ORD 23/0009, ORD 21/0011 & ORD 24/0045

IN THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN
CIVIL DIVISION
ORDINARY PROCEDURE

Between:

<u>ORD 23/0009</u>
ALEXANDER FRANCIS MORRISON & OTHERS Claimant
and
(1) **UTMOST INTERNATIONAL ISLE OF MAN LIMITED**
(2) **UTMOST PANEUROPE DAC**
(3) **FRIENDS PROVIDENT INTERNATIONAL LIMITED** Defendants

<u>ORD 21/00011</u>
(1) **DAVID PARRY**
(2) **SHELAGH PARRY**
(3) **SOVERIGN TRUST (GUERNSEY) LIMITED AS TRUSTEE OF THE ATLANTICA PERSONAL PENSION PLAN** Claimants
and
QUILTER INTERNATIONAL ISLE OF MAN LIMITED
Defendant

<u>ORD 24/0045</u>
NICHOLAS PANKOVAS & OTHERS Claimants
and
(1) **UTMOST INTERNATIONAL ISLE OF MAN LIMITED**
(2) **UTMOST PANEUROPE DESIGNATED ACTIVITY COMPANY**
(3) **FRIENDS PROVIDENT INTERNATIONAL LIMITED** Defendants

***Ex tempore* Judgment of**
His Honour Acting Deemster Rosen KC
delivered on 23 April 2025

INTRODUCTION

1. The hearing before me has been concerned with the question arising under an order of Deemster Gough dated 21 January 2025 as to whether, and if so what, is the position regarding common issues in this claim. There are 1,600 Claimants approximately and the case is so far very centered on the advice of brokers who acted for, and advised, the Claimants in their dealings with the various Defendants.

2. Deemster Gough's judgment also dated 21 January 2025 dealt with the background. I have heard more about that and a certain amount about the procedural history as well, and I do not need at this stage to repeat or set that out in any detail, or indeed at all, save insofar as it is relevant to the specific question which I must decide under Deemster Gough's order.

3. I am not satisfied that in this case it is necessary to make a direction as to any common factual issues in the case. I say that on the basis of the contentions of the parties and

in particular the submissions of the various advocates. They are, Mr Cumming KC for the Claimants and Mr Buck for the First and Second Defendants, the so-called Utmost Defendants, and Mr Nash KC for the Third Defendant, Friends Provident; in the case of I am very grateful for their assistance in what has been a wide-ranging discussion which I hope will educate me, not only for the purpose of today's hearing and question, but also to some extent for the future.

THE CLAIM

4. The issues which the Claimants claim to be common have evolved, to put it neutrally, over the last few months, since before the hearings in front of Deemster Gough beginning in December of last year. I will concentrate on the way it is put in the Claimants' written submissions as summarised in the schedule thereto. I am not going to read it all, but it should be taken that the whole of the schedule is part of my judgment.

5. It begins with the Claimants' current proposal pursuant to paragraph 19 of Deemster Gough's order that the outcome of the test claimants' trial should be to find common issues which will bind each of the claimants and each of the defendants as defined. The issue put regarding the First Defendant is, was there combination, an understanding, between the First Defendant and any of the adviser-brokers to the test claimants by which they intended to cause loss to:

   (1) those advised by the relevant adviser-broker contracting with the First Defendant through a portfolio bond as set out in paragraph 58 APOC, meaning the Amended Particulars of Claim; and/or

   (2) those advised by the relevant adviser-broker contracting with the First Defendant through a portfolio bond who chose to make notional investments in funds that paid Second Commission as set out in paragraph 58 APOC.

   The same wording is used as regards the allegedly common issue concerning the Second and Third Defendant.

6. There is then a gloss in the proposal of the Claimants as to the common issues saying that, for the avoidance of doubt as regards the intention to cause loss, the issue is, did the relevant defendant and the relevant adviser-broker intend to cause harm to those advised by the relevant adviser-broker contracted with that defendant for portfolio bond in three various ways, which I do not need to read aloud given the incorporation of the schedule in this my judgment, where the relevant defendant continued to market and operate the portfolio bond in circumstances where it knew that the relevant adviser-broker was in a position of conflict, both in marketing the bonds and then making investment recommendations, as fund adviser and (2) only permitting the portfolio bonds to be sold through brokers such as the adviser-broker.

DISCUSSION

7. The Claimants explain that they do not seek for each of the claimants to be bound by the resolution of those issues in the test claim. The test claim will involve, as I understand it, 20 chosen claimants, and the basis for their selection has included a questionnaire and the answers to the questionnaire directed, I believe, to 90 of the claimants pursuant to Deemster Gough's order.

8. The Claimants' proposal as explained is that the claimants, who should be bound by the decision on these issues, notwithstanding that they are not primary parties to the test claim trial (the first trial in this matter), as proposed, but should bind those claimants who are clients of the relevant adviser-broker featuring in the test claims because that relevant adviser-broker was advising and pursuing instructions on behalf of one or more of the test claimants. So, that proposal I note is narrower than previous proposals, not only the long lists of over 100 issues of everything that can be found in dispute in the pleadings, but also somewhat narrower than the schedule appears to read.

