THE HIGH COURT
COMMERCIAL

[2021] IEHC 163
[2020 No. 2194 P.]

BETWEEN
AVONCORE LIMITED AND CANMONT LIMITED T/A DOUGLAS VILLAGE SHOPPING CENTRE

PLAINTIFFS

AND
LEESON MOTORS LIMITED, ADAM OPEL GMBH, OPEL AUTOMOBILE GMBH AND VAUXHALL MOTORS LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Denis McDonald delivered on 11th March, 2021

The application before the court

1. The application before the court is a motion brought by the first, third and fourth named defendants ("*the moving parties*") for an order pursuant to the inherent jurisdiction of the court and/or pursuant to O. 63A, r. 5 of the Rules of the Superior Courts staying these proceedings and/or suspending any further directions in respect of them. As explained in the grounding affidavit of Ms. Julie Murphy-O'Connor, the stay is sought by the moving parties in circumstances where the issues between the parties to these proceedings are substantially the same as those that arise in the "*Callistoy proceedings*" (as described further below). The moving parties maintain that it would make sense, both in terms of costs and court time, if the issues were determined solely in the Callistoy proceedings and that, in the meantime, these proceedings should be stayed. They contend that, if the matter is addressed in that way, this will avoid unnecessary duplication of evidence, hearing time, and interlocutory procedures. The stay is sought on the basis of the principles established in the judgment of Clarke J. (as he then was) in *Kalix Fund v. HSBC Institutional Trust Services (Ireland) Ltd* [2010] 2 I.R. 581 (discussed in more detail below).

Background

2. In order to understand the interrelationship between these proceedings and the Callistoy proceedings, it is necessary to explain the relevant factual background. Both these proceedings and the Callistoy proceedings arise out of a very serious fire which occurred at Douglas Village Shopping Centre, Douglas, Cork on 31st August, 2019. On that day, Ms. Nagham Mohsen, who has been joined to these proceedings by the moving parties as a third party and who is named as a defendant in the Callistoy proceedings, set out on a shopping trip to the centre in Douglas. She drove her Opel Zafira vehicle to the shopping centre and parked her vehicle on level two of the car park which is situated above the shopping centre. While Ms. Mohsen was still in the vehicle, she noticed smoke emerging from the bonnet. Ms. Mohsen got out of the vehicle and telephoned her husband and asked him to come and assist her. In the meantime, Ms. Mohsen decided to go down to the shopping centre on the lower level with a view to seeking help. As she was doing so, the vehicle burst into flames, causing a major fire which quickly spread and which caused damaged to adjoining vehicles, to the car park itself, and to the shopping centre beneath.

3. The plaintiffs in these proceedings ("*the Avoncore plaintiffs*") are the owners and operators of the shopping centre, including the car park. They commenced these proceedings in March, 2020, naming the moving parties, together with the second named defendant, Adam Opel GmbH (the manufacturer of the Zafira vehicle) ("*Adam Opel*") as defendants.

4. In the statement of claim delivered in these proceedings, the Avoncore plaintiffs have made a case as against the first named defendant, Leeson Motors Ltd, on the basis that it is the distributor and vendor of Opel motor vehicles in Ireland manufactured by Adam Opel. The third named defendant, Opel Automobile GmbH is sued on the basis that it was involved in a number of recall campaigns in relation to potential risks found in Opel vehicles including the model of the Zafira vehicle driven by Ms. Mohsen. The fourth named defendant, Vauxhall Motors Ltd ("*Vauxhall*") is a company incorporated in the United Kingdom and it is sued on the basis that it was allegedly responsible for the conduct and management of the recall of Zafira B vehicles in the United Kingdom and that it provided direction to and/or liaised with the first named defendant with regard to the recall of the vehicles in Ireland. The plaintiff further alleges that Zafira B vehicles were manufactured and designed with a defective heating and ventilation system ("*HVAC system*") which led to the emergence in 2015 of a *"sudden increase in vehicle fires involving the Zafira B*". The Avoncore plaintiffs allege that the defendants acted too slowly in commencing a full investigation into the fires affecting the model. It is also alleged that, when the defendants subsequently commenced a number of recall programmes, these were also defective. With regard to Ms. Mohsen's vehicle, the case is made in the statement of claim that there was a failure on the part of the defendants to notify or make her aware of the danger known to exist in the Zafira B vehicle and it is also contended that Ms. Mohsen was not notified of the recalls and furthermore that no adequate steps were taken to ensure that she was notified or made aware of the potential for a fire in her vehicle.

5. According to the case made by the Avoncore plaintiffs in the statement of claim, the fire in Ms. Mohsen's vehicle was caused by the allegedly defective manufacture of the vehicle and, in particular, the HVAC system. The Avoncore plaintiffs contend that their losses will exceed €30 million.

6. The moving parties have delivered a full defence in which they deny that the Zafira vehicle was manufactured and designed with a defective HVAC system. They also refer, in their defence, to the attempts which they claim were made to notify Ms. Mohsen of the recall programme and they allege that there was a failure on her part to respond to their attempts. They deny that the fire originated in or was caused by any defect in the vehicle but they contend, in the alternative, that the loss and damage sustained by the Avoncore plaintiffs was caused by Ms. Mohsen. In addition to the claim that she failed to respond to the recall, the moving parties allege that she is liable, *inter alia,* on the basis of the rule in *Rylands v. Fletcher*. In so far as the case against Vauxhall is concerned, the moving parties contend that the statement of claim discloses no cause of action against it. They

also reserve their rights to amend their defence in circumstances where there is an ongoing investigation into the fire underway.

7. A full defence has also been delivered on behalf of Adam Opel in which similar allegations are made. In addition, Adam Opel claims that the Avoncore plaintiffs are guilty of contributory negligence in allegedly failing to have any adequate system or safeguards in place to prevent the outbreak of fire or to prevent the spread of fire and that there was also a failure to properly supervise the car park or to take any reasonable measures to guard against the outbreak of fire at the property. The defence also makes the case that the Avoncore plaintiffs have failed to name Ms. Mohsen as a defendant to the proceedings and that the plaintiffs must, therefore, be fixed, in accordance with s. 35(1)(h) of the Civil Liability Act, 1961, with responsibility for the negligence, breach of duty and breach of statutory duty on the part of Ms. Mohsen.

8. As noted previously, Ms. Mohsen has since been joined as a third party to these proceedings both by the moving parties and by Adam Opel. The case made against Ms. Mohsen is similar to that particularised in the defence as previously delivered in response to the claim by the Avoncore plaintiffs.

