THE HIGH COURT

COMMERCIAL

[2014 No. 468 COS]

BETWEEN

AIDAN GARCIA (LIQUIDATOR) AND PANSHIRE LIMITED (IN LIQUIDATION)

APPLICANTS

AND

MARK KILKENNY, PATRICK ROONEY AND DANSKE BANK

RESPONDENTS

JUDGMENT of Mr. Justice Hedigan delivered on the 19th of February 2016

1 Introduction

1.1. In these proceedings, the third named respondent ("the Bank") seeks the trial of one preliminary issue:

> "Whether the security held by the Third Named Respondent ranks in priority to any claims, rights or interests asserted by the Applicants in respect of the Clearstream Development and/or related sale proceeds?"

1.2. By notice of motion dated 19th October, 2015, the Bank seeks the following reliefs:

> "1. An order pursuant to Order 63A Rule 5 of the Rules of the Superior Courts ("RSC") and/or Order 63AQ Rule 6(1)(ii) RSC and/or the inherent jurisdiction of this Honourable Court fixing the following issue to be determined by way of preliminary issue (the "Preliminary Issue") in the above entitled proceedings:
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> "Whether the security held by the Third Named Respondent ranks in priority to any claims, rights or interests asserted by the Applicants in respect of the Clearstream Development and/or related sale proceeds?"
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> 2. In the event of the Preliminary Issue being determined in the affirmative, an order pursuant to Order 19 Rule 28 RSC and/or the inherent jurisdiction of this Honourable Court striking out the within proceedings as disclosing no reasonable cause of action; and/or as being frivolous or vexatious; and/or bound to fail.
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> 3. Such directions as to this Honourable Court deems appropriate in respect of the setting down of the Preliminary Issue.
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> 4. A stay on the directions timetable in respect of the substantive proceedings as issues on 9 September 2015 pending determination of the Preliminary Issue.
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> 5. Such further or other order as may be appropriate.
>
> 6. Costs."

2 The Factual Background

2.1. The substantive proceedings are brought by the applicants by way of notice of motion dated 21st October, 2014, seeking, *inter alia:*

> (1) An order pursuant to section 298 of the Companies Act 1963 against the first and second named respondents;
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> (2) An order pursuant to section 38 of the Companies Act 1990 against all of the respondents
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> (3) A declaration pursuant to section 139 of the Companies Act, 1990 (as amended) that the property of the Company comprising of the proceeds of sale of the apartments situated at Clearstream Court, Finglas, Dublin 11 was disposed of with the effect of perpetrating a fraud on the Company and its creditors.
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> (4) An Order pursuant to section 139 of the Companies Act 1990 (as amended) requiring the Respondents to deliver up or pay a sum to the Liquidator on such terms and conditions as the court deems fit in respect of the disposition of the proceeds of sale of the apartments situated at Clearstream Court, Finglas, Dublin 11.

2.2. Section 139 of the Companies Act, 1990 ("the Act of 1990) provides:

> "139.—(1) Where, on the application of a liquidator, creditor or contributory of a company which is being wound up, it can be shown to the satisfaction of the court that—
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> > (*a*) any property of the company of any kind whatsoever was disposed of either by way of conveyance, transfer, mortgage, security, loan, or in any way whatsoever whether by act or omission, direct or indirect, and

(*b*) the effect of such disposal was to perpetrate a fraud on the company, its creditors or members,

the court may, if it deems it just and equitable to do so, order any person who appears to have the use, control or possession of such property or the proceeds of the sale or development thereof to deliver it or pay a sum in respect of it to the liquidator on such terms or conditions as the court sees fit."

