In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: No. 293
2020: No. 373

BETWEEN:

(1) BIDZINA IVANISHVILI

(2) EKATERINE KHVEDELIDZE

(3) TSOTNE IVANISHVILI

(An infant, by his mother and next friend, Ekaterine Khvedelidze)

(4) GVANTSA IVANISHVILI

(5) BERA IVANISHVILI

(6) MEADOWSWEET ASSETS LIMITED

(7) SANDCAY INVESTMENTS LIMITED

Plaintiffs

-and-

CREDIT SUISSE LIFE (BERMUDA) LIMITED

Defendant

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr Joe Smouha QC, Ms Louise Hutton QC, Ms Sarah-Jane Hurrion and Mr Henry M Komansky of Hurrion & Associates Ltd, for the Plaintiffs**

Mr Stephen Moverley Smith QC, Mr Steven Thompson QC, Mr John Wasty,

Ms Hannah Tildesley and Ms Luisa Olander of Appleby (Bermuda) Limited, for the Defendant

Dates of Hearing: **15 - 19 November 2021;**
22 - 26 November 2021;
29 November - 2 December 2021;
6 - 10 December 2021 and;
14 - 17 December 2021

Date of Judgment: **29 March 2022**

JUDGMENT

Elements of implied misrepresentations; whether the representee must "understand" that the representation is being made in the sense in which he complains in the action; the scope and exceptions to the double actionability rule as it applies to torts committed outside the jurisdiction; public policy exception and operation of section 34A(1),(2) and (5) of the Limitation Act 1984; scope of the rule in Hollington v Hewthorn; admissibility of statements made to the police and investigative bodies in civil proceedings; whether appropriate to draw adverse inferences due to lack of discovery and failure to call relevant witnesses

INDEX OF TOPICS

HARGUN CJ

A. Introduction

1. In these proceedings Mr Bidzina Ivanishvili, a successful businessman and former Prime Minister of Georgia, and others ("**the Plaintiffs**") seek relief in relation to losses suffered by them in respect of assets placed with the Defendant, Credit Suisse Life (Bermuda) Limited ("**CS Life**"), resulting from alleged frauds at Credit Suisse group ("**Credit**

Suisse")[1] involving its executive (and Mr Ivanishvili's Relationship Manager) Patrice Lescaudron ("**Mr Lescaudron**"). From 2005 Mr Ivanishvili invested over a billion dollars with Credit Suisse.

2. The Plaintiffs claim that from as early as 2007, Mr Lescaudron was misappropriating and mismanaging funds and securities from Mr Ivanishvili's (and other clients') accounts and that this continued (and increased in scale) until 2015 when his employer, Credit Suisse AG ("**the Bank**"), acted to stop him. The Plaintiffs allege that the Bank became aware of some significant wrongdoings of Mr Lescaudron at least as early as 2011 but failed to take any steps to stop him or investigate his conduct properly, because it was earning huge profits from Mr Lescaudron's clients and was fearful of losing those clients and their investments.

3. The Plaintiffs claim that in 2011 Mr Ivanishvili was persuaded by Mr Lescaudron to entrust, in the event, over USD 750 million (within trusts for the benefit of Mr Ivanishvili, his wife and children) with the Defendant, CS Life, using a Bermudian life insurance policy investment structure. Under this structure, the Plaintiffs entrusted USD 755 million by way of premiums paid to CS Life which it was to invest with its parent, the Bank. The structure operated on the basis that the money and assets were legally held in CS Life's name and placed for investment in CS Life accounts with the Bank (so that the Plaintiffs had their contractual relationship in respect of their investments only with CS Life).

4. After the inception of the Life Policies, reports were received that the investments were performing well. The Plaintiffs claim that in 2015, Mr Lescaudron's frauds on Mr Ivanishvili's and the Plaintiffs' accounts became known to Credit Suisse following internal investigations. Credit Suisse did not however, the Plaintiffs allege, inform Mr Ivanishvili of what it knew, namely that Mr Lescaudron had committed a long-running fraud against Mr Ivanishvili's accounts over many years, as part of which he had

[1] "**Credit Suisse**" refers to the Credit Suisse Group as a whole or where it is unnecessary to draw a distinction between different Credit Suisse entities.

provided false reports of the performance of the investments in the Plaintiffs' accounts and forged documents to cover unauthorised and improper transactions.

5. It is the Plaintiffs' case that Mr Lescaudron's fraudulent conduct included misappropriating assets, transferring assets from Mr Ivanishvili's accounts to those of unrelated clients, transferring assets into Mr Ivanishvili's accounts at an overvalue to hide the losses of those unrelated clients, and enriching himself through investing Mr Ivanishvili's assets in order to obtain improper commissions for himself. Following criminal complaints made by the Bank, Mr Ivanishvili and others, Mr Lescaudron was convicted by the Swiss criminal courts and sentenced to 5 years in prison. He subsequently committed suicide.

6. By these proceedings, the Plaintiffs seek relief for the losses suffered on the CS Life Accounts as a result of Mr Lescaudron's wrongdoing. The Plaintiffs' primary claim is for damages calculated as amounting to USD 553.86 million as of 31 July 2020, being the difference between the value of the assets on the Policy Accounts (allowing for capital movements) as at 31 July 2020 and the total value the funds invested in the Policy Accounts would have amounted to as at 31 July 2020 had they been invested instead in the medium risk portfolio identified by the Plaintiffs' investment management expert.

7. In response CS Life points to the fact that by the time Mr Ivanishvili invested in the insurance policy investment structure he already had a long-established relationship with the Bank and his relationship manager, Mr Lescaudron. He had numerous accounts and significant assets held with the Bank, before and after the unit linked life policies were taken out.

8. CS Life contends that in this case the Court should be concerned to understand the contractual relationships and the particular functions for which CS Life had responsibility, as distinct from the Bank. Broadly speaking, CS Life contends, that it handled administration of the unit linked policies and the Bank was responsible for managing the underlying assets, albeit under the immediate control and discretion of the

First Plaintiff himself (and his assistants). In fact, CS Life asserts that it had nothing to do with the investment of the underlying assets which was handled directly between the Mr Ivanishvili, his assistants and the Bank pursuant to a sub-delegated Power of Attorney.

9. CS Life argues that any claims the Plaintiffs may have in relation to the frauds alleged against Mr Lescaudron can only properly be pursued against Mr Lescaudron and/or his employer, the Bank, and not against CS Life. The Defendant argues that companies are entitled to limit their liability by contract and group structuring, and it is commonplace to ring fence certain separate business activities within distinct entities. CS Life argues that this is indeed the position in this case and the Court must give effect to those legal limits.

Factual and expert evidence at the trial

10. The Court heard evidence from witnesses of fact tendered by the parties. On the Plaintiffs' side the Court heard evidence from: (1) Mr Bidzina Ivanishvili, who provided four witness statements: first witness statement dated 14 May 2020 (Ivanishvili 1); second witness statement dated 25 June 2020 (Ivanishvili 2); third witness statement dated 25 March 2021 (Ivanishvili 3); and fourth witness statement dated 12 November 2021 (Ivanishvili 4) and (2) Mr George C Bachiashvili, the former CEO of the Georgian Co-Investment Fund.

11. Mr Bachiashvili acted as Mr Ivanishvili's intermediary with the Bank from 2012 and provided three witness statements: first witness statement dated 15 May 2020 (Bachiashvili 1); second witness statement dated 1 July 2020 (Bachiashvili 2); and third witness statement dated 12 November 2021 (Bachiashvili 3).

12. On CS Life's side the Court heard evidence from: (1) Mr Daniele Celia, head of the Bank's insurance division, who tendered four witness statements dated 15 May 2020 (Celia 1), 10 July 2020 (Celia 2) and 9 April 2021 (Celia 3) and 28 October 2021 (Celia

4); (2) Mr Thomas Coffey, who was the CEO of CS Life between 2009 and 2017, who tendered one trial witness statement dated 15 May 2020 (Coffey 1) as well as four affidavits on interlocutory matters; (3) Ms Cecilia Homann, Head of Product Management for life insurance business at the Bank who tendered one witness statement dated 15 May 2020 (Homann 1); (4) Mr Sacha Keusch, Head of Life Insurance Management at the Bank tendered one witness statement dated 15 May 2020 (Keusch 1); and (5) Mr Nicolas Vaccaro, line manager at the Bank and, from 2018, a director of CS Life who provided three witness statements dated 15 May 2020 (Vaccaro 1),10 July 2020 (Vaccaro 2) and 22 November 2021 (Vaccaro 3).

13. The Court also heard expert evidence in the fields of investment management, forensic accounting, Georgian and Swiss law.

14. The Plaintiffs' investment management expert is Mr David Morrey. His reports are dated 12 February 2021 (Morrey 1), 6 August 2021 (Morrey 2), 10 September 2021 (Morrey 3), 12 November 2021 (Morrey 4) and 2 December 2021 (Morrey 5). CS Life's expert is Mr Bruno Campana. His reports are dated 12 July 2021 (Campana 1) and 10 September 2021(Campana 2). Their joint statement is dated 29 October 2021 (IM Joint Report).

15. The Plaintiffs' forensic accounting expert is Mr William Davies. His five reports are dated: 23 November 2020 (Davies 1); 5 February 2021 (Davies 2); 23 April 2021 (Davies 3); 6 August 2021 (Davies 4); and 10 September 2021 (Davies 5). CS Life's expert is Mr Mark Bezant. His reports are dated 12 July 2021 (Bezant 1) and 10 September 2021 (Bezant 2). Their joint statement is dated 22 October 2021 (FA Joint Report).

16. The Plaintiffs' Georgian law expert is Professor Rolf Knieper, a retired professor who was involved in drafting the Georgian Civil Code. His reports are dated 14 May 2021 (Knieper 1) and 26 June 2021 (Knieper 2). CS Life's expert, Mr Vasil (Sandro) Bibilashvili, is a Georgian attorney. His reports are dated 14 May 2021 (Bibilashvili 1) and 29 June 2021 (Bibilashvili 2). Their joint statement is dated 2 August 2021 (Georgian Joint Report)

17. The Plaintiffs' Swiss law expert is Professor Dr. Pascal Pichonnaz, a professor of Swiss law and arbitrator. His reports for the trial are dated 14 May 2021 (Pichonnaz 4) and 25 June 2021 (Pichonnaz 5). CS Life's expert witness is Dr. Thomas Weibel, a Swiss attorney and academic. His reports for trial are also dated 14 May 2021(Weibel 4 and Weibel 5) and 25 June 2021 (Weibel 6). Their joint statement dated is 23 July 2021 (Swiss Joint Report).

B. Background

(1) Parties

18. As noted above, Mr Ivanishvili, the First Plaintiff, is a Georgian philanthropist, businessman and former politician. He was the Prime Minister of Georgia from October 2012 to November 2013. The Second Plaintiff is his wife, Mrs Ekaterine Khvedelidze. The Third, Fourth and Fifth Plaintiffs are their children. The Third Plaintiff is a minor and is represented in these proceedings by Mrs Khvedelidze.

19. The Sixth and Seventh Plaintiffs ("**Meadowsweet**" and "**Sandcay**", respectively) are investment companies forming part of trust structures set up for the benefit of Mr Ivanishvili and his family. They are also the account and policyholders of the LPI policies at issue in these proceedings. They are referred to collectively as the "**Policyholders**" or the "**Account Holders**".

20. CS Life is a Bermuda insurance company, which is registered as a segregated accounts company under the Segregated Accounts Companies Act 2000 (the "**SAC Act**"). It is regulated by the Bermuda Monetary Authority. CS Life is a wholly owned subsidiary of the Bank.

21. According to the evidence of Mr Celia CS Life was incorporated in November 2004 because "*the Bank wanted to be able to offer an additional international life insurance product to its clients*." Mr Celia says that it started to offer its life insurance product,

Life Portfolio International (**"LPI**"), in 2005. The purpose of this product, according to CS Life's witnesses, is that it "*allowed clients to take advantage of the financial and practical benefits of an offshore life insurance policy, in terms of wealth and inheritance planning, without changing the way their assets were managed*." There is also a suggestion that it offered stamp duty savings on equities trading.

(2) Mr Ivanishvili's relationship with the Bank

22. According to his evidence, in the early 1990s, Mr Ivanishvili (along with a business partner) used profits from an import business to establish Rossiysky Kredit, one of the first privately-owned banks in Russia. Towards the end of 2004, Rossiysky Kredit sold its major stake in a metallurgical complex, Mikhailovsky, for c. USD 1.6 billion and in 2005 it sold the retail bank, Impexbank, for USD 550 million.

23. Mr Ivanishvili states that around 2005 he decided to move back to Georgia from Russia. The sales of Mikhailovsky and Impexbank had made him extremely wealthy, and he had decided to engage a specialist investment bank to take care of and invest the profits. Although Mr Ivanishvili had managed his own assets prior to 2005, the sums were comparatively small and he had invested predominantly in Russian stocks, as he was familiar with Russian companies. But the Russian market was volatile, and he was keen for his new wealth to be invested in a more reliable and stable manner.

24. Again, according to the evidence of Mr Ivanishvili, Credit Suisse, having heard about the sale of Mikhailovsky, contacted Mr Ivanishvili in late 2004 to offer him private wealth management services. Mr Ivanishvili had planned to speak to other banks regarding the management of his money, but he was not approached by any other bank, and the offer that Credit Suisse presented was a good one. Credit Suisse offered Mr Ivanishvili low fees in return for which it would provide sound investment management services. Mr Ivanishvili agreed to this, principally because of Credit Suisse's reputation as an internationally renowned and respected bank, operating in Switzerland.

25. Mr Ivanishvili's first relationship manager or "**RM**", Ms Daria Mihaesco Krassiakov, was replaced with Mr Lescaudron in 2006. According to the evidence of Mr Vaccaro the relationship between Mr Ivanishvili as the client and Mr Lescaudron as the RM was key to the LPI Policies. Mr Vaccaro accepted in cross examination that Mr Lescaudron as the RM was the point of contact between Mr Ivanishvili as the client and CS Life, as well as between Mr Ivanishvili and the Bank: "*it was meant to be a seamless set-up."*

(3) The Mandalay Trust

26. Mr Ivanishvili states that in around 2004-5, he began planning for his children's future and explained to the Bank that he wanted to take steps to ensure his money would be safeguarded for his family. He explained to the Bank that he wanted a well-balanced portfolio with a moderate approach to risk in order to preserve the wealth that he had built up throughout his lifetime, and that he did not want the Bank to invest more than 25% in emerging markets because of the risks involved.

27. According to Mr Ivanishvili, the Bank advised that he set up a trust to be administered in Singapore by Credit Suisse Trust, a division of the Bank. This proposal led to the establishment of the Mandalay Trust.

28. In his first witness statement Mr Ivanishvili explains that he wanted to retain the option of having input into investment decisions both because: (i) he wanted to continue to give instructions with respect to certain Russian stocks (which he intended to transfer into the Mandalay Trust) as he had particular knowledge of the Russian market; and (ii) the relationship with the Bank was still in its early stages and he did not yet feel comfortable handing over complete control of his assets to the Bank. Mr Ivanishvili's intentions are recorded in the Mandalay Trust Memorandum of Wishes dated 7 March 2005. This provides that the principal beneficiary of the Mandalay Trust is Mr Ivanishvili, that the trustees "*may have regard to his recommendations in respect of the investment of the Trust Fund*" and that in the event of his death, the fund was to be split between his family. The Mandalay Trust application form records that the purpose of the trust is "*Inheritance*

Planning and Asset Holding". The Declaration of Trust was executed on 7 March 2005 and records that the beneficiaries are Mr Ivanishvili, his wife and children.

29. Mr Ivanishvili confirms that he subsequently transferred profits from his share of the sales of Mikhailovsky and Impexbank (c. USD 1.1 billion) into accounts held with the Bank in the name of two investment companies wholly owned and controlled by Credit Suisse Trust, namely Meadowsweet and Soothsayer Limited ("**Soothsayer**").

30. Meadowsweet and Soothsayer entered into a series of discretionary portfolio agreements with the Bank, which permitted the Bank to manage investments on a discretionary basis. The Meadowsweet discretionary portfolio management agreement dated 29 March 2005 provided that the Bank would manage the investments in accordance with a "mixed portfolio" investment portfolio, i.e., having "*an average risk exposure through acceptance of the fluctuation of asset value; long-term capital growth aimed at through steady income, capital and currency gain*". The Soothsayer Investment Mandate dated 1 April 2005 similarly states that Mr Ivanishvili's objective was to "*achieve real-time capital preservation*" and that the "*[r]isk tolerance will be average*".

31. Mr Ivanishvili signed a letter addressed to Credit Suisse Trust dated 7 March 2005 stating that he wished to be appointed as "*the initial investment manager to the trust*". Mr Ivanishvili explains in his first witness statement that he was not thereby taking responsibility for managing the investments within the accounts and Credit Suisse did not wish him to do so; the objective of the relationship and the structure set up with Credit Suisse Trust and the investment companies was that Credit Suisse should manage the investments which were legally owned by its trust and subsidiaries. Mr Ivanishvili states that it would have made no sense for him to be the active investment manager actually making day-to-day decisions as to how the vast amounts being given to Credit Suisse to look after should be invested given: (i) Mr Ivanishvili did not have the requisite time, skills or experience to do so; (ii) he was paying the Bank substantial sums of money to provide investment management services; and (iii) Meadowsweet and Soothsayer had entered into discretionary portfolio management agreements with the Bank. Mr

Ivanishvili asserts that if he intended to direct the investments, this would have been unnecessary.

(4) Interaction with the Bank

32. It is the evidence of Mr Ivanishvili that after the Mandalay Trust was established, he gave instructions with respect to the Russian stocks, whilst the Bank managed the other investments. In the first year after the trust was settled, Mr Ivanishvili was in regular contact with the Bank, but from around 2007 this reduced as Mr Ivanishvili became familiar with the Bank and his trust of the Bank grew. His contact with the Bank was normally through his relationship manager, Mr Lescaudron, who was, according to Mr Ivanishvili, "*the outward face of Credit Suisse*".

33. From around 2008, Mr Ivanishvili began having annual or bi-annual meetings with the Bank in Georgia. These were attended by various Bank and CS Trust employees, including Mr Lescaudron's superiors. The discussions at these meetings tended to be high-level – the Bank would present the performance of Mr Ivanishvili's investments and make proposals for the upcoming year. The value of all Mr Ivanishvili's investments would be presented together, giving one total value. The reports suggested the investments were performing well.

34. At these meetings, the Bank would suggest investment proposals (e.g., a particular structure) and provide the documentation that Mr Ivanishvili needed to sign to take these ideas forwards. In his first witness statement Mr Ivanishvili states that the Bank knew that he could not read the detail of these documents (his English, he contends, is not good enough) and that he was not obtaining independent legal advice on the proposed transactions. Mr Ivanishvili states that he trusted the Bank and signed the documents, as he was being told this was necessary to put the Bank's investment advice into practice. The Bank would occasionally email Mr Ivanishvili documents (through his assistants) for him to sign after the meetings. As he trusted the Bank, Mr Ivanishvili states that he

would sign these too, in the belief the Bank was making good faith proposals in his best interests.

35. Mr Ivanishvili gave evidence that he had been told by his former business partner that it was normal to reward relationship managers for good performance. Since it appeared the investments were performing extremely well, Mr Ivanishvili therefore made a number of '*bonus*' payments to Mr Lescaudron during this period. These were made before the election in October 2012. He stopped after being told by his new assistant, Mr Bachiashvili, that there was no need to pay bonuses, given relationship managers were already well remunerated.

(5) Mr Ivanishvili's political life

36. In 2011, Mr Ivanishvili states that he decided to form a political party and to stand for the position of Prime Minister in the following year's elections in Georgia. Achieving this goal, according to Mr Ivanishvili, was going to require all of his time and attention. Accordingly, in late 2011 or early 2012, Mr Ivanishvili informed the Bank during one of the meetings that took place in Tbilisi that he would "*no longer have time to provide any input into investment decisions*". This is reflected in an email exchange between Mr Lescaudron and Mr Ivanishvili's then-assistant, Mr Khukhunashvili in August 2011, in which Mr Khukhunashvili wrote:

> "*[Mr Ivanishvili] asked me to apply for your expertise and discuss opportunities for managing his Geneva assets that he used to manage himself. Reason is that at present he does not have enough time to dedicate to the portfolio so he would rather let a professional hedge fund do the job. It could be either someone in CS or an outsider, but the managed portfolio should not leave the bank.*"

37. Mr Ivanishvili founded the Georgian Dream Democratic Georgia Party ("**Georgian Dream**") in April 2012. In the 2012 elections, Georgian Dream defeated the governing party and formed a coalition government, leading five other parties. On 25 October 2012,

Mr Ivanishvili was elected as the Prime Minister of Georgia. Mr Ivanishvili states that he stepped down one year later, as he had promised he would do, in order to allow Georgian Dream to continue its programme of reforms in Georgia.

(6) The Life Policies

The Meadowsweet Policy

38. According to the evidence of Mr Ivanishvili, Credit Suisse first proposed the investment by Meadowsweet in a life policy at the annual meeting that took place in Tbilisi in March 2011. On the Credit Suisse side, this meeting was attended by Mr Lescaudron, Ms Josephine Novoa Sampaoli (a CS Trust employee) and Mr Felipe Godard, Mr Lescaudron's direct superior at the time and head of private banking for Russia.

39. CS Life has not discovered any client notes from this meeting. Given the passage of time, Mr Ivanishvili states that he cannot recall the precise detail of what was discussed at this meeting. His understanding from Credit Suisse, however, was that all the structures proposed by Credit Suisse were designed to achieve his objectives, i.e., "*to preserve and protect the wealth that I had built up for my family and to ensure they were looked after in the future should anything happen to me*".

40. Mr Ivanishvili states that he did not focus on which Credit Suisse entity was proposing the investment in the life policy. He states that he does not believe that anyone at the meetings was introduced as being from CS Life. He was led to believe that Mr Lescaudron (and his colleagues) acted on behalf of the relevant Credit Suisse entities that they were discussing and with whom Mr Ivanishvili would be investing. Mr Ivanishvili states that he was not introduced to any of the other Credit Suisse entities, instead it was Mr Lescaudron and his superiors who presented the investments, asked him to sign documents and reported on their progress.

41. Mr Ivanishvili accepted Credit Suisse's recommendation to invest in a life policy because a few weeks after the March meeting on 2 April 2011 he signed a letter of wishes addressed to the Mandalay Trust requesting that Meadowsweet (through a company called "**Manex Limited**") sign an application for an LPI policy with CS Life (the "**Meadowsweet Letter of Wishes**"). The policyholder was to be Meadowsweet and the life policy was to be insured against Mr Ivanishvili's life. Upon Mr Ivanishvili's death, the assets would be remitted to Meadowsweet and distributed according to the Mandalay Trust Letter of Wishes.

42. According to Mr Ivanishvili the Meadowsweet Letter of Wishes would have been drafted by Credit Suisse and presented to Mr Ivanishvili for signature. He states that he would not readily have understood the letter as it was written in English, and he was not provided with a Georgian translation; he would have signed it because Credit Suisse asked him to. The Bank emailed CS Life a few days after the letter of wishes was signed, saying "*We closed the deal …*".

43. The Meadowsweet Letter of Wishes states that Mr Ivanishvili "*would like to be appointed as investment manager*" and to have access to "*all the investment products to which [Meadowsweet] has access*". The letter then sets out a list of investment products that Meadowsweet "*has access to for the time being*". Mr Ivanishvili states that this list will have been devised and drafted by Credit Suisse. CS Life contends that the Meadowsweet Letter of Wishes indicates that Mr Ivanishvili was supposed to be "*responsible for choosing the investments*" that were to be made under the Meadowsweet life policy. This is disputed by Mr Ivanishvili and he explains in his first witness statement that he does not recall any discussion of being appointed investment manager, but he observes that: "*Certainly, by the time the Policy was issued in November 2011, the last thing I would have wanted was to be appointed as an investment manager since I was preparing to launch an opposition party to challenge the Georgian government in the 2012 elections.*"

44. The Meadowsweet Letter of Wishes records that the initial fee for the LPI policy was USD 25,000 with a flat annual fee of USD 100,000 per annum. Partial surrenders would be possible "*at any time*" with 100 free partial surrenders per year. It appears to be common ground that this shows how the LPI policy structure was simply a structure for part of Credit Suisse's clients' investment. Mr Ivanishvili was not committing investments on terms that there would be no payment by CS Life until his death, but rather was enabled by the ability to make partial surrenders to obtain payments of part of the "*premium*" from CS Life, i.e. a return of part of his investment; just as he was also able to add to the investment.

45. The Meadowsweet Policy was issued on 7 November 2011, with a commencement date of 25 October 2011. The Meadowsweet application documentation was prepared and presented to Mr Ivanishvili for signature. It consists of a suite of documents dealing with various aspects of the LPI policy. Mr Ivanishvili explains that he would not have read or understood the documents at the time. He states that he signed them because Credit Suisse had recommended the structure to him and he trusted Credit Suisse to act in his best interests.

46. Mr Ivanishvili confirms that assets from Meadowsweet's accounts at the Bank were transferred to the Meadowsweet Policy Accounts beginning in September 2011. CS Life thus assumed legal ownership of the Meadowsweet assets. It avers that it subsequently "*entrusted the custody and investment of the [Meadowsweet] Assets to the Bank*".

47. The Plaintiffs contend that this new structure changed the contractual arrangements with the Bank in relation to the assets invested through this structure. Whereas previously the Mandalay Trust (of which Mr Ivanishvili was the principal beneficiary) had a direct contractual route to the Bank through Meadowsweet in relation to monies invested with the Bank, under the new life policy arrangement, the direct relationship stopped with CS Life. Legal ownership of the assets invested was transferred to CS Life (the premium) and CS Life in turn had the direct contractual arrangement with the Bank, as it was the Bank's customer and had entered into the various contractual arrangements with the

Bank. Mr Ivanishvili states that although the overarching structure was different, on a day-to-day level nothing changed. Before the Meadowsweet Policy was taken out, the Bank managed the Meadowsweet assets, and this continued after the policy incepted.