The Callistoy proceedings

9. The Callistoy proceedings relate to the same underlying incident. The Callistoy proceedings were commenced on 21st August, 2020. The Record Number is 2020/5895P. The plaintiffs are Callistoy Ltd, Armari Shoes Ltd, Sheehan Brothers Family Butchers Ltd, Layered Approach Ltd and Neville Jewellers Ltd. The plaintiffs in the Callistoy proceedings are occupiers of five retail units in the shopping centre and they carry on business as a bookseller, a shoe shop, a family butcher, a florist and a jeweller respectively. In the Callistoy proceedings, they have named as defendants each of the moving parties (other than Vauxhall), Adam Opel, Ms. Mohsen, and the Avoncore plaintiffs. The case made by them against Adam Opel and the moving parties is similar to the case made by the Avoncore plaintiffs against the same parties, save that Vauxhall is not named as a defendant. The case made by them against Ms. Mohsen is also similar (albeit not identical) to the case made in the third party notices against Ms. Mohsen in the Avoncore proceedings. Insofar as the case against the Avoncore plaintiffs is concerned, the Callistoy plaintiffs contend that, in their capacities as owners, occupiers and operators of the shopping centre and car park, the Avoncore plaintiffs had a duty to take reasonable care to prevent the premises from becoming a source of danger and to have in place systems and safeguards to protect against fire spreading. There are also allegations of failure to carry out an adequate risk assessment, a failure to supervise the premises including the car park adequately or at all, and a failure to take all reasonable measures to guard against the outbreak of fire (thereby acting in breach of s. 18(2) of the Fire Services Act, 1981). The Callistoy plaintiffs also rely upon the torts of nuisance and *Rylands v. Fletcher* in their case against the Avoncore plaintiffs.

10. The Callistoy proceedings were commenced in August, 2020 but defences have already been delivered on behalf of each of the defendants and the Callistoy plaintiffs have delivered a reply to the defence of the moving parties and also Adam Opel. Both the

Callistoy and the Avoncore proceedings have been admitted into the Commercial Court list. At present, they are being progressed separately albeit that they have been listed from time to time together for the purposes of further directions. In the affidavit grounding the application to admit the Callistoy proceedings into the Commercial List, Mr. Ivan Durcan, solicitor for those plaintiffs, explained that the aggregate value of the plaintiffs' claims is in excess of €1 million. Mr. Durcan explained that each of the Callistoy plaintiffs was insured by Aviva Ireland Insurance DAC ("*Aviva*") and that Aviva has also provided insurance cover to three further parties who conducted business from retail units at the shopping centre and to approximately 20 drivers or vehicle owners in respect of vehicles which had been parked in the car park at the time of the fire and which were damaged or destroyed in the fire. Mr. Durcan explained that the legal and factual issues that will arise for determination in the Callistoy proceedings will be identical to the issues to be determined in other anticipated claims and it is, therefore, likely that an expeditious determination of the issues in the Callistoy proceedings "*will have a significant bearing on those anticipated claims, and will assist in the timely resolution of those other claims".*

The basis upon which the moving parties seek a stay

11. In making a case for a stay of the Avoncore proceedings, the moving parties submit that it makes much more sense for the Callistoy proceedings to be determined first, at least insofar as liability is concerned. They submit that the Callistoy plaintiffs are representative not just of the parties who are before the court in those proceedings but of other parties who are not before the court such as those identified by Mr. Durcan in his affidavit sworn on behalf of the Callistoy plaintiffs in support of their application to have the proceedings admitted into the Commercial List. Counsel for the moving parties also stressed that the Callistoy plaintiffs, in their responses to requests for particulars, have given specific figures for the losses claimed. In contradistinction, the Avoncore plaintiffs, have maintained that it is too early to provide details of their claimed losses.

12. Secondly, counsel for the moving parties place some emphasis upon the fact that, in contrast to the Avoncore plaintiffs (who are named as defendants in the Callistoy proceedings) no one, at this point, has said that the Callistoy plaintiffs (who are merely tenants of retail units in the shopping centre and thus, have no role in the management of the centre) have done anything wrong. On that basis, counsel submitted that the Callistoy plaintiffs are, therefore, in a position to lay out their case against all of the alleged wrongdoers in a normal and straightforward way without having to deal with issues of contributory negligence. The Callistoy plaintiffs have pleaded their case as against all of the alleged tortfeasors save for Vauxhall. With respect to Vauxhall, counsel for the plaintiff suggested that the case against Vauxhall is very thin.

13. Counsel for the moving parties further submitted that the fact that Vauxhall is not a party to the Callistoy proceedings should make no difference insofar as the present application is concerned. While the moving parties do not accept that any cause of action has been pleaded against Vauxhall, they also maintain that, insofar as the pleadings are concerned, the case made by the Avoncore plaintiffs is directed primarily as against the remaining moving parties who were responsible for the recall programme in Ireland. Counsel

submitted that, if the remaining moving parties or Adam Opel are found to be liable for the recall in Ireland or for the alleged negligent handling of the recall in Ireland, it is "*hard to see what additional liability… Vauxhall would bear with regard to its liaison activities".* Similarly, if the remaining moving parties or Adam Opel are ultimately found to have no liability with regard to the recall, counsel suggested that it was equally hard to see how Vauxhall could bear any liability in circumstances where the parties with responsibility for Ireland are held to have no liability. Counsel for the moving parties also submitted that the judgment of Clarke J. in *Kalix* makes clear that it is not necessary in an application of this kind that all parties in both of the actions in issue are identical. On all of these grounds, counsel argued that the fact that Vauxhall is a party to the Avoncore proceedings but is not a party to the Callistoy proceedings is not a reason to refuse the application for a stay. Moreover, it was argued that if the Callistoy proceedings were directed to proceed and the Avoncore proceedings were stayed, it would remain open to the Callistoy plaintiffs to seek to join Vauxhall as a defendant to those proceedings or it would remain open to the Avoncore plaintiffs (in their capacity as defendants in the Callistoy proceedings) to seek to join Vauxhall as a third party.

