Neutral Citation Number: [2012] IEHC 25

THE HIGH COURT

COMMERCIAL

2009 6385 P

BETWEEN

WEAVERING MACRO FIXED INCOME FUND LIMITED (IN LIQUIDATION)

PLAINTIFF

AND

PNC GLOBAL INVESTMENT SERVICING (EUROPE) LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Charleton delivered on the 26th day of January 2012

The defendant seeks a modular hearing in advance of the main trial of certain key issues. The relief is sought in the expectation that the advance disposal of aspects of the claim will shorten the trial and reduce expense. This case is predicted at full trial to run for 64 days and security for costs has already been conceded in favour of the defendants by the plaintiff company. Those costs are currently estimated at €5.6 million for the defendant's side alone. It is not for this court on the current motion to adjudicate on the proposed sums. The test of what costs are bearable will, no doubt, reflect the economy within which professional fees are proposed to be charged.

No estimate has been given as to the extent to which a saving in time at trial, in pre-trial discovery and in expense may be achieved by a modular trial order. In other similar motions, such an estimate was not required. It may be that in similarly long cases parties can reach agreement that a particular issue might be tried on agreed facts or, alternatively, the trial judge on the motion may be confronted with a situation where parties are so in conflict as to be unable to agree anything of impact to the resolution of their dispute. Estimates on affidavit may be helpful to a motion of this kind, but there is no precedent requiring affidavit evidence to that effect and this Court does not intend to establish same. These are not required. The appraisal of the correctness of a modular trial order is not balanced on an adversarial dispute: rather, splitting up a trial so that a modular hearing on particular issues precedes the main hearing requires the application of the good sense of the judge. It is a matter of experienced assessment on reading the relevant papers and hearing submissions.

The issues sought to be tried in advance are to be seen in the context of the background facts of the case. The Court is not now judging contested testimony nor is it ruling on legal issues beyond what is necessary for the disposal of this motion. Any apparent comment by the Court on what is alleged by either side is not declaratory of fact. Any comment as to the apparent state of the law, at this stage, can be no more than a statement of what may be argued should the relief sought on the motion be granted.

A modular hearing is sought on the following issues:-

> 1) Is the plaintiff's claim in the proceedings limited to (A) any alleged causes of action and/or claims which arose within 12 months of the date of issue of the proceedings on 30th June 2009 or (B) any alleged causes of action and/or claims which arose within 12 months of the date of service of the proceedings on 5th July 2010?
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> 2) When did the causes of action relied upon by the plaintiff in these proceedings occur for the purposes of clause 14(D) of the administration agreement?
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> 3) Are the acts and/or omissions of the directors of the plaintiff company as determined by the findings in the Cayman judgment and/or as contended for and/or accepted by the plaintiff in the Cayman proceedings attributable to and binding in these proceedings and can the plaintiff herein otherwise seek to litigate any findings in these proceedings?
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> 4) Is the plaintiff vicariously liable in respect of the acts and/or omissions of the directors of the plaintiff company referred to in issue (3)?
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> 8) Did the acts and/or omissions of the directors of the plaintiff determined and/or admitted and/or accepted by the plaintiff in the Cayman proceedings cause the loss and damage claims against the defendant in the proceedings or otherwise were such as to disentitle the plaintiff to maintain these proceedings?
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> 9) Can the plaintiff maintain any claim other than a claim for wilful misfeasance, bad faith, gross negligence or reckless disregard of duties against the defendant in the proceedings, whether pursuant to a claim based upon the administration agreement or otherwise?
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> 10) If the answer to issue nine is "no", which (if any) of the plaintiff's claims in the proceedings can be maintained against the defendant?
>
> 11) Is the plaintiff's claim for damages involving in whole or in part a claim for consequential, special or indirect loss or damages?
>
> 12) If the answer to issue 11 is "yes", is the defendant liable for such consequential, special or indirect loss or damage?

It is necessary to examine these issues in their specific context.

Background

The plaintiff company, Weavering Macro Fixed Income Fund Limited ("Weavering") was incorporated in 2003 in the Cayman Islands and its shares are listed on the Irish stock exchange. It is an investment company which purchases complex financial instruments on behalf of a range of investors. Voting rights in the plaintiff company are divided into 100 voting shares. There are also four million redeemable shares which can be purchased in the ordinary way as a share investment but which do not carry voting rights within the company. Certain of the money market instruments used to effect investment by the plaintiff are notoriously impenetrable. The investment manager for the plaintiff company is another company which bears a similar name, namely Weavering Capital (UK) Limited, which is incorporated in England and carries on business from an office in London. The instruments purchased included fixed income assets held in bonds. Also among the range of transactions invested in by the plaintiff company Weavering, on the apparent advice or direction of its London counterpart, were interest rate swaps. The counterparty to the swaps was another very similarly named company called Weavering Capital Fund Limited ("Weavering Capital"). This kind of transaction, as I now understand it, is a form of betting. As between the plaintiff company Weavering and Weavering Capital, contracts were entered into by reference to the interest rate available on investments and depending upon which side was up or down, a liability to pay arose.

