[2022 Gib LR 335]

GVC HOLDINGS (GIBRALTAR) LIMITED (formerly known as BWIN.PARTY DIGITAL ENTERTAINMENT LIMITED and formerly known as BWIN.PARTY DIGITAL ENTERTAINMENT PLC) v. EMERALD BAY LIMITED, STINSON RIDGE LIMITED, R. PARASOL DELEON and J.R. DELEON

SUPREME COURT (Dudley, C.J.): December 20th, 2022

2022/GSC/035

Civil Procedure—trial of preliminary issue—appropriate issues—no trial of preliminary issues in claim for breach of contractual, tortious and/or fiduciary duties where preliminary issues fact sensitive and no agreed factual matrix

The court considered whether certain issues should be resolved by way of a preliminary issues hearing.

The claimant was a company incorporated in Gibraltar which operated in the online gaming industry. The defendants were shareholders in the claimant (the first and second defendants directly, and the third and fourth defendants indirectly through their ownership of the first and second defendants).

A dispute had arisen between the parties. The defendants asserted that pursuant to a series of agreements between BWIN (which was later taken over by the claimant), the defendants and others, the defendants had been obliged to divest themselves of their shares in BWIN by a certain date. In breach of contractual, tortious and/or fiduciary duties, BWIN failed to provide required information to the defendants and failed to consider or support their request for an extension of the period during which they were required to sell their shares. It was asserted that the shares were sold at a heavy loss. In proceedings between the parties, the defendants brought a counterclaim that the claimant had breached contractual, fiduciary or tortious duties to them, causing them loss and damage.

The claimant proposed a list of 10 issues to be resolved by way of a preliminary issues hearing. Draft preliminary issues 1, 2, 3, 6, 7 and 8 sought the determination of the proper construction of express terms in, and whether there arose alleged implied terms under, the various agreements between the parties. Draft preliminary issue 10 asked whether, in effect, the defendants' claim for an extension of the period allowed for the

disposal of their shares was destined to fail because, even if made good on the facts, it was invalidated by a provision in an agreement between the parties. Draft preliminary issues 4, 5 and 9 asked whether the claimant owed alleged fiduciary and tortious obligations.

The claimant submitted that in relation to draft preliminary issues 1, 2, 3, 6, 7 and 8, the questions related to the proper construction of express terms and whether implied terms arose. These were fundamentally questions of law capable of resolution without evidence beyond the agreements themselves and on the basis of submissions alone. In so far as the claimant might prevail on those issues, that would be the end of the counterclaim for breach of contract. If it prevailed on the majority or even some of those issues, it would substantially narrow the issues for trial. In relation to draft preliminary issue 10, the issue was whether, in effect, the defendants' extension claim was destined to fail because, even if made good on the facts, it was invalidated by a provision in an agreement. This was a paradigm preliminary issue, being a potential "knock-out" point. In relation to draft preliminary issues 4, 5 and 9, it was submitted that the suggestion that a company might owe any fiduciary duty to its former shareholders appeared to be unprecedented and that there was a fundamental contradiction in the defendants' case on fiduciary duties which meant that draft preliminary issues 4 and 9 could readily be resolved on assumed fact.

The defendants did not object in principle to the determination of preliminary issues but submitted that this should not progress at a stage in the claim where there were no agreed facts, disclosure had not taken place and witness statements had not been exchanged. The draft preliminary issues were mixed questions of fact and law which could not be properly or fairly decided in the absence of established or agreed facts. Furthermore, the draft preliminary issues would not in any event be determinative of the claim unless the claimant were to be successful in respect of all issues, including sub-issues.

Held, judgment as follows:

It would be more appropriate for all of the issues to be dealt with at trial. This was a complex high value case. The draft preliminary issues concerning the construction and interpretation of the various agreements were the issues which most clearly could be dealt with as preliminary issues in that, in interpreting a carefully drafted commercial agreement, the meaning of a clause would usually be derived from the language used. However, unless the language used was wholly unambiguous, where there were competing constructions the principles relating to the interpretation of contractual documents required the court to undertake an iterative process with each possible interpretation considered against the terms of the agreement, its commercial consequences and a detailed analysis of the factual matrix. The fundamental importance of the factual matrix was even greater in so far as the claims were framed as breach of tortious or fiduciary duties. These raised questions of alleged liability on the part of the claimant which was concurrent with the contractual obligations but in respect of which

determinations of fact as to the nature of the relationship between the parties was fundamental. Moreover, as regarded the breach of fiduciary duty, there was a suggestion that a company might owe a fiduciary duty to its former shareholders. This was a novel point of law and it was well established that, generally, any decision on any such point should not be based on assumed fact but on actual findings of fact. In varying degrees, all of the proposed preliminary issues were fact sensitive and, in the absence of an agreed factual matrix, it would be very unwise to proceed on the basis of assumed facts, as findings at trial contradicting any such assumed facts could unfairly prejudice one of the parties or be useless because a determination on facts which turn out to be wrong would be of no value. Any preliminary issue would therefore have to be progressed with the benefit of witness statements and oral evidence. Against the backdrop of diverse heads of claim which were all underpinned by the same factual matrix there was a very real likelihood that the same witnesses would have to give evidence both at the preliminary issues hearing and at trial and involve a high degree of duplication. The preliminary issues identified would not, taken individually, dispose of the case, whilst the multiplicity of proposed preliminary issues of itself militated against proceeding in that fashion. Moreover, any determination on one or more of the draft preliminary issues would likely be followed by an appeal which would probably result in the proceedings overall taking longer (paras. 25–31).