14. In the affidavit grounding the present application, Ms. Julie Murphy-O'Connor, the solicitor for the moving parties has suggested that a joint hearing of the Avoncore and Callistoy proceedings would not be feasible. This is addressed in paras. 22-23 of her affidavit where she says:-

> *"22. …[In] the Avoncore Proceedings the Plaintiffs are the owners and occupier of the [shopping centre]. The same parties are Defendants in the Callistoy Proceedings. Similarly, the Driver is a party to the Callistoy Proceedings as a defendant… The involvement of the same parties but in different capacities in both proceedings has the potential to give rise to significant procedural difficulties. For example, if the two cases were heard together at the same time by the same judge issues will arise as to where the burden of proof lies in circumstances where parties appear in different roles. This is of particular relevance to the position of the Owner and Occupier [of the shopping centre] which is (sic) the Plaintiff in the Avoncore Proceedings but defendant in the Callistoy Proceedings. It may also significantly lengthen the hearing in light of the procedural difficulties posed.*
>
> *23. Based on the pleadings to date, and for the following reasons I say and believe that it appears appropriate that one of either the Avoncore Proceedings or the Callistoy Proceedings should be stayed because the issues in both sets of proceedings are precisely the same and it would make little logistical or financial sense for both cases to be tried at the same time. While the extent of the damage allegedly suffered by both sets of Plaintiffs is obviously different depending on the proceedings, that is not a justification for arguing that both cases should be heard at the same time. Instead, it would be more sensible for all questions of liability to be tried first in one set of proceedings with the question of damage to be determined afterwards."*

15. The issues addressed by Ms. Murphy-O'Connor in paras. 22-23 of her affidavit were also emphasised in the written submissions delivered on behalf of the moving parties. However, the written submissions did not elaborate on the difficulty which it was suggested by Ms. Murphy-O'Connor would arise in relation to the burden of proof. A further point was, however, made that:-

> *"By definition having two sets of proceedings sent to trial will result in significantly greater expenditure in terms of time and costs, which is not in accordance with the imperative of the Court to ensure that the scarce court resources and the resources of the parties are not inappropriately wasted by duplication of litigation. It is difficult to find any objective justification for the unnecessary additional time and expense that would be incurred in progressing and bringing to trial a multiplicity of proceedings on the same issues and between the same parties."*

In addition, the point was made that, to simultaneously progress both sets of proceedings further would significantly increase the costs in that *"Two full sets of costs would be incurred in every interlocutory application*". It was also suggested that "*experience demonstrates*" that the trial of an action with three parties takes substantially longer than the trial of an action with two parties *"so that the costs of each of the two actions would be greatly increased unnecessarily, and substantially greater resources in terms of the Court's time would be unnecessarily consumed*".

16. In the course of the hearing of the application, I asked counsel for the moving parties to explain in more detail the concern raised by Ms. Murphy-O'Connor (and repeated in the written submissions) in relation to the burden of proof in the context of a single trial of both proceedings. In response, counsel said that very real practical difficulties would arise in relation to the sequencing of witness statements. Counsel suggested that, in the ordinary course, the Callistoy plaintiffs would go first with their witness statements. That step would obviously not give rise to any particular difficulty given that no one has made any claim that they have done anything wrong. Counsel then posed the question as to who should go next? If there is a joint trial, how are the witness statements of the Avoncore plaintiffs to be addressed? Do they deliver their witness statements at the same time as the Callistoy plaintiffs or do they go after the Callistoy plaintiffs? They might want to go after the Callistoy plaintiffs because the latter, in their witness statements, will wish to set out their case against the Avoncore plaintiffs who are defendants in the Callistoy proceedings. In such circumstances, counsel suggested that it was likely that the Avoncore plaintiffs would wish to reserve the right to present their witness statements after the Callistoy plaintiffs. However, they would still have to deliver their witness statements in advance of the other defendants in circumstances where the Avoncore plaintiffs are themselves making allegations of negligence and breach of duty against the defendants to their proceedings (namely, the moving parties and Adam Opel). Counsel suggested that, inevitably, there would be at least two rounds of witness statements from the Avoncore plaintiffs and potentially a third round. The first round would involve the Avoncore plaintiffs setting out their case; the second would be in response to the Callistoy witness statements and, potentially, the third would set out their case against the other

defendants. Counsel also suggested that the Avoncore plaintiffs would presumably wish to reserve to themselves the right to deliver a further round of witness statements by way of response to whatever case in contributory negligence the defendants in the Avoncore proceedings have made against them. There was also the complicating factor arising from the fact that Ms. Mohsen is a third party in the Avoncore proceedings such that *"we then have to have a whole other round of witness statements insofar as the case against Mrs. Mohsen is concerned, where the Defendants who have joined her would issue their witness statements as against her, she would respond and so on".*

17. Counsel for the moving parties contrasted the difficulties outlined in para. 16 above with what would happen if the Callistoy proceedings were to proceed on their own. The Callistoy plaintiffs would deliver their witness statements setting out their position and liability as against each of the defendants including the Avoncore plaintiffs (who are defendants in the Callistoy proceedings). Each of the defendants (including the Avoncore plaintiffs) would respond to the case that is made against them in their witness statements and would also set out their claims *inter se.* Counsel very properly conceded that it was not impossible to arrive at a situation whereby a set of directions could conceivably deal with a joint trial but it was suggested that the "*fairer and procedurally more straightforward*" way of dealing with it is simply to have one case which deals with all issues of liability where all of the parties can set out their case as against each other without "*varying rounds of witness statements and varying issues as to who bears the burden of proof in respect of what allegation*". Counsel also stressed that the prosecution of the Callistoy proceedings will determine all of the issues of liability and that all of the expert investigations that have been carried out can be deployed, just as readily, in the Callistoy proceedings as in the Avoncore proceedings.

18. Counsel for the moving parties suggested that there was no substance to the concerns raised on behalf of the Avoncore plaintiffs. Insofar as the quantum of their claim is concerned (which is significantly higher than that advanced by the Callistoy plaintiffs), counsel submitted that this did not give the Avoncore plaintiffs any equity to go first. Furthermore, counsel submitted that the Callistoy plaintiffs' action is truly representative and reliance was placed on Mr. Durcan's affidavit in support of that submission. Counsel also dismissed the suggestion that the Avoncore plaintiffs could be left high and dry in the event that their action was stayed in favour of the Callistoy proceedings and the latter subsequently settled. Counsel submitted that this was always a possibility in cases where a stay is sought on *Kalix* principles and that could never, in itself, be a reason to avoid the grant of a stay. Moreover, the discovery and the expert reports in the Callistoy proceedings could in any event be used in the Avoncore proceedings in the event that the Callistoy proceedings ultimately did not go to trial.

