IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2013-485-6758
[2014] NZHC 730

BETWEEN	JOHN RUSSELL STRAHL as Trustee of the O T GOUGH FAMILY TRUST Plaintiff
AND	ALEXANDER MALCOLM McKINNON, JOHN RUSSELL STRAHL, ANTONY THOMAS GOUGH, TRACY OWEN GOUGH, AVENAL BERYL ELIZABETH McKINNON, LISA ANGELIQUE D'HARCOURT GOUGH, WYNTON GILL COX, NICHOLAS RICHARD WILLIAM DAVIDSON, HARCOURT DAVID GOUGH, JAMES TRACY GOUGH, RACHEL CORALIE KOOPMAN-GOUGH, MATTHEW OWEN McKINNON, SOPHIA AVENAL ANNA McKINNON, GINA LOUSE SATTERTHWAITE, BENJAMIN THOMAS GOUGH, FIFE HOLDINGS LIMITED First Defendants
	GOUGH HOLDINGS LIMITED Second Defendant

Hearing:	2 April 2014
Counsel:	R J Fowler QC for Plaintiff A V Foote for Fourteenth, Fifteenth and Sixteenth-named First Defendants in support of the application J W A Johnson for First and Fifth-named First Defendants J A Farmer QC and P Robertson for Third, Fourth, and Ninth-named First Defendants B D Gray QC for Head Trustees in proceeding CIV-2012-404-3798 (Auckland Registry)
Judgment:	9 April 2014

RESERVED JUDGMENT OF ASSOCIATE JUDGE SMITH

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[1] The fourteenth, fifteenth, and sixteenth–named first defendants (the applicants) seek orders transferring this proceeding (the Wellington proceeding) to the Auckland Registry of the High Court, and directing that the Wellington proceeding be heard after proceeding CIV-2012-404-3798 (the Directions proceeding) which is pending in the Auckland Registry of the High Court. The applicants also seek a direction that the Wellington proceeding be heard by the same judge who hears the Directions proceeding.

[2] Both the Wellington proceeding and the Directions proceeding affect a number of the same parties, who are descendants of the late T T Gough, who died in the 1950s. T T Gough established the well known New Zealand company Gough Gough and Hamer Ltd in 1929.

[3] Under his last will (and a series of codicils), T T Gough established various trusts. The main trust assets were shares in Gough Gough and Hamer Limited. The beneficiaries in the estate of T T Gough were the deceased's children and grandchildren. All of T T Gough's children are now deceased. The surviving beneficiaries are the third, fourth, fifth, and ninth–named first defendants, being the children of T T Gough's son Owen, and the fourteen and fifteenth–named first defendants, being the children of T T Gough's son Blair. For convenient reference, the children of Blair Gough have so far been referred to in the Wellington proceeding as the "B T Gough parties", and the children of Owen Gough (and certain of the children of the fourth, fifth and ninth defendants) have been referred to as the "O T Gough parties".

[4] The trusts established in the estate of T T Gough were varied by Deed of Family Arrangement dated 4 October 1962, and by a reorganisation which occurred in 1986 through 1987. The reorganisation dealt with a range of matters, including difficulties in the administration of the trusts and the management of Gough Gough and Hamer Ltd. A series of deeds and agreements were approved by the High Court on behalf of infant and unborn beneficiaries, in November 1986 and May 1987.

[5] The 1986/1987 reorganisation established a trust structure whereby the B T Gough parties and the O T Gough parties were represented by the "B T Gough Sub-Trust" and the "O T Gough Sub-Trust". A Head Trust was also set up, with each Sub-Trust appointing one trustee to the Head Trust. Those two trustees in turn appointed an independent trustee to the Head Trust.

[6] Part of the reorganisation involved the incorporation of a new holding company, Gough Holdings Ltd (GHL). GHL was re-registered under the Companies Act 1993 on 26 June 1997, and at that time the shareholders of GHL adopted a new constitution, the interpretation of part of which is the subject of the Wellington proceeding.

