



04-01-02

1 IN THE CHAMBERS

2
3 IN THE GRAND COURT OF THE CAYMAN ISLANDS

4
5 CAUSE NO. 458 OF 1998

6
7 IN THE MATTER of trusts of a Settlement made 5 January 1984 made between Captain
8 Pandelis Christos Lemos as Settlor and Roywest Trust Corporation (Cayman) Limited
9 and others as Trustees (known as the Trofos Foundation)

10
11 BETWEEN: (1) PANDELIS CHRISTOS LEMOS
12 (2) MARIKA CHRISTOS LEMOS
13 (3) PANDELIS GEORGIOS LEMOS (a minor)
14 (by Georgios Pandelis Lemos his father and next friend)
15 (4) ASPASIA GEORGIOS LEMOS (a minor)
16 (by Georgios Pandelis Lemos her father and next friend)
17 (5) AIKATERINI GEORGIOS LEMOS (a minor)
18 (by Georgios Pandelis Lemos her father and next friend)

19 Plaintiffs

20
21 -and-

22 (1) COUTTS (CAYMAN) LIMITED
23 (2) COUTTS (JERSEY) LIMITED
24 (3) SEATON TRUSTEES INC.
25 (a company incorporated in the Turks & Caicos Islands)
26 (4) PARTHENON TRUSTEES INC.
27 (a company incorporated in the Turks & Caicos Islands)

28
29 Defendants

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33 **Appearances:**

34 Mr. Bernard Eder Q.C. and Mr. John Stephens instructed by Mr. Seamus Andrew of
35 Walkers for the plaintiff

36 Mr. Michael Briggs Q.C. instructed by Mr. Andrew Jones and Mrs. Anna Peccarino of
37 Maples and Calder for the defendants.

38
39 **Before:**

40 Chief Justice Anthony Smellie
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RULING

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3 The plaintiffs sue the defendants who are their former trustees for damages for breach of
4 trust. This is an application by the defendants for directions that certain issues be tried as
5 preliminary issues. If those issues are resolved in favour of the defendants, a long and
6 expensive trial could be avoided.

7 The matter has a complex history.

8 The plaintiffs and other members of the Lemos family were beneficiaries of a trust
9 settlement known as the Trofos Foundation which was established by a Deed of
10 Settlement dated 5th January 1984. It was made between Captain Pandelis Christos
11 Lemos ("Captain Lemos") as settlor and four trustees who are the defendants.

12 Captain Lemos who was himself a beneficiary of the Trofos Foundation, died in 1989.

13 The plaintiffs are his grandchildren. They are the children of sons of Captain Lemos who
14 challenged the validity of the Trofos Foundation after his death by the bringing of an
15 action in Greece claiming that the assets of the Trofos Foundation belonged to Captain
16 Lemos' estate. One of the sons and his two children, also brought an action in this Court
17 by which they sought the removal of the trustees and other remedies citing, among other
18 complaints, allegations of breach of trust.

19 The result of those challenges was a compromise which was approved by this Court in
20 March 1994 in which the plaintiffs acknowledged the validity of the Trofos Foundation
21 and the settlement of its assets upon it.

22 Among other things, the compromise provided for payments of capital out to the sons in
23 settlement of any interests they might have had under the Trofos Foundation. They and
24 their spouses were removed as beneficiaries under the trusts of the Trofos Foundation.

1 The action against the Trustees and the Foundation was dismissed. There were other
2 important aspects of the compromise which are relevant here.

3 The beneficiaries who had raised them, released the allegations of breach of trust by way
4 of executed deeds of release and an application was made and granted under section 64 of
5 the Trust Law for a release which would be binding upon the minors, unborn and
6 unascertained beneficiaries.

7 Finally, certain amendments were agreed to the Deed of Settlement and along with a
8 Statement of Investment Policy and Guidelines which was presented by the Trustees, a
9 Revised Settlement was approved by this Court.

10 This was done as part and parcel of the approval of the compromise.

11 In the Revised Settlement certain provisions were introduced which, on a different basis
12 than earlier provisions in the original settlement, provided the Trustees with exculpation
13 or protection from liability arising in the course of their trusteeship.