19. Counsel for Adam Opel supported the case made by the moving parties. He emphasised that there is an ongoing forensic investigation of Ms. Mohsen's Zafira vehicle underway. He suggested that, in those circumstances, any concern that might otherwise arise in relation to delay, in the event that the court were to stay the Avoncore proceedings and the Avoncore parties were forced to join Vauxhall as a third party in the Callistoy

proceedings, was not a significant concern. Counsel submitted that, in the Callistoy proceedings, each of the defendants who are alleged to have been guilty of some element of wrongdoing have been sued and that each of those defendants can serve on the other a notice of indemnity and contribution which would ensure that all issues are addressed. Even if there is "*some slight delay*" in relation to the joinder of Vauxhall to those proceedings (should that arise), all of the issues can be addressed in the Callistoy proceedings without any of the complexity that has arisen as a result of the decision taken by the Avoncore plaintiffs in the Avoncore proceedings not to join Ms. Mohsen as a defendant to those proceedings.

20. Counsel for the Callistoy plaintiffs confirmed that his clients adopt a neutral stance in respect of the application for a stay. He also, very helpfully, confirmed that, in the event that the court was minded to direct that issues of liability should be addressed in advance of issues as to quantum, his clients would have no objection to that course. He stressed that his clients' main concern was to ensure that the Callistoy proceedings continued to be progressed as expeditiously as possible.

21. Counsel for the Avoncore plaintiffs strongly opposed the application made by the moving parties. He stressed that, as *Kalix* shows, the default position is that the Avoncore plaintiffs should be entitled to bring their proceedings to trial subject to there being no disproportionate expense or use of court time. He submitted that the benefits of first running the Callistoy proceedings are negligible and unclear and he submitted that the better course of action is to allow matters to proceed in both actions and to use the case management procedures available in the Commercial List to ensure that the conduct of the actions is undertaken in an efficient and cost-effective way.

22. Counsel for the Avoncore plaintiffs drew attention to the suggestion that was made in para. 12 of the affidavit of David Strahan, the solicitor acting for the Avoncore plaintiffs, as to how the issues in both sets of proceedings could be addressed if both proceedings were linked and case-managed in tandem. In para. 12 of his affidavit, Mr. Strahan suggested that it would be possible to identify the issues in both proceedings to be tried together and that it would also be a straightforward process to identify who would bear the burden of proof in relation to each of the issues that require to be decided. On the issue as to whether the moving parties and/or Adam Opel are liable for the fire, Mr. Strahan suggested that the plaintiffs in the Avoncore proceedings could prosecute their claims as plaintiffs for liability against those entities and the Callistoy plaintiffs could prosecute their claims as plaintiffs against the first three of those entities. Mr. Strahan said that the prosecution of the claims could take place jointly and he highlighted that the defence to the claims is "*in effect identical*". Any concerns about the duplication of expert evidence can be managed through agreement between the parties or, in default of agreement, by means of directions given by the court. Insofar as the issue as to whether the Avoncore plaintiffs have any liability in respect of the fire, the Callistoy plaintiffs could prosecute their claims against the Avoncore parties at the same time as the contributory negligence case made by the defendants in the Avoncore proceedings against the Avoncore plaintiffs. Similarly, insofar as the issue as to whether Ms. Mohsen has any

liability for the fire, the defendants in the Avoncore proceedings could prosecute their third party claim against Ms. Mohsen at the same time as the Callistoy plaintiffs could prosecute their claim against Ms. Mohsen for negligence.

23. Counsel submitted, however, that the suggestions made by Mr. Strahan in para. 12 of his affidavit were of a preliminary or provisional nature in circumstances where, at this point in these proceedings, not all of the issues between the parties have fully crystallised. He suggested that, as the proceedings develop, the parties would obtain a better understanding of the issues, following the making of discovery and further case management directions given by the court. That said, counsel suggested that the issue of greatest complexity that arises in both the Avoncore and Callistoy proceedings is the issue around the causes of the fire and the responsibility of the moving parties and of Adam Opel for that fire. Counsel submitted that, irrespective of the manner in which the cases ultimately proceed to a hearing, the logical way to proceed is for the issues in relation to the cause of the fire to be the subject of evidence once only. He submitted that all relevant parties should be heard on that issue and that liability in relation to that issue should be determined as between the different parties. Counsel suggested that, in turn, this would entail the issues as between the Avoncore parties, the moving parties and Adam Opel all being determined as part of that process. If the Callistoy case is to proceed alone, the Avoncore parties will need to serve notices of indemnity and contribution and it would also be necessary to join Vauxhall as a third party. In contrast, if the Callistoy and Avoncore cases go forward in tandem, that work is already done. It was submitted that this was, manifestly, the most sensible way to proceed.

24. In response to the suggestion made by counsel for the moving parties that, in circumstances where the discovery and the expert reports in the Callistoy proceedings could be deployed in the Avoncore proceedings in the event that the Callistoy proceedings were to settle, counsel for the Avoncore plaintiffs stressed that the very fact that discovery is likely to be similar and the very fact that witness statements are likely to be very similar or identical lean strongly in favour of letting the Avoncore proceedings continue in tandem with the Callistoy proceedings and for both proceedings to be case-managed together. Counsel observed that there was a degree of artificiality inherent in the case made by the moving parties who are saying, on the one hand, that everything is "*more or less the same*" in both sets of proceedings but, on the other hand, saying "*let's not have Avoncore proceed because there seems to be some additional tier of cost or expenditure involved*". In answer to a question from me, counsel for the Avoncore plaintiffs expressed the view that, while one could not say with absolute certainty that there was going to be complete identity between the issues in both sets of proceedings, there is a "*huge degree of overlap*". He suggested that, to a very large extent, the discovery and the witness statements in both sets of proceedings would be the same and there would, accordingly, be no need to replicate in both actions each of the requests for discovery or each of the expert reports.

