Giles Robert Piers Corbin v Michal Bartolomiej Dorynek

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
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Text

Between
Giles Robert Piers Corbin
Plaintiff
and
Michal Bartolomiej Dorynek
First Defendant
Tyson Werner Hermann Flath
Second Defendant

[2022] JRC 238

Before:

Advocate Matthew John Thompson, Master of the Royal Court.

ROYAL COURT

(Samedi)

Damages — application by both defendants

Authorities

Corbin v Dorynek [2022] JRC 047.

Shipping (Jersey) Law 2002.

Ure v Minister for Health [2015] JRC 256.

Corbin v Dorynek and Flath [2020] JRC 031.

Jersey Evening Post Limited v Al Thani & Four Ors [2002] JLR 542.

The Satanita [1897] AC 59.

Michael v Musgrave [2012] 2 Lloyds Rep 37.

Holyhead Marina Ltd v Farrer [2021] EWCA Civ 1585.

Steedman v Scofield and Another [1992] 2 Lloyds Rep 163.

R v Goodwin [2006] 1 WLR 546.

Holmes v Lingard [2017] JRC 012.

Steele v Steele [2001] C.P. Rep.106.

Stock v Pantrust International SA and Others [2015] JRC 268.

Lingard v Holmes [2017] JRC 012.

Energy Works (Hull) Limited v MW High Tech Projects UK Limited & Anor [2020] EWHC 2133 (TTC).

Steedman v Scholfield [1992] Lloyd's Rep. 163

R v Goodwin [2005] EWCA Crim 3184.

Public Services Committee v Maynard [1996] JLR 343.

Advocate J. C. Heywood **for the Plaintiff**.

Advocate C. Hall **for the First Defendant**.

Advocate S. Franckel **for the Second Defendant**.

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THE MASTER:

1 This judgment contains my decision in relation to an application by both defendants that the court should order a trial of a preliminary issue before any trial on quantum as to whether each of the defendants are entitled to limit their liability to the plaintiff by virtue of the provisions of the Convention on the Limitation of Liability for Maritime Claims 1976 ("the Convention") which has the force of law in Jersey as set out later in this judgment. I shall refer to this issue as the " *ship issue*" in this judgment.

2 This application relates to the plaintiff's claim for injuries suffered following a tragic accident on 9 th July 2017. On that day, as summarised at paragraph 1 of the Royal Court judgment dated 16 th February 2022 reported at *Corbin v Dorynek* [2022] JRC 047 (the "liability judgment"), the plaintiff was travelling on a jet ski driven by the second defendant which collided with a speedboat driven by the first defendant. The injuries suffered by the plaintiff were described as life changing.

3 In the liability judgment the Royal Court found that the first defendant was 60% liable for the plaintiff's injuries and that the second defendant was 40% liable for those injuries. For the sake of completeness in relation to the second defendant's claim for damages against the first defendant for personal injuries the second defendant claims to have suffered, he was found to be guilty of 40% contributory negligence in relation to this claim meaning that the first defendant was 60% to blame for the second defendant's injuries.

Relevant procedural history

4 As a result of issues on liability being determined and because there was no further appeal of that judgment, the claims for damages by the plaintiff and the second defendant came before me on 20 th June 2022 for a directions hearing to enable the quantum of those claims to be assessed.

5 Shortly before that hearing Advocate Franckel for the second defendant raised the ship issue i.e. the question of whether his client could limit its liability under the Shipping (Jersey) Law 2002 ("the Shipping Law"). and the Convention which has legal effect in Jersey pursuant to certain provisions of the Shipping Law. In view of the importance of this argument to the parties, I concluded that I was not prepared on that day to deal with such an

application but instead adjourned it to 15 th August 2022 to enable the first defendant to consider whether he wished to make such an application and secondly to allow the other parties to exchange detailed skeleton arguments on any relevant applicable legal principles for such an application.

6 At the 20 th June hearing the defendants also complained that they did not know the quantum of the damages the plaintiff was seeking albeit they indicated it was likely to be extensive because prior to the accident the plaintiff had been a partner in the law firm of Mourant Ozanne. Therefore, the effect of the accident was likely to have caused a significant loss of earnings because the plaintiff was no longer a partner in that firm.

7 At the same hearing I received a draft order for directions from the plaintiff which proposed expert evidence from ten experts in medical and related fields as well as expert evidence in relation to investment management, forensic accounting and from an economist. The draft directions proposed this evidence be disclosed in stages with meetings between experts' meetings taking place after exchange of all expert evidence for that stage. The draft directions also provided for simultaneous exchange of expert evidence. The draft order would have meant that the parties would only come back for a further directions hearing in June 2023.

8 In relation to this draft order, I took a different approach.

9 Firstly, I made a general discovery order (paragraph 1 of the Act of Court of 20 th June 2022 (“the June Act”)).

10 I also ordered the plaintiff and the second defendant to file their witness statements on quantum. The rationale for this order was to allow each of them to set out their evidence about the injuries they had suffered and any care or ongoing treatment they needed as a result of those injuries.

11 I further directed the plaintiff, because his injuries are more much more complicated than those of the second defendant, to make disclosure of his evidence in the fields of orthopaedic surgery and psychiatry by 2 nd December 2022. I did this because in relation to expert evidence concerning quantification of personal injuries the general approach is to order sequential not simultaneous exchange (see *Ure v Minister for Health* [2015] JRC 256). The rationale for taking this approach is that it allows a defendant (usually through insurers) to make an assessment of whether that defendant wishes to challenge a plaintiff's expert evidence on injuries a plaintiff says he/she has suffered and if so to what extent. The aim is to encourage a cost-effective approach to assessing damages.

12 I also ordered by paragraph 8 of the June Act that the plaintiff provide an expert report from a forensic accountant to set out his claim for loss of earnings both past and future save that

the forensic account was not required to address the plaintiff's potential future earning capacity. I took this approach because loss of earnings was likely to form a significant, if not the most significant part, of the plaintiff's claim. The question of the plaintiff's potential future earning capacity is also a matter that might depend on the plaintiff's medical evidence, his own evidence as to the nature of the injuries suffered and their effect on him and expert evidence from an employment expert. These issues are not straightforward, but they did not prevent me from ordering the plaintiff to set out his maximum claim even if at some point in the future credit might have to be given for the plaintiff's potential future earning capacity.