14 These provisions will be considered more fully below.

15 Reference must be made here to the Trustees' Statement of Investment Policy and
16 Guidelines as some aspects of it arise for consideration in the present context. In broad
17 terms, it stated that the Trustees would continue to manage the assets of the Trust Fund as
18 divided between a General Capital Fund and a Shipping Capital Fund. The General
19 Capital Fund would comprise all the issued shares of named investment companies which
20 in turn would hold that Fund's cash and equity investments.

21 The Shipping Capital Fund would comprise all the issued share capital of the ship owning
22 companies. At no time should the value of the Shipping Capital Fund exceed 50% of the
23 overall value of the assets of the Foundation.

1 Importantly for present purposes as it relates to the appointment of shipping investment
2 advisors, section 2.11 of the Statement of Investment Policy and Guidelines (“the S.I.P.”)
3 stated:

4 “2.11 The Trustees shall apply the following criteria where appointing
5 Investment Advisors for the purposes of Clause 16 (iii) (e) of the
6 [(Revised)] Deed of Settlement: -

7 (a) the advisor must have demonstrated experience and success in
8 its field of expertise;

9 (b) the appointment will not be made on terms that the advisor is
10 relieved from liability for negligent or wrongful acts;

11 (c) the advisor must be an individual or company of substance;

12 (d) the advisor will not normally be appointed for a term of more
13 than two years at a time;

14 (e) the advisor must not be precluded from acting by any conflict
15 of interest”.

16

17 Also of importance for present purposes section 3.1 of the S.I.P. stated:

18 “The Trustees shall operate a fleet of bulk of carriers so long as they consider that
19 such operations are capable of generating an adequate long term return on capital
20 employed. The Trustees are not to engage in the trade of buying and selling
21 vessels for profit”.

22

1 That sets the context for Article 16 of the Revised Deed of Settlement which in relevant
2 part provides:

3 (i) Subject to the proviso following Clause (vi) hereof, every discretion or
4 power hereby or by law conferred on the Trustees shall be an absolute and
5 uncontrolled discretion or power and no trustee shall be held liable for any
6 loss or damage accruing as a result of the Trustees concurring or refusing
7 or failing to concur in an exercise of any such discretion or power.

8 (ii) No trustee hereof shall be liable for any error of judgment or mistake of law
9 or other mistake or for anything save wilful misconduct or wilful breach of
10 the Trusts hereof by such trustee and except in the case of such wilful
11 misconduct or wilful breach the Trustees shall be indemnified and held
12 harmless out of the Trust Fund against any claims, losses, death duties,
13 taxes and impositions arising in connection with the Trust Fund or any
14 part thereof.

15 (iii)(a) The Trustee may from time to time and at any time on such terms as it
16 may think fit whether for a fixed period of time or subject to a fixed period
17 of notice or otherwise and either in relation to the whole of the Trust Fund
18 or to such part or parts thereof as may for the time being be invested in
19 any particular country or group of countries act as Investment Advisor or
20 employ any person, firm or company including without prejudice to the
21 generality of the foregoing any company being the parent company or
22 otherwise associated with the Trustee as an Investment Advisor.

23 --

1 (c) No trustee shall incur any liability or be in any way responsible for any
2 loss which may be incurred as a result of anything done or not done as a
3 result of advice or recommendation given or purported to have been given
4 by such Investment Advisor (whether in writing or by cablegram or orally
5 or by telephone) or for any non-receipt of such advice or recommendation
6 from such Investment Advisor.

7 --

8 (iv) Notwithstanding any other provision of the Deed the Trustee shall exercise
9 the powers of investment and related powers conferred upon the Trustee
10 by this Deed in accordance with the Investment policy from time to time
11 approved by the Court pursuant to an application under sections 45 or 60
12 of the Trusts Law (Revised) of which reasonable notice has been given to
13 all the Beneficiaries for the time being living and the Trustees shall not be
14 entitled to the protection afforded by subclauses (i), (ii), (iii) and (v) of
15 Clause 16 of this Deed unless the Trustees shall have complied with the
16 said investment policy or any modification thereof approved as aforesaid.

