Neutral Citation Number: [2020] CA (Bda) 13 Civ

Case No: Civ/2020/5

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL COMMERCIAL JURISDICTION
THE HON. CHIEF JUSTICE
CASE NUMBER 2017: No. 293

Sessions House
Hamilton, Bermuda HM 12

Date: 07/10/2020

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL ANTHONY SMELLIE
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

- -

Between:

CREDIT SUISSE LIFE (BERMUDA) LIMITED

Appellant

- and -

(1) MR BIDZINA IVANISHVILI

(2) MRS EKATERINE KHVEDELIDZE

(3) TSOTNE IVANISHVILI (an infant, by his mother and next friend, Mrs Ekaterine Khvedelidze)

(4) MS GVANTSA IVANISHVILI

(5) MR BERA IVANISHVILI

(6) MEADOWSWEET ASSETS LIMITED

(7) SANDCAY INVESTMENTS LIMITED

Respondents

Mr. Stephen Moverley Smith QC (instructed by Mr John Wasty, Mr Hannah Tildesley and Mr Sam Riihiluoma of Appleby (Bermuda) Ltd.) for the Appellant

Mr. Charles Hollander QC (instructed by Ms Sarah-Jane Hurrion and Ms Judith Roche of Hurrion & Associates) for the Respondents

Hearing dates: 4th June 2020

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APPROVED JUDGMENT

GLOSTER JA:

Introduction:

1. This is an appeal by the defendant in the underlying action, Credit Suisse Life (Bermuda) Limited ("CS Life" or "the Appellant") against certain discovery orders sought by the Plaintiffs in the action ("the Respondents" or "the Plaintiffs") and made by the Honourable Chief Justice Hargun on 11 February 2020 after a two-day hearing which involved (at CS Life's request) cross-examination of experts on Swiss law. The Chief Justice's reasons for granting the Plaintiffs' specific discovery application are set out in his judgment dated 11 February 2020 ("the Judgment"). The order giving effect to his judgment is dated 2 June 2020 ("the order") and a copy of it is annexed at schedule 1 to this judgment.

2. By notice of motion dated 18 February 2020 CS Life applied to the Chief Justice for leave to appeal against the orders set out in the Judgment on six grounds as set out in the proposed notice of appeal attached to the notice of motion. CS Life also applied for a stay of the orders in the Judgment pending appeal.

3. In his ruling on the motion dated 25 February 2020, the Chief Justice granted leave to appeal on two grounds relating to: the requirement for CS Life to provide information in relation to its discovery methodology (ground 3); and a short point on waiver of privilege (ground 5). He also granted a stay pending appeal in relation to these orders.

4. The Chief Justice refused leave to appeal on the remaining grounds ((ground 1, 2 4 and 6), which, accordingly, were the subject of a renewed application for leave before this court. The Chief Justice also refused a stay of the other orders in the Judgment but extended time for compliance until 10 March 2020. The Registrar ordered that the application for permission to appeal should be considered at the appeal by the full court by way of a rolled-up hearing.

5. Mr Stephen Moverley Smith QC, together with Mr John Wasty of Appleby (Bermuda) Limited, appeared on behalf of the Appellant, CS Life, both in this court and in the court below. Mr Charles Hollander QC, together with Ms Sarah-Jane Hurrion of Hurrion & Associates Ltd, appeared on behalf of the Respondents, the Plaintiffs, likewise both in this court and in the court

below. The court is grateful to counsel for their oral and written submissions.

Factual background relating to the discovery application

6. The Plaintiffs' claim in the action against CS Life is for losses suffered by two unit-linked life insurance policies ("the Policies"), which were issued to Meadowsweet Assets Limited and Sandcay Investments Limited, the Sixth and Seventh Plaintiffs (as policyholders) in 2011 and 2012 respectively. The First to Fifth Plaintiffs are the ultimate beneficiaries of the proceeds of the Policies, as the beneficiaries of trusts within which the Policies are held.

7. The Plaintiffs allege that they entrusted US $755 million to CS Life by way of lump sum insurance premiums ("the Policy Assets"). CS Life is an insurance company incorporated and registered in Bermuda as a segregated accounts company under the Segregated Accounts Companies Act 2000 (the "SAC Act"). The Policy Assets were invested in accounts with Credit Suisse AG ("the Bank") in the name of CS Life ("the CS Life Accounts"). CS Life is a wholly-owned subsidiary of the Bank, which provides private banking services from various locations around the world. In 2015 the Plaintiffs discovered unauthorised, imprudent and fraudulent trading on the CS Life Accounts resulting in huge losses to the Policy Assets.

8. In particular, the statement of claim alleges that, from the end of 2014 to September 2015, the value of the policy assets had collapsed by over 40%: see SOC at paragraphs 44 to 46. The Plaintiffs' case is that CS Life breached contractual, fiduciary, statutory and common law duties owed to the Plaintiffs resulting in losses estimated to be in the region of USD 400 million. CS Life denies all claims made against it. Nothing in this judgment addresses the merits of the main action.

9. On 20 October 2015, according to the Plaintiffs' case, the Bank informed the First Plaintiff that it had mandated PwC to conduct "a comprehensive due diligence of your relationship with Credit Suisse AG" and that it assured the First Plaintiff that "Once PwC has completed its investigation we will be able to set up a meeting to discuss the results and our proposed way forward". The Plaintiffs complain that no such meeting took place and the results of the PwC investigation have not been shared with the Plaintiffs.

10. Criminal proceedings subsequently took place in Switzerland against Mr Lescaudron, one of the Bank's employees and relationship manager to the Plaintiffs. The Plaintiffs contend that Mr Lescaudron admitted the majority of the allegations against him and in February 2018 was convicted of embezzlement, simple and aggravated misappropriation and forgery, and sentenced to 5 years in prison.

11. The following is taken from the judgment where the Chief Justice helpfully summarised the rival contentions of the parties:

9. *"The Plaintiffs complain that to date, CS Life has offered no explanation to the Plaintiffs regarding the cause of the collapse in value in the Policy Assets, nor has CS Life shared the results of any investigation or inquiry conducted into the fraud carried out on the CS Life Accounts, nor accounted to the policyholders for the losses suffered. The position CS Life has taken in this litigation is to put the Plaintiffs to proof of the wrongdoing in relation to bank accounts in CS Life's name which held assets which the Plaintiffs had entrusted to CS Life.*

10. *The Plaintiffs also complain about the piecemeal nature of the discovery given by CS Life. Mutual exchange of discovery was initially due to take place on 4 September 2018 but was extended by the Order dated 21 November 2018 to 10 December 2018.*

11. *On 10 December 2018, CS Life produced its First List of Documents which comprised of 1241 documents.*

12. *On 31 January 2019, CS Life produced its Second List of Documents which comprised of 1666 documents provided to CS Life by the Bank and 18 documents omitted from CS Life's First List of Documents.*

13. *Following correspondence from the Plaintiffs detailing the deficiencies in CS Life's discovery, CS Life produced its Third List of Documents on 5 July 2019. This list comprised of an additional 156 Documents obtained from the Bank.*

14. *Following service of this discovery summons, CS Life produced two further document lists (the Fourth and Fifth Lists of Documents). The Fourth List of Documents disclosed client notes relating to the Policies, which CS Life said it had obtained from the Bank. The Fifth List of Documents comprised of 1283 documents obtained from the Bank on 23 September 2019, including previously disclosed illegible and/or incomplete documents along with a large number of account statements.*

15. *Mr Coffey's Third Affidavit anticipated the Sixth List of Documents disclosing relevant but previously undisclosed documents, which had previously been marked as irrelevant. The Sixth List of Documents was served upon the Plaintiffs a day before the hearing of this application. Mr Hollander complains that no explanation has been provided as to why the Sixth List of Documents was provided the day before the hearing when it was promised to be served in October 2019. Mr Hollander also complains that the Sixth List was provided with a corrupted USB flash drive.*

16. *All of the affidavits filed in relation to CS Life's compliance with its discovery obligations have been sworn by Thomas Coffey, who was the Chief Executive Officer of CS Life between 28 September 2009 and 31 July 2017. The Plaintiffs argue that it is wholly inappropriate for Mr Coffey to be swearing such affidavits and that these affidavits should be sworn by an existing director and/or officer of CS Life.*