[7] The GHL constitution provides for a number of governance responsibilities to be exercised by the trustees of the Head Trust, including the power to appoint directors to GHL. The constitution also provides a mechanism for appointing directors in the event that there are no longer any trustees of the Head Trust. It is the interpretation of the provisions relating to the appointment and removal of directors in the latter situation which is the subject of the Wellington proceeding.

The Directions proceeding

[8] The Directions proceeding was commenced in Auckland in 2012. In it, the trustees of the Head Trust seek certain directions, including the following:

> (a) Whether upon expenditure or distribution of [the balance of the Head Trust assets, namely a sum of approximately $1 m at the time of the commencement of the Directions proceeding], the Head Trust has come to an end.
>
> (b) Whether upon expenditure or distribution of that sum the Head Trustees are then obliged to wind up the Head Trust.
>
> (c) If, notwithstanding expenditure or distribution of what remains of that sum, the Head Trustees, whilst not obliged to wind up the Head Trust, have a discretion so to windup the Head Trust.
>
> (d) Whether, in the exercise of the discretion referred to in the preceding paragraph, there are matters the Head Trustees must take into account when considering whether to wind up the Head Trust …

(e) If the Head Trust is not wound up, for what period does the Head Trust continue, and what are the beneficial interests in the powers exercised by the Head Trustees in relation to GHL.

(iv) Appoint and remove directors to the Board of Directors of GHL.

[9] The Directions proceeding is scheduled to be heard in Auckland by Ellis J over four weeks commencing 25 August 2014.

The Wellington proceeding

[10] The Wellington proceeding was commenced on 17 May 2013. The plaintiff is the trustee of the O T Gough Family Trust, which holds approximately 42.4 per cent of the share capital of GHL. The first defendants are the shareholders of GHL.

[11] The particular provisions of GHL's constitution which are the subject of the declaratory relief sought in the Wellington proceeding, are the following:

13.2 Appointment of Directors

(a) Subject to sub-clause (b) hereof the head trustees shall be entitled to appoint and remove any person as a director of the company:

(b) The head trustees may, on the recommendation of the Board, appoint any full-time employee of the company or a subsidiary thereof, as a director of the company;

(e) For the avoidance of doubt the right of appointment and removal of all executive of the company and its subsidiaries shall be vested in the board who may delegate that power.

13.5 Exceptions to rotation:

The directors who are in the full-time employment of the company or any subsidiary of the company are exempt from the obligation to retire under clause 13.4 but are subject to removal only as a director (but not as an employee) by the head trustees at any time.

13.7 During such time as there are head trustees only the head trustees shall be entitled to remove and appoint the directors of the company or if there are no head trustees then the provisions in the Third Schedule hereto shall apply in addition to clauses 13.1, 13.3 (but excluding sub-clauses 13.3(a) and (c)), 13.4 to 13.6 and 13.8 but with the exclusion of clause 13.2.

> Third Schedule, clause 3: Disqualification from Appointment
>
> No person shall be appointed as a director who:
>
> (c) Is a member of the Gough Family unless all shareholders unanimously agree.

[12] The specific issue which has arisen, is that Mr Benjamin Gough, one of the B T Gough parties, is currently a director of the company, who:

(a) is a member of the Gough family;

(b) was appointed as a director by the Head Trustees; and

(c) subsequent to his appointment as a director became a full-time employee of GHL (and remains so).

[13] The questions asked in the Directions proceeding raise the possibility that the Head Trust may be wound up, in which case there will be no Head Trustees. In that event, the Third Schedule to GHL's constitution will apply, including the relevant parts of cl 3 quoted above.

[14] The plaintiff says that if the Third Schedule does apply, an issue of construction arises as to whether Mr Benjamin Gough (as a family member not approved by all shareholders as a director) can only continue as a director if that continuance has the unanimous support of all shareholders under cl 3(c) of the Third Schedule.

[15] The plaintiff seeks a declaration under s 3 of the Declaratory Judgments Act 1908 determining the following question:

> Where under cl 13.7 the provisions of the Third Schedule are applicable, does cl 3(c) of that schedule prohibit the continuation in office of a director who is a member of the Gough family previously appointed by the Head Trustees but who has since become and continues as a full time employee of the company, unless all shareholders unanimously agree to his/her continuation?