Cases cited:

(1) *Investors' Compensation Scheme Ltd.* v. *West Bromwich Bldg. Socy*., [1998] 1 W.L.R. 896; [1998] 1 All E.R. 98; [1998] 1 BCLC 531; [1997] CLC 1243, considered.

(2) *McLoughlin* v. *Grovers (A Firm)*, [2001] EWCA Civ 1743; [2002] Q.B. 1312; [2002] 2 W.L.R. 1279; [2002] PIQR P20; [2002] PNLR 21, considered.

(3) *Marks & Spencer plc* v. *BNP Paribas Secs. Servs. Trust Co. (Jersey) Ltd*., [2015] UKSC 72; [2016] A.C. 742; [2015] 3 W.L.R. 1843; [2016] 4 All E.R. 441; (2015), 163 Con. L.R. 1; [2016] 1 P. & C.R. 13; [2016] L. & T.R. 8, considered.

(4) *Rossetti Marketing Ltd.* v. *Diamond Sofa Co. Ltd.*, [2012] EWCA Civ 1021; [2013] Bus. L.R. 543, referred to.

(5) *Steele* v. *Steele*, [2001] C.P. Rep. 106, referred to.

Legislation construed:

Civil Procedure Rules (S.I. 1998/3132), r.3.1(2): The relevant terms of this provision are set out at para. 13.

D. Lewis, *K.C.* with *S. De Lara* (instructed by Ellul & Co.) for the claimant; *O. Smith* (instructed by TSN) for the defendants.

1 **DUDLEY, C.J.:** This is the judgment on an issue arising at a case management conference ("CMC") following close of pleadings and the

filing of directions questionnaires. Namely, whether some or all the issues identified by the claimant in its list of proposed preliminary issues should be resolved by way of a preliminary issues hearing. A second issue requiring determination but which in some measure is dependent upon the first, is as to the breadth of disclosure. In the event because of time constraints, I was not addressed at the hearing in relation to disclosure and the claim will have to be listed for a further CMC so that that issue is determined before a different judge.

2 I say a different judge, because the skeleton argument relied upon by the defendants is co-signed by Ms. Emma Dudley, who happens to be my daughter. At the start of the hearing I immediately brought this to the attention of counsel, and made the point that this was clearly recusal territory and that the CMC could be listed before another judge the following day. In the event the parties agreed and submitted that the hearing should proceed and gave an undertaking to the effect that they would not advance in any matter or any manner any doubts or complaints as to my independence in respect of the hearing. I agreed to proceed with the hearing but said that any future applications or hearings would be listed before another judge.

3 The claimant is a company incorporated in Gibraltar, operating in the online gaming industry. The defendants were shareholders in the claimant, in the case of Emerald Bay Ltd. ("Emerald") and Stinson Ridge Ltd. ("Stinson") directly, and indirectly in the case of the third defendant and the fourth defendant through their respective ownership of Emerald and Stinson.

4 As Mr. Lewis accurately puts it, the defendants are the natural claimants in this dispute, and it is only the unusual procedural history which has led to them being formally the defendants.

5 An overview of the dispute is to be found in the Court of Appeal judgment of Moore-Bick, J.A., with whom Goldring, J.A. and Kay, P. agreed (reported at 2017 Gib LR 95) which concerned the question whether the dispute between the parties should be determined in New Jersey or Gibraltar. In the event the Court of Appeal upheld the judgment of Jack, J. that the dispute should be determined in Gibraltar (*ibid.*, at paras. 2–12):

> "2 The respondent, Bwin.Party Digital Entertainment Ltd. ('Bwin'), represents the result of a merger between two companies involved in online gaming, PartyGaming plc, a company incorporated in Gibraltar, and Bwin Interactive Entertainment A.G. ('BIE'), a company incorporated in Austria. Immediately before the merger, Ms. Ruth Parasol and Mr. James DeLeon each beneficially owned a substantial body of shares in PartyGaming: Ms. Parasol through a wholly owned company, Emerald Bay Ltd. ('Emerald') and Mr. DeLeon through another wholly owned company, Stinson Ridge Ltd. ('Stinson'). The original intention was for PartyGaming to absorb

BIE and become a *societas europaea* and it was envisaged that following the merger Ms. Parasol and Mr. DeLeon would each retain, through their respective companies, the beneficial interest in a substantial body of shares in the new entity. In the event, however, the merger took a different form from that originally intended. Instead of creating a *societas europaea*, PartyGaming simply absorbed BIE under the Companies (Cross-Border Mergers) Regulations 2010. It was subsequently renamed and converted into an ordinary limited liability company, the present respondent. As the judge observed, therefore, Bwin is the same corporate entity as PartyGaming and as a result Ms. Parasol and Mr. DeLeon each continued to be the beneficial owner through Emerald and Stinson respectively of a substantial body of its share capital.