17. *The Plaintiffs say that proper discovery is critical in this case given that the Policy Assets were under the control of the Bank, acting as agents for CS Life pursuant to mandates given by CS Life, and that vast sums disappeared as a result of fraudulent, unauthorised and imprudent trading or were simply stolen by an employee of the Bank. The Plaintiffs have no visibility as to how this happened and are therefore dependent on information and documentation provided by CS Life on discovery and (through CS Life) on that provided by the Bank.*

18. *In response CS Life emphasises that its role in the overall transaction was a limited one. CS Life argues that it was required by the Policy documentation to entrust the custody and investment of the Policy Assets to the Bank and it was the Bank's responsibility, not that of CS Life, to acquire and manage the investment under the Policies. Save that investments were acquired for the policyholders through accounts with the Bank in CS Life's name and held on their behalf by CS Life, CS Life did not acquire or direct the acquisition of any investments.*

19. *CS Life argues that, contrary to the Plaintiffs' allegation that the Bank acted as CS Life's agent in making and managing investments, CS Life had appointed Meadowsweet and Sandcay as its attorneys for the purpose of entering into investments through the Bank. As a result of the sub-delegation of a power of attorney to the First Plaintiff, he acted as the investment manager of the Policy Assets and gave instructions, either directly or through his agents, to the Bank in respect of investments.*

20. *CS Life points out that the limited role it was intended it would take was set out in the relevant contractual documentation. The Policies were "wrapper" products designed to hold a client's investment being managed by the Bank. CS Life's role was to set up the policies, and transfer the premium to an account with the Bank. After that the investment relationship was between the client and the Bank and CS Life had no further involvement, save to deal with the certain limited, largely formal, matters that remained within its remit, such as surrenders, certain regulatory and compliance matters and, on occasion, to execute certain Bank Documents, such as general deeds of pledge."*

12. It appeared that, originally, CS Life's position was that it was dependent on the Bank, a Swiss law entity, to provide discovery in these proceedings, stating that almost all documents relevant to the CS Life Accounts were in the possession of the Bank and could only be accessed pursuant to the consent of the Bank or Swiss law rights. However, that position changed very shortly before the hearing of the specific discovery application in front of the Chief Justice. According to the submissions filed in this Court by Mr Charles Hollander QC, on behalf of the Plaintiffs, in an affidavit served on the eve of the hearing of the specific discovery application before the Chief Justice, CS Life accepted (in contrast to what had been said previously) that CS Life had access in the normal course of business to significant tranches of documents held by the Bank. That evidence was provided by a Mr Thomas Coffey, CS Life's ex-chief executive officer, who left CS Life almost 3 years ago in July 2017, and now lives in British Columbia. He was not a current director or employee of CS Life, nor was it clear from his evidence what involvement, if any, Mr Coffey had had in the litigation or in CS Life's discovery process.

13. In summary, Mr Coffey explained that 26 Bank employees were made available by the Bank to CS Life to conduct CS Life's life insurance business. He accepted that, to the extent those email accounts had not already been searched, they could and would be searched. At the hearing of the specific discovery application, CS Life reiterated its offer to search the email accounts to the extent that they had not already been searched. Mr Coffey acknowledged that many Bank employees did indeed have dual functions and explained that a large proportion of those individuals were appointed as officers of CS Life. Mr Coffey accepted that, in the normal course of business, CS Life had access to the entirety of the Lifeware software system and parts of the Bank's Segregated Electronic Archive.

14. In the respondents' skeleton argument before this court, Mr Hollander summarised what he contended was the position of CS Life in relation to discovery, which led to the making of the order by the Chief Justice as follows:

> *"24. The implication to be drawn from Coffey 4 [the fourth affidavit of Mr Coffey] and from the CS Life's discovery provided to date, is that the Bank, a third party to this litigation, has conduct of CS Life's discovery process, or has at least played a significant role in that process. Reading the evidence, it is impossible to avoid the conclusion that CS Life receives documents from the Bank to the extent that the Bank wishes to provide them.*
>
> *25. It is plain that CS Life's discovery has been utterly unsatisfactory and that there has been a wholesale failure to comply with its discovery obligations under Bermuda law:*
>
> > *a. CS Life has drip-fed the Plaintiffs documents: providing discovery on a piecemeal basis and claiming that it is dependent on the will of the Bank as to the documents (even CS Life's own documents) that it is able to obtain. It is apparent that the litigation is in effect being run on CS Life's behalf by the Bank - a third party to this litigation.*

> *b. The dramatic change of position that CS Life was forced to take when filing Coffey 4 has exposed the wholly inadequate discovery given to date by CS Life. CS Life was forced to admit that there are various sources of documents which its own personnel had (and still have) access to, but that CS Life has not conducted searches of those documents, and has instead left compliance with its discovery obligations in these proceedings to a third party.*
>
> *c. Despite CS Life's further evidence, there remains no visibility as to the methodology employed by CS Life to provide discovery in these proceedings. CS Life's evidence in response to the specific discovery application was sworn by a person who, CS Life now admits, was entirely inappropriate to give such evidence ……and apparently without knowledge of CS Life's discovery exercise. It is not clear to what extent the decisions as to discovery are being taken by CS Life, Appleby (CS Life's lawyers) or the Bank.*
>
> *d. CS Life has taken the position that it has complied with its discovery obligations because it has asked the Bank to provide any relevant documents, but at the same time has refused to disclose copies of the requests for documents it has made to the Bank. It is plainly unjust for CS Life to defend a specific discovery application by reference to correspondence which it says neither the Plaintiffs nor the Court are entitled to see.*
>
> *e. This is a case where discovery is enormously important. The Plaintiffs entrusted hundreds of millions of dollars to CS Life, following which vast sums disappeared as a result of fraudulent, unauthorised and imprudent trading on the CS Life Accounts. The Plaintiffs have virtually no visibility as to how this happened. Nevertheless, in these proceedings, CS Life is seeking to put the Plaintiffs to proof as to the losses caused to the Policy Assets. It is CS Life and the Bank (as CS Life's agent) that are in possession of this information, but so far it has been an uphill struggle to obtain documents by way of discovery in these proceedings."*

The discovery orders made by the Chief Justice against which CS Life appeals or seeks leave to appeal

15. In summary, in the Judgment, the Chief Justice decided as follows:

(1) that CS Life should file and serve an affidavit sworn by a current officer of the appellant verifying the discovery of the defendants in relation to: emails, additional documents referred

to in Coffey 4, attendance notes/call records of CS Life, documents evidencing transactions carried out on the CS life accounts, documents evidencing investigations and reports into the collapse in value of the policy assets in 2015, audit, risk assessment and monitoring documents, documents evidencing fees and commissions, conduct of discovery and methodology; this requirement was set out in paragraphs 26-27, 28, 33-34, 42, 47-49 and 50-55 of the Judgment and is reflected in paragraph 1 of the order;

(2) that CS Life should provide a further and better list of all native documents emanating from the sources listed in Coffey 4 and the email accounts referred to, if not already discovered; this requirement was set out in paragraph 56 of the Judgment and reflected in paragraph 2 of the order; CS Life does not appeal against this order;

(3) that CS Life should confirm by way of the affidavit referred to above that it had required the Bank pursuant to Article 400 of the Swiss Code of Obligations to provide all specified documents to it, CS Life, and to provide copies of all letters of request and responses received from Credit Suisse AG; this requirement was set out in paragraphs 64-93 of the Judgment and reflected in paragraph 3 of the order;

(4) that, insofar as CS Life had not requested all documents relating to any of the categories above from Credit Suisse AG, CS Life should make such request of the Bank, such request and any response received from the Bank should be provided to the Plaintiffs; this requirement was dealt with in paragraph 94 of the Judgment and reflected in paragraph 4 of the order;

(5) that CS Life should confirm that it had examined the disclosed documents in unredacted form and satisfied itself that any reductions were appropriately made in accordance with Bermuda Law; and that, to the extent that such reductions were not appropriate, provide a further list of unredacted versions of the disclosed documents; this requirement was set out in paragraph 95 of the Judgment and reflected in paragraph 5 of the order;

(6) that CS Life should provide the Plaintiffs with copies of all correspondence between it and the Bank, in respect of which any alleged privilege has been waived, in relation to CS Life's requests that the Bank should produce documents in relation to the discovery in this action and the responses received from the latter; this requirement was reflected in paragraphs 57-63 of the Judgment and reflected in paragraph 6 of the order.