The Sandcay Policy

48. Mr Ivanishvili states that in around 2011, he decided to sell his Russian business interests and spoke to Mr Lescaudron about transferring the proceeds to Credit Suisse. Credit Suisse proposed that he establish a second trust and that the trust invest in a second life policy.

49. In or around May 2012, Mr Lescaudron visited Mr Ivanishvili in Tbilisi and was informed that Mr Ivanishvili had sold his Russian business and that he was expecting to transfer c. USD 1.1 billion to Meadowsweet's account.

50. It appears that the decision to invest (at least some of) these funds in another LPI Policy was made at the annual meeting in Tbilisi around 27-28 June 2012, which was attended by Mr Lescaudron and his superior, Mr Vitse. On 19 June 2012, Mr Lescaudron emailed Mr Garibashvili (one of Mr Ivanishvili's assistants) explaining that he had "*asked [Mr Ivanishvili] to come to Tbilisi next week to submit to him the investment proposal.*"

51. In the evidence produced to the Court there is a presentation dated 25 June 2012, which Mr Ivanishvili assumes he was shown at the June 2012 meeting – it records the advantages of the new structure as being, *inter alia*, "*Asset protection / estate planning / flexibility*". Mr Ivanishvili explains in his witness statement that: "*I would have understood that the proposed trust structure and investment in a second life policy were designed to meet my objectives — to keep my wealth safe and to provide for my family*."

52. A few weeks later on 11 July 2012, Sandcay was incorporated in the Bahamas. Mr Ivanishvili went on to establish a second trust (the "**Green Vals Trust**") through Credit Suisse, this time in Canada. The trust acceptance documentation records, "*the Trust is*

set up for inheritance planning". The investment vehicle for the Green Vals Trust is Sandcay. The Green Vals Declaration of Trust was executed on 10 August 2012.

53. A few days prior, on 6 August 2012, Mr Ivanishvili signed four letters of wishes:

    (1) A letter requesting that Sandcay *qua* vehicle of the Green Vals Trust, sign the application for an LPI policy with CS Life (the Sandcay Letter of Wishes). This is in substantially the same terms as the Meadowsweet Letter of Wishes. The policyholder was to be Sandcay and the life policy insured against Mr Ivanishvili's life. Upon his death, the assets would be remitted to Sandcay and distributed according to the Sandcay Trust Letter of Wishes. As with the Meadowsweet Letter of Wishes, the letter states that Mr Ivanishvili wished to be "*appointed as investment manager*" and that he would like access to a list of "*investment products*". The proposed fees are similar to the fees applicable to the Meadowsweet Policy: USD 25,000 initial fee; an annual fee of USD 100,000 and 80 (rather than 100) free partial surrenders per annum.

    (2) A letter to the Green Vals Trust naming his wife and children as the beneficiaries of the trust and requesting that, on his death, the fund be split equally between them.

    (3) Another letter to the Green Vals Trust reserving the right to choose the investment manager "*who shall be responsible for making decisions as to the assets of the trust*" and expressing his wish to be appointed as the "*initial investment manager to the trust*".

    (4) Finally, a letter asking the Green Vals Trust to provide his advisor, Mr Garibashvili, with "*any information and/or documents related to the Trust*" and expressing the wish that the trust may communicate with him through Mr Garibashvili.

54. Mr Ivanishvili does not recall signing these letters, but states that they would have been drafted by Credit Suisse and presented to him for signature. It is the evidence of Mr

Ivanishvili that whilst the letters state that they were signed in Geneva, this is not accurate, since (so far as he can recall) Mr Ivanishvili signed all documents in Georgia and does not recall travelling to Geneva in that period.

55. Mr Ivanishvili contends that although there is a letter stating that Mr Ivanishvili wished to be appointed investment manager for the assets held in the Green Vals Trust, he certainly did not want to have primary responsibility for the day-to-day management of assets held in the trust through the proposed LPI policy. That would have made no sense for the reasons discussed in relation to the Meadowsweet Policy. The Meadowsweet Policy had been operating for a number of months and Mr Ivanishvili states that he was not in fact managing the assets under that Policy – there would be no reason for him to have agreed to a different approach for the Sandcay Policy. Mr Ivanishvili states that, by this point, he had founded Georgian Dream and was busy fighting elections in Georgia. It was therefore critical that his investment portfolio "*required the absolute minimum input from* [Mr Ivanishvili]".

56. In around October or November 2012, Mr Bachiashvili took over the role of Mr Ivanishvili's intermediary with Credit Suisse from Mr Garibashvili. This was, according to Mr Bachiashvili, an unpaid relatively informal role. At that time, Mr Bachiashvili was the deputy CEO of the Georgian Partnership Fund, an important, full-time role effectively running a significant private equity firm. He explains:

> "[Mr Ivanishvili] *wanted me to act as an intermediary with his bankers, meaning to liaise with them, to check the performance of the accounts, to relay information and to arrange any meetings. Mr Ivanishvili did not have a family office, so he needed someone to take on this responsibility given the requirements on his time that his businesses and political engagements demanded*."

57. According to Mr Bachiashvili the intermediary role was extremely limited. He was not expected to second-guess Credit Suisse's investment decisions, let alone make any

investment decisions or otherwise manage the investments (which he did not have the time, skills or resources to do).

58. A few months later on 7 December 2012, the life policy for Sandcay ("**the Sandcay Policy**") was issued. It largely mirrors the terms of the Meadowsweet Policy, although the 'Single premium' payment was USD 275,075,927 and the 'commencement date' was 27 November 2012. The Sandcay Policy suite of application documents were again prepared and presented to Mr Ivanishvili for signature. They are similar to the Meadowsweet documents. There is again a dispute about whether Mr Ivanishvili agreed that the Bank would manage the assets on a discretionary or non-discretionary basis. The Plaintiffs' case is that Mr Ivanishvili was sold the Sandcay Policy on the basis that the Bank would manage the assets, which is what he agreed with Mr Lescaudron acting on behalf of CS Life, and which is what happened in practice.

59. On 10 December 2012, CS Life and the Bank executed a discretionary mandate premium covering the CS Life Sandcay equities account (CIF 0251-1461005-75- 3). Pursuant to this agreement, the Bank agreed to manage this part of the portfolio on a fully discretionary basis. Sandcay subsequently signed a discretionary mandate agreement on 14 January 2013. CS Life is the Bank's contractual counterparty with respect to this agreement.

(7) The Contractual Framework

60. It is common ground that the contracts between Meadowsweet and CS Life and Sandcay and CS Life are made up of:

(a) The Meadowsweet and Sandcay Policies.

(b) CS Life's General Policy Conditions 2011 (the 2011 GPCs) and 2012 (the 2012 GPCs) (collectively, the GPCs).

(c) The Meadowsweet and Sandcay LPI application documents.

61. Separate contracts are referred to as the 'Sandcay Policy' and the 'Meadowsweet Policy' and the two policies are referred to collectively as 'the Policies'.

The Meadowsweet Policy

(a) The terms of the Meadowsweet Policy

62. The Meadowsweet Policy records that (i) the 'Policyholder' is Meadowsweet Assets Limited; (ii) the 'Insured person' is Mr Ivanishvili; (iii) the 'Single premium' payment is USD 480,267,313; (iv) the 'commencement date' is 25 October 2011; and (v) the 'applicable conditions' are the general policy conditions version 01.2011 ("**the 2011 GPCs**").

(b) The 2011 GPCs

63. The 2011 GPCs introduction explains that CS Life is a Bermuda insurance company operating as a segregated accounts company:

> "*Credit Suisse Life, is a Bermuda incorporated company, licensed as an insurance company and registered as a segregated accounts company under the Segregated Accounts Companies Act 2000 (the "**SAC Act**") of Bermuda.*
>
> *For the purposes of the SAC Act, these General Policy Conditions serve as the governing instrument of the segregated account and the policyholder shall be an account owner as defined in and pursuant to the SAC Act*."

64. Clause 1 (the 'definitions' section) provides:

> "***The internal fund***

Consists of the integrated assets invested separately from the other assets of Credit Suisse Life, in accordance with the investment alternative chosen by the policyholder and is linked to the segregated account in respect of the Policy…

The investment alternative

The policyholder chooses an investment alternative to match his/her investment goals and risk tolerance. For discretionary mandates, the portfolio is managed according to the current investment policy of the custodian bank and in line with the guidelines relating to discretionary mandates issued by the Swiss Bankers Association.

The insurance premium

Compensation to Credit Suisse Life for assuming the insurance coverage and acquiring the investments…".

65. Clause 6 provides:

"***Use of the premium***

The invested capital consists of the premium after deduction of any up-front insurance fees or deductions. The net single premium and the net additional premium (if any) are invested in the internal fund in accordance with the investment alternative indicated in the application form and as set out in the Policy and any Policy addendum."

66. Clause 7 provides:

"***The investment alternative and content of the internal fund***

The policyholder may choose an investment alternative with or without discretionary mandates. The investment alternative without discretionary mandate may comprise of investment funds, structured investments, direct investments and fiduciary deposits.
The investment alternative without discretionary mandate may not however comprise of any of the following investments:

- *Promissory Notes & Bills of Exchange*
- *Real Estate*
- *Precious Metals (physical)*
- *Investments without market value*"

67. Clause 18 provides:

"***a) Segregated Account***

A separate and distinct account (comprising of and including entries recording data, assets, rights, contributions, liabilities and obligations linked to such account) of Credit Suisse Life pertaining to an identified or identifiable pool of assets and liabilities of Credit Suisse Life which are separated, segregated or distinguished from other assets and liabilities of Credit Suisse Life for the purposes of the SAC Act. The SAC Act requires that assets linked to a segregated account must be held by Credit Suisse Life as a separate fund, which does not comprise of assets of its ordinary account (or referred to as its 'general account'). The fund, in this case the internal fund, is to be held for the benefit of the policyholder as the account owner and is available to meet the claims of the policyholder and the creditors of the segregated account. The fund is not available to meet the obligations of Credit Suisse Life to its shareholders or those creditors whose claims are not linked to the segregated account."

68. Clause 20 provides Bermuda law as the governing law and Bermuda as the exclusive jurisdiction for the resolution of disputes.

(c) The Meadowsweet Application documents

69. The Meadowsweet Application provides, insofar as material:

> "*The single premium will be invested in an internal fund as stated below (which is invested separately to the insurance company's other assets)…*
>
> *The competent supervisory authority is the Bermuda Monetary Authority in Bermuda.*
>
> ***General Description of the Internal Fund & Asset Management***
>
> ***The Internal Fund***
>
> *The internal fund is invested separately from the insurance company's other assets and managed according to the investment alternative chosen in the application. The internal fund is managed by [the Bank].*
>
> ***Asset Management with or without Discretionary Mandates***
>
> *Credit Suisse Life will invest the insurance premium according to the investment alternative agreed with the policyholder…*
>
> ***Costs***
> *The costs for the asset management services provided by [the Bank] … will be debited directly to the internal fund…*".

70. The Meadowsweet Application attaches two Swiss law governed powers of attorney:

(1) A limited power of attorney, pursuant to which the principal (CS Life) appoints Meadowsweet as its attorney "*in his relations with [the Bank] for the above mentioned relation…insofar as any transactions of an administrative nature is concerned in connection with the above-mentioned CIF and securities and valuables deposited with the Bank in his name, especially with regard to the purchase and sale of securities, investments and reinvestments of funds*" etc.

The limited power of attorney "*does not include the right to withdraw, pledge or transfer all or part of the funds*…" and states, "*[t]he obligations of the Bank are discharged insofar as it executes an instruction from an Attorney, which is within the scope of the authority agreed to under this power of attorney*" and that "[*t]he Bank bears no responsibility for the investment decisions of the Attorney."*

(2) A sub-delegation of the limited power of attorney pursuant to which the principal (i.e., Meadowsweet) appoints Mr Ivanishvili his attorney "*in his relations with [the Bank] for the above-mentioned relation…insofar as any transactions of an administrative nature is concerned in connection with the above-mentioned CIF and securities*… [etc]". The sub-delegation is also governed by Swiss law and contains the same wording with respect to the Bank's obligations as the limited power of attorney (at [1] above).

71. The following documents / information sheets are attached to the Meadowsweet Application:

(1) A document empowering CS Life to "*to enter into contact with [the Bank] in connection with the insurance policy*" signed by Meadowsweet.

(2) A custody agreement instructing CS Life to keep the insurance policy in its custody signed by Meadowsweet.

(3) A declaration of the beneficial owner's identity.

(4) A relationship manager profile, listing Mr Lescaudron as the relationship manager.

(d) The CS Life/Bank Investment Agreements

72. A series of contracts/documents empowering the Bank to carry out certain transactions are also attached to the Meadowsweet Application ("**CS Life-Bank Investment Agreements**"). These agreements deal with various matters relating to the investment of the insurance premium after it had been paid to CS Life, transferred into the internal fund and managed by the Bank.

73. Unlike the Policies, each of these agreements is governed by Swiss law and is entered into between CS Life and the Bank. Certain of these agreements are also signed on behalf of Meadowsweet *qua* Policyholder, but not as a contracting party. The agreements are as follows:

(1) A securities lending contract between CS Life (termed the 'client') and the Bank, entitling CS Life to lend securities "*to the Bank as borrower against payment of a commission by the Bank*". Dr. Weibel explains that title to the securities is transferred to the Bank, meaning that CS Life gives up its ownership interest in the securities and replaces it with a right to request the return of the securities or to bring a damages claim. Clause 13 provides, "*If the Bank does not meet its obligations to return the loaned securities or does not meet them on time, [CS Life] is entitled only to damages for non-performance*".

(2) An application for a framework credit limit pursuant to which CS Life requested the Bank to provide a credit limit, which the Bank granted "*according to its customary lending guidelines*".

(3) A general deed of pledge by which CS Life pledged the Meadowsweet Policy Assets to the Bank to "*cover any and all claims of the Bank against* [CS Life]".

(4) An agreement between CS Life and the Bank relating to the execution of orders for Non-Traditional Investment Products "*and the safekeeping of such products on behalf of and for the account of* [CS Life]".

(5) The "*Conditions for Handling Options Contracts*" which apply "*to the execution of options contracts in the name of [the Bank] but on behalf of, and for the account of the Customer*". Customer is undefined but from context is evidently CS Life.

(6) The "*Conditions for Handling Financial Futures Contracts*" which likewise "*apply to the execution of financial futures contracts in the name of [the Bank] but on behalf at, and for the account of the Customer*" (i.e., CS Life).

The Sandcay Policy

74. The terms of the Sandcay Policy are similar to the Meadowsweet Policy. The key features of the Sandcay Policy are summarised below.

(a) The terms of the Sandcay Policy

75. The Sandcay Policy records that (i) the policyholder is Sandcay; (ii) the 'Insured person' is Mr Ivanishvili; (iii) the 'Single premium' payment is USD 275,075,927; (iv) the 'commencement date' is 27 November 2012; and (v) the 'applicable conditions' are the general policy conditions version 01.2012 (**the 2012 GPCs**).

(b) The 2012 GPCs

76. The 2012 GPCs are materially the same as the 2011 GPCs.

(c) The Sandcay Application

77. The Sandcay Application states the policy is being taken out for the purpose of "*succession planning*". The Application terms are broadly similar to those contained in the Meadowsweet Application (*mutatis mutandis*) and are therefore not repeated here.

78. The Sandcay Application again contains a limited power of attorney in favour of Sandcay and a sub-delegation of the limited power of attorney in favour of Mr Ivanishvili (collectively, "**the Sandcay LPoAs**").

79. The Sandcay Application contains a similar suite of documents and contracts to the Meadowsweet Application (see: [69] to [71] above).

(8) Operation of the Policies

80. According to Mr Bachiashvili, the Policies appeared to be operating as intended. The Bank continued to manage the investments (as it had done previously) and appeared to be doing so successfully. Mr Bachiashvili contends that it is clear from the contemporaneous documents that the Bank was managing Mr Ivanishvili's portfolio, including the Policy Assets. For instance, on 30 January 2013, Mr Lescaudron emailed Mr Bachiashvili to say:

> "*Regarding the 'old mandate' [i.e. the assets the Bank was managing before the funds from the sale of the Russian assets were transferred to Credit Suisse], we have to define a way to work together.* ***So far we have been extremely free to manage these assets*** *and it will be good to have a dialogue to see what you want to do, if you want to change anything, if you want to be more involved, etc… We will prepare the infos and different proposals on that topic*." (emphasis added)

81. Mr Bachiashvili responded "*we are not planning to change the level of our involvement*".

82. In August 2013, Ms Hirst (of the Bank) asked Mr Bachiashvili "*to arrange client signature*" on what were termed the "*additional documents*". These turned out to be OTC

(Over the Counter) derivative trade confirmations for certain transactions on the Sandcay Policy Accounts. Following several chasers, Mr Bachiashvili asked for "*a very short description of what are these docs for, as the client has never signed any currency option docs before*." Ms Hirst promised to "*get clear answers*" as apparently, she was also unsure why they were required. Given the apparent importance of the documents, Mr Bachiashvili sent across signed versions before any explanation was provided but made clear that "*we still need the clarification*". Ms Hirst promised to "*provide ... an explanation as soon as possible*", but Mr Bachiashvili does not recall whether an explanation was ever provided.

83. Mr Bachiashvili explains that, following the exchange with Ms Hirst, he started signing the OTC confirmations when requested to by Credit Suisse. Since these were sent across after Credit Suisse had made the trades, Mr Bachiashvili understood the documents to be mere formalities. He did not understand that he was being asked to approve particular investment decisions made by the Bank (which he did not have the knowledge, tools or authority to do).

84. Mr Bachiashvili states that in September 2013 Credit Suisse reported that the value of Mr Ivanishvili's portfolio (i.e., all his investments with the Bank) had increased significantly such that it now exceeded USD 1 billion. He says that Credit Suisse appeared to be managing Mr Ivanishvili's portfolio successfully, and so Mr Ivanishvili transferred further funds to Credit Suisse from late 2013 to early 2015.

85. According to Mr Bachiashvili, in broad terms, Mr Lescaudron on behalf of the Bank and CS Life (so far as concerned the Policy Accounts), would report the balance of the various accounts to Mr Bachiashvili who would relay the headline figures to Mr Ivanishvili when they met. On occasion, Mr Lescaudron would mention how specific investments were doing or (unusually) raise the possibility of a particularly interesting investment opportunity. Mr Bachiashvili would mention this to Mr Ivanishvili, if the opportunity arose and if it seemed sufficiently important. On rare occasions, Mr Lescaudron would propose and ask Mr Bachiashvili to obtain Mr Ivanishvili's approval

of a particular investment (for instance Mr Lescaudron raised the possibility of an investment in the tech company 'Spotify', although this did not materialise). This was, however, according to Mr Bachiashvili, unusual.

86. Mr Bachiashvili states that as the Bank was managing the portfolio, the only information that Mr Ivanishvili needed, or wanted, on a regular basis was updates as to the overall performance of the assets. To this end, from February 2013, Mr Lescaudron began sending Mr Bachiashvili regular reports summarising the value of the Policy Accounts broken down into sub-accounts, as well as the total inflows and outflows ("**the Direct Reports**"). Mr Ivanishvili did not see these reports at the time; instead, he would ask Mr Bachiashvili for updates as to the performance of his investments and Mr Bachiashvili would update him. Mr Ivanishvili was chiefly concerned with the overall headline profit and loss figures.

87. Mr Ivanishvili maintains that the Direct Reports were the principal source of information that was provided to him (through Mr Bachiashvili) about the performance of his accounts. He says that neither CS Life nor the Bank, as a rule, sent Messrs Ivanishvili or Bachiashvili other reports detailing the performance of his portfolio, although Mr Ivanishvili would receive updates in person at the annual meetings in Tbilisi. After Mr Lescaudron's fraud was uncovered, the Bank said that the Direct Reports "*[do] not qualify as official Credit Suisse AG account statements*" and that "*the official and binding Credit Suisse AG account statements have continuously been delivered into 'Retained Mail' with Credit Suisse AG and Credit Suisse Trust*." Mr Ivanishvili states that it had never previously been suggested that he should have accessed documents through 'retained mail'. He contends that the Bank and CS Life must also have known that neither Mr Ivanishvili nor Mr Bachiashvili had been provided with access information for 'retained mail' or had in fact accessed retained mail.

88. Mr Bachiashvili states that on occasion he would ask Mr Lescaudron to clarify certain points arising out of the Direct Reports. When he did so, Mr Lescaudron would respond

with an explanation and sometimes provide a corrected report. Mr Bachiashvili accepted these explanations and thought nothing further of it.

89. Mr Ivanishvili's portfolio seemed to be performing strongly throughout 2013 and 2014. In September 2013 Mr Lescaudron sent a direct report setting out a "*snapshot of the profitability as of today. Results are impressive: We added USD 120 m profit to the client's portfolio…as a conclusion we could extrapolate that the profit YTD is around USD 156m and the total assets currently managed is USD 1.010 billion*". Mr Lescaudron suggested meeting Mr Ivanishvili in November in Tbilisi along with Mr Andreas John, "*head of our Market Group", to "show results…answer questions*" etc. On 22 October 2013 Mr Lescaudron again reported "*huge profits*" as a "*result of the trading*" and indicated again that he and Mr John would soon meet Mr Ivanishvili. He promised to provide "*an analysis of the 2013 profit*".

90. The positive news continued into 2014. On 21 January 2014 Mr Lescaudron wrote to say "*[w]e had already in January some good news for the portfolio*" and that he wanted to "*share*" them with Mr Bachiashvili. Mr Lescaudron then summarises "*some of*" the various investments.

91. On 7 March 2014, Mr Lescaudron reported that "*[t]otal performance ytd is USD 88 m, which is really a strong figure*". He explained that this was because of an "*extraordinary profit on the share of KAZAKHMYS*". Mr Lescaudron said that he "*built up a position on the stock that appeared interesting*", that he had pursued "*in parallel an interesting zero-cost option strategy on Kazakhmys, with sale of PUTs and buy of CALLs*" and that "*we sold 70% of the position and therefore locked more than 2/3 of the profit*". The Plaintiffs contend that this email is only explicable if the Bank was managing the investments.

92. In June 2014, Mr Lescaudron reported that "*[p]erformance remains very good, USD 93 m profit in 5 months, almost 10%*". In August he reported that "*we bought some Ukrainian bonds months ago…and we sold them*" and that "*we do not expect to invest in Russian securities in the near future (unless Mr BI would have an opposite view on it).*

We consider that there is still downside risks…". In September 2014, Mr Lescaudron reported "*cumulated profit is USD 95,2m which is approximately 9.9% return*". A further direct report was then provided on 10 November 2014. Again the Plaintiffs contend that these statements also only make sense if the Bank was making the investment decisions.

93. In November 2014 Mr Lescaudron emailed Mr Bachiashvili suggesting the LPI Policies would have to be wound up. He said that "*we [i.e. Credit Suisse] created for BI 2 structures named 'LPIs, Life Portfolio International', each of them in each of the 2 Trusts*" and that these had been adopted to allow equities trading without having to pay stamp duties.

94. Mr Lescaudron said: "*For regulatory reasons, we have to get rid of these 2 structures and what we propose is to replace them by a fund structure for the Equity part of the portfolio*." Given the passage of time, Mr Bachiashvili cannot recall the detail of these proposals. But it appears that Mr Lescaudron travelled to Tbilisi for a meeting on 14 November 2014. At that meeting Mr Lescaudron proposed setting up replacement Cayman funds, with the setup costs to be paid by Credit Suisse. Before this restructuring plan could come to fruition, however, Mr Lescaudron's fraud was exposed, with the result that the LPI policies remained at CS Life.

95. Mr Ivanishvili states that separately, in early 2015 he considered restructuring his Credit Suisse portfolio so that parts of it would be put into his children's and wife's names. He therefore asked Credit Suisse to propose a new structure for this purpose. In April 2015, Mr Lescaudron came to Tbilisi to meet Mr Ivanishvili to discuss potential options. In advance of that meeting, on 17 April 2015, Mr Lescaudron emailed Mr Bachiashvili ("*result for the month of April is already +2%*"), attaching a further direct report showing the total value of the assets in Mr Ivanishvili's Credit Suisse accounts as over c. USD 1 billion.

96. At the April 2015 meeting, which was attended by Mr Lescaudron, Mr Jean de Skowronski (then a managing director at the Bank) and Ms Novoa Sampaoli, a

presentation was given entitled "*Preserving and Protecting your Wealth*" (on Credit Suisse notepaper), which likewise recorded that the value of the total assets in Mr Ivanishvili's portfolio was over USD 1 billion. Credit Suisse proposed that Mr Ivanishvili establish individual trusts for each of the family members, which Mr Ivanishvili agreed to.

97. The Plaintiffs contend that it is therefore evident that it was not only Mr Lescaudron who was misrepresenting the value of the Policy Assets, it was also other senior Bank employees. At best, those employees failed to check and confirm that the figures being presented by Mr Lescaudron were accurate. The figures were at no point corrected until after the fraud was uncovered.

98. On 26 June 2015, Mr Lescaudron emailed Mr Bachiashvili out of the blue saying that a portion of Mr Ivanishvili's portfolio had been "*basically managed by me and my team outside the frame of a mandate. We are there in a grey zone and the point is that it is this part that proved the most profitable for BI in the past (we generated USD 91m end of May and so far in June another 13/15m profit in June. 2/3 of the profit ytd comes from my trading activity*" (emphasis in original). He went on to say:

> "*We started the process of writing a tailored-made mandate where I would be the manager and where all the trades we do would be covered, but this process will take a few weeks and if successful will start probably in September or October.*
>
> *In order to cover the gap, we started to send you the daily activity and in the next days I will send you the investment ideas, on which we are supposed to have a discussion and ultimately a sign-off from your side.*
> *The problem for you will be that this process will take you some time (trading activity is high). Basically there are 2 options:*
>
> > *- We push to put in place this tailored-made mandate and you will not be required to review all the trading ideas and daily executions*

- *We start to work on a advisory basis, then you are required to review all the ideas and daily executions, and in that case you should probably dedicate somebody who will have time to have this dialogue with me on a daily basis*".

99. This email shows, the Plaintiffs contend, that regardless of the position recorded in the initial paperwork, Mr Lescaudron and the Bank, rather than Mr Ivanishvili and Mr Bachiashvili, had been managing Mr Ivanishvili's portfolio on a fully discretionary basis.

