?*
>
> *(3) Third, whereas here the preliminary issue was one of law the Court should ask itself how much effort would be involved in identifying the relevant facts.*
>
> *(4) Fourth, if the preliminary issue was one of law to what extent was it to be determined on agreed facts?*
>
> *(5) Fifth, where the facts were not agreed the Court should ask itself to what extent that impinged on the value of a preliminary issue.*
>
> *(6) Sixth, would determination of the preliminary issue unreasonably fetter the parties or the Court in achieving a just result?*
>
> *(7) Seventh, was there a risk of the determination of the preliminary issue increasing costs and/or delaying the trial?*
>
> *(8) Eighth, the Court should ask itself to what extent the determination of the preliminary issue may turn out to be irrelevant.*
>
> *(9) Ninth, was there a risk that the determination of the preliminary issue could lead to an application for the pleadings to be amended so as to avoid the consequences of the determination?*

(10) Tenth, taking into account the previous points, was it just to order a preliminary issue?"

11. The critical questions in the present case were questions (2) and (7): would the determination of the preliminary issues significantly save pre-trial and/or trial costs, and/or was there a risk that the determination would lead to an increase in costs and a delay in the trial? I regarded it as comparatively straightforward to conclude that:

(a) the preliminary issues would dispose of part of the case (this was essentially agreed);

(b) although the preliminary issues would not be determined on agreed facts, this did not impinge on the value of the preliminary issues to a significant extent in circumstances where the First to Fourth and Sixth Defendants were unable to identify what parts of the factual matrix were likely to be contentious or germane to the construction questions. On the other hand there was a marginal risk that the picture might change after the parties' witness statements had been exchanged and filed;

(c) apart from concerns about potential delay and added costs, the determination of the preliminary issues would not to any significant extent impede the parties from achieving a just result;

(d) there was no apparent risk of the pleadings being amended to sidestep the determination of the preliminary issues in favour of the Plaintiff, the First to Fourth and Sixth Defendants having already pleaded a defence to meet that possible outcome.

12. The implications of the application essentially turn upon an analysis of the pleadings and an imperfect assessment of the way the litigation is likely to unfold with and without the trial of the proposed preliminary issues.

The Pleadings in outline

13. The Plaintiff's claims are summarised in paragraph 4 of the Statement of Claim as follows:

"*4.1 that each of the First to Fourth and Sixth Defendants holds certain assets on resulting or constructive trust for the Heirs or Mr YC Wang's estate notwithstanding that those Defendants purport to hold such assets on the trusts of certain trusts governed by the laws of Bermuda (defined below as the Bermuda Trusts), because*

(a) in the case of the Sixth Defendant, the assets transferred to it were transferred after Mr YC Wang's death without the authority of his duly appointed personal representative;

(b) the Bermuda Trusts to which the assets were transferred are void for:

i. purporting to be mixed charitable and non-charitable purpose trusts, which is impermissible under Bermuda law, and/or

ii. for uncertainty;

(c) when Mr YC Wang's assets were transferred to the First to Fourth Defendants, Mr YC Wang did not understand that he was transferring, nor did he intend or agree to transfer, them and the FPG shares which they held, to structures under which his family could never benefit;

(d) if, which is denied, Mr YC Wang gave any effective consent to the transfer of the assets into the purpose trusts, it was given

i. in the mistaken belief that there was or would be a means for his family to benefit from the assets so transferred. This mistake was of so serious a character, given the scale and irrevocable nature of the dispositions, that justice requires the transfers to be set aside;

ii. as a result of undue influence such that the transfers should be set aside;

4.2 that the Fifth Defendant exceeded his authority or committed breaches of trust or fiduciary duties in causing or permitting such assets to be transferred to the First to Fourth and Sixth Defendants on the terms of the Bermuda Trusts or at all…"

14. Paragraph 4.1(b) asserts the 'Invalidity Claims' which are sought to be tried as a preliminary issue. Sub-paragraphs (a) and (c) assert the 'Invalid Transfer Claims'. In summary terms, the Plaintiff primarily alleged that if either of these two sets of claims succeeded the result was that the assets would be held on trust for the Plaintiff as Administrator of the Estate of YC Wang or for the Heirs.

