IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 105 of 2014 (DDJ)

BETWEEN:

(1) ARNAGE HOLDINGS LTD.

(2) BROOKLANDS HOLDINGS LTD.

(3) EAST FARTHING HOLDINGS LIMITED

(4) MS. KATIA RABELLO

(5) MR. FERNANDO TOLEDO

Plaintiffs

AND

WALKERS (A FIRM)

Defendant

Appearances:	Mr. Graham Chapman QC, Mr. Ben Hobden, Ms. Roisin Liddy-Murphy and Ms. Sean-Anna Thompson for the Plaintiffs
	Mr. Mark Simpson QC, Mr. Sebastian Said, Mr. Nico Leslie, Mr. Daniel Hayward-Hughes and Ms. Mehreen Siddiqui for the Defendant
Before:	The Hon. Justice David Doyle
Heard:	19 April 2021
Draft Judgment circulated:	28 April 2021
Judgment delivered:	5 May 2021

HEADNOTE

O33 r 3 GCR: preliminary issues, separate trial of separate issues; principles to be applied and guidance; English and local precedents; case management considerations

JUDGMENT

Summary

1. In this judgment I decide that certain issues (namely retainer, duty and breach) should not, as requested by the Plaintiffs, be heard at a separate trial in advance of other issues including loss, causation and illegality. The judgment refers to the relevant law in respect of preliminary issues and split trials, the position of English and local precedents, gives brief reasons for the decision reached by the court and makes provision for certain case management directions.

Introduction

2. The papers in respect of this matter were placed before me on 23 March 2021 and I noted that the matter had been listed for 19 April 2021.

3. On 24 March 2021 on my direction an email was sent to the attorneys in this case requiring them to file an agreed reading list and electronic bundle before 4pm on 1 April 2021 and position statements (no more than 20 pages) before 4pm on 8 April 2021. It was further indicated that the matter remained listed on 19 April 2021 with a start time of 9:30am and a maximum of 2 hours allocated.

4. I am grateful to the attorneys Mr. Graham Chapman QC, Mr. Ben Hobden for the Plaintiffs and Mr. Mark Simpson QC and Mr. Sebastian Said for the Defendant who appeared at the hearing for their assistance to the court.

The present issue for determination

5. Following the judgment of the Court of Appeal in these proceedings being handed down on 1 February 2021 the attorneys for the Plaintiffs wasted no time and filed an application by way of summons dated 4 February 2021 (the "Preliminary Issues Summons") seeking the following order:

> "The issues as to (i) whether the Plaintiffs (or any of them) were clients of the Defendant; (ii) whether the Defendant owed duties to the Plaintiffs (or any of them) and, if so, which duties; and (iii) whether the Defendant breached any such duty and, if so, in what respect(s) (the "Preliminary Issues") be tried as preliminary issues (the "Preliminary Issues Trial")."

6. The Plaintiffs also sought directions in respect of the exchange of pleadings on the Preliminary Issues and sought a hearing post 1 August 2021 with an estimate of 5 days. Further directions were sought in connection with trial bundles, skeleton arguments and authorities, discovery and witness statements and oral evidence at the Preliminary Issues Trial.

7. The present issue before the court for determination is whether it is appropriate to proceed to determine the Preliminary Issues at the proposed Preliminary Issues Trial.

Brief overview

8. The Defendant ("Walkers"), a Cayman Islands law firm, describe this case as "a highly unusual professional negligence action" in which the "Plaintiffs seek over US$390 million in damages, reflecting the alleged value of assets held by Ms. Rabello [the Fourth Plaintiff] and the Second and Third Plaintiffs ("Arnage" and "Brooklands") that have been incorporated by the Brazilian Courts into the bankruptcy of a petrochemical conglomerate ("Petroforte"). There is also an unquantified claim for the loss of the entirety of Ms. Rabello's assets / estate" (paragraph 9 of Walkers' position statement dated 8 April 2021).

9. A generally endorsed writ was filed as long ago as 4 February 2014. On 24 July 2014 Walkers applied for a strike out and/or summary judgment and/or security for costs. On 18 September 2014 the Plaintiffs applied for a strike out or summary judgment. There were various delays beyond the control of the court and on 24 July 2019 the Hon. Anthony Smellie, Chief Justice, handed down his judgment in favour of the Plaintiffs as to liability with loss and damages to be assessed. The Chief Justice dismissed an application by Walkers to strike out the case on the ground of illegality. The Chief Justice declined to grant security for costs. The matter went to the Court of Appeal and in a judgment delivered on 1 February 2021, the Court of Appeal allowed Walkers' appeal against summary judgment and dismissed the appeal against the refusal to strike out the Plaintiffs' case. The attorneys have indicated that the appeal against the refusal to grant security for costs is due to be heard by the Court of Appeal on 25 May 2021.

10. In essence, the Plaintiffs claim that they were clients of Walkers and that in breach of duties of trust, loyalty and confidence owed to them as clients or former clients Walkers accepted instructions from Dr. Alfonso Braga ("Dr. Braga"), a Brazilian court-appointed trustee of bankruptcy for the estate of Petroforte.

11. Dr. Braga sought to identify the ultimate beneficial owner ("UBO") of Securinvest (a company owned by Arnage and Brooklands) which was said to have been used as a vehicle of fraud on Petroforte. As Arnage and Brooklands were incorporated in the Cayman Islands Dr. Braga decided to come to this jurisdiction and Walkers accepted his instructions. They obtained two *Norwich Pharmacal* disclosure orders on 27 May 2010 and 2 July 2010. The disclosure indicated that Ms. Rabello was the UBO of Securinvest.

12. To cut a long story short, the courts in Brazil extended the Petroforte bankruptcy to her personal assets and she was also made bankrupt. The losses claimed in these proceedings are alleged to flow from the inclusion of Securinvest's and Ms. Rabello's assets into the Petroforte estate which is further alleged to have been the consequence of Walkers' breaches of duty in accepting instructions from Dr. Braga and obtaining disclosure that Ms. Rabello was the relevant UBO of Securinvest.

13. The Plaintiffs attribute their losses to the Cayman disclosure obtained by Walkers for Dr. Braga.

14. In addition to issues of liability, causation and quantum Walkers have also raised the defence of illegality. Walkers aver that it was Ms. Rabello's own deception and participation in the fraud on the creditors of Petroforte which brought about her personal bankruptcy and losses. On the issue of illegality, the court will, as stated by Sir Alan Moses in the Court of Appeal (at paragraph 169 of his judgment), have to assess the extent and gravity of Ms. Rabello's wrongdoing and weigh any proven fraud committed by Ms. Rabello against any breaches of Walkers' duties to any of the Plaintiffs established as its clients. The court will have to determine whether, in the public interest, it is proportionate to bar Ms. Rabello's claim. In the words of Sir Alan Moses "much will depend on the facts as found at trial."