Under the rules of the Irish stock exchange, and pursuant to assurances given to investors under an initial prospectus and on an investment information document, this aspect of the plaintiff's investment business was never to exceed 20% of the value of the funds invested. Truly fantastic gains, however, were supposed to have been made on these interest rate swaps. This pushed the valuation of the supposed investment over that limit. Various different figures have been referred to in the pleadings and in due course proof through testimony or by admission will be required of these.

The value of the interest rate swaps is said to have risen in favour of the plaintiff from a profit of US$1.5 million in April 2005 to over US$630 million in January 2009. It will be a central allegation in the case that all of these interest rate swaps were fictitious. Notwithstanding that huge sums of money were being earned by the plaintiff company on paper, no actual money was deposited in its bank account by Weavering Capital. It is claimed that on one occasion there was a gain in the other direction when a sum of US$8 million was run up in favour of Weavering Capital; but on this occasion actual money changed from one bank account to the other. The three Weavering companies, it is alleged, had the same board of directors comprising two people. It seems at this stage hard to believe that any reasonable business person could regard the profit on the interest rate swaps over an extended period of time as being valid in the absence of money changing hands. Since gambling involves an assessment of risk in the context of performance to the date of laying a bet, it perhaps stretches credulity that any independent company would continue to engage in interest rate swaps with the same counterparty on which it was losing substantial sums month after month and year after year. The veil of mystery over all of this may be at least partially drawn back at trial, in the event that an explanation is forthcoming.

In March 2008, the Irish stock exchange issued a formal non-compliance notice to the plaintiff on the excess of the allowable 20% of the value of investments that had accrued due to apparently dominant interest rate swap profits. In November of the same year, the defendant reported its concerns in relation to these swaps to the board of directors of the plaintiff company Weavering. Here is the essence of the case. What service was the defendant supposed to offer the plaintiff and why had no such warning been previously issued?

The defendant, PNC Global Investment Servicing (Europe) Limited, was engaged by the plaintiff as an income fund manager pursuant to an administration agreement. The terms of that agreement are at the heart of the determination of this motion and I will refer to them shortly. Central to the disposal of the case is the nature of the duties undertaken by the defendant on behalf of the plaintiff. The defendant company certainly administered the processing of subscriptions for shares and, on a month to month basis, was required to give investors a net asset value on their investment. In a letter dated 26th October 2011, the plaintiff summarises its case against the defendant on the basis of a breach of duty. Whether this alleged breach arises under the administration agreement, or pursuant to a general duty of care in tort, it will be central to the disposal of the case. The breach of duty is pleaded by the plaintiff to arise against the defendant in allegations of wrong in the following respects:-

1. it miscalculated the net asset value of the fund;

2. it failed to inform the directors of Weavering of the identity of the interest rate swap counterparty; and

3. it failed to inform the directors of Weavering of an increasingly perilous investment risk relating to the interest rate swaps.

The plaintiff makes the claim that, in consequence, losses in excess of €378 million were concealed within the interest rate swap transactions and that, as a direct result, the investors' fund encompassing all of the activities of the plaintiff, was reduced by an amount of about €280 million. In addition, the plaintiff claims against the defendant Weavering for reimbursement of management fees of €14 million which would not otherwise be payable in that amount but for the inflated value of the interest rate swap transactions. On the same basis, it is claimed brokerage transactions through commission cost the plaintiff €50 million. Finally, interest, expenses and foreign exchange charges were allegedly incurred by the plaintiff of €15 million. The total claim is therefore for about €360 million.

Without doubt, the nature of the causation for these alleged losses will be closely disputed. The relationship between the three Weavering companies and the interrelationship through identity of the board of directors may be one cause. That cannot be assessed at this point in the litigation. Even if it was a cause, the plaintiff claims against the defendant that the administration agreement obliged it in the exercise of its contractual obligations to have spotted and reported the hollow nature of the interest rate swaps.

Central to any fair disposal of any case is a focus on the core decisions that a court must make. At this stage, it is possible to tentatively set out the issues which will be central to the trial. These may usefully be set out by counsel in opening even a short case. In longer cases the formulation of issues for the court is essential. As this is important to the decision on the motion, the Court would set out the issues as follows:-

1) what was the duty of the defendant under the administration agreement or in tort and, in particular, did it encompass the discovery of the irregularity?;

2) did the irregularity arise due to misconduct within the plaintiff and is that misconduct to be visited on the plaintiff as a limited liability company separate from its directors, notwithstanding any breach of duty by the defendant, be that in contract or in tort?;

3) is there any legal principle which requires the alteration of the duties as set out in contractual form in the administration agreement between the plaintiff and the defendant companies?

4) is the entire relationship between the plaintiff and the defendant governed by that administration agreement as a matter of contract law or is it a less burdensome obligation to a co-extensive duty of care in tort?