3 It was envisaged by those behind the merger that the new company would wish to pursue fresh business opportunities wherever they might arise, particularly in the United States of America, where it was thought that some states might decide to liberalize their gaming laws. However, they recognized that it would be necessary to satisfy local regulatory requirements in order to do so. Accordingly, in contemplation of the merger, PartyGaming, BIE and certain of their shareholders entered an agreement dated July 29th, 2010 ('the 2010 agreement'), conditional on the completion of the merger, under which they made provision for certain steps to be taken in order to enable the merged entity to obtain any regulatory approval it might require in order to operate in a new jurisdiction. The 2010 agreement was subsequently amended and restated on December 22nd, 2010, and it was common ground before us that the amended and restated agreement is the relevant contract for present purposes. All references to the 2010 agreement must therefore be understood as referring to the later version.

4 The 2010 agreement expressly contemplated that persons directly or indirectly interested in the ownership of the new entity, as well as its directors and members of its senior management team, might have to be personally approved by any relevant regulator if Bwin were to be permitted to enter the local online gambling market. In particular, it contemplated that the regulator might require Ms. Parasol and Mr. DeLeon as holders (albeit indirectly) of a substantial body of shares in the new entity to obtain the regulator's approval and perhaps to reduce the size of their shareholdings before it would give its approval to the company's entering the local market. In order to provide for that eventuality, the parties agreed a mechanism by which the directors could require Ms. Parasol and Mr. DeLeon to take such action as might be necessary to persuade the regulator to grant its approval, if necessary by disposing of some or all of their

shares. In due course the proposed merger took place and the 2010 agreement became unconditional.

The 2010 agreement

5 The provisions relating to the identification by the company of potentially valuable new sources of business and the subsequent triggering of obligations on the part of Ms. Parasol and Mr. DeLeon to assist Bwin in complying with the regulator's requirements are contained in cl. 4 of the 2010 agreement. They are quite complex, but for present purposes their essential elements can be summarized as follows:

(i) Ms. Parasol and Mr. DeLeon's obligations to assist Bwin to obtain regulatory approval for a new business opportunity arose only if a majority of the independent directors and both chief executive officers (if there were two) considered that the new business was likely to increase Bwin's annual revenue or profits by at least 10%, or was likely to result in an increase in its market capitalization of at least 5%. Such an opportunity was called a 'Qualifying Business Opportunity' ('QBO').

(ii) If obtaining regulatory approval to pursue the new business opportunity required steps to be taken by Ms. Parasol and Mr. DeLeon to obtain the regulator's approval of them personally, Bwin was required to give them formal notice of those requirements in the form of a ' Qualifying Business Opportunity Notice' ('QBO notice').

(iii) On receipt of a QBO notice, Ms. Parasol and Mr. DeLeon became obliged to submit to individual licensing and suitability reviews or to enter into such transactions as would enable the regulatory process to be successfully completed, including, if necessary, disposing of part or all of their shareholdings.

The triggering of obligations under the 2010 agreement and the execution of the 2014 agreement

6 As a result of an amendment to state legislation passed in February 2013, internet gambling was legalized in New Jersey with effect from November 26th, 2013. In order to take advantage of that business opportunity, on June 10th, 2013 Bwin formed a New Jersey subsidiary, Bwin.Party Entertainment NJ LLC, to carry on the business of internet gambling in New Jersey, and on June 12th, 2013 it served a QBO notice on Ms. Parasol and Mr. DeLeon pursuant to cl. 4.2 of the 2010 agreement.

7 Gambling in New Jersey is governed by the Casino Control Act. The regulator responsible for the administration of the statutory provisions is the Division of Gaming Enforcement ('DGE'), part of

the New Jersey Department of Law and Public Safety. The need to obtain regulatory approval for Bwin's entry into the online gambling market and the service of the QBO notice led to negotiations between Bwin, Ms. Parasol, Mr. DeLeon and the DGE, which culminated in a divestiture agreement dated October 30th, 2013, to which Bwin, Ms. Parasol, Mr. DeLeon and the DGE, among others, were parties. By that agreement Ms. Parasol and Mr. DeLeon agreed to arrangements under which they would divest themselves of the entirety of their interests in the shares of Bwin within a period of three years following the date on which internet gambling became legal in New Jersey (the 'authorized state go-live date'). Those arrangements involved the transfer into trusts of the shares held by Emerald and Stinson and their subsequent disposal in accordance with the terms of the agreement. Ms. Parasol and Mr. DeLeon were given control over the disposals for a period of two years; thereafter control over the disposal of any remaining shares passed to Bwin. The divestiture agreement was amended and restated on January 27th, 2014 following a change of trustees. Again, it was common ground before us that the later version of the agreement ('the 2014 agreement') contains the terms which govern the relationship between the parties.