17 (It is common ground that the reference here to "the said investment policy" is a
18 reference to the S.I.P.).

19
20 (v) Provided that the Trustee shall have complied with its stated investment
21 policy and guidelines in relation to the Shipping Capital Fund, the Trustee
22 shall not be liable or accountable in any manner or circumstances for any
23 loss caused by failure to diversify the investments compromised in the

1 Shipping Capital Fund and for greater clarity, it is hereby declared that it
2 is specifically intended (and indeed the Trustee is so directed by the
3 Settlor) that the Scheduled Company [(the Noel Corporation – the ultimate
4 ship holding company of the Shipping Capital Fund)] will indirectly
5 through its subsidiary companies acquire own and manage ships and other
6 cargo vessels and generally engage in the business of shipping with all the
7 risks that the shipping business entails this settlement having been
8 constituted inter alia for this express purpose. The Trustee may continue
9 to hold the shares in the Scheduled Company for as long as the Trustee
10 may in its sole discretion think fit despite any capital losses arising from
11 time to time and the Trustee is specifically hereby indemnified and held
12 harmless out of the Trust Fund in respect of any losses of any kind
13 whatsoever arising in respect of the said Scheduled Company. This
14 Clause shall be read and construed as affording full and complete
15 protection to the Trustee in accordance with the wishes of the Settlor”.

16
17 Finally, as to the relevant provisions of the Deed of Settlement, Clause 7 vested the
18 Trustees with what on the face of them appear to be wide discretionary powers of
19 investment but which were subject to the provisions of Clause 16.

20 In particular Clause 7 (i) and (ii) provide:

21 “7. In addition to all the powers vested in the Trustee by law equity or statute
22 the Trustee without the interposition of any Beneficiary under this

1 Settlement shall have and may exercise from time to time the following
2 powers (subject only to Clauses 16 and 19 below): -

3 (i) To retain any property belonging to or forming part of the
4 Trust Fund in the actual state or condition in which the
5 same shall be received by the Trustee so long as the Trustee
6 shall think proper without being answerable for any loss
7 occasioned thereby.

8 (ii) To sell alienate or otherwise dispose of all or any property
9 at any time forming part of the Trust Fund in such manner
10 by public or private treaty and for such price in money or
11 other consideration as the Trustee may think proper and to
12 receive the consideration price and grant discharges
13 therefor.”

14 In respect of the Trustees’ power to appoint an investment advisor, Clause 7 (xi) provides
15 (subject also to Clauses 16 and 19) that the Trustees shall have power:

16 “(xi) To employ and pay for such professional or other assistance as the Trustee
17 may deem requisite in the discharge of the duties of the Trustee and in
18 particular but without prejudice to the generality of the foregoing to
19 appoint and be guided by an Investment Advisor who may or may not be a
20 Beneficiary”.

21 At the time of the approval of the Compromise by this Court in 1994, the Shipping
22 Capital Fund owned three ships which had been acquired in 1987.

1 Shortly after the Court proceedings in 1994 the Trustees invested some 90 million dollars
2 in the acquisition of three new ships. These were delivered in 1997. I was told in his
3 submissions by Mr. Briggs Q.C. that the intention to acquire these ships was announced
4 to the Court at the time of the approval of the compromise and so the plaintiffs, who were
5 parties to the compromise, were then on notice and did not object.

6 It also appears from the affidavit of Peter Stradling filed on behalf of the Trustees in
7 support of the application in 1994 for approval of the compromise (at paragraph 5.3.4
8 thereof); that the Trustees also then informed the Court and the parties of their intention
9 to appoint an investment advisor in relation to the Shipping Capital Fund. That advisor
10 was also then identified to be Mr. John Samonas. It is said that no objection was taken to
11 that appointment.

12

13 The Claims in the present action

14 Primarily because of differences arising as between members of Captain Lemos' family
15 as beneficiaries of the trust, including over whether the retention of the shipping business
16 was a prudent investment; this Court ordered the segregation of the Trofos Foundation
17 into 4 sub-trusts, one for the primary benefit of each branch of the family. This was done
18 towards the end of the year 2000, some 6 and one-half years after the approval of the
19 compromise.