9. Notwithstanding that, balancing the various contentions of the parties, including contentions as to what the pleadings mean, how the alleged issues fit into the pleadings and whether they are properly already the subject of the pleadings, and also the risks and alleged necessity to direct common issues. As I will explain, I have reached the conclusion to which I have referred, namely that I should not direct common issues of fact on the material before me, and, at this stage in the proceedings.

10. When I talk about submissions as to how the proposed issues fit into the pleaded issues, that is of course a matter of prime importance, because claims, whether group claims involving common or related issues or other claims, have to be properly pleaded. One of the points made by the Defendants relates to paragraph 58 of the amended claim form which is referred to in the schedule setting out the Claimants' proposal to which I have referred. What is said is that the allegation that there was a combination, or agreement as alleged, and the submission that the findings as to that involving an adviser-broker should be applied as binding as regards the other client-claimants of that same broker, does not lie properly within paragraph 58. Paragraph 58 involves a repetition of the allegations in paragraphs 12 to 41, many of which are said to be adviser-broker or client-claimant specific. Paragraph 58 itself begins in relation to each portfolio bond by a claimant, there was a combination or understanding between the relevant defendant and relevant adviser-broker by which they intended to, and did, cause loss to the relevant claimant. There then followed some particularisation, as far as that is concerned, which might be taken as a summary of principle matters from which such a combination or understanding should be inferred. What is said by the Defendants is that this refers to each portfolio bond and necessarily to each of the claimants.

11. Allied with that is a submission which was made by the First and Second Defendants that there is no jurisdiction to find for the common issue contended for by the Defendants in the light of what is said to be, at least, inconsistencies in Deemster Gough's judgment and order of 21 January 2025.

12. As regards the first point, I disagree with the Defendants' submission. It seems to me that an allegation that one particular claimant being within the phrase 'each portfolio bonds purchased by the claimants', does not exclude a finding that several claimants were in the same position and were subjected to, or victims of, the combination or understanding between the defendant and the relevant adviser-broker. Where the facts are indistinguishable for those purposes in relation to all the claimants who were advised by a particular adviser/broker who is involved in the test trial, the court might find that each of them and all of them were in the same position. However, the point goes further because, as submitted on behalf of the Third Defendant, there is clearly no allegation of any general agreements of understandings, combinations, between a particular adviser-broker and the Defendants applicable, as a matter of that general agreement to

all the relevant adviser-broker's clients, I would say client-claimants. What is said is that when it comes to deciding that the outcome on this decision, for example that there was such a combination or understanding, applied not only to the test claimants but to all or some of the other clients of the adviser-broker, that severely weakens the communality in the structure of the way the claim is put in relation to the adviser-broker.

13. Against that it is said that whether or not that connection, that communality, would have been stronger if there had been an agreement applicable to all the relevant adviser-broker's client-claimants, does not affect the assessment of whether there is sufficient communality if the case is that there were separate combinations or understandings as regards each client-claimant, perhaps successively or not.

14. It seems to me that there is a relevance in the absence of an allegation of a general agreement. That is not to say that the case based on inference relating to each client-claimant of that particular adviser-broker is weak, and it is not to suggest that absent a pleading and proof of a more general agreement the claim is more or less likely to fail. But it does suggest to me that the evidence connection between the claim of one client-claimant of the broker and of another is less.

15. As regards to the second point, the alleged absence of jurisdiction, I consider the submission made against the Claimants and against my power to decide on any common issues misconceived. Reading the judgment of the learned Deemster Gough I do not find that he considered that, absent a GLO, the court might not be able to order that there were common issues. It seems to me that the learned Deemster's rejection of a GLO on the grounds that he did not consider a sufficient necessity to order common or related issues in the light of the other risks, including the risk of injustice to a party who was not the subject of the test trial, so it seems to me, was very clear. If there were common issues, then it would be very helpful as part of his co-management scheme for those to be defined. But if there were not, pivotal issues might still be of great assistance obviously in informing the parties and hopefully leading to a resolution subsequent to the test trial of other claimants. That might be by compromise, a narrowing of claims and abandonment of claims, as mentioned by Deemster Gough. But it might also be that the position as at the end of the test claims is such, on the findings then made, that the court would be able to give either strong indications as to other claims or directions as to the other claims, more than 1,500 of course, which might, as the Third Defendant mentioned, involve limiting evidence or summary judgment.

16. The fact that Deemster Gough did not address in more detail what the common issues might be, or how they were common rather than related issues for the purposes of his decision at that stage not to order a GLO, in my judgment does absolutely nothing to take away from the court's power by way of co-management to define any common issues. That express procedure in Deemster Gough's order, which we have endeavored to follow, at that hearing suggests that the rejection of the GLO, as far as he was concerned, did nothing to prevent the identification of common issues on which he embarked, or invited the parties, and then the court to embark. Indeed, as was pointed out on behalf of the Claimants, there are a number of cases, including three English cases, *McLean & Ots v Thornhill KC* [2023] EWCA Civ 446, *Lancaster & Ors v Peacock QC* [2020] EWHC 1231 (Ch) and *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312, in which the courts assumed that in the course of management common issues could be identified so as to bind those not party to an initial preliminary or a test claim.