5) is the loss experienced by the plaintiff recoverable under the administration agreement, or is loss to be recovered in damages under a duty of care in tort?

6) are certain limitation clauses in the administrative agreement binding as to the kind of loss to be recovered or the time within which such losses may be claimed?

These relatively simple issues may require a considerable volume of evidence. Expert evidence is said to be central. What is important is that the parties should have access to such court time as enables the fair disposal of the case. I will now turn to this issue.

Concision and Trial Direction

The framework within which this motion is now heard is important. The time and expense of litigation are undoubtedly burdens on the constitutional right of the people of Ireland of access to the courts for the settlement of disputes. In theory, a person may take a case unaided by legal assistance and, in recent years, there has been a marked increase in lay litigants. The very existence of centrally funded legal aid system points to the argument that such a course may not be satisfactory, notwithstanding the invariable aid of the trial judge who will always attempt to intervene and find the truth beyond what would normally be expected where both parties are represented. Courts have limited resources in personnel and in sitting days. Litigants draw on these resources, as is their right. Over the last fifteen years, however, the course of trials has evolved and expanded. With the increasing incorporation of large volumes European legislation and references to the European Convention on Human Rights, what was once been a relatively simple legal system of common law and statues set within a constitutional framework has become markedly more complex. Almost every cause of action as to fact is pleaded in the alternative as to remedy; this is understandable given that failure to plead an available cause of action may constitute negligence on the part of the pleader. The range of citations applicable to even straightforward cases has increased exponentially. Properly prepared litigants are rarely content in commercial cases to adopt the course of reliance on primary testimony as to fact. Instead, increasingly, expert evidence is called in aid. The approach of wide ranging enquiry necessitated by a lack of pleadings which has characterised hearings under the Tribunals of Inquiry Act 1923, as amended, is perhaps less foreign to the disposal of court business than it once was. Even re-examination can or rare occasions occupy hours of court time and this is not surprising in those trials where witnesses have been examined in chief over days and cross examined within a timespan that bridges two or even three weekends, leading to the suspicion that the judge must by that stage have lost the important points.

The essential purpose of legal pleadings and pre-trial consultations is to focus hearings on the matters which are essential to the fair disposal of the case. Pre trial procedures, however, do not necessarily have the effect of focusing attention on the core issues. Those preparing for trial can be put under pressure by clients and pushed in the direction of scrupulosity. Notices for particulars may not concentrate on what is essential and the replies to diffuse questions can tend to increase rather than narrow focus. If affidavits are exchanged, these may become more argumentative as they cross each other and less disposed to deal with fact. Issue papers drafted by one side can be so contradicted and qualified by the other that the essence of what the case is about can be lost. This understandable trend may not assist the process of litigation. It must be remembered that trials are decided on relatively narrow pieces of evidence and particular and identifiable principles of law. Counsel for the parties offer immense benefit to the courts in narrowing the scope of the court's enquiry to what is essential in disposing of the case. These essential elements never consist of minute debate on obscure fact or the raising of legal argument so inventive that in its complexity it becomes self-defeating. Trials cease to be the fair disposal of the case where hearings are allowed to become so unwieldy that important evidence may be overlooked in a thicket of side issues, overburdened documentation and multiple challenges and cross pleas to the occlusion of what is essential. Not every litigant can afford to even risk a lengthy trial and few litigants can hire expert witnesses at will. Is it to be the case that if one side is better funded that more experts may be called on one side than on the other? There must be some regulation of the number of experts called at trial; otherwise wealth can unfairly enhance one side of the case to the ostensible impoverishment of the other. Apart from any issue as to experts, the system of court trial requires concision in order to be fair. Are the courts not entitled to structure hearings so that focus on issue aids the disposal of litigation in a time and cost effective manner? In *Orange Communications v. Director of Telecommunications Regulation and Meteor Mobile Communications Ltd*. [2000] 4 I.R. 159 at 202-3, where Keane C.J. commented that:-

> "The case has occupied a wholly inordinate degree of court time, both in the High Court and in this Court. It took 51 days in the High Court and 17 days in this Court. This was due in part at least to the absence of appropriate case management structures in the High Court at the time of the hearing. The Working Group on a Courts Commission in their Sixth Report, having reviewed their previous work on administrative case management, concluded that it should now be regarded as being within the remit of the Courts Service. This case demonstrates that the problem can be indeed acute. If and when the issues had been identified in pleadings and discovery limited to those issues duly made, a preliminary conference between the judge, counsel and solicitors should have ensured that the issues were clearly understood and that the judge was provided well in advance of the hearing with the relevant documents - and only the relevant documents - so as to avoid the immensely time consuming process of documents being read in court during the opening and indeed throughout the giving of the evidence. No doubt it is easier to see with the benefit of hindsight the problems which arose and how they might have been resolved but it may well be that the substantial parties to commercial litigation having access to the best legal advice may be best placed to adopt newer procedures and illustrate their benefits for others."