13 I further issued directions for the defendants to file their medical evidence in response by 17 th February 2023. By this date, the second defendant was also required to set out any expert evidence he wished to rely upon from an orthopaedic surgeon and a psychiatrist in relation to his claim against the first defendant. For the sake of completeness, I observe that the second defendant's claim against the first defendant appears to be much less complex in nature and primarily relates to the effect of witnessing the accident.

14 The rationale for the above directions was to address the defendants' complaint they did not know the amount of the plaintiff's claim. Production of the expert evidence ordered would start to give the defendants some idea of the claims they were facing. The directions issued also allowed at the next directions hearing the parties to assess what further expert evidence might be required in relation to the plaintiff's claims for future care. In that regard Advocate Heywood fairly accepted that the list of experts he had set out at this stage were simply possible experts that might be required. Until he had an expert opinion in the field of orthopaedic surgery, he was not able to assess fully what other expert evidence might be required.

15 Finally, in relation to the June Act, I ordered the exchange of witness statements of fact in relation to whether each vessel could be classified as a ship while leaving over the question what expert evidence was required until determination of whether or not the ship issue should be determined by way of a preliminary issue.

16 Subsequent to the June Act both defendants issued the present summons.

A preliminary objection

17 Before I turn to determine the defendants' application, I must firstly deal with a preliminary objection raised by Advocate Heywood for the plaintiff.

18 This objection arose out of the fact that in January 2020 the first defendant, as well as applying for a split trial, also applied to determine at the trial on liability whether any liability to the plaintiff might be limited pursuant to the provisions of the Shipping Law. I refused that application as recorded in paragraph 2 of the Act of Court of 22 nd January 2020 as

follows:-

> *"2. the First Defendant's application for determination of whether any liability to the Plaintiff may be limited pursuant to the provisions of the Shipping (Jersey) Law 2002 at the same time as the trial on liability is refused…"*

19 My written reasons for that decision were handed down on 18 th February 2020 reported at *Corbin v Dorynek and Flath* [2020] JRC 031. The material part of my decision was set out at paragraphs 53 to 58 as follows:-

> ***"53. In relation to an argument about limiting liability, this will have a significant impact. The real problem with this issue is firstly that it is not based on a schedule of agreed or assumed facts. Secondly, the amount of damages claimed is far from agreed as noted above. Thirdly, there is a factual dispute about whether the jet ski or the speedboat are vessels or ships and therefore whether or not the Shipping (Jersey) Law 2002 applies at all. The question of law to be determined therefore requires factual and expert evidence. If this were heard at the same time as the trial on liability it would lengthen the trial on liability and also make it more complex .***
>
> ***54. I also consider in relation to this issue, because it has not been heard before, that it is much more likely to lead to an appeal whatever the first instance decision. This is in contrast to ordering a split trial on liability. If the point is one of general importance to users of small craft, it is not improbable or fanciful for the issue to end up in the Privy Council. Even if preparations for a trial on quantum could start, it would not be proportionate to hold a complex and therefore expensive trial on quantum while there was an appeal outstanding. Ordering the preliminary issue asked for therefore runs the very real risk of delay to a trial on quantum beyond the time I consider that it will take to be ready for such a trial .***
>
> ***55. While there is a superficial attractiveness to the submission that it would be desirable for the parties to know where they stand in terms of whether or not they can limit liability, there are other means available to the defendants to protect their position in terms of arguing that their liability is limited by payments into court or without prejudice save as to costs offers. The defendants, represented by insurers, are in a position to calculate what that limitation might be and make a judgment whether to take such steps. The position in terms of liability by contrast requires the evaluation of factual and expert evidence to assess who might be to blame and therefore involves more difficult judgment calls in relation to any without prejudice save as to costs offers on liability. Such offers may not therefore have the same protection as an offer based on the application of the relevant convention .***
>
> ***56. The issue of how far claims may be limited may also be complicated by any application Advocate Hall makes on behalf of Mr Dorynek for a ruling***

that the limitation of liability applies to all possible claims arising out of the collision. Such an application should not delay a trial on liability .

57. The other conclusion I have reached is that this part of Mr Flath's application is an example of approaching determination of a case on an issue by issue basis which the courts on various occasions have warned against (see for example *Cohen, Kerr & Anor v Arbitrage Research Trading Ltd* [2019] JRC 229). ***I therefore refer to the well-known warning in*** *Public Services Committee v Maynard* [1996] JLR 343) ***cited at paragraph 13 of*** *Stock v Pantrust* ***as follows:-***

"However, in our judgment, the Royal Court should consider its current practice. To single out bare points of law in this way (which might, when the facts are found, prove to be hypothetical) is likely to increase costs and to extend the time before the plaintiff knows whether he or she is to receive damages for his or her injury and receives the damages awarded. Justice delayed is usually justice denied, particularly in personal injury cases, in which the normal approach should be to fix as early a date as possible for the trial of all issues."

58. For these reasons I refused the application to determine whether or not the liability of Mr Flath (and Mr Dorynek) should be limited by way of a preliminary issue to be determined at the same time as a trial on liability."

20 On 30 th April 2020 I issued the following Act of Court. Paragraph 2 of that Act of Court stated as follows:-

"2. the matter shall be dealt with by way of a split trial, with a preliminary hearing in relation to issues of breach of duty and causation (the "Liability Issues"); and thereafter if necessary (and involving the parties deemed necessary after the resolution of the Liability Issues) a hearing in relation to damages (including the right of either Defendant to limit its liability)…"

I then issued directions in relation to the liability trial.

21 Advocate Heywood relied upon paragraph 2 of the Act of Court of 30 th April 2020 to contend that I had determined that the ship issue should take place at the same time as a trial on quantum and therefore the defendants were not permitted to bring the present application on the basis that I was *functus officio* applying *Jersey Evening Post Limited v Al Thani & Four Ors* [2002] JLR 542.

22 The conclusion I have reached is that I did not accept this preliminary objection raised by the plaintiff. In my judgment what was decided in January 2020 was that the first defendant could not at the same time as a trial on liability also raise before the Royal Court the question of whether its liability might be limited pursuant to the provisions of the Shipping Law. That decision is contained in paragraph 2 of the Act of Court dated 22 nd January

2020.