15. There are references to lies in respect of the identity of the UBO of Securinvest prior to the disclosure being ordered and Walkers' position is that if Ms. Rabello had told the truth in September 2009, then Dr. Braga would have had no need to go to the Cayman Islands in search of the correct identity of the UBO of Securinvest. Walkers add that if she had told the truth in 2009 her personal bankruptcy and the losses would have occurred in any event. Walkers deny that the Superior Tribunal de Justica in Brazil relied on the disclosure obtained in the Cayman Islands and raise various other causation issues some of which are referred to in the judgment of the Court of Appeal and I do not repeat them within this brief overview.

The relevant legal framework

16. Under the Grand Court Rules ("GCR") the court must seek to give effect to the overriding objective of dealing with matters in a just, expeditious and economical way. The parties and their attorneys are obliged to help the court to further the overriding objective. This required co-operation and assistance is essential to the administration of justice.

17. Furthermore, the court must further the overriding objective by actively managing proceedings. This may include identifying the issues at an early stage, deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others, deciding the order in which issues are to be resolved, dealing with as many aspects of the proceeding as is practicable on the same occasion and giving directions to ensure that the trial proceeds quickly and efficiently.

18. Whenever a proceeding comes before the court, the court should also consider making orders of its own motion for the purpose of giving effect to the overriding objective of the GCR.

19. Under Order 33 rule 3 of the GCR, it is provided that 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 trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

20. Under Order 33 rule 4(2) of the GCR in actions begun by writ different questions or issues may be ordered to be tried by different modes of trial and one or more questions or issues may be ordered to be tried before the others.

21. Under Order 33 rule 7 of the GCR, it is further provided that if it appears to the court that the decision on any matter or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment as may be just.

22. Section B4 of the Financial Services Division Guide (Second Edition August 2015) is headed "Standard Pre-Trial Directions" and B4.3 provides:

> *"The overriding objective places considerable emphasis on the need for the Court to ensure, inter alia, that a cause or matter proceeds and is determined on its merits in the most expeditious way, that it is not delayed and that a trial proceeds quickly and*

efficiently. The parties legal representatives are expected to co-operate with each other and with the Court in achieving these objectives. The FSD will give these obligations particular regard in giving directions concerning timetables and setting hearing and trial dates. It will not allow hearing or trial dates to be unduly delayed, for example merely to suit the availability of individual overseas lawyers. It is ultimately for the Court to set a hearing or trial date having regard to all the circumstances and the requirements of the overriding objective."

The position under English law and procedure

23. Before turning to the relevant previous decisions of the courts of the Cayman Islands I refer to the position under English law as the decisions of the courts of Cayman Islands on preliminary issues have been heavily influenced by the English authorities in this area of law and practice.

24. The commentary under 33/4 to the English Supreme Court Practice 1999 White Book refers to the discretionary nature of the court's jurisdiction as to the trial of preliminary issues emphasising that such must be exercised upon proper considerations and materials. It adds:

> "An order for the separate trial of separate issues is a departure from the beneficial object of the law that all disputes should be tried together, and therefore, generally speaking, such an order should only be made in exceptional circumstances or on special grounds…
>
> On the other hand, these rules provide the machinery for avoiding the trial of unnecessary issues or questions, by isolating particular issues or questions for separate trial and thus eliminating or reducing delay and expense in the preparation and the trial of issues or questions which may ultimately never arise for trial or which otherwise warrant being separately tried. An order should therefore be made for the separate trial of a preliminary issue, *e.g*. a point of law, which if decided in one way is likely to be decisive of the litigation and it is not necessary that the decision should be such as to dispose of the entire action whichever way it is decided… Such an order may have the beneficial effect of expediting the hearing of the substantial issue in the action, eliminating the need for the discovery of documents and evidence on the other issues, and producing a substantial saving of costs…
>
> On the other hand, where there has been delay and there is a likelihood of additional costs and where also there are facts to be determined, the Court will be disinclined to order the trial of a preliminary issue…

An order for the separate trials of issues of liability and damages will only be made if there is a clear line of demarcation between these issues on the pleadings, and not where they interact upon each other…

While the normal procedure should still be that liability and damages should be tried together, the Court should be ready to order separate trials of liability and damages whenever it is just and convenient to do so… However an order to separate trials of the issues of liability and damages, by way of exception to the general rule, was only to be made in exceptional circumstances where there was a clear line of demarcation between the issues of liability and quantum…

On the other hand, where the issue of liability is separate and distinct from the issue of damages, litigants should take advantage of the facilities which are afforded of having the question of liability decided as a preliminary issue before the issue of damages…and this is specially so where the issue of damages is detailed and complicated…"

25. The English White Book 2021 commentary on Rule 3.1(2)(i) dealing with the subject of directing a separate trial of any issue refers to *McLoughlin v Grovers (a firm)* [2001] EWCA Civ 1743; [2002] QB 1312 at paragraph 66 and states:

"… trying one issue separately can sometimes lead to huge savings in costs and delays if that issue is or may be determinative of the whole proceedings, or if a court decision upon it is likely to assist the parties to resolve other issues by means of settlement or ADR. However, there is always a risk that an order directing a preliminary issue will lead to unnecessary expense and delay if a decision on that issue would not be decisive of the litigation either way…

although they are intended to short circuit proceedings, separate trials may actually increase the time and cost of resolving the underlying dispute, for example, if witnesses called to the first trial also have to be called to the second trial…

Before directing a preliminary issue the court should consider how much effort will be involved in identifying the relevant facts. The greater the effort the less likely it is that the preliminary issue will lead to a saving in costs. If there are serious disputes of fact giving judgment at the trial of the preliminary issue may be unsafe or useless…"

26. David Steele J in *McLoughin v Grovers* at paragraph 66 indicated that in his judgment the right approach to preliminary issues should be as follows:

(1) Only issues which are decisive or potentially decisive should be identified;

(2) The questions should usually be questions of law;

(3) They should be decided on the basis of a schedule of agreed or assumed facts; and

(4) They should be triable without significant delay, making full allowance for the implications of a possible appeal.

Any order should be made by the court following a case management conference, where the proposed preliminary issue has been identified with precision (*Lahey v Pirelli Tyres Ltd* [2007] EWCA Civ 91; [2007] 1 WLR 991, [5]).

27. Reference has also been made to the well-known English Court of Appeal authority of *Rossetti Marketing Limited v Diamond Sofa Company Limited* [2012] EWCA Civ 1021 and the following observations when the then Master of the Rolls (Lord Neuberger), in the same month as he gave his Hamburg lecture on *Judges and Professors-Ships passing in the night*, gave the following well-informed warning at paragraph 1 of his judgment:

> "It represents yet another cautionary tale about the dangers of preliminary issues. In particular, it demonstrates that (i) while often attractive prospectively, the siren song of agreeing or ordering preliminary issues should normally be resisted, (ii) if there are nonetheless to be preliminary issues, it is vital that the issues themselves, and the agreed facts or assumptions on which they are based, are simply, clearly and precisely formulated, and (iii) once formulated, the issues should be answered in a clear and precise way."

