Groote Eylandt Aboriginal Trust Inc v Deloitte, Touche Tohmatsu & Ors
[2016] NTSC 39

PARTIES:	GROOTE EYLANDT ABORIGINAL TRUST INCORPORATED (NT 00142C) (Statutory Manager Appointed) v DELOITTE TOUCHE TOHMATSU (A Firm) and KPMG (A Firm) and MINTER ELLISON (A Firm)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	89 of 2014 (21441221)
DELIVERED:	4 August 2016
HEARING DATES:	12 July 2016
JUDGMENT OF:	HILEY J

CATCHWORDS:

PRACTICE AND PRODECURE — Supreme Court Rules — application for order for separate trial of questions pursuant to r 47.04 — 'just and convenient' – standing – validity of charitable trust.

Evidence (National Uniform Legislation) Act 2013 (NT) s 63, s 64, s 72, s 78A.

Limitation Act (NT) s 44.

Proportionate Liability Act (NT).

Supreme Court Rules (NT) r 1.10(1)(a), r 9.02, r 47.04.

Attorney-General for New South Wales v The Perpetual Trustee Company (Limited) (1940) 63 CLR 209; *Australian Communications Corporation Pty Ltd v Coles Myer Ltd* [2002] VSC 443; *AWB Ltd v Cole (No 2)* (2006) 233 ALR 453; *Bass v Permanent Trustee Company Ltd* (1999) 198 CLR 334; *Byrnes v Kendle* (2011) 243 CLR 253; *CBS Productions Pty Ltd v O'Neill* (1985) 1 NSWLR 601; *City of Swan v Lehman Brothers Australia Ltd* (2009) 73 ACSR 86; *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531; *Dunstan v Simmie & Co Pty Ltd* [1978] VR 669; *Flynn v Mamarika* (1996) 130 FLR 218; *Re Income Tax Acts (No 1)* [1930] VLR 211; *Latimer v Commissioner of Inland Revenue* (2002) 3 NZLR 195; *Murphy v Victoria* (2014) 45 VR 119; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Plan B Trustees Ltd v Parker* [2013] WASC 216; *Rainsford v Victoria* (2005) 144 FCR 279; *Re Compton* [1945] 1 Ch 123; *Re Evans; Union Trustee Co of Australia Ltd v Attorney-General for Queensland* [1957] St R Qd 345; *Reading Australia Pty Ltd v Australian Mutual Providence Society* (1999) 217 ALR 495; *Save The Ridge Inc v Commonwealth* (2005) 147 FCR 97; *Shire of Derby-West Kimberley v Yungngora Association* [2007] WASCA 233; *Stratton v Simpson* (1970) 125 CLR 138; *Tallglen Pty Ltd v Pay TV Holdings Pty Ltd* (1996) 22 ACSR 130; *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1; *Thompson v Federal Commission of Taxation* (1959) 102 CLR 315; *Vale v Daumeke* [2015] VSC 342; *Windsor Refrigerator Co Ltd v Branch Nominees Pty Ltd* [1961] Ch 375, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	R Whitington QC and D McConnel
First Defendant:	P Maher
Second Defendant:	(No appearance)
Third Defendant:	N Christrup

Solicitors:

Plaintiff:	Roussos Legal Advisory as town agents for Johnson Winter & Slattery
First Defendant:	Paul Maher Solicitors as town agents for Thomson Geer
Second Defendant:	Hunt & Hunt Solicitors as town agents for Clifford Chance
Third Defendant:	Halfpennys as town agents for Lander & Rogers

Judgment category classification:	B
Judgment ID Number:	Hil1604
Number of pages:	42

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Groote Eylandt Aboriginal Trust Inc v Deloitte, Touche Tohmatsu & Ors [2016] NTSC 39
No. 89 of 2014 (21441221)

BETWEEN:

GROOTE EYLANDT ABORIGINAL TRUST INCORPORATED (NT 00142C) (Statutory Manager Appointed)
Plaintiff

AND:

DELOITTE TOUCHE TOHMATSU
First Defendant

AND:

KPMG
Second Defendant

AND:

MINTER ELLISON
Third Defendant

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 4 August 2016)

Introduction

[1] By summons filed on 11 May 2016, the plaintiff, Groote Eylandt Aboriginal Trust Inc (**GEAT**) has sought an order pursuant to r 47.04 of the *Supreme Court Rules* (NT) that two questions be tried as preliminary questions ahead of the trial of the other issues in these proceedings.

[2] Those two questions are as follows:

(1) Do the matters alleged in paragraph 13 of the Defence of the Third Defendant to the Amended Statement of Claim filed 2 October 2015 filed on 29 January 2016, or any of them, deny to the Groote Eylandt Aboriginal Trust (as established and continued under the deeds of trust identified in paragraphs 7, 10, 19, 25 and 30-32 of the Amended Statement of Claim) the status of a valid charitable trust at law? For the avoidance of doubt, this question includes whether the matters alleged are established.[1]

(2) Does the Plaintiff have standing to bring these proceedings against Minter Ellison in the capacity of trustee given that the Plaintiff:

(a) has not been found liable for breach of trust; and

[1] This question is referred to as the **Valid Charitable Trust Question**.

(b) has not been found responsible for the loss and damage it now claims against Minter Ellison?[2]

[3] On 18 July 2016 I indicated that I am prepared to determine the two questions after hearing the parties during the week commencing 5 December 2016. These are my reasons.

The Proceedings

[4] The plaintiff has commenced three separate actions, against Deloitte Touche Tohmatsu (**Deloitte**) and KPMG in September 2014 and against Minter Ellison Lawyers (**Minter Ellison**) in January 2015. The three actions were consolidated into the one action by order made on 31 March 2015 pursuant to r 9.02 of the *Supreme Court Rules* (NT). The statements of claim and defences have since been amended and pleadings have now closed.

[5] In short the actions are based upon allegations of misuse of assets of the Groote Eylandt Aboriginal Trust (the **Trust**) which has resulted in significant losses in the vicinity of $35 million. The then Public Officer of the Trust, Ms Rosalie Lalara, has already pleaded guilty to and been convicted and sentenced for offences relating to some of the transactions that are the subject of these proceedings involving the expenditure of approximately $600,000.[3] The main differences between the three actions concern the respective retainers and

[2] This question is referred to as the **Standing Question**.
[3] See sentencing remarks of Hiley J on 22 April 2016 SCC 21328675.

responsibilities of each of the defendants in relation to the Trust and its administration.