[16] The applicants Gina Louise Satterthwaite and Benjamin Thomas Gough are the B T Gough parties. The applicant, Fife Holdings Limited, is a company owned and controlled by the B T Gough parties for the purposes of holding shares in GHL.

[17] One of the O T Gough parties, Mr James Gough, is the other Gough family member presently on the board of GHL. Mr James Gough is not a full-time employee of GHL.

The argument for transfer and consolidation

[18] The applicants rely on r 10.12 of the High Court Rules. That rule provides as follows:

> **10.12 When order may be made**
>
> The court may order that 2 or more proceedings be consolidated on terms it thinks just, or may order them to be tried at the same time or one immediately after another, or may order any of them to be stayed until after the determination of any other of them, if the court is satisfied—
>
> (a) that some common question of law or fact arises in both or all of them; or
>
> (b) that the rights to relief claimed therein are in respect of or arise out of—
>
> (i) the same event; or
>
> (ii) the same transaction; or
>
> (iii) the same event and the same transaction; or
>
> (iv) the same series of events; or
>
> (v) the same series of transactions; or
>
> (vi) the same series of events and the same series of transactions; or
>
> (c) that for some other reason it is desirable to make an order under this rule.

[19] Rule 10.13 of the High Court Rules provides that r 10.12 applies even although:

> (a) the relief claimed in the proceedings is not the same; or

(b) 1 or more of the proceedings –

…

(ii) is brought under the provisions of an Act conferring special jurisdiction on the court.

[20] The discretion to make orders under r 10.12 is a wide one, to be exercised broadly in the interests of justice.[1] The application of the rule will necessarily be highly dependent on the facts of each case, bearing in mind that the overall object of the rule is to avoid unnecessary multiplicity of trials if that can be achieved without injustice.[2]

[21] Common considerations will be the desirability of avoiding a repetition of hearings and evidence on common points, and reducing the risk of inconsistent decisions through separate hearings. However, the Court must take care to see that consolidation will not, in the end, result in confusion through multiplicity of parties and issues, and will not, in the end, cause injustice by comparison with separate hearings.[3]

[22] The applicants identify the key question in this case as whether the Wellington proceeding and the Directions proceeding contain a sufficient common thread that they should be heard together.[4] They say there is such a common thread. They also submit that there are other reasons which justify the transfer of the Wellington proceeding to the Auckland Registry.

[23] The applicants argue that both proceedings arise from the same background events, namely long-standing, inter-generational arrangements between the beneficiaries of the estate of T T Gough. They say that while at first glance the Wellington proceeding concerns a relatively narrow point of interpretation of the constitution of GHL, it must be viewed against the wider dispute between the various parties. As counsel for the applicants, Ms Foote, put it in her submissions:

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1 *Regan v Gill* [2011] NZCA 607 at [10].
2 *Fortune Personnel Ltd v Fortune* HC Auckland CL24/00, 26 March 2002 at [11].
3 *Amalgamated Finance Ltd v Wyness* HC Wellington CP156/86, 19 February 1987.
4 *CallPlus v Telecom NZ Ltd* (2000) 15 PRNZ 14 at [16].

> The management and control of GHL is inextricably linked with the wider estate T T Gough through the governance responsibilities exercised by the Head Trustees. Thus the interpretation of the constitution of GHL is flavoured by the factual background to the estate T T Gough.

[24] Ms Foote identified three possible outcomes of the Directions proceeding:

(a) There could be a determination that the Head Trust has already ended, in which case there would be no current power for the Head Trustees to deal with the issues of removal and appointment of directors of GHL.

(b) There could be a determination that the Head Trust has not ended, and a determination that it should not be wound up. In that event, the issues of appointment and removal of directors would remain to be dealt with by the Head Trustees, and no question of entrenchment of directors would arise.

(c) There could be a determination that the Head Trust has not ended, but that it could or should be wound up and that the Head Trustees should consider that issue.

