Neutral citation [2022] CAT 44

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1436/5/7/22 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

11 October 2022

Before:

THE HONOURABLE MR JUSTICE JACOBS
(Chair)

Sitting as a Tribunal in England and Wales

BETWEEN:

ALLIANZ GLOBAL INVESTORS GMBH AND OTHERS

Claimants

- v -

(1) DEUTSCHE BANK AG LONDON
(2) DEUTSCHE BANK AG
(6) GOLDMAN SACHS INTERNATIONAL
(7) GOLDMAN SACHS INTERNATIONAL BANK
(9) GOLDMAN SACHS GROUP UK LIMITED
(10) GOLDMAN SACHS BANK USA
(12) MORGAN STANLEY INTERNATIONAL LIMITED
(14) MORGAN STANLEY & CO. INTERNATIONAL PLC
(17) BANK OF AMERICA N.A.
(18) BANK OF AMERICA MERRILL LYNCH INTERNATIONAL DESIGNATED ACTIVITY COMPANY
(20) MERRILL LYNCH INTERNATIONAL
(21) BNP PARIBAS S.A.
(22) BNP PARIBAS LONDON BRANCH
(23) BNP PARIBAS SECURITIES SERVICES SCA
(24) SOCIÉTÉ GÉNÉRALE S.A.
(25) STANDARD CHARTERED PLC
(26) STANDARD CHARTERED BANK
(27) ROYAL BANK OF CANADA

Defendants

Heard at Salisbury Square House on 29 September 2022

RULING: APPLICATION FOR A PRELIMINARY ISSUE

APPEARANCES

Ms Marie Demetriou KC, Mr Colin West KC and Mr Ben Lewy (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) appeared on behalf of the Claimants.

Mr Kieron Beal KC, Mr Simon Atrill and Ms Emily Neill (instructed by King & Spalding International LLP, Cleary Gottlieb Steen & Hamilton LLP, Bryan Cave Leighton Paisner LLP, Shearman & Sterling (London) LLP, Allen & Overy LLP, Linklaters LLP, Hogan Lovells International LLP and Eversheds Sutherland (International) LLP, and Mayer Brown International LLP) appeared on behalf of the Deutsche Bank Defendants, the Goldman Sachs Defendants, the Morgan Stanley Defendants, the Bank of America Defendants, the BNP Paribas Defendants, the Société Générale Defendant, the Standard Chartered Defendants and the Royal Bank of Canada Defendant respectively.

Ms Sarah Abram KC (instructed by Latham & Watkins (London) LLP, Allen & Overy LLP, Norton Rose Fulbright LLP, Slaughter and May, Macfarlanes LLP and Gibson, Dunn & Crutcher LLP) appeared on behalf of the First to Eighth Defendants of Case No. 1430/5/7/22 (T).

A. INTRODUCTION – THE PARTIES AND THE SHAPE OF THE PRESENT PROCEEDINGS

1. This judgment concerns, principally, the application by Deutsche Bank AG London and 17 other Defendants that their limitation defence should be determined as a preliminary issue in the present proceedings.

(1) The parties

2. The Claimants in these proceedings are, in the main, large investment or pension funds. There are around 175 individual Claimants grouped into 11 Claimant groups. The claim arises from their engagement in substantial volumes of business on the foreign exchange (or "FX") markets during the period 2003 – 2013. These proceedings concern allegations of anti-competitive manipulation of the FX market by a number of banks between those years (the "Claims Period"). The Defendants to these proceedings are large and well-known banks whose full names I will abbreviate to Deutsche Bank, Goldman Sachs, Morgan Stanley, Bank of America, BNP Paribas, Société Générale, Standard Chartered, and Royal Bank of Canada ("RBC").

3. I will refer to these banks collectively (as did the parties) as "the New Defendants" in order to distinguish them from a group of similarly large and well-known banks, against whom materially identical allegations of FX manipulation are made in separate proceedings commenced some two years prior to the present proceedings (Case No. 1430/5/7/22 (T)). Those banks (again I abbreviate their names) are Barclays, Citibank, HSBC, JPMorgan, RBS and UBS. I will refer to those banks as "the Original Defendants".

4. This is therefore the second set of proceedings that the Claimants have begun in this jurisdiction concerning the alleged market manipulation. The first set of proceedings was commenced in late 2018, and I will refer to them as the "Original Proceedings", in order to contrast them with the present proceedings (the "New Proceedings"). The New Proceedings were begun in November 2020. Both were originally commenced in the Commercial Court before being

transferred to this Tribunal. No case management conference ("CMC") in either case has yet been held in this Tribunal.

5. The Original Defendants are a number of banks which are addressees of three decisions adopted by the European Commission in May 2019 and December 2021 concerning manipulation of the FX market in breach of Article 101 TFEU. The New Defendants are a number of further banks which were <u>not</u> addressees of the Commission's decisions, but which, so the Claimants allege in the present proceedings, were in fact involved in conduct of the same description as that found in those decisions. The Claimants in both sets of proceedings are materially identical. They contend that they engaged (both on an individual and cumulative basis) in substantial volumes of FX trading during the Claims Period as part of (or ancillary to) their investment activities, and contend that they suffered substantial losses as a result of the FX manipulation with which both sets of proceedings are concerned.

(2) The conduct alleged

6. The Claimants allege that there were two principal forms of manipulative conduct at issue. They refer to these forms as "Benchmark Manipulation" and "Bid/ask Manipulation".

7. "Benchmark Manipulation" refers to the manipulation by the banks of certain 'benchmark' foreign exchange rates. Benchmark rates are published exchange rates which are meant to represent an objective measure of the prevailing market rate for particular currency pairs at particular points in time. The two best-known such benchmarks are the World Markets/Reuters ("WM/R") rate, and in particular WM/R's 4pm London 'closing' rate; and the rates published by the European Central Bank at 1.15pm every business day.