100. A few days later, Mr Lescaudron emailed Mr Bachiashvili ("*In June so far we added around 10 to 12 m USD to the profit*") and attached another report reporting total assets of over USD 1.1 billion in his Credit Suisse portfolio.

101. It is the evidence of Mr Bachiashvili that Mr Lescaudron travelled to Tbilisi with Mr Babak Dastmaltschi (then head of the group UHNWI Western and Emerging Europe), Mr Cédric Huguenin (Mr Lescaudron's direct supervisor at the time and head of UHNWI Geneva) and Ms Novoa Sampaoli to meet Mr Ivanishvili on 29 or 30 June 2015. Mr Dastmaltschi raised with Mr Bachiashvili the fact Credit Suisse was managing Mr Ivanishvili's assets without a proper mandate, i.e., in a '*grey*' zone. Mr Bachiashvili did not escalate this to Mr Ivanishvili at the time because it was presented as a matter of form only. The Plaintiffs contend that this email shows that Credit Suisse was managing Mr Ivanishvili's investments, as it was supposed to be doing, and the Bank had proposed a way forward.

102. Around this time, Credit Suisse suddenly started sending Mr Bachiashvili reports of trading activity on Mr Ivanishvili's accounts on a nearly daily basis ("**the Daily Trading Reports**"). Mr Bachiashvili did not pay a great deal of attention to these reports; he was not being asked to sign off on any transactions and was not in a position to analyse the merits of the various trades. In their witness statements the Plaintiffs explained their suspicion that this was little more than an attempt to shift responsibility (at least optically) for managing Mr Ivanishvili's portfolio away from Credit Suisse, which, by

this time, had discovered (or at least suspected) that something had gone badly wrong with Mr Lescaudron's management of the portfolio.

103. The Plaintiffs complain that despite the Bank having started to suspect all was not well with Mr Lescaudron's management, trading on the Policy Accounts continued apace in the summer of 2015; in August 2015 there were sales of USD 138 million on the Sandcay Policy Account alone.

(9) Uncovering of Mr Lescaudron's fraud

104. According to Mr Bachiashvili, he received a call on 15 September 2015 from Messrs Dastmaltschi and Huguenin, who informed him that there had been a margin call of USD 4 million on one of Mr Ivanishvili's accounts (the Wellminstone account, which is outside the Policies) due to a sudden drop in the Raptor share price and that there were going to be more margin calls on his other accounts. They informed Mr Bachiashvili that Mr Ivanishvili held roughly 14.2 million Raptor shares across his portfolio, which constituted c.18% of the company. This came as a complete surprise to Mr Bachiashvili: "*I was surprised that it was even possible for Mr Ivanishvili to own nearly 20% of a company that he had no involvement in, and even more surprised that Credit Suisse had considered it appropriate for Mr Ivanishvili's accounts to have this level of exposure to a single company*".

105. Mr Bachiashvili relayed this to Mr Ivanishvili, who was similarly troubled by the news. He took the view that the Bank should provide a proper explanation about how this situation had arisen. Mr Bachiashvili informed the Bank of this on 15 September 2015. It is evident from Mr Ivanishvili's response that he considered the "*CS management team*" to have been responsible for managing the portfolio:

> "*I had a 20 minute call with the UBO [ultimate beneficial owner] and gave him the information as provided above.*

His reaction was very negative. Let me list you the main points he raised:

1. It was the first time he found out of the size of the total exposure to the company (170Mn USD before the fall). (Frankly I was also very surprised by this)

2. He doesn't remember giving approval to this size of exposure on any of the shares. He also doesn't recall any document/order of that magnitude (although he recalls that this company has been mentioned and he had agreed to some exposure)?

3. Even if he had approved such a purchase 7 years back, he does not understand why has the position been kept for this long and why were there additional purchases since then? According to the new mandate which was signed in the 2012/2013 he was not supposed to actively manage any part of the portfolio therefore CS investment team was responsible for managing (disposing or otherwise) any shares which were bought before (with or without direct order of the BO)?

4. How would CS risk department let you hold for 6-7 years a single stock representing 50% of all clients equity investments? This is not normal? Moreover if we calculate what share it represents in the US Equities part of the portfolio this would be a scary number. (Please correct me if I am wrong)

5. What was the information you had about the company and what control did you have over it (while holding 18%). The BO doesn't understand how could one have 18% in the company without any control of the company?

6. And why were there any purchases made in the recent months? Who decided to even further increase the exposure?

Dear Cedric and team, it is very unpleasant for me to have such a conversation, however in our opinion there has been a serious failure on several levels. I hope you will be able to address this issue in great detail and provide explanations. BO is thinking of launching a serious investigation of this matter.

Until he has more explanations he refused to talk about the margin call part of the conversation (and given the relation we have I kindly suggest to wait until there is a concrete remedy and action plan).”

106. Mr Bachiashvili states that Mr Barrial’s (Team Leader Client Management UHNWI Geneva) response on 24 September 2015 raised further questions. Amongst other things, he said that “*Raptor is on the list of restricted stocks of Credit Suisse*” and that “*Credit Suisse research does not cover this stock as it is restricted*.” Mr Barrial promised that they were “*working hard to have a better understanding of your current positions and will remain in close contact with you to solve all pending issues*.”

107. Mr Bachiashvili immediately asked what it meant for Raptor to be a ‘*restricted stock’* and was advised that the Raptor stock was restricted due to “*significant client positions in the stock*” with the result “*no research or advice is usually given nor is any advice or solicitation on the shares allowed*”. This suggested to Mr Bachiashvili that something had gone badly wrong with the portfolio since, if the Bank was properly managing the portfolio, it would not have been permissible for the large Raptor positions to have been built up.

108. On 27 September 2015, the Bank sent Mr Bachiashvili the Investment Reports for Mr Ivanishvili’s accounts (including the Policy Accounts). According to Mr Ivanishvili this was the first time these reports had been provided to him. They showed the value of Mr Ivanishvili’s portfolio as at December 2014 was approximately USD 743 million and not, as the Bank had been reporting, over USD 1 billion.

109. On 29 September 2015, Messrs Huguenin and Barrial promised that "*[o]ur team has been actively engaged in a thorough review of your portfolio*" and the Bank "*will keep you fully updated on the progress of this review and the result of our assessment*." On 20 October 2015, the Bank informed Mr Bachiashvili that PwC had been "*mandated to conduct a comprehensive due diligence of your relationship with Credit Suisse AG*" and that "*[o]nce PwC has completed its investigation we will be able to set up a meeting to discuss the results and our proposed way forward*." A few days later, Mr Barrial promised to provide Mr Bachiashvili with documentation in two steps. First, he promised the Bank would provide all requested documents such that Mr Ivanishvili would "*have full transparency on all flows and transactions*". Secondly, he promised to "*share further information resulting from PwC's comprehensive due diligence of your relationship with Credit Suisse AG*." He concluded that "*[b]y following this approach, we provide you with full transparency on what we have readily available on our systems and will share insights from the independent PwC review as they become available*."

110. Mr Ivanishvili notes that regrettably, the Bank went back on those promises and instead of providing "*full transparency*" has sought to make it as difficult as possible for the Plaintiffs to find out what went wrong with the portfolio. As explained in [148] to [152] below, amongst other things, the Bank only provided the PwC Reports (insofar as they apply to the CS Life accounts) to the Plaintiffs (through CS Life) when faced with an unless order that, unless CS Life did so, its defence in these proceedings would be struck out.

111. Mr Huguenin informed Mr Bachiashvili that there had been four further margin calls on Mr Ivanishvili's accounts on 29 September 2015, including margin calls of USD 5.55 million on the Meadowsweet Policy Accounts and USD 26.88 million on the Sandcay Policy Accounts. Further margin calls followed, such that in the end Credit Suisse made margin calls of USD 122,725,000 on Mr Ivanishvili's various trust and corporate accounts, including USD 68,135,000 on the Policy Accounts.

112. After the initial margin calls, the Bank adopted a new policy of informing Mr Bachiashvili that there were investment decisions that needed to be taken and stating that if he did not respond, the Bank would assume that Mr Ivanishvili consented to the transaction. This was unacceptable to Mr Ivanishvili and as Mr Bachiashvili informed the Bank on 1 October 2015:

> "*We were never before consulted on any decision in regards to managing our portfolio, that is why we are not in a position and will not be instructing you to do any particular decision in regards to any transactions that are taking or are to take place in the portfolio. Therefore please when dealing with or deciding on the transactions do not consider our silence (no particular response in regards to the proposed transaction) as acceptance or rejection of your decisions. We still hope that the bank has enough expertize and will to act in our best interests*."

113. Following the first margin call in September 2015, trading was effectively paused on the Policy Accounts.

(10) The Raptor investments

114. The Plaintiffs contend that a substantial portion of the losses on the Policy Accounts were driven by the very large exposure that Mr Lescaudron had, unbeknownst to the Plaintiffs, built up in Raptor on the Policy Accounts. Raptor is a pharmaceutical stock with a focus on the development of new treatments. It is a high-risk investment given its '*boom or bust'* business model. As noted above, it is now known that Raptor was not part of the Bank's product range such that "*no advice should have been given on this security*" and that it was on the Bank's restricted list from August 2013.

115. It does not appear to be disputed that there were extraordinary levels of Raptor purchases on the Policy Accounts. Mr Lescaudron not only built up very large direct positions on Raptor (the direct positions alone accounted for 15.48% for the Sandcay Policy Accounts and 17.02% for the Meadowsweet Policy Accounts, as at August 2015 and December

2014 respectively), but he also invested heavily in funds that were in turn exclusively, or almost exclusively, invested in Raptor. Mr Lescaudron appears to have admitted (before he died) that these disguised Raptor investments were "*not authorised*" by Mr Ivanishvili (see [324] and [325] below). The Plaintiffs contend that they appear to have largely been made in order to generate unlawful commissions for Mr Lescaudron (see [339] to [345] below).

116. It appears that sometime in 2011, Mr Lescaudron had recommended that Mr Ivanishvili invest in Raptor, including outside of the Policy Accounts. Mr Ivanishvili followed his advice and purchased Raptor stock in accounts with Coutts and Cartu Bank in around June 2011. However, it is the evidence of Mr Ivanishvili that after this point he does not recall giving instructions for the purchase or sale of Raptor stock. Mr Ivanishvili states that he did not authorise Mr Lescaudron to build up these large direct and indirect positions on the Policy Accounts. It appears that that the Raptor transactions were almost exclusively documented as telephone orders on the Bank's system, and that there are indications that these telephone orders did not take place at all (see [128] and [325] below).

117. The Plaintiffs contend, in light of the various investigations into Mr Lescaudron's fraud, that a key plank of his fraudulent behaviour was investing in Raptor inappropriately through his clients' accounts. The Plaintiffs also contend that it is also now evident that the Bank was on notice that Mr Lescaudron's trading in Raptor was problematic, but that the Bank took no meaningful steps to investigate what was going on or to prevent Mr Lescaudron's wrongdoing (see [360] to [404] below).

(11) The criminal conviction of Mr Lescaudron

118. On 21 December 2015, Mr Ivanishvili filed a criminal complaint in Geneva against Mr Lescaudron alleging misappropriation, criminal mismanagement, and forgery. A few days later, on 23 December 2015, the Bank filed its own complaint (the "**Bank's Complaint**") similarly alleging that Mr Lescaudron had committed the following

offences: "*abuse of trust… or even fraud … criminal mismanagement of the assets of another … and forgery of instruments … as well as all other offenses revealed by the [Bank's] investigation*." The Bank explained that its Complaint was based on interviews with Mr Lescaudron and an internal investigation carried out by the Bank's lawyers (Homburger):

> "*…the representations obtained from Mr Patrice Lescaudron himself … within the context of three hearings held on 18 September (just before the termination of this employment contract effective immediately), 9 October 2015, and 26 October 2015, as well as on the preliminary results of an investigation conducted by the Homburger firm and its associates over the last several weeks as a result of the revelations disclosed by the Respondent on 18 September 2015. That internal investigation has not been completed as of today, but certain pieces of evidence has already been brought to light*."

119. The Bank's Complaint refers to "*three major clients and/or beneficial owners affected by Mr Lescaudron's wrongdoing*" by the pseudonyms Client 1, Client 2 and Client 3. Mr Ivanishvili is 'Client 1'.

120. Section 2.5 of the Bank's Complaint summarises the "*Facts revealed by the investigation conducted by Homburger*". These include that:

> *"29.…unauthorized transfers were apparently conducted among the various accounts of the clients of the Bank"* and that Mr Ivanishvili's accounts were *"mainly"* involved:
>
> *31. "The transfers among the three clients were conducted in three ways, which can be summarized as follows:*
>
> *i. Transfer of funds deposited in the account of Client 1 to the accounts of Client 2 and Client 3 (via the accounts of investment companies controlled by the clients).*

ii. Trading of securities between the accounts of Client 1 and the accounts of Client 2 and Client 3, at incorrect values (too high or too low) redounding to the benefit of the accounts of Client 2 and Client 3.

iii. Transfer of securities from Client 1's brokerage account to Client 2's brokerage account (without a corresponding payment or wire transfer).

32. According to the Bank's analysis, the unauthorized transfers were primarily conducted to Client 2 and Client 3."

121. It is evident that the Bank had therefore concluded that monies were transferred out of Mr Ivanishvili's accounts and into the accounts of Clients 2 and 3 without authorisation and was sufficiently certain of that on the evidence it had gathered including Mr Lescaudron's own admissions to be able to make a criminal complaint on that basis.

122. The Bank's Complaint exhibited an interview with Mr Lescaudron conducted by the Bank on 18 September 2015. In the interview, Mr Lescaudron explained that Clients 2 and 3 "*expect large profits and do not tolerate losses*" but that Mr Lescaudron's investments had performed badly leading to substantial losses on Clients 2 and 3's portfolios. He explains that in 2009 he had the "*idea*" of taking "*strong positions on Russian shares and bonds bought from [Mr Ivanishvili's] account*". Mr Ivanishvili "*trusted [him] implicitly*" and so he "*took advantage of the situation to buy more securities than he wanted*". When the investments made profits he transferred the profits out of Mr Ivanishvili's accounts to Clients 2 and 3. In order to facilitate the fraud, he explained that he "*copied [Mr Ivanishvili's] signature so as to create false handwritten transfer orders*". He also admitted that he created sub-accounts that were not visible to his clients and used them to trade securities without authorisation.

123. Mr Ivanishvili filed further criminal complaints against Mr Lescaudron and Credit Suisse during 2016 alleging that banking activity had taken place for the purpose of generating exorbitant commissions for Credit Suisse, and that Mr Lescaudron and the Bank had committed aggravated money laundering under Swiss law. Meadowsweet and Sandcay also filed criminal complaints on 23 December 2016.

124. In June 2017, the Public Prosecutor separated the investigations into Mr Lescaudron's conduct and into the Bank's conduct and issued an indictment against Mr Lescaudron charging him with fraud committed for commercial gain, alternatively misappropriation, forgery, and criminal mismanagement. In the context of the prosecution against the Bank, the prosecutor set dates for hearings with Bank employees, including Babak Dastmaltschi and Andreas John, Mr Lescaudron's superiors at the relevant time. The first of these hearings were due to take place in November and December 2021.

125. On 9 February 2018, the Swiss Criminal Court convicted Mr Lescaudron of fraud, criminal mismanagement, aggravated criminal mismanagement and document forgery ("**the Criminal Judgment**"). Mr Lescaudron had co-operated with the investigation and had pleaded guilty to many of the charges. His conviction was upheld on appeal. Mr Lescaudron was interviewed 18 times by the Public Prosecutor and gave evidence at trial. Six Credit Suisse employees were also interviewed. The Criminal Judgment provides further details of *admitted wrongdoing* by Mr Lescaudron on Mr Ivanishvili's accounts:

(1) Between August 2007 and May 2011, Mr Lescaudron misappropriated assets in Mr Ivanishvili's accounts by transferring assets to other clients with the intention of covering up losses suffered by those clients.

(2) Due to the trust structure in place Mr Lescaudron could not easily transfer money from Meadowsweet's accounts to a non-beneficiary. He therefore transferred money from Meadowsweet's accounts to Wellminstone's accounts (i.e., another of Mr Ivanishvili's companies) using false transfer orders and then created false loan agreements between Wellminstone and a third party to transfer funds out of Mr

Ivanishvili's (and his family's) beneficial ownership. Mr Lescaudron transferred money to his other clients from Mr Ivanishvili's accounts by executing '*purchases*' of securities on Mr Ivanishvili's accounts at a price exceeding the market value. Mr Lescaudron used credit lines to finance concealed purchases of securities.

(3) Mr Lescaudron admitted to copying and pasting Mr Ivanishvili's signature on transfer orders and falsifying telephone verification of the authenticity of his signature, as well as to creating false account statements to conceal unauthorised trading and losses on accounts.

(4) Mr Lescaudron established three investment funds, Hyperion, Mensa and Matterhorn, owned by Sequoia, and invested monies from the Policy Accounts in these three funds. These three funds had huge exposure to Raptor: at times Raptor shares represented between 90% to 100% of the investments of these funds.

(5) Mr Lescaudron received substantial commissions as a result of the investments in the Sequoia Funds, along with investments in Centris, Exten, Marketview and Swiss Asia. Mr Lescaudron admitted that he had not informed Mr Ivanishvili about these investments or the resulting commissions.

(6) Forgery for falsifying Mr Ivanishvili's signature on transfer instructions.

126. The Criminal Judgment sentenced Mr Lescaudron to prison for 5 years and also sentenced him to pay the Bank USD 92,484,773, EUR 31,186,105 and GBP 352,460.

(12) The Bank's investigations into the fraud and the PwC Reports

127. It is evident from a letter dated 5 February 2016 written by the Bank's lawyers ("**Walder Wyss**") to the prosecutor in the Swiss Criminal Proceedings ("**the Walder Wyss Letter**") that the Bank carried out extensive internal investigations into Mr Lescaudron's wrongdoing, assisted by two Swiss law firms (Homburger AG and then Walder Wyss

AG), with PwC providing assistance with forensic services and forensic accounting expertise. Certain of the investigation steps are explained in the Walder Wyss Letter at section 2:

> "*In a first step, Credit Suisse's lawyers together with PwC have reviewed the transactions between Bidzina Ivanishvili (including the companies or entities in which he is beneficial owner) on the one hand and [redacted] (and their respective entities) on the other hand. In a second step, Credit Suisse's lawyers together with PwC also reviewed transactions between Bidzina Ivanishvili, [redacted] and further clients for whom Mr Lescaudron was the relationship manager*."

128. The Walder Wyss letter explains that the Bank "*has been conducting an internal investigation in this matter … which is ongoing*". It says the Bank "*is also analysing further aspects of Mr Lescaudron's actions, in particular investments he made on behalf of clients. Due to the complexity of these actions, i.e several thousand sale and purchase orders over the course of several years, such investigation remains ongoing*." It sets out some of the Bank's initial findings:

(1) It describes an analysis of Mr Ivanishvili's alleged signature on various payment orders, which were found on Mr Lescaudron's home computer that were allegedly signed by Mr Ivanishvili, but which had not been sent to him for signature. The letter records that "*…most of the loan agreements/contract as well as payment orders have been identified in Mr Lescaudron's home drive as word documents. The word documents have been created by the user 'Patrice Lescaudron'. Furthermore, there was no indication that these documents were sent to Bidzina Ivanishvili for signature through email…an initial analysis by Credit Suisse's Security Services indicates a high likelihood that at least some of the signatures may have been forged…*".

(2) It records that the Bank considers that various "*loan agreements*" were suspicious because they were not found on the Bank's archive, but were instead "*found on Mr Lescaudron's office computer*."

(3) The letter explains that the Bank's "internal investigation" had discovered "*[s]ecurity transfers with over- or underpayment".* In short, the Bank's investigation revealed that "*[g]enerally, in these transaction (sic) Bidzina Ivanishvili (or his companies) were either the buyer 'paying' too much, or a seller 'receiving' too little, and thus causing a net transfer of assets to other customers*." The Bank's investigation found that various instructions purportedly justifying these transactions were "*flawed since they have been discovered on Mr Lescaudron's office computer as word documents*". In other instances, the Bank's investigation revealed that "*no payment or sales instructions could be identified, which is why these transactions have been deemed suspicious."* The Bank's *"analysis of the respective market values on the various transaction dates showed an overpayment by Bidzina Ivanishvili towards other customers of Credit Suisse*."

(4) The Bank's investigation had found that "*[a] final part of the suspicious transfers and flows are a result of shares being transferred out of the securities account of Bidzina Ivanishvili to other clients without any identifiable compensation*." The Bank was apparently "*still in the process of reviewing with clients the background of these transfers*" but had "*deemed these transfers as suspicious for the time being*."

(5) The Walder Wyss Letter also contains an extract from the PwC Reports (the "*Commissions and Fees Calculation Review*") commissioned by the Bank, which records that the CS Life accounts at issue in these proceedings "*have been identified as accounts from which Mr Lescaudron executed potentially unauthorised transfers of cash and securities to other clients of the Bank*".

(13) FINMA's investigation into Mr Lescaudron's fraud and the Bank's governance and compliance history

129. In 2016, the Swiss Financial Market Supervisory Authority ("**FINMA**") ordered that Geissbühler Weber & Partner AG ("**GWP**"), a Swiss law firm, conduct an investigation into Mr Lescaudron's wrongdoing and the Bank's governance and compliance systems. The final report ("**the FINMA Report**") is dated 6 April 2017.

130. GWP explains that Mr Lescaudron had "*repeatedly attracted negative attention during his time at Credit Suisse*." He received four formal disciplinary measures and "*there were other misconduct cases which were neither punished nor documented*". The reasons for this included that Mr Lescaudron "*generated more than CHF 54 million in income for the bank in seven years*". It is evident he was one of the Bank's most successful revenue generators. Indeed, he "*generated the most new money for the bank in 2012*".

C. Factual Findings

131. Over a period of eight days the Court heard evidence (by way of cross examination on their witness statements) from seven witnesses of fact called for the parties. The Plaintiffs invite the Court to make certain findings of fact in relation to that evidence given by the factual witnesses. Before considering the specific findings sought by the Plaintiffs it is convenient to deal with two preliminary issues: (i) the admissibility of the interviews of Mr Lescaudron by and on behalf of the Bank; the questions and answers to Mr Lescaudron and others by the police and the Public Prosecutor in the investigations for proceedings; the judgments of the Swiss criminal courts; the PwC Reports; and the FINMA Report; and (ii) whether having regard to the discovery provided by CS Life and the alleged failure to call relevant witnesses to give evidence at trial, it is appropriate for the Court to draw adverse inferences in relation to certain factual issues against CS Life.

The objection relating to the admissibility of evidence

132. CS Life submits that under the common law, criminal convictions and civil judgments are inadmissible, as evidence of the facts established in them, in the trial of any other proceedings, relying upon *Hollington v F Hewthorn & Co* [1943] KB 587. The position is, it is argued, *a fortiori* for foreign convictions and judgments. Whilst there are statutory exceptions, none is engaged here and so the Swiss convictions, and any facts which the Swiss judiciary considered proven, are inadmissible as evidence of the alleged wrongdoing at this trial.

133. Mr Thompson QC, Counsel for CS Life, submits that the rationale for the rule is that the opinion of other judges on the underlying facts is of no evidential value, and any weight which the court might place on such opinions is impossible to gauge without effectively a re-run of the first set of proceedings. He relies upon the explanation of the rule given by Christopher Clarke LJ in *Rogers v Hoyle* [2015] QB 265, CA, approving the decision of Leggatt J, as he then was:

> "*[39] As the judge rightly recognised the foundation on which the rule must now rest is that findings of fact made by another decision maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it ("the trial judge"), and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on evidence other than that which the trial judge has heard and in reliance on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard*."

134. Mr Thompson QC argues that the same is true of the PwC and FINMA Reports upon which the Plaintiffs wish to rely and points to the decision of the House of Lords in *Three*

Rivers District Council v Bank of England (No. 3) [2003] 2 AC 1. He argues that the Court cannot ascertain the precise scope of the enquiry of any report writer, and it is unlikely to the point of being unrealistic to imagine that the authors of any reports would have the same powers and view of the underlying matters as the instant Court.

135. Accordingly, Mr Thompson QC submits that, as a matter of law, the Swiss court convictions and judgments, and the PwC and FINMA Reports, are inadmissible and ought to be disregarded in their entirety in the trial of the main and misrepresentation claims.

136. Mr Thompson QC accepts that the Court is entitled to consider the remaining material comprising, in essence, interviews with and interrogations of Mr Lescaudron himself. This includes the interviews of Mr Lescaudron by and on behalf of the Bank and questions and answers to Mr Lescaudron by the Police and the Public Prosecutor. As will be seen in [324] to [326] below these statements contain admissions by Mr Lescaudron of serious wrongdoing in relation to the accounts of Mr Ivanishvili and the Policy Accounts. The Court agrees that the interviews and interrogations of Mr Lescaudron on behalf of the Bank and questions and answers to Mr Lescaudron by the Police and the Public Prosecutor are admissible in relation to the issues in these proceedings.

137. In *Rogers v Hoyle* the scope of the exclusionary rule in *Hollington v Hewthorn* was narrowly defined by Leggatt J at first instance and Christopher Clarke LJ in the Court of Appeal. Leggat J considered at [93] that the underlying rationale for the exclusionary rule is "*that it is the duty of a court to form its own opinion on the basis of the evidence placed before it; and that it would not be proper for the court in forming that opinion to be influenced by the opinion of someone else, however reliable that person's opinion is likely to be*." The Court of Appeal agreed with this rationale in the judgment of Christopher Clarke LJ cited at [133] above.