8 Bwin was authorized to accept online gambling business from the authorized state go-live date, November 26th, 2013. The period during which Ms. Parasol and Mr. DeLeon could exercise control over the disposal of their shares (unless extended under the terms of the agreement) therefore expired on November 25th, 2015. The judge found that on November 26th, 2013 (*i.e.* some three weeks after the divestiture agreement had been executed) Bwin's share price had been 128.6 pence, but that it had subsequently declined to an all-time low of 75.72 pence per share on April 17th, 2015. As a result, Ms. Parasol and Mr. DeLeon sought an extension of the period during which they could control the disposal of their shares and asked Bwin to help them persuade the DGE to grant one. Nothing came of that, however, and a dispute has since arisen between Bwin and Ms. Parasol and Mr. DeLeon, who say that Bwin failed to comply with its obligations under the 2014 agreement to provide them with co-operation and assistance in their dealings with the DGE.

9 In the event, the shares beneficially owned by Ms. Parasol and Mr. DeLeon were all finally disposed of during 2015 at prices well below that at which they had stood when Bwin had started trading in New Jersey. However, in September 2015 another company, GVC Holdings plc, made a takeover bid for Bwin. The shares rose in value and by the time the purchase was completed in February 2016 the consideration was worth 143.041 pence per share.

The proceedings in New Jersey

10 On May 13th, 2016, Ms. Parasol, Mr. DeLeon, Emerald and Stinson brought an action against Bwin in New Jersey. The complaint contains nine causes of action, which for present purposes can conveniently be grouped under the following heads:

(i) claims based on an allegation that Bwin had no reasonable basis for giving a QBO notice (and thereby triggering the operation of the 2010 agreement) because it had no reasonable grounds for thinking that entering into the online gambling market in New Jersey would improve its financial position to the extent required (the first, second and third causes of action);

(ii) claims based on alleged breaches of warranties given in the 2014 agreement to the effect that at the date of that agreement Bwin honestly and reasonably believed that entering the online gambling market would improve its financial position to the extent required (the fourth, fifth and sixth causes of action); and

(iii) claims based on alleged breaches of its obligation to provide reasonable support and co-operation in connection with the claimants' request for an extension of the two-year period allowed for the disposal of the shares under their control (the seventh, eighth and ninth causes of action).

11 On July 4th, 2016, Bwin issued proceedings here in Gibraltar seeking an anti-suit injunction restraining the appellants from pursuing their action in New Jersey and a declaration that it was not liable to them for any breach of contract or duty as alleged. On July 27th, 2016, the matter came before Dudley, C.J. *ex parte* on notice on an application by Bwin for interim relief by way of anti-suit injunction, which the Chief Justice granted. Subsequently, on August 22nd, 2016, the appellants applied for an order staying the proceedings in Gibraltar until judgment had been given on their claims in New Jersey. The applications were heard together *inter partes* by Jack, J. who granted an anti-suit injunction in favour of Bwin and dismissed the cross-application for a stay of the proceedings in Gibraltar.

12 In the meantime Bwin had filed a motion in New Jersey seeking to have the proceedings there dismissed on jurisdictional grounds. By a consent order dated August 24th, 2016, the court in New Jersey ordered that time for the claimants to file a response to that motion should be extended until after the determination of the present applications. Despite some procedural hiccoughs, that remains the position."

6 On July 25th, 2018 GVC amended its claim form (which had been issued in 2016) and provided particulars of claim, to claim *circa* £300,000 in damages which reflected the US legal fees incurred by GVC in the New Jersey proceedings. By their claim GVC also seeks final anti-suit relief (which is now said to be otiose, given that the New Jersey proceedings have ended) and declarations of non-liability.

7 The substantive dispute is to be found in the counterclaim which runs to 268 paragraphs across 87 pages. It is summarized in the defence and counterclaim as follows:

> "13. Without seeking to represent an exhaustive or comprehensive summary of the same, the following is an overview of the Defendants' Counter Claim.
>
> 14. Pursuant to a series of agreements between inter alia the parties, more particularly referred to below, culminating in an agreement between inter alia the Defendants and BWIN the Defendants were obliged to divest themselves of and dispose of their shares in BWIN by 26 November 2015.
>
> 15. Pursuant to those agreements and/or pursuant to the Special Relationship and/or the Fiduciary and/or Tortious Duties described below:
>
> (a) the Defendants were entitled to information generally in respect of BWIN's affairs and/or on any issue which affected the Disposal of the Shares and/or in relation to any Takeover Offer as defined in the relevant agreements set out below;
>
> (b) The Defendants were entitled to seek and sought an extension of time to allow them to sell their shares;
>
> (c) BWIN was inter alia obliged to consider the Defendants request in good faith and provide all reasonable support and co-operation in connection therewith;
>
> (d) BWIN owed the Defendants a number of contractual obligations and/or duties which are detailed below and were either contractual or tortious or fiduciary in nature.
>
> 16. Further and independently of the relevant contractual obligations that BWIN owed the Defendants, BWIN owed the Defendants a number of fiduciary and tortious duties.
>
> 17. In breach of contract and/or in breach of its fiduciary and/or tortious duties BWIN:
>
> (a) Failed to provide the Defendants with any or any sufficient information in relation to the Takeover Offers as due to the

Defendants pursuant to the various obligations or duties or at all;

(b) Failed to consider and/or support the extension request adequately or at all and/or in good faith support and/or take steps in good faith adequately or at all to facilitate an extension of time for the Defendants to sell their shares in BWIN.