8. The Claimants accept, and indeed assert, that Benchmark Manipulation was the subject of substantial litigation commenced in the United States as early as November 2013. This litigation followed the publication of an article by Bloomberg in June 2013. A number of class action lawsuits were filed. In one of the class actions, the complaint alleges that during "the Class Period,

Defendants entered into a series of agreements to reduce competition amongst themselves by coordinating trading strategies for the purpose of manipulating the WM/Reuters Rates for various currency pairs". The class actions were consolidated into a single class action in March 2014.

9. A claim in relation to Benchmark Manipulation is made in the present proceedings. The Claimants say that the various banks (both the Original and New Defendants) were involved in manipulating the benchmark (or "fix") rates by trading collusively in the run-up to the fixing "window" so as to seek to move the published rate up or down, depending on what would be in their collective interests (and, by the same token, contrary to their customers' interests) on that particular day. They say that this manipulation was organised in part through multi-bank online communications platforms known as "chat rooms". The members of the chat rooms were (in the main) senior FX traders at various banks. Membership was by invitation only. The three Commission decisions are usually described using the name of one of the chat rooms considered in each decision: "Three Way Banana Split", "Essex Express" and "Sterling Lads". The addressees of each Commission decision are the banks which employed the traders who were members of each respective chat room from time to time.

10. The second form of manipulation relied upon by the Claimants is, on the Claimants' case, different. "Bid/ask Manipulation" concerns manipulation of the difference (or "spread") between the rate at which banks will buy the base currency of any particular currency pair (known as the "bid") and the rate at which they will sell the base currency of that same pair (known as the "ask"). The Claimants allege that the wider the spread, the more beneficial the trade for the bank, and the less beneficial for the customer. The allegation is that banks colluded between themselves – including by means of discussions in online chat rooms – in relation to the spreads they offered to customers, thereby keeping spreads wider than they would otherwise have been.

11. Although the Claimants allege that there were two forms of manipulation, there is a significant issue between the parties as to whether, for the purposes of the critical issue which arises on the New Defendants' limitation defence, a material distinction is to be drawn between Benchmark Manipulation and Bid/ask

Manipulation. Nothing in this judgment should be taken as expressing any view on that issue.

(3) The development of the two sets of proceedings

12. The Original Proceedings were commenced against the Original Defendants in late 2018. The Claimants have explained that this was because those Original Defendants were the banks which, according to press reports (whose contents those banks did not dispute), had agreed to settle with the Commission and thereby admit their involvement in FX manipulation contrary to Article 101 TFEU. The Claimants say that they took the view in those circumstances that allegations of FX manipulation contrary to Article 101 TFEU could properly be made against those banks. Subsequently, the Commission adopted its first two decisions in May 2019, making findings against all of the Original Defendants apart from one (HSBC, which is an addressee of the later decision concerning "Sterling Lads").

13. By contrast, the Commission has never pursued any proceedings concerning FX manipulation against any of the New Defendants. The position in this respect is said by the Claimants to mirror that in relation to an earlier investigation into FX manipulation by the UK Financial Conduct Authority, which concluded in 2014-15 with fines against all of the Original Defendants, but no fines against any of the New Defendants.

14. The first CMC in the Original Proceedings took place (in the Commercial Court) in February 2020 and the Original Defendants were ordered at that stage to give disclosure of a significant body of material, including trading records and chat room transcripts. The Original Defendants had already collated the documents covered by that order for the purposes of producing documents to the European Commission and UK and US regulators, and/or giving disclosure (or discovery) in certain US proceedings raising allegations concerning the same kinds of conduct.

15. The Claimants say that it then became apparent to the Claimants' legal representatives, as a result of their review of this material, that there were many

more chat rooms than those which were the subject of the Commission decisions in which conduct of the same kind had taken place, including chat rooms to which the New Defendants were party. The chat rooms at issue in the three Commission decisions therefore made up only a small fraction of what the Claimants contend to be the overall infringing conduct. As a result of their initial review of the disclosure, the Claimants' representatives identified 198 chat rooms which are said to evidence infringing conduct. These are a mix of so-called "permanent" chat rooms which lasted for months or years and more or less *ad hoc* chat rooms which may have lasted no more than a few hours or days.

16. The Claimants therefore made an application to the Commercial Court under CPR 31.22 for permission to use the disclosure in the Original Proceedings to commence new proceedings against the New Defendants. Such permission was granted and the New Proceedings were then instituted in November 2020.

17. It would have been possible for the Claimants to have applied to join the New Defendants as additional defendants to the Original Proceedings. Ms Demetriou KC, who appears for the Claimants, explained at the hearing that the reason for not doing so was to ensure that proceedings against the New Defendants were commenced as soon as possible. An application to join might, if contested, have taken some time for the court to determine. Fresh proceedings could be commenced immediately, and this would avoid any potential limitation defence that might otherwise have accrued between the time of commencement and the time when the court would have determined an application to join. This submission was borne out by the evidence contained within the Claimants' application notice for permission to use the disclosure.

18. The two sets of proceedings, against the Original and New Defendants, have thereafter proceeded separately, although (as explained below) they are in most material respects substantially the same. There has as yet been no application by any party for consolidation or that they be heard at the same time. However, the parties have already recognised the close connection between the two sets of proceedings. For example, the hearing of the New Defendants' application for a preliminary issue did involve, by agreement of the parties and the Tribunal, the Defendants in both actions. This was because the Original Defendants

wished to be given the opportunity to make submissions, in order to explain the potential case management implications which might arise if a preliminary issue were to be ordered in the New Proceedings. In a nutshell, the concern of the Original Defendants, for whom Ms Abram KC made brief submissions, was to avoid a situation whereby an order for the determination of a preliminary issue in the New Proceedings might result in a delay in the resolution of the claim against the Original Defendants, or where the Tribunal's ability to make appropriate case management directions in relation to the Original Proceedings was hamstrung.

19. It is not necessary to describe in detail the procedural steps which have been taken in each of the proceedings. The present position can be summarised as follows.