15. The First to Fourth and Sixth Defendants' Defence and Counterclaim summarises the defence to these claims as follows:

"*101. It is denied that the Trustees hold any assets on resulting or constructive trust for YC Wang's heirs or for his estate as alleged in sub-paragraph 4.1. As to the grounds relied on by Winston Wong:*

101.1. In the case of the assets transferred into the Ocean View Trust, following YC Wang's death such assets were held by Mr Hung for such purposes as were directed by his surviving brother, YT Wang. YT Wang assented to the transfer of such assets into the Ocean View Trust, both orally himself and in writing by his duly appointed attorney William Wong. It was not necessary to obtain the authority or consent of YC Wang's personal representative to such transfer.

101.2. The Trusts are not void by reason of the fact that they contain a mixture of charitable and non-charitable purposes. Such trusts are permissible under Bermuda law.

101.3. The Trusts are not void for uncertainty. Each of the Trusts satisfies the provision at section 12A(2)(a) of the Trusts (Special Provisions) Act 1989 ("1989 Act") as inserted into that Act by the Trusts (Special Provisions) Amendment Act 1998 ('1998 Act').

101.4. The Founders fully understood and intended that the assets transferred into the First Four Trusts by Mr Hung would be held so that their families could never benefit personally from those trusts.

101.5. The Founders gave their full and informed consent to the transfer of the assets by Mr Hung into the First Four Trusts. That consent was not given in the mistaken belief that there was or would be a means for their families to benefit from the assets so transferred, or as a result of any undue influence. Rather, the transfer of assets into the First Four Trusts achieved what the Founders wanted to achieve, which was to protect and preserve the operations of FPG into the future and to give back wealth to society, including through the continued support of the Charitable Enterprises they had established.

101.6. In any event the claims to the assets held under the Trusts except the claims that the Trusts are invalid ('Invalidity Claims'), are all governed by Taiwan law and all fail under that system of law.

101.7. Further, the claims to the assets held under the Trusts, except the Invalidity Claims, are all time-barred or alternatively should he dismissed pursuant to the doctrine of acquiescence, waiver or laches, as set out in further detail below.

102. It is further denied that Mr Hung exceeded his authority or committed any breaches of trust or fiduciary duty in causing or permitting assets to be transferred to the Trustees on the terms of the Trusts, or at all, as alleged at sub-paragraph 4.2."

16. The Defence and Counterclaim runs to over 110 pages. The Counterclaim most significantly (a) applies to vary the objects of the Trusts if they were void or uncertain and (b) avers that (paragraphs 256-259) if variation was not possible, and/or the transfers were held to be invalid, the assets were still held on trust by Mr Hung's estate subject to (1) a continuing power of appointment in favour of Susan Wang (paragraph 261), and (2) an obligation that he would re-exercise the power to "re-settle" the assets so as to restore the present status quo (paragraph 262).

17. The fulsome Reply and Defence to Counterclaim, *inter alia*, (a) denies that Mr Hung held the assets as trustee for an undefined purpose (to be decided by YC and YT Yang in the future) (paragraph 13) and (b) "*denied that there is any so-called 'Re-settlement Obligation'*" (paragraph 97).

Potential outcomes if preliminary issues were tried: overview

18. How the trial of the preliminary issues (estimated length of hearing 3-4 days) would impact on the proceedings as a whole in outline terms was essentially agreed and requires consideration of the alternative scenarios of one or both of the issues being determined in favour of the Plaintiff and in favour of the First to Fourth and Sixth Defendants. The relevant analysis was assisted by the Plaintiff's flow chart which is summarised below. Only the estimated length of the hearing of a trial of the preliminary issues and a full trial without preliminary issues were agreed.