Lord Neuberger in his concluding observations at paragraph 74 referred to the first instance judge's comment that it "would have been far better to have had a trial to resolve all the issues". Lord Neuberger added that whatever the judge decided on the preliminary issues, and irrespective of who won on those issues, it should have been obvious to those agreeing the preliminary issues that a trial would not necessarily be avoided. Lord Neuberger also stated that it should have been appreciated that it would be very likely that two of the witnesses who gave fairly extensive evidence before the judge at first instance at the preliminary issues hearing

would have to give evidence at the main trial and "that at least some of that evidence would duplicate the evidence on the preliminary issues".

28. Some years earlier Neuberger J, as he then was, in *Steele v Steele* [2001] C. P. Rep 106; [2001] 1 WL 542150 had indicated that when deciding whether to order determination of a preliminary issue the court should ask itself the following questions:

(1) Could the determination of the preliminary issue dispose of the whole or at least one aspect of the case?

(2) Could the determination of the preliminary issue significantly cut down the cost and the time involved in pre-trial preparation and in connection with the trial itself?

(3) If the preliminary issue was an issue of law, how much effort, if any, was involved in identifying the relevant facts for the purpose of the preliminary issue? The greater the effort the more questionable the value of ordering a preliminary issue.

(4) If the preliminary issue was one of law, to what extent was it to be determined on agreed facts? The more facts that were in dispute the greater the risk that the law could not be safely determined until the disputes of fact were resolved.

(5) Whether the determination of the preliminary issue could unreasonably fetter either or both of the parties or the court in achieving a just result at trial.

(6) To what extent was there a risk of the determination of the preliminary issue increasing costs and/or delaying the trial? In that regard the court could take into account the possibility that the determination of a preliminary issue might result in a settlement.

(7) The extent to which the determination of a preliminary issue was relevant. The more likely it was that the issue would have to be determined by the court, the more appropriate it was to have it as a preliminary issue.

(8) To what extent was there a risk that the determination of the preliminary issue, if apparently helpful in terms of saving costs and time, could lead to an application for the pleadings to be amended to avoid the consequences of the determination?

(9) Was it just and right to order a preliminary issue?

29. The following year Arden LJ (as she then was) in *Royal & Sun Alliance Insurance plc v T & N Ltd* [2002] EWCA 1964 Civ at paragraph 46 commented that the ability to order preliminary issues is a valuable case management tool. It must however be used with great care. A watchful eye has to be kept out for possible "treacherous short cuts" which may in the long run lead to further delays and expense. In particular, it should not generally be used where the application of the relevant law will depend on the determination of the precise facts, which have yet to be identified. Arden LJ stressed that in respect of preliminary points of law or a separate trial of a point of law if tried on the basis of assumed facts there may still have to be a second trial of the actual facts, which may turn out to be materially different from the assumed facts upon which the question of law was determined.

30. The English Court of Appeal in *Greville v Venables* [2007] EWCA Civ 878 dealt with an appeal in respect of a preliminary issue as to whether there was a partnership between the parties. The claim was also to be advanced on other grounds. The judge at first instance heard evidence on the preliminary issue as to partnership and made various findings of fact. Lloyd LJ in the English Court of Appeal at paragraph 4 stated:

> "… this seems to me to be another of the many cases in which the preliminary issue has turned out to be a diversion, and an expensive one, on the path to a full resolution of the position as between the parties."

And at paragraph 16:

> "… one may have a number of reservations about the very fact of a preliminary issue being ordered at all and about its formulation."

31. Thomas LJ at paragraph 51 referred to the importance of Lloyd LJ's observations on the dangers of preliminary issues adding:

> "In my view this is a case which yet again underlines the necessity for great caution in the ordering of preliminary issues … this case should therefore stand simply as yet a further reminder of the necessity for great caution before preliminary issues are ever embarked on."

32. Pill LJ completed the trio of judicial warnings at English appellant level in respect of preliminary issues in that case by adding at paragraph 53 the following words:

"This case demonstrates once again, as Lord Justice Lloyd and Lord Justice Thomas have pointed out, the dangers involved in preliminary hearings to decide particular points at issue."

33. Lord Hope in *SCA Packaging Ltd v Boyle* [2009] UKHL 37, in the context of a tribunal case, at paragraph 9 referred to Lord Scarman's "treacherous shortcut" warning and added "Even more so where the points to be decided are a mixture of fact and law" and stressed that there were "dangers in taking what looks at first sight to be a shortcut but turns out to be productive of more delay and costs than if the dispute had been tried in its entirety".

34. Arden LJ (as she then was) in *Bond v Dunster* [2011] EWCA Civ 455 at paragraph 18 referred to various preliminary issues at first instance designed to determine certain facts in respect of the development of a property and whether an agreement had been entered into and added "The ordering of preliminary issues is often found in the end to have delayed the resolution of an action and this case is no exception".

35. Lord Neuberger (the then Master of the Rolls) at paragraph 106 of his judgment delivered in *Bond v Dunster* just two days before he delivered the Judicial Studies Board annual lecture 2011 *Open Justice Unbound?* referred to the problem in that case in respect of the agreement of the parties to the determination of preliminary issues stating:

"This appears to me to have been very unwise, given that the hearing was anticipated to last four days, and, it would seem, to involve oral evidence, much of it from parties or witnesses who could reasonably have been expected to give evidence at any subsequent hearing".

The Master of the Rolls added:

"107. While they have their value, it is notorious that preliminary issues often turn out to be misconceived, in that, while they are intended to short-circuit the proceedings, they actually increase the time and cost of resolving the underlying dispute. It would, in my judgment, require a very exceptional case, almost inevitably one where a subsequent multi-week trial was anticipated, before a preliminary issue hearing, involving witnesses and expected to last four days, could be justified."

36. At paragraph 108 the Master of the Rolls warned that " … parties and their legal advisers should carefully consider the potential benefits and risks before proposing a preliminary issues hearing, and, before a judge orders such a hearing, he or she should normally test the soundness of the proposed course".

37. Where the risk of duplication of evidence between trials is substantial, a separate trial may not carry a clear advantage. In *McKeown v Attheraces Limited* [2011] EWHC 3232 (QB), albeit in a defamation claim context, Eady J at paragraph 21 wisely stated:

> "Experience shows that the attraction of preliminary issues, or separate trials, can often be a snare and delusion… Each case must obviously turn on its own facts. If this Defendant succeeds completely on privilege, of course, that would be the end of the matter and time would undoubtedly be saved. In the event, however, that the Claimant succeeds on privilege, wholly or in part, there will be no saving of costs and indeed there may be some duplication…"

38. Eady J concludes his judgment in that case as follows:

> "30. Looking at the matter as an exercise in case management, and in seeking to achieve the overriding objective of the CPR, I am unpersuaded by the evidence in this case that there are likely to be significant savings either of time or money if the issues of privilege are hived off and tried separately. Indeed, I think it would be difficult to avoid duplication. The case does not lend itself to easy compartmentalising.
>
> 31. I have come to the conclusion, in all the circumstances, that there would be no clear advantage in directing a preliminary issue in this case. It is in the interests of all concerned that a trial should now take place of all the issues together."

39. Where at the hearing of preliminary issues there will be disputed evidence, taking the preliminary issue may be inappropriate as it could lead to additional costs and duplication (*Lachaux v Independent Print Ltd* [2017] EWCA Civ 1334; [2018] QB 594 - a defamation case but as *Zuckerman on Civil Procedure* Fourth edition at page 612 notes for the converse see *Hope Not Hate Ltd v Farage* [2017] EWHC 3275 (QB)).