20 The plaintiffs are beneficiaries of two of those subtrusts.

21 As already noted, this action against the Trustees is brought by them claiming various
22 breaches of trust alleged to have arisen since the date of the compromise. The allegations
23 revolve around the Trustees' decision to retain the 1987 fleet and to acquire the 1997

1 fleet. Allegations also raise questions over the suitability of Mr. John Samonas for
2 appointment or retention as shipping investment advisor.

3 In essence, the Statement of Claim avers that the Trustees acted in breach of their duty in
4 not disposing of the 1987 fleet and in ordering and retaining the 1997 after it had become
5 apparent or would have become apparent upon due and proper consideration, that the
6 fleets would not be capable of generating a long term return on capital invested. The
7 plaintiffs say that in so acting, the Trustees acted in breach of Clause 3.1 of the S.I.P. and
8 thus, by operation of Clause 16 (iv) of the Revised Deed of Settlement, lost the protection
9 afforded by Clause 16 (i) and (ii).

10 Against that background the issues which the defendants seek to have tried as preliminary
11 issues are framed in their summons.

12 The first issue, framed in terms as amended upon my suggestion during the course of the
13 arguments and as I intend to direct, reads as follows:

14 “(1) Whether on the true construction of the Revised Deed of Settlement of the
15 Trofos Foundation and the Statement of Investment Policy and Guidelines
16 (paragraph 3.1 in particular) the allegations in the Amended Statement of
17 Claim or any of them are capable of disclosing a failure by the Trustees to
18 comply with the Investment Policy (apart from paragraph 2.11 thereof)”

19 [(As to paragraph 2.11 see second issue below)].

20 The second and third preliminary issues as framed in the defendants’ summons are as
21 follows:

22 “(2) Whether on the true construction of the Revised Settlement and the
23 Statement of Investment Policy and Guidelines a failure by the Trustees to

1 comply with paragraph 2.11 of the Statement of Investment Policy
2 disentitled the Trustees from relying upon subclauses (i) (ii) and (v) of
3 Clause 16 of the Revised Settlement, rather than clause 16 (iii) (c) thereof
4 only.

5 (3) Whether on the true construction of clause 16 (ii) of the Revised
6 Settlement the allegation in paragraph 10 (b) of the Amended Reply [(to
7 the Defence)] discloses a case of wilful misconduct or wilful breach of the
8 trusts thereof by the Trustees or any of them.”

9 The plaintiffs, through Mr. Eder QC, objected to the first preliminary issue on the ground
10 that the issue even as reframed, is not susceptible of being tried as a preliminary issue.

11 The primary concern was that it unavoidably raises issues of fact as derived from the
12 allegations in the Statement of Claim and, without a trial to conclusion on those
13 allegations of fact, a conclusion on the trial of the preliminary issue would be decisive of
14 nothing and could turn out to be “a treacherous short cut”; falling afoul of the warning in
15 those terms given by Lord Scarman in Tilling v Whiteman [1980] A.C. 1 at 25. Thus
16 resulting in delay, futile effort, anxiety and wasteful expenditure of costs.

17 Mr. Eder submitted that even if taken as framed the issue could be regarded as one of
18 construction, it would be but one of a number of such issues of construction, the rest of
19 which would nonetheless remain to be answered only at a trial.

20 I accept that the issue of construction as stated in the preliminary issue of construction
21 would appear to involve the pivotal factual question - raised in the Statement of Claim -
22 whether the Trustees duly considered that the shipping operations were capable of
23 generating an adequate long term return on capital invested.

1 The resolution of that question would involve the fact intensive exercise of enquiring into
2 and determining how the Trustees acted or should have acted in that regard. That should
3 not, however, preclude the early determination of the issue of construction about which
4 the first preliminary issue is framed.

5 The first preliminary issue, in my view, must be taken as presuming that the factual
6 averments as to the Trustees' conduct are provable against them, while raising the
7 question whether the protections of Clause 16 (i) and (ii) would nonetheless be available
8 to the Trustees.