23 The effect of the Act of Court is also consistent with my reasons for that decision set out above. In particular paragraph 58 also made it clear that I was simply refusing the application to determine whether or not the liability of the defendants should be limited as a preliminary issue at the same time as a trial on liability. The question therefore as to whether such a preliminary issue should be heard in advance of a trial on quantum was not considered by me in January 2020.

24 To the extent that the Act of Court of 30 th April 2020 suggests otherwise, paragraph 2 of the Act of Court is inconsistent with the Act of 22 nd January 2020. What paragraph 2 recorded was that a split trial would take place. However, paragraph 2 did not follow any argument or an application that the issue of limiting liability should be heard at a hearing on quantum. Rather the directions set out in the 30 th April Act of Court were agreed by consent to give effect to the court's direction in the Act of Court of 22 nd January 2020 that the parties should agree directions. The agreed directions were not seeking to vary the decision of the Act of Court of 22 nd January 2020. Rather their purpose was to set out what directions were necessary for the trial on liability to take place.

25 For all these reasons I refused the plaintiff's preliminary objection.

The parties' submissions

26 I now turn to set out the submissions of the parties in relation to the defendants' substantive application.

27 Advocate Franckel took the lead for the defendants. In this judgment I wish to express my gratitude for the assistance provided by him and his English Q.C. (now K.C.) for the detailed submissions as to how a shipowner may limit liability under the Convention as a matter of Jersey law and for the submissions as to the approach taken by the courts in England in relation to applications to limit liability by shipowners.

28 In relation to the issue that the defendants sought to determine by way of preliminary issue, fundamentally it was contended that the application was a matter of timing. This was because the ship issue was a standalone issue compared to assessment of the damages claimed by the plaintiff. It was an issue that always had to be determined. The defendants' argument was that it should be determined in advance of a quantum hearing and arose because of the effect of the Convention.

29 The Convention was incorporated into the law of Jersey pursuant to Section 119 and Schedule 6 of the Shipping Law. The relevant parts of the Schedule to the Shipping law are

as follows:-

30 The general limits are set out in Article 6 of Chapter II, Part 1 of Schedule 6 as follows:-

> ***"1. The limits of liability for claims other than those mentioned in Article 7, arising on any distinct occasion, shall be calculated as follows:***
>
> ***(a) in respect of claims for loss of life or personal injury*** ,
>
> ***(i) 3.02 million Units of Account for a ship with a tonnage not exceeding 2,000 tons*** ,
>
> ***(b) in respect of any other claims*** ,
>
> ***(i) 1.51 million Units of Account for a ship with a tonnage not exceeding 2,000 tons*** ,
>
> ***2. Where the amount calculated in accordance with paragraph 1(a) is insufficient to pay the claims mentioned therein in full, the amount calculated in accordance with paragraph 1(b) shall be available for payment of the unpaid balance of claims under paragraph 1(a) and such unpaid balance shall rank rateably with claims mentioned under paragraph 1(b)."***

31 The Units of Account are described in Article 8 of the Schedule as the " ***special drawing right as defined by the International Monetary Fund***.".

32 Under Part 2 of Chapter 5 of Schedule 6, Article 5 provides that the general limits referred to in paragraph 1(a)(i) of Article 6 referred to above, for ships with less than 300 tons are 1 million units of account and with the corresponding limit referred to in paragraph 1.b.(i) being 500,000 units of account.

33 This was material because both the jet ski and the speedboat weigh significantly less than 300 tons.

34 If therefore the defendants are entitled to limit their liability, it is the limits set out in paragraph 5 of Part 2 of chapter 5 of Schedule 6 that will apply. 1 million units of account for claims for loss of life or personal injury is approximately £1.1 million pounds. The limit in respect of any other claims is approximately £550,000 pounds.

35 For each defendant therefore it is entitled to limit its liability either to £1.1 million pounds or alternatively £1.55 million pounds depending on whether the plaintiff is entitled to aggregate the limits for claims for loss of life or personal property and for other claims or not.

36 In relation to what is a ship, Article 1(1) of the Shipping Law defines a ship as including " ***every description of vessel used in navigation***".

37 As this is the first occasion when the question of limitation of liability under the Shipping Law has come before the Royal Court, Advocate Franckel helpfully drew my attention to the approach taken in the United Kingdom which is also a party to the Convention under its equivalent of the Shipping Law. In the absence of any local authority but without determining the law of Jersey, the authorities referred to were helpful in explaining the legal framework that could be applied in this case. He therefore referred me to the following cases:-

(i) Pleasure craft have the right to limit their liability — see *The Satanita* [1897] AC 59 which was a dispute relating to a collision between two yachts during a regatta on the River Clyde.

(ii) In *Michael v Musgrave* [2012] 2 Lloyds Rep 37 a rigid inflatable boat used for sightseeing was a ship for the purposes of the Athens Convention 1974 Convention (dealing with carriage of passengers). By analogy, the same reasoning should apply to the Convention.

(iii) In *Holyhead Marina Ltd v Farrer* [2021] EWCA Civ 1585 the Court of Appeal concluded that:-

> ***"…a marina had a statutory right to limit its liability for a series of claims brought by a group of yacht owners.*** One of the court's reasons for concluding that the marina did have the right to limit was that it would be anomalous if the yacht owners had a right to limit liability under the 1976 ***convention, but a marina could not avail itself of the statutory right to limit available to "docks'…"***

38 In relation to the question of what a ship is, Advocate Franckel referred me to two English authorities *Steedman v Scofield and Another* [1992] 2 Lloyds Rep 163 and *R v Goodwin* [2006] 1 WLR 546 both of which considered whether a jet ski fell within the definition of a ship.

39 Advocate Franckel sought to distinguish these cases firstly on the basis that the jet ski in the present case was a vessel and secondly when the accident took place the jet ski was being used to transport the plaintiff back to St Helier and was therefore being used in navigation.

40 He also accepted that in order to determine the preliminary issue some factual and expert evidence would be required. Nevertheless, the extent of any such evidence was limited. Firstly, the Royal Court had already made certain findings as to what happened on the day of the accident and had described the vessels. Secondly his client would give evidence

along with the co-owner about their knowledge and experience of the jet ski. There might also be expert evidence from a major retailor who could describe the characteristics of the jet ski. Finally, there would be evidence from the defendants' navigational experts to deal with navigation of small watercraft such as the jet ski and the speedboat.

