CAUSE NO: G2022-0111

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

BETWEEN:

(1) PURE AIR LTD
(2) PM INDUSTRIAL GAS LTD
(3) CONOR PACIFIC CANADA INC

Plaintiffs

-and-

(1) ROBERTO SILVA
(2) CAMP SILVA HOLDINGS LIMITED

Defendants

Appearances:	**Mr James Kennedy of KSG for the Plaintiffs**
	Mr Richard Parrish of Broadhurst LLC for the Defendants
Before:	**The Honourable Justice Asif KC**
Heard:	**11 April 2024**
Judgment:	**24 April 2024**

CASE SUMMARY
(not part of judgment)

Application for split trial—whether to order trial of liability issues before causation and loss issues.

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JUDGMENT

A. Introduction

1. This is my judgment on the Plaintiffs' application by summons dated 16 February 2024 for liability to be tried separately from and before a trial of causation and loss, if needed. Mr James Kennedy of KSG for the Plaintiffs and Mr Richard Parrish of Broadhurst LLC for the Defendants argued the summons before me on 11 April 2024.

2. The Plaintiffs' summons was supported by an affidavit sworn by Mr Matthew Harders on 16 February 2024, which exhibited certain correspondence between the parties. There was no evidence filed on behalf of the Defendants. The parties provided me with an agreed bundle in advance of the hearing of the summons, including helpful skeleton arguments. In addition, shortly before the hearing, the Plaintiffs filed a supplemental bundle containing certain underlying documents which the Plaintiffs considered were relevant to the summons. Prior to the hearing, Mr Parrish complained about this bundle being provided to the court. However, his continued objection during the hearing was muted. Whilst I sympathise with his complaint, the documents in question were small in number and were all documents to, from or filed on behalf of his clients and I therefore concluded that the Plaintiffs could rely on them in support of their argument despite not formally being in evidence.

B. Background facts

3. The Plaintiffs' business is the supply of packaged gases and the delivery of gases to medical facilities in the Cayman Islands. Mr Silva, the First Defendant, was the First and Second Plaintiffs' Managing Director from 2003 until late 2018. In October 2018, he was dismissed for reasons that are not set out in the evidence before me. I was told that the First and Second Plaintiffs (with others) initiated legal proceedings against Mr Silva, which were resolved by a Settlement Agreement dated 5 December 2019. The Settlement Agreement included restrictive covenants of 5 years' duration, which ran from October 2018, when Mr Silva was dismissed. I do not need to address in this judgment the potential enforceability of covenants of such duration.

4. The Plaintiffs commenced the current claim against Mr Silva and the Second Defendant, a company of which he is the sole shareholder and director, by writ filed on 11 May 2022. In essence, the Plaintiffs' claim is that Mr Silva and the Second Defendant breached the terms

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of the restrictive covenants in the Settlement Agreement, affecting the Plaintiffs' business and causing them loss and damage.

5. The Settlement Agreement was not included in the agreed bundle or in the Plaintiffs' supplemental bundle, but the relevant provisions have been pleaded in the Amended Statement of Claim and admitted in the Amended Defence. Accordingly, it is common ground that Mr Silva agreed that for 5 years from October 2018 he would not, directly or indirectly:

   a) be involved in any capacity (including, but not limited to, as agent, consultant, director, employee, owner, partner, shareholder, or lender) with any business concern which has or intends to have an interest in the supply of packaged gas or the provision of any other services related to the delivery of gases to medical facilities in the Cayman Islands consistent with the past business practices of the Plaintiffs; and

   b) interfere with or intervene in any way with the business of the Plaintiffs, including in respect of any and all license applications which the Plaintiffs may make.

C. <u>The claims and defences</u>

6. The Plaintiffs' pleaded claim is for:

   a) specific performance of the Settlement Agreement;

   b) restitution of any profits earned by the Defendants as a result of their breaches of the Settlement Agreement; and

   c) damages, including exemplary damages.