[6] At all material times by its statements of claim, GEAT has:

(a) claimed standing to sue in its capacity as trustee of the Trust to recover monies paid away in breach of the terms of the Trust by certain officers having control of the affairs of the Trust in circumstances where Deloitte, KPMG and Minter Ellison had responsibility in different capacities over the relevant period from about 1 April 2009 to 19 October 2012 effectively to see the terms of the Trust complied with;

(b) alleged that the Trust is a charitable trust in point of law.

[7] KPMG in its Defence does not take any issue with GEAT's standing to sue and admits the charitable character of the Trust.

[8] Deloitte in its Defence only admits that GEAT alleges that it brings the proceedings against it in the capacity as trustee of the Trust but makes no other admission as to standing and, further, does not admit that the Trust is a charitable trust.

[9] In its initial Defence filed on 16 April 2015, Minter Ellison did not take issue with either premise and pleaded positively on the basis that the Trust was a valid charitable trust. However by its Amended Defence filed 29 January 2016 (**Amended Defence**), Minter Ellison

pleads positively, first, that GEAT has no standing to bring the action against it and, secondly, that the Trust is not a valid charitable trust.

[10] These are challenges which GEAT and Minter Ellison say go to the very foundation of the action. The other defendants have not adopted those explicit pleas. Nevertheless, the result of those challenges will be binding in respect of all three defendants in the consolidated action.

[11] Following orders made on 3 March 2016 the parties have provided general discovery (not restricted to any categories or issues) comprising more than 90,000 documents. It was expected at the case management conference that had been scheduled for 21 July 2016 a timetable would be set for the sequential exchange of witness statements and expert statements, after allowing sufficient time for the parties to digest those documents.

This Application

[12] Written submissions were provided on behalf of GEAT,[4] Deloitte[5] and Minter Ellison[6].

[13] The first defendant, Deloitte neither opposes nor consents to this application but reserves its right to be heard on the separate questions

[4] "Plaintiff's Written Submissions in respect of the Plaintiff's Summons Seeking Orders for a Separate Question Hearing filed 11 May 2016" dated 23 June 2016 (**Plaintiff's Submissions**).
[5] "First Defendant's Written Submissions in respect of the Plaintiff's Summons Seeking Orders for a Separate Question Hearing filed 11 May 2016" dated 30 June 2016 (**Deloitte Submissions)**.
[6] "Minter Ellison's Written Submissions in respect of the Plaintiff's Summons filed 11 May 2016" dated 1 July 2016 (**Minter Ellison Submissions**).

if this application succeeds. In that event Deloitte will apply for a stay of the remainder of the proceedings pending the final determination of the separate questions, concerned that considerable cost and time will be wasted if the proceedings were to continue in parallel to the separate questions and the separate questions are decided against the plaintiff. GEAT agrees that there should be no compulsion on the parties to proceed with the main action until the separate questions are determined in the event that this application is successful.

[14] Minter Ellison opposes this application. Counsel contended that the following factors militate against such a course:

(a) the proceeding is likely to be significantly delayed;

(b) Minter Ellison would have to carry out extensive factual investigations before the Trust Validity Question could be heard;

(c) there is a reasonable prospect that the order made following the determination of the Standing Question and the Trust Validity Question will be appealed;

(d) it is possible some witnesses will have to give evidence at both trials;

(e) the parties are already committed to an extensive and costly discovery exercise on all issues;

(f) a split trial is likely to postpone any settlement by alternative dispute resolution; and

(g) there is a prospect that evidence relevant to the other issues will deteriorate if there is a split trial.[7]

[15] At the hearing on 12 July, GEAT read the affidavits of Anthony Francis Johnson sworn 4 May 2016 (**Johnson Affidavit**) and Hugh Burton Bradley sworn 26 May 2016 (**Bradley Affidavit**). Minter Ellison read an affidavit of Matthew Ethan Dudakov sworn 10 June 2016 (**Dudakov Affidavit**) in opposition to the application.

Legal principles relating to split trials

[16] Rule 47.04(a) of the Supreme Court Rules relevantly provides that the Court may order that a question in the proceeding be tried before the (principal) trial of the proceeding.[8] In exercising its power, the Court shall endeavour to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined: rule 1.10(1)(a).

[17] Most of the relevant principles are summarised in the reasons of Branson J in *Reading*[9] at 497-499 [6] – [9].[10] Counsel for Minter

[7] Minter Ellison Submissions [2].
[8] Minter Ellison accepts that the Standing Question and the Trust Validity Question are questions for the purpose of this rule.
[9] *Reading Australia Pty Ltd v Australian Mutual Providence Society* (1999) 217 ALR 495 (***Reading***).
[10] See too *Bass v Permanent Trustee Company Ltd* (1999) 198 CLR 334 (***Bass***); *Rainsford v Victoria* (2005)144 FCR 279 (***Rainsford***) at 290-293 [34]-[41]; *AWB Ltd v Cole (No 2)* (2006)

Ellison conveniently provided a summary of principles which they say are relevant for present purposes.

[18] It has long been recognised that the discretion should only be exercised with great caution and only in a clear case.[11] The onus is on GEAT to persuade the Court to exercise its discretion to make such an order. The test adopted in the Federal Court of Australia that it must be "just and convenient" in all the circumstances is an apt reflection of the test under r.47.04.

[19] Ordinarily all issues of fact and law should be determined at the one time following a trial. However the power to determine issues or questions separately from and preliminary to the trial of the whole action has been exercised in a wide range of circumstances, including those where the questions of capacity or competence have been raised.[12]

[20] Factors which tend to support the making of an order for the determination of separate questions include that the determination may contribute to the saving of time and cost by substantially narrowing the

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233 ALR 453 (***AWB***) at 460-463 [26]-[40]; *City of Swan v Lehman Brothers Australia Ltd* (2009) 73 ACSR 86 (***City of Swan***) at 95-96 [27]; and *Vale v Daumeke* [2015] VSC 342 (***Vale***) at [31].

[11] *Dunstan v Simmie & Co Pty Ltd* [1978] VR 669 at 671 per Young CJ and Jenkinson J and *Murphy v Victoria* (2014) 45 VR 119 (***Murphy***) at [28]. See also *Windsor Refrigerator Co Ltd v Branch Nominees Pty Ltd* [1961] Ch 375 at 396 (per Lord Evershed MR).