18. As a consequence, the Defendants were:

(a) deprived of the opportunity to make an informed choice in relation to matters affecting the sale of their shares and/or the Takeover Offers which in turn affected the sale of the shares; and/or

(b) forced to dispose of their shares in an unstable, distressed and disorderly market pursuant to the contractual time constraints; and

(c) denied the benefit of an extension of time to sell their shares.

19. The Defendants thereby suffered loss and damage. The loss and damage were caused by the acts and/or omissions of BWIN, its servants or agents as detailed in the Counterclaim."

8 Over a substantial period of time leading to the CMC, the parties engaged so as to narrow the issues to be decided at the first CMC. Both sides produced a list of main issues. The claimants filed and served their list, together with a draft list of proposed preliminary issues on March 23rd, 2021. These were subsequently amended to add an issue to each list, arising out of the amendments to the reply and defence to counterclaim, with the revised lists being filed in court and served on the defendants on June 6th, 2022.

9 The defendants' list of main issues was served on the claimant's lawyers on September 10th, 2022. It is a tabulated document, described as a "working document" which runs over 16 pages which, possibly other than for the initiated in this dispute, is difficult to follow.

10 Mr. Lewis submits that given the defendants did not engage with the claimant's list of main issues, for example by proposing modifications or additions, the court should proceed on the basis of the claimant's list of main issues when determining whether to proceed by way of a preliminary issues hearing.

11 The claimant's list of proposed preliminary issues is extensive. It reads:

"1. On a proper construction of the 2010 Agreement and/or the 2010 Relationship Agreement:

(1) Was BWIN obliged to consider the Defendants' request for its support for their application for an extension to the Granter Disposal Period ('the Extension') in accordance with the principles set out under clause 4.3(c) of the 2010 Agreement? Or were those principles only applicable where the Defendants had pursued what BWIN describes as 'possibility (3)' under clause 4.3(c)?

(2) Did the 2010 Agreement and/or 2010 Relationship Agreement expressly or impliedly incorporate a 'general right to receive and exchange information concerning the BWIN's affairs and/or duties of cooperation in respect of the management of information and/or confidential information'?

(3) Was BWIN obliged to 'provide sufficient information to the Defendants in relation to any material issue that could affect the Disposal of their shares'?

(4) Did the 2010 Agreement and/or 2010 Relationship Agreement expressly or impliedly 'envisage' or otherwise recognize a principle of an orderly sale of the Defendants' shares?

(5) Was BWIN subject to duties of co-operation and good faith if sales of shares were called for? Was BWIN obliged to consider requests made by shareholders for extensions of time in which to divest their shares in a spirit of co-operation, 'reasonably and in good faith'?

(6) Was it 'envisaged' that the disposal of shares by the Defendants should occur at the best price possible?

(7) Was BWIN expressly or impliedly obliged to 'facilitate and acquiesce . . . as much as possible' to requests made by shareholders for extensions of time in which to divest their shares?

(8) Was it envisaged that there could be extensions of time to allow sales of shares to take place in an orderly fashion, before, during and after the completion of a Regulatory Process as defined therein?

(9) Did the 2010 Agreement and/or 2010 Relationship Agreement expressly or impliedly envisage that extensions of time could also be permitted after the completion of a Regulatory Process if permitted by the Regulatory Body?

(10) In particular, in the case of requests for an extension was BWIN obliged to consider these reasonably and in good faith and facilitate the orderly distribution of shares in light of shareholder requests?

(11) Was BWIN obliged to conduct itself in good faith towards the Founders and not act or omit to act in a manner that would frustrate or undermine the performance of the 2010 Relationship Agreement and/or the 2010 Agreement?

(12) Was the contractual obligation of good faith limited to clause 4.3(c)?

(13) Was it an implied term that the sale of the Defendants' shares would be done slowly and/or in such manner as to minimize market disruption and ensure price stability?

2. In view of the answers to the foregoing sub-issues, if the Founders sought BWIN's support for the Extension, was BWIN obliged to consider such a request in accordance with any or all of the considerations described at paragraph 67(a)–(f) of the Particulars of Counterclaim?

3. Was it an express or an implied term of the 2010 Relationship Agreement that, if the Founders approached BWIN to seek an extension of time, BWIN would 'in practice grant such a request' as alleged at paragraph 67(g) of the Particulars of Counterclaim?

4. Did BWIN owe the fiduciary obligations to the Defendants alleged at paragraph 73 of the Particulars of Counterclaim? In particular:

(1) Did the Claimant undertake to act for or on behalf of or for the benefit of the Defendants?

(2) Did any aspect of the parties' relationship require BWIN to subordinate its own interests to those of the Defendants rather than to put its own interests first?

(3) Would the fiduciary duties alleged be inconsistent with and/or are they excluded by the terms of the 2010 Relationship Agreement and the 2010 Agreement?

(4) Would the duty regarding information alleged at paragraphs 73(c), (f) and (g) of the Particulars of Counterclaim be inconsistent with the DTR, in particular rule 2.5.1 and/or 2.5.3 and/or 2.6.1711?

5. Did BWIN owe the tortious obligations to the Defendants alleged at paragraph 74 of the Particulars of Counterclaim? In particular:

(1) Did BWIN assume a responsibility to the Defendants in respect of the matters pleaded?