20. The Original Proceedings are more advanced than the New Proceedings in terms of pleadings, with multiple rounds of amendments having been made. Substantial disclosure has been given within those proceedings. The volume of disclosure is vast, although the work required to produce it is less onerous than might have been expected, given the size of the disclosure. This is because a substantial disclosure exercise has already taken place in the context of the US proceedings, and orders have been made which essentially provide for the US disclosure to be reproduced as disclosure within the Original Proceedings. The broad approach to disclosure can be seen in my judgment when the case was still in the Commercial Court: *Allianz Global Investors GmbH v Barclays Bank PLC* [2020] EWHC 2187 (Comm).

21. A two-day CMC in the Original Proceedings is due to take place early next year, in January or perhaps early February. The agenda may include, as is often the case, the resolution of outstanding issues concerning disclosure. However, both the Claimants and the Original Defendants are in substantial agreement that the principal agenda items will concern the setting of a timetable leading to a trial, including dates for factual witness statements, expert evidence and the trial itself. The precise directions that each party may seek were not identified at the present hearing, and (as Mr Beal KC for the New Defendants was keen to remind me), the present hearing is not a CMC and I am not presently giving

case management directions in either of the two actions. It was however, common ground, in the submissions of both Ms Demetriou and Ms Abram, that the Claimants and the Original Defendants would be seeking to move the case forward to trial. The case has, on any view, moved rather slowly, for reasons which it is not necessary to explore. There has, however, already been a significant decision of the Court of Appeal: see *Allianz Global Investors GmbH v Barclays Bank PLC* [2022] EWCA Civ 353. The Claimants and the Original Defendants want to avoid further "drift", as Ms Abram described it.

22. There is clearly scope for argument at the upcoming CMC for the Original Proceedings as to how long the trial will take, and when the case will be ready for trial. In the course of her submissions, and in response to my questions, Ms Demetriou suggested that a trial could take place in 2024, probably towards the end of that year, and that its duration would be in the region of three months. The New Defendants, by contrast, estimate a trial length of six to nine months, on the basis (as I understand it) that all issues in both sets of proceedings involving all Defendants were to be resolved.

23. I am obviously not presently in a position to decide when the trial should take place, or how long it will last: these are matters which the parties will no doubt reflect upon in the run-up to the January/February CMC. However, it does seem to me that, given the amount of work on pleadings and disclosure that has been done in the past, and bearing in mind that the allegations of FX manipulation have been around for some time, a trial towards the end of 2024 (still two years away) is a realistic possibility – at least as between the Claimants and the Original Defendants – and indeed it would be disappointing if the case could not be made ready within that sort of timescale.

24. The New Proceedings are somewhat behind the Original Proceedings. The case has been pleaded out in some detail, but disclosure has yet to take place. However, it is probable that the basic disclosure exercise will be accomplished in a similar manner to that which has taken place in the Original Proceedings. Accordingly, although the disclosure is vast, it is not necessarily vast in terms of the work to produce it. Ms Abram therefore submitted that it would not actually take very long, as matters stand, for the New Proceedings to "catch up"

with the Original Proceedings, in terms of reaching more or less the same stage of preparation that the latter has achieved. Against a background where the FX litigation has been underway, in the US and England, for some time, I consider that this submission is likely to be broadly correct.

25. However, there is clearly scope for debate as to the length of time that would be required for the New Proceedings to catch up with the Original Proceedings. Whether or not that debate is required, however, may depend upon (i) the outcome of the New Defendants' present application, and (ii) the resolution of any argument as to whether it is desirable and appropriate for the two sets of proceedings to be consolidated or proceed in tandem in some other way. As will become apparent from this judgment, these two issues are not unrelated.

B. THE PROPOSED PRELIMINARY ISSUE

26. In their Defences to the New Proceedings, the New Defendants each contend that the proceedings are time-barred in their entirety. There is no dispute that, apart from s. 32 of the Limitation Act 1980, the Claimants' claims in these proceedings would be time-barred. This is because the conduct in issue spanned the period 2003 – 2013, and the present proceedings were not commenced until more than 6 years thereafter.

27. However, s. 32 provides for an extension of time in cases of concealment:

> "(1)… where in the case of any action for which a period of limitation is prescribed by this Act, either –
>
> …
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant;
>
> …
>
> the period of limitation shall not begin to run until the plaintiff has discovered the … concealment … or could with reasonable diligence have discovered it."

28. The issue of limitation having been raised in the defences of the New Defendants, the Claimants responded in their consolidated reply by alleging deliberate concealment. In paragraph 24 of the reply, the Claimants say that they

"did not know and could not with reasonable diligence have discovered the necessary facts relevant to their claims prior to 11 November 2014". (11 November 2014 is six years prior to the commencement of the present proceedings.) The Claimants' reply addresses the issue in approximately 10 pages, which includes a detailed response to the defences of two New Defendants (Goldman Sachs and BNP Paribas) which had identified material relied upon in support of the case that any concealment could have been discovered with reasonable diligence.

29. The legal test for the running of time under s. 32 in a case involving concealment has been recently addressed in the case of *Gemalto Holding BV v Infineon Technologies AG* [2022] EWCA Civ 782 ("*Gemalto*"), itself a competition law case where a preliminary issue on limitation had been ordered. Following that case, the test is whether, based on material within the Claimant's actual or constructive knowledge, the Claimant was in a position to recognise that it had a "worthwhile claim". The particular issue which arose in *Gemalto* was whether knowledge of the contents of a Commission Statement of Objections was sufficient to start time running. The first-instance Judge (Bacon J) held (after a two-day hearing) that it was, on the basis that a Statement of Objections represents the Commission's preliminary conclusions after having undertaken a detailed investigation. This analysis was upheld by the Court of Appeal: see *Gemalto* at [56].