Success on Invalidity

19. The following issues would require resolution after discovery and witness statements and take a further 5-6 days if the Plaintiff succeeded on Invalidity but not on the availability of a Scheme to vary the Trusts:

- whether or not there should be a Scheme and if so to what extent;
- whether or not there was an undefined oral trust and a Re-settlement Obligation;
- the nature and extent of Susan Wang's powers.

Success on all Preliminary Issues

20. The following issues would require resolution after discovery and witness statements and take 5 days of further trial if the Plaintiff succeeded on all preliminary issues:

- whether or not there was an undefined oral trust and a Re-settlement Obligation;
- the nature and extent of Susan Wang's powers.

Failure on all Preliminary Issues

21. If all preliminary issues were resolved in the First to Fourth and Sixth Defendants' favour, the following issues would require resolution after discovery and witness statements and take a further trial of approximately 9 weeks:

- Wrongful Transfer claims;
- Mistake Claims;
- Undue Influence Claims;

- Post-Death Transfer claims;
- Taiwanese Law Defences;
- Breach of Trust Claims;
- Accounts;
- The Removal Claim;
- Susan Wang's Powers;
- the undefined oral purpose trust (but not the Re-Settlement Obligation);
- any further issues raised by the personal representatives of YT Wang and Mr Hung.

No trial of preliminary issues

22. If there were no preliminary issues trial at all, the following issues would require resolution after discovery and witness statements and take a further trial of approximately 10 weeks:

- Invalidity Claims;
- Wrongful Transfer claims;
- Mistake Claims;
- Undue Influence Claims;
- Post-Death Transfer claims;
- Taiwanese Law Defences;
- Breach of Trust Claims;
- Accounts;
- The Removal Claim;
- Susan Wang's Powers;

- the undefined oral purpose trust and the Re-Settlement Obligation;

- any further issues raised by the personal representatives of YT Wang and Mr Hung.

Preliminary views

23. Assuming the Plaintiff's time estimates in relation to the trial of the remaining issues to be approximately correct, it appears obvious that it is only if the preliminary issues are resolved wholly or partially in the Plaintiff's favour that their early trial will result in a far shorter final trial. Very properly it is conceded that there will be only marginal savings in terms of Court time if the preliminary issues are resolved in the Defendants' favour. It was common ground that it was not appropriate for the Court at this stage to assess the likely merits of the preliminary issues. Accordingly, it seems to me that something more than the possibility of saving costs in the event the Plaintiff achieves success at the preliminary issues trial ought logically to be required to justify acceding to the application. In forming this preliminary conclusion, I fully accept the submission (Skeleton Argument of the Plaintiff, paragraph 43) that it is permissible to order the trial of preliminary issues which will not dispose of the entire case. The most cogent additional benefit of ordering the trial of preliminary issues which the Plaintiff's counsel advanced in oral argument was promoting the possibility of settlement. The most cogent risk attached to following that course which was identified by the First to Fourth and Sixth Defendants was the risk of interlocutory appeals which would cause delay and add to costs without actually achieving any tangible benefits.

Findings: Would the preliminary issues result in a significant savings of costs in relation to preparing for and hearing the trial?

The respective submissions

24. The Plaintiff in his Skeleton Argument answered this question in the following way:

> "*44. Yes. As explained above, if Dr Wong succeeds at the preliminary issue trial, numerous fact sensitive issues raised in the pleadings will no longer need to be determined. It will, therefore, substantially obviate the need for disclosure, exchange of witness/expert evidence and a lengthy 10 week trial (and the substantial costs associated therewith). If, on the other hand, Dr Wong is unsuccessful at the preliminary issue trial, there will be no duplication in terms of cost and time, because the proposed preliminary issues are simply discrete issues of law which will no longer be live, but such a determination will obviate the need for the PTCs' fallback claims to be determined. This is not a case where, for example, the same witness will be required to give overlapping evidence at both the preliminary issue trial and the main trial.*"

25. The First to Fourth and Sixth Defendants in their Skeleton Argument adopted a diametrically opposed position:

"*89. As well as causing significant delay, an order directing the trial of preliminary issues is guaranteed to occasion substantial additional costs:*

89.1 For the reasons set out above, the determination of preliminary issues will not dispose of the case, however they are determined. There will have to be a trial in any event, and it will cover the same factual ground as would have had to be covered if no preliminary issues were directed. There will thus be no saving of costs by resolving the Invalidity Claims as a preliminary issue.