The leave to appeal proceedings

16. By notice of motion dated 18 February 2020, CS Life applied for leave to appeal against the orders set out in the Judgment on six grounds as set out in the proposed notice of appeal attached to the notice of motion. The parts of the Judgment complained about were paragraphs 26-27, 28, 33-34, 42, 47-49, 55, 63, 82-95 and 98 of the Judgment. CS Life also applied for a stay of the orders in the judgment pending appeal.

17. In a ruling dated 25 February 2020, Chief Justice Hargun granted leave to appeal on two grounds: ground 3 (which related to paragraphs 50 to 55 of the Judgment) and ground 5 (which related to paragraph 57 to 63 of the Judgment) and granted a stay of the orders set out in paragraphs 50 and 63 of the Judgment. He refused leave to appeal in relation to the other grounds of appeal. The Chief Justice also refused a stay of the other orders in the Judgment but extended time for compliance until 10 March 2020.

18. CS Life filed a notice of appeal in relation to the appeal on grounds 3 and 5 on 2 March 2020. On the same date, it renewed its application for leave to appeal to this court on grounds 1-2, 4 and 6 of the proposed notice of appeal by notice of motion, supported by the third and fourth affidavits of Janita Kate Burke dated 2 March 2020 and 3 March 2020 respectively.

19. The trial date has been fixed for January 2021.

The Appeal

20. The grounds of appeal in relation to which the Supreme Court gave permission are as follows:

Ground 3

(1) "The judge erred in concluding that RSC O.1A enabled the Court to require CS Life to provide information in relation to its conduct of discovery and the methodology it had employed. In the alternative, if RSC O.1A did enable the Court to require CS Life to provide such information, the judge erred in making such an order in the absence of any relevant criteria justifying the same.

Ground 5

(2) The judge erred in finding that CS Life had, by paragraph 27 of the third affidavit of Mr Coffey and by Appleby's letter of 2 July 2019, waived privilege. In the alternative, even if there has been any waiver of privilege, the judge erred to the extent that he failed to conclude that any such waiver was limited to (i) the "Further Bank Request", identified in paragraph 58 of the Judgment; (ii) Credit Suisse AG's response of 23 September 2019, referred to in paragraph 59 of the Judgment; and (iii) the requests referred to in Appleby's letter of 2 July 2019 and any responses from the Bank thereto."

21. The grounds of appeal in relation to which the judge refused leave and upon which CS Life seeks permission to appeal are the following:

Ground 1

(1) "The judge erred in concluding that the Court was entitled, on an application made under RSC O. 24 r. 7, to grant relief beyond that provided for in that rule, namely to make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.

Ground 2

(2) The judge accordingly erred in:

(i) requiring CS Life to undertake specific searches and confirm the results of those searches;

(ii) dictating which agents of CS Life should undertake searches;

(iii) dictating who should carry out redactions on behalf of CS Life

(iv) requiring CS Life to swear an affidavit containing information beyond that required by RSC O. 24 r. 7.

Ground 4

(3) In any event, the judge erred in making orders obliging CS Life to make further discovery without taking into account the discovery already given and the verification of discovery already provided.

Ground 6

(4) The judge erred in making a finding of fact that Article 400 required an agent to provide all relevant documents to his principal including purely internal documents. Such finding was against the weight of the evidence and made:

(i) without regard to the unchallenged expert evidence of Dr. Dallafior that in his practical experience the Swiss courts did exclude purely internal documents;

(ii) without regard to the fact that in the Swiss Federal Tribunal (SFT) case ATF III 139 49 the SFT expressly identified a separate category of purely internal documents that were not subject to the duty to account;

(iii) wrongly relying on a statement in the Swiss Federal Tribunal case FT 4A 522/2018 that 'The duty to provide information may also relate to the content of internal documents, provided that it is relevant for monitoring the activities of the agent', as providing confirmation that case ATF III 139 49 decided that the sole criteria for seeking information was relevance, without recognising that FT 4A 522/2018 was not a case concerning the duty to account or involving the distinction between internal and purely internal documents; and

(iv) failed to take account of decision DFT 143 III 348 which stated (at §5.3.1):

> *"to meet its accountability obligation the agent must inform the principal in a complete and truthful manner and give it all the documents relating to the matters dealt with in the latter's interest. Exceptions are purely internal documents, such as preliminary studies, notes, draft material collected and accounting."*

The application for leave to appeal

22. It was common ground that the applicable test for leave to appeal in this jurisdiction is whether the appeal is arguable and/or raises a novel question of importance upon which further argument and a decision of the Court of Appeal would be to public advantage. It was also common ground that the standard to apply when deciding whether an appeal was arguable was whether the appeal was 'doomed to fail'; see the decision of this court in *American Patriot Insurance Agency Inc v Mutual Holdings (Bermuda) Ltd* [2004] Bda LR 55).

23. The relevant principles were also considered in *Avicola Villalobos SA v Lisa SA and Leamington Reinsurance Co Ltd* [2007] Bda LR 81 which in turn cited the case of *The Iran Nabuvat* [1990] 1 WLR 1115. In the latter case - one decided under the former English procedural rules - Lord Donaldson of Lymington MR stated 'no one should be turned away from the Court of Appeal if he had an arguable case by way of appeal' (p.1117) and 'That is really what leave to appeal is directed at, screening out appeals which will fail.' That standard is different from the current stricter standard in England where an appellant now has to establish that his grounds are likely to succeed or have "a real prospect of success"; see CPR 52.6 of the English Civil Procedure Rules.

24. In our judgment, the relevant grounds of appeal, in relation to which leave was not granted by the judge (i.e. grounds 1, 2, 4 and 6), are arguable. Moreover, the points which grounds 1, 2 and 4 raise, and which were argued by Mr Moverley Smith, are substantially the same as, or very similar to, the issue which arises under ground 3, in relation to which leave was granted. Accordingly, we give leave to appeal in relation to grounds 1, 2, 4 and 6 above. Mr Moverley Smith also submitted that the appeal raised issues of public importance as to the scope of Order 24, rule 7 and its relationship with Order 1 A of the Rules of the Supreme Court, and that, additionally, leave should be given on this ground. We are not persuaded that issues arising on these grounds raise "a novel question of importance upon which further argument and a decision of the Court of Appeal would be to public advantage" and do not give leave to appeal on this ground. While the relevant issues arising give rise to an arguable question of construction of the rules, we are not convinced that, per se, they are sufficiently novel or important to justify further argument or a decision of this court.

Grounds 1 to 4

25. In both his written and oral submissions, Mr Moverley Smith, on behalf of CS Life, addressed his arguments in relation to these grounds together, since they all raised essentially the same point. Accordingly, I adopt a similar approach.

26. Order 24 rule 7 of the Rules of the Supreme Court ("the RSC") provides:

> *(1) "Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.*
>
> *(2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavit under rule 2 or rule 3.*
>
> *(3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document specified or described in the application and that it relates to one or more of the matters in question in the cause or matter."*

27. Order 1A of the RSC which sets out The Overriding Objective, introduced in Bermuda in 2006, is in the following terms, so far as here material:

> *"**1A/1 The Overriding Objective***
> *1. (1) These Rules shall have the overriding objective of enabling the court to deal with cases justly.*
> *(2) Dealing with a case justly includes, so far as is practicable—*
> *(a) ensuring that the parties are on an equal footing;*
> *(b) saving expense;*
> *(c) dealing with the case in ways which are proportionate—*
> *(i) to the amount of money involved;*
> *(ii) to the importance of the case;*
> *(iii) to the complexity of the issues; and*
> *(iv) to the financial position of each party;*
> *(d) ensuring that it is dealt with expeditiously and fairly; and*
> *allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*
>
> ***1A/2 Application by the Court of the Overriding Objective***
> *2. The court must seek to give effect to the overriding objective when it—*
> *(a) exercises any power given to it by the Rules; or*
> *(b) interprets any rule.*
> ***1A/3 Duty of the Parties***

3. The parties are required to help the court to further the overriding objective.

1A/4 Court's Duty to Manage Cases

(1) The court must further the overriding objective by actively managing cases.