25. With regard to the concerns expressed on behalf of the moving parties in relation to procedural difficulties, counsel for the Avoncore plaintiffs submitted that there was

nothing unusual about the existence of such issues which typically arise, for example, in cases where a third party claim or a claim on foot of a notice of indemnity or contribution is addressed at the same time as the trial of issues as between the plaintiff and the defendants. Issues in relation to the sequencing of witness statements also arise in cases where a defendant mounts a counterclaim against a plaintiff. Counsel suggested that it was not at all clear that, even if the Callistoy proceedings were to proceed alone, similar issues would not arise, in any event. This would happen if, for example, the Avoncore parties are required to join Vauxhall as a third party to those proceedings. In relation to Vauxhall, counsel for the Avoncore plaintiffs confirmed that, in the event of a stay of these proceedings, he has instructions to join Vauxhall as a third party to the proceedings. He stressed that a case has been made out against Vauxhall in the Avoncore statement of claim in relation to the extent to which Vauxhall directed and or liaised in relation to the recall process in Ireland. He emphasised that no one has brought any application to dismiss the claim against Vauxhall. Counsel submitted that additional costs would have to be incurred if his client was compelled to join Vauxhall as a third party to the Callistoy proceedings. Counsel also drew attention to the manner in which the Avoncore proceedings were delayed as a consequence of confusing messages given on behalf of the moving parties as to the identity of the manufacturer of the vehicle and as a consequence of the steps which the Avoncore plaintiffs were forced to take in order to serve proceedings abroad. As a consequence of the attitude adopted by the moving parties and Adam Opel, service had to be effected through the transmitting agency process. Had those difficulties not arisen, the Avoncore proceedings would have been significantly further advanced at an earlier stage than the Callistoy proceedings. Counsel also made the point that, in terms of the joint investigation that is currently underway (which has encountered significant difficulties having regard to the ongoing impact of the COVID-19 pandemic), the Avoncore plaintiffs have acted as a point of contact and that they are very much the parties who have taken the lead insofar as the investigation process is concerned.

26. Counsel for Ms. Mohsen supported the position adopted by the Avoncore plaintiffs. While the point was made by counsel for the moving parties in reply that Ms. Mohsen was insured by the same insurer as the Avoncore plaintiff, I found the submissions on behalf of Ms. Mohsen to be very helpful in the context of the application of the *Kalix* principles. Counsel for Ms. Mohsen submitted that, on the basis of the decision of Clarke J. in *Kalix*, the moving parties have the burden of demonstrating that a stay of the Avoncore proceedings is (a) necessary and (b) proportionate to prevent unnecessary expense and usage of court time. Counsel suggested that the application gives rise to an important question which he posed in the following way:-

> *"Can a well-resourced Defendant choose the case in which it is sued and which will go to trial first and which, accordingly, will determine the important issues in the case, the case in which it, perhaps, perceives that it has some strategic advantage?"*

He highlighted that, from his client's perspective, Ms. Mohsen's position is quite different in both sets of proceedings. In the Callistoy proceedings, she has been named as a defendant whereas, in the Avoncore proceedings, the case against her is at one remove in circumstances where, as a third party, there will be no case against her unless one of the defendants is found liable and that defendant succeeds in its claim for indemnity and/or contribution as against her.

27. In circumstances where counsel for the moving parties accept that the issues in both cases are essentially identical, counsel for Ms. Mohsen suggested that this begs the question why the Avoncore proceedings should be stayed rather than the Callistoy proceedings. Counsel suggested that the answers to that question given on behalf of the moving parties are not clear. Counsel also suggested that, while he did not have express instructions on the point, it manifestly makes sense that the issues of liability should be addressed first before any issues of quantum are considered. Counsel submitted that the concerns expressed by the moving parties can appropriately be dealt with by way of case management and the sequencing of issues and that the moving parties have not advanced any real reason why this should not be possible.

28. In her replying submissions, counsel for the moving parties stressed that, depending upon the outcome of the joint investigation as to the cause of the fire, it may be necessary for the parties to amend their pleadings. She suggested, in those circumstances, that the issue of the joinder of Vauxhall as a third party to the Callistoy proceedings (in the event that a stay is granted of the Avoncore proceedings) would be *"a relatively confined one*". Similarly, insofar as counsel for the moving parties stressed that, if the present proceedings are stayed, it would be necessary for notices claiming indemnity and/or contribution to be served by the Avoncore parties in the Callistoy proceedings, counsel suggested that this was a relatively minor step in the context of the potential for re-pleading the case following the completion of the joint investigation and also the possible joinder of additional parties (in the event that others are identified as having a potential liability on the conclusion of that investigation). Counsel suggested that the position adopted by the Avoncore plaintiffs was unsatisfactory in that, counsel on their behalf, in his submissions, had not provided any clear direction as to how witness statements would be addressed in the event of a joint trial of both proceedings.

The principles applicable to an application for a stay of the kind sought here

29. The principles which emerge from the decision of Clarke J. in K*alix Fund Ltd v. HSBC Institutional Trust Services (Ireland) Ltd* [2010] 2 I.R. 581 can be summarised as follows:-

    (a) The court has a broad power to give directions for the conduct of proceedings entered in the Commercial List. O. 63A, r. 5 makes this clear. Under that rule, the court can give directions "*as appear convenient for the determination of proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings";*

(b) The court has an inherent power to stay proceedings in a range of different circumstances. For present purposes, what is relevant is that the court has the power to stay one set of proceedings until another related case has been determined. A stay of this kind is, in essence, a procedural direction to the effect that no further steps should be taken in one set of proceedings until some other proceedings, or set of proceedings, have been heard and determined;

(c) In ordering its business, the court has a discretion to ensure that scarce court resources and the resources of parties to litigation are not inappropriately wasted by an unnecessary duplication of litigation. In addition, it is important that measures are taken to minimise the risk of any inconsistent determinations arising from different proceedings. For the latter reason, cases can be linked with a view to ensuring that a particular series of cases (which share common factors) are assigned to a single judge who will determine all relevant issues across the range of cases concerned;

(d) As part of its power to manage the conduct of a series of cases in which there is either a significant factual or legal overlap, the court should aim to bring about a just and expeditious trial while, at the same time, seeking to minimise costs and to ensure that scarce court resources are not wasted;

(e) Among the factors to be borne in mind in assessing how a series of cases are to be managed are the following:-

(i) The fact that each individual plaintiff is entitled to have the proceedings determined in an expeditious manner "*subject only to ensuring that there is no disproportionate added expense or drain on court time imposed*";

(ii) Consideration should be given as to the extent to which the first case to be tried is likely to bind all other cases in whole or in part.

(iii) It is important to ensure that any measures adopted which have the effect of preventing a case from progressing in the ordinary way must be no more than is necessary and proportionate to achieve the end of preventing unnecessary expense or use of court time.

(f) There is no reason, in principle, why a number of cases could not come to trial at the same time. Furthermore, in the context of a sequenced trial of all of the cases, there is no reason why the issues which arise in the various cases could not be tried in a logical way with only those parties who had a logical and legitimate interest in the particular set of issues in question, having an entitlement to be heard in respect of those issues.