7. The Plaintiffs allege that Mr Silva breached the Settlement Agreement as follows:

   a) he interfered in the First Plaintiff's application for a licence under the Local Companies (Control) Act;

   b) he has an interest in the supply of packaged gas and/or the provision of other services related to the delivery of gases to medical facilities in the Cayman Islands and the servicing of medical gas systems at medical facilities in the Cayman Islands;

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c) he has been involved in at least three companies, including the Second Defendant, that have or intend to have an interest in the supply of packaged gas and/or the provision of other services related to the delivery of gases to, and the supply and maintenance of medical gas systems at, medical facilities in the Cayman Islands;

d) he has been engaged in the provision of other services related to the delivery of gases, has provided other services to medical facilities, and has interfered with and intervened in the supply of hard goods in direct competition with the First Plaintiff; and

e) he and the Second Defendant have interfered with and intervened in the First and Second Plaintiffs' business.

8. The Defendants do not challenge many of the underlying facts. However, they dispute that their conduct amounts to a breach of the Settlement Agreement. In particular:

a) the Defendants accept that Mr Silva made representations in a letter in October 2019 to the Board that was to determine the Plaintiffs' application for a Local Companies (Control) Act licence, and did not disclose this to the Plaintiffs, but assert that this was before the Settlement Agreement was negotiated or concluded and was therefore not a breach of it;

b) Mr Silva accepts that he concluded a consultancy agreement with the Cayman Islands Health Services Authority in June 2021 and assisted the HSA to purchase an on-site oxygen generator but again asserts that this was not a breach of the Settlement Agreement; and

c) Mr Silva does not dispute that he provided services to other medical facilities but avers that the Settlement Agreement allowed him to be employed directly by medical facilities and any work he performed was done in this capacity.

D. Procedural background

9. It is necessary to set out the procedural background to provide context for the Plaintiffs' application for a split trial. Regrettably, this claim has made slow progress towards a

determination. As indicated earlier, the Plaintiffs issued their writ on 11 May 2022, with a Statement of Claim attached. It does not appear that the Plaintiffs ever sought an interim injunction to enforce the covenants in the Settlement Agreement pending trial.

10. The Defendants served their Defence on 30 September 2022, some four months later. The Statement of Claim was amended on 24 March 2023 and the Defendants served Amended Defences in response on 25 April 2023, in materially identical terms.

11. The parties gave discovery in late 2022 but each side was unhappy with the adequacy of the discovery given by the other. The Defendants' skeleton argument explained the Defendants' position regarding the alleged inadequacies in the Plaintiffs' discovery as follows:

> *"… one of the major issues in contention between the parties at trial will be … whether said services provided by the First Defendant can be classified as:*
>
> > *'other services related to the delivery of gasses by the Pure Air Companies in accordance with the past practices of the Pure Air Companies to medical facilities in the Cayman Islands and Louisiana.'*
>
> *…*
>
> *A further issue … is … the First Defendant's alleged interference in the First Plaintiff's application … for a trade and business licence …. In short, it is alleged that as a result of the First Defendant's interference, the Board delayed their decision in granting a Licence to the First Plaintiff and that when said licence was granted, it was only granted for three years. Given the nature of this allegation, the Defendants sought production of all documents pertaining to the First Plaintiff's application to the Board, including but not limited to: copies of all correspondence … from Robert Nowack to the Board, as well as the 'multiple letters from Norm Klein, our counsel at Appleby's' as referred to in Mr Nowack's email dated 8 March 2021."*

12. The Plaintiffs issued a summons filed on 5 June 2023 seeking further and better discovery from the Defendants and the Defendants made a cross-application by summons filed on 13 June 2023.

13. Shortly before the summonses were due to be heard, on 18 August 2023 the parties agreed a consent order addressing the outstanding discovery on both sides and making directions intended to lead to a trial towards the end of 2023 or in the first quarter of 2024.