[25] Ms Foote submitted that it is only in the third of those possible outcomes that the issue of construction might arise in a way that would be relevant to the Head Trustees. However, she noted that on the first possible outcome (the Head Trust has already ended) the issue of construction of the constitution might arise, but the Head Trustees would have no power to remove directors anyway.

[26] The applicants contend that if the Head Trustees were to take steps to remove directors (and in particular Mr Benjamin Gough) from the board of GHL, the B T Gough parties would be likely to apply to the Court for an injunction to maintain the status quo pending resolution of the proceedings. In those circumstances, they submit that it is unlikely that the Head Trustees would be able to take any formal steps prior to the resolution of the proceedings, and it would therefore be appropriate that the two proceedings be heard together.

[27] As to the manner in which a consolidated hearing would be conducted, the applicants say that the proceedings should be heard sequentially, and that the order in which they proceed should be left to Ellis J as the (Directions proceeding) trial Judge. A judgment on the issue in the Wellington proceeding could be issued before the Judge gave her judgment in the Directions proceeding; if that were done, any party who sought to prevent the Head Trustees from removing directors could then seek appropriate orders.

[28] The applicants also refer to the geographic spread of counsel involved in the case, and say that the proceedings have little historical connection with Wellington. The majority shareholders (the B T Gough parties, including Fife Holdings Limited and the affected director, Mr Benjamin Gough) reside in Christchurch, as do the major O T Gough parties. They refer also to the knowledge of the parties and of the background of the T T Gough estate which Ellis J has, she having heard proceedings involving some of the same parties before.

[29] Hearing the Wellington proceeding with the Directions proceeding in Auckland is also said to be more efficient in terms of the use of Court resources and time: the Wellington proceeding (which will only need a one or two day hearing) could be accommodated within the four weeks which have been allocated to hear the Directions proceeding.

[30] Finally, the applicants submit that it is likely that appeals will be filed against the judgments in both the Wellington proceeding and the Directions proceeding, whatever those judgments may decide. They submit that in those circumstances there would be no advantage in hearing the Wellington proceeding separately from the Directions proceeding – separate hearings would only create unnecessary complexity.

[31] The application is opposed by the O T Gough parties. Mr Farmer QC appeared for Tracy Owen Gough, Antony Thomas Gough and Harcourt Gough (the third, fourth and ninth-named first defendants), and Mr Johnson appeared for Owen Gough's daughter, Avenal McKinnon, and her son, Alexander Malcolm McKinnon

(the first and fifth-named defendants). The application is also opposed by the plaintiff.

[32] A memorandum filed on behalf of GHL, the second defendant, advised that the second defendant will abide the decision of the Court on the questions of change of venue and consolidation with the Directions proceeding. However, the Wellington proceeding should be heard and determined prior to the Directions proceeding.

[33] A memorandum was also filed by counsel for the Head Trustees, and Mr Gray QC made brief submissions for the Head Trustees at the hearing. In his memorandum, Mr Gray advised that the Court's construction of the Third Schedule to GHL's constitution (whatever that construction might be) might be relevant to the directions which the Head Trustees have sought in the Directions proceeding, and that in those circumstances "it will be convenient to have the Court's construction of the Third Schedule of the Constitution before the Directions proceeding, or contemporaneous with it". Mr Gray stressed that the Head Trustees are concerned not to jeopardise the August fixture for the hearing of the Directions proceeding.

[34] The parties opposing the application generally argued that there is in fact no sufficient commonality between the two proceedings, and that it would be prejudicial to them to consolidate the proceedings. Arguments based on convenience factors were said not to support the application: there is unlikely to be any greater convenience in having the Wellington proceeding transferred to Auckland and consolidated with the Directions proceeding.

[35] Mr Johnson for the first and fifth-named first defendants submitted that, in the event that the Head Trust is wound up (without the issue in the Wellington proceeding having been determined), one of two scenarios would occur:

(a) no member of the family could ever be a director of GHL (Mr Johnson submitted that that could have a bearing on the Directions proceeding); or

(b) Mr Benjamin Gough would be entrenched as a director, but no other member of the family could ever become a director (raising a possible issue as to whether the Head Trustees would "need to respond").