[12] *Reading* at [7].

issues for trial, or even lead to disposal of the action, or contribute to the settlement of litigation.[13]

[21] The making of an order for the preliminary determination of questions will entail a trial of the questions, including the final determination of any facts relevant to the questions, unless such facts can be assumed or are admitted.[14] Where the split trial will be one of mixed fact and law, it is important that there be precision in specifying the facts upon which it is to be decided and that all the facts that are on any fairly arguable view relevant to the question, are ascertainable.[15]

[22] Counsel for Minter Ellison submitted that it would therefore be appropriate to refuse a split trial where the Court is not satisfied those facts have been properly investigated, and can be properly determined, by the time the application for a split trial is heard, citing *AWB Ltd* at [56] and *Vale v* at [31(i)]. For the same reason, it is in most cases inappropriate to order the trial of preliminary questions before discovery of documents relevant to the questions, citing *Vale* at [31(j)].

[23] Counsel also pointed to other circumstances that may weigh against the hearing and determination of preliminary questions:

[13] *Reading* at [8(f)].
[14] *Bass* at [45] & [53] and *Reading* at [8(a)].
[15] *AWB* at [32] & [33].

(a) the likelihood of significant (but different) contested factual issues having to be determined at the early trial and at the principal trial;[16]

(b) where there may be a significant overlap between the evidence adduced at both hearings, possibly involving the calling of the same witnesses, particularly where the court will be required to form a view as to the credibility of witnesses who may give evidence at both stages of the trial;[17]

(c) where the preliminary determination may prolong rather than shorten the litigation,[18] including where an appeal is likely.[19]

[24] Counsel for Minter Ellison also pointed to the following observations by Kirby and Callinan JJ in *Tepko*[20] at [168] & [170], that:

(a) the attractions of trials of issues rather than of cases in their totality, are often more chimerical than real;

(b) the additional potential for further appeals to which the course of the trial on separate issues may give rise is a factor militating against a split trial; and

(c) single-issue trials should only be embarked upon when their utility, economy and fairness to the parties are beyond question.[21]

[16] *Reading* at [8(g)(i)].
[17] *Reading* at [8(g)(ii)] & [13].
[18] *Reading* at [8(g)(iii)].
[19] Citing *AWB Ltd* at [84].
[20] *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1.

Plaintiff's contentions

The Trust

[25] The relevant history of the constitution of the Groote Eylandt Aboriginal Trust and the several constating instruments and amendments thereto is set out in the Recitals to the amended trust deed executed on 12 August 2008 **(**the **Trust Deed).**[22]

[26] Clause 2 of the Trust Deed provides (and at all times material to the action all previous counterpart instruments relevantly provided):

> The Trustee shall hold and apply the Trust Fund exclusively for such charitable purposes (in the strict legal sense) as may be served by the provision of money property or other advantages for the benefit welfare and advancement of the Beneficiaries.

[27] The expression "Beneficiaries" is defined in the Trust Deed (and was similarly defined in all previous counterpart instruments from 25 June 1996) to mean "all Aboriginal people who are members of the traditional clans of and permanently resident on Groote Eylandt or Bickerton Island and their successor generations".

[28] In essence, the Trust Deed provides that the income in any annual period derived by the Trust both from its existing assets and from the royalty payments received from mining on Groote Eylandt is to be allocated in a certain amount to a Growth Fund so as to increase the

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[21] See also *Save The Ridge Inc v Commonwealth* (2005) 147 FCR 97 at [15] per Black CJ and Moore J and *Tallglen Pty Ltd v Pay TV Holdings Pty Ltd* (1996) 22 ACSR 130 at 141-2 per Giles J.
[22] Johnson Affidavit, exhibit AFJ – 1 at pp 98-100.

investment funds within the Trust Fund, to an Asset Preservation Fund in a certain amount with a view to the preservation and maintenance of assets of the Trust and their value, to an Administration Fund in a certain amount in order to fund costs and expenses of GEAT and the Trust and, out of the annual royalty payments and subject to the allocations to the three aforementioned Funds, a remainder amount to the Charitable Grant Fund for the purpose of providing benefits to the Beneficiaries.

[29] Clause 6.3.2 provides that the Charitable Grant Fund may be applied towards eight stipulated charitable purposes.

[30] Counsel for the plaintiff submit that it is trite that the charitable status of a trust is determined by construing the wording of the objects and powers set out in the declaration of trust in the context of the instrument as a whole with reference where appropriate to extrinsic circumstances known to the settlor.[23]

[31] In the case of the subject Trust Deed, the plaintiff contends that clause 2 plainly establishes the overriding objects, purposes and character of the Trust, and the particular purposes in clause 6.3.2 are subordinate thereto.

[23] *Byrnes v Kendle* (2011) 243 CLR 253, 263 [17], 272-277 [49]-[65], 290 [114]; *Attorney-General for New South Wales v The Perpetual Trustee company (Limited)* (1940) 63 CLR 209, 227.

[32] I note that the earlier history of the Trust, the construction of the deed of trust dated 7 March 1989 (the **Old Trust**) and its status as a charitable trust was examined and the subject of findings made by this Court in 1996 in *Flynn v Mamarika*[24]. There are significant similarities between paragraph 4 of the 1989 deed of trust and clause 2 of the Trust Deed.

Standing Question

[33] GEAT's claim to the right to sue Minter Ellison arises upon the facts and circumstances alleged in the Statement of Claim. The question of standing is to be determined on the assumption that the facts are as pleaded in the Statement of Claim. In effect, the first question raises a demurrer point. A determination that GEAT has no standing to sue will finally dispose of the action adversely to GEAT.

[34] By paragraph 11 of the Amended Defence, Minter Ellison admits that GEAT was appointed trustee of the Groote Eylandt Aboriginal Trust by the original Trust Deed (dated 7 March 1989) but otherwise does not admit that GEAT is and was at all material times the trustee of the Trust or that it brings the proceedings in that capacity. Further, Minter Ellison alleges that

> GEAT does not have standing to bring these proceedings in the capacity as trustee as GEAT has not been found liable for

[24] *Flynn v Mamarika* (1996) 130 FLR 218.

> breach of trust and has not been found responsible for the loss and damage it now claims against Minter Ellison.

[35] Otherwise, Minter Ellison has not provided further particulars of the plea.

[36] By an earlier letter from its solicitors dated 14 August 2015,[25] Minter Ellison alleged that a "fundamental issue … which prevent(s) [GEAT] from pursuing its claim [is that] it does not have standing to seek compensation". This was put on the following basis.