30. It is useful to consider how Clarke J. applied those principles to the facts of the cases before him. The *Kalix* proceedings were one of a large number of cases pending before the court arising out of the collapse of an investment service company controlled by the disgraced financier, Mr. Bernard Madoff ("*the Madoff company*"). The Madoff company had been appointed by HSBC (the custodian/trustee of a number of investment funds) as

sub-custodian. In the *Kalix* case and several others cases also, the monies in question had been invested through an Irish registered UCITS fund vehicle, namely, Thema International Fund ("*Thema*"). Very large losses were suffered by investors as a result of the fraudulent way in which the Madoff company was run. With a view to recovering some of these losses, proceedings were taken by Thema against HSBC. However, Thema was also a defendant in a significant number of proceedings taken by investors who had entrusted funds to it. It appears that approximately 50 sets of proceedings were in existence in which investors sought compensation against HSBC or as against both HSBC and Thema. These included proceedings taken by Kalix against HSBC and they also included proceedings taken by UBI Banca against both Thema and HSBC.

31. The *Kalix* proceedings were instituted in April, 2009. The UBI Banca proceedings were instituted in August, 2009. Thema's proceedings had previously been instituted by it against HSBC in December, 2008. In each of the proceedings, it was alleged that HSBC was in breach of an alleged duty of care, as a custodian of the funds. It was also alleged that it was in breach of its statutory duty under the *UCITS* Directive. Allegations were also made against HSBC that it was in breach of trust. There were, however, a number of issues which were specific to the Kalix proceedings and, separately, issues which were specific to the UBI Banca proceedings. There were also issues which were solely raised in the Thema proceedings relating to the terms of the custodian agreement in place between Thema and HSBC. Against that backdrop, HSBC applied for an order staying both the Kalix proceedings and the UBI Banca proceedings pending a determination of Thema's proceedings against HSBC. As outlined above, there were obviously common issues between all three sets of proceedings but there were also individual issues which were peculiar to each one of the three sets of proceedings in question. At pp. 601-604 of the report, Clarke J. came to the conclusion that all proceedings in which an allegation was made against either or both Thema and HSBC should be linked for the purposes of case management and trial, such case management and trial to be undertaken by the same judge. He also indicated that it would not be appropriate: *"that there be any unnecessary duplication either in pleading, witness statements as to fact, expert reports, or… written submissions for trial…".*

32. At that point in the Kalix proceedings, it was not possible to specifically identify the issues which "*truly require to go to trial*" but Clarke J. indicated that, when that point was reached, it would be possible to form a better view as to whether the issues as between Thema and HSBC should be tried before or after the standalone issues that arose between the investors and HSBC. At p. 602, Clarke J. continued:-

> *"It seems to me that, in general terms, what should be aimed at is that the Kalix and UBI Banca proceedings together with the Thema… proceedings should be prepared for trial. When a clearer picture emerges as to all of the issues that will truly require to be determined, a decision can be made as to the precise sequence in which those issues can be tried. There is no reason why issues which are common to all or many of those proceedings cannot be tried together. For example, the issues which relate to whether any actions of [HSBC] give rise to a cause of*

action… under the UCITS Regulations… are common to all cases…, and there is no reason why those issues cannot be tried together as issues in the trial of both the Kalix, UBI Banca and Thema proceedings. Likewise, those issues which are specific to the investor proceedings can be tried separately. Which part of a sequenced trial should take place first is a matter to be determined at a later stage."

33. With regard to the balance of the investor proceedings, Clarke J. formed the view that it should not be necessary to progress any of them unless a discrete issue arose in any one of them which was not covered by the issues in either the *Kalix* or *UBI Banca* proceedings. If any such issue did emerge, Clarke J. expressed the view that, while it could be progressed through pleadings and through other procedural steps, a trial of those proceedings would be unlikely "*until all of the issues of more general application have been determined".*

34. At p. 603 of his judgment, he summarised his approach as follows:-

"What is envisaged is, therefore, that the Kalix, UBI Banca, Thema… cases (together with any additional cases necessary to complete the overall picture) should, in principle, be tried together. However, it is not my current view that that means that all issues in all cases should come to trial at the same time. Rather when the totality of all of the issues that arise in each of the cases has been clarified not just by pleadings but by all other pre-trial steps, a final decision on the precise sequence in which those issues will be tried will be made. For the purposes of that decision an overall view… will be taken and there is no reason in principle why issues common to a number of cases may not be tried together."

35. In reaching that view, Clarke J. explained that he was mindful that some risk existed that, in following the procedure suggested by him, some costs might be wasted by progressing proceedings which may ultimately not have to be heard. However, he was of the view that the risk of not following that procedure was greater. At p. 603, he said:-

"There is a risk that proceedings which have not been progressed at all will need to be restarted so that remaining issues can be decided. If I were to accede to the motion brought on behalf of [HSBC] then it follows that no further progress could take place in any of the investor proceedings until such a time as the Thema proceedings were completed. It would then be necessary to restart the investor proceedings to deal with whatever issues remained for determination. For the reasons which I have analysed earlier in this judgment it is impossible to say at this stage whether those remaining issues would be many or few and indeed that question is… partly dependent on how the Thema proceedings might be resolved. However, under the procedure which I now set out, all common issues will be ready for trial at more or less the same time. While that may involve some additional expense only those issues which can conveniently, efficiently and justly be tried together will be tried together. However, as soon as any set of issues have been determined, the next set of issues which logically arise can immediately go to trial if they remain necessary of resolution in the light of the decision taken on the earlier

issues. On that basis, there should be no significant delay in any relevant party getting a determination of all issues which are material to its interests. It seems to me that such a course of action is more calculated to lead to a just, efficient and timely disposal of all of the proceedings and to minimize the risk of the waste of court time."

36. The approach taken by Clarke J. in *Kalix* provides valuable guidance, not just in relation to the principles which govern an application of this kind but also in relation to how those principles should be applied in practice. The decision illustrates that, where there are issues shared between a number of actions which have reached a similar level of preparation for trial, it will often make sense that those actions, at least insofar as they share similar factual or legal issues, should be heard and determined together. In that way, duplication of effort and duplication of court time will be avoided. While such an approach may increase costs to some extent, the approach taken by Clarke J. ensures that issues which can conveniently, efficiently and justly be tried together will be tried together. It also ensures that all issues that require to be tried will be addressed in an appropriate sequence and without any significant delay between the determination of one issue and another. Furthermore, the fact that one party (in that case, Thema) may be both a plaintiff and a defendant in the proceedings to be case-managed in that way, was clearly not regarded as something that could not be appropriately addressed in the sequencing of the hearing of issues.