89.2 The only aspect of the case that might be resolved by hearing the preliminary issues are the Invalidity Claims themselves. Trying those claims separately rather than as part of the main trial will entail (at least) two hearings rather than one, with a resultant increase in costs and Court time.

89.3 Further, given the enormous value of this action and the points that arise in it, the determination of any preliminary issues will inevitably be appealed to the Court of Appeal and Privy Council for the reasons set out above. For the same reasons, the subsequent determination of the remaining claims and counterclaims will similarly be appealed to the Court of Appeal and Privy Council. Directing a preliminary issue will therefore result in two sets of appeals up to the Privy Council rather than one, with six sets of Court hearings rather than three. The additional costs involved, and the drain on Court resources, would be significant.

89.4 In addition, if the factual basis on which any preliminary issue is determined is later found at trial to be false, the determination of the preliminary issue may need to be re-opened, leading to a further hearing, further rounds of appeal, further additional costs and a further drain on court resources."

Findings

26. In my judgment it is impossible to fairly conclude that the trial of the preliminary issues would result in a significant saving of costs in terms of trial preparations and the trial itself. I accept that there would potentially be a significant savings if the issues were resolved in the Plaintiff's favour, but the position is in my judgment difficult to assess in concrete terms without evidence of costs estimates when potential appeals are taken into account.

27. Although Mr Adkin QC at times appeared to be doing little more than waving an array of swords of Damocles over my head, the likelihood that there would be appeals all the way to the Privy Council is a very real one. A huge amount is in dispute. The Trusts are purpose trusts so there are no beneficiaries whose interests might serve as a brake on emotive 'family' litigation which appears fully geared up to run at 'full throttle'. Nonetheless, if the Plaintiff prevailed on some or all issues, the scope of the trial would likely be much shorter so that some costs saving would be achieved. How great that saving would be in net terms when one takes into account the possibility of a second phase of appeals to the Privy Council is difficult to realistically assess.

28. Taking the Plaintiff's case at its highest, the costs savings are far less obvious than initially appears to be the case. The preliminary issue might either save or increase the ultimate costs. And that is the analysis through the Plaintiff's rose-tinted spectacles. If the First to Fourth and Sixth Defendants prevail on all issues, it is obvious that there is no real costs savings at all and in fact an increase in the costs burden attributable to two sets of appeals.

29. Would the trial of the preliminary issues result in a significant savings of costs in terms of trial preparations and the length of the trial? I simply do not know.

Findings: Is there a risk that ordering the trial of the preliminary issues could increase costs and delay the trial?

Introductory

30. I have already found while dealing with the costs/benefit issue above that there is a risk that the trial of the preliminary issues could (a) significantly add to the overall costs of the action if they were all resolved in the Defendants' favour and (b) (as a matter of inference) cause delay due to interlocutory appeals. However, I will focus on the extent of the risk and the question of delay more fully below.

The respective submissions

31. The Skeleton Argument of the Plaintiff relied on the same submissions advanced in support of the costs-savings issue in support of the argument on the risk of increased costs and delay. The First to Fourth and Sixth Defendants also essentially relied on the same arguments to undermine the Plaintiff's costs saving case and to make their own case on increased costs. They advanced a forceful freestanding submission on delay however.