30. The New Defendants' application is that their limitation defence should be tried as a preliminary issue. The New Defendants acknowledge that the determination of this preliminary issue would be a substantial exercise. This is because the case would require a factual investigation as to the actual or constructive knowledge of each of the Claimants in order to determine whether each of them was in a position to recognise that it had a worthwhile claim. The New Defendants have proposed a timetable which includes further pleadings, disclosure by both parties, factual witness evidence and an eventual trial of three weeks (excluding judicial pre-reading time). They suggest that the preparatory work could be accomplished in sufficient time to enable a trial of the preliminary issue to take place in approximately 12 months' time.

C. THE PARTIES' SUBMISSIONS

31. On behalf of the New Defendants, Mr Beal submitted that justice required the determination of limitation as a preliminary issue. The New Defendants were faced with an enormous action, which would cost an enormous amount of money to defend and would occupy a very long time in trial. There was, he submitted, a real prospect that their limitation defences would succeed on the merits. If those defences succeeded in full, then there would be no need for any trial involving a large group of banks. Even a partial success on limitation could radically cut down the scope of the trial, by reducing the scope of the period under consideration, or the number of Claimants or Defendants involved.

32. He referred to the decision of Neuberger J (as he then was) in *Steele v Steele* [2001] CP Rep 106 ("*Steele*"). This contains a very useful framework or checklist of issues which a court should consider when deciding on an application for a preliminary issue. The New Defendants' written argument addressed each of the points within that framework, reaching the conclusion that, in the overall interests of justice, the proposed preliminary issue should be ordered.

33. Mr Beal's written submission focused principally upon the New Proceedings independently of the Original Proceedings. The primary case was that the Tribunal should focus on the impact of the proposed preliminary issue in relation to the New Proceedings alone. It was remarkable, he submitted, for the Claimants to argue that the proposed preliminary issue might impede the New Proceedings from catching up with the Original Proceedings. There had never been an application by the Claimants for consolidation, and it was unclear whether the Claimants would seek consolidation. Furthermore, the Claimants had taken the decision to start separate proceedings. The New Defendants, having been sued separately, were "entitled to proper case management of the claims brought against them".

34. It became quickly apparent to Mr Beal, in the course of his opening, that I was not very attracted to the argument that the Tribunal's approach to the future case management of the New Proceedings should disregard the existence of the

Original Proceedings, bearing in mind that identical claims are made there against different banks in respect of the same underlying conduct and loss. Whilst maintaining that it was right to focus simply on the position of the New Defendants, Mr Beal submitted that there were sufficient case management techniques available to ensure that the two sets of proceedings could be heard at least in close proximity to each other, consistently with ordering the proposed preliminary issue. He did not accept that, if the two cases proceeded, the two cases should or needed to be consolidated or heard at the same time. However, he suggested that the two cases could "follow one after the other in close proximity". There would therefore be two trials, albeit before the same Tribunal.

35. In his reply submissions, Mr Beal put forward, as an alternative, a hybrid solution. He submitted that if the Tribunal remained concerned about overall case management of both proceedings, but considered that in principle a preliminary issue was or might be desirable, an indication to that effect could be given, together with initial directions (such as further pleadings and disclosure) which would move the preliminary issue forward. The question of overall directions, and how the two proceedings might work together, could then be revisited at the Original Proceedings' forthcoming CMC.

36. The Claimants submitted that the proposed preliminary issue was inappropriate and should not be ordered. Ms Demetriou submitted that, for three reasons, the proposed preliminary issue would not be determinative of the case, however it is decided, and that it would not cut down the scope of the eventual trial.

37. The first reason was that there were key allegations in the case which would not be knocked out by a limitation argument. There was, she submitted, no material which fixed the Claimants with knowledge, prior to the critical date in November 2014, of Bid/ask Manipulation (in contrast to Benchmark Manipulation). Nor was there any material which fixed them with knowledge on the part of certain of the New Defendants, namely Société Générale, Standard Chartered and RBC. None of those Defendants had been party to the pre-November 2014 class action litigation which had taken place in the United States.

38. Secondly, any allegations which particular New Defendants might be successful in knocking out at the preliminary issue trial would remain live against those New Defendants who remained. The reason is that all of the allegations in the case are pursued against all of the New Defendants on a joint and several liability basis. In her oral submissions, Ms Demetriou emphasised that the case on joint and several liability impacted significantly on the claim against the Original Defendants. Thus, even if all of the New Defendants succeeded in their limitation defences, their conduct would nevertheless require scrutiny and decision in the context of the case against the Original Defendants; because the Claimants contended that the Original Defendants were jointly and severally liable for the conduct of all the infringers. Accordingly, whilst success on the limitation defence would (subject to her third point) remove some or all of the New Defendants from the proceedings, it would not substantially affect the shape of the proceedings in terms of the conduct that required investigation.

39. Thirdly, any allegations which particular New Defendants might be successful in knocking out against them at the preliminary issue trial would be likely to be resurrected against those very same New Defendants by means of contribution proceedings. There would be no limitation defence in any such contribution proceedings. Thus, any success any particular New Defendants might have as against the Claimants at the preliminary issue trial on limitation grounds would be wholly nugatory.

40. The Claimants also submitted, however, that overall case management considerations dictated that the preliminary issue should be refused. This was so even if one simply considered the New Proceedings on their own. But it was appropriate to look at both sets of proceedings together, since it was clearly appropriate that both sets of proceedings be subject to sensible joint case management, potentially up to and including having them consolidated or heard together. The proposed preliminary issue would impede and disrupt the efficient conclusion of the proceedings (i.e. both sets of proceedings) when looked at together. Ms Demetriou's oral submissions focussed very much on these case management arguments.

41. She submitted that this involved looking at the proceedings in the round, looking at the pros and cons. The cons were extremely weighty. There would be very great prejudice, by delay, if the two cases were to be heard together. There would be prejudice even to the New Proceedings just looked at by themselves, because the proposed preliminary issue would delay the resolution of the New Proceedings. That was highly undesirable in circumstances where it was unlikely that the preliminary issue would be determinative. When one adds into the mix the importance of joint case management of the two sets of proceedings, and the risk of delay to the Original Proceedings, the balance in the ledger was clear.