138. The Court of Appeal recognised in *Rogers v Hoyle* that the exclusionary rule in *Hollington v Hewthorn* does not apply to expert evidence and the bar to be surmounted

in order to count as an expert is not particularly high. Furthermore, the court does not ordinarily engage in the exercise of excising opinion evidence in an expert report which does not require expertise. In this regard Christopher Clarke LJ held at [41], [43] and [53]:

> "*41 As the Hollington case [1943] KB 587 recognises in terms, different considerations apply to scientific or expert witnesses. In so far as an expert gives evidence of fact (e g where he found the wreckage to be) his evidence is as admissible as that of any other person. Where his evidence is evidence of opinion it is admissible because it is the product of a special expertise which the trial judge is unlikely to possess and which, even if he did, it is not his function to apply.*
>
> *…*
>
> *43 I do not regard this objection as well founded. The identity of the principal investigators is known and their expertise must be a matter of public record or at least readily discoverable. The bar to be surmounted in order to count as an expert is not particularly high, the degree of expertise going largely to the weight to be given to the evidence rather than its admissibility*.
>
> *…*
>
> *53 In so far as an expert's report does no more than opine on facts which require no expertise of his to evaluate, it is inadmissible and should be given no weight on that account. But, as the judge also observed, there is nothing to be gained, except in very clear cases, from excluding or excising opinions in this category. I agree with what he said in para 117 of his judgment*:
>
> > *"Such an exercise is unnecessary and disproportionate especially when such statements are intertwined with others which reflect genuine expertise and there is no clear dividing line between them. In such circumstances, the proper course is for the whole document to be before the court and for the judge at trial to take account of the report only to the extent that it reflects expertise and to disregard it in so far as it does not. As Thomas LJ*

trenchantly observed in Secretary of State for Business Enterprise and Regulatory Reform v Aaron [2009] Bus LR 809, para 39:

"It is my experience that many experts report views on matters on which it is for the court to make its decision and not for an expert to express a view. No modern or sensible management of a case requires putting the parties to the expense of excision; a judge simply ignores that which is inadmissible"."

139. The FINMA Report sets out the results of the investigation at the Bank into Mr Lescaudron's wrongdoing and into the Bank's governance and compliance systems, on behalf of the Swiss Financial Market Supervisory Authority, a regulatory body in Switzerland, and was prepared by **GWP**, a Swiss law firm. In carrying out their regulatory investigation, GWP's investigative team comprised 17 professional persons in the main team and five professional persons in the IT forensics team called in for the forensic work.[2] GWP carried out its work at the Bank's premises between 4 April 2016 and 6 February 2017. I accept Mr Smouha QC's submission, on behalf of the Plaintiffs, that the FINMA Report, in substance, is an expert report because it contains the results of the regulatory investigations and findings of Swiss lawyers appointed by the Swiss financial regulator to investigate the Bank's governance and compliance systems in light of Mr Lescaudron's fraud, and with the benefit of interrogation of the Bank's IT system by the IT forensics team, as they refer to and describe in paragraph 2.5 of the Report.[3] The Court accepts Mr

[2] The main team was comprised as follows: Alex Geissbuhler, Partner; Reto Weber, Partner; Olivier Stulz, Senior Manager; Dominique Rudolf von Rohr, Senior Manager; Stefanie Widmer, Senior Manager; Franziska Zobrist, Senior Manager; Thomas Fuchs, Senior Manager; Maria Antoinetta Conenna, Senior Manager; Stephen Staehli, Manager; Marius Gisler, Consultant; Lena Meisberger, Consultant; Thomas Walch, Consultant; Dominique Klausler, Consultant; Fabrice Gamma, Consultant; Laura Griinig, Consultant; Christoph Pfaltz, Consultant; and Rael Miller, Consultant. The IT forensics team was comprised as follows: Dani Romay, Director; Fabian Niederer; Leandro Réschli; Manuel Diggelmann; and Lionel Bloch.

[3] The following applications and their data sources were considered relevant and interrogated by the IT forensic team: (i) FrontNet, typically used by a client advisor as a central element for client relationship documentation; (ii) The HOST, used within Credit Suisse in Switzerland to perform targeted CIF queries; (iii) The Formalities Control Centre (FCC), part of FrontNet and covers various KYC questions and clarifications as well as client ID processes and tasks; "ELAR", the bank's electronic archive; SignBase, the signature authorisation of persons stored for the respective accounts (without numbered accounts); FormSec, information on the roles and authorised signatories

Smouha QC's submission that the FINMA Report is not in the same category as the BCCI enquiry presided over by Bingham LJ in *Three Rivers District Council v Governor and Company of the Bank of England* (No 3) [2003] 2 AC 1. The FINMA Report, as stated above, is properly to be considered expert evidence. In contrast there was no suggestion that the findings and conclusions of Bingham LJ in the BCCI enquiry constituted expert evidence. Accordingly, the Court concludes that the FINMA Report is admissible in relation to the issues raised in these proceedings.

140. The same position prevails in relation to the PwC Reports. These Reports were prepared by PwC in support of the Project Dino investigation carried out by the Bank in light of its discovery of Mr Lescaudron's misconduct and the documents provided to PwC by the Bank for the purposes of their work. PwC were instructed to provide forensic accountancy services to assist in Project Dino. That is clear from the Walder Wyss letter of 5 February 2016, where they say that the Bank was assisted by Homburger AG, a law firm, which in turn was assisted by PwC forensic services and forensic accounting. The work carried out by PwC in relation to Project Dino which resulted in the PwC Reports is in the same category as the work carried out by Mr William Davies and Mr Mark Bezant, the forensic accounting experts instructed by the parties in relation to this matter. The Court is satisfied that the PwC Reports are properly to be regarded as expert evidence. The PwC Reports are not in the same category as the BCCI enquiry report in the *Three Rivers District Council* case. Accordingly, the Court concludes that the PwC Reports are admissible in relation to the issues raised in these proceedings.

141. As noted earlier, Mr Lescaudron was convicted of fraud and the conviction was upheld by the Swiss Court of Appeal. Mr Smouha QC accepts that under the common law, as stated in *Hollington v F. Hewthorn & Co Ltd* [1943] KB 587, the effect of the judgment is not evidence of the truth of the position. Accordingly, he accepts that he cannot rely on the fact of the criminal conviction itself. However, he argues that the Court is entitled

of numbered accounts; Document Matter Management System – DMMS, Legal and Compliance works with the DMMS when conducting internal compliance investigations; Physical Archive; Emails; and Data Warehouse, data aggregations allowing the Bank to carry out cross-system reporting and business intelligence evaluations.

to admit the recitation of the evidence that is referred to in the Criminal Judgments, on which the Plaintiffs can and do place reliance. Mr Smouha QC points out that the findings made by the Swiss courts during the course of convicting Mr Lescaudron of fraud are not the determination of matters in dispute in other proceedings but are in substance a convenient way of identifying relevant admissions made by Mr Lescaudron. The Court accepts that most of the findings of fraud made by the Swiss courts are in fact admitted by Mr Lescaudron in the interviews by and on behalf of the Bank and questions and answers to Mr Lescaudron by the police and the Public Prosecutor.

142. The issue to what extent, if any, a court can rely upon the recitation of facts in an earlier judgment or report was considered by Leggatt J and Christopher Clarke LJ in *Rogers* v *Hoyle*. Leggatt J held at [64]:

> "*64 First of all, as I have described, the report contains statements of fact as well as statements of opinion.* ***On any view, the factual evidence in the report is admissible since, as discussed earlier, the evidence is relevant and fact that it is hearsay is not a ground for its exclusion, nor is there any other rule of law which prohibits its reception****."*

143. Mr Smouha QC correctly points out that in this case the parties have expressly agreed that all the documents in the trial bundle are admissible as to the truth of their contents. Accordingly, any objection to the admissibility of the recitation of evidence in the Swiss Judgments cannot be based on the application of the hearsay rule. Christopher Clarke LJ also dealt with this issue and held at [49]:

> "49 *Mr Lawson submitted that the case for the exclusion of the report was as compelling as it was in respect of Mr Hewthorn's conviction or the decision of the Greek court in Calyon. I do not agree. The report is not a bare finding such as one of carelessness or ownership of a painting.* ***The statements of fact contained in the report, e g as to the position of the wreckage or the reported observations of the eyewitnesses, are evidence which the trial judge can take into account in like***

manner as he would any other factual evidence, giving to it such weight as he thinks fit."

144. The above passages from the judgments in *Rogers v Hoyle* show that there is no absolute prohibition against a court taking into account factual evidence referred to in an earlier judgment or report and it is for the Court to give such weight to that evidence as it thinks fit. In the present case the Court concludes that the findings of fact in the Swiss Judgments, to the extent that they reflect admissions made by Mr Lescaudron, are admissible in relation to the issues raised in these proceedings.

Whether Court should draw adverse inferences against CS Life

145. The Plaintiffs complain that CS Life has materially and deliberately failed to give proper discovery in this case and has failed to call material witnesses who could give evidence in relation to significant material issues. In the circumstances the Plaintiffs invite the Court to draw adverse inferences against CS Life in relation to specified factual issues.

(i) CS Life's failure to give proper discovery

146. There have been serious shortcomings in the provision of discovery by CS Life during the currency of these proceedings which included the provision of substantial discovery during a five-week trial. During the course of these proceedings the Court has noted:

"*I accept that the discovery provided by CS Life has been unsatisfactory*" (22 December 2020 Ruling [53])

"*Despite the clear terms of the 25 February 2020 Ruling that compliance was required by 10 March 2020, it seems clear that there was no real attempt made to comply with the terms of that Ruling. Even on CS Life's own case compliance was not achieved until Burke 16 was filed with this Court on 21 October 2020, the day before the hearing of this application for an unless order. This is a delay of over 7*

months and CS Life made no application to the Court seeking an extension of time to comply with the clear orders of this Court." (22 December 2020 Ruling [48])

"*The Court is bound to conclude that the PwC Reports were not provided by the Bank to CS Life to ensure that CS Life was not put in a position where it had to discover the PWC Reports in these proceedings*." (23 September 2021 Ruling [25])

147. The Court has repeatedly observed that discovery is of particular importance in this case. Most recently, in its 30 September 2021 Ruling, the Court held:

"*In the Court's view the conduct of a fair trial in this case requires that there be proper disclosure of relevant documents by CS Life and the Bank. This is particularly so in this case as the alleged wrongful conduct took place within the Bank and by the Bank's employees. It necessarily means that the primary source of documentary evidence is the Bank. In circumstances where CS Life has put the Plaintiffs to strict proof on the part of the Bank's employees, the Court has a duty to ensure that the discovery process necessary for a fair trial is not frustrated by a party (the Bank) who has a clear commercial interest in the outcome of these proceedings and is in a position to frustrate the discovery process by refusing to provide the PwC Reports to CS Life*."

148. The Specific Discovery Order dated 2 June 2020 required CS Life to discover, among other things, the following documents and categories of documents:

"*3.4 Documents evidencing investigations and reports into the collapse in value of the Policy Assets in 2015 including:*

(a) PwC reports commissioned by Credit Suisse AG and supporting documents, insofar as they relate to the CS Life Accounts;

(b) Any documents produced in the course of Credit Suisse AG's investigation into the conduct of Patrice Lescaudron, insofar as they relate to the CS Life Accounts;

(c) Any audits conducted in relation to the performance of the Policies and/or the CS Life Accounts; or

(d) Documents dated between 1 September 2015 and 31 December 2016 relating to the collapse in the value of the Policy Assets; margin calls on the CS Life Accounts; fraudulent conduct on the CS Life Accounts; "Project Dino"; the reports produced by PwC and surrounding documentation (including correspondence, whether by email or otherwise), any restructuring of the investments in the CS Life Accounts and/or other remedial action taken in relation to the CS Life Accounts.

3.5 Audit, risk assessment and monitoring documents in connection with the policies and all documents evidencing the monitoring of the CS Life accounts and/or Credit Suisse AG's management of the Policy assets.

3.6 Documents evidencing fees and commissions in connection with the Policies and/or the CS Life Accounts and/or the investments entered into on the CS Life Accounts and/or for the benefit of the Policies."

149. The Plaintiffs justifiably complained that there had been a wholesale failure on the part of CS Life to discover these documents or categories of documents and this failure has caused, and was causing, the Plaintiffs substantial prejudice.

150. Despite the terms of the Specific Discovery Order, CS Life refused to provide the Plaintiffs with its requests to the Bank or the Bank's responses. CS Life also refused to provide the Plaintiffs with any concrete information about what documents the Bank had provided in response to its requests. At the same time, CS Life gave the Court (and the

Plaintiffs) the impression that the Bank had provided all responsive material to its requests. For instance, Ms Burke informed the Court in a sworn affidavit dated 10 September 2021 (when resisting the Plaintiffs' application for an 'unless order'):

> "***The documents provided by the Bank are in line with what CS Life would expect.*** *CS Life does not know, nor can it be expected to know, exactly what documents the Bank does or does not have but* ***CS Life has no reason to think there has been any failure on the part of the Bank to provide documentation to which CS Life is entitled***." (emphasis added)

151. The Plaintiffs suspected that the Bank had not provided all responsive documents since the PwC Reports and the FINMA Reports had not been disclosed. Accordingly, their summons for an "unless order" sought an order that unless CS Life provided discovery of (i) the PwC Reports and the supporting documents and (ii) the FINMA Report its Defence shall be struck out. The Court made the 'unless order' sought by the Plaintiffs.

152. Following the 'unless order', CS Life finally discovered the FINMA Report and the PwC Reports, along with some of the supporting documents just prior to the trial of this matter. The Plaintiffs complain that in addition to the extremely late discovery of documents from the PwC data room (i.e. documents supporting the PwC Reports responsive to the Plaintiffs' 'unless order' application) there remains a wholesale failure on the part of CS Life to give discovery of documents responsive to the Specific Discovery Order. The Plaintiffs justifiably argue that the fact that highly relevant documents were being provided in the last days of the trial from a PwC data room simply emphasises the failure of CS Life's discovery exercise, because rather than discovery being given at the appropriate time and from CS Life's own databases in accordance with CS Life' primary discovery obligations, these documents are being provided at the last possible moment and only because they were provided to PwC and fall within the scope of the unless order.

153. The Court accepts that position prevailing at the close of the trial with respect to discovery of documents from the PwC data room was highly unsatisfactory:

(1) At the time of filing the parties' skeleton arguments, CS Life had filed: (i) its fourteenth list of documents on 14 October 2021 containing the PwC hand-over file; (ii) its fifteenth list of documents on 21 October 2021 containing documents referred to in the PwC Reports; and (iii) its seventeenth list of documents on 2 November 2021 containing some 11,799 documents from the PwC data room.

(2) Since 5 November 2021, CS Life has provided the Plaintiffs with a further 53,489 documents across 13 productions. The Plaintiffs say they have endeavoured to review as much of this late discovery as possible during the trial of these proceedings, however the Plaintiffs contend that it has not been practically possible to complete the review whilst the trial has been ongoing.

(3) On 12 November 2021, Appleby informed Hurrion that a pool of 1.6 million documents in the PwC data room had been affected by an error with the result that these had not been searched during CS Life's review of the data room ("**the Text File Error Documents**"). Following a dispute between the parties, the Court determined that discovery of the Text File Error Documents should be given but accepted the Plaintiffs' reservation of their position to make submissions in relation to what inferences should be drawn from the way in which discovery had been given.

(4) CS Life produced 3,393 documents on 8 December 2021 under cover of a letter confirming that the 83,255 responsive Text File Error Documents had been reviewed.

(5) It was unclear whether further documents are going to be discovered during the final week of trial.

154. Thus, the Court accepts that highly relevant documents have been disclosed at the last possible moment, with vast numbers of documents being provided during trial, so that the Plaintiffs have had no reasonable opportunity to consider their relevance and impact on the case. In the premises, the Court accepts the Plaintiffs' submission that it is appropriate for the Court to infer that within the late discovery are documents which would harm CS Life's case, support the conclusions in the PwC Reports and that the PwC documents have been deliberately withheld from discovery until now.

155. The evidence that emerged during trial from CS Life's witnesses demonstrates that (i) CS Life resisted giving discovery on an entirely false basis, and (ii) CS Life's discovery is materially incomplete in further important ways. In the early discovery applications CS Life claimed only to be able to give discovery from the 26 so called Bank-Life Employees identified in Mr Coffey's fourth affidavit. CS Life's repeated submission was that it was not the Bank and, therefore, could not give discovery of other documents held by the Bank. The Plaintiffs submit that this assertion was premised on a false account of how CS Life and the Bank operated: it is now clear that Credit Suisse operated on an integrated basis, that numerous functions including anti-fraud, compliance, security services, human resources, general counsel and so forth were centralised and performed by the Bank or Group functions and departments on behalf of CS Life. The Plaintiffs contend that this began to be apparent from late disclosure, starting with the asset monitoring documents, but the picture of a wider delegation by CS Life became clear during the trial from the new discovery, particularly of documents relating to internal investigation of Mr Lescaudron's frauds. In addition, CS Life witnesses revealed the internal organisation of the Life business within Credit Suisse and confirmed the integration of CS Life, not the putative separation and independence that had been posited as the factual basis for its discovery. CS Life should have disclosed this at the outset and given relevant discovery from these sources.

156. The Court accepts the Plaintiffs' submission that it is highly likely that the centralised Group Function (as defined in paragraph [284] below) hold materially important relevant documents. For instance:

(1) The fraud prevention team will have documents relevant to: (i) Mr Lescaudron's fraud; and (ii) what CS Life knew, or should have known, about Mr Lescaudron's wrongdoing at particular times.

(2) The Court now has evidence that Compliance and internal audit was involved in monitoring and investigating Mr Lescaudron.

(3) The general counsel (with assistance from the Security Services department) investigated Mr Lescaudron's fraud. Having conducted an investigation, it concluded that he had committed a fraud, including against the Policy Accounts, and submitted the criminal complaint to the Swiss authorities on that basis. Documents produced and considered as part of that investigation are likely to be material to issues in this action.

(4) The human resources department are likely to hold documents detailing Mr Lescaudron's woeful disciplinary record.

157. The Court accepts that if a party fails to discover relevant documents, a court is entitled to draw adverse inference at trial in relation to the absence of those documents. In *Mackenzie v Alcoa Manufacturing (Gb) Ltd* [2019] EWCA Civ 2110 Dingemans LJ held at [50]:

> "*It seems therefore that it is possible to state the following propositions. First whether it is appropriate to draw an inference, and if it is appropriate to draw an inference the nature and extent of the inference, will depend on the facts of the particular case, see Shawe- Lincoln at [81]-[82]. Secondly silence or a failure to adduce relevant documents may convert evidence on the other side into proof, but that may depend on the explanation given for the absence of the witness or document, see Herrington at 970G; Keefe at [19] and Petrodel at [44]*."

158. To the same effect is the passage in *Matthews & Malek Disclosure 5th Ed.* [17.38]: "*Negative inferences can be drawn in relation to those issues which specifically relate*

to the categories of documents a party has failed to disclose in breach of his disclosure obligations."

159. In the circumstances of this case the Court takes the view that the discovery given by CS Life in this case is seriously deficient and that this deficiency is bound to cause prejudice to the Plaintiffs in relation to these proceedings. Accordingly, in principle, the Court is prepared, depending on the context, to draw relevant adverse inferences against CS Life.

CS Life's failure to call relevant witnesses

160. The Plaintiffs justifiably complain, and the court accepts, that the witnesses called on behalf of CS Life were not involved in CS Life when the LPI Policies were taken out in 2011 and 2012 or when the Lescaudron fraud was uncovered in September 2015 and had no direct involvement in the operation of the LPI Policies. This was freely admitted by Mr Celia who was the head of product management for the Credit Suisse Liechtenstein equivalent of CS Life during the material period. Despite adducing four witness statements, the Court accepts that Mr Celia had little direct factual evidence to give. He was not an appropriate witness. He revealed that his equivalent for CS Life Bermuda, who was head of product management and did have involvement, was Mr Saluz (see below at [164]).

161. CS Life's CEO during the material period, Mr Coffey, was on paper an appropriate witness, but it transpired under cross examination that he had very little direct evidence to give about any material matters. It appears that he was largely kept in the dark, whilst important decisions were taken by others, including his self-described 'line manager', Mr Läser. Surprisingly, his knowledge of Mr Lescaudron's fraud on the CS Life accountsappeared to be largely limited to what he had read in the press and the snippets that Mr Läser chose to reveal to him. He accepted that as CEO he should have been (but was not) informed about Mr Lescaudron's disciplinary record, as well as Credit Suisse's investigations into his fraud, given it affected CS Life accounts.

162. Mr Vaccaro was the only CS Life director giving evidence, but he was only appointed in 2020. He also had very little direct factual evidence to give. He was not involved in the selling or commencement of the Policies, had little involvement in the Policies whilst they were in force and agreed the limit of his involvement was the fact he was copied into occasional emails querying the availability of particular investments and the like.

163. Ms Homann was able to give evidence about how CS Life's LPI policies were intended to operate in principle (as she had been involved in setting the product up in 2004), but she also had very little direct evidence to give about relevant facts or matters as for "*most of the period*" that this action is concerned with she was working on non-CS Life business.

164. Mr Celia's counterpart at CS Life during the material period was Mr Luzi Saluz. In contrast to Mr Celia, he was directly involved in the operation of the LPI Policies, but unlike Mr Celia, the Plaintiffs complain, he was not called to give evidence, despite the fact he is still employed by the Bank working on insurance matters. Amongst other things, Mr Coffey explained that Mr Saluz would have been in charge of giving CS Life approval for Raptor purchases, after CS Life imposed the special pre-authorisation regime for Mr Lescaudron's Raptor purchases.

165. The Plaintiffs also point to Mr Cielen who was (it seems) in 2015 the most senior Bank-Life employee in Zurich. Mr Saluz reported to Mr Vanacore (who was also not called to give evidence) who in turn reported to Mr Cielen. Mr Cielen was involved on the CS Life side in supporting the Bank's investigation into the Lescaudron fraud.

166. Mr Riccardo Wettstein was CS Life's Compliance Officer during the material period. The Plaintiffs justifiably complain that all the information about Mr Lescaudron's wrongdoing, investigations into him, and the like that was generated within and known in the CS Compliance department will have been known to and available to him. However, he was not called to give evidence on behalf of CS Life.

167. Mr Patrik Läser was a director of CS Life Bermuda throughout the material period. He was CFO of the trust and insurance department (sitting therefore within the Bank's wealth management division). Mr Celia's evidence was that he was "*the senior Credit Suisse executive directly responsible for CS Life (Bermuda) matters throughout the period 2011 to 2015"*. Mr Coffey, although notionally CS Life's CEO, reported to Mr Läser, who he described him as his "line manager". He agreed that Mr Läser was "*the main route through which the bank controlled and directed CS Life at board level*".

168. Mr Celia explained that Mr Läser "*had responsibility for considering the potential impact of Lescaudron's wrongdoing on the assets of CS Life (Bermuda)".* Likewise, Mr Coffey explained that Mr Läser had become aware of Mr Lescaudron's activities. Mr Läser was directly involved in various other relevant facts and matters. For instance, Mr Schmid raised his concerns about Mr Lescaudron's investments in the Hyperion funds directly with Mr Läser.

169. The Court accepts that it now emerges that Mr Läser was the key CS Life director, who acted as the connection between CS Life and the Bank and who directed CS Life's activities on the Bank's behalf. Neither Mr Celia nor Mr Coffey were aware of any reason why Mr Läser could not give evidence. CS Life has provided no explanation for why it chose not to adduce evidence from Mr Läser.

170. Mr Läser was Mr Coffey's line manager. Messrs Coffey and Läser communicated by email (and telephone). It was Mr Läser who contacted Mr Coffey to ask him to give evidence (which resulted in Mr Coffey being given the consultancy agreement which had not been disclosed).

171. The Plaintiffs submit, and the Court accepts, that is clear from the diagram detailing CS Life's senior and middle management and reporting lines contained in the April 2012 CS Life Governance Handbook that CS Life opted not to call witnesses that were involved in managing CS Life at the material time.

172. Mr Dastmaltschi had overall responsibility for Mr Lescaudron throughout the material period. He had the fullest knowledge of Mr Lescaudron's early wrongdoings (before the LPI Policies) and was involved in disciplining Mr Lescaudron when Mr Lescaudron breached Credit Suisse rules and regulations. He was directly involved in the investigation into the Lescaudron fraud. He appears to have been the principal executive responsible for allowing Mr Lescaudron to continue to be the Relationship Manager for Mr Ivanishvili before and during the currency of the LPI Policies. He was also very directly involved in dealings with Mr Ivanishvili and Mr Bachiashvili (travelling to meetings in Tbilisi to meet Mr Ivanishvili with Mr Lescaudron in 2015), and then dealing with Mr Bachiashvili in relation to the margin calls. He did not disclose to Messrs Ivanishvili and Bachiashvili his knowledge of the extent of the Lescaudron frauds in September 2015 and in the following months, despite becoming aware quickly on the basis of the Bank's investigations and Lescaudron's admissions. He made conciliatory noises suggesting he would share information and find out what had happened, while not disclosing what he knew and pressing forward with the margin calls.

173. The FINMA Report sets out that instead of informing Mr Ivanishvili about the unauthorised payments and asking questions about the large Raptor positions, Mr Dastmaltschi sought instead to "*create a decentralised asset management mandate for P.L.*" The Plaintiffs suggest that it is now clear that the purpose of such a decentralised assets management mandate was to cover up/legitimise Mr Lescaudron's unauthorised trading.

174. Mr Dastmaltschi is still a senior executive employed at the Bank. The Court accepts the Plaintiffs' submission that he is a key witness who should have been called and the failure to call him, and his knowledge, make CS Life's "nonadmission" of the Lescaudron frauds an abuse of process.

175. Mr Vitse was present at the meeting in June 2012 when the Sandcay Policy was sold to Mr Ivanishvili. He was "*the direct supervisor of P.L. … between 2010 and 30 September 2013, and shared the office premises with P.L.*" He had been tasked with keeping a close

eye on Mr Lescaudron, given Mr Lescaudron's many disciplinary issues: "*Philippe Vitse was appointed IP Geneva team leader, to avoid issues such as those raised above, with a particular focus on Patrice [Lescaudron], in light of his mixed track record*." The FINMA Report explains that Mr Vitse had been informed about Mr Lescaudron's "*problems with…cross trades*" in June 2011.

176. CS Life failed to proffer any witness involved in the Group Function. There was accordingly no one giving evidence who could talk about (i) the anti-fraud and monitoring mechanisms that operated on the Policy Accounts during the material period; or (ii) what the Group Function noticed with respect to Mr Lescaudron's wrongdoing. The Plaintiffs complain that they have therefore been left trying to piece together the pieces from CS Life's late and incomplete discovery.