2.3. The first named applicant is the liquidator of the second named applicant ("the Company"). The Company was involved in the development of an apartment complex in McKee Avenue, Dublin 11, comprising 88 apartments and 132 car-park spaces, and known as Clearstream Court. For the purposes of the preliminary issue the following facts are admitted:

(i) That at all times Mr. Kilkenny and Mr. Rooney were directors and shareholders of the Company;

(ii) That under a facility letter dated 20th March, 2006, the Bank advanced loans in the amount of €7,900,000 ("the Term Loan") and €12,100,000 ("the Development Loan") – which loans were subsequently increased under a facility letter dated 19th November, 2007, to approximately €24,000,000 – to Mr. Kilkenny to assist in the purchase of the lands on which the Clearstream Court apartments were built, and to assist with the development costs associated with the constructions of same;

(iii) That both the Term Loan and the Development Loan were to be repayable from the proceeds of apartment sales in the development at Clearstream Court;

(iv) That Mr. Kilkenny purchased the beneficial interest in the land comprising the site on which Clearstream Court was built relying upon the Term Loan provided to him by the Bank;

(v) That Mr. Kilkenny executed a mortgage dated 25th April, 2006, in favour of the Bank over all of his interest in the Clearstream Court lands ("the Mortgage");

(vi) That Mr. Kilkenny contracted with the Company to build the Clearstream Development for reward;

(vii) That Mr. Kilkenny drew down the Development Loan to facilitate the construction of the site known as the Clearstream Development;

(viii) That the Bank did not lend any money to the Company and that it does not hold (and never did hold) any security from the Company, whether by way of mortgage, charge, or otherwise;

(ix) That the Clearstream Development was ready for occupation/sale in August 2008;

(x) That the first unit in Clearstream Court was sold on the 9th December, 2008;

(xi) That the first 30 units in Clearstream Court were sold by means of two separate contracts, the first being a contract for the sale of the site ("the Site Contract") as between Mr. Kilkenny and Mr. Rooney and the purchaser, and the second being a building agreement between the purchaser of a unit and the Company ("the Building Agreement")

(xii) That in respect of the first 30 sales, the Bank was furnished with a Closing Statement which referred to the consideration payable by the purchaser, as apportioned between "Sale of Site as per Contract (Mark Kilkenny & Patrick Rooney)" and "Building Agreement (Panshire Limited)" and;

(xiii) That the Bank received a substantial sum of money representing the proceeds of sale of the apartments at Clearstream Court, including part of the "Building Agreement" element of such proceeds of sale, and applied the same in permanent reduction of the debt due by the first named respondent in respect of the Term Loan and Development Loan.

3 The Legal Framework

3.1. Order 63A, r. 5 of the Rules of the Superior Courts provides:

"A Judge may, at any time and from time to time, of his own motion and having heard the parties, give such directions and make such orders, including the fixing of time limits, for the conduct of proceedings entered in the Commercial List, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings."

3.2. Order 63A, r. 6(1)(ii) RSC provides:

"Without prejudice to the generality of rule 5 of this Order, a Judge may, at the initial directions hearing –

(a) of his own motion and after hearing the parties, or

(b) on the application of a party by motion on notice to the other party or parties returnable to the initial directions hearing,

give any of the following directions to facilitate the determination of the proceedings in the manner mentioned in that rule:

…

(ii) fixing any issues of fact or law to be determined in the proceedings;…"

3.3. On a procedural note, the applicants contended that the Bank ought to have brought the application pursuant to Order 25 and/or

Order 34(2) RSC, rather than Order 63A. Order 25 RSC provides:

> "1. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the Judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the Court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.
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> 2. If, in the opinion of the Court, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the Court may thereupon dismiss the action or make such other order therein as may be just."

Order 34, r. 2 RSC provides:

> "2. If it appear to the Court that there is in any cause or matter a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to an arbitrator, the Court may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed."