40. In *Lachaux* (albeit in the specialised defamation context) Davis LJ at paragraph 82(4) stated:

"Courts should ordinarily be slow to direct a preliminary issue, involving substantial evidence, on a dispute as to whether serious reputational harm has been caused or is likely to be caused by the published statement"

And at paragraph 92:

"… I think it very unfortunate that a point of this kind was ever pursued at the hearing of the preliminary issues."

41. In *Hope not Hate Ltd* Warby J had to deal with a case which involved initially an agreement between the parties that there should be a trial of serious harm as a preliminary issue and the matter had been accordingly listed for an impending preliminary issues trial. The Defendant belatedly (just two weeks before the preliminary hearing trial date) raised the question as to whether, in light of *Lachaux*, the preliminary issues trial should proceed. Warby J concluded that given the particular circumstances of the case the preliminary issue trial should go ahead (paragraph 5 of the judgment).

42. Warby J at paragraph 35 stated:

"Preliminary issues are generally frowned on in litigation. At least, the court takes a cautious approach. The risks of taking what is often called a "treacherous shortcut" are well-documented… There have, however, been a number of orders for preliminary issue trials of the issue of serious harm in a defamation claim… What is clear is that in *Lachaux* the Court of Appeal was concerned at the risk that preliminary issue trials would run up significant if not substantial costs to no useful purpose or indeed, in a way that is inimical to achieving the overriding objective."

43. Warby J stressed at paragraph 36:

"all these cases depend on their particular facts … The court must apply the overriding objective, seeking to identify what the issues would be, and how they fit within the overall picture of the litigation. It must strive to balance the competing considerations – of which there are many – in such a way as to best achieve the overriding objective."

44. Warby J at paragraph 37 stated:

> "I bear in mind the warning that the court should be slow to direct a preliminary issue trial involving substantial evidence. I am mindful of the risk in this case that the determination of the issues might generate an appeal. But my conclusion that, despite what was said by the Court of Appeal in *Lachaux*, the envisaged trial should proceed in this action is based on an assessment of all the circumstances of this case."

Warby J added:

> "It does seem to me that the evidential investigation that would be involved in the trial that I am now contemplating would be relatively modest…"

45. I end this section reviewing the English authorities with two short cautionary quotes from two English appellate judges.

46. Firstly, the oft-repeated warning of Lord Scarman in *Tilling v Whiteman* [1980] AC 1 at 25, that "Preliminary points of law are too often treacherous short cuts. Their price can be, as here, delay, anxiety and expense."

47. Secondly, the words of Longmore LJ in *Fox v Jewell* [2013] EWCA Civ 1152 at paragraph 24 where he referred to the English Court of Appeal having "fairly considerable experience of how sometimes unsatisfactory preliminary issues can be, if they are not truly entirely separate and independent issues from other issues which are left to be tried later."

The position under the laws of the Cayman Islands

48. The Cayman Islands and England and Wales are marching together in harmony in the development of the law in respect of preliminary issues and split trials.

49. It is important however to emphasise that English authorities are, of course, not binding on courts in the Cayman Islands but depending on the context and the issue under consideration English authorities, especially at appellate level, may be persuasive and in some cases highly persuasive. In considering the impact of English authorities regard must always be had to local circumstances.

50. In respect of the weight to be attached to judgments of the English Court of Appeal, Zacca P in *Miller v R* 1998 CILR 161 at 164 sets out the position of the Court of Appeal of the Cayman Islands as follows, albeit in the context of a criminal appeal,:

> "A decision of the English Court of Appeal, while not formally binding upon this court automatically, is necessarily one of great persuasive authority, especially where it is unanimous and is directed towards a doctrine of the common law."

51. Sanderson J in *National Trust for Cayman Islands v Planning Appeals Tribunal* 2002 CILR 59 at 66 para 19 referred to *Miller* stating that in such appeal, the Court of Appeal acknowledged that "unanimous decisions of the English Court of appeal are strong persuasive authority locally but not binding authority." Sanderson J referred to *de Lasala v de Lasala* [1980] A.C. 546 an authority in the Judicial Committee of the Privy Council in an appeal from Hong Kong adding, "the Privy Council stated that on questions of common law, a decision of the House of Lords was of very great persuasive authority locally because of the common membership of those courts. However, it stated that this principle does not apply where circumstances locally make it inappropriate to develop a field of common law in a manner similar to England."

52. The Privy Council also referred to *de Lasala* in *Frankland v R* 1987-89 MLR 65 at 80 where Lord Ackner, delivering the judgment of the Board, stated:

> "Decisions of the English courts, particularly decisions of the House of Lords and the Court of Appeal in England, are not binding on Manx courts, but they are of high persuasive authority… Such decisions should generally be followed unless either there is some provision to the contrary in a Manx statute or there is some clear decision of a Manx court to the contrary, or, exceptionally, there is some good reason for not following the particular English decision. The persuasive effect of a judgment of the House of Lords, which has largely the same composition of the Judicial Committee of the Privy Council, the final Court of Appeal from a Manx court, is bound to be very high."

53. There are a number of decisions of the courts of the Cayman Islands in the area of preliminary issues and split trials law and procedure and it is to those that I now turn. All these cases are, of course, acutely fact and context sensitive but some general guidance may be obtained from them.

54. The Honourable Chief Justice Smellie, some twelve years ago, in *SPhinX Group of Companies* 2009 CILR 28 at 39 helpfully stated:

"The trial of preliminary issues should not be taken unless to do so would be clearly conducive to the just and timely outcome of the case. Otherwise, the practice will often tend only to increase the costs, time and anxiety of legal proceedings and add to the difficulties faced by the Court of Appeal in resolving matters coming before them. In the cautionary words of Lord Scarman in *Tilling v Whiteman* … "preliminary points of law are too often treacherous short cuts""

55. The Note in *Ojjeh Trust* 2008 CILR Note 3 records that it was held by Chief Justice Smellie that:

"(1) The plaintiffs' application for a direction for a preliminary trial would be dismissed and directions for a full trial ordered. When considering such a direction, the court should examine the case as a whole, be assured that the issues to be singled out were amenable to the proposed discrete treatment, and should have regard to (a) whether determination of the issues would completely dispose of the case or at least a significant aspect of it; (b) whether the costs and time involved in preparation for the trial, and for the trial itself, would be significantly reduced; (c) whether the issues could be determined on established facts or whether further examination of evidence was required; (d) the degree of risk that a trial of preliminary issues would increase costs or delay the trial overall; and (e) whether, taking into account all considerations, it would be just to make such an order. The basic principle was that separate trials of separate issues required special grounds and the court should be careful to avoid leaving the case "in tatters," and unless the outcome could be reasonably assured there was no justification for taking the risk of doing so. The court should seek to confine the practice of tackling issues preliminarily to cases which would be made less complicated by the resolution of discrete but significant legal issues, as the overriding objectives of the Grand Court Rules, O.33, rr. 3–4 was to enable actions to be dealt with in a just, expeditious and economical manner."