177. Likewise, CS Life failed to call a single witness involved in investigating the Lescaudron fraud. There are a number of individuals involved in that investigation with direct knowledge about Mr Lescaudron's actions, how the fraud was carried out, the impact it had on the Policy Accounts and what steps were taken (or not taken) by the Group Function throughout the material period. A list of individuals involved in the investigation is set out in the FINMA Report. CS Life failed to call any of them.

178. The Court can in appropriate circumstances draw adverse inferences from the absence of a witness who might be expected to have material evidence. In *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 Brooke LJ held:

> *"(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*
>
> *(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.*

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4)If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified".

179. As the review of witnesses above shows, CS Life failed to call any witness who could give evidence in relation to: (i) the investment mandate agreed upon by Mr Ivanishvili and Mr Lescaudron in relation to the Policies; (ii) investigations and actions taken against Mr Lescaudron by Credit Suisse in relation to his misconduct and/or wrongdoing during the period 2008 to 2015; (iii) Mr Lescaudron's investment management of the Policy Accounts in what he termed as the '*grey zone*" and actions taken by Credit Suisse in relation to that discovery; and (iv) the investigation by Credit Suisse into the fraud committed by Mr Lescaudron in relation to the Policy Accounts. It is clear to the Court that there are witnesses available to CS Life who could have given evidence in relation to these central issues. Yet CS Life elected to call witnesses who could give no direct evidence in relation to any of these issues. In the circumstances this is an appropriate case where, depending on context, the Court should be willing to draw appropriate adverse inferences arising out of CS Life's decision not to call witnesses who could give direct evidence in relation to central issues in these proceedings.

Factual Findings

180. The Plaintiffs invite the Court to make a number of findings of fact having regard to the factual evidence presented to the court during the trial of this matter. CS Life opposes that the Court should make the findings sought and contends that the proposed findings of fact are either unpleaded; and/or not in accordance with the evidence; and/or irrelevant.

(1) From the outset Mr Ivanishvili informed Credit Suisse that he had a moderate approach to risk and wanted the assets managed by Credit Suisse to be managed on the basis of a well-balanced portfolio / to be kept safe / with the objective of asset preservation in the long term / without adopting a risky investment strategy / without "aggression" and those investment objectives did not change.

181. The issue of Mr Ivanishvili's investment goals and risk appetite is addressed by him in his first witness statement at paragraph 86-95. At paragraph 86 Mr Ivanishvili explains that:

> "*I had planned to speak to other banks regarding the management of my money, but I was not approached by any other banks, and the offer that Credit Suisse presented was a good one. Credit Suisse said that it would offer me low fees in return for which it would provide sound investment management services. The Credit Suisse representatives were keen to have me as a client, but the most important factor in my deciding to trust my money to Credit Suisse was that it was an internationally renowned and respected bank. I was all too aware of the volatile nature of the Russian banking system, and I was keen to move my money to a stable bank in a stable country. Given its reputation, I trusted the Swiss banking system.* ***Ultimately, I wanted my money to be invested wisely and kept safe, and a short time after I was contacted by Daria I decided to place my money with Credit Suisse. Daria became our first relationship manager***.
>
> *During my first meetings with Credit Suisse, in 2005, I explained my objectives for investing with a bank such as Credit Suisse and the level of risk I was willing to take.* ***I was very clear with Credit Suisse that I wanted a moderate approach to risk and a well- balanced portfolio, in order to preserve the capital I had built up. I did not want Credit Suisse to adopt an aggressive or risky investment strategy***."

182. Mr Ivanishvili also gave evidence that his investment goals did not change during the relevant period. In his first witness statement he confirmed at [93] that:

"*My investment goals and appetite for risk remained the same over the years that Credit Suisse managed the accounts, as I made clear to Credit Suisse at the various annual meetings which took place in Tbilisi. While I understood that some of the investments carried higher risk, I understood that others carried a lower risk, maintaining what I believed to be a balanced portfolio*."

183. Commenting on Mr Lescaudron's proposal of what became the Sandcay Policy for the management of the Credit Suisse of the sale proceeds of Mr Ivanishvili's Russian businesses Mr Ivanishvili stated "*From this I would have understood that the proposed trust structure and investment in a second life policy were designed to meet my objectives – **to keep my wealth safe and to provide for my family***."

184. The Court does not accept CS Life's contention that Mr Ivanishvili's rather more aggressive attitude to risk and return is better reflected by his significant entrepreneurial success in the most challenging of economic and political circumstances and in his predilection for taking large and concentrated positions in Russian stocks which include Gazprom, Sberbank and Lukoil. In relation to this contention the Court accepts Mr Smouha QC's submission that it was precisely to move his now much greater wealth away from that volatility that he put it with Credit Suisse, and to obtain their expertise in long term wise and safe wealth management.

185. Likewise, the Court does not accept that Mr Ivanishvili's interest in hedge funds is to be to be equated to an aggressive attitude to risk and return or otherwise inconsistent with Mr Ivanishvili's evidence that he had a moderate approach to risk as set out in his first witness statement.

186. The Court accepts that following three days of cross-examination Mr Ivanishvili's evidence remained as set out in [181] to [183] above. During his oral evidence Mr Ivanishvili confirmed that his position was that he wanted a "*conservative portfolio*" and trusted Credit Suisse to keep his money "*safe*" and preserved for his children. As a general observation the Court found Mr Ivanishvili, in relation to this issue and generally,

to be a credible witness. No doubt at times he gave his evidence in an excited way, but the Court does not doubt the veracity of the evidence which he gave to the Court.

187. Accordingly, the Court finds that from the outset Mr Ivanishvili informed Credit Suisse that he had a moderate approach to risk and wanted the assets managed by Credit Suisse to be managed on the basis of a well-balanced portfolio / to be kept safe / with the objective of asset preservation in the long term / without adopting a risky investment strategy / without "aggression" and those investment objectives did not change.

(2) CS Life delegated responsibility for the sale of the LPI Policies, agreeing the terms on which assets would be transferred to CS Life (including the 'investment alternative'), reporting on the LPI Policies and any ongoing dealings with respect to the LPI Policies to Mr Lescaudron qua Mr Ivanishvili's relationship manager.

188. During the middle of the trial and as a result of the evidence given by Mr Coffey, CS Life disclosed additional Board Minutes of CS Life and a document headed "***CS Life Governance Handbook***" which sets out, *inter-alia*, the organisational structure of CS Life; the functions of CS Life which are contractually outsourced to other entities and organisations; reporting framework; roles and responsibilities within CS Life and the Credit Suisse organization.

189. In relation to outsourced contracts the *Governance Handbook* provides that the senior management and the Board of Directors have a due diligence responsibility to maintain oversight of all outsourced functions.

190. Contractually outsourced functions are divided into two categories: key service contracts and non-key service contracts. Key service contracts relate to the following 9 categories of outsourced functions:

1. Sales / Distribution (Credit Suisse AG)
2. Insurance Policy Administration (Ops) (Credit Suisse AG)

3. Asset Management & Custody (Credit Suisse AG)
4. AML Due Diligence Delegation (Compliance) (Credit Suisse AG)
5. Consolidation Reporting (Credit Suisse AG)
6. Trademark Licensing (Credit Suisse AG)
7. Asset Accounting (Ernst & Young)
8. Software Licensing & Maintenance (ProfiData)
9. Actuarial Services (Willis)

191. The *Governance Handbook* notes that in relation to the key service contracts there is a "*Secondary Contract*" relating to "*Intra CSG Delegation of Duties."* According to the Governance Handbook "*This allows CS to delegate duties within the Group. In this case, from CS AG to CST*" (emphasis added).

192. Non-key service contracts relate to the following 7 categories of outsourced functions:

10. Corporate Legal Administration (Appleby LLC)
11. Office Rent (Argonaut Ltd)
12. Payroll (Expertise Ltd)
13. Statutory Audit (KPMG)
14. EAM Asset Mgmt & Custody (BCP, Clariden, Hofmann)
15. EAM AML Due Diligence Delegation (BCP, Clariden, Hofmann)
16. EAM Intermeditation (sic) (Sales) (BCP, Clariden, Hofmann)

193. The Plaintiffs correctly submit that the *Governance Handbook* clearly demonstrates that virtually all of CS Life's operational functions were delegated to Bank departments and individuals as appropriate. This was done as a matter of legal formality and actually in substance. The *Governance Handbook* confirms that "*Sales / Distribution*" was (together with Asset Management and Custody and Due Diligence/Compliance) contractually outsourced to the Bank. The Plaintiffs submit that it was not only the legal position that CS Life delegated to (and thus conferred actual authority on) the Bank to carry out all

matters in relation to selling and then operation of the LPI Policies on its behalf, but that was also what was done in fact.

194. Mr Smouha QC for the Plaintiffs submits that the factual and documentary evidence (including CS Life's own witness evidence) establishes that CS Life deputed to and was necessarily reliant on the Credit Suisse relationship managers for all its dealings with its potential clients and existing clients. In this case, this meant that CS Life looked to Mr Lescaudron to sell the LPI policies to Mr Ivanishvili on behalf of CS Life, to agree the '*investment alternative'* that the assets would be held under and to prepare and finalise the LPI documentation. Once the LPI Policies were taken out, all dealings with respect to the LPI Policies were carried out on CS Life's behalf through Mr Lescaudron, as the client face of CS Life. This included reporting on the performance of the LPI Policies.

195. The Court accepts that there is overwhelming and consistent evidence which supports this factual finding. The evidence which supports this factual finding includes the following:

196. First, a consistent theme of the evidence adduced on behalf of CS Life is that CS Life did not have any "*operational employees of its own*." As Mr Coffey, the former Chief Executive Officer of CS Life, confirmed in his fourth affidavit at [13]:

> "*Much of CS Life's business administration with respect to the individual LPI policies was outsourced to the Bank and CS Life's day to day business was conducted by Bank employees. For this purpose the Bank made available its own employees to undertake CS Life work, as explained below. The only people employed by CS Life were myself and Mr McCallum... Mr McCallum was employed by CS Life as Chief Financial Officer and had access to the same documents as me…"*

197. Secondly, CS Life's witnesses consistently gave evidence that the relationship managers were in charge of selling the LPI policies. Thus, Mr Celia told the Court that "*CS Life*

did not have a sales team who approached clients or prospective clients without the involvement of the Bank's RM".

198. Thirdly, CS Life's witnesses confirmed that as part of the LPI sales process, the relationship manager would discuss and agree with the client the various policy terms, including the "*investment alternative*" or the mandate that would be applied to the assets to be transferred to CS Life. In this regard Ms Homann told the Court that "*the choice of mandate would be a matter to be discussed between the client and the relationship manager*" and "*that question, that choice, would be discussed between the client and the relationship manager and agreed between the client and the relationship manager.*" Mr Celia's evidence to the Court was that in relation to the management of the Policy Assets "*What then was agreed was part of the discussion between the relationship manager and the client. So there we were not part of these discussions*…"

199. Furthermore, it is clear to the Court that the relationship manager was in charge of pre-filling the LPI documentation (and printing the necessary documents from the "*suite*" of available policy documents) based on the agreement that the relationship manager had reached with the prospective client. In this regard Mr Celia confirms in his first witness statement that the relationship manager "*had the ability to generate the life insurance application documents based on what the client wanted from their LPI policy*" and "*would prefill the [LPI] application by ticking the necessary boxes and the document package generated was limited to the selections made*". Ms Homann's evidence to the Court was to the same effect: "Q. *The relationship manager prepares the documents for CS Life?* A. *Correct.*"; "… *it is the relationship manager who would decide which documents to take off the system. Is that right*? A. *Yes, he or the trust and estate adviser, who could also in some cases be involved in the client meetings*. Q. *And it would be a matter for the relationship manager to identify which forms should be completed and present them to the client?* A. *Clear, because he was the distributor*.".

200. Fourthly, Mr Celia, who is now the head of the Bank's insurance division, advised the Court that CS Life was dependent on the relationship manager, not only to prepare the

LPI documentation correctly, but also to communicate the client's instructions and agreement to CS Life properly.

201. Fifthly, once the LPI Policies were taken out, CS Life directed its clients to raise all matters in connection with the policies with their relationship manager and all dealings with its clients went through the relationship managers. Accordingly, Mr Coffey agreed that "*all dealings in relation to the LPI policies*" were supposed to go through Mr Lescaudron. Mr Vaccaro accepted the Credit Suisse relationship manager would "*continue to be the point of contact*" for the Policyholders after the Policies were taken out. Ms Homann went further and told the Court that even if an issue arose as to whether a transaction had been effected on the CS Life accounts without authority, CS Life would want the client to raise that with the Relationship Manager.

202. Sixthly, Mr Lescaudron, as the relationship manager, was also tasked by CS Life with arranging for the payment of the Policy Assets into the relevant accounts with the Bank and for giving the "*explicit instruction*" for the investment of the Policy Assets "*in a management mandate*". This is confirmed by an email from CS Life to Mr Lescaudron sent on 15 August 2012:

> "• *VERY IMPORTANT: PLEASE NOTIFY US IMMEDIATELY (BY THE SALES AND ADVICE TOOL (THE "STATUS" TAB), BY EMAIL OR TELEPHONE) WHEN THE PAYMENT FOR THE SECURITIES IS COMPLETE.*
> *Your opinion is important, as it is the condition for the issuance of the insurance policy, as well as for the investigation of the investment in a management mandate. Without your explicit opinion, the instruction to start the investment in a management mandate will not be given. The single premium will be evaluated when the payment is complete. The risk of exchange rate or loss of value is borne entirely by the policyholder*."

203. The above evidence given by witnesses tendered by CS Life is consistent with contemporaneous documentary evidence. In relation to the Sandcay Policy, CS Life

enclosed the policy documentation under cover of a letter dated 7 December 2012 and expressly advised the policyholder that "*If you have any questions or would like any changes to be made, please ask your Relationship Manager. We are delighted to be able to offer you a truly personal-client service*." Mr Celia accepted that CS Life was in this letter expressly holding out Mr Lescaudron i.e., the relationship manager, as the person who was to provide the "*personal-client service*" on its behalf.

204. The critical role of the relationship manager was explained to the Court by Mr Keusch, CS Life's Head of Life Insurance Management at the Bank:

> *"Q.…The basic point you are making in this section [of your witness statement] is that in so far as dealings with the client were concerned in relation to the proposal of the policies, that was all done through the relationship manager?*
> *A. It was done by the relationship manager, correct.*
>
> *Q. Likewise, explaining to the client what the LPI policies did, what their benefits were, again done by the relationship manager?*
> *A. Correct.*
>
> *Q. Getting the client's agreement on what the client wanted, again that was done by the relationship manager for CS Life?*
> *A. Correct*
>
> *Q. Putting the documents together for agreement, again done by the relationship manager?*
> *A. Yes.*
>
> *Q. And then subsequently, after inception of the policies, all dealings with the client during operation of the policies in connection with the policies was done, again, through and by the relationship manager?*
> *A. Correct.*"

205. The Court accepts that it was part of the role of a Credit Suisse relationship manager not only to prepare all client documentation and to lead on managing the assets, but also to be the single point of contact for each client with respect to their dealings with Credit Suisse, regardless of which Credit Suisse entity may be involved. The Plaintiffs contend and the Court accepts that this explains why CS Life did not deal directly with Mr Ivanishvili (or his assistants) but instead dealt with him through Mr Lescaudron *qua* client relationship manager. Mr Lescaudron was Mr Ivanishvili's relationship manager for his relationship with Credit Suisse (generically), so primarily with the Bank but also for CS Life. No distinction was made by Mr Lescaudron by reference to different Credit Suisse legal entities in his dealings with Mr Ivanishvili.

206. Moreover, it is apparent to the Court that CS Life delegated responsibility for the sale of LPI Policies and for reporting on the LPI Policies to the Bank and to the relationship managers. The Court finds that when the Bank and Mr Lescaudron sold the LPI Policies and reported on the LPI Policies to the Plaintiffs they were acting on behalf of CS Life. The Collaboration Agreement dated 25 January 2005 does not negate the existence of an agency relationship between CS Life on the one hand and Mr Lescaudron and the Bank on the other. Indeed, Professor Pichonnaz expressed the view that the Collaboration Agreement is properly characterised under Swiss law as a commercial agency contract.[4]

207. CS Life invites the Court to reject this proposed finding sought by the Plaintiffs principally on the ground that this is not a pleaded issue. The Court is unable to accept the submission in the circumstances of this case. It is reasonably clear from the Plaintiffs' pleaded case that they contend that the Bank and/or Mr Lescaudron were acting at CS Life's agents in marketing, promoting and selling the Policies to the Plaintiffs (see for example paragraph 50A of the Re-Amended Statement of Claim and paragraph 19 of the Amended Reply).

208. The evidence of Mr Ivanishvili in his first witness statement at [57] is that he "*was led to believe that Patrice (and his colleagues) acted on behalf of the relevant Credit Suisse*

[4] Pichonnaz 1 [82]

entities that we were discussing and with whom we were investing, as I was not introduced to any of the other Credit Suisse entities, instead it was Patrice and his superiors who presented the investments, asked me to sign documents and reported on their progress."

209. In the opening written submissions of the Plaintiffs, it is foreshadowed that "*There is an issue between the parties about whether Mr Ivanishvili and Mr Lescaudron (acting on behalf of CS Life) agreed when the Meadowsweet policy was sold to Mr Ivanishvili, that the Meadowsweet assets would be managed by the Bank on a discretionary or non-discretionary basis*."

210. All the witnesses have been examined in relation to this issue. No doubt the evidence has developed with the cross examination of CS Life's witnesses, but it cannot reasonably be contended that CS Life has been taken by surprise or that there is any unfairness to CS Life for the Court to consider the evidence which they have given without any objection from CS Life.

211. Accordingly, having regard to the evidence outlined above, the Court finds that CS Life delegated responsibility for the sale of the LPI Policies, agreeing the terms on which assets would be transferred to CS Life (including the '*investment alternative'*), reporting on the LPI Policies and any ongoing dealings with respect to the LPI Policies to Mr Lescaudron *qua* Mr Ivanishvili's relationship manager.

(3) ***Mr Ivanishvili (on behalf of Sandcay and Meadowsweet) agreed with Mr Lescaudron (acting on behalf of CS Life) that the Policy Assets would be managed by the Bank on a discretionary basis***.

212. Mr Ivanishvili's clear evidence is that he was always told and always understood that Credit Suisse was responsible for managing the investments within the Policy Accounts. At paragraph 97 of his first witness statement Mr Ivanishvili states that:

"*At no time, however, did I intend to take responsibility for managing the investments within the accounts, nor did anyone at Credit Suisse ever suggest during my discussions with them that I had such responsibility. As I have said, I had no experience of managing such large sums of money; I had no training in finance or investment management; and I had no experience of markets other than Russian and Georgian markets. Importantly,* ***I was paying Credit Suisse (as the experts) substantial sums of money to provide this service. If I had wanted to direct the investments myself, I would have continued investing the money on my own and saved considerable money in fees***."

213. In his reply witness statement Mr Ivanishvili again makes the point that he was always told, always understood, that Credit Suisse was responsible for managing investments within the Policy accounts:

"*17… I had no involvement at all in the day-to-day trading on the accounts - my involvement was limited to meeting Credit Suisse once or twice a year to discuss performance and high-level strategy…*

18. As far as I was concerned, once I have set the parameters of the investment activity that could take place on the Policy accounts, it was for Credit Suisse to manage accounts at their discretion, this is why I was paying them.

19. I was always told, and always understood, that Credit Suisse was responsible for managing the investments within the Policy Accounts…

20. Had I been told that I was responsible for managing or directing the investments on the Policy Accounts, I would not have agreed to enter into the Policies…"

214. It is not in dispute that the proposal of the policies by Mr Lescaudron and the agreement of them by Mr Ivanishvili came about in the context of an existing relationship between Mr Ivanishvili and the Bank under which Mr Ivanishvili had already placed his assets

with Credit Suisse for it to manage (with investment objectives agreed in 2005) and that Credit Suisse was, so far as Mr Ivanishvili understood, already doing so. Mr Lescaudron was already the Relationship Manager. Mr Lescaudron's proposal of the Meadowsweet Policy was that Mr Ivanishvili should move assets that were already invested with Credit Suisse into the LPI Policy structure. In fact, almost all the Meadowsweet policy premium – about $459m of $480m – was simply transferred from the existing Meadowsweet accounts with Credit Suisse, and the balance from Mr Ivanishvili's personal accounts with Credit Suisse. As Mr Ivanishvili explains in his first witness statement "*save for the early input from me in relation to the investment in Russian stocks, Credit Suisse had always taken the lead in relation to investment decisions on the accounts*." Mr Ivanishvili had not changed his reasons for wanting his assets to be managed by Credit Suisse and had not changed his investment objectives. The court accepts that the question of choice of investment alternative for the Meadowsweet Policy Assets (discretionary or non-discretionary) would not have been a major issue unless he had cause to change what he had wanted before. In 2011 he did not want any such change: "*by the time the Policy was issued in November 2011, the last thing I would have wanted was to be appointed as an investment manager since I was preparing to launch an opposition party to challenge the Georgian government in the 2012 elections."*

215. The Court accepts that Mr Ivanishvili gave clear, consistent, and convincing evidence that he did not, and would not have, agreed that he (or his assistants) would be in charge of making investment decisions with respect to the assets on the Policy Accounts. As Mr Ivanishvili explained in cross examination; "*we have given this money for management of the Credit Suisse and we just didn't know how to do this. We trusted this money to them and whatever the trust structure or any other structure, neither me nor Mr Malkin have not had understanding of this. So we were just giving this money for them for management*."

216. In cross examination Mr Ivanishvili confirmed that his understanding throughout was that the Bank was managing the investments on the Policy Accounts. In this regard there

was no change in Mr Ivanishvili's understanding and agreement from what he had sought and agreed with Credit Suisse from the start:

> *"Q. Are you aware that there are essentially three types of mandate? There is a discretionary mandate where the bank takes complete control of the assets, makes all investment decisions and you simply get a report from time to time telling you how the investments are getting on. Secondly, there is a non-discretionary mandate, where you give instructions to the bank and the bank advises you as to how you might give those instructions. Thirdly, there is execution only where you simply give instructions without any advice. Those are the three possibilities, aren't they, in relation to mandates?*
>
> *A. So I never -- nobody ever explained this to me in so much detail, but* ***as far as I understand our relations with the bank back then, this was indeed in the scope of the first type of mandate, because my expectation was for them to manage my assets without me interfering*** *and the only condition that I had was for them not to act too rashly, not to be too risky in treating my assets."*

217. Mr Ivanishvili further confirmed that nor was there any change of what he wanted when Mr Lescaudron proposed the second policy (and trust structure) to receive the new money Mr Ivanishvili wanted to invest with Credit Suisse. His evidence in relation to the Sandcay Policy was that he wanted the assets to be "*properly and professionally managed by competent people and ultimately left for the benefit of my family*".

218. Mr Bachiashvili, who acted as Mr Ivanishvili's intermediary with the Bank from 2012, explained in cross examination that when he started assisting Mr Ivanishvili in 2012 he was informed that the Bank was managing Mr Ivanishvili's portfolio: "*I was given general instruction by Mr Ivanishvili that those banks are managing all the portfolio and all the wealth which is entrusted to them*." He also confirmed that it was his understanding that throughout the material period the Policy Assets were being managed by a team of investment management professionals at the Bank.

219. Mr Bachiashvili was clear in his evidence that he certainly did not consider that it was any of his duty to manage the investments in the Policy Accounts. In his first witness statement he explains at paragraph 28 that:

> "*It would have been ridiculous to suggest that I was the person entrusted to manage Mr Ivanishvili's accounts. Credit Suisse was paid handsomely to perform this role. In order to manage Mr Ivanishvili's accounts, I would have needed access to daily or real-time financial information services such as Reuters or Bloomberg and all the computer equipment required to use those services. I would also have needed to dedicate many hours a day to managing the portfolio – Credit Suisse knew this was not possible given that I had a full-time job, not to mention none of the additional training I would have needed. There was in the circumstances never any suggestion from Credit Suisse that I should be providing the investment instructions or making the investment decisions on the accounts – Credit Suisse did not ask for my advice or instructions before making investments*."

220. The evidence given by Mr Ivanishvili and Mr Bachiashvili is entirely consistent with the documentation before the Court:

(1) An internal Credit Suisse '*travel report'* from Mr Lescaudron to his superiors including Mr Dastmaltschi, Mr Andreas John and Mr Vitse (who was present when the Sandcay Policy was sold to Mr Ivanishvili in July 2012) sent on 12 November 2012 following a meeting with Mr Ivanishvili on 8 November 2012 stated that: "*This investment proposal relates to a USD 1 billion total, half already received, half to be received. The major options had been validated already in July by the client: the fact that* ***almost all will be discretionary*** *the fact that we will invest a large part in external managers (100% of the party Hedge Funds and PE) and the global asset allocation"* (emphasis added).

(2) Mr Lescaudron in fact executed transactions on the Policy Accounts without instructions, which strongly suggests that Mr Ivanishvili believed the Bank was

managing the Policy Assets on a discretionary basis. If Mr Ivanishvili had agreed that he would personally be making the investment decisions on the Policy Accounts, he would have been very surprised, and immediately raised concerns, when the Bank was doing so.

(3) Mr Lescaudron's communications with Mr Ivanishvili are only explicable if Mr Lescaudron was taking the investment decisions. If Mr Ivanishvili had agreed that he was personally supposed to be in charge of managing the Policy Assets, these communications would be nonsensical and would have raised alarm bells. Thus:

(a) On 30 January 2013, Mr Lescaudron emailed Mr Bachiashvili to say:

"*Regarding the 'old mandate' [i.e., the assets the Bank was managing before the funds from the sale of the Russian assets were transferred to Credit Suisse], we have to define a way to work together. **So far we have been extremely free to manage these assets** and it will be good to have a dialogue to see what you want to do, if you want to change anything, if you want to be more involved, etc… We will prepare the infos and different proposals on that topic*" (emphasis added). Mr Bachiashvili responded "*we are not planning to change the level of our involvement*".