14. The consent order required both sides to give further and better discovery of a large number of categories of documents, verified by affidavit. They were to serve witness statements within 42 days thereafter, and the Plaintiffs were also to serve a Schedule of Loss. Compliance with the order for further and better discovery was also the trigger for the parties to apply to fix a trial date.

15. The parties appear to have addressed the outstanding discovery during September and October 2023. There is no suggestion before me that the Defendants failed to comply with the consent order regarding the further and better discovery that they had agreed to provide. However, it is clear that there was a dispute regarding the adequacy of the Plaintiffs' further and better discovery in relation to the two categories of documents referred to above, and which the Plaintiffs had agreed in the consent order to provide, namely:

> *"1. (d) Copies of correspondence (including but not limited to; emails, letters, text messages) exchanged between the Plaintiffs and medical facilities in the Cayman Islands pertaining to the historical provision of services related to the delivery of gasses to medical facilities in the Cayman Islands and Louisiana;*
>
> *...*
>
> *(g) Copies of all correspondence (including but not limited to; emails, letters, text messages) from Bob Nowack to the Board, as well as the 'multiple letters from Norm Klein, our counsel at Appleby's' as referred to in Mr Nowack's email dated 8 March 2021 (document no.11 in the Plaintiffs' discovery);"*

16. The Plaintiffs did not disclose any further documents within these two categories and Mr Nowack, a director of all three Plaintiffs, stated in his affidavit sworn on 11 October 2023 to verify the Plaintiffs' further and better discovery that documents of the kinds described in paragraphs 1(d) and (g) of the consent order (and others) are not relevant to the issues.

17. One month later, on 9 November 2023, the Defendants' attorneys wrote to complain about the Plaintiffs' failure to provide discovery in these two categories.

18. The Plaintiffs did not respond until 15 January 2024, when they provided a hyperlink from which the documents which had been disclosed in Mr Nowack's affidavit of 11 October 2023 (i.e. three months later) could be downloaded and argued in support of the Plaintiffs' position regarding the paragraph 1(d) and (g) documents. The Plaintiffs' position in relation to the paragraph 1(d) documents was:

> *"... To the extent it is necessary for it to be established what the historical services provided by our clients were, that is purely an evidentiary question on which our clients bear the burden. In any event, those historical services are most readily established by way of the historical invoices discovered by our client in response to paragraph 1(c) of the Consent Order.*
>
> *For our clients to review many years' worth of electronic and physical records (involving thousands of documents) in order to give discovery of documents responding to this category would be extremely onerous, burdensome and expense (sic), for no discernible benefit. This correspondence would have no probative value, beyond that which is already provided by way of our clients' invoices.*

> *The correspondence referred to in paragraph 1(d) of the Consent Order is not germane to the issues in dispute. …"*

And in relation to the paragraph 1(g) documents, the Plaintiffs' stance was:

> *"Our clients have not brought into issue the cause of the First Plaintiff … failing to obtain a LCCL for a longer term. Our clients have directly alleged that it was Mr Silva's conduct which caused that outcome. The Court is only required to determine whether or not our clients have made good that allegation. Whether there was some other reason for our client obtaining a LCCL for a shorter period does not need to be determined; if there were some other reason, our clients' allegation will simply fail.*
>
> *Moreover, the allegation made at paragraph 14 of the ASOC is not made arbitrarily. It follows paragraphs 12, 12A, 12B, 12C, 13, 13A, and 13B, which plead to the specific conduct of Mr Silva which our clients contend constitutes the direct interference and cause of our client obtaining a LCCL for a shorter period. The allegation at paragraph 14 of the ASOC is clearly made in the premises of the preceding paragraphs under the heading 'Interference in LCCL Application.' Any correspondence between our clients and/or their representatives and the Trade and Business Licensing Board has no relevance whatsoever to the matters pleaded in those paragraphs, or to Mr Silva's conduct more generally.*
>
> *The documents described at paragraph 1(g) of the Consent Order are not probative of any matter in issue in the proceedings and are plainly irrelevant. …"*

19. The Plaintiffs' attorneys also set out in their letter their proposal for a split trial and sought the Defendants' consent. Their explanation for this course was essentially in the same terms as their submissions before me. Accordingly, I do not need to set out the terms of their letter.