41 Advocate Franckel disputed that expert evidence was required from a naval architect for the ship issue as the plaintiff was contending. For the purposes of this part of my decision it is not necessary to resolve that difference because Advocate Franckel accepted that some form of expert evidence was required to determine the preliminary issue. Whether that was the expert evidence he sought or from a naval architect or a combination of the two did not matter to the application of the test I was required to apply.

42 In relation to the applicable legal principles when ordering a preliminary issue, these had been considered in my earlier judgment in this case and *Holmes v Lingard* [2017] JRC 012. Advocate Franckel emphasised however that the overall purpose of the decision I had to make was whether a preliminary issue would assist in a cost effective and efficient resolution of the litigation. He therefore argued that ordering a preliminary issue would allow the plaintiff and the defendants to know where they stood in relation to whether or not liability could be limited. Once that issue was determined the parties were in a better position to resolve questions of quantum.

43 The ship issue was important to the defendants because they had not received any schedule of loss. Nor had there been any application for an interim payment which Advocate Franckel accepted could be made so long as it was below the minimum limitation of liability that might apply.

44 Although the directions given in June 2020 had started the process of the plaintiff providing evidence, the defendants had not yet received sufficient information to allow them to evaluate the quantum of the plaintiff's claim. By contrast the preliminary issue could be determined quickly and would mean that progress had been made in the action.

45 Advocate Franckel also referred me to the case of *Steele v Steele* [2001] C.P. Rep.106 and summarised the decision giving rise to ten relevant factors as follows:-

> ***"a. Will the determination of the preliminary issue dispose of the case or at least one aspect of the case?***
>
> ***b. Could determination of the preliminary issue significantly cut down the cost and time involved in pre-trial preparation or in connection with the trial itself?***
>
> ***c. If the preliminary issue is one of law, how much effort will be involved in identifying the relevant facts for the purpose of the preliminary issue?***
>
> ***d. If the preliminary issue is an issue of law to what extent is it to be***

determined on agreed facts?

e. To the extent that facts are not agreed to what extent does that impinge on the value of a preliminary issue?

f. Will determination of the preliminary issue unreasonably fetter either or both parties in achieving a just result?

g. To what extent is there a risk of the determination of the preliminary issue increasing costs and/or delaying the trial?

h. To what extent might determination of the preliminary issue be irrelevant?

i. To what extent is there a risk that determination of a preliminary issue could lead to an application for the pleadings being amended so as to avoid the consequences of the determination?

j. Taking into account all the previous points, is it just to order a preliminary issue?"

46 In relation to the approach previously taken in Jersey, the defendants' position was that the preliminary issue was decisive or potentially decisive and while not exclusively a question of law the evidence needed was limited. In addition, the test did not prevent evidence on a preliminary issue only that the question should usually be questions of law. The preliminary issue could be also tried without significant delay.

47 In relation to the question of an appeal, while he accepted that an appeal was likely, an appeal to the Court of Appeal could still be determined before the plaintiff's case on quantum was ready. By reference to the directions proposed by the plaintiff in June 2020, the parties were not going to be ready for trial on quantum until 2024.

48 In relation to an appeal to the Privy Council, if leave was granted to the Privy Council, the choice was whether quantum was determined first including the ship issue followed by possible appeals, or whether the ship issue should be determined including any possible appeals.

49 The defendants' position was that dealing the ship issue followed by a quantum hearing if matters could not be resolved by agreement was more likely to save costs.

50 In relation to the plaintiff's suggestion that the plaintiff's treatment would be delayed if a preliminary issue was ordered, there was no evidence that this was the case. The current position was that the plaintiff's treatment was ongoing. The solution for that concern in any event was for the plaintiff to make an interim payment application.

51 Advocate Hall for the first defendant supported the submissions of Advocate Franckel and emphasised that the benefit of certainty outweighed any prejudice the plaintiff might suffer. She also contended that an appeal to the Privy Council was unlikely because the cases in the UK had not led to any hearings before the Supreme Court.

52 Advocate Hall also emphasised that it was for the Court to take a view on what was the appropriate way to actively manage the matters now in issue and to look at matters in the round.

53 Advocate Heywood for the plaintiff firstly criticised the defendants' approach because they now wanted to split the dispute into three separate trials which would require the plaintiff to give evidence on three separate occasions. This approach was not fair on the plaintiff.

54 Secondly, he contended that the defendants' application was based on a fallacy because resolution of the ship issue would not be determinative of the whole or any part of the case. If both defendants were able to limit their liability, there still needed to be a trial on quantum to determine what the actual liability was. A trial on quantum would also be necessary if the application failed completely, or if only one of the two defendants was able to limit their liability. If the Court was satisfied that the ship issue was not conclusive of the whole or a substantial part of the case, then the application should be refused as the key criteria for ordering a preliminary issue would not be made out.

55 A trial on quantum was also important because the amount of insurance currently available to the defendants was limited in any event. The plaintiff might therefore have to explore enforcing against assets of the defendants personally. It could not do so without a trial on quantum.

56 Resolution of the ship issue would also not make settlement any easier. The defendants would shortly have clarity in relation to the main parts of the plaintiff's case and would be able to make an assessment on whether they accepted that case or parts of it. Accordingly, they could then make offers of settlement including making an assessment of the strength of the ship issue. The existence of the ship issue did not alter that assessment and therefore did not make settlement any more or less likely.

57 The correct approach was that there should be one trial of all remaining issues unless the parties chose to settle. It would be wrong for the court to assume that if the ship issue was determined that settlement might then occur. Case management has to proceed on the assumption that a case would be resolved at trial while allowing the parties an opportunity to settle in the meantime.

58 In relation to appeals, whatever the outcome of the ship issue there would very likely be an appeal. If one defendant was able to limit liability and the other was not, there would be the potential for appeals by all three parties. The analysis at paragraph 54 of my previous

judgment refusing to hear the ship issue at the same time as a trial on liability applied equally to the present application. This court was also not able to conclude that the matter might not be appealed to the Privy Council.

59 By contrast in relation to potential appeals following a single trial, because quantum would have been assessed an appeal was less likely because the parties could make an assessment of whether or not to appeal based on the actual findings of the court, including in relation to the overall damages payable.