56. The Note in respect of *T Trust* 2002 CILR Note 1 records the decision of Chief Justice Smellie as follows:

"In deciding whether to direct the trial of a preliminary issue, the court should have regard to the following matters: (a) whether the determination of the issue will dispose of the case or at least an important aspect of it so as to narrow the triable issues — if the respondent can avoid the consequences of trying the issue simply by amending his pleadings, there will be no value in trying it; (b) whether the costs and time involved in

preparations for trial or the trial itself will be significantly reduced; (c) where the issue is one of construction, to what extent it can be determined or agreed on readily ascertainable facts; (d) the degree of risk that the determination of the preliminary issue (or the process of appeal against directions for its trial) will increase costs or delay the trial; and (e) whether, taking into account all other relevant considerations, *e.g.* the stage which preparations for trial have reached and the parties' relative resources, it would be just to order the trial of the issue (*Steele* v. *Steele*, [2001] All E.R. (D) 227, applied). The more expeditiously and economically preliminary issues can be resolved, the better for the interests of all concerned (*Tilling* v. *Whiteman*, [1980] A.C. 1, *dicta* of Lord Wilberforce applied)."

57. The headnote to *TMSF v Wisteria Bay Ltd* 2007 CILR 310 at (3) summarises the holding on the preliminary issue point as follows:

> "(3) The application to try as a preliminary issue the question of whether the plaintiff had a valid title to the ships by operation of Turkish law would be refused. The allegations of fraud and the validity of the mortgages were highly contentious issues of fact that could only be decided after an adversarial hearing and were therefore unsuited to a preliminary trial, which would only prolong the case with the attendant risk of increased costs (paragraphs 31-32)."

The following are the relevant extracts from the judgment of Chief Justice Smellie:

> "Preliminary issue for trial
>
> 30 By way of an alternative to their strike-out application, the defendants' summons invites the court to certify for trial by way of preliminary issue the very question of whether TMSF has a valid title to the ships and whether it has any proper standing to seek any other relief claimed in the re-re-amended statement of claim. This, however, was not an argument which Mr. Robinson pressed before me and not one which in any event was likely to succeed.
>
> 31 The allegation of fraud which is so germane to TMSF's acquisition of title under Turkish law and the separate allegations going to the validity of the mortgages on the Shipping Register here are all hotly-contested issues. They are essentially factual in nature and can be fully resolved only after adversarial enquiry. Plainly, no sensible attempt could be made to resolve the issue of TMSF's proprietary title or its *locus*

standi to bring these proceedings and ultimately its right to the declaratory relief which it seeks in respect of the mortgages without first resolving those factual allegations.

32 The case authorities admonish against seeking to resolve factual allegations by way of trial of preliminary issue, a process designed mainly to resolve discrete or narrow issues, the resolution of which should assist in the more efficient disposal of the case. Any attempt at resolution of such acrimonious and intensely factual issues as these by way of preliminary trial would, in my view, be at great risk of serving only to prolong and postpone the final disposition of the case with the further attendant risks of increased costs. *In re T Trust* (10) and *Tilling v. Whiteman* (11) are very much on point."

58. More recently, Williams J in *Herrara-Frederick v The Health Services Authority* (unreported judgment 7 March 2014), in the context of a clinical negligence claim, dealt with an application by the Plaintiff for an order for a split trial with the issue of liability being heard prior to the issue of quantum pursuant to Order 33 rule 4(2) of the GCR. The judge (at paragraph 19 of his helpful and comprehensive judgment) did not accept that split trials should only be ordered "in exceptional circumstances where the advantages far outweigh the risk". The judge was of the view that there must be a good and sufficient reason to split the trial "to outweigh the sense and prescribed objective of dealing with as many aspects of the case as is practicable on the same occasion". The judge referred to the Chief Justice's judgment in *TMSF v Wisteria Bay Ltd* 2007 CILR 310 and (at paragraph 25) accepted that "split trials are more appropriate where the issues in dispute are discreet and narrow and that the resolution of which may finalise the proceedings". Williams J also referred to a number of English first instance authorities rightly stressing (at paragraph 55) that each case must be considered on its own facts and circumstances. The judge, having considered a number of authorities, helpfully outlined (at paragraph 27) some of the reasons why a split trial may be preferable in certain cases including:

(1) better use of court time and resources, as well as reduction of costs. The possibility of a speedier conclusion caused by narrowing down of considerations;

(2) if liability is established the parties can focus on quantum without being distracted by other issues of breach of duty and causation;

(3) settlement negotiations may be promoted; and

(4) there will be an early determination of liability.

59. The judge at paragraph 28 wisely pointed out that on the other hand in certain cases separate hearings may prolong the overall duration of the action, and may have the opposite effect in relation to costs by increasing them, this is particularly the case if causation issues are linked to other issues and there is duplication of costs, overlap of evidence and the parties having to endure the stress of two trials rather than one. Williams J also considered the judgment of Hildyard J in *Electrical Waste Recycling Group Ltd v Philips Electronics UK Limited* [2012] EWHC 38 (Ch) which he had helpfully brought to the attention of the parties.

60. The judge concluded (at paragraph 57) that "On the limited evidence before me and the submissions received, the boundaries between liability, causation and quantum appear tolerably clear. I am satisfied that, although in particular the Second Defendant has indicated that there is some overlap, it is not clear from the submissions made what she contends that overlap to be and to what degree it exists. I am not satisfied that it is impossible to draw meaningful distinction between issues of liability on (sic) quantum which would in turn lead to a duplication of costs, rather than a cost saving".

61. Gunn J in *Edwards v De Alwis-Seneviratne* (unreported judgment 29 June 2018), in the context of a personal injury claim, gave a few examples of "how credibility and reliability of the parties is interwoven throughout the issues in the case and cannot be neatly separated. Any attempt to do so would be highly artificial and likely to prejudice one or both parties by preventing relevant evidence being adduced at the relevant time" (paragraph 30). At paragraph 31 Gunn J recognised that at times there was a need to reassess a witness' credibility and reliability in split trials but these tended to be in circumstances when credibility was defined to narrow and discreet issues adding "However, in instances where credibility / reliability is so central and interwoven into many aspects of the case on liability, it is simply not appropriate. Compartmentalising credibility in such circumstances is likely to cause prejudice to one or other party by preventing the Court from having all of the relevant information when making its assessment of their evidence …". Gunn J also placed reliance on Hildyard J's judgment in *Electrical Waste Recycling Group Ltd* stressing that the court should take a common sense and pragmatic approach and consider the following factors:

    (1) whether the prospective advantages of saving the costs of an investigation of quantum if liability is not established outweighs the likelihood of increased aggregate costs if liability is established and a further trial is necessary;

(2) what are likely to be the advantages and disadvantages in terms of trial preparation and management;

(3) whether a split trial will impose unnecessary inconvenience and strain on witnesses who may be required in both trials;

(4) whether a single trial to deal with both liability and quantum will lead to excessive complexity and diffusion of issues, or place an undue burden on the judge hearing the case;

(5) whether a split trial may cause particular prejudice to one or other of the parties;

(6) whether there are difficulties of defining an appropriate split or whether a clean split is possible;

(7) what weight is to be given to the risk of duplication, delay and the disadvantage of bifurcated appellate process;

(8) whether a split trial would assist or discourage mediation and/or settlement;

(9) if the order for a split trial is made late in the proceedings, whether the expenditure of time and costs might actually increase the overall costs; and

(10) generally, what is perceived to offer the best course to ensure that the whole matter is adjudicated as fairly, quickly and efficiently as possible.