20. The Defendants' response on 31 January 2024 was that the Plaintiffs should comply with the consent order for discovery before the parties addressed the next steps in the litigation. They argued that, having consented to give the discovery in question, the Plaintiffs could not now raise the issue of relevance. They also said, in essence, that it was too late to argue that providing the outstanding discovery would be disproportionate.

21. By letter dated 5 February 2024, the Plaintiffs' attorneys challenged the Defendants to pursue an application to the court if they wished to maintain their complaint on discovery and reiterated their request for the Defendants' consent to a split trial. When that consent was not forthcoming, the Plaintiffs issued the summons seeking a split trial.

22. Mr Kennedy told me that there has not been any further substantive correspondence between the parties leading up to the hearing. The Defendants have not issued any summons regarding the Plaintiffs' discovery.

E. The applicable law and practice

23. Mr Kennedy for the Plaintiffs referred me to the power to order a split trial in GCR O.33, r.4(2) and to the editorial notes in *Supreme Court Practice 1999* at paragraph 33/4/12. He primarily relied on the recent judgment of Williams J in *Diana Brown v Dr George Meggs and another* (unreported, 7 November 2022) as a *"current, accurate description of the state of the law in the Cayman Islands as relates to an application for a split trial on issues of liability and quantum."*

24. Mr Parrish's analysis of the law focussed on the judgment of Doyle J in *Arnage Holdings Ltd v Walkers* (unreported, 5 May 2021), which Williams J cited in *Brown*. His summary of the law was essentially the same as Mr Kennedy's submissions.

25. In *Brown*, which was a clinical negligence claim, Williams J quoted from his earlier decision in *Herrara-Frederick v The Health Services Authority* (unreported, 7 March 2014), also a clinical negligence case, as to the reasons why a split trial may be appropriate:

> *"17. …*
>
> *(i) … having regard to the overriding objective, by conducting separate liability and quantum hearing there is a better use of court time and resources, as well as a reduction of costs. In certain circumstances split trials may lead to a speedier conclusion, caused by the narrowing down of considerations, thereby saving costs;*
>
> *(ii) if liability is established following a split trial then both parties can focus on the issues of quantum without being distracted by the other issues of breach of duty and causation;*
>
> *(iii) if a Plaintiff succeeds on liability, this may promote negotiations leading to agreement and settlement out of court. […]*
>
> *(iv) of course, if the claim does not succeed an early liability hearing will mean that the Plaintiff will know at an earlier stage that he is not successful and the matter will not be hanging over a Defendant for a potentially longer period of time."*

26. However, Mr Kennedy did not cite the following paragraph, where Williams J gave examples of countervailing considerations:

> *"18. However, I also recognised that '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.' I noted that:*
>
> > *'This is particularly so when one considers duplication of costs which would occur if causation arguments are linked to issues of condition and prognosis. For example, there may be an overlap of expert evidence.'*
>
> *I highlighted that a split trial may also mean that the Plaintiff and the Defendants have to endure the stress of two trials rather than one."*

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27. In *Brown*, Williams J then went on to adopt the following summary of the relevant principles set out by Doyle J in *Arnage Holdings*, based upon his extensive review of the relevant case law (citations omitted). This passage was relied on by both Mr Kennedy and Mr Parrish:

> *"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 …;*
>
> *(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 …;*
>
> *(4) the court should have regard to … 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 …;*
>
> *(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 …;*
>
> *(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 …."*