60 The other criteria for ordering a preliminary issue were also not made out because factual and expert evidence would be required. There would be at least four witnesses plus six expert witnesses. A court would have to resolve both whether the speedboat and jet ski were vessels and if they were whether they were used in navigation. Dealing with the ship issue at a single trial would not add very much to complexity of the case because the case on quantum was already complex.

61 The defendants' approach was trying to resolve matters on an issue by issue basis which I had criticised at paragraph 57 of my previous decision refusing to deal with the ship issue at the same time as a trial on liability. That criticism still applied. The Plaintiff had already been denied a single trial. It was unfair on the plaintiff for him to face three trials.

62 In relation to the plaintiff applying for an interim payment, this was different from obtaining a final conclusion, albeit such an application was being contemplated.

63 Advocate Franckel in reply, stated that while the defendants were entitled to appeal (as was the plaintiff) this would only delay matters for 18 months. The preliminary issue was of real importance because only its resolution gave certainty to the defendants as to whether or not they could limit liability.

64 In addition, the plaintiff did not have to give evidence in relation to how the jet ski was used. How the jet ski was used could be dealt with by cross-examination. In any event the extent of the factual evidence was limited in particular when compared to the extent of the evidence required for a quantum trial.

65 Whether or not a preliminary issue was determinative was not a decisive factor but only one of a number of factors the court had to consider having regard to *Steele*.

66 Advocate Franckel was also critical of Advocate Heywood's suggestion that the court could not assume that cases would settle but could assume there would be an appeal following a trial.

Decision

67 I start by reference to the applicable test on whether or not a preliminary issue should be ordered. I considered this test in *Stock v Pantrust International SA and Others* [2015] JRC 268 at paragraphs 11–15 as follows:-

> ***"11. Advocate Sinel, firstly reminded me of when it was appropriate to order preliminary issues. In particular he referred to*** *Enhörning v Nordic Link* [1996] JLR 37 ***and paragraph 2 of the head note as follows:-***
>
> ***"However, it would only be appropriate to determine the question whether the share transfer had been at an under-value as a preliminary issue if it were shown that there were exceptional circumstances or special grounds for doing so.*** Although it was sometimes advantageous to determine an issue of liability separately from the question of the quantum of damages (e.g. if deciding the matter one way would dispose of the entire litigation, if hearing the preliminary issue would expedite the subsequent hearing of other major issues or if it would eliminate the need for discovery of documents or the hearing of evidence in relation to other matters, thus saving costs), it was only rarely appropriate to divide the question of liability itself into preliminary and subsequent issues, which was proposed here. While the normal approach was to hold a single trial of all the issues between the parties, the court nevertheless had a wide discretion to order a separate trial of preliminary issues and it would do so more readily than would English courts because of the small size of the Jersey judiciary. In deciding whether to make such an order, it was important to ensure that neither party would be advantaged or disadvantaged thereby (page 41, line 4 – page 43, line 24)."
>
> ***12. He also referred me to*** *Berry v B.G. Trustees* [2000] JLR 293. ***Paragraph 1 of the head note is as follows:-***
>
> ***"This is an application by the Plaintiffs for an order that there be a trial of a preliminary issue in the following terms:-***
>
> ***"That the following questions or issue of fact and law be heard as a preliminary issue in this action before the hearing of the action and that until the determination of the preliminary issue all further proceedings in the action be stayed, namely:***
>
> ***(i) Whether the provisions of Article 28 (1) of the Trusts (Jersey) Law 1984 (as amended) are available to protect the First and/or Second Defendants against claims made by the Plaintiffs under a contract made between the said Defendants and the Plaintiffs and governed by English law; and***
>
> ***(ii) If they are so available, on what date the "trust property" is to be ascertained for the purposes of the said Article 28 (1).***""
>
> ***13. I was also reminded of the words of Southwell J.A. in*** *Public Services Committee v Maynard* [1996] JLR 343 ***at page 360 lines 11 to 19 as follows:-***

"However, in our judgment, the Royal Court should consider its current practice. To single out bare points of law in this way (which might, when the facts are found, prove to be hypothetical) is likely to increase costs and to extend the time before the plaintiff knows whether he or she is to receive damages for his or her injury and receives the damages awarded. Justice delayed is usually justice denied, particularly in personal injury cases, in which the normal approach should be to fix as early a date as possible for the trial of all issues." "14. He also referred me to a decision of the English Court of Appeal reported at *McLoughlin v Grovers* [2001] EWCA Civ 1743. ***In setting aside a first instance judgment where a preliminary issue had been ordered and had taken place, the English Court of Appeal were critical of a trial on the issue of foreseeability of damage only.*** Mr Justice David Steel at paragraph 65 of the decision stated:-

"No attempt was made to distinguish between the factual investigation required for the purposes of the limitation plea as opposed to the issue of foreseeability. It was wholly impracticable for there to have a full trial of the factual issues pertinent to foreseeability. It was an issue that should have presented on agreed or assumed facts. If this was not a practical proposition, the issue of foreseeability should never have been taken separately .

In my judgment, the right approach to preliminary issues should be as follows:-

a. Only issues which are decisive or potentially decisive should be identified;

b. The questions should usually be questions of law;

c. They should be decided on the basis of a schedule of agreed or assumed facts;

d. They should be triable without significant delay, making full allowance for the implications of a possible appeal;

e. Any order should be made by the court following a case management conference."

15. In respect of the applicable legal principles to be followed I agree these are as set out by Advocate Sinel by reference to the Jersey authorities he cited. To be fair to Advocate Thomas he did not dispute those principles. The approach in *McLoughlin v Grovers* ***is consistent with these decisions and is a useful summary of the factors I should consider although it may also be possible to have a preliminary issue where there are limited disputed facts in issue not requiring significant evidence*** .