32. The First to Fourth and Sixth Defendants' first point was that the action would have to be stayed while the preliminary issues were not only tried but also finally determined through the appellate courts. Mrs Talbot-Rice QC was only able to tentatively offer a partial accommodation, agreeing with the Court's suggestion that discovery could still proceed while the preliminary issues were tried. One of the commercial rationales for the preliminary issues was reducing costs by narrowing the scope of discovery, so on reflection the option of proceeding with discovery made questionable sense. However, the Plaintiff's counsel did pull a rabbit out of the hat in reply; the example of a case determined by the Privy Council just over a year after the first instance decision: *Crociani-v-Crociani* [2014] UKPC 40.

33. The First to Fourth and Sixth Defendants' second delay argument was another of Mr Adkin QC's 'sword of Damocles' points. The delay would potentially be exacerbated if the factual basis on which the issues had been tried was found to be false at trial. This was a costs point recycled and makes no sense at all to me in terms of delay. The third point was the undesirability of delaying a final trial in relation to stale claims. Mrs Talbot-Rice QC rightly pointed out that although complaint was made of aging witnesses and fading memories, no evidence had been filed in this regard. However the real complaint was not that a fair trial would no longer be possible, the highest form of delay complaints. Rather, the real complaint, persuasively advanced by Mr Adkin QC in oral argument, was that in general legal policy terms courts seek to avoid the trial of stale claims. Reliance was placed on *Hargreaves-v-HMRC* [2014]UKUT 0395[1] where Nugee J (as he then was) stated as follows:

> "*46…One of the disadvantages of directing the competence issue to be heard as a preliminary issue is that it will not be known whether a hearing of the substantive issue is necessary until the preliminary issue has been finally resolved. Given the amount at stake in the present case it is likely that whoever loses the preliminary issue will consider an appeal. I agree with Judge Gort that this is likely to cause further delay in what is already a stale case and that this would not be desirable*." [Emphasis added]

34. The following matters were not in dispute. The present action was commenced in 2018 but is in reality the second stage of proceedings begun in 2013, with *Beddoe* proceedings occupying several years thereafter. Four of the five trusts were settled between May 2001 and May 2005 and three key 'players' are now dead.

Findings

35. I find that there is a risk of both added costs and delay if the preliminary issues are ordered to be tried at this stage as the Plaintiff seeks to achieve.

36. The added costs risk is impossible to assess because while I am satisfied that the preliminary issues are arguable and therefore may well be resolved in the Plaintiff's favour, I am unable to assess the strength of the various arguments. It is possible that the First to Fourth and Sixth Defendants may prevail. The increased costs risk cannot be excluded but is, standing by itself, a neutral consideration.

[1] Upper Tribunal (Tax and Chancery Chamber), upheld by the Court of Appeal: [2016] EWCA 174.

37. The risk of delay is in my judgment a more substantive risk. A trial could possibly take place in the autumn of 2020 based on the parties' largely agreed directions if no preliminary issues are tried. If the preliminary issues were to be tried in the first quarter of 2019, it is in my judgment unrealistic to assume that an appeal would be heard by the Court of Appeal before November 2019. It would be wholly unrealistic to assume that a Privy Council decision would be delivered before late 2019. Trial preparations would only begin in earnest in January 2020 at the earliest pushing back the trial schedule by a year at least and potentially two or more years. That might not be material in relation to a fresh claim. It is potentially a more significant factor where it may make a stale claim staler.

Findings: Would it be just to order the trial of the preliminary issues?

Additional submissions

38. The Plaintiff's first additional submission at first blush appeared to have been made somewhat tongue in cheek in the context of an application the Trustee Defendants opposed: "*only the Court is able to give the trustee the comfort it needs…it is in the interests of the PTCs themselves that the Invalidity Issues are determined expeditiously*" (Skeleton Argument, paragraph 54). The following supplementary point was also made:

> "*…if Dr Wong succeeds on the Invalidity Claims… the PTCs may wish to seek the direction of the Court, under the supervisory jurisdiction, as to how to proceed…*"