> As far as we can ascertain, [the plaintiff as Trustee] has not been found liable for breach of the Trust and it has not been held liable for loss and damage sustained by the Trust.
>
> In the circumstances, [GEAT] has no standing to allege that others must compensate it towards [sic] loss and damage, given there is no loss and damage that it has been found responsible for.
>
> It is [Minter Ellison's] contention that if the plaintiff had been sued by a new trustee appointed or [sic] the Attorney General, it would be open for it to make the allegations it does (and in turn, open for [Minter Ellison] to deny those allegations).

[37] The Dudakov Affidavit does not address the issue of standing.

[38] Minter Ellison has not said any more about this question in the course of its submissions, except to assert that most of the factors identified in its submissions regarding the Valid Charitable Trust Question also apply to the Standing Question.

[25] Johnson Affidavit, exhibit AFJ – 1 pp 1-3

Valid Charitable Trust Question

[39] In its written submissions GEAT contended that the question turns primarily upon the meaning and application of clause 2 of the Trust Deed. See [26] above.

[40] GEAT's primary contention is that clause 2 is (at least) valid as embracing the first of the *Pemsel*[26] categories, that is to say the relief of poverty, and that the more particular objects specified in clause 6.3.2 are governed by and subjected to clause 2.

[41] The Bradley Affidavit addresses the circumstances of the disadvantage and relative impoverishment of the Aboriginal residents of Groote Eylandt and Bickerton Island at [17] to [19]. GEAT contends that it is well accepted that poverty for these purposes is relative and does not require destitution but merely a standard of living below an acceptable community minimum standard.

[42] In the Amended Defence, at [13], Minter Ellison expressly denies the allegation in [13] of the statement of claim that:

> As a charitable trust, the Trust is and was at all material times entitled to protection and enforcement by the Attorney-General of the Northern Territory as *parens patriae*.

and says that the Trust was not a valid charitable trust at law in that:

[26] *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531 (***Pemsel***) at 583.

(a) the trust deed permitted the Charitable Grant Fund to be applied towards *inter alia* sport and social facilities, which purposes are not charitable purposes;

(b) the class of beneficiaries is restricted to those members of specific Aboriginal clans which are permanently residing at three geographical locations and thus the purported benefit of the Trust is not of a public nature and is not for the community as a whole or for an appreciable, but unascertained or indefinite, portion of it;

(c) even if the beneficiaries may rightly be recipients of charitable grants at a particular point in time, the possibility that they were not rightly recipients in the past or the possibility that they may not rightly be recipients in the future is inconsistent with the public benefit test.

[43] GEAT points out that the Dudakov Affidavit relevantly asserts:

(a) first, that agreements were entered, dealings took place and rights and interests were held (referring to such matters deposed to in the Bradley Affidavit at [8]) prior to the execution of the Trust Deed on 7 March 1989 and such material may be relevant in construing the various trust instruments;

(b) secondly (after referring to the definition of "Beneficiaries"), that apart from identifying the traditional clans themselves, it will also

be relevant to identify the individual persons who are members of the clans (which will require examination of the rules of membership) and whether such persons are resident on either island;

(c) thirdly, that "there will in all likelihood be a question of whether the Trust is for the relief of poverty" and relevant to that issue "whether any past or current member of the 'Beneficiary' [sic] could legitimately be said to be impoverished" in the legal sense.

[44] GEAT submits that Minter Ellison does not say how the first of those matters is relevant to the construction of the Trust Deed (or any relevant predecessor deed), nor what evidence it will seek to adduce in that regard. In any event, GEAT says that the relevant words in clause 2 of the Trust Deed (and, to the extent it may be relevant, the equivalent wording of predecessor counterpart deeds) are plain and clear and not liable to be modified by any prior negotiations or dealings to which the settlor was privy. GEAT rejects the suggestion that any evidence of the kind asserted will be relevant or admissible.

[45] GEAT submits that the second assertion raises a false issue. It says there can be no controversy in the identification of the traditional clans and Minter Ellison propounds none. The question of the identification of particular persons entitled to be benefitted is not a matter which arises on the interpretation of the Trust Deed.

[46] GEAT submits that the third assertion raises an issue in a very narrow compass. It is addressed in the Bradley Affidavit. Minter Ellison has not indicated how it might gainsay that evidence. Evidence (or, strictly, agreed facts) of such character was received by Martin CJ in *Flynn v. Mamarika*. In light of clause 2 of the Trust Deed, the issue of relative impoverishment could only conceivably be a matter of controversy if it could possibly be shown that there is not "any" person (as the Dudakov Affidavit puts it) living or yet to be born into the clans on the islands who could ever be impoverished in the relevant sense. The issue raised is able to be resolved both in the abstract and by reference to the reality of conditions on the islands. In either event, it is a very narrow issue.

Discretionary Considerations

[47] GEAT contends that the two issues for separate determination can be framed with appropriate particularity and there is a clear demarcation between those issues and the remaining issues in the consolidated action.

[48] The two issues are both fundamental and threshold issues. If GEAT has no standing to prosecute the action on the basis alleged in the Statement of Claim, that will spell the end of the proceedings.

[49] Similarly, the major premise of the action is that the Trust is a valid charitable trust. A finding to the contrary will go to the foundation of

the proceedings as they are now constituted. Put shortly, the claims of breach of expenditure caps established by the instruments of trust depend upon the existence of a valid express trust constituted by formal instrument which in turn depends upon the Trust being charitable.

[50] Minter Ellison has not formally articulated what it says are the consequences of a denial of the charitable nature of the Trust but its counsel suggested that if the Trust is not a valid charitable trust then all of the royalties paid by GEMCO and/or BHP will need to be returned.[27] Even if the result of a denial of the Trust's charitable status were some form of resulting bare trust, the action as constituted would be inutile and liable to be struck out.

[51] GEAT contends that until the filing of Minter Ellison's Amended Defence on 29 January 2016, all parties had proceeded in the litigation and in their anterior dealings on the footing that the Trust was a valid charitable trust.

[52] GEAT contends that the law of charitable trusts is well established by accepted authority binding on this Court. Further, the Court has the benefit of the judgment of Martin CJ in *Flynn v Mamarika* addressing the charitable status of the Trust under a materially identical instrument of trust.

[27] Johnson Affidavit [32].