68 At paragraph 7 of *Lingard v Holmes* [2017] JRC 012 the Royal Court made the following

observations as follows:-

> ***"7. The trial of a preliminary issue is a mechanism available to the Court to be ordered, generally, in circumstances where to do so would either determine the action or alternatively significantly shorten the overall length or expense of the litigation. There are risks in doing so. It is open to the unsuccessful party to the outcome of the preliminary issue to appeal and this could add very considerably to the delay. This is particularly the case where the outcome of that preliminary issue would, as here, depend upon factual determinations by the Court on evidence before it."***

69 I was also referred to the observations of Mrs. Justice O'Farrell siting as a Judge of the Technology and Construction Court in *Energy Works (Hull) Limited v MW High Tech Projects UK Limited & Anor* [2020] EWCH 2133 (TTC). At paragraph 17 of her judgment she stated the following:-

> ***"17 Turning to the guidance that is set out in the TCC guide, there is no dispute as to the principles applicable.*** The hearing of preliminary issues , ***which the court considers and delivers a binding judgment on particular issues in advance of the main trial, can be an extremely cost effective and efficient way of narrowing the issues between the parties and in certain cases of resolving disputes altogether.*** Appropriate preliminary issue points are ones that may be decisive of the whole proceedings or that will cut down significantly on the scope and therefore costs of the main trial. The TCC guide identifies potential drawbacks of preliminary issues in inappropriate cases where they can have adverse effects. For example, issues that require substantial evidence may result in witnesses and experts having to give evidence more than once, perhaps before different tribunals, there can be delay caused by the time and effort needed to prepare preliminary issues, and if they do not prove to be sufficiently decisive, they can simply push up the overall costs of proceedings and postpone rather than speed up the progress of any settlement discussions."

70 She also referred in paragraph 18 of her judgment to the case of *Steele v Steele* to which Advocate Franckel also drew my attention. While Advocate Franckel, as set out at paragraph 46 above, listed 10 relevant factors, the detailed analysis of Mr. Justice Neuberger (as he then was) in relation to factors one to four, seven and ten, are all relevant to the present application and therefore I set out his analysis in relation to those factors in full as follows starting on page 4 of his decision:-

> ***"Having heard the arguments and considered matters thereafter, I have reached the conclusion that it would not be appropriate to determine this preliminary issue.*** In the light of the effort and expense that have been incurred and in light of the fact that it may well be that the primary responsibility for a preliminary issue being ordered at all lies with the court, the parties are entitled to the reasons for this conclusion. The most convenient course to take is to set

out the questions which I think should be asked, at any rate in a case such as this, when considering whether or not to embark on a preliminary issue .

The first question the court should ask itself is whether the determination of the preliminary issue would dispose of the case or at least one aspect of the case. In the present instance, if the preliminary issue is determined in favour of the claimant, then none of her claim is statute barred and that is one issue out of the way. If the issue is determined in favour of the defendant, then there would be a very limited benefit. The action would certainly not be prevented from continuing. First, there would be the question of the consequences of the claimant having charged or allegedly charged property within the six-year period. Secondly, there would still be money claims because, as I have mentioned, over £6,000 of the $50,400 claimed was ***paid on any view within the six-year limitation period.*** There would still, therefore, be an issue even in relation to payment of money .

The second question that I think the court should ask itself is whether the determination of the preliminary issue could significantly cut down the cost and time involved in pre-trial preparation or in connection with the trial itself. In this case determination of the preliminary issue in favour of the claimant will, obviously, achieve nothing other than determination of one point which would otherwise be determined at trial. If the determination of the preliminary issue is in favour of the defendant, I accept that it would cut down the hearing to some extent, because it would not be necessary to consider at least directly, evidence relating to the 22 or so earlier payments of the £44,000 as any claim based on them would be statute barred. However, as the claim would still subsist in relation to later payments, it seems to me that it is almost inevitable that evidence will have to be led on the circumstances in which at least some of the earlier payments were made. Given that there are disputes as to the circumstances in which the later payments were made and the inferences to be drawn from the circumstances, it must be relevant to consider the circumstances in relation to earlier payments which were made. That must be part of the background in which one assesses the circumstances in relation to the later payments .

Thirdly, if, as here, the preliminary issue is an issue of law, the court should ask itself how much effort, if any, will be involved in identifying the relevant facts for the purpose of the preliminary issue. The greater the effort, self-evidently the more questionable the value of ordering a preliminary issue. In the present case there are 11 pages of agreed facts running to 46 paragraphs with 30 separate footnotes identifying disputes of one sort or another between the parties. The cost and effort in agreeing such a document must to my mind be highly questionable, particularly if there is bound to be a trial relating to a great majority of the issues of law and fact whichever way the preliminary issue is decided .

Fourthly, if the preliminary issue is an issue of law, to what extent is it to be determined on agreed facts? The more the facts are in dispute, the greater the

risk that the law cannot be safely determined until the disputes of fact have been resolved. Indeed, the determination of a preliminary issue, if there are serious disputes of fact, will run a serious risk of being either unsafe or useless. Unsafe because it may be determined on facts which turn out to be incorrect, and this could even risk unfairly prejudicing one of the parties; useless because, having been determined on facts which turn out to be wrong, it would be of no value .

As I have said, the statement of agreed facts in the present case has a large number of identified disputes. Indeed, it appears to me that one could identify over 50 issues of disputed facts, although it is fair to say that around half of them are effectively the same dispute in relation to the great majority of the individual payments, namely whether the defendant insisted on the claimant paying them." and

"Seventhly, the court should ask itself to what extent there is a risk of the determination of the preliminary issue increasing costs and/or delaying the trial. Plainly, the greater the delay caused by the preliminary issue and the greater any possibility of increase in cost as a result of the preliminary issue, the less desirable it is to order a preliminary issue. However, in this connection, I consider that the court can take into account the possibility that the determination of the preliminary issue may result in a settlement of some sort. In other cases the court may well decide that, although the determination of a preliminary issue would not result in a settlement, it will result in a substantial cutting down of costs and time .

In the present case it seems that the parties are at daggers drawn. I have been told that mediation has been considered and presumably rejected, indeed, when I raised it as a possibility, it was rejected out of hand. Further, in the present case the time and risk taken up in identifying in some detail the facts which are agreed and not agreed speaks for itself. It must have been an expensive and time-consuming exercise. Additionally, the issue of law would be not an easy one even if all the facts were agreed. The preliminary issue, it appears to me, raises points that could well be suitable for determination by the Court of Appeal, which would, of course, result in further delay and cost." and

"Tenthly, the court should ask itself whether, taking into account all the previous points, it is just to order a preliminary issue. In this connection, it should be mentioned that the nine specific tests overlap to some extent. Further, some of the points I have mentioned for not ordering a preliminary issue in the present case have been overtaken by events (e.g. the disproportionate effort in preparing a statement of agreed facts)."