It may have been partially in response to such concerns that the commercial list was inaugurated and special rules, set out in Order 63A allowing for case management by the trial judge, were promulgated as part of the Rules of the Superior Courts in 2004. These came into force on 4 January 2004. The High Court is entitled under those rules to control the time taken by each party. In the Federal Courts of the United States of America, a trial judge may make a specific order allowing each side a particular amount of court time, measured in hours, such as 20 hours each, by hearing both sides after reading the core documents and a précis of the percipient and expert testimony. The time allocated may be by a party used in opening the case, closing the case, in examination in chief or in cross examination. If the time allocated is 40 hours to each side, then a trial will occupy 20 days or less, or if in a very complex case 80 hours are allowed, then 40 court days or less will be taken. Order 63A rule 5 provides access to a well structured power:

> "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."

Other provisions of those rules allow for a case conference and for the furnishing of the documents that are core to the case so that a judge may adjudicate justly on the balance that is to be struck between fairness to all parties in cutting down the trouble and expense of litigation and the provision of sufficient court time to the just disposal of the dispute. Many of those rules remain might be further explored by parties to litigation as to their capacity not simply to remove understandable delay but to ensure that the courts are presented with the opportunity to exercise the power to ensure that time is used in a focused manner. Where, in advance of trial, a judge sets the issues to be tried, limits evidence to what is appropriate and measures the time allowed, the parties may through these rulings focus on the core of the case. Ample power, it seems to me, is provided for in the prescient provisions of Order 63A. In particular, rule 6 provides:

"(1) 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:

(i) as to whether the proceedings shall continue—

(I) with pleadings and hearing on oral evidence,

(II) without formal pleadings and by means of a statement of issues of law or fact, or of both law and fact,

(III) without formal pleadings and to be heard on affidavit with oral evidence, or

(IV) without formal pleadings and to be heard on affidavit without oral evidence;

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

(iii) for the consolidation of the proceedings with another cause or matter pending in the High Court;

(iv) for the defining of issues by the parties, or any of them, including the exchange between the parties of memoranda for the purpose of clarifying issues;

(v) allowing any party to alter or amend his indorsement or pleadings, or allowing amendment of a statement of issues;

(vi) requiring delivery of interrogatories, or discovery or inspection of documents;

(vii) requiring the making of inquiries or taking of accounts;

(viii) requiring the filing of lists of documents, either generally or with respect to specific matters;

(ix) directing any expert witnesses to consult with each other for the purposes of—

(a) identifying the issues in respect of which they intend to give evidence,

(b) where possible, reaching agreement on the evidence that they intend to give in respect of those issues, and

(c) considering any matter which the judge may direct them to consider, and requiring that such witnesses record in a memorandum to be jointly submitted by them to the Registrar and delivered by them to the parties, particulars of the outcome of their consultations:

provided that any such outcome shall not be in any way binding on the parties;

(x) providing for the exchange of documents or information between the parties, or for the transmission by the parties to the Registrar of documents or information electronically on such terms and subject to such conditions and exceptions as a Judge may direct;

(xi) for the examination upon oath before a Judge, Registrar or other officer of the Court, or any other person, and at any place, of any witness, in accordance with *Part II of Order 39* ;

(xii) as to whether or not the proceedings should, by virtue of their complexity, the number of issues or parties, the volume of evidence, or for other special reason, be subject to case management in accordance with *Rules 14 and 15 of this Order* ;

(xiii) on the application of any of the parties or of his own motion, that the proceedings or any issue therein be adjourned for such time, not exceeding twenty-eight days, as he considers appropriate to allow the parties time to consider whether such proceedings or issue ought to be referred to a process of mediation, conciliation or arbitration, and where the parties decide so to refer the proceedings or issue, to extend the time for compliance by any party with any provision of these Rules or any order of the Court.

(2) Without prejudice to any enactment or any rule of law by virtue of which documents or evidence are privileged from disclosure, to assist him in deciding whether or not to make any order or give any direction in accordance with *sub rule 1* of this rule, a Judge may direct the parties, or any of them, to provide information in respect of the proceedings, including:

(a) a list of the persons expected to give evidence;

(b) particulars of any matter of a technical or scientific nature which may be at issue or may be the subject of

evidence;

(c) a reasoned estimate of the time likely to be spent in—

(i) preparation of the proceedings for trial, and

(ii) the trial of the proceedings;

(d) particulars of any mediation, conciliation or arbitration arrangements which may be available to the parties.

(3) A Judge may, where he deems fit, at the initial directions hearing, hear any application for relief of an interlocutory nature, whether in the nature of an injunction or otherwise."