(2) Was there a sufficiently special or proximate relationship between the parties as to give rise to the tortious duties alleged?

(3) Was it reasonable to expect or rely on BWIN to do more than perform its contractual obligations?

(4) Do the parties' contracts militate against the imposition of any tortious duties, either at all or against the imposition of tortious duties more extensive than the contractual duties?

(5) Would the tortious duties alleged be inconsistent with the terms of the 2010 Relationship Agreement and the 2010 Agreement?

(6) Would the duty regarding information alleged at paragraph 74(c), (d) and (e) of the Particulars of Counterclaim be inconsistent with the DTR, in particular rule 2.5.1 and/or 2.5.3 and/or 2.6.1?

6. As to the Divestiture Agreement:

(1) Was it an implied term of the 2013 Divestiture Agreement that the parties 'could consider and consent to extensions of the Disposal Period the aim of which was to preserve an orderly market and/or maximise value to the Defendants' as alleged at paragraph 144 of the Particulars of Counterclaim?

(2) Under clause 4.2.2 of the Divestiture Agreement, was BWIN obliged to provide all reasonable assistance to the Trustees in effecting a disposal of the BWIN shares during the Granter Disposal Period, and all reason reasonable support and co-operation in relation to any issues which arise during the course of implementation of that agreement? Alternatively, did the Divestiture Agreement contain the Extension Implied Term alleged at paragraph 57.3 of the Reply to Defence to Counterclaim?

(3) Under clause 19.3 of the Divestiture Agreement, was it an express or implied term that 'BWIN had to provide the Defendants and DGE with information if there was any event likely to increase the Disposal Period'?

(4) Under clause 19.3 of the Divestiture Agreement:

(i) Was BWIN obliged to notify the Defendants (as well as the DGE and the other parties to the Divestiture Agreement) as soon as BWIN was approached in relation to a potential takeover?

(ii) Was BWIN also obliged thereafter to keep BWIN (and the other parties) [*sic*] regularly and promptly informed of any progress relating to any discussions or negotiations in relation to a potential takeover?

(iii) Alternatively, did the Divestiture Agreement contain the Takeover Implied Term alleged at paragraph 56.2 of the Reply to Defence to Counterclaim?

(5) Does clause 4.2.4 of the Divestiture Agreement provide for an extension of the Granter Disposal Period, or do Takeover Offers lead to mandatory or any extension of the 'Grantor Disposal Period' under clause 4.2.4?

7. Was it an express and/or implied term of the 2010 Relationship Agreement and/or 2010 Agreement and/or Divestiture Agreement that an extension of time to sell the shares could and should be granted by the parties to ensure a sale that would preserve an orderly market for the shares for BWIN's benefit and that of its shareholders and the best price for the benefit of the Founders?

8. Was it an implied term of the 2010 Relationship Agreement and/or 2010 Agreement and/or Divestiture Agreement that, if a Takeover Offer (as defined in the Divestiture Agreement) arose, BWIN was obliged to communicate this fact ('the Takeover Information') to the Defendants ('the Alleged Information Obligation')?

(1) Was such a term necessary to give business efficacy to the 2010 Relationship Agreement and/or 2010 Agreement and/or Divestiture Agreement, such that it was so obvious as to go without saying?

(2) Was such a term inconsistent with clauses 4.2.2 and/or 4.2.8 and/or 6.1.4 and/or 7.1(a) and/or 19.4 of the Divestiture Agreement?

(3) Was such a term inconsistent with clauses 3 and/or 7 of the 2010 Relationship Agreement?

(4) Was such a term inconsistent with clauses 4.1 and/or 4.5 of the 2010 Relationship Agreement?

(5) Was such a term inconsistent with rule 2.5.1 and/or 2.5.2 and/or 2.6.1 of the DTR?

(6) Would the Takeover Information amount to inside information?

(7) Did BWIN owe duties of confidentiality to GVC and 888 pursuant to Confidentiality Agreements dated 30 January and 17 April 2015 respectively, which precluded them from providing further information on the progress of negotiation?

9. Alternatively, did the Alleged Information Obligation arise by reason of BWIN's alleged fiduciary or tortious obligations?

10. Insofar as concluded, were the alleged 19 March 2015 agreement and/or the Alleged 2015 Extension Agreement invalidated by clause 22.1 of the Divestiture Agreement?"

12 By their draft preliminary issues 1, 2, 3, 6, 7 and 8, the claimant seeks the determination of the proper construction of express terms in, and whether there arise alleged implied terms under, the various agreements between the parties, namely the 2010 agreement, the (related) 2010 relationship agreement and the divestiture agreement. Draft preliminary issue 10 asks whether, in effect, the defendants' extension claim is destined to fail because, even if made good on the facts, it is invalidated by a provision in the divestiture agreement. Whilst draft preliminary issues 4, 5 and 9 ask whether the claimant owed alleged fiduciary and tortious obligations.

13 CPR 3.1(2) affords the court a wide case management discretion including the power to—

"(i) direct a separate trial of any issue;

(j) decide the order in which issues are to be tried;

. . .