F. The Plaintiffs' submissions in support of a split trial

28. The Plaintiffs' proposal as to the issues to be tried first is as follows:

    a) whether Mr Silva has breached clauses 15.1(a) and/or 15.1(b) of the Settlement Agreement;

    b) whether the Plaintiffs are entitled to an injunction restraining any intended and/or ongoing breaches of the Settlement Agreement by either of the Defendants; and

    c) whether Mr Silva and/or the Second Defendant have committed the tort of intentional interference in contractual relations in connection with the Product Supply and Cylinder Rental Agreement between the Second Plaintiff and the HSA dated 7 November 2003.

29. Mr Kennedy argued that these issues all go to the question of liability alone and are narrow in scope, discrete and capable of clear demarcation.

30. He said that the parties diverge very little as regards the relevant facts and the real issue is whether Mr Silva's admitted conduct amounts to breaches of the Settlement Agreement. The issues could therefore be determined on the basis of lay evidence alone – most likely one factual witness on each side with limited oral evidence, minimal cross-examination, and not requiring detailed consideration of the documents. He suggested that there would be scope for the parties to prepare a Statement of Agreed Facts further limiting the need for oral evidence. He contended that the trial would take up to one day and could be listed shortly after exchange of witness statements.

31. In contrast, Mr Kennedy argued, causation and loss are substantial, complex issues, which will require detailed analysis by forensic accountants of both the Plaintiffs' and the Defendants' respective business records to quantify the Plaintiffs' entitlements, and expert evidence on both sides. However, he said that loss would probably not need any factual evidence, so witnesses would not need to give evidence twice and there would not be any risk of inconsistent findings regarding, for example, credibility. He suggested that the causation and loss issues would probably take 2-3 days of court time.

32. If the Plaintiffs were to fail on the liability issues at a split trial, that would avoid the parties having to go any further in the litigation. If they were to succeed, then the knowledge that the parties would have to incur the costs of expert evidence would be a powerful incentive towards a settlement, which would avoid the need for a causation and loss trial completely. In any event, with liability having been decided, the parties would be likely to be able to narrow the issues on loss and reduce the duration and ambit of the second trial.

33. On the other hand, a conventional trial of all issues would require costs to be incurred in preparing all issues simultaneously, which would be wasted if the Plaintiffs were to fail on liability.

34. To put this into context, Mr Kennedy suggested that one of the three heads of loss identified was worth approximately US $180,000 annually for up to 5 years, totalling some US $900,000. The other heads of loss claimed could add substantially to that figure.

35. Finally, Mr Kennedy acknowledged that the parties had failed to comply with the directions in the consent order, and that *"the case has stagnated for some time"*. He said that ordering a split trial would give the parties a clearer, simpler path to resolving the substantive dispute between them, which would encourage them to do so. He characterised the Defendants' position as being *"smoke and mirrors"* to try to delay a resolution of the claim.

G. **<u>The Defendants' submissions in opposition to a split trial</u>**

36. Mr Parrish submitted that the question I should ask is whether separate trials on liability and loss would be more expeditious and efficient as opposed to trying all issues together. His answer was that they would not be.

37. Despite not having issued a summons relating to discovery, the initial part of the Defendants' skeleton argument and oral submissions were taken up with complaints regarding the Plaintiffs' failure to give discovery of the documents identified in paragraphs 1(d) and (g) of the consent order dated 18 August 2023. Mr Parrish argued that:

    a) the Plaintiffs' discovery failures should be a bar to the court entertaining the application for a split trial; and

b) it is premature to decide whether to order a split trial until discovery has been completed.

38. On the substance of whether to order a split trial, Mr Parrish reminded me that split trials are the exception to the norm and should only be ordered in exceptional circumstances or on special grounds, and only where there is a clear line of demarcation between issues of liability and loss.