37. It is also clear from the approach taken by Clarke J. that, in substance, he refused the application for the stay sought by HSBC and, instead, used the application as a vehicle in which to give case management directions as to how three sets of proceedings which shared a significant number of issues should be prosecuted, heard and determined. In this context, it is important to bear in mind that, as O. 63A, r. 5 makes clear, a Commercial List judge may, having heard the parties, of his or her own motion, give such directions for the conduct of proceedings entered in the Commercial List as appears convenient for the determination of those proceedings in a manner which is "*just, expeditious and likely to minimise the costs of those proceedings".*

The application of the *Kalix* principles in the present case

38. Having regard to the principles outlined by Clarke J. and the approach taken by him in *Kalix* and having heard all of the submissions of the parties in this case and in the Callistoy proceedings, I propose to take a similar course. In the first place, I am not persuaded by the arguments made by the moving parties that a stay should be granted of these proceedings with a view to allowing the Callistoy proceedings to be heard and determined first. It is clear from the judgment in *Kalix* that the default position is that each individual plaintiff is entitled to have its proceedings determined subject only to ensuring that there is no disproportionate expense or drain on court time imposed. It would, of course, be disproportionate (both in terms of wasted costs and wasted court time) if two actions between substantially the same parties and raising substantially similar issues were to proceed in parallel without any attempt being made to case-manage them in a way which ensures that unnecessary duplication is avoided and which

also seeks to ensure that there are not two wholly separate trials addressing the same issues. As explained by Clarke J., such an approach would also carry the risk of giving rise to conflicting outcomes.

39. As the approach taken by Clarke J. very clearly illustrates, there are a series of measures which can be taken (particularly where proceedings are case-managed in the Commercial List) which will ensure that such duplication should not arise and which will also ensure that an efficient and sensible approach is taken to the way in which the issues are heard and determined at trial involving all of the parties in both sets of proceedings insofar as they are affected by the issues. To the extent that individual issues arise between some parties only and not others, the judgment in *Kalix* suggests that such issues should be separately addressed after all of the common issues have been determined.

40. Given the commonality of issues as between the Avoncore proceedings, on the one hand, and the Callistoy proceedings, on the other, it seems to me to be eminently sensible that a similar approach should be taken here as was taken by Clarke J. in *Kalix*. I will therefore invoke my power under O. 63A, r. 5, to make directions that both these proceedings and the Callistoy proceedings should be case managed together and that all issues common to both sets of proceedings should also be heard and determined together. That will allow both sets of proceedings to be progressed while at the same time ensuring that all issues in both sets of proceedings will be addressed in an appropriately sequenced, efficient and cost-effective way. The fact that both sets of proceedings have been advanced to a broadly similar stage makes this a particularly suitable approach to adopt. To stay one case in favour of the other could give rise to a significant risk of injustice if it subsequently transpired that the case allowed to proceed were either to settle or to stall. I am therefore of the view that both sets of proceedings should go forward for trial together and be case managed jointly between now and the trial. As in *Kalix*, there is no reason why the liability issues which are common to both sets of proceedings cannot be tried together with any issues referable to one set of proceedings only being tried subsequently. Likewise, issues of quantum may well require separate hearings.

41. In this context, I am not persuaded by the moving parties that difficult issues will arise in relation to the sequencing of witness statements or in relation to the burden of proof. While I think it would be unwise to attempt, at this stage, to give specific directions in relation to the sequencing of witness statements, I have no doubt that the distinguished legal teams representing the parties in this case will be well capable of putting forward sensible and workable approaches in relation to the sequencing of witness statements. In the unlikely event that there is ultimately any dispute between the parties in relation to sequencing, such a dispute can be resolved by the court. As *Kalix* shows, the fact that a party may be a plaintiff in one set of proceedings and a defendant in the other is not an insuperable barrier to the hearing of both sets of proceedings together. The situation is not very different to cases where a defendant has joined a third party or where a defendant has, in addition to defending the claim brought by the plaintiff, made a counterclaim against the plaintiff.

42. I appreciate that the moving parties are concerned that a hearing of both actions together may increase the length of the trial and thereby increase the costs to be incurred. While I appreciate that a joint hearing may lead to some increase in costs, I am nonetheless of the view that the additional cost involved will not be disproportionate. This is especially so where, but for the absence of Vauxhall in the Callistoy proceedings, the parties in both sets of proceedings are the same albeit that the Avoncore plaintiffs appear as defendants in the Callistoy proceedings and Ms. Mohsen is a third party in Avoncore but a defendant in Callistoy. Crucially, the most significant issue that arises in both sets of proceedings is the cause of the fire and the determination of that issue, common to both sets of proceedings, will be central in any determination as to liability for the damage caused by the fire.

43. I have recent experience of a hearing in which four plaintiffs' claims were heard together on the issue of liability which was largely common to all four claims although there was a separate issue (based on a representation) which arose in one case only. That hearing arose in *Hyper Trust Ltd t/a The Leopardstown Inn v. FBD Insurance plc* [2021] IEHC 78. The hearing was originally estimated by counsel for the defendant to take fourteen days. That estimate was not accepted by the court and the hearing was fixed for twelve days. In fact, the hearing, thanks to the sensible cooperation between the legal teams for the parties, finished in eleven days. Although there were some issues which were peculiar to one or more of the four sets of proceedings, that did not significantly increase the length of the hearing. It was therefore possible, for example, to address, in the course of the joint hearing, the issues based on representation together with the claim for aggravated damages made on foot of it notwithstanding that they arose in only one of the four cases. It was, of course, essential that the legal teams concerned took a very disciplined approach to the making of submissions and the calling of evidence. I have no reason to believe that the same approach cannot be taken in the context of the Avoncore and Callistoy proceedings. In circumstances where similar issues arose in each of the four cases in the *FBD* hearing, it was unnecessary for counsel acting for the individual plaintiffs to repeat the same submissions or to unnecessarily go over the same ground. As points were addressed in the submissions of one counsel, those making submissions thereafter were in a position to adopt the submissions made and to pass on to deal with points which were specific or peculiar to the case in which the latter counsel were retained. Similarly, insofar as the calling of evidence was concerned, it was unnecessary for each of the plaintiffs to call individual experts in each of the four cases to deal with the same subject matter. The plaintiffs ultimately shared one expert. This, therefore, reduced the level of expense incurred and also the amount of court time spent on the hearing. I am confident that a similar approach can be taken by the hugely experienced legal teams in these proceedings.