(l) dismiss or give judgment on a claim after a decision on a preliminary issue . . ."

The commentary in the White Book, vol.1 at 3.1.10 dealing with "(i) direct a separate trial of any issue" sets out the guidance given by David Steele, J. in *McLoughlin* v. *Grovers (A Firm)* (2) ([2001] EWCA Civ 1743, at para. 66) namely:

"a. Only issues which are decisive or potentially decisive should be identified;

b. The questions should usually be questions of law.

c. They should be decided on the basis of a schedule of agreed or assumed facts;

d. They should be triable without significant delay, making full allowance for the implications of a possible appeal;

e. Any order should be made by the court following a case management conference."

14 The *Technology and Construction Court Guide* (as at October 2022) at 8.3 identifies common types of preliminary issues as follows:

"a) Disputes as to whether or not there was a binding contract between the parties.

b) Disputes as to what documents make up or are incorporated within the contract between the parties and disputes as to the contents or relevance of any conversations relied on as having contractual status or effect.

c) Disputes as to the proper construction of the contract documents or the effect of an exclusion or similar clause.

d) Disputes as to the correct application of a statute or binding authority to a situation where there is little or no factual dispute."

Paragraph 8.1.5 which deals with the potential drawbacks of preliminary issues in inappropriate cases is also instructive:

"If preliminary issues are ordered inappropriately, they can have adverse effects:

a) evidence may be duplicated;

b) the same witnesses may give evidence before different judges, in the event that there is a switch of assigned judge;

c) findings may be made at the PI hearing, which are affected by evidence subsequently called at the main hearing;

d) the prospect of a PI hearing may delay the commencement of ADR or settlement negotiations; and

e) two trials are more expensive than one. For all these reasons, any proposal for preliminary issues needs to be examined carefully, so that the benefits and drawbacks can be evaluated. The Court will give due weight to the views of the parties when deciding whether a PI hearing would be beneficial."

15 In relation to draft preliminary issues 1, 2, 3, 6, 7 and 8 it is submitted for the claimant that the questions relate to the proper construction of express terms and whether implied terms arise. It is said that these are fundamentally questions of law capable of resolution without evidence beyond the detailed agreements themselves and on the basis of submissions alone. And that in so far as the claimant may prevail on all those issues, that will be the end of the counterclaim for breach of contract. And that if they prevail on the majority or even some of those issues, it will substantially narrow the issues for trial.

16 In relation to draft preliminary issue 10 the issue raised is whether, in effect, the defendants' extension claim is destined to fail because, even if made good on the facts, it is invalidated by a provision of the divestiture agreement. Again, it is submitted that this is a paradigm preliminary issue, being a potential "knock-out" point.

17 As regards draft preliminary issues 4, 5 and 9, Mr. Lewis adopts a slightly less robust stance and I think that it is implicitly accepted that these issues are fact sensitive. Nonetheless, in relation to draft preliminary issues 4 and 5, he submits that the suggestion that a company might owe any fiduciary duty to its former shareholders appears to be unprecedented and that there is a fundamental contradiction in the defendants' case on fiduciary duties which means that draft preliminary issues 4 and 9 can readily be resolved on assumed fact.

18 The foregoing outline of the submissions advanced by Mr. Lewis does no justice to his analysis of the various draft preliminary issues by reference to the legal principles which may apply in relation to each and with some analysis of relevant provisions in the various agreements which may be engaged. A case management conference listed for one day to undertake an exploration of multiple issues (with the expectation that disclosure also be dealt with) was optimistic. But it also highlights that the time required for the consideration of any one of the proposed preliminary issues would need to be counted in days and not hours. My sense is that in the event that all the draft preliminary issues were to be taken to a hearing, even if it were to be on agreed or assumed facts, the matter would likely have to be listed for no less than 10 days.

19 The defendants do not have a principled objection to having preliminary issues determined but rather oppose that these be identified and progressed at a stage in the claim when there are no agreed facts; when disclosure has not taken place and witness statements have not been exchanged. Mr. Smith's overarching submission is that the draft preliminary issues are self-evidently mixed questions of fact and law. That the court will have to grapple with the construction of express terms, the existence and construction of implied terms, the existence of the special relationship and the duties that arise from it, and the existence and scope of the 2015 extension agreement. That those matters cannot be properly or fairly decided in the absence of established or agreed facts. That they cannot be determined on the basis of the agreements alone.

20 Reliance is placed by Mr. Smith upon the principles of documentary interpretation most succinctly summarized in *Investors' Compensation Scheme Ltd.* v. *West Bromwich Bldg. Socy.* (1), where Lord Hoffmann said ([1998] 1 W.L.R. at 912):

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

Flowing from that it is submitted that it is neither possible nor fair to properly interpret the agreements without first establishing the factual matrix.