9 Mr. Briggs QC said that the Trustees will argue that the protections were indeed none the
10 less available. This is because on a true construction he submitted, neither the S.I.P. nor
11 the Revised Deed of Settlement could be taken as requiring the Trustees to immediately
12 divest themselves of the shipping investment, the moment they harboured some concern
13 over whether the requisite return on capital would be attainable.

14 The Trustees argument in this respect will be that they were in such circumstances able to
15 resort to their "usual discretion" as trustees. That, in the event of doubt (without
16 conceding that there was ever basis for it), they were allowed to resort to the wide
17 discretionary trust powers given to them under the Deed of Settlement (the S.I.P. not
18 being itself a trust) and thus able to decide whether or not to retain the shipping
19 investment. Acting in such circumstances, it will be submitted that there could have been
20 no breach of trust and therefore the protection afforded by subclauses 16 (i) and (ii)
21 remained available to them throughout.

22 If the Trustees succeed upon that construction of the Deed of Settlement, it is accepted
23 that the important aspects of the plaintiffs' Statement of Claim which depend upon the

1 alleged breach of trust in failing to get out of the shipping business, would be greatly
2 narrowed or might even fall away. The Trustees would then be protected by the
3 exculpation clause.

4 And so, even if upon a trial it transpires that a reasonable trustee should have doubted the
5 attainability of the investment objective, a decision taken not to divest in the due exercise
6 of discretion would be protected.

7 There would then remain the much narrower possible basis for a trial; ie: that the decision
8 either was not taken after due consideration or after any consideration at all. Subject to
9 the further allegations of wilful breach of trust to be considered below, if after the
10 completion of the process of discovery that narrower possibility is precluded by the
11 evidence, a resolution of the first preliminary issue as a matter of construction in favour
12 of the defendants, could ultimately result in a complete answer to the plaintiffs' breach of
13 trust claim.

14 Seen in that light, the trial of the first preliminary issue could well result in great savings
15 of time, effort and costs.

16 A further ground of objection raised by Mr. Eder cited the difficulty over deciding upon
17 the appropriate factual framework or matrix for the trial of the first preliminary issue.

18 He did however at least implicitly in his submissions, accept that the factual matrix must
19 be relevant and limited only to the material which was before the Court in March 1994.

20 This was when the Court approved the compromise so as to make it binding upon the
21 parties and in particular upon those under disability - the minors and remoter
22 beneficiaries - whose interests the Court was particularly obliged to consider.

1 Defined in that way, much of the material factual matrix would have been as described in
2 the background which I have set out above. It was as presented in the evidence then put
3 before the Court, as mainly comprised in the affidavit of Mr. Peter Stradling and in the
4 exhibits tendered with that affidavit. That included the Revised Deed of Settlement and
5 the S.I.P. Indeed, it seems to me that there can be little if anything material to the trial of
6 the first preliminary issue which was not tendered to the Court in 1994. The issue is one
7 of construction of the terms of the Revised Deed of Settlement which essentially
8 comprised the arrangement as between the parties and as put before the Court for its
9 approval.

10 The relevant factual matrix can only be that which was known or can be deemed to have
11 been known to the parties to the bargain at the time it was made.

12 The case law requires that upon approaching the issue of construction this Court must
13 “place it itself in thought in the --- same factual matrix as that in which the parties were”
14 at the time of the approval of the compromise and the adoption of the Revised Deed of
15 Settlement. This is on the advice given per Lord Wilberforce in Reardon Smith Kline Ltd
16 v Hangsen – Tangen [1976] WLR 989 at 997. see also In Re Z Trust 1997 CILR 248 at
17 257.

18 I conclude that the relevant factual matrix can readily be identified for the purposes of the
19 trial of the preliminary issues.

20 The final ground of objection raised by Mr. Eder was that a decision on the first two
21 preliminary issues would not in any event obviate the need for a trial. There would
22 remain to be tried the allegations of wilful default or misconduct.

1 As to this head of claim, the plaintiffs acknowledge that their pleadings as they are now
2 framed are in need of elaboration and have indicated an intention to apply to re-amend
3 their Statement of Claim. While Mr. Eder has explained that the plaintiffs do not say that
4 the Trustees have been objectively dishonest, it is plain that upon this head of claim the
5 plaintiffs will need to establish at least a degree of breach of trust akin to fraud.