3.4. In *Campion v. South Tipperary County Council* [2015] IESC 79, McKechnie J. summarised, at para. 35, the circumstances in which the jurisdiction to grant the trial of a preliminary issue might be successfully invoked:

> "• There cannot exist any dispute about the material facts as asserted by the relevant party: such can be agreed by the moving party or accepted by him or her, solely for the purposes of the application.
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> • There must exist a question of law which is discrete and which can be distilled from the factual matrix as presented.
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> • There must result from such a process a saving of time and cost, when the same is contrasted with any other suggested method by which the issues may be disposed of: in default with a unitary trial of the entire action. In the absence of admissions, appropriate evidence will usually be necessary in this regard: impressions of what might or might not be, will not be sufficient.
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> • The greater the impact which a decision on the preliminary issue(s) is likely to have, on the entire case, the stronger will be the argument for making the requested order.
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> • Conversely if irrespective of the courts decision on that issue(s), there should remain for determination a number of other substantial issues or issue(s) of a substantial nature, the less convincing will be the argument for making such an order.
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> • Exceptionally however, even if the follow on impact will not dispose of any other issue, the process may still be appropriate where the subject issue is substantial in its own right and where its determination will clearly benefit the action in an overall sense.
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> • As an alternative to such a process in such circumstances, some other method or mode of proceeding, such as a modular trial may be more appropriate.
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> • It must be 'convenient' to make such an order: at one level this consideration of itself, can be said to incorporate all other factors herein mentioned, but for the purposes of clarity it is I think more helpful, to retain the traditional separation of such matters.
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> • 'Convenience' therefore should be understood as meaning that the process will enhance in an overall way the most efficient, timely and cost effective method of disposing of the entire litigation.
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> • The making of such an order must be consistent with the overall justice of the case, including of course fair procedures for all parties.
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> • The court at all times retains a discretion whether or not to make such an order: when so deciding it should exercise caution so as to make sure that if an order is made, it will meet the purposes intended by it; finally
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> • Subject to giving due and proper weight to the decision of the trial judge, the appellate court can substitute its own views for those of the High Court where it thinks it is both necessary and appropriate to so do."

4 Submissions of the Bank

Delay
4.1. The Bank rejected the claim that the application is made at a late stage. The Bank claimed its entitlement to invoke the jurisdiction of the Court to set down the proposed preliminary issue under Order 25 RSC only arose once it had delivered its Points of Response on 24th July, 2015. It was submitted that there has been no delay by the Bank thereafter in raising the issue, having obtained the leave of the Court to bring its application in early October 2015.

Prior Attempt to Determine a Preliminary Issue
4.2. The Bank submitted that the claim that the Bank has already participated in a failed attempt to have an issue determined is disingenuous. The first and second respondents brought an application, prior to the exchange of pleadings, to have the issue determined as to whether the liquidator was validly appointed. The Bank made a brief submission as to the scope of the preliminary hearing before Haughton J. (*Garcia & Anor. v. Kilkenny & Ors*. [2015] IEHC 272) but made it clear that the Bank did not wish to be heard on the preliminary issue and with the leave of the Court withdrew.

The Issue is Determinable on Agreed or Accepted Facts
4.3. The Bank submitted that the application is brought by reference to facts that are not in controversy between the parties on the pleadings (see "The Factual Background"). In fact, a notable feature of the application is that it is based on pleas positively made by

the applicants in their points of claim.

4.4. In relation to the facility letters and mortgages, the Bank submitted that the liquidator has specifically pleaded and relies upon the terms of the facility letters entered into as between the Bank and Mr. Kilkenny as well as the mortgage executed by Mr. Kilkenny. The Term and Development loans were first advanced on foot of a facility letter dated 20th March, 2006. It expressly provided that the Term and Development loans were to be "repaid from the proceeds of apartment sales from the development". As security for the loans the Bank was to be provided, *inter alia*, with a mortgage over the entirety of the borrower's interest (legal or equitable) in the site, with full planning permission for the construction of the Development and a non-recourse collateral first legal mortgage and charge over the site from the vendors.