44. In terms of the sequencing of issues, it is too early, at this point in the proceedings, to make any determination as to how that might be done. It seems to me that, as occurred in *Kalix*, it would make sense to leave that question over until the totality of the issues that arise in both cases have been clarified not just by reference to the pleadings but also by reference to the outcome of other pre-trial steps such as discovery and the joint

investigation currently underway. At that point, it will be possible to make a final decision on the precise sequence in which the issues should be tried.

45. I appreciate that the moving parties are concerned not just with the costs of a trial but also with the costs that will be incurred at interlocutory stages if both actions are case managed together. As noted in para. 15 above, one of the points made on behalf of the moving parties is that *"Two full sets of costs would be incurred in every interlocutory application"*. I can see no basis upon which two full sets of costs would arise on every interlocutory application if the two actions are case managed side by side. The suggestion made by the moving parties ignores the fact that, in both sets of proceedings, the same legal teams are retained for the respective parties. In those circumstances, I do not believe that there could be any question of more than one set of fees being charged save, perhaps, if there was a specific issue that arose solely in one set of proceedings which required to be addressed separately. However, as I sought to stress in the course of the hearing in February, 2021, there is no reason why discovery cannot be pursued in parallel in both sets of proceedings without unnecessary duplication of costs. The issues that arise as between the parties in both sets of proceedings are substantially the same, if not completely identical. The categories of discovery are, therefore, likely to coincide in both sets of proceedings (save in relation to the losses claimed by the respective plaintiffs). There is no reason why, when discovery is sought in one set of proceedings, the same or substantially the same letter has to be regurgitated in the other set of proceedings. The parties can proceed in a sensible way and make clear that the discovery which is sought in one set of proceedings is also sought in the other proceedings. Agreement can be reached that the discovery in one set of proceedings can be used in the other and the usual implied undertaking can be varied accordingly

46. Likewise, insofar as expert witnesses are concerned, there is no reason why separate experts have to be retained in both sets of proceedings. If the issues are addressed in a sequenced way, the same expert can address both sets of proceedings in a single report. Again, I appreciate that, insofar as *quantum* is concerned, that will require separate consideration. However, I do not envisage that the *quantum* hearings would proceed together. It seems to me that this is an obvious case in which liability should be addressed first. Within any such liability hearing, counsel for the Avoncore plaintiffs submitted that the most obvious issue to be addressed first is the cause of the fire. While I do not make any determination at this point that the cause of the fire should be addressed first, it does seem to be a fairly obvious issue (which is common to both sets of proceedings) to be considered first. Thereafter, the respective liabilities of the different sets of parties can be addressed.

47. In my view, if the further prosecution and hearing of both sets of proceedings are not addressed in this way, there is a very real risk that court time will unnecessarily be spent on separately case managing two sets of proceedings separately. In addition, I must bear in mind the potential injustice that would be caused if a stay was granted in either of the proceedings. The plaintiff in the proceedings stayed would run the risk that the proceedings directed to proceed to trial might settle with the result that significant delay

in determining the liability issues could be experienced by the plaintiff whose action is stayed. Furthermore, if a stay were to be granted of the Avoncore proceedings (as requested by the moving parties), that would place the Avoncore plaintiffs in a particularly difficult position in that they would then have to decide whether or not to seek to join Vauxhall as a third party to the Callistoy proceedings. While the moving parties have, very properly, conceded that they would not raise any issue of delay in those circumstances, they have not gone any further and, therefore, would remain free to seek to set aside the third party notice on other grounds. Quite apart from that possible prejudice to the Avoncore plaintiffs, it also has to be said that the moving parties have adduced no authority for the proposition that a stay of proceedings is justified even where the effect of the stay would be to require a plaintiff to take steps to join an additional party to the proceedings which are to go forward to trial.

Conclusion

48. Having regard to the considerations outlined above, it seems to me that the following directions are appropriate:-

(a) In the first place, both the Avoncore and Callistoy proceedings (as described in para. 9 above) should continue to be case managed together. At this point, there is no reason why case management cannot continue in the usual way before the judge in charge of the Commercial List. While Clarke J. in *Kalix* envisaged that case management might have to be done by the judge assigned to hear the cases in question, I do not believe that the proceedings have yet reached the stage where this is necessary. In due course, it would be advantageous to have the judge assigned to hear the cases deal with any case management issues that arise in relation to the sequencing of witnesses or other aspects relevant to the running of the trial.

(b) Secondly, it seems to me that both cases should proceed to trial in tandem with a view to ensuring that a single trial will take place of the issues which arise in both sets of proceedings in a structured and cost-efficient way. This will require discussions and cooperation between the legal teams acting for the parties to ensure that the hearing can be conducted as smoothly and as efficiently as possible.

(c) Thirdly, for the reasons previously explained, the cases should go forward on the basis that all issues of liability will be addressed separately from *quantum*. Thus, the joint hearing will be confined to issues of liability. Issues of *quantum* will, most likely, have to be addressed individually in both cases at a later point.

(d) Fourthly, once (following the completion of all necessary pre-trial steps), the issues to be determined are crystallised, it will be necessary for the parties to constructively confer with one another with a view to agreeing the sequence in which the liability issues are to be heard.

(e) Fifthly, every effort should be made by the parties to avoid any duplication of costs in relation to pre-trial steps including discovery. Thus, requests for discovery should be tailored appropriately to ensure that a single request for discovery should, where possible, cover all liability issues in both sets of proceedings relevant to the party seeking discovery. In addition, discovery should proceed on the basis that discovery in one set of proceedings would be available in both proceedings with the implied undertaking varied accordingly.

(f) While ultimately a matter for the judge in charge of the Commercial List, it seems to me that it would be wise, at a later point in the proceedings, to give consideration to assigning case management issues in relation to the trial and the sequencing of issues to the judge to whom the trial of the liability issues is to be assigned.

49. I will therefore refuse the application of the moving parties and instead make the directions set out in para. 48 above in exercise of the power available to the court under O. 63A, r. 5. In so far as costs are concerned, my provisional view is that the costs of all parties should be costs in the cause. Although I have refused the moving parties' application, the hearing of the application has nonetheless served a useful purpose in that it has allowed the issues to be debated and provided an opportunity for the court to give directions for the case management of the proceedings. This is, nonetheless, no more than a provisional view and the parties are at liberty to seek a different form of order in relation to costs. If any party wishes to do so, they should email the registrar to that effect not later than 14 days from the date of this judgment, following which I will fix a date for the remote hearing of any submissions in relation to costs. However, the parties should be aware that there may be costs consequences where such a hearing is sought.