(2) Active case management includes—

a. encouraging the parties to co-operate with each other in the conduct of the proceedings;
b. identifying the issues at an early stage;
c. deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
d. deciding the order in which issues are to be resolved;
e. encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
f. helping the parties to settle the whole or part of the case;
g. fixing timetables or otherwise controlling the progress of the case;
h. considering whether the likely benefits of taking a particular step justify the cost of taking it;
i. dealing with as many aspects of the case as it can on the same occasion;
j. dealing with the case without the parties needing to attend at court;
k. making use of technology; and
l. giving directions to ensure that the trial of a case proceeds quickly and efficiently."

28. The first submission made by Mr Moverley Smith was that the application made by the Plaintiffs was an application under Order 24 rule 7; that, accordingly, unless as a matter of construction of that rule, the relief granted by the judge fell clearly within the scope of that specific provision, it was not open to the judge to grant the more extensive relief which he did grant under paragraphs 1, 3, 4 and 5 of the order; he was only seized of an application under Order 24 rule 7, and, likewise, so was this court. He submitted that, in those circumstances, the judge was not entitled to have recourse to the provisions of Order 1A of the RSC to enable him to make orders which required CS Life to swear an affidavit containing extensive information entirely beyond that which Order 24 rule 7 (1) mandated, such as:

a. requiring CS Life to undertake specific searches and confirm in an affidavit the results of those searches (paragraphs 26, 28, 33-34, 42, 47-49 and 55 of the Judgment);

b. dictating which agents of CS Life should undertake searches and carry out redactions on behalf of CS Life (paragraphs 27 and 95 of the Judgment);

c. requiring CS Life to provide in the Affidavit information in relation to its conduct of discovery and the methodology it had employed (paragraph 55 of the Judgment) ("the Methodology Requirement").

29. I do not accept Mr Moverley Smith's basic, and highly technical, proposition that the Chief Justice, or this court, is constrained to treat the Plaintiffs' application for discovery as being exclusively brought within Order 24 rule 7. The summons itself did not specify that it was brought under any rule, and, whilst it is correct that the first affidavit of Ms Roche, an associate at Plaintiffs' attorneys, Hurrion, refers to it being made in support of the Plaintiffs' application under Order 24 rule 7, that does not lead to the conclusion that the court is circumscribed to treat its powers as being restricted to those expressly conferred by that rule.

30. The Chief Justice's reasoning is not altogether clear as to whether, in the light of Mr Moverley Smith's arguments as to the scope of Order 24 rule 7, he approached the matter on the basis that he was construing Order 24 rule 7 expansively by reference to the overriding objective in Order 1A, or whether he regarded himself as having a free-standing power under that latter provision and the inherent jurisdiction to make the orders which he did. He said:

> *"52. Mr Moverley Smith argues that the Plaintiffs' application is brought pursuant to RSC order 24, rule 7 and the remedies provided for under this rule are restricted to the production of an affidavit stating whether any document specified or described in the application is, or has at any time been in the possession, custody or power of the respondent. He argues that order 24, rule 7 does not provide the Court with any power to require a party to detail the methodology adopted in carrying out discovery, nor does it give the Court the ability to require a party to carry out specific searches.*
>
> *53. I consider that the Court does have the power in an appropriate case to require a party to provide the information in relation to the conduct of discovery and methodology as sought by the Plaintiffs in paragraph 50 above. Order 1A incorporates in the Bermuda Rules of the Supreme Court the overriding objective of enabling the Court to deal with cases justly. Order 1A rule 2 requires the Court to give effect to the overriding objective when it exercises any powers given to it by the Rules or interprets any rule.*
>
> *54. An example of this in the discovery context is the decision of Kawaley J in Stiftung Salle Modulable v Butterfield Trust (Bermuda) Limited [2013] Bda LR 45, at [6]. Order 1A rule 4(1) mandates the Court to further the overriding objective by actively managing cases including by the use of technology and giving directions to ensure that the trial of the case proceeds quickly and efficiently.*
>
> *55. In my judgment, in the unusual circumstances of this case as outlined in paragraph 51 above, it is appropriate to require the Defendant to provide the information sought in paragraph 50 above. The provision of this information will allow the Court to ensure that proper discovery has been provided by the Defendant, reduce the risk of further applications in relation to discovery and*

ensure that the trial of this case proceeds quickly and efficiently."

31. The clear purpose of Order 24 rule 7, and, indeed, Order 24 generally, is to enable one party to find out what specific, and relevant, documents the opposing party has, or has had, in its possession and what has become of them, if they have left such party's possession. In addition, of course, the discovery process leads to inspection of the relevant documents by the opposing party. In order to ensure that such an application, and indeed the whole discovery process, is robust and effective, it may well be necessary in circumstances, such as the present, for the types of order to be made as the judge made in this case. Such orders are clearly ancillary to the discovery process and, in my judgment, a judge clearly has power, or jurisdiction, to make them, whether under the inherent jurisdiction or under the case management powers as contained in RSC 1A/4(2) to give directions to ensure that the trial of a case proceeds quickly and efficiently and that the parties are on an equal footing in accordance with the overriding objective. In such circumstances, the fact that, in my view, the express provisions of Order 24 rule 7 do not of themselves authorise a judge to make the type of orders made by the Chief Justice in this case, or cannot legitimately be construed as so doing (even with the aid of the overriding objective) is irrelevant. Accordingly, I have no doubt that the Chief Justice had power (or jurisdiction) to make such orders.

32. It follows that I reject Mr Moverley Smith's arguments to the effect that, because Order 24 rule 7 contains express provisions for provision of an affidavit, that excludes any exercise of the powers of the court, whether under Order 1A or the inherent jurisdiction, to require provision of an affidavit explaining the methodology of the discovery process adopted. If a purported direction made by the court in exercise of such powers were directly in conflict with the provisions of an express rule, one might understand an argument that such direction was not permissible, but no such conflict arises in the present case.

33. As Mr Hollander pointed out, the English civil procedure rules have codified the court's inherent jurisdiction to "…make any other order for the purpose of managing the case and furthering the overriding objective…"; see the CPR 3.1(2)(m). As the commentary in the White Book explains, this rule simply duplicates the inherent jurisdiction already enjoyed by the court; see White Book (2020), vol 1, paragraph 3.1.13; and paragraph 9A-68 vol 2, ibid. Although the RSC has not similarly codified the Bermuda Court's inherent jurisdiction, in my judgment the exercise of such jurisdiction by the Bermuda Court is undoubtedly expansive enough to cover the orders made by the Chief Justice in the present case. As the UK Supreme Court explained in *Al Rawi and others v Security Service* [2012] 1 AC 531 at [20]:

> *"There are many examples of the court in the exercise of its inherent power introducing procedural innovations in the interests of justice. Thus it invented the power to grant Mareva injunctions (see Mareva Navigation Co Ltd v Canaria Armadora SA [1977] 1 Lloyd's Rep 368) and make Anton Piller orders: see Anton Piller KG v Manufacturing Processes Ltd [1976] Ch 55. These orders were devised to prevent misuse of the court's procedure and to ensure that its procedure is effective. The PII procedure was also a creature of the common law*

> *devised by the court in the exercise of its inherent power to regulate its own procedures. The remedy of discovery (now known as disclosure) was developed by the courts of equity in order to aid the administration of justice. Upon the amalgamation of the Court of Chancery and the common law courts into the High Court by the Judicature Acts, that remedy came to be governed by the Rules of Court. It is now contained in CPR Pt 31. The rules governing disclosure recognised that conflict may arise between the public interest in the administration of justice and other public interests which preclude the disclosure of all relevant materials. The law of PII was developed to deal with such situations. The court was exercising its inherent power in controlling its own procedures by deciding the scope of disclosure in cases involving confidential material. The scope of disclosure has long been seen as a matter on which the court has jurisdiction to decide."*

34. Support for the approach taken by the Chief Justice, albeit in a different factual context, is to be found in *Kathryn Ma Wai Fong v Incredible Power Limited & Ors,* Eastern Caribbean Supreme Court, 30 January 2020**.** In that case the claimant sought an order that the respondents each file an affidavit setting out the methodology employed when carrying out searches for the purpose of discovery. The claimant relied on the requirement of the court to further the overriding objective when exercising its discretion or interpreting the rules and also argued that the court was required to further the objective by actively managing cases pursuant to CPR 25.1 of the Rules of the BVI courts; in order to achieve that objective, the court had power to direct that any evidence be given in written form and to give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective as required by the CPR applicable in the BVI. The claimant further submitted that the court had an inherent jurisdiction to order a party to give evidence as to its search methodology in order to police its own disclosure order. In giving judgment, Wallbank J said:

> *"Methodology*
> *[155] The scheme of standard disclosure pursuant to CPR 28 envisages self-certification that a party has understood the duty of disclosure and to the best of that party's knowledge it has been carried out – see CPR 28.9. The CPR contain no express provision for an opponent to go behind such self-certification.*
>
> *[156] I accept the submission of the Claimant that the court has power in furtherance of the Overriding Objective to order a party to file an affidavit to explain how he has conducted his disclosure obligations or to confirm his compliance. The Claimant's learned counsel reads CPR 1.2, 25.1, 26.1(2)(f) and 26.1(2)(w) together to reach this conclusion. I agree.*
>
> *[157] Such a power would, I think, only be used sparingly, in circumstances where the court has a real doubt that a party has been properly compliant with his disclosure obligations.*

> *[158] In the present case I indeed have a real doubt whether the Respondents, and WKY and WKC in particular, have properly complied with their disclosure obligations.*
>
> *[159] In this case WKY and WKC have filed and served six lists of documents in total. Each has been signed and certified by WKY and WKC personally, and their legal practitioners in this jurisdiction have also certified that they have explained the duty of disclosure to WKY and WKC. There is an indication in the materials before me that WKY and WKC have been assisted in the disclosure process by an overseas firm of lawyers, with such lawyers being the channel for communicating WKY and WKC's instructions to their BVI legal representatives. This is common in cases before this Court. Such overseas lawyers are of course unregulated by BVI law and courts and this Court has no visibility over whether such lawyers have properly and indeed honestly complied with BVI disclosure duties. It should be clearly stated that the duty to give proper disclosure is non-delegable with the responsibility resting with the party concerned.*
>
> *[160] The certification of a list of documents is a mere confirmation; it is not a statement under oath or formal affirmation in lieu of an oath. It would be in the interests of all concerned, including the Respondents (WKY and WKC included), and of justice, for doubts to be dispelled as far and as soon as possible concerning the propriety of the Respondents' disclosure. This can, in my respectful judgment, be achieved to a considerable extent by WKY and WKC each personally swearing or affirming an affidavit in which they each explain what they understand their duties of standard disclosure to be, confirming that to the best of their knowledge they have complied with their duties, identifying who it is that has carried out the disclosure exercise on their behalf and confirming that they have explained, or caused to be explained (and if so how and by whom), to any such person who assisted them what the duties of disclosure are. I do not view such an affidavit as a burdensome or oppressive requirement. It should not be problematic for WKY and WKC to make such an affidavit..."*

35. The court went on to make a prescriptive order requiring the respondents to search for and produce three categories of documents. Moreover, the court went on to order what the searches were to comprise, and what matters the affidavits were to address. Thus, the court further ordered that:

> *"(2) Such searches are to include searches of electronic devices and virtual records as well as physical records.*
>
> *(3) The Respondents shall each file and serve an affidavit of compliance with the foregoing. The natural person Respondents (i.e. WKY and WKC) shall each make this affidavit personally. This affidavit shall attest to the completeness of the documents produced. Where such production may not be complete, the*

> *Respondents shall include a detailed description of the searches carried out, including but not limited to identifying by whom such searches were carried out, the entirety of the instructions given to the person(s) carrying out the search if different from the Respondents, what physical, electronic devices and/or virtual spaces were searched.*
>
> *(4) In addition to the affidavit ordered to be made above, WKY and WKC shall each personally file and serve an affidavit:*
>
> > *a. explaining in detail what they understand their duties of standard disclosure to be;*
> >
> > *b. confirming that to the best of their knowledge they have complied with their duties;*
> >
> > *c. identifying who it is that has carried out the disclosure exercise on their behalf if WKY or WKC shall not have carried out their disclosure obligations personally in whole or part,*
> >
> > *d. confirming that they have explained to any such other person who assisted them what the duties of standard disclosure are;*
> >
> > *e. stating how and in what terms they have explained the duties of standard disclosure to any such other person who assisted him or them."*

36. In similar circumstances the English courts have used their powers to develop a line of authority whereby a party whose disclosure is inadequate is required to make disclosure either under the supervision of opponents or independent experts. There is no express rule in the English CPR which justifies this procedure, which goes much further than anything presently sought in these proceedings. Mr Hollander referred to examples such as *Mueller Europe Ltd v Central Roofing (South Wales) Ltd* [2012] EWHC 3417 (TCC) and *Nolan Family Partnership v Walsh* [2011] EWHC 535 (Comm). Whilst the cases emphasise that such orders may be exceptional, they recognise the court's jurisdiction to make such orders notwithstanding the absence of any rule which permits such a course.

37. I accept Mr Hollander's submissions that, if CS Life's submissions were correct, it would lead to the surprising conclusion that the court has no power to enquire into how the parties conduct their discovery exercise, or to become involved in, or make any order in relation to, the parties' discovery methodology, for example by requiring the parties to conduct keyword searches of their electronic documents. That cannot be right and is contrary to everyday practice at case management conferences in Bermuda, England and many other jurisdictions.

38. In his oral submissions, Mr Moverley Smith restricted his criticisms in relation to the actual exercise of the discretion by the Chief Justice, on the assumption that he had power to make such orders, to those contained in CS Life's written submissions, particularly at paragraphs 37-47.

His basic point was that such orders could only be made if the judge concluded that it was "necessary" to make such orders, as per the requirement in RSC Order 24/8 in relation to discovery orders. I disagree that RSC Order 24/8 imposes such a constraint on the exercise of the discretion to make the type of orders made by the Chief Justice in this case, whether under Order 1A or the inherent jurisdiction; in my view it would be sufficient if the court thought that it was "appropriate" to do so. However, irrespective of that point, on the evidence as presented to the judge, he was certainly entitled to conclude that, in the unusual circumstances of the case, and, in particular, in circumstances where responsibility for the discovery process had, in effect, been delegated on a wholesale basis to Credit Suisse AG, that it was indeed necessary to make the orders which he did in order to give effect to the overriding objective, including the need to ensure that the parties were on an equal footing and that the case was dealt with expeditiously and fairly.

39. For the above reasons I see no basis for interfering with the exercise of discretion by the Chief Justice.

40. It follows that I would dismiss the appeal on grounds 1,2,3 and 4.

Ground 5

41. This ground of appeal arises from the Plaintiffs' claim to disclosure of correspondence between CS Life and the Bank which CS Life contends is subject to litigation privilege. The Plaintiffs contend that CS Life has waived privilege by a reference to the correspondence with the Bank in paragraphs 27 and 29 of Coffey 3 and in a letter dated 2 July 2019 from Appleby to Hurrion. CS Life's position is those limited references do not constitute a waiver.

42. The judge summarised the facts relating to this issue at paragraphs 57-60 of the Judgment:

> ***"Issue of Privilege***
> *[57] In correspondence the Plaintiffs have asked for copies of all correspondence between the Defendant and the Bank in relation to the Defendant's requests that the Bank produce documents in relation to the discovery in this action and the responses received from the Bank. The Defendant's position, as set out in Coffey 3, is that this correspondence is privileged and that any reference to that correspondence in the affidavit should not be taken as a waiver of that privilege by CS Life.*
>
> [58] In paragraph 27 of Coffey 3 it is said on behalf of the Defendant that *"whilst the Defendant does not accept that its discovery is in any way deficient, it made a further request to the Bank for the classes of documents and specific documents identified in the Hurrion letter of 19 June 2019 (Further Bank Request). The documents identified in the Hurrion letter of 19 June 2019 substantively mirror the documents sought by the Plaintiffs in this Discovery Application and the*

Further Bank Request requested the specific documents and categories of documents set out in that letter".

[58] In paragraph 29 Mr Coffey states that *"The Bank responded to the Further Bank Request on 23 September 2019 (23 September 2019 Letter) and provided further documentation (Additional Documents). In summary, the Additional Documents include:*

(i) All of the Statements of Account, Statements of Safekeeping Accounts and Investment Reports. Out of an abundance of caution the Bank has resent all of the statements already sent to CS Life (which have already been provided by the Defendant), as well as generating new statements where it is able to do so.