4.5. The Mortgage executed by Mr. Kilkenny identified the "Mortgaged Property" as meaning: "(a) the property described in Schedule 1 hereto; and (b) (by way of extension of Section 6 of the Conveyancing Act 1881) all rights, liberties, powers, easements, quasi-easements and appurtenances (in each case of whatever nature) attached to or appurtenant thereto and all buildings, structures, erections, fixtures (including trade fixtures) from time to time therein and thereon." The "Mortgaged Property" was secured in favour of the bank under the terms of clause 3 of the Mortgage in terms that encompass all potential interests, whether leasehold freehold, registered or unregistered in respect of the lands in question. Clause 4 provided that the Bank was obliged to release and discharge the security only "if all the Secured Liabilities have been finally and indefeasibly paid and discharged in full…" Clause 5 provided that the Mortgage would be "a continuing security" and would "extend to the ultimate balance of the Secured Liabilities and … continue in force notwithstanding any intermediate payment or discharge in whole or in part of the Secured Liabilities". Under Clause 6.1.1, Mr. Kilkenny warranted, represented and undertook to the Bank that he was and would be "at all times during the subsistence of the security…the sole lawful and beneficial owner of the Secured Assets". Under clause 6.1.4, Mr. Kilkenny warranted, represented and undertook to the Bank that "until released by the Bank, [the] Mortgage constitutes a first priority security interest over the Secured Assets enforceable in accordance with its terms…" In addition, under clause 7.8, Mr. Kilkenny covenanted with the Bank that until the Mortgage was discharged he would not:

> "7.8.1 create or permit to subsist any Security Interest over the Secured Assets or any of them; or
>
> 7.8.2 part with, sell, transfer, lend, lease or otherwise dispose of, whether by means of one or a number of transactions related or not and whether at one time or over a period of time, the whole or any part of the Secured Assets…"

At clause 7.18, Mr. Kilkenny covenanted that he would not "…enter into any onerous or restrictive obligations affecting any of the Secured Assets or create or permit to subsist any over-riding interest or right therein or thereover which might adversely affect the value thereof."

4.6. The Bank submitted that the liquidator has not asserted on affidavit that there is a dispute about the Bank's security over the development. The assertions made in the liquidator's affidavit at paras. 16-18 are at odds with the claim as pleaded by the applicants in their points of claim, which the Bank contended positively asserts the acquisition of the relevant lands by Mr. Kilkenny and the securing of same in favour of the Bank under the Mortgage. Further, the suggested concerns raised by the liquidator as to the security in his affidavit are misleading by reference to the documentation before the Court on this application.

4.7. The Bank submitted that its fundamental position is that its security over the Clearstream Court lands extended to the constructed development and that, accordingly, it had a prior claim to all proceeds of the sale of any apartment sold. The Bank contended that this was at all times known to the company insofar as it was involved in the development works. It is on this basis that the Bank contended that the payments to it cannot be considered to be disposals of company property or otherwise caught by the terms of s. 139 of the Act of 1990.

4.8. The Bank submitted that the Mortgage expressly provided that it would extend to secure "all buildings, structures, erections, fixtures (including trade fixtures) from time to time therein and thereon". The Company was at all times aware of this. On the facts, even before any contract for the sale of any apartment to a purchaser was concluded, the completed Clearstream Development was captured by the Bank's prior ranking security. Accordingly, on a sale of a part of the completed development, however structured, the Bank had a prior claim to all proceeds under the terms of its mortgage. The fact that the Bank might have been aware of the structuring of a sale of the first 30 units through the mechanism of a Site Contract and Building Agreement does not alter its security rights, nor give rise to any estoppel. The Bank has never resiled from the position that it is entitled to the proceeds of sale of each unit less agreed deductions. The Bank relied on *In Re N17 Electrics Limited (In Liquidation)* [2012] IEHC 228 in arguing that awareness of the manner in which a mortgagor deals with his property does not bind the mortgagee.