[53] GEAT contends that the evidence relevant to the determination of the two separate issues foreshadowed by both parties is in a very narrow compass. There is no suggestion that there will be any splitting of evidence on any matters between the two trials or any risk of credibility findings on the first trial affecting the second.

[54] It is abundantly clear that the trial of the issues other than the two identified preliminary issues will be long and complex, and costly for the parties both in the preparation and in the conduct. Those costs, as well as the resources of the Court, will be entirely wasted if the Court should determine either of the two threshold issues in favour of the defendant. I agree.

[55] Counsel for GEAT contended that the hearing of the preliminary questions should take no more than one day or possibly two. The questions raise quite narrow issues, primarily as points of law, capable of reasonably summary resolution. The potential waste of costs and resources if the preliminary questions are left to the one main trial is very considerable and out of all proportion to any additional cost and dislocation occasioned by a preliminary trial.

[56] Counsel contended that the case for the present application to proceed is of a kind described by Kirby P in *CBS Productions:*[28]

[28] *CBS Productions Pty Ltd v O'Neill* (1985) 1 NSWLR 601 at 606.

> A matter is 'ripe' for separate and preliminary determination where it is a central issue in contention between the parties, the resolution of which will either obviate the necessity of litigation altogether or substantially narrow the field of controversy.

Minter Ellison's Contentions

[57] As noted in [14] above, Minter Ellison opposes the application on several grounds. However those grounds focus on the Trust Validity question, not the Standing Question.

Delay of the proceeding

[58] Minter Ellison points out that the significant costs of advancing the matters to trial can only be minimised if the investigation and preparation of all the other issues in the proceeding is put on hold pending the final determination of the preliminary questions. The proceeding would effectively be stayed in respect of all other issues.

[59] Minter Ellison contends that the delay in finally determining the Trust Validity Question is likely to be significant. It estimates that it may require 3-4 months to investigate the facts relevant to the Trust Validity Question, the trial itself could take 1-2 weeks, judgment and reasons for decision would probably take 1-2 months, an appeal to the Court of Appeal would take about 6 months, and an appeal to the High Court would take another 8-12 months, assuming special leave to appeal was granted. Even without any appeal, it is likely the Trust Validity Question will not be resolved until about January 2017,

delaying the preparation and trial of the other issues by about 6 months. If the judgment on the preliminary question is appealed, the delay will be over a year and extend beyond the likely trial dates if a single trial is held.

Factual matters for the Trust Validity Question

Legal principles applicable to the validity of a charitable trust

[60] In its written submissions Minter Ellison contends that a valid charitable trust must have the following attributes:

(a) it is for a charitable purpose recognised at law, such as:

(i) the relief of poverty;

(ii) the advancement of education;

(iii) the advancement of religion; or

(iv) other purposes which are generally for the public benefit (being beneficial to the community) not falling within the other heads;

(b) the trust is for the public benefit; and

(c) the benefit is for the community as a whole or an appreciable, but unascertained or indefinite portion of it.

[61] Minter Ellison refers to and relies upon the observations by Lord Simmons in *Oppenheim*[29] that a trust will not have the requisite public purpose if the following qualification describes the class of beneficiaries:

> A group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or several propositii, they are neither the community nor a section of the community for charitable purposes.

and the statement by Lord Greene MR in *Re Compton*[30] that:

> Persons claiming to belong to the class do so not because they are A.B., C.D. and E.F. but because they are poor inhabitants of the parish. If, in asserting their claim, it were necessary for them to establish the fact that they were the individuals A.B., C.D. and E.F., I cannot help thinking that on principle the gift ought not to be held to be a charitable gift, since the introduction into their qualification of a purely personal element would deprive the gift of its necessary public character.

[62] The principles from *Oppenheim* and *Compton* have been accepted as applicable law in Australia.[31] In *Thompson*,[32] which decision was confirmed in *Stratton v Simpson*,[33] Dixon CJ approved the following passage:

> An aggregate of individuals ascertained by reference to some personal tie (e.g. blood or contract, such as the relations of a particular individual, the members of a particular family, the

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[29] *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 (***Oppenheim***) at 306.
[30] *Re Compton* [1945] 1 Ch 123 (***Re Compton***) at 130.
[31] See *Re Evans; Union Trustee Co of Australia Ltd v Attorney-General for Queensland* [1957] St R Qd 345.
[32] *Thompson v Federal Commission of Taxation* (1959) 102 CLR 315 (***Thompson***) at 322 (Dixon CJ, Fullagar and Kitto JJ agreeing).
[33] *Stratton v Simpson* (1970) 125 CLR 138 at 159 (Gibbs J, Barwick CJ and Menzies J agreeing).

> employees of a particular firm, the members of a particular association), does not amount to the public or a section thereof for the purposes of the general rule.

[63] Minter Ellison submits it will be a matter for the trial to determine whether the Trust offends the *Compton-Oppenheim* rule.[34]

[64] As noted in [40] above GEAT's primary contention is that the first of the *Pemsel* categories, namely relief of poverty, applies. At the hearing of this application senior counsel for GEAT took issue with the generality of Minter Ellison's proposition recorded at [60](b) above and submitted that even if the second, third and fourth *Pemsel* categories require an actual specific demonstration of public benefit there is no need on the authorities to demonstrate public benefit for the purpose of a charitable trust established for the relief of poverty.[35]

[65] Senior counsel also referred to the proposition noted at [60](c) above and to more detailed discussion about this aspect in other cases, including in Dixon CJ's consideration of the reasons of Lowe J in *In re Income Tax Acts (No 1)*[36] in *Thompson* at pp 323-4. Counsel also referred to a decision of the New Zealand Court of Appeal in *Latimer v Commissioner of Inland Revenue*[37] which considered and distinguished

[34] It should be noted that the points relevant to the validity of the Trust in this proceeding were not raised or argued in *Flynn v Mamarika* (1996) 130 FLR 218. The case cannot be relied upon for the purposes of asserting the trust is a valid charitable trust.
[35] TS 7.
[36] In *Re Income Tax Acts (No 1)* [1930] VLR 211.
[37] *Latimer v Commissioner of Inland Revenue* (2002) 3 NZLR 195 (***Latimer***).