[36] If scenario (a) above applied, and family members were effectively banned from being directors of the company they own (or all but one member of the family (Mr Benjamin Gough) was banned), that might effectively dictate the positions taken by family members who are parties in the Directions proceeding.

[37] All of those opposing the application say that the construction issue with which the Wellington proceeding is concerned is a narrow one. They say that there is no relevant "series of events", or factual background, which could "flavour" the interpretation of the relevant parts of GHL's constitution. Alternatively, any "background" evidence which might be relevant and admissible on the construction issue can easily be produced by affidavit in the Wellington proceeding. If the decision in the Wellington proceeding impacted the stances of parties in the Directions proceeding, or otherwise affected the determination of the Directions proceeding, that would not mean that a common issue of fact or law, sufficient to form the basis for a consolidation order under r 10.12, was created. The opposing parties also say that there is no danger of inconsistent decisions being reached in the two proceedings.

[38] The opposing parties contend that there is potential for significant prejudice to them if the Wellington proceeding is not heard and determined before the Directions proceeding. They reject the applicants' suggestion that Ellis J could issue staggered judgments in a consolidated proceeding: that might simply result in the parties being forced to return to Court after the issue of the first judgment (dealing with the issue in the Wellington proceeding) had been delivered, to debate what orders were appropriate in the light of the first judgment. Mr Johnson also referred to an "undesirable situation" arising where, after litigation over whether the Head Trustees should or should not be removed, they could then be required to determine the future directors of GHL.

[39] Mr Johnson's submissions were adopted by Mr Fowler QC for the plaintiff. In addition, Mr Fowler pointed out that the parties in the Directions proceeding are not identical with the parties in the Wellington proceeding, and that no question raised in the Directions proceeding is relevant to the plaintiff's position or concerns. As Mr Fowler put it, the plaintiff agrees that the answer to the interpretation issue in the Wellington proceeding will have implications for Head Trustee decision-making, and for the potential directions sought in the Directions proceeding, but not the other way around. Mr Fowler pointed out that an order for consolidation would mean that the plaintiff (and others not otherwise involved in the Directions proceeding) would have to go through four weeks' hearing on other issues, for the sake of a one day hearing on the Wellington proceeding issue (this was said to follow from the applicants' submission that the interpretation of GHL's constitution may be "flavoured" by the evidence of background matters which will be heard in the Directions proceeding).

[40] Mr Fowler submitted that the Head Trustees will need to consider the implications of the Court's construction of GHL's constitution, and if necessary adjust their position in the Directions proceeding, and they will not be able to do that if the application is granted. For that reason, he submitted that the interpretation issue should be heard and determined before the commencement of the Directions proceeding.

[41] Mr Farmer also pointed to the Head Trustees' acknowledgement that the result of the Wellington proceeding may be relevant to the directions they seek in the Directions proceeding, noting that that will not be possible if the two cases are heard together, even if the issue in the Wellington proceeding is heard first. He submitted further that the Court's finding on the constitution interpretation issue will be highly relevant to at least some of the answers the Court will give on the Head Trustees' application for directions. Mr Farmer put that submission in the following terms:

> … if the effect of the Third Schedule of the constitution, as interpreted by the Court, is that Ben Gough's position as a director is entrenched for life and there is no power of removal by the Head Trustees (as there is at present), that will be a powerful reason why the Head Trustees should not resign and the Head Trust should not be wound up.

[42] In his oral submissions, Mr Farmer referred to "the Head Trustees' fiduciary obligation" to ensure that the affairs of GHL are not conducted in a way that is oppressive to the minority shareholders (effectively, the O T Gough parties).

Discussion

[43] The starting point is that the plaintiff, having filed the Wellington proceeding in this Registry of the Court (as he was entitled to do), is entitled to have the proceeding heard in Wellington. The onus is on the applicants to show that the transfer and consolidation orders they seek are appropriate.

[44] Turning to r 10.12, the first question is whether some common question of law or fact arises in both proceedings. In my view, the applicants have failed to identify any such question. I accept the submission of the opposing parties that the issue in the Wellington proceeding is narrow, being an issue of law over the interpretation of a specific aspect of GHL's constitution. That is not an issue which has been raised by the Head Trustees (or by any other party) in the Directions proceeding.