6 It would be the sort of wilful breach contemplated by Clause 16 (ii) as vitiating the
7 protection otherwise provided to the Trustees by that subclause.

8 Mr. Eder acknowledges that an exclusion of liability clause in a trust settlement will be
9 upheld, provided the exclusion did not purport to cover fraudulent dishonest intention:

10 Armitrage v Nurse and others [1998] Ch. 241.

11 The standard of proof is very strict.

12 The plaintiffs therefore wish to be satisfied that they have seen all relevant material to be
13 disclosed by the Trustees and to await the completion of the discovery process before
14 filing their final draft re-amended Statement of Claim.

15 It is also established on the authority of the decision of the House of Lords in Armitage v
16 Nurse (above) that a plaintiff beneficiary will be allowed to examine the trust documents
17 and investigate a trustee's management of the affairs of the trust in order to apply to
18 perfect his pleadings by amendment (or re-amendment) for a case of dishonest breach of
19 trust.

20 For those reasons, the defendants acknowledge that the third issue could not now
21 properly be directed to be tried as a preliminary issue.

22 In the end, it thus became a matter of proportionality whether the trial of the first and
23 second issues as preliminary issues would be a safe, advisable and worth-while exercise.

1 As to the second issue, at the outset Mr. Eder had acknowledged that it was sufficiently
2 discrete and circumscribed in matrix of fact to be amenable to be tried as a preliminary
3 issue of construction. His objection was that taken by itself, it proportionately would
4 resolve so little of the issues in the dispute as not to be worth trying as a preliminary
5 issue.

6 The second issue is over the suitability of the appointment of Mr. Samonas as Shipping
7 Investment Advisor and over the advisability of his retention in that capacity. Here too,
8 the premise for this preliminary issue must be the presumption that the Trustees (without
9 any admission on their part) failed to comply with paragraph 2.11 of the S.I.P. Perhaps
10 an important aspect of the factual matrix in favour of the Trustees will be their
11 declaration to the Court at the time of the hearing in 1994, of their intentions in this
12 regard and without objection from any party. The circumstances of Mr. Samonas'
13 retention as Shipping Advisor since the hearing in 1994 might also be of relevance.
14 Having regard to the rules of construction, the second is an issue which is, in my view,
15 quite amenable to being tried as a preliminary issue against the background of its limited
16 and readily identifiable factual matrix.

17 The decision whether or not to direct the trial of preliminary issues involves, as I think
18 will be apparent from the foregoing analysis, a pragmatic assessment of the various and
19 competing factors for and against such a course of action.

20 The dangers such as those succinctly identified by Lord Scarman in Tilling v Whiteman
21 (supra) as involved in an injudicious direction of preliminary issues and which resulted in
22 "financial disaster" for Mrs. Tilling, must be considered with caution and with the
23 intention of being avoided in every case.

1 A precipitate direction for trial of preliminary issues will likely also result - as it did in
2 Tilling v Whiteman - in appeals all the way to the final appellate Court only to result in
3 substantial matters of factual dispute being referred back to the first instance Court for
4 trial and with nothing of importance being resolved.

5 Conversely, though exceptionally, in a complex case such as this promises to be, much
6 can be achieved in terms of savings of costs, effort, anxiety and time by the early
7 determination of preliminary issues which, if resolved one way or the other; could either
8 determine the entire dispute or at least significantly narrow the issues to be tried.

9 The foregoing and other competing factors which are likely to arise in deciding whether
10 to direct the trial of preliminary issues are helpfully identified in the judgment of
11 Neuberger J in Steele v Steele (New Law On Line Case #2010917101 – delivered 27th
12 April 2001).

13 Considerations identified in that case which I note as being of particular significance here
14 are:

15 (i) Whether the determination of the preliminary issue would dispose of the
16 case or at least an important aspect of the case and so at least narrow the
17 issues to be tried. If the preliminary issues would not be finally
18 determinative of the case or at least some important aspect of it because
19 for instance the respondent could amend pleadings to avoid the
20 consequences of the determination of the issue, then there would be no
21 value in the preliminary trial.