(ii) Attachments to the client notes (which were not provided to CS Life with the client notes).

(iii) Legible versions, where possible, of the illegible documents identified by Hurrion in their letter of 18 April 2019 and clarified by Appleby in their letter of 2 May 2019."

[59] The Plaintiffs also rely upon the letter from Appleby dated 2 July 2019 where the compliance with the Defendants discovery obligations is explained in the following terms:

"Categories of Documents/Information Requests"

All documents evidencing transactions carried out on the relevant accounts (including investment reports and documents relating to investment decisions)
CS Life agrees that it can call on the Bank to provide documents under these categories that fall within the ambit of Article 400.

[60] CS Life has made requests to the Bank for documents in these categories previously (those requests, including the further request Appleby are making to the Bank as set out below, and any responses thereto are, for the avoidance of doubt, legally privileged and CS Life does not waive the legal privilege in those documents by referring to them herein) and disclosed the relevant and non-privileged documents provided by the Bank to the Plaintiffs in the First and Second Discovery Lists.

We note that your clients are of the view that CS Life's discovery is inadequate in respect of the classes of documents under this heading; a view CS Life does not

> *accept. In an attempt to allay those concerns, however, and consistent with the overriding objective, we, on behalf of CS Life, made a further request to the Bank for documents. That request seeks any documents falling within classes of documents and specific documents mentioned by the Plaintiffs in the June 2019 Letter under this heading*".

43. He then defined the relevant issue which he had to determine as follows:

> *"The relevant issue for the Court to consider is whether, having regard to what is said in Coffey 3 and the Appleby letter of 2 July 2019, any privilege which may exist in relation to the correspondence between the Defendant and the Bank has been waived."*

44. Having referred to the decision of Elias J in *Brennan v Sunderland City Council* Employment Appeal Tribunal, [2009] ICR 479, upon which both counsel had relied, he articulated the relevant test as follows:

> *"The relevant test is whether a reference is made to the effect of the document (in which case there is no waiver) or there has been a reference and reliance on the contents (in which case there is a waiver)."*

45. Having quoted from the decision at some length, he then concluded as follows:

> *"[62] Mr Moverley Smith argues that in Coffey 3 and the letter from Appleby dated 2 July 2019 the reference to the correspondence between the Defendant and the Bank is to the effect of that correspondence and not to its contents. He argues that in those circumstances there has been no waiver of any legal privilege which may otherwise exist.*
>
> *[63] I am unable to accept this submission. In paragraph 27 of Coffey 3 it is expressly stated that the Defendant made a request to the Bank for the classes of documents and specific documents identified in the Hurrion letter of 19 June 2019. This is a reference to the contents of the letter sent by the Defendant to the Bank. The significance of this letter is not that it was written but that it contained the identical request made in the Hurrion letter of 19 June 2019. Likewise the reference to the response from the Bank in paragraph 29 of Coffey 3 is not to the fact that a letter was received from the Bank but the precise contents of that response from the Bank. The purpose of this correspondence, as Mr Hollander submits, was to deflect criticism in relation to discovery by pointing out that the Defendant had complied with the request made by the Plaintiffs by making the same request to the Bank. In the circumstances I am bound to conclude that any legal privilege in relation to this correspondence which may have existed has been waived by the Defendant."*

46. Mr Moverley Smith submitted that the references in Coffey 3 and Coffey 4 to a request to the Bank for documents in the categories sought by the Plaintiffs were simply descriptions of a communication sent to the Bank; he argued that this was not a case where part of the contents of a document were relied upon by CS Life with it wishing to prevent the Plaintiffs from seeing the rest of the document; thus none of the detailed contents of the communication were mentioned and no reliance was placed on the contents of the communication, just on the fact that such a request had been sent. Accordingly, there was no requirement of fairness that justified the discovery of the contents of the communication since that was not what was being relied on. What was being relied on is the fact that such a communication was sent. There was no way Mr Coffey could inform the court of the fact that the requests for documents in the categories sought by the Plaintiffs had been made to the Bank in any terms other than the ones he used. In those circumstances, Mr Moverley Smith submitted, neither the reference, nor the nature of the reliance was sufficient to constitute a waiver of privilege in relation to the contents of the communication. He also referred to paragraph 28 of Coffey 3 (not referred to by the judge) which stated:

> *"For the avoidance of doubt, the Further Bank Request and the Bank's response thereto is privileged and the Defendant continues to assert that privilege. Any reference to the request or the Bank's response thereto in this affidavit should not be taken as a waiver of privilege by CS Life and CS Life expressly continues to assert the privilege in these document."*

47. Mr Moverley Smith further submitted that, even if the court on appeal were to conclude that there had been a waiver, the effect of the findings at paragraphs 57-63 of the Judgment was that any waiver was in any event limited to (i) the "Further Bank Request", identified in paragraph 58 of the Judgment, (ii) the Bank's response of 23 September 2019, referred to in paragraph 59 of the Judgment and (iii) the requests referred to in Appleby's letter of 2 July 2019 and any responses from the Bank thereto.

48. Mr Hollander for the Plaintiffs submitted in summary as follows:

(1) CS Life's evidence in response to the Plaintiffs' specific discovery application explained that, in order to comply with its discovery obligations, CS Life had made requests for documents from the Bank; CS Life's evidence did not simply refer to the fact that requests were written and sent to the Bank, but it summarised what was said in that correspondence; CS Life had advanced that evidence in order to demonstrate that it had complied with its discovery obligations and to resist any further order for discovery being made against it.

(2) The terms of the requests to the Bank and the terms of the Bank's responses were of importance in determining whether and to what extent CS Life had complied with its discovery obligations. As a matter of fairness, CS Life should not be permitted to defend a

specific discovery application on the basis of correspondence which it said neither the opposing party nor the Court were entitled to see.

(3) However, the practical problem facing CS Life was that, in order even to begin to demonstrate to the court that it had fulfilled its discovery obligations, it needed to explain what it had asked the Bank and how the Bank had responded. This was exactly what Coffey 3 did at paragraphs 27-29. It had specifically deployed the content of the requests made in writing to the Bank in order to oppose the specific discovery application. It followed that any privilege in the correspondence had been waived.

(4) CS Life's submission was an attempt to have its cake and eat it. It could not, on the one hand, attempt to explain what CS Life had requested and what the Bank's answer was, in order to show there had been compliance with CS Life's obligations, without, on the other hand, producing the privileged material to show what actually had been requested.

(5) Privilege had therefore been waived in the requests from CS Life to the Bank and the responses, as a result of describing the contents of the requests and responses and deploying that information to gain an advantage in the litigation, namely to satisfy the court that it has complied with its discovery obligations and to resist the specific discovery application. The Chief Justice had been right to order discovery of the requests to the Bank and the Bank's responses. There were no proper grounds for going behind the Chief Justice's reasoning at paragraph 63 of the judgment.

49. Both Mr Moverley Smith and Mr Hollander agreed that the relevant principles of collateral waiver of privilege were usefully set out and analysed in the judgments of the Court of Appeal in *Dunlop Slazenger International Limited v Joe Bloggs Sports Limited* [2003] EWCA Civ 901 and of Elias J in *Brennan v Sunderland City Council* in the Employment Appeal Tribunal [2009] ICR 479. Both those cases dealt with the issue as to whether solicitor and own client privilege had been waived. In contrast, the applicable privilege in the present case is agreed to be common interest litigation privilege, which, it might be said, does not attract such a high level of protection. However, it was not suggested by counsel that, for that reason, there was any difference as to the formulation of the relevant principles or as to their application, which was where the area of dispute lay in the present case.

50. The English authorities suggest that there is a distinction in the context of waiver between a reference to the *effect* of the document and *reliance* on its contents, in the sense of deploying its contents to obtain some sort of advantage. The authorities are clear that a party cannot cherry pick what it says about the contents of a privileged document so as to disclose what is to its advantage, but hold back that which may adversely impact its position or demonstrate that the statement has actually been made in a different context.