[45] Nor was Ms Foote able to refer to any issue of fact which will arise in the Wellington proceeding which is likely to be in issue in the Directions proceeding. In her oral submissions, she referred generally to evidence of the background surrounding the establishment of the GHL constitution, which may serve to show *why* the Third Schedule provisions of the constitution provide as they do. But she did not point to any particular evidence, or identify any witness, in this category. And in their amended statement of defence filed in the Wellington proceeding, the applicants plead that cl 3(c) of the constitution of GHL is unambiguous.

[46] In the end, I accept the submissions of Mr Johnson and Mr Fowler that, while a decision in the Wellington proceeding may affect the positions which the Head Trustees and some of the parties to the Directions proceeding take at the hearing of the Directions proceeding, the reverse has not been shown to be the case. In my view a connection of that limited kind between the two proceedings is not enough, without more, to provide a sufficient "common thread" to justify an order for consolidation.

[47] The interpretation question raised by the Wellington proceeding is quite specific. It concerns a sufficiently singular combination of circumstances that the shareholders who agreed to GHL's constitution may not even have turned their minds to it. If and to the extent that there may be background, or "matrix of facts", evidence which might shed light on how the relevant provisions of GHL's constitution were intended to be applied in that combination of circumstances, such evidence is unlikely to be extensive, and could easily be produced by affidavit at the hearing of the Wellington proceeding. See *Yandina Investments Ltd v ANZ National Bank Ltd*, where the Court of Appeal noted that evidence of the parties' subjective intentions as to what they understand the relevant words to mean will not be admissible, and that the appellant had failed to identify any evidence which might possibly have cast objective light on the meaning that the parties intended to convey in using the words which had been used in the deeds in question.[5] I think the situation is similar here. The applicants have not gone beyond broad generalities, and pointed to at least some evidence, or category of evidence, which is likely to be called in the Directions proceeding which may cast some objective light on the interpretation of the particular provisions of GHL's constitution which are relevant in the Wellington proceeding.

[48] At the hearing of the application, I endeavoured to ascertain whether, and if so how, the applicants might be prejudiced in the conduct of their case in the Directions proceeding if the application were refused and a decision given in the Wellington proceeding before the Directions proceeding was heard. In answer, Ms Foote pointed only to "practical" matters, including the likelihood of an appeal being filed against the decision in the Wellington proceeding. She submitted that the filing of an appeal would effectively nullify any benefit for the parties in knowing, ahead of the hearing of the Directions proceeding, the answer to the question posed in the Wellington proceeding. She also referred to the cost and inconvenience of having two sets of proceedings, and the undesirability of having "two appeal tracks" (if appeals are filed against the decisions in both the Wellington proceeding and the Directions proceeding).

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5 *Yandina Investments Ltd v ANZ National Bank Ltd* [2013] NZCA 469 at [54], referring to the judgment of Tipping J in *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZSC 5 at [19].

[49] First, I do not think there is much in the costs and inconvenience point. As I have observed, the Wellington proceeding is narrow in its compass, and is likely to require only one day (or at most two days) of hearing time. There may be some modest additional costs, but they are unlikely to be significant: whether the issue relating to the interpretation of GHL's constitution is heard in Wellington or Auckland, the submissions and evidence on that issue will be the same.

[50] The likelihood of an appeal being filed against any early decision given in the Wellington proceeding is a point which might perhaps be thought to have more substance. Mr Fowler's answer to it was that the Court should allocate a fixture for the hearing of the Wellington proceeding sufficiently early that it will be possible for any appeals to be dealt with before the Directions proceeding comes on for hearing. Given the particularly narrow compass of the Wellington proceeding, and the fact that allocating an early fixture in Wellington *is* feasible, I consider Mr Fowler's answer adequately meets the submission made by Ms Foote.

