Preliminary Issues: Winning the Battle Before It Begins

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PRACTICES Shipping Dispute Resolution, International Arbitration, Offshore Oil and Gas Dispute Resolution, Litigation

Litigation can often become complex, unwieldy, and extremely expensive. Disputes can take years to resolve, and require an expenditure of time and money that is in neither party's interest. A preliminary issues hearing can therefore be a very enticing prospect. It promises to bring victory at an early stage, and may permit one party to deal an early knock-out blow to its opponent. The potential cost savings will be highly attractive to any client, as will the fact that detailed witness evidence and the disclosure of documents on the entire dispute may not be required. In a recent case we have, by way of example, used preliminary issues to resolve to our client's benefit a dispute valued at hundreds of millions of dollars, with around 1,000 pages of submissions and an anticipated 5-6 week trial, prior to any disclosure or preparation of witness evidence and with no need for a full hearing.

However, as the courts have pointed out, preliminary issues can also be "*treacherous,*" leading to "*delay, anxiety and expense.*"[1] As such, the English Court, and any arbitration tribunal applying English law, will be very cautious in permitting a hearing of any preliminary issues. The recent judgment in *Howard & Ors v Chelsea Yacht And Boat Company Ltd & Anor*[2] helpfully sets out the criteria to be applied to any such decision, and serves as a useful reminder of the potential benefits and pitfalls of preliminary issues. In this article, as well as detailing these criteria, we also consider some practical points to bear in mind when deciding whether or not to make an application for a preliminary issues hearing.

Definition

A "preliminary issue" is a discrete element of a dispute that has the potential to decisively conclude the claim, or a substantial part of the claim, or otherwise substantially cut down on the scope and costs of the litigation. A decision on the issue may also encourage the parties to settle the remainder of the dispute.

The Decision in Howard v Chelsea

The Claimants lived in houseboats moored at Chelsea Reach in London, and claimed that the Defendants were overcharging them for mooring costs. They sought a declaration stating that the alleged overcharging amounted to a criminal act, and the Defendants applied for a preliminary issues hearing to decide whether or not the court should exercise its discretion to grant this declaration. In deciding whether or not to grant permission for such a hearing, the judge began by explaining that "*the Court of Appeal has warned on several occasions of the risks of delay and increased costs resulting from a trial of preliminary issues, particularly in complex cases*" and that he should therefore "*take a cautious approach to deciding whether to order a trial of a preliminary issue.*" As part of this approach, the judge helpfully set out a useful summary of the relevant factors a court, and by extension an arbitration tribunal, would take into consideration. Particular reference was made to the following two sets of criteria:

1. Those set out in *Steele v Steele*[3] and summarised as follows in *Koninklijke Philips NV v Asustek Computer Incorporation & Ors*[4]:

> "*(a) Whether the determination of the preliminary issue will dispose of the whole case or at least one aspect of the case*
>
> *(b) Whether the determination of the preliminary issue will significantly cut down the cost and the time involved in pre-trial preparation and in connection with the trial itself*
>
> *(c) If the preliminary issue is an issue of law, the amount of effort involved in identifying the relevant facts for the purposes of the preliminary issue*
>
> *(d) If the preliminary issue is an issue of law whether it can be determined on agreed facts. If there are substantial disputes of fact it is unlikely to be safe to determine the legal issue until the facts are found*
>
> *(e) Whether the determination of the preliminary issue will unreasonably fetter either the parties or the court in achieving a just result*
>
> *(f) The risk that an order will increase the costs or delay the trial and the prospects that such an order may assist in settling the dispute*
>
> *(g) The more likely it is that the issue will have to be determined by the court, the more appropriate it is to have it determined as a preliminary issue*
>
> *(h) The risk that the determination may lose its effect by subsequent amendments and statements of case*
>
> *(i) Whether it is just and right to order the determination of the preliminary issue*"

2. Those set out by David Steel J in *McLoughlin v Jones*[5]:

> "*(i) Only issues which are decisive or potentially decisive should be identified*
>
> *(ii) The questions should usually be questions of law*
>
> *(iii) They should be decided on the basis of a schedule of agreed or assumed facts*
>
> *(iv) They should be triable without significant delay making full allowance for the implications of a possible appeal*"

The judge considered these factors in relation to the request for a preliminary issue hearing, and ultimately ruled it was not appropriate. In particular the fact that the proposed issue would not be determinative of the claim as a whole, any costs savings were unlikely to be significant and there was, in fact, a substantial risk of cost increases and delay due to the acrimonious nature of the dispute, meant that it would not be an appropriate use of the court and the parties' time and resources to split the trial.