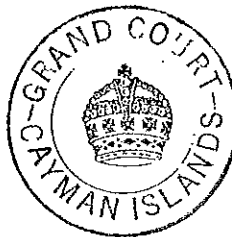
- 1 (ii) Whether the determination of the preliminary issue would therefore
2 significantly cut down the cost and time involved in pre-trial preparation
3 or in connection with the trial itself.
- 4 (iii) Being issues of construction, to what extent are the preliminary issues to
5 be determined on agreed or on readily ascertainable facts. The more the
6 facts are in dispute, the greater the risk that the issue cannot be safely
7 determined until the disputes of fact have been resolved.
- 8 (iv) Having regard to the foregoing, to what extent is there a risk of the
9 determination of the preliminary issue increasing costs and/or delaying the
10 trial. Plainly, the greater the delay caused by the preliminary issues and
11 the greater any possibility of increase in cost as a result of the preliminary
12 issue, the less desirable it is to order a preliminary issue.
- 13 (v) Similarly, in the event of a successful appeal against directions for the trial
14 of preliminary issues, whether the resulting delay and concomitant costs
15 might result in nothing being achieved.
- 16 (vi) Whether, taking into account all the other relevant considerations, it is just
17 to order the trial of the preliminary issues. So, for instance, the Court
18 might consider whether it would be fair to one side or the other to direct
19 the trial of the preliminary issues before discovery is complete. Or
20 consider whether it is proportionately worthwhile to do so in the overall
21 context of the case and in terms of the relative demands of costs and
22 resources of the parties.

1 In the end each case must be considered according to its own context. Here the issues to
2 be preliminarily determined, as being of importance to the ultimate outcome, are issues of
3 construction of provisions within a Deed of Settlement and related documents of a trust.
4 The issues lay at the heart of the allegations of breach of the fiduciary relationships
5 between the parties. The more expeditiously and economically they can be resolved, the
6 better for the interests of all concerned. So ultimately, rather than seeking to fit this into
7 the four square corners of any other case, I found the observations of Lord Wilberforce
8 from Tilling v Whiteman (above at pp 17G – 18A) to be of more general applicability
9 and force:

10 “The learned judge took what has turned out to be an unfortunate course. Instead
11 of finding the facts, which should have presented no difficulty and taken little
12 time, he allowed a preliminary point of law to be taken, whether (the statutory
13 provision) applies to a case where there are joint owners one only of which
14 requires the house as a residence. So the case has reached this House on
15 hypothetical facts, the correctness of which remain to be tried. I, with others of
16 your Lordships, have often protested against a practice of allowing preliminary
17 points to be taken, since this course frequently adds to the difficulties of Courts of
18 appeal and tends to increase the cost and time of legal proceedings. If this
19 practice cannot be confined to cases where the facts are complicated and the legal
20 issue short and easily decided, cases outside this guiding principle should at least
21 be exceptional”.

22 I consider, for the reasons already explained, that the preliminary issues for construction
23 (the first and second) are discrete and amenable to being tried within the confines of a

1 limited and readily identifiable factual matrix. Being issues of construction, the
2 arguments are also amenable to brevity.
3 Even if afterwards the third issue remains to be tried, the savings in costs and time could
4 be great given that, as matters stand, the conservative estimate of the time needed for the
5 trial of the full action would be many weeks, running perhaps into months. The trial of
6 the preliminary issues can be taken in but a few days at most.
7 With the foregoing considerations in mind, I decided to direct the trial of the first and
8 second issues; with the first as reframed during the course of the arguments.
9 As it was said during the course of arguments that the discovery process should be
10 complete by end of February 2002, and as it is possible that the preliminary issues to be
11 tried could be further narrowed by reference to material to be disclosed, I also direct that
12 the trial of the two issues not take place earlier than 28 days after completion of
13 discovery.
14 The costs of this application to be in the cause.



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19 Anthony Smellie
20 Chief Justice
21 Dated this 4th January 2002
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