62. The judge concluded as follows at paragraph 38:

> "It is apparent that both parties wish for a swift resolution of this matter. However, I conclude that a split trial will not only cause significant delay and additional costs. The issues to be addressed at a preliminary trial as proposed by Mr Keeble are not narrow and discreet; and a clean split is simply not possible. In this instance it is not just, convenient or expeditious to split the trial."

63. It can be seen therefore that local law has been heavily influenced by English law in this area and the courts of the Cayman Islands have taken on board the warnings at English appellate court level in respect of separate trials for preliminary issues but where the circumstances have permitted orders have been made for separate trials of preliminary issues.

Summary of the relevant law of the Cayman Islands on preliminary issues trials

64. Pulling all these English and local judicial threads together I endeavour to summarise below the general principles applicable when a court is considering whether or not to order a preliminary issues trial:

(1) each case, of course, must be carefully considered in its own context and on its own facts and circumstances;

(2) the authorities require that a cautious approach should be taken and they warn against potential treacherous shortcuts. The trial of preliminary issues should not be taken unless to do so would be clearly conducive to the just and timely outcome of a case (Chief Justice Smellie in *SPhinX*);

(3) if considering a direction for a preliminary issues trial the court should examine the case as a whole, be assured that the issues to be singled out were amenable to proposed discreet treatment and should have regard to (a) whether determination of the issues would completely dispose of the case or at least a significant aspect of it (b) whether the costs and time involved in preparation for the trial itself would be significantly reduced (c) whether the issues could be determined on established facts or whether further examination of evidence was required (d) the degree of risk that a trial of preliminary issues would increase costs or delay the trial overall and (e) whether it would be just to make an order (Chief Justice Smellie in *Ojjeh Trust, T Trust* and *TMSF*);

(4) the court should have regard to the factors outlined in the English case of *Electrical Waste Recycling Group* in particular (a) the possible saving of costs of a second trial (b) trial preparation (c) the inconvenience and strain on witnesses where evidence is required at both trials (d) complexity of a single trial (e) any particular prejudice to one or other of the parties if a split trial is held (f) difficulties of defining an appropriate split and whether a clear split is possible (g) risk of duplication, delay and appeals (h) whether a split trial would assist or discourage mediation and/or settlement (i) if an order for a split trial is made late in the proceedings whether the overall costs may actually increase (j) what is perceived to offer the best course to ensure that the whole matter is adjudicated fairly, quickly and efficiently as possible (Williams J in *Herrara-Frederick* and Gunn J in *Edwards*);

(5) there must be good and sufficient reason to split the trial to outweigh the sense and prescribed objective of dealing with as many aspects of the case as is practicable on the same occasion (Williams J in *Herrara-Frederick*);

(6) where credibility and reliability of the parties and/or witnesses is interwoven throughout the issues in the case this would normally militate against a split trial as compartmentalising credibility in such circumstances is likely to cause prejudice to one or other parties by preventing the court from having all of the relevant information before it when making its assessment of their evidence (Gunn J in *Edwards*).

The position of the parties in respect of the Preliminary Issues Summons

65. I have considered the written material and submissions placed before the court on behalf of the parties. The position statements and oral submissions on behalf of the Plaintiffs and Walkers form part of the court record so I do not refer to all the detail now in this judgment but I reassure the parties and the attorneys that I take into account all the submissions put before the court.

The submissions of the Plaintiffs

66. I have considered the position of the Plaintiffs in respect of the Preliminary Issues Summons as outlined in their 19 page position statement dated 8 April 2021 from Mr. Chapman QC and Mr. Ben Hobden and the oral submissions put before the court by Mr. Chapman.

67. In short, the Plaintiffs say that what is proposed in substance is a staged trial of the action with the Preliminary Issues of retainer, duty and breach being tried first, with causation, loss, the ex turpi causa illegality defence and any remaining issues being tried, if necessary, subsequently.

68. On behalf of the Plaintiffs it is submitted that a trial of the Preliminary Issues:

(1) represents a cost effective and efficient mechanism for determining the issues of retainer, duty and breach of duty;

(2) requires little in terms of further preparation in respect of discovery or witness evidence;

(3) could take place in early course, leading to certainty for the parties at least insofar as these important indeed critical issues are concerned;

(4) would represent an efficient and proportionate use of the court's resources;

(5) would mean that the court and the parties would only embark on the more lengthy, complex and expensive issues of causation, loss and ex turpi against the backdrop of the issues of duty and breach having been determined (and determined in favour of the Plaintiffs);

(6) would, on Walkers' case, be entirely dispositive of the Plaintiffs' claims.

69. On behalf of the Plaintiffs it is also emphasised that there is no overlap between the evidence of Walkers on the Preliminary Issues and the remaining issues of causation, loss and ex turpi causa. In any event the issues of causation, loss and ex turpi causa are discreet issues which rely on the "Brazilian inquisition" rather than the retainers of Walkers in the Cayman Islands.

70. The Plaintiffs also say that if the relevant retainers are found to have existed and the relevant duties owed "breach of those duties is effectively admitted".

71. On behalf of the Plaintiffs it is stressed that a staged trial with the Preliminary Issues being tried first represents the most effective and appropriate case management of the proceedings. The Plaintiffs say that the following factors are of particular relevance and importance:

(1) the Preliminary Issues must be tried in any event. But they can be conveniently tried separately and first as there is little, if any, meaningful overlap with the remaining issues;

(2) the evidence on the Preliminary Issues is self-contained and already largely available. While some of the Plaintiffs' witnesses will have to give evidence twice in both stages of the trial, their evidence will be discreet and will not overlap;

(3) the remaining issues in the case beyond the Preliminary Issues and in particular, those of causation, loss and ex turpi causa are substantially more complex both factually and legally than the Preliminary Issues and will be significantly more expensive (in time and costs) to try. They will require expert evidence on issues of Brazilian law and quantum issues including valuation of major assets as well as extensive lay witness evidence and documentary evidence;

(4) as a result, a trial of the Preliminary Issues could take place in early course and certainly far sooner than a trial of all issues. That is particularly important given the delay to date;

(5) trying the Preliminary Issues would mean that the court and the parties would only embark on the more lengthy, complex and expensive issues of causation, loss and ex turpi against the backdrop of the issues of duty and breach having been determined (and determined in favour of the Plaintiffs). That determination would frame the dispute on the remaining issues and may enable them to be tried in a more focused and cost effective way; and

(6) on Walkers' case the outcome of the Preliminary Issues will be dispositive and the remaining issues will not need to be tried at all. That would represent a huge saving in costs and importantly court time and resources. The latter is a particularly important consideration given the procedural history to date.