42. Ms Abram for the Original Defendants submitted that the Tribunal should avoid making any order that may cause delay to the Original Proceedings. There had already been enormous drift in litigation which had been underway for years. Whilst maintaining neutrality as to whether or not, as between the Claimants and the New Defendants, a preliminary issue was appropriate, she identified a number of "red flags" for consideration by the Tribunal before taking that course, in the light of the possible impact on the Original Defendants. She submitted that the Tribunal should avoid giving directions or making a decision which would have the effect of limiting the Tribunal's options for the future by going down a path that risked or that would inevitably cause delay to the Original Proceedings.

D. CASE LAW

43. I was referred to a large number of authorities, both in relation to considerations relevant to the question of whether a preliminary issue should be ordered and also to illustrate the variety of cases in which preliminary issues have been determined. In *Wentworth Sons Sub-Debt SARL v Lomas and others* [2017] EWHC 3158 (Ch) ("*Wentworth*"), Hildyard J summarised the *Steele* framework, and made some pertinent observations concerning the value of a preliminary issue on limitation.

> "[32] In *Steele v Steele* [2001] C.P. Rep. 106, Neuberger J (as he then was) examined in detail the questions which must necessarily arise in considering

whether the determination of a preliminary issue is appropriate. In summary, these were:

(1) First, would the determination of the preliminary issue dispose of the case or at least one aspect of it?

(2) Second, would the determination of the preliminary issue significantly cut down the cost and time involved in pre-trial preparation or in connection with the trial itself?

(3) Third, where as here the preliminary issue was one of law the Court should ask itself how much effort would be involved in identifying the relevant facts.

(4) Fourth, if the preliminary issue was one of law to what extent was it to be determined on agreed facts?

(5) Fifth, where the facts were not agreed the Court should ask itself to what extent that impinged on the value of a preliminary issue.

(6) Sixth, would determination of the preliminary issue unreasonably fetter the parties or the Court in achieving a just result?

(7) Seventh, was there a risk of the determination of the preliminary issue increasing costs and/or delaying the trial?

(8) Eighth, the Court should ask itself to what extent the determination of the preliminary issue may turn out to be irrelevant.

(9) Ninth, was there a risk that the determination of the preliminary issue could lead to an application for the pleadings to be amended so as to avoid the consequences of the determination?

(10) Tenth, taking into account the previous points, was it just to order a preliminary issue?

[33] Although when in passing at the hearing I referred to these guidelines as the 'Ten Commandments', Counsel for the LBIE Administrators understandably and correctly warned against treating them as written in stone. That said, the ten points provide useful criteria and a useful reminder of the caution and care to be exercised.

[34] However, the caution required should not be such as to oust the use and utility of preliminary issues where, on the best judgment that can be made at the time, their direction appears appropriate. Especially, as it seems to me, where there are limitation or other time bars potentially in issue, the purposes of the time bar may only really be fulfilled by early determination of its application; and/or where there are points of law which it does appear could, if determined, determine the case, with considerable saving of time and cost, the machinery available is salutary.

[35] Moreover, other more amorphous considerations may militate in favour of seeking early determination, even at some risk that it may not in the end achieve the result envisaged. For example, where there are real signs that the case may be being deployed as a means of introducing a multi-year period of uncertainty to put commercial pressure on those denied their entitlements in

> the meantime, or where there are quasi-systemic issues which will generate uncertainty and possible dislocation until their determination.
>
> [36] In the present case, there is a time bar; there is a commercial imperative for speedy resolution if practicable, fair and satisfactory as a means of lifting the pall of uncertainty which litigation brings; and the LBIE Administrators have identified apparently discrete issues of law which could be decisive and could make unnecessary a very considerable factual enquiry and contest. Against that, the issues are agreed to be novel, raising the spectre of appeals; and the preliminary issues are not clean points of law, and cannot be said to require no evidence for their adjudication. In other words, and not exceptionally, there is a balance to be struck; and caution may be the tie-breaker."

44. In *Merck KGaA v Merck Sharp & Dohme Corp and others* [2014] EWHC 428 (Ch), Nugee J (as he then was) said (at [18])

> "… the ordering of a preliminary issue is bound to include advantages and disadvantages, or pros and cons, some of which are predictable and some of which are less predictable. As I see it, the task of the court in being asked to order a preliminary issue in a case such as this, is to weigh up the possible pros and cons of ordering or not ordering a preliminary issue and decide where the balance lies."

E. DISCUSSION

45. In approaching the question of whether or not to order a preliminary issue, I consider that the following matters are important.

46. First, when considering the case management implications of ordering a preliminary issue, it would not be appropriate in my view to consider the New Proceedings in isolation from the Original Proceedings. There is the closest possible connection between the two sets of proceedings. The Claimants are materially identical. The claims are alleged to involve the same conduct infringing the same competition laws. The claims are said to arise from an alleged "single and continuous infringement" or "SCI" for which the Claimants allege that both the Original Defendants and New Defendants are jointly and severally liable. The damages that the Claimants seek in respect of the SCI case are the same losses suffered on the same trades. Thus, the claim against the Original Defendants contains allegations that the New Defendants conspired with each other and with the Original Defendants, to cause the Claimants loss on the same trades that form the subject matter of the claim against the New Defendants. It is fair to say, as the Original Defendants submitted when applying

to be heard on the preliminary issue application, that the only material differences between the claims made in the New Proceedings and the Original Proceedings are the Defendants who are sued in them, and the dates on which the claims were brought (and hence the limitation issues arising).

47. Accordingly, although I am not presently deciding upon consolidation or case management directions other than those concerning the proposed preliminary issue, I have to consider (to use Nugee J's words) the predictable pros and cons of ordering a preliminary issue. I accept the Claimants' submission that it is appropriate for (or at least predictable that the Tribunal will want) both sets of proceedings to be subject to sensible joint case management, potentially up to and including having them consolidated or heard together.