17. Having dealt briefly with those submissions, I return to the main substance of the dispute between the parties today. The Defendants say that the determination of the issue proposed in the schedule to the Claimants' schedule may or may not determine the claims by other client-claimants of the relevant adviser-broker. There is a risk that they do not because in evidence, as regards the combination or understanding alleged in respect of a test claimant, may simply be inapplicable because of questions passing between the Defendants and the adviser-broker. The possible relevance of the claimants' position in terms of evidence, either written or oral, as regards anything passing with that non-test claimant which might be relevant to the issue of whether there is a combination, or understanding, to cause that non-test claimant loss. Against that it is suggested that the determination of the issue regarding one client of the relevant adviser-broker must be determinative of the claims of other client-claimants of the same broker.

18. That to me seems the fundamental dispute in this case and I am not satisfied on the current state of the pleadings and the evidence, not even knowing details at this stage of the test claimants and the brokers who will be concerned in the test claim trial, I am not satisfied that that is necessarily the case and that therefore the risk of injustice to a non-test claimant in adopting the common issue as binding on them as a matter of, when I say common issue – matter of fact, it seems to me that there are possible gaps between the position regarding a test claimant of a broker and a non-test claimant of the same broker. There may be different evidence, the timing may be different, the context may be different, the broker concerned is the only constant and, whilst the written terms between the broker and the Defendants might be the same as regards all that broker's clients, it does not follow that all the evidence will necessarily be the same. It seems to me that just as that is the fundamental dispute between the parties, that is the fundamental difficulty.

19. I have to confess to some admiration in the way that the proposed common issue has been drafted in an attempt to make it all dependent on the evidence and dealings between the defendant and the adviser-broker, but I am not sure that it satisfies that aim and that the position of the individual clients of that adviser-broker and any evidence relevant to them is irrelevant. I have stressed a few times, but this relates to allegedly common issues of fact, it is quite obvious from the general law and indeed from some of the authorities that I have already mentioned, that common issues of law will be binding on the other parties to these proceedings - I stress these proceedings, multiple party proceedings, which are being co-managed.

FOREIGN LAW

20. I should make it clear that I am not deciding any of the other procedural matters which were elucidated by the parties. In particular, there is likely to be an issue as to applicable foreign law. That has been pleaded to some extent in the case of one Claimant, or rather two, being Mr and Mrs Parry, who I am not sure, and I have not been told, whether they are going to be test claimants. But whether or not they are, if there are applicable foreign law issues as regards the relationship between the Defendants and the adviser-broker, or the claim made by the claimants that the Defendants procured breaches of relevant duties by the relevant adviser-broker, they will have to be pleaded out. The parties appear to accept that, but it is a matter for another day.

21. The suggestion from the Third Defendant was that if there is any more information from the Claimants that they need to decide on their position regarding foreign applicable law

then it will be dealt with before witness statements. It seems to me that is something the parties should consider going forward. I should acknowledge that the Claimants do not accept that any more information from the Claimants is necessary beyond the questionnaire, in particular the answers to question 20 which concerned the location of the adviser-broker and the location of the receipt of advice from the adviser-broker.

22. I have tried to cover what I said was a wide-ranging argument. I hope I have done no disrespect to the parties and their advocates, but if there are specific points decisive to my decision today which I have not sufficiently enunciated in this judgment, I believe I have listened carefully to everything you have said. I have read the submissions with care and I believe they have been taken into account. But if any party would like to point out that there is something very significant that I have not explained, then please could they do so this afternoon.

DISCLOSURE

23. It is said that if other claimants' positions and evidence is relevant to the determination of this question and sufficiently common to justify a finding that the issue is common to the other claimant-clients of the particular broker, then there could be a way of ensuring that those other claimants' evidence is considered for the purpose of the test claim. But if there is anything therefore to distinguish from the test claims, that can be decided at that stage.

24. For my point I consider that if the other claimants' positions and evidence is relevant to the issue between the test claimants and the Defendants, then it might well be helpful for that to inform the test trial. But I do not know whether, and if so from which claimants, that might be the case. Mr Cumming suggested that those other claimants could be subject to disclosure orders and that is part of my thinking behind the use of the phrase *"fully party to the test claim"* and something that is less fulsome. They may have oral evidence to give as well, I do not know. I am entirely against speculating as to these points at this stage. The parties will have to consider that question absent of finding by me that there is a common issue such as should bind those other claimants.

25. The position at the moment is uncertain and could be described as fluid. For what it is worth, I think that the selection of the 20 test claimants, which hopefully has been done with a view to some of the issues which are emerging or have emerged, will mark the time when these other procedural questions as to disclosure by non-test claimants, or evidence by non-test claimants and also as to applicable foreign law, will have to be properly dealt with. That is not to put pressure on the parties as to either of those matters in the sense that there will be a lot of other things to do. But they cannot close their eyes to the necessity to resolve these procedural questions at as early a stage as possible.

COSTS

22. It is agreed that the costs of today's hearing should be costs in the case.

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Acting Deemster Rosen KC