Oppenheim in relation to Maori claimants. Speaking for the Court, at [38], Blanchard J said:

> In the New Zealand context it is, we think, impossible not to regard the Maori beneficiaries of this trust, both together and in their separate iwi or hapu groupings, as a section of the public for the purposes of a trust …

[66] This passage was referred to and apparently applied in relation to a trust established in the context of a native title claim by Edelman J in *Plan B Trustees Ltd v Parker*.[38] See too His Honour's reference at [119] to views expressed by Newnes JA in *Shire of Derby-West Kimberley v Yungngora Association*.[39]

[67] Another potential question of law is whether a trust established for the relief of poverty is invalidated if one of the potential beneficiaries is not impoverished. As noted in [46] above, GEAT contends that it is not necessary that every such person fall within that category. Counsel for Minter Ellison conceded that many if not most of the residents of the islands are impoverished and would be the proper objects of a trust for the relief of poverty, but contended that if one or more of those persons are not poor then the trust arguably fails.

[68] Although these matters do not need to be resolved by me at this stage, it does appear that the determination of this preliminary question will involve a consideration of the authorities and their relevance and

[38] *Plan B Trustees Ltd v Parker* [2013] WASC 216 at [105] – 119].
[39] *Shire of Derby-West Kimberley v Yungngora Association* [2007] WASCA 233.

application to the facts. The parties, in particular the plaintiff, will need to make their own assessment as to what evidence needs to be adduced to cover the possibility of their contentions as to the law being rejected, if not by me by an appeal court.

The facts relevant to the Trust Validity Question

[69] Minter Ellison notes that the purposes of the trust are not on their face confined to the relief of poverty. It also notes that the Beneficiary is confined to those permanently resident on the islands who are members of the traditional clans and their successor generations. It says there is an ambiguity as to whether the definition of Beneficiary refers to the members of the clans and permanently resident on the islands at the time of the settlement of the trust and their descendants or simply members of the clans and their descendants who permanently reside on the islands.

[70] Minter Ellison submits that the following facts are likely to be relevant to determine the application of the *Compton-Oppenheim* principle:

(a) identification of the traditional clans on Groote Eylandt and Bickerton Island since settlement of the Trust;

(b) identification of the customs and rules which govern (or have governed) admittance and expulsion from each of the clans since

settlement of the Trust and the extent to which admittance is governed by a substantial degree of ancestral connection;

(c) identification of the customs and rules which govern (or have governed) who are the descendants of those members;

(d) identification of the members of the clans which have been permanently resident on the islands since settlement of the Trust;

(e) whether there have been, are or in the future may be, members of the clans who do not satisfy the test of poverty; and

(f) the extrinsic facts and circumstances surrounding the execution of the trust instruments to assist in resolving ambiguity, including the ambiguity referred to in [69] above.[40]

[71] Minter Ellison submits that it is entitled to investigate and test each of these factual elements. The investigations are likely to take a significant amount of time, perhaps 3 to 4 months, and should occur in parallel with the investigation of all the other issues in the proceeding.

[72] Senior counsel for the plaintiff submitted that only the facts and evidence of the kind referred to in subparagraphs (a), (b) and (c) of [70] above could conceivably be relevant on the hearing of the preliminary questions. He was confident that such evidence, perhaps

[40] See for example Dudakov Affidavit [27].

from one or more elders and from an anthropologist, would be within a reasonably narrow compass.

[73] Counsel contended that the matters referred to in subparagraphs (d) and (e) relate to the application of the trust funds, not to any question of the validity of trust. However, Minter Ellison contends that such evidence will be relevant because of its contention that every potential beneficiary much be impoverished for the trust to be valid.

[74] Counsel for GEAT contended that the matters referred to in subparagraph (f) are irrelevant, largely because there is no ambiguity, but in any event the issue there posed is in a very narrow compass.

[75] Counsel for Minter Ellison were not any more specific about precisely what facts and evidence would be relied upon in support of the positive assertions made in [13] of its Amended Defence, or what facts, for example the facts deposed to by Mr Bradley in his affidavit, are likely to be challenged. There is some force in the points made by GEAT's counsel that Minter Ellison has now had some 18 months to conduct enquiries and prepare its case, and that its lawyers must have had some basis for raising these allegations concerning the validity of the trust when they did in August last year. Indeed Minter Ellison has been extensively involved with GEAT and the Trust since about 2006. It seems that such involvement has included attendance at GEAT meetings and legal advice concerning earlier versions of the Trust Deed

and representation of GEAT in an action in this Court bought in 2007 to remove the cap on the Charitable Grant Fund.[41] I would expect Minter Ellison to have ascertained by now what evidence there is in relation to the Valid Charitable Trust Question and to have been able to identify the nature of that evidence in the course of resisting this application.

[76] I am not convinced that the factual exercise will be as complex or that the hearing will take as long as Minter Ellison suggests. However I have set aside longer than the time suggested by GEAT for the hearing of the preliminary questions and have allowed the parties about five months to prepare for the hearing. Notwithstanding the recency of this application and Minter Ellison's relatively recent withdrawals of its previous concessions on these two issues, the parties should be in a position to ensure that this application can be properly prepared so they can be heard in December 2016. As I have already noted, the parties will need to make their own decisions about the evidence that they propose to adduce.

Reasonable prospect of appeal

[77] Minter Ellison contends, and I agree, that the nature of the proceeding itself, the amount the subject of the claim and the issues which are likely to require determination in deciding the Trust Validity Question

[41] Action Number 80 of 2007.

give rise to a reasonable prospect that the orders following the first trial will be appealed. However, this is not unusual. If the plaintiff was unsuccessful in relation to the Standing Question, any appeal concerning that question would be relatively straightforward.

Witnesses giving evidence at both trials

[78] Minter Ellison submitted that "it is possible that" various members of "the Beneficiaries" will be witnesses at the principal trial. Reference is made to allegations in the amended statement of claim against Minter Ellison concerning numerous transactions said to be in breach of the Trust Deed. These include remuneration paid to members of the Beneficiaries during three financial years, provision of motor vehicles and boats to persons falling within the definition of Beneficiaries and expenditure of funds in excess of the relevant charitable grants caps in breach of the Trust Deed.

[79] Minter Ellison has denied or not admitted those transactions and requires them to be proved at trial. The persons to whom the remuneration was paid, to whom the vehicles and boats were provided and to whom any charitable grants were made would be relevant witnesses in proving or disproving these alleged transactions. Minter Ellison submits that "it is possible that" some of these persons would also be relevant witnesses in respect of the factual matters relevant to the Trust Validity Question.