48. The alternative approach, of the two cases proceeding independently and on separate tracks – including being subject to two separate trials in close proximity – would potentially lead to duplication of the work required by the Tribunal and inconsistent findings in the two sets of proceedings. This is a result which, if reasonably possible, should be avoided, not least because consistency of outcome is a very desirable objective: see *The Merchant Interchange Fee Umbrella Proceedings* [2022] CAT 31 ("*Merchant Interchange*"), in particular [12] – [16]. Furthermore, the rationale behind the CAT's *Practice Direction 2/2022: Umbrella Proceedings* is that the resources of the CAT should be deployed efficiently, and with a view to avoiding duplication and inconsistent findings. That rationale applies, perhaps with even greater force, to cases such as the present, where the allegation against all the various Defendants concerns the same underlying conduct. I accept Ms Demetriou's submission that it is likely to be a "nightmare scenario" for there to be entirely separate trials involving the two groups of Defendants.

49. It does not, however, necessarily follow that a preliminary issue should not be ordered. In an exceptional case, a Tribunal may have to contemplate making directions which might lead to this scenario. In *Merchant Interchange*, the Tribunal said that cases may be commenced so far apart in time that it is not practically possible to hear both claims together. That, however, is not the situation in the present case, as will be apparent from the discussion below. As

things presently stand, the Original Proceedings are not so far ahead of the New Proceedings that they could not be tried together. The effect of ordering a preliminary issue, however, is likely to make that desirable end far more difficult, essentially because the preliminary issue contemplates that full preparation for the trial of the New Proceedings will only begin after the determination of that issue. The cases could nevertheless be heard together if the Original Proceedings themselves were to be "put on ice" for some time, awaiting the determination of the preliminary issue as well. This would, however, mean delay to the resolution of those proceedings beyond the time when they would otherwise be determined; a course which is opposed by both the Original Defendants and the Claimants. The delay to the Original Proceedings could be avoided if the two cases proceeded on separate timetables, and were determined at different times. However, for reasons already given, this is a scenario which is unattractive, to say the least.

50. Secondly, the written arguments of the Claimants and New Defendants identified many of the factual and legal points which are likely to arise in relation to the preliminary issue. Ms Abram said, correctly in my view, that the limitation issues in this case are weighty. Thus, whilst the decision of the Court of Appeal in *Gemalto* has clearly identified the relevant test in the context of deliberate concealment, it is apparent that there are a substantial number of potentially important legal issues, or issues of mixed fact and law, that will arise. For example, it appears to be suggested by the New Defendants that time can run against all participants in a cartel, provided that the identity of some (but not all) of them could have been discovered with reasonable diligence. There are substantial issues concerning the distinction, relied upon by the Claimants, between Benchmark Manipulation and Bid/ask Manipulation. (On that issue, Judge Schofield in the New York proceedings has given a decision on 28 May 2020, admittedly under New York law, which appears to support the distinction which the Claimants seek to draw.) There will be issues concerning the attribution to the Claimants of the knowledge of a number of individuals who used to work for various of the Defendants, and subsequently came to work for some of the Claimants. Ms Abram also said that there were points about the interrelationship between EU law and English law after Brexit.

51. The fact that there are substantial issues of fact and law is apparent from the New Defendants' time estimate of a three-week preliminary issue trial, excluding pre-reading. That time estimate makes no allowance, however, for expert evidence which (as I discuss below) may well need to be called in the context of the case that economic analysis prior to the critical November 2014 date would or did lead the Claimants to certain conclusions.

52. Against this background, it is in my view apparent that there is a very considerable prospect that a losing party will be able to identify some issues which could be the subject of an appeal or at least an application for permission to appeal. Mr Beal suggested that it was probable that the case would ultimately turn on the facts. I do not consider that this can confidently be predicted at the present stage. By contrast, applications for permission to appeal to the Court of Appeal can be predicted with reasonable confidence.

53. Thirdly, given that the resolution of the limitation defence will require (at least) a three-week trial, it would be unwise and indeed impossible for me to express any view, at the present stage, as to the strength of the parties' factual or legal arguments. For present purposes, I accept the submission of the New Defendants that, on the relatively limited material that I have seen and the brief arguments advanced, there is a real prospect of their limitation defences succeeding, at least in part. Equally, however, my present view is that there is a very real prospect of the limitation defences failing, at least in part. In that context, it is relevant that the New Defendants have not hitherto issued, and are apparently not proposing to issue, an application to strike out the Claimants' case or for reverse summary judgment. They recognise that there would be difficulties in doing so, not least because an issue of deliberate concealment and the application of s. 32 will generally be a fact intensive exercise. Accordingly, this is not a case where it could be suggested that the limitation defence is straightforward or (to use the expression favoured by counsel at the hearing) a "slam dunk".

54. Fourth, I do not accept Mr Beal's submission that a strike-out application would be bound to succeed because of alleged inadequacies in the Claimants' pleading of their s. 32 case. The issue which I am considering is whether or not I should

order the substantial trial of a preliminary issue on limitation. The alleged inadequacies of the Claimants' pleading do not materially assist on that question. I am not presently considering a short strike-out application based on the alleged failure properly to plead a s. 32 case. There has been sufficient opportunity for the New Defendants to make such an application, but it has not been made. Indeed, despite the criticisms directed at the Claimants' pleading, and specifically their alleged failure fully to particularise the s. 32 case where the burden of proof lies on the Claimants, there is no outstanding Request for Further Information.

55. I have also not been persuaded that any inadequacies in the Claimants' pleading (if established) would lead to the striking out of the Claimants' case. The Claimants' reply pleads clearly that they did not have the relevant knowledge of the concealment. It also contains a relatively full response to the defences of the two Defendants which had pleaded a detailed case on knowledge. The nature of the Claimants' case is therefore apparent.