21 In relation to the appropriateness of proceeding to determine as a preliminary issue whether certain terms should be implied a similar submission is advanced. The applicable principles when implying a term into detailed commercial contracts can for present purposes be summarized by relying upon the headnote in *Marks & Spencer plc* v. *BNP Paribas Secs. Servs. Trust Co. (Jersey) Ltd.* (3) ([2015] 3 W.L.R. at 1843):

> "(1) that a term would be implied into a detailed commercial contract only if that were necessary to give the contract business efficacy or so obvious that it went without saying; that the implication of a term was not critically dependent on proof of an actual intention of the parties when negotiating the contract but was concerned with what notional reasonable people, in the position of the parties at the time at which they had been contracting, would have agreed; and that it was a necessary but not sufficient condition for implying a term that it appeared fair or that the court considered that the parties would have agreed it if it had been suggested to them . . ."

Mr. Smith submits that when considering the business efficacy test and/or the officious bystander test, the court will need to be appraised of the circumstances in which the notional reasonable persons would have found themselves, and that it is not possible to do this without first establishing the facts.

22 Again, similar submissions are advanced in relation to the heads of claim which are advanced on the basis of tort and breach of fiduciary duties. It cannot be in dispute that underpinning the claims under these heads is whether there existed a "special relationship" as between the parties outside the scope of the various agreements capable of resulting in fiduciary and tortious duties and if so whether any such duties were breached. Mr. Smith's fundamental point is that establishing the facts is a necessary precursor to determining the existence and nature of any such relationship.

23 More broadly Mr. Smith submits that the draft preliminary issues will in any event not be determinative of the claim unless the claimant were to be successful in respect of all the issues, including sub-issues. That, in what is said to be the likely event, the claimant is on assumed facts unsuccessful on the preliminary issues, the court would then have to potentially revisit all the issues.

24 In relation to the agreed facts or assumptions upon which any of the preliminary issues would fall to be determined, Mr. Smith submits that these need to be formulated with precision so that the issues can then be answered in a clear and precise way (*Rossetti Marketing Ltd.* v. *Diamond Sofa Co. Ltd.* (4)). And, that whilst it is clear from the pleadings that there is an element of commonality as to the chronology of events, that it is equally clear that the facts of key events are not agreed. Moreover, that it

is anticipated that disclosure will strengthen the defendants' claim and substantially undermine the claimant's defence of the counterclaim.

Discussion

25 This is undoubtedly a complex high value case. In their directions questionnaire both parties agree that they will need expert witnesses but both fail to identify the identity of any such witness or their field of expertise. The claimant identifies a specific witness of fact together with "[o]thers to be determined" and provides a trial estimate of five days. For their part the defendants state that they expect to rely upon approximately 40 witnesses of fact and estimate that the trial will take 40 days. It may be that the trial will not take as many as 40 days, but it will certainly take much longer than five days. That uncertainty as to the potential length of the trial does not assist in making a determination as to whether dealing with preliminary issues is likely to result in reducing costs and saving court time.

26 The draft preliminary issues touching upon the construction and interpretation of the various agreements are the ones which most clearly could be dealt with in that way, in that in interpreting a carefully drafted commercial agreement the meaning of a clause will usually be derived from the language used. But of course, unless the language used is wholly unambiguous, where there are competing constructions, the principles relating to the interpretation of contractual documents require the court to undertake an iterative process with each possible interpretation considered against the terms of the agreement; its commercial consequences and a detailed analysis of the factual matrix. Giving each factor the appropriate weight so as to thereby alight upon the objective meaning of the contractual provision.

27 The fundamental importance of the factual matrix is even more stark in so far as the claims are framed as breach of tortious or fiduciary duties. These raise questions of alleged liability on the part of the claimant which is concurrent with the contractual obligations, but in respect of which determinations of fact as to the nature of the relationship between the parties is fundamental. A factual matrix which is intertwined with the contractual claims. Moreover, as regards the breach of fiduciary duty, there is a suggestion that a *company* might owe a fiduciary duty to its former shareholders. This can properly be described as a novel point of law and it is well established that, generally, any decision on any such point should not be based on assumed facts, but rather upon actual findings of fact.

28 In varying degrees all the proposed preliminary issues are fact sensitive and, in my judgment, in the absence of an agreed factual matrix it would be unwise to proceed on the basis of assumed facts, as findings at trial contradicting any such assumed facts, could (adopting the language of

Neuberger, J. as he then was, in *Steele* v. *Steele* (5)) unfairly prejudice one of the parties or be useless, because a determination on facts which turn to be wrong would be of no value.

29 Any preliminary issue would therefore have to be progressed with the benefit of witness statements and oral evidence. Against the backdrop of diverse heads of claim which are all underpinned by the same factual matrix there is a very real likelihood that the same witnesses would have to give evidence both at the preliminary issues hearing and at trial and involve a high degree of duplication.

30 The preliminary issues identified would not, taken individually, dispose of the case, whilst the multiplicity of proposed preliminary issues of itself militates against proceeding in that fashion. Moreover, any determination on one or more of the draft preliminary issues would likely be followed by an appeal which would probably result in the proceedings overall taking longer.

31 In my judgment it makes more sense and it is likely more cost effective to deal with all the issues at trial. It may be that as the litigation progresses that this question can be revisited, but at this stage it would be premature to order determination of either all or any of the draft preliminary issues. I shall be directing that the case be listed for a further case management conference before another judge, so that the court may hear submissions on and make orders as to disclosure.

32 Orders accordingly and I shall hear the parties as to costs.

Judgment accordingly.