39. He submitted that the causation and loss issues in this case are not significantly more substantial or complex than many other cases. He accepted that the liability issues are narrow in scope but argued that the relevant facts are not. He focused on the qualification in the Settlement Agreement that the infringing conduct must be *"... consistent with the past business practices of the Plaintiffs"* and said that there is no agreement as to what are, in fact, the Plaintiffs' *"past business practices."* — this is one of the two areas where the Plaintiffs have refused to give discovery — as well as what services the Defendants offered (if any).

40. Mr Parrish submitted it will require a detailed factual investigation to determine those two questions, and argued I should not order a split trial where the application of the relevant law will depend on the determination of facts which are yet to be established and will require a further examination of the evidence. In support of this proposition, he relied on a passage in the judgment of Smellie CJ in *Tasarruf Mevduati Signorta Fonu v Wisteria Bay Ltd* [2007 CILR 310] at [32], quoted by Doyle J in *Arnage Holdings* at [57]:

> *"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. ..."*

41. Mr Parrish said that it is not possible to determine how many lay witnesses would be required on liability and whether expert evidence will be required as to the technical nature of the services provided historically by the Plaintiffs and by the Defendants (if any). In any event, the Defendants certainly intend to call more than one lay witness on liability.

42. As regards the factual witnesses, Mr Parrish suggested that there will be issues of credibility regarding witnesses who are likely to have to give evidence on liability, causation and loss, which the Court will be better placed to determine after a full trial.

43. He argued that a lot of the documents relevant to liability issues would also be relevant to the causation and loss issues, so there would not be any saving in that regard and in fact there would be a risk of duplication of evidence in the two trials. He submitted that a split trial would not provide any clear advantage.

44. Mr Parrish was extremely sceptical about the Plaintiffs' assertion that a determination of liability would increase the chance of settlement given the history of the parties' relationship and the time already taken without any resolution of the dispute. He countered that it was likely to 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.

45. Mr Parrish complained about the Plaintiffs' *"considerable"* delay in bringing the matter to trial and said that the Defendants should not be made to suffer the further delay to the ultimate resolution inherent in a split trial. He said the Plaintiffs agreed to proceeding to a full trial when they signed the consent order in August 2023 and, if they wanted a split trial, they should have raised this before doing so.

46. In summary, he maintained that the Plaintiffs had failed to establish any real cost or time benefit in proceeding with a split trial, other than to suggest (without any evidence) that such an outcome might lead to a negotiated settlement.

H. <u>Discussion and decision</u>

47. The Defendants have not issued a summons in relation to the disputed discovery, but it is helpful to address that point first, since it is relevant to the Defendants' other submissions.

48. My initial reaction to the Plaintiffs' position on discovery was the same as that of Mr Parrish: that having agreed in the consent order to give discovery, it was not open to the Plaintiffs to say that they would not, whether on the ground of relevance or for any other reason. It seemed to me that there is an analogy with the situation regarding a party consenting to give further and better particulars of a pleading, where it is well established that, having done so, it is not then open to the party to respond that a request is not exigible, for example as being bad in law. However, Mr Kennedy directed my attention to the note in *Supreme Court Practice 1999* at paragraph 24/7/2 which states:

> *"… The making of the order does not prevent the respondent from deposing, in the affidavit that he makes, that he in fact has had no such documents, or that they are irrelevant, or from covering up irrelevant parts, and on a subsequent application for production it may still be decided that the documents are irrelevant* (Thornett v Barclays Bank (France) Ltd *[1939] 1 K.B. 675). …"*

49. Accordingly, I accept that it was sufficient compliance with the consent order for the Plaintiffs to respond by an assertion in Mr Nowack's affidavit that the documents in paragraphs 1(d) and (g) of the consent order are not relevant.