51. In *Dunlop* Waller LJ stated the principles as follows:

> *"11. The authorities in this area are not altogether easy. Mr Croxford drew our attention to, firstly, Government Trading Corporation v Tate & Lyle and then to Marubeni Corporation v Alafouzos. Then he also drew our attention to Nea Karteria Maritime Co Ltd v Atlantic & Great Lakes Steamship Corporation. If one goes to one of the textbooks, Matthews & Malek on Disclosure, 3rd ed (2007), one finds at para 10.17 a summary of the position as those authors see it. First of all, in that paragraph there is the reference to the dictum of Mustill J (as he then was) in Nea Karteria, which provides as follows:*
>
> > *'where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood.'*

52. I would describe that as the cherry-picking aspect. Then the paragraph reads as follows:

> *"The key word here is 'deploying'. A mere reference to a privileged document in an affidavit does not of itself amount to a waiver of privilege, and this is so even if the document referred to is being relied on for some purpose, for reliance in itself is said not to be the test. Instead, the test is whether the contents of the document are being relied on, rather than its effect. The problem is acute in cases where the maker of an affidavit or witness statement has to give details of the source of his information and belief, in order to comply with the rules of admissibility of such affidavit or witness statement. Provided that the maker does not quote the contents, or summarise them, but simply refers to the document's effect, there is apparently no waiver of privilege. This benevolent view has not been extended to the case where the maker refers to the document in order to comply with the party's need to give full and frank disclosure, eg on a without notice (ex parte) application.*
>
> *So it is that the authors correctly identify that the authorities provide for a distinction between a reference to the effect of the document and reliance on the content."*

53. Likewise, in *Brennan* Elias J dismissed an appeal contending that privilege had been waived in various documents and legal advice. In the course of the tribunal's judgment, he examined the court's approach to considering whether there has been a waiver of privilege and, if so, to what extent, when a privileged document is 'deployed' in court. He examined the various authorities at some length; see in particular paragraphs 45 and 47 to 50. Whilst his summary of the relevant principles and some of the authorities is useful, whether or not privilege has actually been

waived in any particular circumstances is necessarily very context specific. Accordingly, I do not find it necessary to cite extensively from his judgement.

54. A recent English case in which the issue was considered in the context of a suggested waiver of litigation privilege (as opposed to legal professional privilege) is *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 1955 (Ch). Two paragraphs of Morgan J's judgment usefully encapsulate the relevant principles:

> *"[13] The other matter to which my attention has been drawn is the very helpful discussion of principle by the Employment Appeal Tribunal in Brennan v Sunderland City Council [2009] ICR 479, I was asked to pay attention in particular to paragraph 62 to 69 of the decision of the tribunal. At paragraph 64 there is reference to two matters which a court should consider. When deciding on the extent of a waiver, one should look at the nature of what has been revealed. This was a case concerning legal advice privilege, rather than litigation privilege. In that context it was said: is what has been revealed the substance of the advice, the content of the advice or merely the effect of the advice?*
>
> *[14] The second relevant matter concerns the circumstances in which the disclosure has been made. Has the revealed matter been deployed to advance a party's case or has it simply been referred to in a way which falls short of reliance and deployment?"*

55. As the Chief Justice correctly pointed out at paragraph 61 of the Judgment, the relevant issue is whether, having regard to what was said in Coffey 3 and the Appleby letter of 2 July 2019, litigation privilege has been waived in the communications between CS Life and the Bank. Appleby's letter of 2 July responded to Hurrion's two letters of 19 June and 1 July 2019 in which requests for various categories of documents had been made. As set out in paragraph 60 of the Judgment, as already quoted above, in relation to each category of document which it had provided, Appleby responded in the terms set out by the judge. (What is perhaps not clear from the Judgment is that the text set out in paragraph 60, including the express non-waiver of privilege, was repeated on several occasions in relation to each category of documents requested.)

56. Put at its highest, it could be said that the representations being made by Appleby and Mr Coffey on behalf of CS Life in the affidavit and the letter were as follows:

(1) that CS Life had made a further request to the Bank for the classes of documents, and the categories of documents and specific documents identified in the Hurrion letter of 19 June 2019; (i.e. the Further Bank Request);

(2) that the Bank had responded to the Further Bank Request on 23 September 2019 by letter of that date and had provided further documentation (i.e. the Additional Documents);

(3) that, in summary, the Additional Documents included the documents specified in subparagraphs (i), (ii) and (iii) of paragraph 29 of Coffey 3; and

(4) that in relation to the documents specified in subparagraph (i) of paragraph 29 of Coffey 3, *all* of "the Statements of Account, the Statements of Safekeeping Accounts and Investment Reports" had been provided by the Bank.

57. Whilst in one sense it could be said that CS Life was so informing the Plaintiffs and the court so as to give the impression that it had been cooperative and discharged its disclosure obligations appropriately, nonetheless, in my view, and approaching the matter on a realistic basis, what CS Life was in fact doing was no more than providing an explanation of what it had done and what the response had been from the Bank. In my judgment, it cannot realistically be said that, in so doing, CS Life was cherry picking, or deploying, to its unfair advantage, parts of its correspondence with the Bank and, arguably, withholding other parts, so as to give rise to a waiver of common interest litigation privilege. In real terms it was doing no more than setting out what the effect of its communications with the Bank had been; it was not in any real sense relying on the content of that correspondence. In those circumstances I conclude that, in the particular circumstances of this case, the Chief Justice wrongly applied the principles governing collateral waiver of privilege to a situation that did not justify it. That, in my view, was an error of law on his part and not merely a case where I take a different view as to the appropriate exercise of discretion in all the circumstances. Accordingly, I would allow CS Life's appeal on this ground.

Ground 6

58. The issue which arises under this ground is whether the obligation to account imposed on an agent under Article 400 of the Swiss Code of Obligations requires an agent to provide all relevant documents to his principal, or whether purely internal documents are excluded from that obligation.

59. The Chief Justice concluded that there was no such exclusion. He dealt with this issue at paragraph 64 to 86 of his judgment.

60. On behalf of CS Life, Mr Moverley Smith contended that the judge's conclusion was erroneous. In support of this contention he submitted, in summary, as follows:

(1) The meaning and effect of foreign law was to be determined by the court as a question of fact (see Dicey, Morris & Collins on the *Conflict of Laws* (15th Ed.) Rule 25). However it was treated as a question of fact of a peculiar kind, such that in an appropriate case the Court of Appeal would be willing to substitute its own decision as to the meaning and effect of foreign law (see e.g. the English decision of the Court of Appeal in *Bumper Development Corp v Commissioner for the Police of the Metropolis* [1991] 1 WLR 1362 at 1370); particularly if it were in as good a position as the judge at first instance to determine

the point (see the English decision of the Court of Appeal in *McMillan Inc . v Bishopsgate Investment Trust* (4 November 1998) (unreported).

(2) In the present case both parties adduced expert evidence. But the disagreement between the experts was very limited and, essentially, revolved around the interpretation of one paragraph of a single decision of the Swiss Federal Tribunal Swiss Federal Tribunal (SFT) in a 2012 case: ATF III 139 49 (ATF 139). Although the experts were cross-examined, it can be see seen from the Chief Justice's analysis at paragraphs 75ff of the judgment that, in the event, he decided the point simply by reference to the wording of ATF 139 and a later decision of the SFT in 2018 (the Plaintiffs' expert, Professor Pichonnaz, had referred to no other material in support of his view).

(3) In such circumstances the Court of Appeal was in just as good a position as the Chief Justice to reach its own determination of the issue and should do so.

(4) Article 400 concerned an agent's duty (i) to account to its principal and (ii) to hand over material the agent has received in execution of its mandate. Those were distinct duties. The issue in the present case arose in relation to the first of those duties: the duty to account. The Chief Justice correctly concluded (at paragraph 75 of the Judgment) that the position in relation to the duty to account was governed by paragraph 4.1.3 of the landmark case of the Swiss Federal Tribunal in 2012, ATF case 139 iii 49, 19 November 2012 ("the 2012 Decision").