56. Nor, at least at present, would I consider it to be worthwhile to require the Claimants, or indeed any of the New Defendants, now to further particularise their case as proposed in the directions sought by the New Defendants (such directions being sought even if no preliminary issue were to be ordered). Whether a preliminary issue is ordered or not, there will be disclosure – in all likelihood substantial disclosure – concerning the s. 32 plea. This will almost inevitably lead the Defendants to revisit their own pleaded case on this issue. I do not consider that any valuable purpose would be served by requiring further pleadings on the s. 32 issue in advance of disclosure. However, I am willing to revisit this issue at the CMC.

57. Against this background, I turn to the question of where the balance lies when considering the pros and cons of ordering the proposed preliminary issue.

58. I accept the New Defendants' submission that there is a potential advantage in ordering a preliminary issue on limitation, if that issue were then to be resolved in favour of the New Defendants. Those Defendants will, potentially, not face the cost and burden of preparing for and dealing with a very substantial trial.

This is a significant point when time-bar is raised, as Hildyard J identified in *Wentworth.* In addition to the New Defendants not facing this burden, the case would potentially involve a saving of time for the Tribunal, and indeed the other parties. If the ultimate case involves only the six Original Defendant groups, rather than an additional eight New Defendant groups, then the hearing is likely to be somewhat shorter, if only because there will be fewer parties making submissions.

59. However, in the present case, these advantages are not clearcut, even assuming that the preliminary issue were to be resolved in favour of the New Defendants. If the New Defendants were to succeed on limitation, that would not necessarily bring the case to an end as far as they were concerned. This is because there is a real prospect that the Original Defendants – or any New Defendants who had not succeeded on limitation – would bring contribution proceedings against those Defendants which had succeeded on limitation. The limitation period for a claim by a party seeking contribution under the Civil Liability (Contribution) Act 1978 is not, or at least is not necessarily, the same as the limitation period in respect of the direct claim by the Claimants. At present, no contribution claims have been made, but in a case such as the present they are clearly a realistic possibility. Although the potential for contribution was a point raised by the Claimants, none of the Defendants has disavowed any intention to bring such a claim in the future.

60. Furthermore, success by the New Defendants on limitation would not (as Ms Demetriou submitted) shorten the issues that needed to be considered at trial. This is because the Claimants advance a claim against the Original Defendants for joint and several liability for the infringements carried out by all participants, including the New Defendants. A successful time-bar defence of a New Defendant would prevent a direct claim by the Claimants against that Defendant in respect of its infringing conduct. However, it would not prevent a claim against an Original Defendant for joint and several liability in respect of that New Defendant's infringements. A claim against the Original Defendant would of course be precluded if it had its own time-bar defence. However, although limitation has been pleaded by the Original Defendants, there is no application for a preliminary issue on that limitation defence. And although Mr Beal's reply

made some observations about the merits of the joint and several case, it is not suggested that there should be a preliminary issue on the question of whether there is joint and several liability. The overall result is that a successful time-bar defence by a New Defendant would still mean that the conduct of the New Defendant would need to be investigated and adjudicated upon, in the context of the Claimants' case on joint and several liability.

61. Even taking into account these possible (but not clearcut) advantages, I have no doubt that there are very significant disadvantages which brings the balance down firmly against ordering the proposed preliminary issue. This is the case when (as I consider to be appropriate) one considers both sets of proceedings in the round. However, I would reach the same conclusion if I were considering only the proceedings against the New Defendants in isolation from those against the Original Defendants.

62. First, the determination of the proposed preliminary issue is likely substantially to delay the resolution of the proceedings involving both sets of Defendants. The Original Defendants have, in my view, very legitimate reasons for not wishing the trial of their proceedings to be delayed, as indeed have the Claimants. Nevertheless, delay to the Original Proceedings, and indeed to the final resolution of the New Proceedings (if the New Defendants were unsuccessful) would in my view be the predictable result of the preliminary issue being ordered.

63. The limitation issue in this case raises, as I have said, weighty issues of fact and law. The New Defendants anticipate that a trial will take approximately a year to prepare, and this makes no allowance for an expert phase. The preliminary issue trial will be a substantial one – far longer and more complex than that in the authorities to which I was referred. The trial of limitation in *Gemalto* was two days. That was the same length as the trial in *Granville Technology Group Ltd v Infineon Technologies AG* [2020] EWHC 415 (Comm). (Both of these were competition law cases.) In *Wentworth*, there were a number of proposed issues which would be resolved in a five-day hearing.

64. Even assuming that a three-week preliminary issue trial could be held at the back end of 2023, it would be impossible to envisage that the Tribunal could produce a decision immediately thereafter. A three-week preliminary issue trial involving fact and perhaps expert evidence would require careful consideration and a fair amount of time for the judgment to be written. For reasons already given, there would then be very real prospects of applications for permission to appeal and the possibility of an appeal. If the claim was held in whole or in part to be timely, the proceedings against the New Defendants would then revive some time towards the middle of 2024 (at best, and assuming no application for permission to appeal). There would then no doubt be arguments as to the lead-time required for preparation of the case by the New Defendants. The trial might then come on around two years later, or possibly a little sooner. A trial towards the middle of 2026 seems a very long way away, and it assumes no appeals. This is to be contrasted with the possibility that the Original Proceedings could be heard, as Ms Demetriou suggested, towards the end of 2024.

65. Mr Beal for the New Defendants suggested that case management directions could be given which would enable some progress to be made simultaneously with the preparation for the preliminary issue. However, if the idea is that the parties should prepare the case on all issues in the ordinary way, then a considerable amount of the proposed benefit of the preliminary issue is lost, at least as far as the New Defendants are concerned. Accordingly, Mr Beal suggested, in effect, that the Claimants could and should carry on preparing the case, but that the New Defendants should not be required to do so until the preliminary issue has been resolved. However, in my judgment, the effective conduct of litigation involves both parties dealing with interlocutory stages, with both sides providing relevant materials (e.g. disclosure, witness statements and expert evidence) to each other.