Even in the absence of such rules, authority establishes clearly that the courts retain power to appropriately order the disposal of justice. In *P.J. Carroll and Co. Ltd. v. Minister for Health* (No. 2) [2005] 3 I.R. 457, Kelly J. referred at 457 to the "jurisdiction inherent in the court which enables it to exercise control over process by regulating its proceedings, by preventing the abuse of process and by compelling the observance of process". He referred to this power as one "which the court may draw upon as necessary wherever it is just and equitable to do so". The issue in that case was the transfer out of the commercial list of a case which had been entered into that list a year earlier. No specific provision of the rules existed allowing for that step. Instead, the entitlement of the courts to order their own procedures was drawn upon. In *Cork Plastics (Manufacturing) v. Ineos Compound U.K. Ltd. & Others* [2008] IEHC 93 (unreported, High Court, 7th March 2008), Clarke J. discussed the circumstances in which the High Court may order a modular trial. The default position, he said, was that the trial should take place in the normal way: in other words that all questions as to the facts, the damages resulting from any liability found, and the applicable law should be disposed of at a single hearing. In founding the order which he made, Clarke J. did not rely on any particular provision of the Rules of the Superior Courts, which merely provide that a preliminary issue may be tried as to law, but rather on the inherent jurisdiction to which Kelly J. referred to in the *P.J. Carroll* case. The function of the courts in administering trials for the benefit of the parties and for the public interest is made clear in the passage which follows from section 2 of his judgment:-

> 2.2 In *Millar- v – Peeples*, [1995] N.I. 6, the Court of Appeal in Northern Ireland accepted that a jurisdiction existed to direct a split trial where it was just and convenient. The Court noted that a broad and realistic view of what is just and convenient should be taken, assessing, as appropriate, questions of the avoidance of unnecessary expense and the need to make effective use of Court time. It was also noted that the Court should balance the advantages or disadvantages to each party and take into account the public interest that unnecessary expenditure of time and money and a lengthy hearing should not be incurred. The Court also noted that undue weight should not be allowed to any tactical advantage which might accrue to either party by the presence or absence of a split trial.
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> 2.3 It is, therefore, in my view, unnecessary to consider the precise provisions of the rules of Court. The somewhat narrow circumstances in which a formal preliminary issue can be directed under the rules of Court are identified in the jurisprudence with precision for good reason. Experience has shown that the formal separation out of a preliminary issue can often make the apparent shortest route, the longest way home. However the conduct of complex litigation in a modular fashion is not the same thing as the formal separation of preliminary issues. Rather it involves the Court exercising its inherent jurisdiction as to how a single trial of all issues is to be conducted. Is the whole trial to be conducted at one go, or should the Court proceed to hear and determine certain issues in advance of others? Dealing with the single trial in such a modular fashion is simply the exercise by the Court of its inherent jurisdiction to order the manner in which a trial is conducted.
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> 2.4 Likewise there is a distinction to be made between the formal consolidation of two sets of proceedings (which involve the proceedings being, in effect, turned into a single case), on the one hand, and the linking, for particular purposes, of two cases which have a large overlap, on the other hand. The later simply involves the exercise by the Court of its inherent jurisdiction to order the trial of cases listed before it in a proper fashion. Exactly how such linkage should progress is a matter for consideration on the facts of each individual case. The two cases may be tried one after the other. However, where there is a significant body of evidence which is common to both, it may be that the Court will consider it best to try both at the same time. Precisely how such a situation is addressed is again a matter within the inherent jurisdiction of the Court, which will be dealt with on the basis of the just and convenient test.
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> 2.5 At the level of principle, I am, therefore, satisfied that I have jurisdiction to direct the way in which both the principal action and the Floplast proceedings are to be tried. I am persuaded that the reasoning of the Court of Appeal in Northern Ireland in *Millar –v- Peoples* represents the broad approach which should be taken to any such consideration. The Court should determine what is just and convenient by reference to a broad and realistic view which should include the avoidance of unnecessary expense and the need to made effective use of Court time. The Court should accord, in its considerations, due weight to the public interest and should not place over regard on perceived tactical advantages or disadvantages of the parties concerned.

A view can be taken in appropriate circumstances that a modular hearing is required in order to fairly try a case in a manner consistent with the duty of the courts towards the parties in litigation before it and in the public interest. It is but one of the essential instruments at a court's disposal for the proper structuring of a complex trial. Operating on the basis of the default position as the starting point, a judge hearing a motion for a modular hearing will assess the balance to be struck between allowing a diffuse and lengthy hearing on multiple issues or choosing instead a preliminary and much shorter hearing on particular central questions that may be determinative of the ultimate issues at trial or which, at the least, will introduce focus and concision to the trial process. Such a balancing process requires the interests of justice to be the determining test. Litigants are not to be shut out from making their case. Rather they can be directed by the court to concentrate on what is essential to their case. In *McCann v. Desmond* [2010] 4 I.R. 554, a modular hearing was ordered in a business dispute as to revenues from the promotion of pop concerts on issues related to the corporate vehicles or persons to the agreement, the relevant profit share that was agreed and the means of accounting for revenue. Without such an order for a modular trial, the parties would not even have been aware if the correct parties to the contract were joined in the litigation. With advance focus on accountancy computation, the principals to the relationship could concentrate their evidence on what would become the key issue at trial, namely the revenue sharing issue. Where a defeat on a modular hearing issue might determine the ultimate trial, for reasons of expense and convenience and in the public interest, the parties each deserve to know this through a concise hearing rather than at the end of a lengthy period of returning to the Four Courts week after week. This Court identified four tests which have since been widely adopted, not as definitive, but simply as a reasonable guide on hearing this kind of motion. These are issues which naturally occur to the mind of a judge on hearing such a motion:

(1) Are the issues to be tried by way of a preliminary module, readily capable of determination in isolation from the other

issues in dispute between the parties? A modular order should not be made if the case could be characterised as an organic whole, the taking out from which of a series of issues would tear the fabric of what the parties need to litigate so that the case of either of the plaintiff or the defendant would be damaged through being seen in the isolated context of a hearing on a number of limited issues.

(2) Has a clear saving in the time of the court and the costs that the parties might have to bear been identified? The court should not readily embark on a modular hearing, simply because of a contention that a saving in time and costs has been identified, but rather it should view that factor in the context of the need to administer justice in the entire circumstances of the case.

(3) Would a modular order result in any prejudice to the parties? If, for instance, the issue as to what damage was occasioned by reason of the wrong alleged by the plaintiff was so intricately woven in to the proofs that were necessary to the proof of liability for the wrong, so that the removal of the issue of damages would undermine the strength of the plaintiff's case, or the response which a defendant might make to it, then the order should not be made.

(4) Is a motion a device to suit the moving party or does it genuinely assist the litigation by being of help to the resolution of the issues? I return to the idea that a judge should always be aware that tactical decisions are made, often out of an abundance of enthusiasm, by parties to litigation, who may seek to put the other party at a disadvantage through the obtaining of an order under the Rules of the Superior Courts 1986 or one capable of being made within the inherent jurisdiction of the court. Obvious examples of pre-trial motions that may merely be tactical are motions to strike out proceedings as being vexatious or frivolous or to seek an order for security for costs under s. 390 of the Companies Act 1963. Other instances include the lengthy arguments that can sometimes ensue in relation to discovery. If the removal of issues in to a modular hearing is likely to disadvantage the proper process of pre-trial preparation that discovery orders, notices for particulars and notices to admit facts, involve, then such a motion should be refused as resulting not from a genuine process that will assist the trial but for tactical reasons related to wrong footing the other party.

These are the principles which I am applying in the analysis that follows. Some further comment is first necessary on the central issue of expert witnesses.

Expert witnesses

Considerable expert evidence is anticipated to be called at trial. It is essential that experts approach a case objectively and not on the basis of an unconscious desire to assist the side which engages them. Under Order 63A rule 6(1)(b)(ix) expert witnesses being called in opposition to each other may be required by the trial judge, or a judge hearing a preliminary motion or holding a case conference, to meet and to attempt to agree evidence. In that regard the judge may direct that the experts are to address their contrary minds to particular issues. The judge may also require them to draw up a memorandum of understanding as to what is agreed and what is not. Contrary to what was suggested in argument, an express provision seems absent from these rules similar to the Order 35.4 of the Civil Procedure Rules in England and Wales, which requires leave of the trial judge before an expert is called and restricts contradictory evidence to one expert on each side of an issue, unless leave is otherwise granted. The inherent power of the court may extend, however, to the control of unnecessary duplication in expert or any other form of testimony. The calling of multiple experts to give lengthy evidence is not always fair or helpful.

The manner in which expert evidence is presented is subject to the control of the trial judge. It may be more than unsatisfactory to hear an expert and then to wait for some time – on the timescale predicted for this case, as for many long cases, it may be weeks or months – before the contradicting case is called in chief. There seems no reason why the High Court in an appropriate case should not adopt the procedure used in the Federal Court of Australia, as a result of Practice Note CM7 and the initiative of Heerey J., whereby after meeting and agreeing what is possible and setting that out in a written memorandum, each opposing expert may be sworn at the same time and debate the issues under the control of the trial judge, with counsel retaining an entitlement to examine thereafter on whatever issues remain in dispute. At trial, under this convenient procedure, if the interests of justice require its adoption, each of the two contradicting experts should be sworn in order to testify at the same time. When this is done, each expert, in such order as the trial judge shall determine, without being examined by counsel, should give an outline of the evidence that is agreed between them. The experts will then, in such order as the trial judge shall determine, present the evidence on which they are not in accord the one with the other. After that presentation, the experts, subject to the control of the trial judge, may be required to debate each of the points of dispute among them. When that procedure is complete, examination in chief, cross examination and re examination may follow on such matters as the trial judge directs. It may be in rare cases that such a procedure would be invoked, but in an appropriate case this Court can see strong advantages to the proper use of court time and the fair disposal of a complex case.