[80] Further, Minter Ellison has requested particulars of a number of matters including the names of the persons to whom the remuneration was allegedly paid, where those names are not set out in Annexure B to the Statement of Claim, the names of the persons to whom the motor vehicles and boats were allegedly provided, and the names of the persons to whom the charitable grants were paid. Minter Ellison complains that GEAT has refused to provide these particulars as a result of which it does not know the identity of the persons alleged to have received the payments or benefits.

[81] Minter Ellison says there is also "the potential for" the same evidence (not just the same witnesses) being relevant to both trials. Until the discovered documents have been analysed it is impossible to say what further investigations must be carried out to determine the evidence relevant to the Trust Validity Question. It may be necessary to interview potential third party witnesses and obtain their documents: Affidavit of Matthew Ethan Dudakov sworn 10 June 2016 (**Dudakov Affidavit**) [32]. In those circumstances, "it is presently unknown" whether there is likely to be "overlapping" evidence in the sense contemplated in *Reading* at [8(g)(ii)].

[82] Senior counsel for the plaintiff points to the fact that Minter Ellison only refers to possibilities concerning evidence relevant to the preliminary hearing. He reiterated that the main factual issue for the preliminary hearing concerned the identity and structure of the clans,

not the actual transactions alleged to have occurred in breach of trust. Counsel said that most of the evidence concerning the transactions was documentary but conceded that there may be some oral evidence adduced at the trial itself in relation to some of those transactions. This may involve calling one or more witnesses who had testified at the preliminary hearing, but the evidence would relate to different issues. Counsel also conceded that there was a possibility of the Court making findings during the preliminary hearing that might relate to the credibility of one or more such witnesses, but said that such a possibility was remote and would be dealt with by counsel at the trial as one would normally deal with a witness whose credibility might be in doubt.

[83] For the reasons advanced by senior counsel for plaintiff I am unable to conclude that the hearing of the preliminary question may "result in significant overlap in the evidence adduced" at both trials, or the Court being "required to form a view as to the credibility of witnesses who may give evidence at both stages".[42]

[84] However, I interrupt to indicate that the plaintiff's solicitors should provide forthwith any further particulars that may relate to the preliminary questions. Subject to any stay of the principal proceedings pending the determination of the preliminary questions, I wish to make it clear that the Court expects Minter Ellison, and the other parties, to

[42] *Reading* [8](g)(ii).

make relevant concessions or to explain why concessions are not being made, in relation to allegations made in the pleadings, for example in relation to transactions alleged. It is not appropriate in this jurisdiction for a party to simply deny or not admit an allegation without reasonable cause, particularly after proper particulars and disclosure have been provided.

Failure to foreshadow a split trial prior to general discovery

[85] Minter Ellison complains about the fact that GEAT did not make this application until 11 May 2016, after Minter Ellison had already embarked upon extensive discovery in relation to the whole of the proceedings.

[86] Minter Ellison had informed GEAT by letter of 14 August 2015 that it intended to raise these two defences, advised on 20 October 2015 that it did not intend to make any application for strike out or summary judgment at that stage, and formally raised the two questions in the Amended Defence of 29 January 2016.

[87] At a directions hearing on 3 March 2016 orders were made for general discovery by 10 June 2016 in compliance with a protocol which had previously been circulated among the parties. The task facing Minter Ellison in respect of complying with the orders for general discovery was significant and costly and extended to approximately 65 solicitor's files and approximately 14,000 individual documents.

[88] GEAT did not warn Minter Ellison during the directions hearing on 3 March 2016, or prior to service of this application on 12 May, that it proposed to seek an order for the preliminary determination of the questions or that it sought a split trial. Minter Ellison contends that if the Court and Minter Ellison had been notified on 3 March 2016 that GEAT proposed to seek a split trial in respect of the separate questions, they would have had the opportunity to consider whether the orders for discovery should be confined to those questions or whether there should be discovery in two tranches (the first confined to the questions and the later to all other matters).

[89] The parties have now provided their general discovery by filing affidavits of documents exhibiting all discoverable documents (save for those privileged or no longer in their possession) in electronic form. The discovery consists of:

(a) 57,696 documents from GEAT (excluding MYOB files);

(b) 18,283 documents from KPMG;

(c) 1,521 documents from Deloitte; and

(d) 13,864 documents from Minter Ellison.

[90] Minter Ellison contends that GEAT should have made this application well in advance of the directions hearing on 3 March 2016 and before the orders for discovery were made. It should not be permitted to

agitate for the split trial after the parties have become committed to the process for general discovery.

[91] I agree that GEAT should have made this application earlier, and advised the parties of its intentions to do so prior to them embarking upon general discovery following the orders of 3 March. However, although Minter Ellison raised the two points in August 2015 it did not formalise its position by pleading them until 29 January 2016, notwithstanding that it was served with a draft statement of claim a year earlier and filed its initial defence in April 2015.

[92] I consider that the only prejudice likely to have been suffered by the parties as a result of this application being brought after the orders for general discovery were made is the considerable time and expense that may have been wasted in the event that either of the questions is determined adversely to the plaintiff. Such prejudice can be ameliorated by appropriate orders as to costs thrown away.

Impact on settlement and alternative dispute resolution

[93] As Minter Ellison submits the effect an order for a split trial may have on court imposed or voluntary alternative dispute resolution is a factor to be considered in deciding whether to make an order under r 47.04.[43] Minter Ellison point out that parties to litigation are more likely to settle where the trial is looming. The sooner the parties are required to

[43] *Australian Communications Corp Pty Ltd v Coles Myer Ltd* [2002] VSC 443 at [13] per Bongiorno J.

commit to trial preparation, view each other's witnesses' and experts' statements and face the prospect of an imposed rather than negotiated outcome, the sooner an informed settlement can be pursued. Counsel submits that the splitting of a trial takes the pressure off the parties and necessarily postpones the parties embarking upon an informed alternative dispute resolution process. This consequence is exacerbated by the fact that KPMG will not, and Deloitte may not, participate in the split trial.

[94] While these general statements are trite, I think it more likely that the determination of these two particular questions will enhance the prospects of settlement. One way or other these two fundamental issues will be resolved. If either answer is adverse to the plaintiff the proceedings will end without further considerable delay and expense to any of the parties. If both questions are answered in the plaintiff's favour, the parties can then negotiate and attempt to reach agreement on the main issues, particularly now that general discovery has taken place.