(5) However, he erred in making a finding of fact that Article 400 required an agent to provide all relevant documents to his principal including purely internal documents. Such finding was against the weight of the evidence and was made:

a. without regard to the unchallenged expert evidence of Dr. Dallafior that in his practical experience the Swiss courts did exclude purely internal documents;

b. without regard to the fact that, in the 2012 Decision, the Swiss Federal Tribunal expressly identified a separate category of purely internal documents that were not subject to the duty to account;

c. wrongly relying on a statement in the Swiss Federal Tribunal case FT 4A 522/2018 that:

> *'The duty to provide information may also relate to the content of internal documents, provided that it is relevant for monitoring the activities of the agent',*

as providing confirmation that the 2012 Decision decided that the sole criteria for seeking information was relevance, without recognising that FT 4A 522/2018 was not

a case concerning the duty to account or involving the distinction between internal and purely internal documents; and

d. failed to take account of decision DFT 143 III 348, which stated (at paragraph 5.3.1):

> *"to meet its accountability obligation the agent must inform the principal in a complete and truthful manner and give it all the documents relating to the matters dealt with in the latter's interest. Exceptions are purely internal documents, such as preliminary studies, notes, draft material collected and accounting."*

(6) Accordingly, the Chief Justice's finding in relation to Article 400 should not stand. The correct interpretation of Article 400 was that the duty to account did not require an agent to provide purely internal documents and accordingly the appeal should be allowed on that ground.

61. Substantially for the reasons put forward by Mr Hollander, on behalf of the Plaintiffs, I do not accept these arguments. My reasons, which reflect Mr Hollander's submissions, may be summarised as follows.

62. First, the Chief Justice heard cross-examination of the Swiss law experts in person. Thus, he heard evidence in person from the Plaintiffs' expert, Professor Pichonnaz (who is Professor of Private Law at the University of Fribourg), and from CS Life's expert, Dr Dallafior, who is a commercial litigator at a Zurich law firm. There was one issue between the experts as to Swiss law, on the scope of Article 400 of the Swiss Code of Obligations. At paragraph 74 of the judgment, the Chief Justice expressly stated that he preferred the evidence of Professor Pichonnaz. Unless there was some good reason for doing so, I would be reluctant to go behind the judge's assessment of the comparative merits of the intellectual analysis by the respective experts on Swiss law.

63. Second, my reading of the Judgment does not support Mr Moverley Smith's submission that the Chief Justice simply decided this issue on an erroneous construction of the words of a Swiss court decision. He was clearly influenced to come to his conclusion by his assessment of the evidence given by the respective experts, after having heard cross-examination of both experts. As stated in Dicey, Morris and Collins, on the Conflict of Laws, 15th Ed. ("Dicey") at 9-010, there are limited circumstances in which an appellate court can interfere with such a finding by a first instance judge in such circumstances:

> *"generally, an appellate court, which will not have had not had [sic] the opportunity to put questions to the expert witness of foreign law, will be slow to substitute its opinion for that of the trial judge."*

Moreover, as Dicey points out at 9-013, a court generally needs to have the assistance of the foreign law expert in order to evaluate or interpret foreign law.

64. Third, I see no reason to depart from, or disagree with, the judge's conclusion, based upon Professor Pichonnaz's evidence, as to the scope of Article 400 and the obligations which it imposes on agents. Article 400 provides:

> *"The agent is obliged at the principal's request, which may be made at any time, to give an account of his agencys activities and to return anything received for whatever reason as a result of such activities."*

65. The dispute between the Swiss law experts was limited to a difference of view as to the effect of Article 400 which imposes two duties on the agent. The first is the duty to return documents, money and anything of value received under the mandate (sometimes referred to as the duty of surrender or delivery); the second is the obligation to give an account of his principal's activities. This, as Professor Pichonnaz explained, includes an obligation to deliver to his principal all documents received during his mandate, including documents between himself and third parties. He said:

> *"The duty to return documents and values is directly linked to the fact that the agent has acted in the interest of another, it is therefore also based on the principle of trust. The agent has to return any money, value-paper, documents, even without market value, received from the principal to perform the contract. The agent has also to return any documents, values or anything received by third parties while performing the contract, which have an internal link to such performance."*

66. The dispute between the experts focused on the second aspect of the duty under Article 400, namely the duty to account. It was agreed between the parties that the function of this duty was to enable the principal to have all documents and information which enabled him to be in a position to assess whether the agent had performed the contract of mandate in accordance with his obligations or not. However, the dispute related to whether "purely internal" documents of the agent had to be disclosed as part of this accounting process, Dr Dallafior's view being that there was a separate category of such documents which did not have to be disclosed, and Professor Pichonnaz's evidence being to the effect that the agent was obliged to hand over any document to the principal which enabled the principal to assess the activities of the agent and determine whether or not the agent fulfilled his obligations.

67. The evidence of the experts showed that, until 2012, Swiss law authorities treated the duty to account as almost identical to the duty of disclosure. However, the evidence demonstrated that the landmark 2012 Decision made a fundamental change in this regard. Professor Pichonnaz's evidence, which does not appear to have been undermined in cross-examination, was that the 2012 Decision made clear that the agent was obliged to hand over any document to the principal which enabled the principal to assess the activities of the agent and determine whether or not the agent fulfilled his obligations. The aim of the 2012 Decision was to open up the right of the principal to obtain internal documents not within the disclosure duty. The only limiting factor

was relevance. If a document was not relevant to the assessment of the agent's performance of the contract by the principal, it did not need to be provided under the duty to account. To the extent that the Federal Tribunal identified types or categories of documents in the 2012 Decision, they were giving examples of what might or might not be relevant. Professor Pichonnaz' position is summarised in the Judgment at paragraphs 68 to 71.

68. Dr Dallafior's view, on the other hand, was that the 2012 Decision identified certain categories of documents which would not be disclosable under the duty to account. His evidence sought to draw a distinction between "internal documents" and "purely internal documents" the latter not being disclosable, and which documents fell into which category had to be worked out on a case by case basis. He did not identify any principle which enabled the court to define what was a non-disclosable "purely internal"document. The evidence which he gave in cross-examination appears to have been muddled and it is certainly difficult to understand. The Chief Justice set out Dr Dallafior's position at paragraphs 72 to 73 of the Judgment.

69. The Chief Justice clearly preferred Professor Pichonnaz's evidence as to the effect of the 2012 Decision and referred to the fact that Professor Pichonnaz drew support from a 2019 decision (FT 4A 522/2018) ("the 2019 Decision"). The Chief Justice clearly concluded that Professor Pichonnaz's evidence, and, in particular, the distinction drawn by him, was supported by the 2019 decision. Thus, at paragraph 83 of the Judgment, the Chief Justice stated:

> *"[83] Professor Pichonnaz's opinion in this regard is supported by the Federal Tribunal case FT 4A 522/2018. At paragraph 4.2.2.1 the court summarised the legal position in relation to the duty to account as follows:*
>
> > *"Regarding the agent's obligation in general, case law accepts that the obligation to account for his management (Accountability) includes the obligation to inform (Obligation to inform). The right to information must allow the principal to verify whether the activities of the agent correspond to a good and faithful execution of the mandate and, if necessary, to claim damages based on the responsibility of the agent… The duty to provide information may also relate to the content of internal documents, provided that it is relevant for monitoring the activities of the agent* ***(ATF 139 III 49 recital 4.1.3 p.56)****."*

70. The Chief Justice then went on to say (in paragraph 84) that he accepted Professor Pichonnaz's evidence that the 2019 Decision confirmed that the *ATF 139* case decided that the sole criterion for seeking information in aid of the duty to account was relevance and not categorisation of the documents into internal documents and purely internal documents. From my review of the totality of the expert evidence, I see no reason to disagree with that conclusion.

71. Mr Moverley Smith made other detailed points as part of his criticisms of the Chief Justice's conclusion, but I do not find it necessary to deal with them. They did not persuade me that the Chief Justice had reached an erroneous conclusion in relation to the scope of Article 400.

72. For the above reasons I would dismiss CS Life's appeal under ground 6.

Disposition

73. It follows that, subject to the concurrence of the President and Justice of Appeal Smellie, I would:

(1) give permission to the Appellant to appeal on grounds 1, 2, 4 and 6;

(2) dismiss the appeal on grounds 1, 2, 3, 4 and 6; and

(3) allow the appeal on ground 5.

SMELLIE JA:

74. I agree. I too would dismiss the appeal on grounds 1, 2, 3, 4 and 6 and allow the appeal on ground 5.

CLARKE P:

75. I concur with My Lady's disposition at paragraph 73 above. Accordingly the appeal will be dismissed on grounds 1, 2, 3, 4 and 6 and allowed on ground 5.