(b) In September 2013 Credit Suisse reported that the value of Mr Ivanishvili's portfolio (i.e., all his investments with the Bank) had increased significantly such that it now exceeded USD 1 billion. Credit Suisse appeared to be managing Mr Ivanishvili's portfolio successfully, and so Mr Ivanishvili transferred further funds to Credit Suisse from late 2013 to early 2015.

(c) The positive news continued into 2014. On 21 January 2014 Mr Lescaudron wrote to say "*[w]e had already in January some good news for the portfolio*" and that he wanted to "*share*" them with Mr

Bachiashvili. Mr Lescaudron then summarises "*some of*" the various investments. The Court accepts that his summary can only sensibly be understood on the basis that the Bank and Mr Lescaudron had been managing the portfolio.

(d) On 7 March 2014, Mr Lescaudron reported that "*[t]otal performance ytd is USD 88 m, which is really a strong figure*". He explained that this was because of an "*extraordinary profit on the share of KAZAKHMYS*". Mr Lescaudron said that he "*built up a position on the stock that appeared interesting*", that he had pursued "*in parallel an interesting zero- cost option strategy on Kazakhmys, with sale of PUTs and buy of CALLs*" and that "*we sold 70% of the position and therefore locked more than 2/3 of the profit*". The Court accepts that this email is only explicable if the Bank was managing the investments.

(e) As noted at [98] above, on 26 June 2015, Mr Lescaudron emailed Mr Bachiashvili out of the blue saying that a portion of Mr Ivanishvili's portfolio had been "*basically managed by me and my team outside the frame of a mandate. We are there in a grey zone and the point is that it is this part that proved the most profitable for BI in the past (we generated USD 91m end of May and so far in June another 13/15m profit in June. 2/3 of the profit ytd comes from my trading activity*" (emphasis in original). The Court accepts that this email shows that, regardless of the position recorded in the initial paperwork, Mr Lescaudron and the Bank, rather than Mr Ivanishvili and Mr Bachiashvili, had been managing Mr Ivanishvili's portfolio on a fully discretionary basis.

(f) Mr Lescaudron travelled to Tbilisi with Mr Babak Dastmaltschi (then head of the group UHNWI Western and Emerging Europe), Mr Cédric Huguenin (Mr Lescaudron's direct supervisor at the time and head of

UHNWI Geneva) and Ms Novoa Sampaoli to meet Mr Ivanishvili on 29 or 30 June 2015. Mr Dastmaltschi raised with Mr Bachiashvili the fact Credit Suisse was managing Mr Ivanishvili's assets without a proper mandate, i.e., in a '*grey*' zone. Mr Bachiashvili did not escalate this to Mr Ivanishvili at the time because it was presented as a matter of form only. The Court accepts the submission that this episode is clear evidence that Credit Suisse was managing Mr Ivanishvili's investments, consistent with Mr Ivanishvili's case, and the Bank had proposed a way forward.

(4) The Court also accepts the submission that Messrs Ivanishvili and Bachiashvili's responses after the margin calls were made reflect their understanding that the Bank was managing the Policy Assets. (See [108] to [112] above).

(5) The Court further accepts that it is inherently improbable that Mr Ivanishvili, an extremely busy businessman and senior politician would have agreed to be personally responsible for managing the Policy Assets. The Court accepts that the whole point of taking his wealth to Credit Suisse was that he wanted it to be managed professionally by competent professional wealth managers.

221. Other than reliance upon the terms of the policy documentation CS Life does not advance a positive case that, as a matter of fact, Mr Lescaudron did not agree with Mr Ivanishvili that the Bank would manage the LPI Assets on a discretionary basis. As Mr Smouha QC points out CS Life has proffered no witness that attended the meetings at which the LPI Policies were sold; the witnesses that it did adduce evidence from accepted that they had no knowledge of what was in fact agreed between Mr Lescaudron and Mr Ivanishvili. That is despite Credit Suisse employees who were at those meetings still being employed by Credit Suisse.

222. In relation to the meeting in March 2011 in Tbilisi in relation to the sale of the Meadowsweet Policy, Mr Ivanishvili recalls that the meeting was attended by Mr

Lescaudron and his colleagues. In relation to the meeting in June 2012 Mr Vitse was present when the Sandcay Policy was sold to Mr Ivanishvili. He was "*the direct supervisor of P.L. … between 2010 and 30 September 2013, and shared the office premises with P.L.*" He had been tasked with keeping a close eye on Mr Lescaudron, given Mr Lescaudron's many disciplinary issues: "*Philippe Vitse was appointed IP Geneva team leader, to avoid issues such as those raised above, with a particular focus on Patrice [Lescaudron], in light of his mixed track record*." The FINMA Report explains that Mr Vitse had been informed about Mr Lescaudron's "*problems with…cross trades*" in June 2011.

223. The Court finds that, in the absence of any evidence to the contrary, these individuals were available to give evidence, yet CS Life did not call them to do so. In the circumstances, the Court considers it is appropriate to infer that, had they given evidence, they would have confirmed that Mr Ivanishvili had agreed that the Policy Assets were intended to be managed on a discretionary basis.

224. CS Life has also not discovered any notes from the meetings at which the LPI Polices were sold to Mr Ivanishvili, even though Credit Suisse would, or should, have kept client notes of these meetings. Indeed, there is now evidence that Mr Lescaudron provided '*travel reports*' updating his superiors on meetings he had with Mr Ivanishvili (the Plaintiffs have only been provided with one such report). The Plaintiffs complain that it is striking that no '*travel reports'* have been discovered reporting on the meetings at which the Policies were sold to Mr Ivanishvili. The Court considers that it is appropriate in the circumstances to infer that CS Life failed to discover client notes, '*travel reports'* and similar documents relating to the meetings at which the LPI Policies were sold because these documents would have recorded an agreement between Mr Lescaudron and Mr Ivanishvili to the effect that the Policy Assets were to be managed by the Bank on a discretionary basis.

225. In considering the issue of the investment mandate agreed upon by Mr Ivanishvili CS Life contends that the issue is to be resolved exclusively by the construction of the LPI

application documents. CS Life argues that this case is no different from any other insurance agreement and accordingly when considering the rights and obligations of the parties to the insurance agreement the Court's function is confined to the construction of the relevant documents. This legal position was rehearsed by almost all of the Credit Suisse witnesses in almost identical terms in their witness statements, though none of them was able to give evidence on what Mr Ivanishvili and Mr Lescaudron had discussed and agreed. Thus, by way of examples:

(1) Ms Homann, in her first witness statement, argues that "*The policy did not include a discretionary mandate for the Bank to manage the investments in accordance with its discretion, instead it provided an investment alternative under which the client would be responsible for directing the investment of the fund*."

(2) Mr Keusch, in his witness statement, contends that "*the management and oversight of the policy assets were the responsibility of the policyholders, who had directed the investments through the structure put in place by the LPI contracts*."

(3) Mr Coffey, in his witness statement, states that "*both Meadowsweet and Sandcay chose a wide 'investment alternative', where Mr Ivanishvili and his agents acted under the delegated power of attorney as ' investment manager', as asked for by Mr Ivanishvili in the letters of wishes. So they were responsible for choosing the investments from a very wide range of investment options*."

(4) Mr Celia, in his first witness statement, also argues that "*This structure allowed Mr Ivanishvili to place his assets into the LPI Policies but retain control over the investment of those assets. As described above, the assets were wrapped in the LPI Policies, but the day to day reality of Mr Ivanishvili's management of those assets was largely unchanged*."

226. However, as Mr Smouha QC correctly submits, the basic fallacy of the submission (and the witnesses' argument) was that there was in the application document a box to tick for

recording the client's choice of investment alternative. It is now apparent, from the evidence of Ms Homann, that the application document itself had never specified that even in in its standard form template. Rather Credit Suisse's back office, internally, interpreted what they thought the client wanted from the Relationship Manager's selection of the various forms and terms and conditions attached to the Application. Thus, if the Relationship Manager did not attach the Discretionary Mandate terms attachment to the pack (so the client would not even know that there was such a set of terms, even if reading the pack carefully) the back office processing the application would assume that the client did not want discretionary management.

227. The Court accepts Mr Smouha QC's submission that it is now reasonably clear that Mr Lescaudron would have been doing this deliberately and carefully in 2011 and 2012 to stop the back office doing something which would cause the Policy Assets, as they were moved into the Policy Accounts, being taken out of the "*grey zone*" that he was operating in whereby the client thought that the assets were being managed by Credit Suisse portfolio managers but Mr Lescaudron was dealing with the assets. Thus:

(1) CS Life's witnesses confirmed that Mr Lescaudron was in charge of putting together the LPI Application Documentation. The Court accepts that it was in Mr Lescaudron's interest to put in place documentation which would have maximised his ability to carry out his fraud, irrespective of Mr Ivanishvili's genuine instructions or the agreement that was reached.

(2) Mr Ivanishvili would only have seen the documents that Mr Lescaudron opted to print off and show him. The Court accepts that given the LPI documentation contains nothing on its face to indicate which type of investment alternative (discretionary or non-discretionary) was selected, the documentation itself is not reliable evidence of the agreement that was in fact agreed between Mr Lescaudron and Mr Ivanishvili.

(3) CS Life places weight on the fact that the "*profile*" on the LPI Policy Documentation is stated as being: "*Structured investments, investment funds, direct investments and fiduciary deposits*", which it now seems (based on Ms Homann's evidence) would be understood by the Credit Suisse back office as internal code indicating a non-discretionary mandate in whole or in part. The Court accepts Mr Smouha QC's submission that this reference alone could not have suggested to Mr Ivanishvili at the time (even if reading the documents carefully) or indeed to any reader or in any objective interpretation that the applicant had or was thereby selecting a non-discretionary investment alternative (and for all the Policy Assets).

(4) In cross-examination Ms Homann accepted that her understanding that the LPI documentation evidences a '*choice*' of a particular type of investment alternative only really makes sense if the relationship manager is doing their job properly by faithfully completing the form in accordance with the agreement reached with the client.

228. The LPI Policy documents were closely considered with Ms Homann in her cross examination – and she was certainly familiar with and able to give evidence from her experience of back-office familiarity with the standard documents, the blank template and how the back office would interpret the RM's selections and omissions. It was Ms Homann's evidence that:

(1) The Bank would hold the assets for CS Life on either a discretionary or non discretionary basis (transcript page 11 on Day 9).

(2) There are only those two options or alternatives (page 11 and page 33).

(3) The choice would depend on which investment alternative had been agreed with the client.

(4) The policyholder could make different choices for different sub-accounts or for different parts of the policy portfolio (page 12).

(5) The choices might or might not have been made at the time of the application and might be discussed or changed as they went along and from time to time (page 13).

(6) The choice would be a matter to be discussed and agreed between the client and the relationship manager (page 12).

(7) Though she had asserted in her witness statement (in paragraph 18) that "*Mr Ivanishvili had chosen an investment alternative without a discretionary mandate*" in fact she did not know what he had agreed "*because this was done between them on the bank side*" (page 34, lines 17-20) and she did not know even what had been discussed because "*I was never in these clients' meetings*" (page 14, lines 13-17) (and likewise had no knowledge for Sandcay, page 90).

(8) If Mr Ivanishvili had chosen only an investment alternative without discretionary management, then CS Life would not place the assets with the portfolio management team at the Bank and that what should happen is that all dealings with the assets on those accounts should be only as instructed by Mr Ivanishvili (page 18).

(9) And there should not be any circumstances in which there could be a dealing with an asset on those accounts other than as instructed by Mr Ivanishvili ("*because he had the power of attorney*") (page 18).

(10) Then, when shown a series of documents about the Meadowsweet Policy, in which Mr Lescaudron himself said that Mr Ivanishvili had selected a discretionary alternative; referred to charging of management fees on Meadowsweet that would only be referable to a discretionary alternative; and referred to the MACS team which would only be involved in a discretionary mandate (pages 21 onwards) Ms Homann accepted that her interpretation / assertion that Mr Ivanishvili had chosen only a non-discretionary investment alternative must be at least in part incorrect (page 26), and that the contemporaneous documents were not consistent with her

interpretation (page 29) and that her interpretation of the Meadowsweet application form may not be correct (page 30). She accepted that she had not seen any document on Meadowsweet which indicated or recorded a change of Mr Ivanishvili's intention or selection (pages 26-29).

(11) Similarly documents which showed Mr Lescaudron admitting that he traded Raptor without authorisation and the "*grey zone*" email could not be reconciled with her interpretation that there were non-discretionary mandates across the whole of Meadowsweet and Sandcay (except for the 75-3 sub-account) (pages 30-36).

(12) In the standard application itself (and in the Meadowsweet and Sandcay application forms) there is nothing that tells the client or asks the client to select discretionary or non-discretionary mandates – because "*the RM would know that*" and because "*it has already been preselected*" (page 47). The reference to a profile and to a list of single instruments would, to Ms Homann and the back office be a strong indication of a non-discretionary mandate but only because "*I know this and worked with this*" and knowing of the Bank's systems. It would be correct only if the RM was doing his job properly and selecting the documents correctly (pages 50-51 and 53-54). Inside the Bank they would interpret it in that way because "*I am biased, I know the product very well*" (page 76) (and for Sandcay page 94). At pages 76, line 24-77:

> *"Q. There is nothing here whatsoever [in the application document] that tells the client that this will be a without discretionary mandate across the whole portfolio?*
> *A. Agree."*

(13) If the RM omits to include the terms for "*Investments with Discretionary Management*" document from the template pack (as Mr Lescaudron did) Ms Homann agreed that there was nothing to tell Mr Ivanishvili there is another

document to sign if he has agreed discretionary management with the RM: "*No, you are right*" (page 82) (and for Sandcay, page 94).

229. The Court accepts that the omission of documents by Mr Lescaudron from the pack appropriate to include if the RM has agreed a discretionary investment alternative with the client would not be apparent to the client and there would be nothing to suggest that anything further was required. Furthermore, as Ms Homann accepted, a policyholder could have different parts of the policy asset portfolio on different investment alternatives – some sub-accounts could be non-discretionary and some could be discretionary. But the application form was not the place where those choices would be recorded nor would that appear on the face of the policy – because the client was buying an insurance policy, not sub- accounts. Thus the selection of investment alternative might be discussed and agreed with the RM before, during or after the application process. The application form was not the investment alternative selecting agreement.

230. Mr Moverley Smith QC, for CS Life, argues that the Court should not make this factual finding sought by the Plaintiffs on the ground that there is no allegation in the pleaded case that Mr Ivanishvili had agreed with Mr Lescaudron that the Policy Accounts would be managed by the bank on a discretionary basis. He argues that in the circumstances it would be unfair to allow the Plaintiffs to argue this unpleaded factual case.

231. In relation to this complaint by CS Life it is to be noted that the Plaintiffs expressly plead that (i) insofar as no discretionary mandates operated in relation to the CS Life Accounts, the Policy Assets were to be invested in accordance with the investment profile (captioned "investment alternative") in the application form, which permitted investment in structured investments, investment funds, direct investments and fiduciary deposits (clause 6 of the GPC); and (ii) insofar as discretionary mandates did operate in relation to the CS Life Accounts, the Policy Assets were to be managed according to the current investment policy of the custodian bank and the guidelines relating to the discretionary mandates issued by the Swiss Bankers Association (clause 1 of the GPC) (paragraphs 51.3 and 51.4 of the Re-Amended Statement of Claim). It is also expressly

pleaded that CS Life failed to assess whether the investment alternative was being complied with; and that CS Life failed to ensure that the Policy Assets were invested and managed in accordance with the Bank's current investment policy and/or the guidelines relating to discretionary mandates issued by the Swiss Bankers Association in 2013, contrary to clauses 1 and 6 of the GPC (paragraphs 53.7(b) and (g)).

232. It is clear beyond any reasonable doubt that this issue is expressly raised in the respective witness statements filed on behalf of the parties. As set out at [212] and [213] above the witness statements of Mr Ivanishvili made it clear that it was his case and his understanding that the Bank was managing the Policy Accounts on a discretionary basis. As noted above in [219] this was confirmed in the witness statement of Mr Bachiashvili. However, as the extracts from the witness statements filed on behalf of CS Life set out in [215] make clear, it was CS Life's case that Mr Ivanishvili had, as a matter of construction of the LPI documentation, agreed that he took the responsibility of managing the investments in the Policy Accounts.

233. The Plaintiffs made it clear in their opening written submissions that it was their case that Mr Ivanishvili and Mr Lescaudron had agreed that the investments in the Policy Accounts would be managed by the Bank on a discretionary basis. Paragraph 76 of the Plaintiffs opening submissions states that:

> "*There is an issue between the parties about whether Mr Ivanishvili and Mr Lescaudron (acting on behalf of CS Life) agreed when the Meadowsweet policy was sold to Mr Ivanishvili, that the Meadowsweet assets would be managed by the Bank on a discretionary or non-discretionary basis.* ***The Plaintiffs' case is that it was always agreed and understood that the assets would be managed by the Bank on a discretionary basis.*** *Conversely, CS Life says that Mr Ivanishvili selected a non-discretionary mandate option and suggests that he subsequently directed all investments and transactions on the Meadowsweet Policy Accounts, which will no doubt be explored in the evidence*."

234. All the relevant witnesses, in particular Mr Ivanishvili and Ms Homann, were examined, without objection, in relation to this issue. Ms Homann's detailed evidence in relation to this issue is summarised in [228] above.

235. In all the circumstances the Court does not consider that it is either unreasonable or unfair that the Court should deal with this issue and take into account the evidence which the Court has heard. No doubt the evidence in relation to this issue developed as a result of cross examination of witnesses. However, the Court does not consider that this evidence introduces a new cause of action which was not pleaded in the Re-Amended Statement of Claim.

236. CS Life also contends that the Bank and Mr Lescaudron were not CS Life's agents for the purposes of putting forward the completed LPI application documentation, but the agents of the clients (Meadowsweet and Sandcay) applying for the policies. The issue of agency is dealt at [284] to [303] and [643] to [659] below.

237. Having regard to the evidence summarised above the Court finds as a matter of fact that Mr Ivanishvili (on behalf of Sandcay and Meadowsweet) agreed with Mr Lescaudron (acting on behalf of CS Life) that the Policy Assets would be managed by the Bank on a discretionary basis.

(4) CS Life knew at the time the Policies were taken out that they were being taken out for the benefit of Mr Ivanishvili and his family

238. The Court accepts that the LPI Polices are life insurance policies which, as CS Life's witnesses explain, are normally taken out for inheritance planning purposes. Ms Homann explained that one of the rationales for the LPI product was that it offered a mechanism for the smooth organisation of a client's succession. CS Life was aware that the LPI Policies were not being taken out solely to benefit Meadowsweet and Sandcay, but were also for the benefit of Mr Ivanishvili and his family. Ms Homann accepted that "*CS Life*

knew, of course that the policies and their assets were for the benefit of Mr Ivanishvili and his family".

239. This is consistent with the contemporaneous documentation. For instance, the Sandcay LPI Application Form records on its face that the "*purpose of concluding this product*" was "*Succession planning*". Furthermore, CS Life was provided with a Credit Suisse presentation before the Sandcay Policy was taken out describing Mr Ivanishvili's family and explaining that the purpose of the Green Vals Trust (under which Sandcay sits) was, *inter alia*, to "*organize [Mr Ivanishvili's] succession smoothly and in a flexible way*".

240. In all the circumstances the Court finds as a matter of fact that CS Life knew at the time the Policies were taken out that they were being taken out for the benefit of Mr Ivanishvili and his family.

(5) If the Policy documentation evidences a 'choice' that the Policy Assets should be managed on a non-discretionary basis this was fraudulently put in place by Mr Lescaudron (acting on behalf of CS Life)

241. The Court has held, at [212] to [237] above, that Mr Ivanishvili (on behalf of Sandcay and Meadowsweet) agreed with Mr Lescaudron (acting on behalf of CS Life) that the Policy Assets would be managed by the Bank on a discretionary basis.

242. CS Life's case is that the LPI documentation records a selection of an investment alternative with a non-discretionary mandate. The Court has not found that the LPI documentation records a selection of an investment alternative with a non-discretionary mandate (see [225] to [229] above). Accordingly, the determination of this issue is unnecessary for the outcome of these proceedings. However, the Court expresses its view briefly.

243. The Court has concluded that Mr Lescaudron engaged in wrongful conduct and was mismanaging Mr Ivanishvili's accounts with the Bank before the Policies were taken out (Findings 15 and 16 at [354] to [359] below). He went on to fraudulently mismanage the

Policy Accounts thereby earning himself very substantial amounts in bribes and commissions (Finding 15(ii) at [339] to [345] below).

244. The Court accepts the submission that in order to facilitate his fraud, Mr Lescaudron needed the freedom to deal with the Policy Accounts, irrespective of what was agreed with Mr Ivanishvili. It is now common ground that if the investment alternative with a discretionary mandate had been put in place across the entirety of the Policy Assets, then they would have been placed with the Bank's portfolio management team (Multi Asset Class Solutions or "MACS") and thus out of Mr Lescaudron's reach. Conversely, if the non-discretionary investment alternative was put in place, Mr Lescaudron as the relationship manager would have a central role, in that he would be in charge of relaying investment instructions from the client to the operational team at the Bank (as long as the Policyholders did not utilise the Bank's 'DirectNet' service, which allowed them to monitor trading and book investments directly). In this regard it is noteworthy that Mr Lescaudron did not take steps to ensure the Policyholders had access to the Bank's 'DirectNet' service. This ensured that Mr Ivanishvili was dependent on Mr Lescaudron for information about the Policy Accounts.

245. In the premises, the Court accepts that it is likely that Mr Lescaudron deliberately did not select the correct additional documents for the application pack that would have shown the insurance department that he had agreed with Mr Ivanishvili discretionary mandates across the totality of the Policy Accounts. This was to engineer a situation in which (i) Mr Ivanishvili believed the Bank was professionally managing the Policy Assets on a discretionary basis; but (ii) in fact, Mr Lescaudron had a free reign to do as he pleased with the Policy Assets, by the simple expedient of falsely recording client instructions for the trades he was doing.

(6) Mr Lescaudron did not place the Policy Assets in toto with the Bank's portfolio management team in order to facilitate his fraudulent management of the Policy Accounts

246. The Court has held that (i) CS Life delegated responsibility for the sale of the LPI Policies, agreeing the terms on which assets would be transferred to CS Life (including the 'investment alternative'), reporting on the LPI Policies and any ongoing dealings with respect to the LPI Policies to Mr Lescaudron *qua* Mr Ivanishvili's relationship manager (Finding 2 at [188] to [211] above) and (ii) Mr Lescaudron committed a long-running fraud against Mr Ivanishvili, involving the Policy Accounts and that fraud included: (i) making investment decisions without proper authority; (ii) forging documents; (iii) executing investments for the purpose of obtaining unlawful commissions; (iv) directing the sale of assets for an undervalue; (iv) directing the purchase of securities at an overvalue; and (v) transferring assets to his other clients (Finding 15 at [313] to [353] below).

247. The Court accepts that had the Policy Assets been placed with the Bank's portfolio management team, Mr Lescaudron would have lost access to the Policy Accounts and therefore the ability to perpetrate his frauds. In the circumstances it is likely, and the Court finds, that had the Policy Assets been placed with the Bank's portfolio management team, Mr Lescaudron would have lost access to the Policy Accounts and therefore the ability to perpetrate his frauds.

(7) Mr Ivanishvili did not give Mr Lescaudron a "general instruction" to take investment decisions on the Policy Accounts and nor did he make the "final decisions" as to the investments that were made on the Policy Accounts.

248. CS Life, in its written closing submissions, contends that the best '*fit*' for the available evidence is that Mr Lescaudron did have general instructions to make investment decisions in collaboration with Mr Ivanishvili and his assistants from time to time and this is also consistent with Mr Ivanishvili's approach to investing in hedge funds and his instructions to Mr Khukunashvili.

249. The Court is unable to accept this submission made on behalf of CS Life for the reasons advanced by the Plaintiffs.

250. First, the Court finds that not only is there no formal record of such an instruction (e.g., a client note, or other record in the Credit Suisse file), but there is also no informal evidence. There is no evidence that Mr Ivanishvili transmitted the "*final decisions*" to Mr Lescaudron. All the contemporaneous evidence indicates that Mr Lescaudron was making investment decisions.

251. Second, both Mr Ivanishvili and Mr Bachiashvili rejected this suggestion in the clearest terms when it was put to them in cross examination. The Court accepts their evidence in relation to this issue.

252. Third, Mr Lescaudron admitted to executing investments on the Policy Accounts without authority. If he was acting under cover of a general authority provided by Mr Ivanishvili, as Mr Smouha QC correctly points out, this is what he would have told Credit Suisse and the police. The suggestion that Mr Lescaudron would have kept silent about the fact Mr Ivanishvili had given him "*general instructions*" and was making the "*final decisions*" on the investments seems unrealistic. On the basis of this new case theory Mr Lescaudron allowed himself to be convicted of fraud even though he would have had (it would appear) a defence to at least some of the charges.

253. Fourth, CS Life is effectively suggesting that Mr Lescaudron was granted a *de facto* discretionary mandate to manage the Policy Accounts. But that is not an option available under the LPI Polices. Mr Celia accepted in cross examination that the GPCs provide that there are only two types of investment alternative: discretionary (where the Bank selects the investments) and non-discretionary (where the policyholder selects the investments). There is no third option whereby the relationship manager selects the investments. Nor would this be permissible under Credit Suisse's internal policies which, understandably, require discretionary mandates to be administered by the appropriate team of qualified professionals at the Bank.

254. Fifth, as Mr Smouha QC observes, if Mr Ivanishvili was making the "*final decisions*" with respect to investment decisions on the Policy Accounts, then Mr Lescaudron would not have forged the client notes.

255. In all the circumstances the Court finds as a fact that Mr Ivanishvili did not give Mr Lescaudron a "*general instruction*" to take investment decisions on the Policy Accounts and nor did he make the "*final decisions*" as to the investments that were made on the Policy Accounts.

(8) Aside from the Sandcay 75-3 sub-account, investment decisions on the Policy Accounts were made by Mr Lescaudron without instructions from the Policyholders or their lawful attorney

256. The Plaintiffs' case is that Mr Lescaudron executed the investments on the Policy Accounts without instructions from the Policyholders or their lawful attorney.