Deterioration of evidence

[95] Minter Ellison points out that testimony and documentary evidence at the principal trial is likely to extend to events which took place many years ago, as far back as 2008. The longer the delay to this trial, the

greater the likelihood that memories will fade and that documents will be lost.

[96] First, Minter Ellison points out that the alleged transactions in respect of trust funds are said to have occurred during the 2009 to 2013 financial years. The persons within GEAT effecting the various transactions, and the recipients of the benefits from those transactions, are likely to be relevant witnesses in proving the transactions themselves and the circumstances in which they were made. This evidence is likely to be relevant in a number of important respects, including whether the transactions:

(a) occurred as alleged;

(b) were in breach of the Trust Deed;

(c) were the result of contributory negligence; and

(d) were caused by the alleged negligence of Minter Ellison.

[97] Second, Minter Ellison says that the circumstances relating to the engagement of Minter Ellison, Deloitte and KPMG are likely to be relevant in determining the scope of any duties or obligations assumed by each defendant. The scope and obligations of Deloitte and KPMG are relevant to Minter Ellison because of the provisions of the *Proportionate Liability Act* (NT). It is alleged Minter Ellison was engaged in 2006, Deloitte from 2000 and KPMG from 1992.

Testimony from the persons within these organisations, and the persons within GEAT who engaged them, gave instructions and received advice, is likely to be relevant.

[98] Third, Minter Ellison points out that the proceedings were commenced against the defendants after the expiry of the limitation periods for most (if not all) of the claims and GEAT is seeking an extension under s 44 of the *Limitation Act* (NT). The proceeding should therefore proceed to trial of all issues without any additional delay.

[99] Senior counsel for GEAT points out that Minter Ellison has not provided any evidence to support its assertion that evidence will be lost or will deteriorate if there is a delay before the principal hearing. Much of the evidence is documentary. Counsel also made the point that there is a greater risk that important evidence concerning the Valid Trust Question may be lost if that question cannot be determined earlier rather than later, because evidence regarding clans and traditional membership rules is likely to rely upon the knowledge of senior and elderly members of the clans. I share these concerns.

[100] Counsel for Minter Ellison submitted that not all of the evidence will be in documentary form. Although the terms of the respective retainers were probably in writing, he contended that this may not be the case in respect of every dealing between Minter Ellison (and KPMG and Deloitte) and relevant members of the Trust. No specific examples

were provided. I do not attach much weight to this submission. One would expect a solicitor or accountant to keep notes of all relevant conversations and other dealings with its client, and for those notes to be located during the disclosure process and to assist the solicitor, accountant and their respective lawyers to prepare a detailed statement for the purposes of adducing evidence at the trial.

[101] Having said that, I would expect the plaintiff to provide proper particulars of every act, omission, transaction or dealing upon which it relies so that the defendants can prepare their evidence for trial. I would also expect that the plaintiff and the other parties have now disclosed all documents relevant to all of the issues in the proceedings, including issues concerning the nature and scope of retainers. I note too that KPMG was retained about 14 years, and Deloitte about 6 years, before Minter Ellison was first retained, but have not raised concerns such as these.

[102] Counsel for Minter Ellison also referred to the need for its lawyers to contact third parties, such as persons who are said to have received benefits following alleged breaches of trust. GEAT's counsel submitted that such evidence would probably not be necessary as the fact and nature of such payments and benefits would be established by the documentary evidence, now disclosed. Whilst I accept that it might be necessary or appropriate to make these and other kinds of enquires and to obtain evidence from third parties, and that the passage of time

may render this more difficult, I have not been informed of any particular person or categories of persons who are ill or otherwise unlikely to be available to answer enquiries or give evidence. Further, as I noted above, potential prejudice of this kind should be limited if and when the plaintiff fully particularises its claim.

[103] Of course there is always a risk of evidence being lost or deteriorating, particularly oral evidence unsupported by contemporary notes or other corroborating evidence. Nowadays such risks are relatively small in light of provisions such as those in the *Evidence (National Uniform Legislation) Act 2013* (NT) which facilitate the use of hearsay evidence (eg ss 63 and 64) and evidence concerning Aboriginal traditional laws and customs (ss 72 and 78A).

Conclusions

[104] Clearly these three matters involve a large number of facts many of which are contained in or otherwise evidenced by the large quantity of documents (over 90,000) that have been recently disclosed. The pleadings are extensive, in some cases exceeding 100 pages. Hopefully a significant number of the factual issues can be resolved now that general discovery has taken place. At present however, it would seem that there is a significant amount of work to be done by way of preparation for trial, and that the trial itself will be lengthy, possibly requiring a special listing over a period of months. The time and cost

likely to be wasted if the trial proceeds but either of these two questions is answered adversely to the plaintiff, is enormous.

[105] None of the substantive reasons advanced on behalf of Minter Ellison suggest that a preliminary determination of the Standing Question is likely to involve any factual issues or controversial issues of law that would take long to prepare for and argue. If Minter Ellison was successful in relation to that question, the actions would be doomed and the need for a lengthy and expensive trial avoided. For that reason alone I consider it appropriate to determine that question as soon as possible.

[106] Whilst the preparation for and determination of the Valid Charitable Trust Question is likely to take a lot more time I do consider that it is just and convenient for that question too to be argued and determined as a preliminary question.

[107] I realise that my decision in relation to these questions may not be published until after March next year and that an appeal against my decision is a real possibility. I also appreciate that the parties should not be forced to otherwise proceed with their preparation for the substantive trial until I have provided my decision. Consequently the substantive trial may not be able to be heard until early 2018. However the matter has already taken a long while to reach this stage

and would appear unlikely to be ready for hearing much before late 2017 in any event.

[108] When the parties were notified on 18 July of my decision the parties were informed that I could hear the matter during the week commencing 5 December 2016 and that they should prepare directions designed to achieve that objective. That period of time takes into account the period that Minter Ellison estimates it would require to investigate the relevant facts and the assertions made by senior counsel for the plaintiff as to the nature and extent of the evidence proposed to be led concerning this question. I expect the solicitors for GEAT to clearly identify the facts and evidence upon which they rely and to provide that evidence to the defendants in sufficient time for them to deal with it. To the extent that the particulars requested by Minter Ellison on 12 December 2015 may be relevant to either of the separate questions I expect the solicitors for GEAT to provide those particulars. I also expect the solicitors for Minter Ellison to proceed expeditiously with the identification, and if requested the better particularisation, of the facts and evidence upon which it relies in support of its positive assertions in paragraph 13 of the Amended Defence.