71 In relation to that detailed analysis, Neuberger J. emphasised that the questions he considered should be asked should all be considered by the court in deciding whether or not to order a preliminary issue. The questions should not therefore be approached on an individual basis and no single question should therefore be regarded as determinative of the application whatever the answers to the other questions posed. This is the approach I

have taken.

72 The first question Neuberger J. asked himself was not therefore of greater prominence than the other factors he listed, albeit it is clear that the question is a significant one. I therefore do not accept Advocate Heywood's argument that, if I am of the view that the preliminary issue would not or might not be determinative of the whole or a significant part of the action, such a conclusion would be sufficient to dispose of the application as a whole and would be fatal to the defendants' summons. Rather I consider that I should view all the factors relevant to the application listed in the Jersey authorities as expanded upon in *Steele v Steele* in order to reach a decision.

73 In relation to the first question, the preliminary issue will not be determinative of anything if the plaintiff was right that no limit applied. It will also not be determinative if only one defendant was successful. For reasons I explain below this is a real possibility. If both defendants were successful, as matters stand, while the defendants believe that the amount of the claim might exceed the limit of liability, that position is not yet clear. I therefore have to proceed on the assumption that a trial on quantum will still be needed, because the effect of the preliminary issue would simply be to determine the maximum liability, if any, and not what is due to the plaintiff. There is therefore a real possibility of the action continuing either because a limitation of liability does not apply to one or both defendants and also to determine what damages are actually due.

74 In relation to the second question determination of the preliminary issue will also not significantly cut down the cost and time of a trial on quantum if only one defendant is successful or if the plaintiff is successful in that no limitation of liability applies.

75 In this case while determination of the ship issue is a matter for the trial court, the outcome that the second defendant as owner of the jet ski will not be able to limit liability is a real possibility and therefore is one that I am entitled to have regard to in considering how far the preliminary issue might avoid the need for a trial on quantum. I say this by reference to the two English cases which have explored the issue and to which I was referred.

76 In *Steedman v Scholfield* [1992] Lloyd's Rep. 163, the Admiralty Court firstly reached the conclusion that a jet ski was not a vessel. In the alternative Mr Justice Sheen concluded at page 166 that:-

> ***"a jet ski is capable of movement on water at very high speed under its own power, but its purposes not to go from one place to another.*** "A person purchases a jet ski for the purpose of enjoying 'the thrills of water-skiing without the ties of a boat and towrope' and for the exhilaration of high-speed movement over the surface of water. The heading of the craft at any particular moment is usually of no materiality." (I use the word "heading' because it is ***more appropriate than the word 'course'.*** the word 'course' denotes a constant direction on the same heading.) indeed part of the thrill of driving a jet ski

> appears to come from frequent alterations of heading at high speed. it may be possible to navigate a jet ski but, in my judgment, it is not 'a vessel used in navigation'."

77 In *R v Goodwin* [2005] EWCA Crim 3184 the Court of Appeal when considering whether or not the driver of a jet ski had committed an offence contrary to the Merchant Shipping Act allowed the appeal and ruled that the jet ski in question, although capable of being a vessel, was not being used in navigation. The headnote set out the Court of Appeal's conclusion as follows:-

> ***"the words "used in navigation" excluded craft, such as the jet ski, that were simply used for having fun on the water without the object of going anywhere; that, further, although jet skis were used on the sea in proximity to land, they did not go to sea on voyages, nor were they likely to be seaworthy in heavy weather and, therefore, could not be described as "sea-going" for the purposes of regulation 4 of the Merchant Shipping Act 1970 (Unregistered Ships) Regulations 1991…"***

78 At paragraph 27 the Court of Appeal posed the following question —

> ***"What is critical in the present case is, however, whether, for the purposes of the Merchant Shipping Act definition of ship, navigation is "the planned or ordered movement from one place to another" or whether it can extend to "messing about in boats" involving no journey at all."***

79 It answered that question, after a detailed review of a number of the authorities at paragraph 33 as follows:

> ***"We have concluded that those authorities which confine "vessel used in navigation" to vessels which are used to make ordered progression over the water from one place to another are correctly decided.*** The words "used in navigation" exclude from the definition of "ship or vessel" craft that are simply used for having fun on the water without the object of going anywhere, into which category jet skis plainly fall."

80 I have referred to these authorities because they appear to be against the second defendant and, if followed in this jurisdiction, which I stress is a matter for the Royal Court, mean that there is a significant risk that a trial on quantum will still be required. In reaching this conclusion I accept the characteristics and use of the jet ski in this case may be different and therefore the approach taken in England may be capable of being distinguished on the facts. All parties reserved their position on both the applicable legal principles and how they should be applied in the present case as being matters for trial. However these reservations do not prevent me from evaluating the risk of a finding adverse to one or more of the defendants if a preliminary issue were ordered.

81 In relation to the third factor, returning to *Steele v Steele* and Neuberger J.'s comments, to determine this preliminary issue evidence of law and fact will be required. I accept the amount of evidence will be less than a trial on quantum, but evidence of fact will be required in relation to both the characteristics of the second defendant's jet ski and whether or not it was a vessel and how that jet ski was used. Evidence will also be required in relation to the first defendant's speedboat as it is also disputed by the plaintiff that this is a vessel used in navigation.

82 In relation to factual evidence required for a preliminary issue, it would also be an incorrect approach to proceed on the assumption that the plaintiff would not give evidence given that he was a friend of the second defendant and may have been familiar with the jet ski, its characteristics or how it was used. Any cross-examination put without reference to the plaintiff's evidence runs the risk of restricting the plaintiff's ability to challenge any evidence given by the second defendant or on his behalf. Ordering the preliminary issue if asked for would therefore lead to the plaintiff being highly likely to have to give evidence three times which is a factor I am entitled to take into account.

83 In addition, there is likely to be disputed expert evidence, both as to the characteristics of the jet ski and whether or not it is a vessel used in navigation. The parties cannot even agree on what experts are required. There may also be disputed expert evidence about the characteristics of the speedboat.