The contract

The plaintiff Weavering agrees that issue 1(B) should be tried in a module in advance of the main hearing. It is not appropriate in this judgment to give definitive rulings on the issues of law that will be in dispute between the parties. The purpose, rather, of a modular hearing is to identify those issues which can be fairly and conveniently tried to the benefit of both parties prior to a lengthy trial. Several of the issues focus on the administration and accounting services agreement between the plaintiff and the defendant made as of 30th July 2003. A contract is to be construed according to its written terms; not by reference to negotiations or preliminary drafts. A contract must be seen, however, within the context in which it was made. The plaintiff accepts that there may conveniently and justly be a modular trial on one of these contract issues but argues that background evidence as to the purpose of the contract within an appropriate context is not a matter for a modular hearing. It is hard to see how the evidence can be limited to that issue and cannot extend, in so far as that is necessary or appropriate, to the other contract issues. It may be that some contract issues require slightly different evidence to others, but limited evidence on that factual matrix is nonetheless admissible for that purpose; *Igote Ltd. v. Badsey Ltd*. [2001] 4 I.R. 511.

Clause 14(A) of the agreement provides:-

> "No party may assert a cause of action against [the defendant] or any of its affiliates that allegedly occurred more than 12 months immediately prior to the filing of the suit (or, if applicable, commencement of arbitration proceedings) alleging such cause of action."

Issue 1 is concerned with what this term means. The plenary summons in this case was issued on 14th July 2009 but it was not served until 15th July 2010. If there is a 12 month window of opportunity then it is relevant that the plaintiff company went into

liquidation on 3rd April 2009. Clearly, those services were being provided that involved the share swap transactions from that date up to 2nd April 2010. On the other hand, a 12 month period back from 14th July 2009, embraces alleged wrongs from 15th July 2008. Whereas the stock exchange non-compliance notice was issued on 10th March 2008, it might reasonably be argued that if action was not taken then, the defendant was under an obligation of enquiry which continued within the earlier period. An apparently crucial report on net asset valuations was delivered by the defendant to the plaintiff within that period on 6th November 2008 and was considered by the board of directors in the Cayman Islands. Was the intention of the parties to limit the exposure of the defendant to what it should or should not have done under the contract to a 12 month period? The proper interpretation of limitation of liability and damages clauses is central to this trial. The contract limits liability and the recovery of damages. Might there be a coextensive obligation by the defendant towards the plaintiff Weavering that is not so limited? That liability might arise in tort, or it may be that in the event that a modular hearing limits the obligation of the parties to those described under the contract that the plaintiff will know that it must prove, perhaps, fraud or concealment. These are matters which can clearly be properly decided in a modular hearing in advance of the trial and which may dispose, depending on the answer, of either a large portion of the trial, or will determine the answer to liability if it emerges that no recoverable damages were occasioned within whatever the applicable time period turns out to be.

Clause 14(C) of the contract provides:-

"Notwithstanding anything in this agreement to the contrary, neither [the defendant] nor its affiliate shall be liable for any consequential, special or indirect losses or damages, whether or not the likelihood of such laws and/or damages was known by [the defendant] or its affiliates."

I do not accept that a modular trial of this issue, in accordance with issue 11, is the trial of quantum before liability. Rather, as in issue 12, the question is whether a particular category of damage is recoverable or not. The disposal of that issue would markedly cut down on the evidence of the main trial given that the dispute between the parties may resolve itself down to one of reimbursement as where money is expended in a futile manner, a relatively small sum compared to the hundreds of millions of euros as is claimed in compensation for what happened to the investment fund. I do not wish to comment on the proper interpretation of the contract.

Crucial to the construction of the contract is its centrality to the disposal of the issues between the parties. Is it an agreement which entirely incorporates, to the exclusion of tortious liability, the mutual expectations and obligations of the parties? An argument can be made to that effect; *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd*. [2011] EWHC 479. The circumstances under which such limitation might occur can be many and varied. If, moving into the trial, that issue was already determined, the focus of the parties would be to the exclusion of the contract, because of its limiting nature, and the remedy that might be available would be in tort for negligent misrepresentation under a special duty of care, or otherwise. Determining that issue gives rise to a clear saving in time.

Clause 14(A) of the contract provides:-

> "[The defendant] shall be under no duty hereunder to take any action on behalf of the fund except as specifically set forth herein or as may be specifically agreed by [the defendant] and the fund in a written agreement. [The defendant] shall be obligated to exercise care and diligence in the performance of its duties hereunder and to act in good faith in performing services provided for under this agreement. [The defendant] shall be liable only for any damages arising out of [the defendant's] failure to perform its duties under this agreement to the extent such damages arise out of [the defendant's] wilful misfeasance, bad faith, gross negligence or reckless disregard of such duties."