257. CS Life submits that the communications between the Plaintiffs and Mr Ivanishvili's assistants and Mr Lescaudron were sufficient to provide Mr Lescaudron with authority to manage the Plaintiffs' portfolio.

258. The Court accepts Mr Ivanishvili's firm evidence that neither he nor his assistants[5], authorised the investments on the Policy Accounts.[6] In his reply witness statement, Mr Ivanishvili said that "*I had no involvement at all in the day-to-day trading on the accounts*…". Mr Bachiashvili explained his role was to act as an intermediary between Credit Suisse and Mr Ivanishvili;[7] he was not in charge of managing the Policy Accounts

[5] {Day 3/110}, per Mr Ivanishvili ("*He wasn't giving any instructions to Credit Suisse. This post, actually this position, was really very unimportant for him and his main role was in politics, fighting alongside with me*."); {Day 4/63}, per Mr Ivanishvili ("*the attitude towards selection of Mr Bachiashvili was the same as in relation to other assistants and he had no entitlement to interfere with the management of assets at Credit Suisse*."); {Day 4/86}, per Mr Ivanishvili ("*once again, I want to make the statement that none of my assistants have ever had any possibility to get involved in the management of the assets and Bachiashvili also did not have any such rights*.")

[6] E.g. {Day 3/80}, per Mr Ivanishvili ("*I confirm that I have never interfered with the management of the investments, that's right*."); {Day 3/102}, per Mr Ivanishvili ("*But I have never managed these assets, neither before they were transferred to the hedge fund, nor after this. I have never managed them.");* {Day 4/67}, per Mr Ivanishvili ("*I repeat, I never controlled Credit Suisse because I had -- I trusted Credit Suisse more, actually, than I trusted Mr Garibashvili or Mr Bachiashvili or Mr Khukhunashvili, or even Cartu Bank. That was my attitude towards them. I did not intend and I did not control them in any way*"); {Day 4/70}, per Mr Ivanishvili ("*Neither before this nor after this I have never been interfering with the investment management*."); {Day 4/80}.

[7] {Day 5/46} ("*I was given general instruction by Mr Ivanishvili that those banks are managing all the*

and did not give investment instructions to Mr Lescaudron. He considered Credit Suisse to be managing the Policy Accounts.[8]

259. The evidence given by Mr Ivanishvili and Mr Bachiashvili to the Court is consistent with the other evidence as well as the inherent probabilities.

260. First, the Court accepts that Mr Lescaudron forged the client notes, which is only explicable if Mr Ivanishvili was not giving instructions to Mr Lescaudron.

261. Secondly, the Court finds that Mr Lescaudron repeatedly admitted that he made the investment decisions on the Policy Accounts without authority which resulted in him being criminally convicted and being sent to prison. For instance, Mr Lescaudron's evidence in his deposition to the Credit Suisse Security Services (acting on behalf of CS Life) was that, with respect to Raptor he "*did a large amount of solo trading*" and that he "*did not have an advisory mandate to do this*".

262. Thirdly, CS Life is required to establish that Mr Ivanishvili personally gave all the investment instructions on the Sandcay account (because he was the only person with a power of attorney) and that he personally gave all investment instructions on the Meadowsweet account until 2014 when Mr Bachiashvili was given a power of attorney.

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portfolio and all the wealth which is entrusted to them, and I was there to communicate with them if there is some need from BI to the banks or if they need to communicate with him and I also was to get their results and relay to Mr Ivanishvili whenever he asks to.")

[8] {Day 5/49} ("*I was given general instruction by Mr Ivanishvili that those banks are managing all the portfolio and all the wealth which is entrusted to them, and I was there to communicate with them if there is some need from BI to the banks or if they need to communicate with him and I also was to get their results and relay to Mr Ivanishvili whenever he asks to…*"); {Day 5/58} ("*To me and to Mr Ivanishvili, everything was managed under the mandate, everything was basically managed by Credit Suisse.");* {Day 5/69} ("*Once again I was not dealing with $1.1 billion of assets. I was there just to give Mr Ivanishvili information about the balances on his accounts and relay the communication between them. I was not there to manage the assets, I was not there to manage the accounts, I was not there to question the mandates, I was not there to question any investments and in no occasions I have done so. So Mr Ivanishvili was very clear to me what was my job and I was doing my job very clearly*."); {Day 5/87} ("*So my job was not to monitor it and if I was asked to monitor the investment, I would refuse because it is a full time job and it needs special qualifications to monitor investments*.")

This is inherently improbable. The Court accepts Mr Ivanishvili's evidence that he was not giving frequent investment instructions telephone to Mr Lescaudron. The Court accepts Mr Ivanishvili's evidence when he told the Court:

> "*I have never been involved in the management of these assets and I have never been so -- then I would have to sign hundreds of the messages a day because there were so many changes. You can see what transactions were made, you see, that I would have to be involved only in this and I would have to sign hundreds of messages per day and you don't have any single document that would prove that I was managing this. It's unimaginable that somebody from the outside, one person from the outside, can manage all these assets. My understanding now and then, it was that these such assets should be managed by a large bank who has hundreds of thousands and they could do this*."

263. The Court is unable to accept the suggestion made on behalf of CS Life that Mr Bachiashvili was somehow making all the investment decisions on the Meadowsweet accounts after 2014 pursuant to the power of attorney. The Court accepts Mr Bachiashvili's evidence that he did not have Mr Ivanishvili's authority, the knowledge, time or equipment (for instance access to a Bloomberg terminal)[9] that would have been required to manage the Meadowsweet policy assets on behalf of Mr Ivanishvili.

264. Fourthly, the evidence before the Court is that there were extremely high volumes of trading on the Policy Accounts. This seems inconsistent with the suggestion that Mr Ivanishvili or his assistants gave the investment instructions:

(1) There is no genuine record of any instructions, let alone a large volume of instructions, having been given. The Bank is a regulated investment bank. If Mr Ivanishvili or his assistants had been giving regular investment decisions to Mr

[9] {Day 5/111} per Mr Bachiashvili ("*No I did not have option, I did not have Bloomberg terminal, I did not have proper training and I did not have a team and I did not have time. And every single employee of Credit Suisse knew that*.").

Lescaudron, the Bank would have a genuine record of the same. However, no such records have been produced to the Court.

(2) If Mr Ivanishvili and/or Mr Bachiashvili had been giving tens of thousands of investment instructions to Mr Lescaudron by telephone, there would be reference to such instructions in the contemporaneous emails between Mr Lescaudron and Mr Ivanishvili and/or Mr Bachiashvili. But there is no reference to Mr Ivanishvili having given instructions to Mr Lescaudron.

(3) Mr Ivanishvili and Mr Bachiashvili have discovered their telephone records. There is no record of anything like enough or long enough calls to Mr Lescaudron to support an argument that Messrs Ivanishvili and Bachiashvili were giving the investment instructions.

(4) The Policyholders did not have access to the Bank's '*DirectNet*' service. The '*DirectNet*' service allows the client to "*monitor his trading*" and give investment instructions without having to go through the relationship manager. As Mr Vaccaro explained, if a client is "*trading actively*", they would normally sign up for '*DirectNet*'. The fact the Policyholders did not access the '*DirectNet*' suggests they were not making the investment decisions on the Policy Accounts.

(5) There were so many trades being executed on a daily basis on the Policy Accounts that CS Life considered that there must have been "*automated*" trading taking place. The Court accepts that this strongly suggests that Messrs Ivanishvili and Bachiashvili were not giving instructions for these trades.

265. Fifthly, Mr Lescaudron's contemporaneous emails are only explicable on the basis that he/the Bank were making the investment decisions and wanted Mr Bachiashvili to believe that this was being done by the investment management team:

(1) Mr Lescaudron's emails reporting on the performance of the Policy Assets can only sensibly be read on the basis that Mr Lescaudron (or the Bank) were making the investment decisions.

(2) On 26 June 2015, Mr Lescaudron emailed Mr Bachiashvili saying that "*However there is a part of the portfolio (around 25% + margin) which is basically managed by me and my team outside the frame of a mandate. We are there in a grey zone*…" This is a clear statement that Mr Lescaudron (and his alleged "*team*") had been making the investment decisions. This appears to be common ground, given CS Life's construction of this email is that Mr Lescaudron was "*essentially coming clean about the fact that he had been essentially operating Mr Ivanishvili's account without any proper contractual basis to do so*".[10]

266. Sixthly, the Court accepts that it is inherently improbable that Messrs Ivanishvili and Bachiashvili would have instructed Mr Lescaudron to invest the Policy Assets in the manner that they were in fact invested, i.e., substantially into Raptor or into indirect Raptor funds (that Mr Lescaudron was associated with and obtained commissions from).

267. On the other hand, there is no genuine evidence to support CS Life's case that the investment decisions were made by Mr Ivanishvili or his assistants. CS Life's case up until trial was based on Mr Lescaudron's client notes, but these were not even put to Mr Ivanishvili or Mr Bachiashvili in cross-examination. The Plaintiffs put their authenticity in issue. CS Life has called no evidence to seek to establish that they are genuine or that they record anything truthful. Accordingly, the Court concludes that no weight can be placed upon them.

268. It was not put to Mr Ivanishvili that either he or his assistants had in fact authorised each individual transaction on the Policy Accounts. The high point of CS Life's case was that Mr Ivanishvili had given investment instructions to Mr Lescaudron in (unparticularised

[10] {Day 5/126} per Stephen Moverley Smith QC.

by date or otherwise) "*fairly general terms*", a contention which the Court has rejected at [255] to [258] above.

269. In all the circumstances the court finds that aside from the Sandcay 75-3 sub-account, investment decisions on the Policy Accounts were made by Mr Lescaudron without instructions from the Policyholders or their lawful attorney.

(9) Mr Lescaudron was not instructed (or otherwise authorised) by the Policyholders or their lawful attorney to build up the large concentrations in Raptor on the Policy Accounts.

270. The Court has already found that Mr Ivanishvili did not give Mr Lescaudron a "*general instruction*" to take investment decisions on the Policy Accounts and nor did he make the "*final decisions*" as to the investments that were made on the Policy Accounts *and* aside from the Sandcay 75-3 sub-account, investment decisions on the Policy Accounts were made by Mr Lescaudron without instructions from the Policyholders or their lawful attorney.

271. As noted at [104], [105], [114] to [116] above, Messrs Ivanishvili and Bachiashvili were both shocked to learn about the extent of the Raptor exposure, once it was revealed after the margin calls. It is Mr Ivanishvili's case that the extent of the exposure to Raptor was entirely unauthorised and was undertaken by Mr Lescaudron for the illegitimate purpose of receiving commission payments.

272. CS Life's case is that Mr Ivanishvili and Mr Lescaudron's arrangements was for the latter to act in accordance with general instructions from the former. CS Life contends that the Court will need to determine whether in the context of Mr Ivanishvili's clear attraction to the investment in Raptor and established willingness to take large positions in risky equities, it is more likely that he approved or acquiesced in the growth of the Raptor investments or not and, if he did not, at what point did his approval or acquiescence cease?

273. The starting point in this context is that Mr Lescaudron repeatedly admitted in the investigations into his fraudulent behaviour that he executed Raptor investments without instructions from Mr Ivanishvili. For instance in his deposition with the Credit Suisse Security Services, Mr Lescaudron admitted that he "*did a large amount of solo trading given that [Mr Ivanishvili] was not vigilant. He knew of the initial investment in but not the volumes which followed. I did not have an advisory mandate to do this*." Further, in his interview with Homburger he again made clear that the Raptor purchases were not authorised: "*I cannot say that [my clients] would have accepted the existent concentration in their portfolio in Raptor if they had known. I must admit that I do not think they would, it was too much*".

274. Mr Ivanishvili explained that he had followed Mr Lescaudron's advice to purchase Raptor shares in 2011 outside the Policy Accounts, but he had not authorised the very large positions that Mr Lescaudron built up after that on the Policy Accounts. The Court accepts that the inherent probabilities are consistent with the Plaintiffs' case that Mr Lescaudron directed the Raptor purchases. Mr Lescaudron had an obvious reason for building up what Mr Moverley Smith QC described as "*extraordinary*" levels of Raptor stock on the Policy Accounts through the funds he was associated with: he was receiving tens of millions of US Dollars in unauthorised commissions for the purchases.

275. CS Life argues that the fact Mr Bachiashvili and Mr Ivanishvili signed a '*Schedule 13G'* form provided to them by Credit Suisse (to provide information to the US Securities and Exchange Commission) containing reference to certain Raptor shares is evidence that they were aware that a large number of Raptor shares had been purchased on the Policy Accounts. The Court is unable to accept this contention:

(1) As Mr Bachiashvili explained in cross-examination, Mr Ivanishvili would not have paid any particular attention to the detail of this form but would have signed it because Credit Suisse indicated it was necessary to do so.

(2) The form does not record the totality of the direct Raptor investments, let alone the indirect investments. Mr Vaccaro accepted that this form did not provide a means for the Policyholders (even if they had understood the form) to appreciate the volume of the Raptor shares on the Policy Accounts.

(3) Even if the form was comprehensive, the information is presented in a difficult to understand manner, as Mr Vaccaro (who has extensive experience in this area) accepted.

(4) Leaving aside the above, this form would anyway not evidence an instruction from the Policyholders (or their lawful attorney) to purchase Raptor shares on the Policy Accounts.

276. In all the circumstances the Court finds that Mr Lescaudron was not instructed (or otherwise authorised) by the Policyholders or their lawful attorney to build up the large concentrations in Raptor on the Policy Accounts.

(10) Mr Lescaudron sent reports (the Direct Reports) to Mr Bachiashvili fraudulently misreporting the value of the Policy Accounts

277. Mr Lescaudron sent false reports addressing the performance of the Policy Accounts to Mr Bachiashvili (the Direct Reports). CS Life's own expert, Mr Mark Bezant, accepts that the Direct Reports inaccurately overvalued the Meadowsweet Assets from December 2013 onwards.

278. Mr Lescaudron admitted in interviews with the Credit Suisse Security Services (interviewing him on behalf of CS Life) that he doctored these reports in order to mislead Mr Ivanishvili:

Did you alter the in-house documents (Excel file) to alter performances? Yes. The aim was to hide the losses and in other cases to hide a profit. I recall this recently regarding [Mr Ivanishvili] for about 2 years…

279. In the circumstances the Court finds that Mr Lescaudron sent reports (the Direct Reports) to Mr Bachiashvili fraudulently misreporting the value of the Policy Accounts.

(11) Insofar as the Direct Reports reported the value of the Policy Accounts, they were sent by Mr Lescaudron on behalf of CS Life

280. The Court has already found at [188] to [211] above that CS Life delegated responsibility for the sale of the LPI Policies, agreeing the terms on which assets would be transferred to CS Life (including the 'investment alternative'), reporting on the LPI Policies and any ongoing dealings with respect to the LPI Policies to Mr Lescaudron *qua* Mr Ivanishvili's Relationship Manager.

281. Mr Vaccaro accepted that it was appropriate for CS Life's clients to ask their relationship managers to provide reports on the performance of the policy assets. He also accepted that it would be appropriate for the reports to be provided in excel format, if this is what the client requested.

282. The emails and spreadsheets came from Mr Lescaudron using a credit-suisse.com email address. CS Life used credit-suisse.com email addresses. CS Life directed the client to have all dealings with the Relationship Manager. These statements were in the form requested by the client and by letter dated 7 December 2012 CS Life represented to the Policyholder that "*if you have any questions or would like to make any changes to be made please ask your Relationship Manager*." There was nothing on their face to indicate falsity.

283. In the circumstances the Court finds that insofar as the Direct Reports reported the value of the Policy Accounts, they were sent by Mr Lescaudron on behalf of CS Life.

(12) The Bank performed various 'group' functions on behalf of CS Life, including providing compliance, human resources, fraud prevention and general counsel services for CS Life.

284. The oral and documentary evidence presented to the Court establishes that CS Life operated as an integrated unit of the Credit Suisse Group. CS Life delegated extensive functions to the Bank to perform on its behalf, as its witnesses confirmed in cross-examination. CS Life's witnesses confirmed that the following functions were all performed by the Bank on behalf of CS Life[11]: fraud prevention[12]; legal support[13]; compliance (and internal audit)[14]; security services and investigations[15]; and human resources[16]; ("**Group Function**").

285. This witness testimony is consistent with the Credit Suisse Organisational Guidelines and Regulations, which Mr Celia confirmed applied to CS Life. Amongst other things, these guidelines provide those numerous functions (called Shared Services Functions or "ShS") are "*consolidated at Bank level*". Those functions include the Chief Risk Officer (paragraph 18) and General Counsel (paragraph 22). Thus the Chief Risk Officer of CS Life from time to time was a senior Bank employee from the Risk Management/Compliance department of the Group/Bank. In relation to the legal function, Mr Vaccaro confirmed that the Group's centralised General Counsel function is running this litigation on behalf of CS Life.

286. CS Life also uses the Credit Suisse website, and its personnel use the "@credit-suisse.com" email domain.

287. Documents disclosed by CS Life in the third week of the trial confirm that these matters are built into CS Life's governance framework as a matter of formality as well as substance and that each is covered by agreements between CS Life and the Bank whereby the particular functions are delegated to the Bank to be done for and on behalf of CS Life. CS Life retains responsibility for the discharge of those functions and supervision

[11] {Day 9/105-6} per Ms Homann.
[12] {Day 6/32} per Mr Celia; {Day 7/128} per Mr Coffey.
[13] {Day 6/32} per Mr Celia.
[14] {Day 7/80} per Mr Coffey and {Day 6/32} per Mr Celia.
[15] {Day 6/38; 40} per Mr Celia.
[16] {Day 9/105-6} per Ms Homann.

of what the Bank does (achieved by having the relevant senior Bank or Group employee as the person responsible at CS Life e.g., Chief Risk Officer).

288. Where CS Life uses a Group Function, it is responsible for the actions (or omissions) of that Group Function. It remains an action or omission of CS Life. This was accepted by CS Life's witnesses:

(1) Mr Celia accepted that the Bank's subsidiaries (including CS Life) used the Bank's group functions to "*discharge their responsibilities*".

(2) He also accepted that if fraud is detected by the Group Function which affects a Credit Suisse subsidiary, or an investigation is being undertaken into fraud affecting a subsidiary, this detection and/or investigation is done by the Group Function on behalf of the subsidiary. He accepted that "*in relation to compliance monitoring or fraud prevention, if fraud is detected or suspected by fraud prevention or the internal Security Services, that's being detected or suspected for the group, for the bank and for any relevant affected subsidiaries*."

(3) Likewise, he accepted that if the Group Function failed to find or deal with a fraud affecting its subsidiary this would be a failure by the Group Function acting on behalf of the subsidiary. He accepted that "*if there is a failure to monitor, or a failure to find fraud or to deal with fraud, affecting the bank and a relevant subsidiary that would be a failing by the group function that is providing those services for and on behalf of the bank and its subsidiaries*."

(4) Mr Vaccaro accepted that it would be a matter for the Group Function to monitor and identify whether a "*relationship manager was executing trades without authorisation from the clients*". He further explained that if CS Life had suspected there was fraud on the Policy Accounts, CS Life "*would speak to compliance and compliance would start an investigation together with possible general counsel colleagues*."

(5) Ms Homann explained that where issues with particular transactions arose, CS Life would "*escalate*" those issues to the Group compliance function, which would follow up with the relationship manager to resolve any issues.

(6) CS Life's CEO, Mr Coffey, was clear that if the Group Function found or suspected fraud affecting CS Life accounts this should have been drawn to his attention. Insofar as he was aware, there were no limits or restrictions on the compliance or risk management functions the Group Function was able to provide to CS Life.

(7) Mr Vaccaro similarly explained that CS Life was entitled to obtain documents from the Group Function.

289. Further information about the extensive scope of CS Life's delegation of functions from CS Life to the Credit Suisse Group has also been revealed from CS Life's board minutes and associated documentation disclosed during the course of the trial. The April 2012 *CS Life Governance Handbook* sets out some of the many functions that CS Life delegated to the Bank to perform on its behalf pursuant to various outsourcing contracts referred to as "*Credit Suisse Life (Bermuda) Ltd's service level agreements ("SLAs") and revenue splitting agreements ("RSAs")"*. As noted earlier at [190] and [191], the Handbook sets out "*Key Service Contracts*" and further "*Non-Key Service Contracts*". Significantly, it also states that: CS Life "*Senior Management and the Board of Directors have a due diligence responsibility to maintain oversight of all outsourced functions*."

290. Slide 33 of the *Handbook* explains that various compliance and risk management functions are "*embedded*" in the Credit Suisse Group structure:

> "*Independent functions, such as risk management, internal audit, actuarial, and compliance to assist in oversight responsibilities and have direct communication to the Board and relevant committees. These functions are imbedded in Credit Suisse Group Structure pursuant to the SLA. The Board can be contacted directly. All risk management, internal audit, actuarial, and compliance reports are placed*

before the board for their review and approval. For an issue that is significant, material, or technically complex, individuals are invited to attend specific board meetings."

291. Slide 39 of the *Handbook* explains that CS Life senior management *"Support oversight of internal functions, including risk management, audit, compliance, actuarial, and external third-party services. This is done, where appropriate, pursuant to employment contracts and the SLA."*

292. The individuals that made up CS Life's senior management in 2014 are set out in a diagram on slide 6, which also sets out the relevant reporting lines. The Plaintiffs complain that it is evident from this diagram that CS Life has largely opted not to proffer witnesses involved in managing CS Life at the material time. The senior CS Life individuals were:

(1) In the Legal and Compliance Function: Messrs Wettstein, and Feuchter, who reported to Mr Strazzer who reported to Mr Cielen, and up to Ms Pauli and Mr Meister.

(2) Mr Läser (who was a director of CS Life and as Mr Coffey advised the person through whom the Bank directed and controlled CS Life); Mr Vanacore (Products and Solutions); Mr Vaccaro (Advisory and Sales - he did give evidence at the trial), and Mr Marti (Trust Management) all of whom reported to Mr Cielen.

293. Another new document produced by CS Life during the course of the trial is the 2010 *Governance Framework* ("*a central document that captures the current state of CSLB governance*") which explains that "*Activities outsourced to Credit Suisse AG are organized and controlled by five functions: Sales, Products, Finance, Operations, and Legal*" (page 6). Amongst other things, it explains:

(1) The BoD has oversight of: "*Independent functions, such as risk management, internal audit, actuarial, and compliance to assist in oversight responsibilities and have direct communication to the Board and relevant committees*" which are "*imbedded in CS Group Structure pursuant to the SLA*" (page 10).

(2) Mr Coffey (as CEO) "*has full access to all information required to properly perform his duties*" (page 19).

(3) "*Fraud risks are assessed with the overall Systems & Operational Risk framework*" (page 33).

294. The 2010 FINMA Newsletter, also disclosed by CS Life during the trial, is dated 27 April 2010. It was discovered together with two other reports to the Board dated 25 June 2010 and 26 October 2010 respectively. It appears from these documents that it may have been the FINMA letter (advising life companies that they had the full suite of due diligence obligations themselves and could not leave that to the bank or asset manager) that prompted CS Life then to put in place or reinforce a full governance framework of its own.

295. Having regard to the evidence outlined above,the Court accepts the Plaintiffs' submission that - contrary to the picture painted by CS Life (at least until its witnesses gave evidence) - CS Life had anti-fraud, legal and compliance, asset and transaction monitoring, human resources and compliance functions. These functions were simply delegated to the Credit Suisse Group to perform on its behalf.

296. The evidence reviewed above demonstrates that the board of directors of CS Life recognised that it was obliged to carry out the Group Function. However, for reasons of convenience or commercial necessity, CS Life determined that it would outsource those functions to other entities within the Credit Suisse Group. Significantly, despite the fact that Group Functions had been delegated to other entities within the Credit Suisse Group, as mandated by the April 2012 CS Life Governance Handbook, "*Senior Management*

and the Board of Directors [continued to] have a due diligence responsibility to maintain oversight of all outsourced functions."

297. It is self-evident that if CS Life itself was carrying out the Group Function it would be fixed with the relevant knowledge it acquired in the performance of those functions. In principle it can make no difference, to the acquisition of relevant knowledge by CS Life, if CS Life adopts a structure whereby these functions are outsourced to other Credit Group entities, with the senior management and Board of Directors maintaining "*oversight*" of all outsourced functions. In these circumstances CS Life would be fixed with the knowledge acquired by the Credit Suisse Group entities whilst performing the Group Functions on behalf of CS Life. Credit Suisse Group entities performing the Group Functions delegated by CS Life are in the same position as the Bank Life employees in the insurance department and it is accepted that their knowledge while performing duties on behalf of CS Life is the knowledge of CS Life.

298. CS Life argues that it is contrary to principle that it should be fixed with the knowledge of the entire Group Function without considering the prior question whether CS Life was obliged to undertake that function. Even assuming that this is a relevant qualification to the issue of attribution of knowledge, evidence given by its own witnesses confirms that CS Life expected to be advised, by the relevant Group Function, in relation to wrongdoing affecting CS Life Accounts so that it could properly discharge its own duties.

299. Thus, Mr Celia accepted that (i) the Bank's subsidiaries (including CS Life) used the Bank's Group Function "*to discharge their responsibilities*"; (ii) in terms of his responsibilities as CEO of CS Life Liechtenstein and his fiduciary duties and other duties to ensure that CS Life Liechtenstein was correctly managed and operated, he was dependent upon the Group Function, for example, for detecting fraud affecting CS Life Liechtenstein accounts with the Bank; and (iii) that would include of course the need to detect fraud by any Bank employee whose work affected CS Life Liechtenstein accounts.

300. Mr Coffey, CEO of CS Life accepted that (i) if the Group Function found or suspected fraud affecting CS Life Accounts this should have been drawn to his attention; (ii) if asset monitoring had picked up any fraudulent conduct in relation to assets of CS Life Accounts this is a matter which should have been investigated by CS Life and perhaps was by Mr Läser; (iii) if it had been properly investigated and the true position had been found; namely, that these were investments with CS Life assets in a fund made by Mr Lescaudron without authority of the client, then CS Life should have made sure that that was stopped; (iv) if there was any fraud found or suspected that impacted on CS Life Accounts, that should have been drawn to his attention as the CEO of CS Life; and (v) if he had been made aware of there being suspect or potentially counterfeit client orders by a relationship manager in relation to transactions on CS Life accounts, he would have immediately taken steps to prevent any repeat of that and removal of the relationship manager in terms of those possible dealings with CS Life assets.