[51] As for the risk of there being "two appeal tracks", I do not see that as being a significant consideration. If the circumstances following the judgments in both the Wellington proceeding and the Directions proceeding were such that it were then considered appropriate that any appeals be heard together, I do not imagine there would be any difficulty in obtaining a direction from the Court of Appeal to that effect.

[52] Against the practical considerations referred to by Ms Foote, it seems to me that there may be real benefit to the parties involved in the Directions proceeding, and to the Court hearing the application for directions, if the constitution interpretation issue is heard and determined first. The Head Trustees have expressed a preference that the issue in the Wellington proceeding should be determined first, and I think there is force in the opposing parties' submission that the answer to the question of whether Mr Benjamin Gough will hold an entrenched position on the board of GHL if the Head Trust is wound up is likely to affect the positions the Head Trustees and the other parties take in their preparation for, and conduct of, the Directions proceeding.

[53] Weighing the potential prejudice to the applicants if the orders sought by them are refused against the potential prejudice to the opposing parties if the application is granted, it seems to me that the balance favours the application being refused, and directions being given for an early fixture for the hearing of the Wellington proceeding. In my view, the arguments in favour of the application are unconvincing when weighed against the concerns of the opposing parties to have an answer to the question posed in the Wellington proceeding before they and the Head Trustees finalise the arguments they will make in the Directions proceeding. The "convenience" arguments are, in my view, insufficiently strong to affect that view: I am not persuaded that a one or two day hearing of the Wellington proceeding (in Wellington) will add significantly to the costs of parties who are involved in both proceedings, and I am not persuaded that there is any particular need for the Wellington proceeding to be heard and determined by Ellis J – the point involved is a very narrow one which can, in my view, be adequately heard and determined by another Judge. Nor do I see any merit in the submission that the Court may in the past have pointed to the undesirability of split hearings of disputes involving some of the parties to the present litigation. The question of separating issues for determination by different judges is always going to be very fact-specific, and decisions of other judges in other cases, including the decisions of Ellis J and Courtney J to which the applicants referred, offer little assistance.[6]

[54] A final consideration is that there appears to be no reason why the Wellington proceeding cannot be allocated a hearing date immediately. In their memorandum for the 17 March 2014 case management conference the applicants proposed a close of pleadings date of 17 April 2014, and noted that "no discovery or associated orders should be required". The proceeding was said to be a "simple issue of construction of the Constitution of GHL". While the applicants' counsel considered that there might be additional documents relevant to the question of the construction of the Constitution, any such documents would be "well familiar to the other parties" and would be in their possession or power. No cross-examination was anticipated, and the two day fixture was considered appropriate.

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[6] *Ram Custodian Ltd v Raymond* [2012] NZHC 3438; *H D Gough v Ram Custodian Ltd* [2012] NZHC 2926.

[55] For all of the foregoing reasons, the application is refused. Time is available to hear the claims in the Wellington proceeding on ***20*** and ***21 May 2014***, and I direct that the proceeding be set down for hearing on those days accordingly.

[56] A telephone conference will be held at ***9.00am*** on ***16 April 2014***, for the purpose of confirming the close of pleadings date and making appropriate directions for the hearing on ***20*** and ***21 May 2014***. Counsel are to file memoranda for the telephone conference, setting out proposed directions for the filing and service of any further affidavits, the filing and service of written submissions and a bundle of relevant documents, and any other directions which may be considered necessary. The memoranda are to be filed and served no later than ***5pm*** on ***Monday, 14 April 2014***.

Costs

[57] The opposing parties are entitled to costs on the application. If counsel cannot agree, the opposing parties may file memoranda within seven days of the date of this judgment. The applicants may file a memorandum in reply within seven days after their receipt of any such memoranda from the opposing parties.

Associate Judge Smith

Solicitors:
DLA Phillips Fox, Wellington for plaintiff
Wynn Williams, Christchurch for first and fifth-named first defendants
Mortlock McCormack Law, Christchurch for third, fourth and ninth-named first defendants
Duncan Cotterill, Christchurch for fourteenth, fifteenth and sixteenth-named first defendants
Clark Boyce, Christchurch for second defendant
Wilson Harle, Auckland for Head Trustees