Commentary

It is clear from this case, and from prior case-law, that a party must consider very carefully its application for a preliminary issues hearing before it is made. In its application, the applicant must set out clearly and succinctly the issue(s) it is seeking to be determined. A good argument must be made that determination of these issues is likely to have a dramatic effect on the likely costs and time-scale of the dispute. There must be a good chance that it will render substantial portions of the statements of case moot. If the applicant cannot point to a "knock-out blow," it is unlikely the application will be granted.

Simplicity

The court has criticised preliminary issues which were "*unduly complicated*"[6] (in that case there were nine issues divided into 35 separate questions), and it is unwise to present an entire smorgasbord of preliminary issues in the hope that some of them will succeed. The more expensive and complicated any potential preliminary issue hearing will be, the less likely it is to be granted.

Indeed, ideally the wording of the preliminary issues should be agreed between the parties where possible, and case law is replete with comments to this effect.[7] It is also useful for parties to agree a list of assumed or admitted facts in order to ensure that minimal (or preferably no) evidence is required. It is especially important to try and avoid any issues that contain a mix of fact and law. If extensive oral evidence is required, then the issue is unlikely to be considered suitable for a preliminary issues hearing.[8] A party seeking to avoid preliminary issues is therefore well advised to draft its statements of case in such a manner as to ensure that any legal arguments are bound as closely as possible to the factual matrix.

Timing

An application made too late in the day is unlikely to have the desired effect on the scope of the dispute. However, if an application is made too early, the parties' positions may not have been adequately set out in the statements of case. With this in mind, the Technology and Construction Court Guide, applicable as guidance to the other courts as well as an arbitration panel, states that "*it is not generally appropriate for the court to make an order for the trial of preliminary issues until after the defence has been served.*"[9] The most appropriate time for an application is therefore likely to be at the first Case Management Conference after the statements of case have been exchanged, by which point the court or tribunal will be better placed to evaluate the potential benefits of a preliminary issues hearing. Nevertheless, it is important to note that it is not impossible for an application to be made earlier. In the *Kononklijke Philips* case, for example, the court decided that, even though statements of case were not closed, they were sufficiently advanced to identify the relevant issues.

Drawbacks

Finally, when considering whether or not to request a preliminary issues hearing, the potential drawbacks of this approach need to be kept in mind. There may be costs incurred in the duplication of evidence which has to be re-deployed in the main hearing, and issues may need to be re-visited in that later hearing. Indeed, it is entirely possible that a finding at the main hearing may affect, or run counter to, findings at the preliminary issues hearing, rending the entire process pointless. If settlement negotiations, or alternate dispute resolution procedures, are already gaining traction, a preliminary issues hearing may delay this process. It is also arguable that a party may be best advised to "keep its powder dry" on certain points, so that they can be used to more powerful effect

in the main hearing. This is particularly the case with arguments which benefit from evidential support, and may be weakened by being taken out of their factual context.

Nevertheless, the value of an early resolution of key preliminary issues is incontestable. Parties are well advised to consider the potential of such an approach at an early stage in any dispute, and ensure that statements of case are carefully reviewed to ensure that any opportunity for early resolution is taken. The issues for resolution should be drafted with a close eye on the criteria set out above in order to increase the chance of success.

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[1] Lord Scarman in *Tilling v Whiteman*: "*Preliminary points of law are too often treacherous short cuts. Their price can be, as here, delay, anxiety and expense.*"

[2] [2018] EWHC 1118 (Ch)

[3] [2001] CP Rep 106

[4] [2016] EWHC 867

[5] [2001] EWCA Civ 1743

[6] *Rossetti Marketing Limited and another v Diamond Sofa Company Limited [2012] EWCA Civ 1021*

[7] For example: "*The undesirability of hearing and deciding preliminary issues where the wording of the issues themselves is not only not agreed or ordered by the court, but the approach to the issues is different, is obvious.*" *Larkfleet -v- Allison Homes Eastern Limited [2016] EWHC 195 (TCC)*

[8] A useful example of these problems can be found in Gateley Manchester LLP v Rose [2013], where the Court of Appeal found that the "*case never was suitable for trial of a preliminary issue…It was not possible to extract these particular issues as issues of law from their factual matrix and it was not possible…to extract those facts that would be relevant to the preliminary issue from those facts that would be relevant to the determination of other issues. This was not truly a preliminary issue of either law or fact which could have been resolved by the District Judge…The position arrived at by him was that almost everything had to be left over to the trial, because they were matters of fact that had to be decided and which he could not decide on the documents or evidence then before him.*"

[9] Paragraph 8.1.3.