72. The Plaintiffs emphasise that if Walkers are correct on the issue of retainer then that will be the end of the case. If Walkers are wrong then there would have been a substantial "clearing of the decks" and the parties and the court can then move on, against a backdrop of there being final findings of duty and breach on the part of Walkers to the remaining more complex and costly issues of causation, loss and ex turpi causa.

73. Mr. Chapman argued against any injustice to Walkers in not being able to test the Plaintiffs' credibility at the Preliminary Issues Trial by reference to events in Brazil. He emphasised two points. Firstly, Walkers' attack insofar as the Preliminary Issues were concerned was to credit alone. Secondly, the Preliminary Issues would ultimately turn on an analysis of the "objective evidence" rather than turning on what the witnesses would say they believed to be the case.

74. Mr. Chapman referred to the draft list of issues and the case memorandum and submitted that the two documents demonstrated that the proposed split was clear and plainly hived off to trial 2 the more complex, lengthier and costly issues.

75. Mr. Chapman emphasised that the retainer and duty issues were exclusively concerned with interactions between the Plaintiffs and Walkers and they did not require a detailed examination of events in Brazil.

76. Mr. Chapman said that Walkers own estimate of twelve weeks for one main trial and just three weeks for the Preliminary Issues Trial revealed that there was no substantial or material overlap between the Preliminary Issues and the other issues.

77. Mr. Chapman referred to Mr. Simpson's point of overlap between breach and the hypothetical competent attorney causation defence and submitted that such would be a benefit of a split trial rather than a detriment and the allegations of breach, which were exclusively concerned with interactions between the Plaintiffs and Walkers, could be tried without embarking on "the wholesale Brazilian inquisition".

The submissions of Walkers

78. I have also considered the position of Walkers as outlined in the 18 page position statement dated 8 April 2021 from Mr. Simpson QC, Mr. Sebastian Said, Mr. Nico Leslie and Ms. Mehreen Siddiqui and the oral submissions put before the court by Mr. Simpson.

79. In short, Walkers say that the Preliminary Issues Trial will not work in this case because:

(1) the Plaintiffs' proposal would not resolve all issues of liability at the first trial;

(2) there is, in any event, no clear split between issues of liability, quantum and other wider issues in the case including the fundamental issue of credibility;

(3) the witness evidence and disclosure will substantially overlap;

(4) the perceived credibility of the witnesses (including Ms. Rabello and Mr. Toledo) will be critical and cannot fairly be determined piecemeal across two hearings; and

(5) the Preliminary Issues Trial (of at least three weeks in late 2021 or early 2022) would itself be very lengthy and expensive.

80. Walkers have suggested potential directions leading to a trial of all issues of about twelve weeks to be heard in late 2022 or early 2023.

81. It is not appropriate (as clearly explained by Gunn J in *Edwards*) to order a split trial where witness credibility is central to the liability issues and the same witnesses may be required to give evidence at both the first and second trials. On behalf of Walkers it is further submitted that to do so would be fundamentally wrong, because it would require the court to make critical evidential findings without having the full picture.

82. Walkers say that the proposal by the Plaintiffs is misconceived and contrary to authority and that it would also be inappropriate in practice. Walkers add that the Plaintiffs have failed to properly specify the proposed preliminary issues which in themselves involve a multitude of other issues and sub-issues. Moreover, it is said on behalf of Walkers that the issues in relation to duty and breach overlap very considerably with issues of illegality and causation. A clear split cannot be achieved in practice as an investigation into the alleged attorney / client relationship will require dealing with issues that overlap with Walkers' illegality defence, and an investigation into the allegations of breach will overlap with the defences based on causation.

83. Considering the criteria identified by Hildyard J in the English *Electrical Waste Recycling* authority as applied locally by Williams J in *Herrara-Frederick* and by Gunn J in *Edwards* Walkers say:

(1) it is correct that if Walkers win on duty and breach against all Plaintiffs that is the end of the matter and subject to any appeal there will be a substantial saving as against a full trial, but Walkers add that there are multiple Plaintiffs with factually disparate cases and even if only one Plaintiff succeeds there will have to be a full trial;

(2) there will be an overlap in issues and in discovery and witnesses and oral evidence between the two trials and this will cause numerous potential difficulties with trial preparation;

(3) there will be an overlap in witness evidence;

(4) a single trial of liability and quantum will be a heavy trial, but no more complex or defuse than many other heavy trials listed before the Grand Court;

(5) a split trial is likely to cause significant prejudice to Walkers because it will inevitably limit its scope to attack the credibility of the Plaintiffs' witnesses by reference to the wider facts of the case. In particular it would be artificial and unfair for Walkers to be forced to cross examine those witnesses without being able to put to them the wider allegations that the proceedings are an abuse of process, that they arise ex turpi causa, that elements of the quantum claim have fraudulently inflated and to cross examine them as to their involvement in and/or knowledge of the fraud on the Petroforte estate;

(6) the Plaintiffs have not defined the proposed split adequately and in any event no clean split is possible in practice;

(7) the risk of duplication and delay and of appeals is particularly acute in this case; and

(8) insofar as the overriding objective is concerned, a trial of the Preliminary Issues will be both unfair and inefficient and will risk substantial further delay because it will not leave the parties closer to a resolution or settlement. It will also inevitably lead to increased costs because of the likely duplication of each stage of the proceedings, including disclosure, witness statements and cross examination, on top of the additional costs inherent in a second trial.

84. Walkers say that the directions proposed by the Plaintiffs leading to the listing of a five day hearing after 1 August 2021, are wholly unrealistic, especially where detailed cross examination will be necessary covering a period of over three decades. Moreover, witness statements could not be provided within 28 days and discovery could not take place within 42 days.

85. Mr. Simpson emphasised that the allegation that Walkers misled the Grand Court about its retainer with Dr. Braga (which goes to breach) overlapped substantially with the question as to what the Grand Court would have ordered had Dr. Braga been represented by a hypothetical reasonably competent attorney (which goes to causation).

86. Mr. Simpson referred to and gave examples of what he described as the "factual and temporal" overlap between duty and causation which, he submitted, meant that a split trial should not be ordered.

87. Mr. Simpson also emphasised that credibility was fundamental, in particular, to the issue of retainer. The issue will not, as submitted by Mr. Simpson, mainly turn on the analysis of the documents.

Discussion and determination

88. There is sometimes a strong superficial attraction which is difficult to resist, especially in complex and lengthy cases, of trying to divide the issues up and determining some in advance of the main trial in the hope that it will make the main trial more manageable. Judicial experience however reveals that there are also sometimes very real dangers in seeking to determine issues in a piecemeal fashion rather than dealing with all relevant issues at one main trial.

89. I have not been persuaded that it would be appropriate and sensible to proceed by way of the proposed Preliminary Issues Trial.