4.9. The Bank argued that the claim advanced by the liquidator under s. 139 cannot succeed. First, there has been no disposal of Company property to the Bank. Secondly, the Company was at all times on express notice both of the terms of the Mortgage and the terms of the loan facilities made available to Mr. Kilkenny on foot of which development funds were in turn provided to the Company. In addition, both the 2006 and 2007 facility letters, the terms of which were known to the Company through its directors, made it clear that the Bank debt was to be repaid from sales proceeds of all constructed apartments. To the extent that it is now contended by the liquidator that the Company acquired some interest in the mortgaged property by constructing the development or on foot of an agreement with Mr. Kilkenny, the quality of such interest is effected by the Mortgage both as to the validity of that interest insofar as it can now be asserted as against the Bank, and its priority. Any company interest is postponed to the Bank's prior security (see *In Re Salthill Properties (In Receivership)* [2004] IEHC 145, [2006] IESC 35). Thirdly, the payments of sales proceeds to the Bank did not have the effect of perpetrating any fraud on the Company or its creditors. This could only arise if money would have been available to the Company to pay other creditors but for the payments to the Bank. However, insofar as the Company had a claim to a potion of the proceeds of sale, this ranked behind the Bank's priority to such payments. Fourthly, the Bank was the biggest contributor in monetary terms to the Clearstream Development (advancing in excess of €20,000,000) and suffered the largest loss, with a sum of €14,000,000 being irrecoverable. The Bank asserted that the Bank acted on foot of its security as any lender would be entitled to do.

5 Submissions of the Applicants

Delay

5.1. The applicants argued that the application ought to be refused for delay in bringing this application, being made at a very late stage in the proceedings. The first time the Bank indicated it wished to fix a preliminary issue was in October 2015. By that time, the parties had agreed to have the matter dealt with as a unitary trial and considerable expense was incurred by the applicants on that basis. Further, the applicants rejected the bank's assertion that the entitlement of the bank to raise the preliminary issue only arose on 24th July, 2015, when the pleadings closed with the delivery of the points of defence. In his affidavit sworn on 29th October, 2015, Aidan Garcia notes the almost identical nature of the defence set out in the affidavit of Michael Leonard of the Bank setting out

its full defence in January 2015 and the affidavit grounding this application.

The Applicants' Position
5.2. The applicants submitted that the issue of the Bank's security is not straightforward and is not a question of priority as claimed by the Bank. The applicants rely on *Barclays v. Langdraf* [2015] 1 All ER (Comm) 720, which concerned the determination of loan agreements through the summary judgment procedure and provides that where there is evidence that the written agreement is at odds with the actual intention or the actions of the parties to it, the summary disposal of an action is not appropriate. It is asserted by the applicants that, at trial, it will be submitted that the Bank's charge on the buildings both in substance and in fact is not a fixed charge, including the buildings on the land, as claimed by the Bank. The intention of the parties was that the Bank would be repaid from the proceeds of the sale through the sale of the developed sites and that its security would be limited to the sites. The applicants contended that, for this reason, the contracts for sale took the form of two separate agreements.

5.3. The applicants submitted that the Bank cannot now assert a fixed security over buildings which did not exist at the time of the loan when this is contrary to its actions throughout the existence of the loan in allowing the profits from the sale of those buildings to be paid to the Company and to be applied for purposes other than repaying the Bank's loan. Written terms of an agreement cannot be determinative where the parties act in contravention of them (see *Agnew v. Inland Revenue Commissioner* [2001] 2 AC 710). Reliance was placed on *J.D. Brian Limited (in Liquidation) t/a East Coast Print and Publicity [*2015] IESC 62, with the applicants arguing that an application of the "text in context" approach in the present case indicates the true intention of the parties to the charge was that the Bank would not have a fixed security over the Buildings aspect of the land and that the Company would be free to deal with and dispose of the proceeds of the sale of the Building arrangement without recourse from the Bank.