39. It is *prima facie* for trustees to determine when they wish to seek guidance from the Court in relation to litigation, not the party suing them. Mrs Talbot-Rice QC advanced what I found to be a more attractive point in oral argument: the Court has a positive duty under Order 1A of the Rules to encourage the parties to settle litigation. The Court was required to consider whether the trial of the preliminary issues would potentially promote a settlement; the Plaintiff's counsel submitted that it would. She supported this submission by reference to a case where preliminary issues were ordered to be tried on an opposed basis even though, as here, they would (a) not resolve the entire action, and (b) only avoid a lengthy trial if the questions were answered in the negative: *Re Lehman Brothers (Europe) (in Administration) Wentworth-v-Lomas* [2017] EWHC 3158 (Ch). Hildyard J (in dealing with the delay consideration) observed as follows:

> "*103….On the other hand, early resolution or exposure of some flaw in the approach of either side may well encourage early settlement, particularly given the professional and statutory responsibilities of the LBIE Administrators concerned…*"

40. It bears noting at this juncture that the application in *Lehman* was supported by the Administrators and two other parties, and opposed by only one party. Administration

proceedings, like liquidation proceedings, are typically governed by considerations of commercial efficiency in a way that bears little comparison with private trust litigation where there is no suggestion that the trust assets are at risk of depletion. It is also noteworthy that Hildyard J adopted a nuanced approach, ordering the preliminary trial of certain issues and deferring for subsequent consideration whether certain other issues should be so tried.

41. The First to Fourth and Sixth Defendants essentially supported their submission that it would not be just to order the preliminary issues trial with the arguments already mentioned above, but concluded with the following submission:

> "*91. Conversely, it would not be unjust to Winston Wong to refuse to direct a preliminary issue. Such refusal would not increase his costs or delay the final determination of the proceedings or prejudice his ability to pursue his claims at trial. To the contrary, he acknowledges that a trial of the entire action could be accomplished by 2020.*"

42. In light of my finding above that the basic fair hearing rights of civil litigants is to have their cases finally heard fairly and within a reasonable time, this was an important and potentially pivotal submission.

Findings

43. As noted at the beginning of this Ruling, the protagonists essentially commended to the Court two different philosophical approaches. Mrs Talbot-Rice QC effectively encouraged the Court to be a "bold spirit" while Mr Adkin QC cautioned the Court to be a "timorous soul". The correct approach must inform how an evenly balanced application should be disposed of. The preliminary issues raise discrete points of law with a risk that surrounding facts not presently identified but which might crystallize later might be wrongly ignored. The issues do offer a prospect of saving costs to a significant extent and shortening the trial, but the possibility of an increase in costs cannot be ruled out. The final trial will inevitably be delayed to some extent and the claims are stale ones. The only additional case management factor prayed in aid of the application which I consider to be a weighty one is the duty of the Court to promote a settlement.

44. In my judgment the relevant legal policy elucidated by the case law referred to by the First to Fourth and Sixth Defendants' counsel clearly requires the Court to adopt a cautious approach because preliminary issues are ordered by way of exception to the general rule that there should be one final trial. This is consistent with the spirit with which case management ought generally to be approached. While case management powers are deliberately broadly cast with a view to facilitating a flexible and nimble touch, the governing spirit of any 'management' function must be a pragmatic and results-oriented one. A precautionary approach designed to minimize the risk of prolixity and inefficiency rather than an intuitive reflexive response is required. My natural instincts inclined me to embrace these intellectually captivating preliminary issues with open arms.

45. It is not only in the 19th century that cautionary judicial guidance about the risks of trying preliminary issues can be found[2]. In *Tilling-v-Whiteman* [1980] AC 1, Lord Scarman observed (at page 25C): "*Preliminary points of law are too often treacherous shortcuts*…" In *Rossetti Marketing Ltd-v-Diamond Sofa Co Ltd* [2013] Bus LR 543, Lord Neuberger MR (as he then was) opined (at paragraph 1): "…*while often attractive prospectively, the siren song of agreeing or ordering preliminary issues should normally be resisted.*" Similar guidance may be found elsewhere in the Commonwealth[3]. Even in *Re Lehman Brothers (Europe) (in Administration); Wentworth-v-Lomas* [2017] EWHC 3178 (Ch), Hildyard J in explaining the approach to his decision (to order some preliminary issues to be tried and postpone deciding on other issues) noted that "*there is a balance to be struck; and caution may be the tie-breaker*" (at paragraph 36).