50. However, that is not the end of the matter. I have not heard argument on it, since the Defendants have not issued any summons, but it is reasonably arguable, at the very least, that the Plaintiffs' interpretation of the issues in the case and of the relevance to those issues of the documents described in paragraphs 1(d) and (g) of the consent order is in error, given the terms of their letter dated 15 January 2024 describing their analysis, which I quoted earlier. Accordingly, there may be merit in the Defendants' complaint and it may be that, if pursued, the Plaintiffs may have to provide further documents through the discovery process. This is a factor that I bear in mind in considering the issues surrounding a possible split trial since it represents a potential hold-up in the timeline towards a liability trial and is an indication that the issues may not be as compartmentalised as the Plaintiffs argue.

51. In considering the exercise of my discretion to order a split trial pursuant to GCR O.33, r.4(2), I have reviewed the notes in *Supreme Court Practice 1999* at paragraph 33/4/12, bearing in mind that those reflect English law. More importantly, I adopt the summary of the relevant law and practice set out by Doyle J in *Arnage Holdings*.

52. It is worth repeating that in most cases where a split trial is ordered, unless the claim is dismissed at the end of the liability trial:

    a) it is likely that the overall duration of the case until final determination will be extended, since the parties will then have to prepare the causation and loss side of the case whereas they can address that in parallel with the liability preparation if there is a single trial;

    b) there is likely to be duplication of effort and an increase in costs for the parties if the case has to be prepared in two phases rather than one;

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c) there is likely to be an increase in the amount of overall court time that has to be allocated to the determination of the case, and therefore a reduction in time available for other litigants; and

d) there is likely to be significantly increased stress for the parties as a result of the need for two trials, and for those trials to be spread over an expanded timeline.

This is the reason that the guidance on the exercise of the discretion is in terms that emphasise that a split trial is an exception to the general rule. However, I recognise that there is a greater willingness to order separate trials of liability and of causation and quantum in personal injury claims than in, for example, commercial cases, for reasons that include: (i) the desirability in such cases of determining liability when witnesses' recollections are fresher, given that there is unlikely to be relevant documentary evidence regarding the occurrence of the accident, and (ii) the availability of the interim payment regime once liability is established.

53. As a preliminary point, I do not accept Mr Parrish's submission that the Plaintiffs cannot advance their application for a split trial because of their failure to comply with the consent order on discovery. I do not agree that a procedural failure of that kind has the effect of debarring the party in default from making an application for a split trial, if that is an appropriate course of action.

54. In any event, as I have already indicated, the Plaintiffs did comply with the terms of the consent order, albeit in a way that leaves open the possibility for challenge to the adequacy of their response.

55. In addition, I do not accept that it is premature for the court to consider the question of a split trial before discovery has been fully completed. The court is often asked to make directions as to the future conduct of a case at a stage where there is significant uncertainty as to the future shape of the case. So far as an application for a split trial is concerned, the court needs to be able to understand what the issues in the case are, which it gets from the pleadings, and to comprehend how the parties' cases will be proved, which it gets from the affidavit evidence filed in support of and in opposition to the application for a split trial. The parties must also address in evidence and by argument the other relevant considerations. As with any other application, the court must then make its decision based on the material before it at

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that time. I do not consider that the possibility that the Plaintiffs may be required to give further discovery, or that they have documents that they have not disclosed because they do not consider them relevant, has the result that it is premature to consider whether to order a split trial.

56. Turning then to the substance of the application, applying the guidelines formulated by the learned judge in *Arnage Holdings*, and being mindful that each case has to be carefully considered in its own context and on its own facts and circumstances, my conclusion is that this is not an appropriate case to order a split trial.

