

## Preliminary Issues/Split Trials/Expedition



**Kate Traynor**

## Preliminary Issues: What are they?

- The CPR has no specific definition of a ‘preliminary issue’. However, generally, a preliminary issue is a decisive, or potentially decisive issue (*McLoughlin v Grovers (A Firm)* [2001] EWCA Civ 1743, para 66), which should be capable of one of the following:
  - (1) Deciding the whole, or a significant element, of the claim.
  - (2) Reducing the costs and scope of the main trial.
  - (3) Improving the possibility of a settlement of the whole proceedings.

*(Section 21.27 Chancery Guide and Section 8.2.1 TCC Guide)*

## Preliminary Issues: What can the Court do?

- The court can, among other things:
  - Direct a separate trial of any issues (CPR 3.1(2)(i)).
  - Decide the order in which issues are to be tried (CPR 3.1(2)(j)).
  - Dismiss or give judgment on a claim after a decision on a preliminary issue (CPR 3.1(2)(l)).
- The court can exercise its discretion to make an order for the trial of preliminary issues, usually on one or both of:
  - Point of Law.
  - Question of fact.

## Preliminary Issues: Criteria

- In *Steele v Steele* [2001] CP Rep 106, Neuberger J (as he then was) set out a useful ten-point checklist of some of the factors for consideration by the court:
  - (1) whether the determination of the preliminary issue would dispose of the case, or at least one aspect of the case;
  - (2) whether the determination of the preliminary issue could significantly cut down the costs and time involved in pre-trial preparation or connection with the trial;
  - (3) how much effort, if any, will be involved in identifying the relevant facts for the purpose of the preliminary issue;
  - (4) to what extent is it to be determined on agreed facts;
  - (5) where the facts are not agreed upon, the court should ask to what extent that impinges on the value of a preliminary issue hearing;

## Preliminary Issues: Criteria

- (6) whether the determination of a preliminary issue may unreasonably fetter either or both parties, or the court achieving a just result;
- (7) to what extent there is a risk of the determination of the preliminary issues increasing costs and/or delaying the trial;
- (8) to what extent the determination of the preliminary issue may be irrelevant;
- (9) to what extent the determination of a preliminary issue could lead to an application for the pleadings being amended so as to avoid the consequences of the determination;
- (10) taking into consideration all of the other points, is it just to order a preliminary issue.

This is a non-exhaustive list and each case will turn on its own facts: *Aldersgate Estates Ltd v Ham Construction Ltd and another* [2013] EWHC 104 (TCC).

## Preliminary Issues: Procedure

- The following guidance can be extracted from case law:
  - Questions should usually be points of law and decided against a schedule of agreed or assumed facts: *McLoughlin v Grovers (A Firm)* [2001] EWCA Civ 1743.
  - The preliminary issues and agreed/assumed facts should be articulated with precision: *Rossetti Marketing Ltd and another v Diamond Sofa Company Ltd* [2012] EWCA Civ 102; *Walter Lilly & Co Ltd v Clin* [2016] EWHC 357 (TCC).
  - Preliminary issues should be triable without considerable delay, making full allowance for the implications of a possible appeal: *McLoughlin*.

## Preliminary Issues: Approach of the Courts

- The courts differ in their approach to preliminary issues:
  - **Commercial Court and Circuit Commercial Court:** the parties must produce an agreed list of key issues (of both law and fact). The list of issues should be a neutral document (*section D5.5, the Circuit Commercial Court Guide and section D5, the Commercial Court Guide*). Before the CMC, the parties must complete a case management information sheet indicating their position on the matter of preliminary issues.
  - **Chancery and QBD:** the parties are typically asked to prepare a list of issues (*paragraph 9.13, Chancery Guide*). The court will consider the matter of preliminary issues at the point of allocation, CMC or any PTR (*paragraph 21.28, Chancery Guide and paragraph 10.31, Queen's Bench Guide*).
  - **Technology and Construction Court:** preliminary issues will be considered at the first CMC (*section 8.1.2., TCC Guide*). Generally, an order for (or consideration of) the trial of preliminary issues will follow the defence (*section 8.1.3., TCC Guide*).