90. In my judgment there were really only two factors that could possibly have led the court to order the Preliminary Issues Trial requested by the Plaintiffs in this case. Firstly, the fact that if at the Preliminary Issues Trial there was a determination that none of the Plaintiffs were clients of Walkers and no duties were owed to them then that would (subject to any appeal) be an end of the proceedings. But as Mr. Simpson says it is not quite as simple as that because there are multiple Plaintiffs with factually disparate cases and even if only one Plaintiff succeeds there will have to be a full trial. I also take on board the credibility issues. Therefore, although this potential knock-out blow is a factor to have regard to it is not determinative of the Preliminary Issues Summons.

91. Secondly, a trial of all the issues will be a lengthy and complex trial and if some of the issues could properly be decided in advance of the main trial then this could make the latter more manageable, but as Mr. Simpson says, although a single trial of all issues in this case will be a heavy trial it will be no more complex than many other heavy trials listed before the Grand Court, and there is also the fundamental credibility issues to take account of.

92. I have carefully considered these two factors (the Defendant's knock-out blow factor and the main trial manageability factor) but when you weigh in the balance all the other factors which militate against the proposed Preliminary Issues Trial, the scales come firmly down in favour of dismissing the Preliminary Issues Summons.

93. In arriving at that decision, I have taken into account the relevant law, the submissions put before the court, all the circumstances of this case and in particular my conclusions that:

(1) the issues of retainer, duty and breach cannot, despite Mr. Chapman's eloquent submissions to the contrary, easily be separated from the issues of causation, loss and illegality. It is normally better to deal with all the issues in dispute at one trial. Experience has taught us that it can be notoriously difficult to separate issues as to duty, causation and recoverability of loss. In this case there are also serious issues of illegality and credibility to consider;

(2) the Preliminary Issues were not defined with any meaningful particularity in the Preliminary Issues Summons. The belated filing by the Plaintiffs, somewhat presumptuously, on Thursday 15 April 2021 (without permission of the court, the court having directed that the filings be made before 4pm on 8 April 2021) of the draft List of Issues and Statement of Claim on the Preliminary Issues (together with an update with

references on Saturday 17 April 2021) did not lead me to conclude that the Preliminary Issues could be safely and cleanly separated;

(3) I found the examples given by Mr. Simpson, to support his submissions that there would be an overlap on various issues and a split trial was not possible, persuasive. I agree that an investigation into the alleged attorney/client relationship will overlap with Walkers' causation arguments and the illegality defence. Moreover an investigation into the allegations of breach will overlap with the defences based on causation. There would necessarily also be an overlap in discovery and oral evidence. I found Mr. Chapman's bold and valiant efforts to persuade the court that there could be an appropriate split of issues and the Preliminary Issues Trial was otherwise appropriate to be, frankly, unconvincing. Put simply I was not persuaded that a clear and appropriate split of the issues would be possible in this case;

(4) there may be some duplication of evidence and some witnesses will be required to attend both trials (although Mr. Simpson fairly conceded that it was unlikely that Walkers' witnesses would have to be called twice);

(5) there will be a considerable risk of further delay and costs in respect of any appeals against the determination of the Preliminary Issues;

(6) one main trial and its preparation may in fact prove less time-consuming and costly than the time and money spent on two separate trials;

(7) of central importance is the fact that the credibility of Ms. Rabello is plainly squarely in issue and it would be unfair to determine that at a split trial dealing with just some of the issues in this case. The credibility of Mr. Toledo (the Fifth Plaintiff) and Robert Macaulay (the Rabellos' overseas counsel in Miami) also appears to be in issue. There is a clear overlap in respect of many of the issues and the credibility of Ms. Rabello and Mr. Toledo. It is clear that in advancing a case on client retainer which does not exclusively rely on documentation that the credibility of Ms. Rabello and Mr. Toledo will be important. Much will depend on oral evidence and findings of fact. The evidence in respect of issues other than the Preliminary Issues will be relevant to the credibility of Mr. Rabello and Mr. Toledo especially on the retainer issue. It will also go to the causation, loss and illegality issues. It is plain that credibility will be fundamental to the determination of the issues in this case. It would not be appropriate to determine the credibility of Mr. Rabello and Mr. Toledo solely on evidence limited to the Preliminary Issues. The court will be better

placed to determine the credibility of Mr. Rabello and Mr. Toledo and the reliability of their evidence after a full trial of all relevant disputed issues. Credibility in this case is fairly and more appropriately tested at a main trial of all issues rather than at a Preliminary Issues Trial of only some of the issues.

94. In short, I have not been persuaded by the Plaintiffs that the trial of the Preliminary Issues which they propose would in the words of Chief Justice Smellie in *SPhinX* "be clearly conducive to the just and timely outcome of the case". I therefore dismiss the Preliminary Issues Summons.

95. I do however agree with Mr. Chapman when he emphasises that these protracted proceedings must be progressed. It was apparent from the hearing and the documents filed in advance of the hearing that the issues had been refined since the filing of the pleadings and both sides sensibly agreed that substituted pleadings would be helpful. I therefore order that the Plaintiffs are to file and serve a substituted pleading of their claim (maximum of 40 pages) before 4pm on 7 June 2021 and Walkers are to file and serve a substituted defence (maximum of 30 pages) by 4pm on 9 July 2021.

96. I also order that the parties are to provide their discovery by list by 4pm on 16 July 2021 and that inspection is to be given by 4pm on 30 July 2021.

97. I require the attorneys for the parties to co-operate with each other to file, if possible on an agreed basis and if not then separately, by 4pm on 13 September 2021 a detailed and meaningful draft of proposed further directions to a main trial of all disputed issues in 2022.

98. I have provided that significant amount of time to enable the parties to complete the necessary work and to co-operate with each other in the production of the draft directions and other agreed documentation to assist the court. The attorneys have been living with this case far longer than I have and I rely upon them to consider how best the court will be assisted in determining what should be included in the draft directions and any other accompanying and consequent documentation.

99. Furthermore as these proceedings progress, from my present perspective the court would certainly be assisted with an updated agreed case memorandum with the agreed facts and legal issues being outlined and the areas of disagreement being highlighted, an updated chronology and dramatis personae, the names of witnesses and the areas their evidence is intended to cover, the proposed time allocation for the evidence and the proposed estimates of time for the opening and closing addresses by the attorneys for the parties.

100. It is unfortunately necessary to remind the parties and their attorneys that they have a duty to assist the court in achieving the overriding objective and I expect them to do just that. The parties and the experienced attorneys engaged on each side of this protracted dispute (no doubt at great expense) must realise that the time for costly and time-consuming interlocutory skirmishing has passed and now is the time to focus on progressing these long outstanding proceedings to a manageable trial in 2022.

101. Any ancillary applications consequent upon this judgment dismissing the Preliminary Issues Summons such as costs with concise (no more than five pages) written submissions in support to be filed and served before 4pm on 14 May 2021 and any concise (no more than five pages) written submissions in opposition before 4pm on 20 May 2021. The court will, subject to any further order, decide any such ancillary issues on the papers without the need for an oral hearing.

102. I would be grateful if the attorneys would before 4pm on 7 May 2021 file with the court agreed draft orders for my approval dealing with the determinations contained in this judgment.

David Doyle

The Hon. Justice David Doyle
Judge of the Grand Court