46. In my judgment the scales are not sufficiently tilted in favour of ordering preliminary issues at this stage to justify acceding to the Plaintiff's application. There is no objective basis for me to conclude that granting the application will promote settlement. The best evidence would be a joint application by the parties, who (as I indicated in the course of the hearing) must in a case on the present scale be presumed to know where they stand in relation to settlement. Not only is this a case where caution should be the 'tie-breaker'. The Court's overarching duty is to manage civil litigation in a way which promotes a fair hearing in a reasonable time. Those rights are, in my judgment, more likely to be respected rather than undermined by refusing the Plaintiff's present application. One trial with, most importantly, one set of appeals, is most likely to achieve that fundamental fair hearing imperative, as Mr Adkin QC crucially submitted.

47. That said the preliminary issues identified could perhaps help to promote settlement at a later stage of the litigation when the parties are better placed to assess the real merits of the various issues which the present application has helpfully identified. It is always open to the Court, particularly in light of Order 1A rule 4(2)(d), to direct the preliminary issues be tried before the remaining issues are tried, on terms that any appeal rights would be suspended until after the rest of the trial. Such a direction might be warranted if the parties agreed (at the pre-trial review for instance) that such a course could assist the parties to settle the entire case. I therefore propose, subject to hearing counsel if required, (a) to adjourn the Plaintiff's Summons with liberty to apply rather than to dismiss it at this stage and (b) to reserve the costs of the present application.

Directions

48. The parties were substantially agreed on the directions which should be ordered in the event that the Plaintiff's application for a trial of preliminary issues was to be refused. Two contentious areas were when discovery should take place and whether, as the First to Fourth and Sixth Defendants proposed and the Plaintiff opposed, there should be reply witness statements and supplementary expert reports. On discovery, the First to Fourth and Sixth Defendants proposed June 29, 2018 on the basis that they would likely bear the brunt of the discovery burden. The Plaintiff proposed three months from the date of the present judgment.

[2] *Piercy-v-Young* (1879) 15 Ch D 475;
[3] *Tepko Pty Limited & Ors-v-Water Board* [2001] HCA 19 (at paragraph 168) (Australian High Court); *San International Pte Ltd.-v- Keppel Engineering Pte Ltd.* [1998] 3 SLR 871 (Singapore Court of Appeal).

On reply witness statements and supplementary expert reports, the First to Fourth and Sixth Defendants contended that these would be useful while the Plaintiff contended they were not necessary.

49. Having insisted on the importance of expediting a full trial of this action, in my judgment the Defendants should expect to be pressed to expedite the discovery process as far as is reasonably possible. I accordingly direct that discovery should take place by May 31, 2019. As far as reply witness statements and supplementary expert reports are concerned, they are far more likely to be of assistance to the Court and the parties than they are likely to be unhelpful, particularly in a case on this scale. I approve the First to Fourth and Sixth Defendants' proposed directions in this regard.

Conclusion

50. The Plaintiff's application for the trial of the preliminary issues identified in its Amended Summons is refused. My provisional view is that the Summons should be adjourned with liberty to apply and costs reserved. I will deal with any outstanding matters arising on the Defendants' Summons for Directions (which I have not dealt with above and which cannot be agreed) on the papers.

51. I shall hear counsel if required (if possible on the basis on written submissions without an oral hearing) on the terms of the Order to be drawn up in respect of the Plaintiff's preliminary issues Summons and the First to Fourth and Sixth Defendant's Summons for Directions, and as to costs.

Dated this 4th day of January 2019

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IAN RC KAWALEY
ASSISTANT JUSTICE