The issue which arises here is as to the nature of the contractual obligation; in other words is there a limitation where the standard of performance under the contract is set far above the varying standard of care that may under the tort of negligence embrace everything from mistake to recklessness; as the latter concept is understood in criminal law in Ireland. Were expert witnesses to give evidence on the issue of duties under the fund, it is essential that their evidence be focused on whether mere carelessness is involved, or something worse than that, as in the reckless disregard which the contract somewhat rhetorically seems to specify. It may be that there is no concept of gross negligence in tort law in Ireland; but that makes little difference if liability in the case is to be determined as a matter of contract. Issue 9 focuses, again, on a contract construction issue. It is at least arguable that those who draft contracts may be concerned to restrict liability under the agreement to a level of neglect beyond the foundation level in the law of negligence in tort; *ICDL GCC Foundation FZ-LLC and Others v. The European Computer Driving Licence Foundation Ltd* [2011] IEHC 343 (unreported, High Court, Clarke J., 4th August 2011). Whether that is successfully done, or whether the contract must be construed *contra preferentum*, so as to arrive at the ordinary negligence level, is an issue that can be conveniently and fairly decided by a modular hearing prior to the trial.

Finally, it might also be usefully repeated that a decision as to the contract issues may not dispose of the case finally by means of a modular hearing, since it will remain open to the plaintiff company to seek to argue that fraud or concealment vitiates the exclusion clauses, or to seek to revive the concept of total failure of consideration. Going into a trial knowing that fraud or concealment is what the plaintiff must prove constitutes a considerable contraction of the issues beyond the diffuse hearing is otherwise in prospect.

Abuse of process

Issues 3 and 4 concern a judgement given by Jones J. of the Grand Court of the Cayman Islands on 26th August 2011. At the hearing, which took place over only six days, in contrast to what is estimated in this case, the plaintiff company sued its two directors Stephan Peterson and Hans Ekstrom for negligence in failing to note or take action on what was going on over the interest rate swaps. For some reason, tactical or otherwise, it would appear that a decision was made not to sue the directors for fraud. Instead, making no comment as to what the outcome of such a suit might have been, the focus of the trial was on the loss to the fund the property of the plaintiff company due to the neglect of duty by the corporate officers. I do not regard it as appropriate to quote from that judgment beyond noting that Jones J. found in favour of the plaintiff in respect of the loss to the fund in consequence of the directors' neglect to act in any way as an alive and interested board of directors. Considerable detail in terms of finding of fact could operate as a basis for an Irish court moving forward to trial. The plaintiff is not now in a position to say whether it accepts that judgment as evidence in these proceedings. Whereas I understand that stance, a strong argument can be made that it may be an abuse of process, notwithstanding that there are different parties, to seek to reopen the findings of fact made by Jones J. or to advance different factual arguments than those put forward by the plaintiff company in the Cayman Islands court. In these proceedings there may be direct focus on the conduct of the said directors. In *Bula Ltd. and Others v. Crowley* (unreported, High Court, Barr J., 29 April 1997) Barr J. set out four tests, as follows, as to the cross-admissibility of findings from one trial to another:-

> "1. It is common case that issue *estoppel* does not arise per se in this case and that the status of the findings made by Lynch J. in the judgment relates to whether or not, in the context of *Bula* II, it would be unjust in all the circumstances and an abuse of the process of the court to allow such findings to be re-visited in this action. However, the principles of

law relating to issue *estoppel* and abuse of process are closely related in their content and application.

2. The concept of abuse of the process of the court applies irrespective of privity. When an issue has been finally determined by a court of competent jurisdiction it is an abuse of the process of the court to seek to have it relitigated in new proceedings - see judgment of Blayney J. *in Breathnach -v- Ireland* (No.2) [1993] I.R. 448 and the judgment of the House of Lords in *Hunter -v- Chief Constable of West Midlands* [1982] A.C. 529.

3. The Supreme Court (see judgment of Keane J. in *Belton -v- Carlow County Council*, Prendergast & Another, Third Parties unreported 25th February, 1997) has recently adopted with approval the law as to issue estoppel stated by Sir Owen Dixon in *Blair -v- Curran* [62 C.L.R. 464 (High Court of Australia) at p.p. 531/2] as follows:-

> 'A judicial determination directly involving an issue of fact or of law disposes once [and] for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. The distinction between res judicata and issue-estoppel is that in the first the very right or cause of action claimed or put in suit has in the formal proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order'."

I do not know whether it is likely that a trial judge on a modular hearing would make a similar decision, but I am satisfied that it is sensible to dispose of this issue in advance of the trial.

Central issue
What should not be done on a motion providing for a modular trial is to take the factual heart out of the action so that nothing is left to be decided as to the central factual issue in dispute between the parties. Issue 8 was not pressed, and rightly so. Deciding whether the actions of the directors of the plaintiff company were the cause of the damage claimed against the defendant is the central factual dispute in the trial. That dispute can only be decided, however, within a context of focus on the rights and obligations of the parties. The application on issue 8 is therefore refused.

Result
In result, I would order a modular hearing on issues 1, 2, 3, 4, 9, 10, 11 and 12. It is essential that preparation begin for this hearing and the relevant witness statements should be exchanged in advance of any directions at hearing that may be necessary. This should be listed before Kelly J., unless he otherwise orders.