84 The fact that factual and expert evidence is required is not however fatal because I also accept that the evidence required for a trial on quantum would be much more significant than would be required for the trial of the preliminary issue and the evidence required for each does not overlap. The preliminary issue trial would probably last in the region of one week; a trial on quantum is likely to last a number of weeks. While therefore there will be significant effort in identifying the facts for the purposes of the proposed preliminary issue, that effort is less than that required for a trial on quantum which also requires evidence of fact from the plaintiff and significant expert evidence. This can be seen from the number of experts the plaintiff proposes albeit this is a maximum figure and may reduce or in some cases be of limited scope. In other words, there will be lengthy and complex reports from a large number of experts in a number of different areas and many more than required for a trial of the preliminary issue.

85 In relation to the fourth factor, there is a complete separation between determination of the preliminary issue and a trial on quantum. To that extent a finding, if a preliminary issue were ordered, would not affect a trial on quantum because the two issues are discrete. This factor favours making the order asked for.

86 In relation to the seventh factor, while a trial of the preliminary issue could take place in the Spring of next year, whereas a trial on quantum is unlikely to take place until 2024, if the preliminary issue were ordered, I consider that whatever the outcome it is highly likely that one or more of the parties would appeal. The plaintiff would almost certainly appeal if the

defendants were successful. If the Defendants were unsuccessful in respect of the preliminary issue the defendants may well appeal. If one defendant was successful and the other defendant failed there could be appeals by all three parties.

87 In relation to an appeal to the Court of Appeal, if a hearing of a preliminary took place in the Spring of 2023, allowing time for the writing of a judgment, an appeal would be unlikely to come on until the beginning of 2024 at the earliest because of the need to produce transcripts and to allow for detailed submissions. I also cannot rule out the possibility of an appeal to the Privy Council. Although matters in England may be settled at the Court of Appeal level, that does not mean that leave would not be given to pursue the matter to the Privy Council. If that occurred when such an appeal might take place is unknown. It would certainly not be before the beginning of 2025.

88 I have referred to these possible delays because while the preliminary issue is being determined a trial on quantum would be highly likely to be stayed until any appeals on the preliminary issue were determined. Allowing time to prepare for a trial on quantum, such a trial might only take place in 2026 or possibly later, if a hearing of a preliminary issue was ordered. This would be some 9 or 10 years after the accident took place. Given that liability has been determined, to keep the plaintiff waiting for a determination of damages he is entitled to for this length of time is a strong factor against ordering the determination of the ship issue as a preliminary issue. As observed in *Public Services Committee v Maynard* [1996] JLR 343 and as I referred to paragraph 57 of my previous decision refusing to allow the Ship Issue to be determined at the same time as a trial on liability " **Justice delayed is usually justice denied, particularly in personal injury cases, in which the normal approach should be to fix as early a date as possible for the trial of all issues**."

89 While I accept that the plaintiff can seek interim payments, any application will not exceed the amount of any potential limitation of liability under the ship issue and is not an answer to the unfairness of keeping a plaintiff from having damages assessed for many years.

90 I accept there might be appeals on the ship issue in any event if a single trial on quantum and the ship issue takes place but I agree with the plaintiff that the parties will be in a better position to make an assessment on whether or not to appeal because damages will have been assessed and they will have the benefit of a first instance judgment on the ship issue both as a matter of law and fact

91 In relation to the tenth question set out by Neuberger J., I have to look at all the previous questions to assess whether it is just to order the hearing of a matter as a preliminary issue in this case. In my judgment it is not. The choice I faced was ultimately whether to allow a single trial with the possibility of the ship issue being appealed or whether I should allow the preliminary issue with appeals being highly likely, followed by a trial on a quantum only taking place once all possible rights of appeal in respect of the preliminary issue had been exhausted.

92 The conclusion I have reached is that the latter approach would not be just and would not be fair on the plaintiff and departs from the warning in *Maynard*. The fact that the preliminary issue will require less evidence than a trial on quantum is not a factor sufficient to persuade me to depart from the approach of having a single trial even though that trial will be longer and more complex. The plaintiff is entitled to know where he stands on all outstanding issues and his approach is not disproportionate or unfair. He suffered a tragic accident with significant consequences for which he was not to blame. He should not be kept out of an assessment of what damages follow from that accident any longer than is necessary.

93 The words I set out at paragraph 55 of my previous judgment in relation to appeals also still apply. At paragraph 55 I stated the following:-

> ***"55. While there is a superficial attractiveness to the submission that it would be desirable for the parties to know where they stand in terms of whether or not they can limit liability, there are other means available to the defendants to protect their position in terms of arguing that their liability is limited by payments into court or without prejudice save as to costs offers. The defendants, represented by insurers, are in a position to calculate what that limitation might be and make a judgment whether to take such steps."***

94 The defendants have not persuaded me that I should reach any different conclusion. The defendants, with the benefit of experienced advisers, are able to form an assessment about the likely prospects of success in relation to the ship issue as part of the evaluating quantum (as is the plaintiff). Certainly a decision on the ship issue is not required to make that assessment. I have also issued directions so the defendants will start to know sooner rather than later the likely maximum amount of the plaintiff's claim so that the defendants can decide what approach they wish to take in relation to assessment of damages and determination of the ship issue. At this stage, the orders made place most of the burden on the plaintiff to set out what it is he is claiming. This approach is intended to put the defendants in a position of being able to analyse the claim and determine their response. The defendants at this stage are not being required to incur significant costs to dispute the quantum claim until they know how that claim is to be put.

95 If the defendants are ultimately right that they can limit liability, but they have been put to the expense of a trial on quantum, because the plaintiff will recover significant damages at least up to any limit that is found to apply, the defendants are also protected because they can have recourse to any damages awarded in order to enforce any costs order in their favour on the ship issue if such a costs order is made. This is not therefore a case of the defendants being compelled to incur significant costs without any recourse to recover those costs if the arguments they wish to advance ultimately prevail.

96 The approach I have just described is an application of the overriding principle and the duty of active case management to allow sufficient information to be exchanged or provided

to allow parties to explore settlement before the further and often significant costs required for a trial are incurred. It would not be dealing with cases justly not to create a realistic opportunity for settlement and instead to progress to trial regardless. Nor does case management that I must determine issues one at a time or order a preliminary issue just because they might favour one party if the issue is determined in their favour.

97 For all these reasons the defendants' application is refused. When the judgment is handed down, I will give directions on what expert evidence should be ordered in relation to the ship issue and the timeframe for delivery of such expert evidence.