## Preliminary Issues: will resources, costs and time be saved??

- Examples of costs, resources and time saved, include:
  - *Takeda Pharmaceutical Company Ltd v Fougera Sweden Holding 2 AB* [2017] EWHC 1402: the court held that a trial of preliminary issues was the course most likely to maximise the orderly resolution of the dispute.
  - *Nicolas Guy Simpkin v The Berkeley Group Holdings plc* [2016] EWHC 1618 (QB): emphasised that it would enable “a much more focused, cost-effective and fair approach to this litigation:
- Exemplified of the preliminary issues hearing being refused, include:
  - *Ascapia Capital Private Ltd v Pilau Ltd* [2021] EWHC 3131 (Comm): it might result in a mixed outcome, necessitating cross-appeals, with the expense involved with that:
  - *Midal Cables Limited v AMEC Foster Wheeler Group Limited* [2019] EWHC 1155 (TCC): it might result in a disjointed trial at a greater cost and expense for the parties:

## Split Trials: What are they?

- The courts differ in their approach to whether a split trial is a type of preliminary issues hearing, for example:
  - The TCC specifically differentiates between split trials and the trial of preliminary issues (*section 8.1.6, TCC Guide*). In essence, the TCC considers that it is sensible for liability to be tried before quantum of damages. On occasion, the subject matter of a claim is so extensive that for case management purposes, the trial needs to be broken down.
  - The Queen's Bench Division (QBD) in personal injury cases refers to an order for the separate trial of an issue of liability as an example of a trial of a preliminary issue (*section 10.31 Queen's Bench Division Guide 2022*).

## Split Trials: Case Management

- Similar to a trial of preliminary issues, the court's power to order split trials arises under CPR 3.1(2):
  - (e) direct that part of any proceedings (such as a counterclaim) be dealt with as separate proceedings;
  - (f) stay the whole or part of any proceedings or judgment either generally or until a specified date or event;
  - ...
  - (i) direct a separate trial of any issue;
  - (j) decide the order in which issues are to be tried;
  - ...
  - (l) dismiss or give judgment on a claim after a decision on a preliminary issue

## Split Trials: The Court's Approach

- Hildyard J, in *Electrical Waste Recycling Group Ltd and another v Philips Electronics UK Ltd and Others* [2012] EWHC 38 (Ch), suggested several factors to consider when determining to order a split trial under CPR 3.1(2). These include:
  - (a) The defining of the split;
  - (b) The overriding objective;
  - (c) Prejudice to the parties;
  - (d) The risk of duplication, delay, unnecessary complexity and a bifurcated appeal process;
  - (e) Cost savings;
  - (f) Advantages and disadvantages to trial preparation and management;
  - (g) Inconvenience to witnesses and the judge; and,
  - (h) The effect on settlement.

These factors were considered in a personal injury and clinical negligence context, but they are a helpful “checklist”.

## Expedited Trial: The Court Guides

- The courts guides differ in their approach to expedited trials:
  - **The Commercial Court Guide:** provides that the court is able to provide an expedited trial in cases of “sufficient urgency and importance”. The party seeking an expedited trial should apply to the Judge in charge of the commercial court, on notice to all parties and at the earliest opportunity (J.1).
  - **QB Guide:** does not make any reference to expedited trials.
  - **The Chancery Guide:** notes that applications must be made and considered in the Applications Court, and Masters do not have the power to direct expedition.
  - **TCC Guide:** provides detailed guidance on expedition in the context of procurement cases, in particular in matters where it will enable the contracting authority to enter into the contract without undue disruption to its timetable (sections 62-64)

## Expedited Trial: The Court's Approach

- The court wishes to bring all cases on as soon as they reasonably can be brought on, balanced against the resources of the courts. The resources of the courts are managed having regard to the overriding objective:

*“The question of expedition is partly a question of principle and partly a question of practice. Any order for expedition involves a disturbance of the normal procedure of a case to be got to trial. It involves giving preference to one case in the allocation of court time over other cases; it also involves requiring the lawyers on both sides to give preference to the tasks of preparation of a trial for that case as over tasks of a similar nature in relation to the affairs of other clients.”*

*Lloyd J. in Daltel Europe Ltd (in Liquidation) v Makki (No.2) [2004] EWHC 1631 (Ch)*