57. First, I am not satisfied, taking a cautious approach to the question, that proceeding by way of a split trial would clearly be conducive to the just and timely outcome of the case. In fact, I think it is more likely to result in a delay in the overall time that this case would take to reach a conclusion and an increase in the associated costs, court time and stress for the parties and their witnesses, given that there would have to be two distinct phases of case preparation, one for the liability issues and one for the causation and loss issues. I accept Mr Parrish's argument that it is unlikely that a resolution of a liability trial in favour of the Plaintiffs would be likely to lead to a settlement or even a significant narrowing of the causation and loss issues, based on the conduct of the parties so far. My impression from Mr Kennedy's presentation is that the Plaintiffs are very confident on the liability issues, so the Plaintiffs' own position would appear to be that it is unlikely that the liability trial is the conclusion of the whole case.

58. Secondly, I am not satisfied that the issues proposed by the Plaintiffs are amenable to discreet treatment. I accept that the issues can be described in compartmentalised form but in my judgment the Plaintiffs have ignored the important qualification in the Settlement Agreement that the infringing conduct must be *"... consistent with the past business practices of the Plaintiffs"*. I agree with Mr Parrish that this will require detailed examination of the nature of the Plaintiffs' business, and also that of the Defendants, so that the Court can determine whether or not there is any breach. There is likely to be a substantial overlap in the documentary evidence that must be examined for this task with the documents needed to review the conduct of the Plaintiffs' and the Defendants' businesses in order to determine the causation and loss issues. There is also likely to be duplication in witnesses, in that both Mr Nowack and Mr Silva will be needed to give evidence on the liability issues

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and also on the causation and loss issues. I do not accept Mr Kennedy's submission that causation and loss will be solely dependent on expert evidence.

59. Neither do I accept Mr Parrish's submission that a split trial can only be ordered where there is no substantive dispute as to the facts, and that where the court needs to carry out a fact-finding exercise that is, of itself, a reason not to order a split trial. I note that in *Tasarruf Mevduati Signorta Fonu*, Smellie CJ was addressing the question of a trial of a preliminary issue, i.e. an application under GCR O.33, r.3, where the considerations are not necessarily the same for a split trial under GCR O.33, r.4. In any event, I do not believe that Smellie CJ intended to rule out the possibility of a split trial under GCR O.33, r.4 being appropriate where facts still need to be found. If that were right, it would be impossible ever to order separate trials of liability from causation and loss, which is clearly not the law.

60. Thirdly, I do not agree that determination of the proposed issues first will completely dispose of the case or at least a significant aspect of it, with an overall benefit to the conduct of the case. Whilst there might be a benefit to all parties if the Plaintiffs were to lose, in my judgment, if they were to win, there would not be a consequent narrowing of issues such as to lead to a net benefit in the overall time and cost of resolving the parties' dispute. Neither am I satisfied that a resolution of the liability issues is likely to improve the prospects of a settlement on the causation and loss issues. To the contrary, for the reasons already considered, my judgment is that there is likely to be an overall increase in the duration of the dispute, the work needed to advance the case, costs, court time and stress for the witnesses.

61. Fourthly, I consider there is some merit in the Defendants' complaint that the Plaintiffs' application is made late, in procedural terms. It is notable that the Plaintiffs agreed as recently as August 2023 with directions intended to lead to a trial in late 2023 or early 2024. It appears that they have changed their minds because of the Defendants' refusal to move forwards with exchange of witness statements until the Plaintiffs have provided the disputed discovery. Mr Kennedy prayed in aid of his primary submission that ordering a split trial would by-pass the discovery dispute. However, this does not seem to me to be a good justification for ordering a split trial. In my view, either the Defendants should have issued a summons to compel the Plaintiffs to give the outstanding discovery or the Plaintiffs should have issued a summons seeking to compel the Defendants to serve their witness statements and should have moved the matters onwards towards the intended trial.

62. Overall, for the reasons already expressed, I am not satisfied that there is good and sufficient reason to split the trial, which outweighs the sense and the exhortation in the overriding objective of dealing with as many aspects of the case as is practicable on the same occasion. I therefore dismiss the Plaintiffs' summons.

Dated 24 April 2024

THE HONOURABLE JUSTICE ASIF KC
JUDGE OF THE GRAND COURT