66. Overall, I consider that the proposed preliminary issue will cause lengthy and unacceptable delay. This is in my view a very important consideration. As Neuberger J said in *Steele*:

> "Seventhly, the court should ask itself to what extent there is a risk of the determination of the preliminary issue increasing costs and/or delaying the trial. Plainly, the greater the delay caused by the preliminary issue and the greater any possibility of increase in cost as a result of the preliminary issue, the less desirable it is to order a preliminary issue".

67. It is in my view particularly important here, where the impact of delay will – if the two cases are not to be separated – fall not only upon the Claimants but also upon the Original Defendants.

68. Secondly, I consider that the complexity of the issues raised by the proposed preliminary issue are such as to tell against the wisdom of ordering it. In *Steele*, Neuberger J's third point was that

> "… the court should ask itself how much effort, if any, will be involved in identifying the relevant facts for the purpose of the preliminary issue. The greater the effort, self-evidently the more questionable the value of ordering a preliminary issue".

69. The present case involves a preliminary issue trial on limitation of, as far as I can see, exceptional length and potential complexity. That trial would potentially involve difficult expert evidence. Paragraph 136.1.3 of the defence of BNP Paribas pleads as follows:

> "The Claimants' case is that the existence of anti-competitive collusion may be proved by means of economic analysis. Such economic analysis could with reasonable diligence have been undertaken prior to 11 November 2014".

Similarly, the New Defendants' skeleton argument asserts that the steps which the Claimants could have taken might reasonably have included "carrying out economic analysis".

70. I accept the Claimants' submission that this case gives rise to the need, or at least potential need, for economic evidence on the question of what analysis the Claimants could have conducted and what they could have discovered by means of such analysis, based on the material available to them at the time. Mr Beal sought to downplay the potential relevance of this evidence, but in my view it is squarely raised by the case advanced. It would, as Mr Beal accepted, be unusual to have expert evidence in the context of the determination of a

preliminary issue. The fact that it is potentially required here is a point against determining the proposed preliminary issue.

71. This might not be the case if the expert evidence was simple, but it is well known that economic evidence in competition cases is usually complex. It may, for example, be suggested by some of the New Defendants that economic analysis would have led to the conclusion that there was Bid/ask Manipulation, as well as Benchmark Manipulation. Or it may be suggested that economic analysis would have led to the identification of additional banks, such as Société Générale, Standard Chartered and RBC. It is not difficult to see the scope for substantial expert disagreement on these or related issues. In my view, it would be preferable to consider economic evidence, relevant to the limitation issue, in the context of the trial, when there will clearly be significant economic evidence directed at the question of the alleged market manipulation and its alleged consequences.

72. Thirdly, I do not consider that these difficulties, particularly the difficulty of delay, can be overcome by imaginative or robust case management decisions. For the reasons already given, it is in my view predictable and inevitable that a preliminary issue would cause lengthy and unacceptable delay in the resolution of both cases. Realistically, it seems to me, on the present material, that there are the following alternatives.

(1) If a preliminary issue is refused, then the two cases can proceed at the same time, and the proceedings as a whole can be subject to the full range of ordinary case management decisions, without the need for those directions to be subordinate to the Tribunal's prior decision to order a preliminary issue. This would enable an order to be made (whether on the request of a party or the Tribunal's own initiative) for consolidation or at least for the two cases to be heard at the same time. There is a real prospect that the case as a whole might then be subject to directions leading to a trial at the end of 2024 or thereabouts.

(2) Alternatively, if a preliminary issue is ordered, then it would in practice be impossible to lay down a timetable which enabled both cases to be

heard by that time. It would be possible to separate the two cases, so that the Original Proceedings proceeds to a resolution. But for reasons already given, it is undesirable to have two trials in these closely related matters.

(3) Alternatively, both sets of proceedings could await the determination of the preliminary issue, with directions being held in abeyance until the final resolution of that issue. Final resolution would then not be possible until some considerable time in the future, with the realistic possibility that it would be a period of two years after the resolution of any appeal. In effect, both cases would be put "on ice" for a period of some years whilst the preliminary issue was resolved. I do not consider that this would be a sensible or just result.

73. Fourth, it is in my view relevant that the New Defendants are all substantial companies and well resourced. So, as far as I am aware, are the Claimants. Ultimately, as Ms Demetriou submitted, if the New Defendants succeed on the limitation defence at the substantive trial, then the Claimants will have to pay them substantial costs.

74. Accordingly, I consider that the balance comes down against the proposed preliminary issue.

75. I also reject the 'hybrid' or 'wait and see' suggestion proposed by the New Defendants. In the light of my conclusions in this judgment, I cannot indicate that I am favourably disposed towards the hearing of the proposed preliminary issue, with a final decision being deferred to the CMC. I also consider that this approach is not consistent with the application that has been made, and for which the parties have been preparing. The application could have been made for the question of a preliminary issue to be determined at a CMC. However, the New Defendants have sought an order, in advance of a CMC, that limitation should be the first issue to be resolved, and that this decision should be taken now. I think that it is appropriate to deal with that application, on the basis of the evidence and argument presented to me.

76. However, I recognise that I have not actually made any case management decision relating either to consolidation or the cases being heard at the same time, or given any directions leading to the substantive hearing. This is a matter to be considered early next year, it being common ground that – if the present application were rejected – the CMC should take place in both cases, with all parties attending. It is, at least theoretically, possible that the overall proceedings may have a different complexion at that stage. If, for example, it was to become clear that the trial could not take place until many years after the end of 2024 in any event, then the question of a preliminary issue could be revisited. Equally, if the case management directions resulted in the phasing of the final hearing, then the case could be advanced that the preliminary issue should be one of the phases. Accordingly, this judgment does not forever preclude the question of the preliminary issue being raised again.

77. I therefore reject the application by the New Defendants, and dismiss the application for a preliminary issue. I also decline to give any directions, at this stage, relating to the further pleading of the parties' cases on deliberate concealment or the other preliminary steps that might have been relevant if a preliminary issue had been ordered.

The Honourable Mr Justice Jacobs
Chair

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 11 October 2022