## Expedited Trial: The Court's Approach

- In the authority of *W. L. Gore & Associates GmbH v Geox SpA* [2009] EWCA Civ 794, the decision not to grant a direction for expedition in a patent case was under appeal. At first instance Lewison J (as he then was ([2008] EWHC 462 (Pat)), refused permission to vary the consent order (CPR 3.1(7)), to allow the expedition of the hearing, as he did not think there was a significant change in circumstances.
- On appeal, Neuberger LJ (as he then was) was presented with a different case management proposal facilitated. In provisionally granting the new timetable, the court exercised its jurisdiction by reference to four factors:
  - (1) Is there a good reason?**
  - (2) The good administration of justice.**
  - (3) Unfair prejudice to the other party.**
  - (4) Other special factors**

## Expedited Trial: The Court's Approach

- Is there a good reason to expedite?
  - Essentially, the question is whether there is a real risk of irreparable harm or prejudice if the claim is not expedited.
  - Examples of the application being refused are:
    - *JW Spear & Sons Ltd v Zynga Inc* [2012] EWHC 1374 (Ch)
    - *Vachha v Hamilton* [2020] 12 WLUK 14
  - Examples of when urgency has justified the expedition:
    - *Rangers Football Club Plc (In Administration) v Collyer Bristow LLP* [2012] EWHC 1427 (Ch)
    - *Apache Beryl I Ltd v Marathon Oil UK LLC* [2017] EWHC 2258 (Comm)
    - *McLaren Holdings Ltd v US Bank Trustees Limited* [2020] EWHC 1892 (Ch)

## Expedited Trial: The Court's Approach

- The good administration of justice:
  - Key points:
    - The applicant should employ reasonable measures to assist the court in understanding the issues in the case and the necessary case management requirements.
    - The applicant should have investigated with the listing office the possibility of getting the claim heard in the proposed window and ensure that the time estimate is realistic: *Arora Management Services Ltd v Hillingdon BC* [2020] EWHC 79 (Ch).
    - The practicality of the timetable should also be workable and sensible: *Law Debenture Trust Corporation v Elektrim SA* [2008] EWHC 2187 (Ch).

## Expedited Trial: The Court's Approach

- Unfair prejudice to the other parties:
  - *Law Debenture Trust Corporation v Elektrim SA* [2008] EWHC 2187 (Ch): Morgan J. held that the respondent's role in an application to expedite a trial is limited to explaining what, if any, prejudice will likely be suffered if the trial and timetable is expedited.
  - *W.L. Gore & Associated GmbH v Geox SpA* [2008] EWCA Civ 794: the Defendant had been provided with a limited opportunity to consider whether the proposed compressed timetable would cause any prejudice, and the court specifically gave it liberty to apply, though doubted that the 6-month timetable would cause any prejudice.

## Expedited Trial: The Court's Approach

- Other special factors often include:
  - Whether the applicant has acted promptly: *Samsung Bioepis UK Ltd v Fresenius Kabi Deutschland GmbH* [2018] EWHC 2657 (Pat).
  - The remedy sought by the parties and whether it would finally resolve the dispute: *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2009] EWHC 3204 (Ch).
  - Whether undertakings offered by one party provide sufficient protection such that an expedited trial is not necessary: *Middlesbrough Football & Athletic Club (1986) Ltd v Flahavan & Ors* [2018] EWHC 4051 (QB).

# Thank you for listening

© Copyright Landmark Chambers 2022

**Disclaimer: The contents of this presentation do not constitute legal advice and should not be relied upon as a substitute for legal counsel.**

## London

180 Fleet Street  
London, EC4A 2HG  
+44 (0)20 7430 1221

## Birmingham

Cornwall Buildings  
45 Newhall Street  
Birmingham, B3 3QR  
+44 (0)121 752 0800

## Contact

✉ [clerks@landmarkchambers.co.uk](mailto:clerks@landmarkchambers.co.uk)  
🌐 [www.landmarkchambers.co.uk](http://www.landmarkchambers.co.uk)

## Follow us

🐦 @Landmark\_LC  
📘 Landmark Chambers  
📺 Landmark Chambers