5.4. There is a dispute between the parties as to the precise effect of the Bank's charge, whatever charge is found to be the relevant charge. The applicants contest on two grounds the Bank's assertion that the arrangement (sale of units proceeded on the basis of a separate Site Contract and Building Agreement with the Company) "could not alter the Bank's *de facto* entitlement to claim all proceeds of sale pursuant to its security." The first of these relate to the manner in which the closings occurred and, for example with the sale of unit one, the claim that sums of money that were paid to the Bank were not covered by the charge in favour of the Bank as the Bank had provided partial release of the charge earlier on the close of sale. The applicants submitted that by allowing and directing the monies to be paid to the Bank when they are lawfully due and owing to the Company, a breach of s. 139 of the Act of 1990 occurred. Secondly, by way of alternative and separate agreement, the applicants contended that due to the nature of the agreement between the Company and the Bank, the Bank is estopped from relying on the terms of the charge. In the alternative, the Bank is estopped from relying on the wording of the mortgage when by its conduct it clearly accepted a state of affairs, whereby the proceeds of the Building Agreements were for the benefit of the Company.

5.5. The applicants contend that the four elements of estoppel by convention are met (see *Ulster Investment Bank v. Rockrohan* [2015] IESC 17 and *Garcia (Liquidator) and Panshire Limited (in liquidation) v. Kilkenny & Ors.* [2015] IEHC 272). By approving and enabling the sales of the apartments being effected by separate and building contracts, the Bank's conduct led the Company to develop the buildings on the site using its funds and then to proceed to market and sell those units in a manner approved by the Bank. The applicants contend that it is unconscionable for the Bank to now seek to rely on the wording of the charge.

5.6. The applicants submit that even if the preliminary issue could be decided, the matter is not suitable for hearing by way of preliminary issue having regard to the substantial matters involving the Bank that would have to be addressed, such as the Bank's position as shadow director and the corresponding duties that would flow from that finding.

6. The Decision of the Court.
6.1 The applicant's raise the issue of the bank's delay in seeking the trial of this preliminary issue. The bank argues that it was only when the pleadings closed with the delivery of the points of defence that its entitlement to raise this preliminary issue arose. Is this correct? Order 63 A r. 5 and r. 6 (1) (ii) cited above at 3.2 makes it clear that a judge at the initial directions hearing has a wide range of powers to direct the manner in which the case shall proceed. This includes the fixing of any issues of fact or law. Thus the bank could at any time from when the case entered the commercial list have applied for the trial of this preliminary issue. It argues that this right only arose on the 24th of July 2015 when the pleadings closed. It brought this application on the 19th of October 2015 almost three months later. This in itself is somewhat delayed. Yet it is clear from the affidavit of Michael Leonard sworn on the 19th of January 2015 notably at para. 15 thereof, that the bank intended to rely upon its security to answer the claim of the applicant herein. No explanation is offered (other than above) for the failure to move more swiftly to raise this preliminary issue. In the interim the motion for directions has been before the court on nine separate occasions. There has been an application for security for costs finally withdrawn on the 16th of March 2015 and there has been the trial of another preliminary issue concerning the validity of the appointment of the applicant. In my judgment this application for the trial of a preliminary issue ought to have been made in January 2015 or immediately thereafter. Much forensic water has flowed under the bridge since then. In any court but most particularly in the commercial court, it is incumbent upon the parties to move with all possible expedition. In this matter the third respondent has delayed too long. Moreover it is undesirable that multiple applications be made in a piecemeal fashion for the determination of certain issues on a preliminary basis. This is particularly so in the Commercial Court where efficiency and expedition are the byword. All possible grounds for seeking the determination of any issue in a preliminary hearing should be examined at the same and the earliest time. Save for the most exceptional circumstances, there should be only one bite at the cherry.

6.2 I propose to make such orders now as I can to bring this case on for trial as soon as possible. The application is refused.