301. The Court accepts the submission that the above evidence demonstrates that the "*wrapper*" argument made by CS Life that it had no duties or capacity because of suggested lack of capability to do anything and the "*lean operation*" arguments are unsustainable. CS Life had the capacity and did do all of these things and had all the knowledge by being a Group company which did them through the Group Function. The Board documents show recognition at Board level that CS Life had those duties and responsibilities.

302. The investigations into the Lescaudron fraud were carried out by the Group Function, including the Credit Suisse Security Services which investigated Mr Lescaudron, searched his computers and interviewed him on behalf of CS Life. For example, the Walder Wyss Letter records that "*As part of the internal investigation, a forensic copy of the hard drive of Mr Lescaudron's office computer was taken by Credit Suisse's Security Services and provided to PwC for review*."). Various items were found, including numerous modified 'Word' documents that were not present on the Credit Suisse archive.

303. In the circumstances, having regard to the evidence outlined above, the Court finds that the Bank performed various 'group' functions on behalf of CS Life, including providing compliance, human resources, fraud prevention and general counsel services for CS Life.

(13) The Bank and CS Life shared the same '@credit-suisse.com' email domain and website

304. CS Life's witnesses accepted that CS Life did not have its own email domain and that instead all CS Life personnel used the same @credit-suisse.com email addresses that employees of the Bank used.

305. This is also evident from the fact that CS Life "branded" documents, such as "life.operations@credit-suisse.com", use the CS Life contact email address. The same document lists "www.credit-suisse.com" as the CS Life website.

306. Accordingly, the Court finds that the Bank and CS Life shared the same '@credit-suisse.com' email domain and website, acknowledging that it is readily apparent which entity or department the email is sent from from the signature block of the sender.

(14) The Bank on behalf of CS Life monitored the Policy Accounts for fraud or wrongdoing and/or supervised the Bank's management of the Policy Accounts for fraud or wrongdoing

307. At trial CS Life's witnesses accepted that Credit Suisse had fraud prevention systems and monitoring functions in place that operated on CS Life's accounts on behalf of CS Life.

308. Mr Celia explained that CS Life did not have its own independent systems in place to monitor for fraud on its accounts because it had delegated this function to the Bank, which performed this function on behalf of CS Life. Mr Celia accepted that the Bank's subsidiaries (including CS Life) used the Bank's Group Function to "*discharge their responsibilities*". He accepted that one such Group Function is "*fraud prevention*". He also accepted that if fraud is detected by the Group Function which affects a Credit Suisse

subsidiary, or an investigation is being undertaken into fraud affecting a subsidiary, this detection and/or investigation is done by the Group Function on behalf of the subsidiary. Likewise, he accepted that if the Group Function failed to find or deal with a fraud affecting its subsidiary this would be a failure by the Group Function acting on behalf of the subsidiary.

309. Mr Vaccaro accepted that it would be a matter for the Group Function to monitor and identify whether a "*relationship manager was executing trades without authorisation from the clients*". He further explained that if CS Life had suspected there was fraud on the Policy Accounts, CS Life "*would speak to compliance and compliance would start an investigation together with possible general counsel colleagues*."

310. CS Life's CEO, Mr Coffey, was clear that if the Group Function found or suspected fraud affecting CS Life accounts this should have been drawn to his attention:

> *"Q. But so far as this monitoring is concerned that has picked this up, is the position that you don't know what aspect of asset monitoring and why this was picked up, but you will accept that there clearly was some substantive asset monitoring going on in relation to assets on the CS Life accounts?*
> *A. I agree with you, sir, yes.*
>
> *Q. You do agree. And if it had been properly investigated and the true position had been found; namely, that this was being -- that these were investments with CS Life assets in a fund made by Mr Lescaudron without authority of the client, then CS Life should have made sure that that was stopped?*
> *A. Yes.*
>
> *Q. Now, can I ask you, in relation to systems and monitoring and compliance and fraud prevention, we have looked at certain aspects of monitoring that was done. So far specifically as fraud prevention is concerned that is a matter that CS Life*

was dependent on the Credit Suisse Group function in relation to Security Services, fraud prevention and so on. Is that right?

A. That would be my understanding, yes.

Q. And if there was any fraud found or suspected that impacted on CS Life accounts, that should have been drawn to your attention?

A. I agree, sir."

311. Having regard to the evidence outlined above and in relation to Group Function (Finding 12 at [284] to [303] above) the Court finds that the Bank on behalf of CS Life monitored the Policy Accounts for fraud or wrongdoing and/or supervised the Bank's management of the Policy Accounts for fraud or wrongdoing.

312. The existence of the Group Function is a factual issue and developed during the cross examination of CS Life's witnesses. The Court does not consider that this factual issue needs to be pleaded in detail and considers that there is no unfairness in the Court determining this factual issue.

(15) Mr Lescaudron committed a long-running fraud against Mr Ivanishvili, involving the Policy Accounts. That fraud included: (i) making investment decisions without proper authority; (ii) forging documents; (iii) executing investments for the purpose of obtaining unlawful commissions; (iv) directing the sale of assets for an undervalue; (v) directing the purchase of securities at an overvalue; and (vi) transferring assets to his other clients.

313. CS Life makes no admissions that any fraud or wrongdoing took place on the Policy Accounts. This continues to be the position in its final written submissions to this Court.

314. The Plaintiffs understandably expressed astonishment at CS Life and its legal advisers' decision to take the position that CS Life is unable to admit the fraud committed by Mr Lescaudron. The Plaintiffs point to the fact that this litigation against CS Life is being conducted by the General Counsel's office of Credit Suisse. They also point out that the

same General Counsel Office was instrumental in making a Criminal Complaint, on behalf of the Bank, against Mr Lescaudron arising out of the same facts and circumstances.

315. In that Criminal Complaint dated 23 December 2015 the Bank alleged that "*Mr Lescaudron has, primarily, revealed that he conducted unauthorised transfers to the accounts of major clients of the Bank, without the knowledge of the said clients*." The Bank also relied on facts revealed by the investigation conducted by Homburger on its behalf. The detailed allegations of fraud against Mr Lescaudron, made by the Bank in the Criminal Complaint, are set out at [118] to [122] above. As noted at [121] above the Bank had clearly concluded that the monies were transferred out of Mr Ivanishvili's accounts and into the accounts of Clients 2 and 3 without authorisation and was sufficiently certain of that, on the evidence it had gathered including Mr Lescaudron's own admissions, to be able to make a criminal complaint on that basis.

316. As noted at [125] above, as a result of the Criminal Complaint made by the Bank, Mr Lescaudron was found guilty of a number of offences relating to Mr Ivanishvili's accounts. Despite this, CS Life continues to take the position that it does not admit that Mr Lescaudron committed a long-running fraud against Mr Ivanishvili, involving the Policy Accounts.

317. The Plaintiffs contend that this non-admission is, in any event, no longer properly open to CS Life:

(1) The only director of CS Life who was proffered to give evidence, Mr Vaccaro, accepted that Mr Lescaudron committed a fraud against the Policy Accounts.

(2) Mr Coffey gave evidence that when he was CEO he had been made aware that his co-director (and line manager), Mr Läser, had become aware of the Lescaudron fraud when it blew up publicly in 2015; he and Mr Läser knew that it impacted on a client who had policies with CS Life and potentially on policy accounts; it was

discussed between them; "*there was a lot of information available*"; and that the court case affected a client of CS Life. There is reason to believe that Mr Läser himself initiated the investigation, but he was certainly involved in it because on 28 September 2015 he made a very urgent request to Mr Keusch to obtain from Asset Accounting "*a complete history of the portfolios. That means every shares and units were ever booked in this two polices form the beginning (sic) (October 2011).*"

(3) The Group Function carried out the investigations which concluded that Mr Lescaudron committed a fraud against the Policy Accounts (which the Bank's criminal complaint was subsequently based on) (Finding 27 at [427] to [423] below).

(4) It transpires, CS Life itself carried out an investigation (which had hitherto not been revealed), in light of which it concluded that Mr Lescaudron had committed a fraud against the Policy Accounts. Mr Celia explained in cross-examination that CS Life had itself investigated the Lescaudron fraud and had concluded that he had committed the fraud, such that it would be wrong to describe the fraud as '*alleged*', as the fact of the Lescaudron fraud had been "*established*".

> *"Q. You are head of the insurance division in which CS Life sits. You have responsibility for this company. You know and have known apparently since 2015, about the Lescaudron issues. Since 2018 you have been responsible for this company and what I am asking you now is surely by now, 2021, CS Life has investigated these matters which you accept it should have done, and reached conclusions as to whether or not there was serious misconduct by a bank employee or employees that caused loss to CS Life's accounts?*
> *A. That's correct.*
>
> *Q. Has CS Life reached a conclusion -- has CS Life investigated these matters and reached a conclusion as to whether or not there was serious*

misconduct by a bank employee committed against and concealed from CS Life as the named account holder for the LPI policies?
A. CS Life has done certain investigations, yes, that's correct. But the case or the misconduct has been brought to court in Switzerland and has been -- but there has been no other conclusion from Credit Suisse Life's side.

Q. When you say it has been brought to court in Switzerland you are referring to the criminal proceedings against Mr Lescaudron?
A. Yes right.

Q. Which were established partly by his own guilty pleas and partly by the findings of the court that there had been such misconduct?
A. Yes. I don't know the exact details but that's the proceeding I am referring to against Mr Lescaudron, yes.

Q. So the misconduct is not alleged, it is established?
A. Correct, correct.

Q. Why don't you know the details?
A. Well, I know the proceeding more or less, but I don't know all the details by heart of the proceeding against Mr Lescaudron. There was the GC team taking care of this investigation that we have done, or compliance at that time, but I don't know all details of the proceeding against Mr Lescaudron.

Q. But you know that serious misconduct has been established; correct?
A. Yes.

Q. You know that that misconduct caused loss to assets under CS Life's accounts?
A. Correct.

Q. You know that that was Mr Lescaudron's breach of his obligations?
A. Correct.

Q. You know that that, therefore, meant that the bank was in breach of its obligations to CS Life as account holder?
A. Correct, that is true."

318. CS Life's director, Mr Vaccaro, appeared to accept that Mr Lescaudron engaged in fraudulent conduct with respect to the Policy Accounts and stated that it would be "*very odd*" to deny the Lescaudron fraud:

"Q. So are you aware of the key findings of the [FINMA] report?
A. I'm not, no. I cannot quote you the key findings. What I know is that there was a fraud from one of the bankers, from Mr Lescaudron.
...
Q. Can you remember when you found out that that fraud had affected CS Life policy accounts?
A. I think immediately, because we knew that the accounts were affected, the accounts managed by Patrice Lescaudron, and I think immediately we knew that there was a problem, or there might be a problem with the policy accounts. Around the end of 2015 or in the last part of 2015.

Q. Mr Vaccaro, would you accept that given what you have told us this morning about your knowledge of Mr Lescaudron's fraud and the fact that it affected the policy accounts, it is slightly surprising that in the paragraphs we have looked at in your witness statements you seem so reluctant to accept that there has been any fraud on the policy accounts that these proceedings are concerned with?
A. I don't think that I am reluctant. At least it was not my intention to be reluctant that there might have been fraud in the accounts in my witness statements.
Q. You accept there was?
A. I do accept there was.

Q. Now, Mr Vaccaro, just to go back to one point that you made earlier this morning at the start of your evidence, you said that you know now there was a fraud by Mr Lescaudron on the policy accounts. That's right, isn't it?
A. Yes."

319. As noted below (Finding 27 at [427] to [433] below), the Group Function carried out the investigation into Mr Lescaudron's fraud. It follows that the conclusions reached by the Bank and its agents PwC and Walder Wyss, that Mr Lescaudron had committed the fraud against the Policy Accounts were conclusions reached by, or on behalf of, CS Life in light of its own investigations. As already noted, on the basis of those investigations, the Bank made the Criminal Complaint which resulted in Mr Lescaudron being convicted and the Bank being awarded civil remedies. Given the foregoing, the Court accepts that there is no proper basis on which CS Life can properly not admit Mr Lescaudron's fraud.

320. The Plaintiffs complain that CS Life neither revealed in its factual witness statements for trial nor gave discovery of any documents related to its own investigation into Mr Lescaudron's fraud. The Plaintiffs contend that it can be inferred that this concealment from the Court has been orchestrated by the same General Counsel function (that serves CS Life as it does the Bank according to Mr Celia), that has directed that CS Life not admit the fraud in these proceedings. The Plaintiffs submit and the Court accepts that the Court can safely infer that these documents would have confirmed that Mr Lescaudron had committed a fraud against the Policy Accounts, including by: (i) making investment decisions without proper authority; (ii) forging documents; (iii) executing investments for the purpose of obtaining unlawful commissions; (iv) directing the sale of assets for an undervalue; and (v) directing the purchase of securities at an overvalue.

321. The drawing of adverse inferences is supported by the fact that CS Life has given no explanation for its failure to call any CS Life (or Bank) personnel who were involved in investigating Mr Lescaudron's fraud as part of the Group Function or the CS Life-Bank employees who were involved. The most obvious CS Life-Bank candidates would have been Mr Saluz who seems to have been in charge of the investigations on the CS Life

side and Mr Läser, who as a director of CS Life and the Credit Suisse executive responsible within the Wealth Management Division for CS Life will have been very fully aware of what investigations were being done, if he did not himself initiate them. The Plaintiffs contend that this 'stonewalling' litigation tactic was adopted to allow CS Life to maintain its pretence that it was not involved in the Lescaudron investigations, in order (i) to run its false non-admission case on the fraud; and (ii) to justify not giving relevant discovery from the investigations carried by the Group Function on its behalf into Mr Lescaudron's wrongdoing.

322. The drawing of adverse inferences is also supported by the fact that CS Life did not give proper discovery of documents relevant to Mr Lescaudron's fraud. Not only did it not give discovery of documents responsive to the Specific Discovery Order, but it also did not disclose the fact of the Group Function. As things stand, CS Life has therefore given no discovery from the Group Function despite it now being evident that the Group Function: (i) monitored the Policy Assets for fraud; (ii) had access to Mr Lescaudron's disciplinary record; and (iii) investigated the fraud on behalf of CS Life once things unravelled in September 2015.

323. It appears to the Court that the evidence in support of a finding that Mr Lescaudron committed a long-running fraud against Mr Ivanishvili, involving the Policy Accounts, is overwhelming. Mr Lescaudron's own statements in relation to this issue are sufficient to make this finding.

324. In his Police interview in Geneva on 18 January 2016 Mr Lescaudron stated in a written statement that:

(1) "*I am going to specify the reasons why I stopped needing the client's approval at some point, which was from 2009 onwards. From this moment, I started to manage independently. I initially started to buy the securities the client used to buy, but I bought more…My proposals to Mr IVANISHVILI worked well. From 2009, I began*

*to put forward personal ideas that I called him about**. And eventually, I didn't call him anymore.”***

(2) *“I had two solutions. **I chose to lie and tell the client that he had gained between 7 and 10%...I know that at this time, I sent an Excel report to the client with false figures**. I made modifications in Excel and I changed values. I put the bonds at nearly 0 and I put the shares to nearly the maximum. I also modified the performance. At this time, **I started to do even more 'solo trading' to recover the sum.”***

(3) *“In addition, I sold securities of two or three other clients to Mr IVANISHVILI. **These securities were sold at a price 60 to 70% more expensive than their value. This cost M IVANISHVILI around 6 or 7 million.”***

(4) *“I don't know why but **I continued unauthorised trading with the accounts of Mr IVANISHVILI, especially between 2013 and 2015**. From the moment that I recovered the losses in the Singapore account and June 2015, I must have made about 110 million.”*

(5) *“I also carried out unauthorised trading for Clients 2 and 3. Unfortunately what had worked for Mr IVANISHVILI did not work for them. **I had to compensate for this by transferring the profits of my unauthorised trading for Mr IVANISHVILI. I estimate that the total sum injected into the accounts of Clients 2 and 3 was 10 million**.”*

(6) ***“Previously we talked about falsifying signatures. I did so to transfer money between the accounts of various clients. I proceeded to obtain a photocopied signature to validate the transfers made without the clients' knowledge**. The original was not necessary.”*

(7) *"When the shares collapsed in September 2015, I collapsed too. I stayed at home for one or two days and didn't take any calls, then I spoke to my superior.* ***I told him that I had bought shares without my client's knowledge****. One or two days later, I was summoned by Credit Suisse security who recorded my statement."* (emphasis added)

325. In a further signed statement dated 27 March 2016 to the Public Prosecutor's Office, Geneva, Mr Lescaudron made the following voluntary statements:

(1) *"<u>Transfers of funds from Mr Ivanishvili's account to the accounts of other clients</u>*

1) It is true that I made a transfer of funds directly from Mr Ivanishvili's account to the accounts of other clients which I was managing. To do this, it is true that ***I signed false instructions for Mr Ivanishvili's account.*** *Regarding the chart mentioned above,* ***I think that the total of 87,371,917.00 CHF diverted from Mr Ivanishvili's account is correct*** *even if I cannot recall those transactions in detail. The clients given in the chart who benefited from these diversions also seem to me to be correct.*

2) With reference to "scenario 2" given in the chart, it is true that on Mr Ivanishvili's account, and unknown to him, ***I transferred securities belonging to him to other clients for a price below their value or else I acquired securities from other clients for Mr Ivanishvili's account at a price above their value. To do this I also made use of false instructions from the client****. Regarding the transactions and the total amount of 32,119,998.00 CHF given in the chart, the figures and the clients in question seem to me to be correct, with the exception of the transactions from which the XX account profited and about which I have some questions.*

3) I think I actually did make transfers of securities from Mr Ivanishvili's account to other clients' accounts. With reference to "scenario 3" of the

chart, I think ***I actually transferred securities belonging to Mr Ivanishvili directly to XX account without payment from the latter****. I proceeded in the same way in favour of the client XX. When it comes to the amount of 728,550.00 CHF, I no longer remember this transaction, but it is possible that it may be a remainder from the transactions made according to scenario 2.*

The total amount of 120 M CHF in assets diverted to Mr Ivanishvili's detriment seems to me to be right.

(1) *"There was also a fund in Singapore, Swiss Asia Fund. From memory, there were 10 M USD invested in this fund solely for Mr Ivanishvili. This fund was good. it was managed by a team in Singapore.* ***I got a small quarterly kickback.…****From 2012 to 2015, I estimate the amount of kickbacks that I received to be around 15 M USD."*

(2) *"****In early 2008, if I remember correctly, I started to buy and sell securities without obtaining prior agreement from Mr Ivanishvili****. I thought that I could act that way because he trusted me. I would still send him a summary of the investments made by e-mail once a week or once a fortnight. He never complained after receiving these summaries, so I assumed that this way of working suited him.* ***I managed the client's portfolio in this way until the end of 2013. To be precise, in 2009 and 2010 I traded through Mr Ivanishvili's portfolio without reporting back to him, in order to cover losses suffered by some other clients and by himself after Credit Suisse failed to carry out some of his instructions****. I never hid the losses that he sustained because of the market. Nonetheless, I never confessed to him that, after Credit Suisse had failed to carry out some of his instructions, he had sustained serious losses. Credit Suisse Singapore was responsible for this failure to carry out his instructions."*

(3) *"I do not think that my superiors at Credit Suisse were aware that, until the end of 2013, the investments that I was making on Mr Ivanishvili's behalf were being approved only a posteriori by the client. At that time, I shared an office with my superior, Mr Vitse, who had a drinking problem. I told him what operations I was carrying out on behalf of Mr Ivanishvili and he was fully aware that I was not in regular telephone contact with Mr Ivanishvili."*

(4) *"The year 2013 was pivotal, as the client was elected prime minister and decided to sell all his Russian assets. Owing to these sales in 2012, his portfolio grew again to around 900 million. In 2013, I started trading significantly again on the client's behalf. I made a profit of 110 million in 2013, to which a further 40 million was added by the other accounts that I was not responsible for managing and for which the client had granted Credit Suisse a discretionary mandate. As a result, in 2013 the client made a total profit of 150 million. I presented this overall result to Mr Ivanishvili. It was important to him to know what proportion of his assets was being managed by Credit Suisse and what proportion by external managers.* ***In 2013, I invested heavily in the Raptor security. I informed the client about how the security was performing, but I did not tell him how much had been invested.*** *"*

(5) *"****Until the end of 2013, the reports that I was submitting in Excel format to Mr Ivanishvili were factually accurate. In early 2014, the value of the Raptor security dropped sharply. That was when I started to hide the losses that Mr Ivanishvili had sustained, in particular by sending him falsified Excel reports****. I did the same to XX. I sent falsified tables to these three clients only. As regards the other clients who had sustained losses, I hid their losses by replenishing their accounts through transfers, but I never sent them falsified Excel documents."* (emphasis added)

326. At the hearing before the Judicial Authority in Geneva on 17 June 2016 Mr Lescaudron stated that:

(1) *"The SWISS ASIA FUND is a fund of funds whose underlying assets are composed only of Asian funds that are not normally accessible from Europe for some… I only invested in the fund up to about USD 10 to 15 million for Mr IVANISHVILI under the SANDCAY relationship, a life insurance account within a trust. I did not speak of this investment to Mr IVANISHVILI. As part of this contract (see Annex 1), I received commissions from SWISS ASIA FINANCIAL SERVICES LTD (hereinafter SWISS ASIA) that were paid to the account of NFAM AG at OBWALDNER KB. The amount of these fees is approximately USD 300,000 at first, then more quarterly payments until the investment in the fund ends."*

(2) *"MARKET VIEW is a fund that is in England. It is mainly composed of equities and derivatives. It was a fund that was being launched (seeding). Consequently, the available track record was not important. Initially, the fund's assets under management totalled between USD 30 and 50 million…**I only invested in this fund for Mr IVANISHVILI via the SANDCAY structure and perhaps MEADOWSWEET. The investments were made in several parts to a total amount of approximately USD 25 to 30 million**. I did not talk specifically about this investment with Mr IVANISHVILI… I received a retrocession of ownership on this fund on behalf of NFAM AG from OBWALDNER KB and also on behalf of POLSON MANAGEMENT with the LLB. I think the total commissions earned to date have been USD 1'5 million."* (emphasis added)

327. In the circumstances the Court is satisfied that Mr Lescaudron committed a long-running fraud against Mr Ivanishvili, including the Policy Accounts.

(i) Making investment decisions without proper authority and forging documents

328. In relation to **Client Notes** the Court has already found that aside from the Sandcay 75-3 sub-account, investment decisions on the Policy Accounts were made by Mr Lescaudron without instructions from the Policyholders or their lawful attorney (Finding 8 at [256] to [269] above). The Plaintiffs contend that they were executed by Mr

Lescaudron without instructions and without authority (Mr Lescaudron did not have a power of attorney). To cover up his fraud, he forged the Client Notes in order to give the false impression that the transactions had been instructed by Mr Ivanishvili or Mr Bachiashvili. The Court accepts the Plaintiffs' submission that it is overwhelmingly clear that the Client Notes were forged by Mr Lescaudron. The Court refers to the following evidence relied upon by the Plaintiffs.

329. First, Mr Lescaudron admitted that he forged documents. For example, in an interview with the Prosecutor on 22 March 2016 Mr Lescaudron stated that "*To do this, it is true that I signed false instructions for Mr Ivanishvili's account*" and "*To do this I also made use of false instructions from the client*". Mr Vaccaro (a CS Life director) accepted that the Client Notes were at least to an extent false: "*I knew that some of the records were false records. I don't know whether all of the interaction between Mr Lescaudron and the client were false*." It would (as Mr Vaccaro also accepted) be very odd for Mr Lescaudron to have admitted to forging documents if he had not done it.

330. Secondly, Messrs Ivanishvili and Bachiashvili did not give the instructions purportedly recorded in the Client Notes (Finding 8 above). It follows the Clients Notes are false.

331. Thirdly, Messrs Ivanishvili and Bachiashvili disclosed their phone records and were cross examined on them. The phone records do not match the forged Client Notes.

332. Fourthly, CS Life did not discover any documents supporting the contents of the Client Notes. Mr Smouha QC understandably observes that if they were genuine, CS Life could, and would, have discovered phone records showing that calls were made at the times recorded in the Client Notes. Such records were not disclosed because, he argues, the Bank's phone records no doubt do not match up with the false instructions recorded in the Client Notes.

333. Fifthly, the Group Function's investigation into Mr Lescaudron's fraud concluded that Mr Ivanishvili had forged documents. GWP, investigating on behalf of FINMA, reached

the same conclusion. The FINMA Report concluded, at page 166, that "*127 of these transactions were filed by P.L. with 12 documents to prove the corresponding client order. In the bank's internal legal investigation, these were described as forged, in the sense that P.L. imitated B.I.'s signature or copied it into the documents*".

334. Finally, as noted earlier, CS Life's case up until trial was based on Mr Lescaudron's Client Notes, but these were not even put to Mr Ivanishvili or Mr Bachiashvili in cross-examination. The Plaintiffs put their authenticity in issue. CS Life has called no evidence to seek to establish that they are genuine or that they record anything truthful.

335. In relation to **Payment Instructions** the Plaintiffs submit that it is evident that Mr Lescaudron routinely forged payment instructions as part of his fraud.

336. It is clear to the Court that Mr Lescaudron has in fact admitted that he routinely forged the Payment Instructions. In his interview with the Prosecutor on 22 March 2016 he stated, "*It is true that I made a transfer of funds directly from Mr Ivanishvili's account to the accounts of other clients which I was managing. To do this, it is true that I signed false instructions for Mr Ivanishvili's account*."

337. The Credit Suisse Security Services also found multiple '*word documents'* on Mr Lescaudron's home computer which had been modified and which could not be found on the Credit Suisse systems. Walder Wyss, based on PwC investigations, informed the Public Prosecutor that one of Mr Lescaudron's means of committing the fraud involved executing transactions where "*The underlying payment instructions for these transactions have several indications suggesting that they are not authentic*".

338. In the circumstances the Court is satisfied and finds that the fraud included making investment decisions without proper authority.

(ii) Executing investments for the purpose of obtaining unlawful commissions

339. The Plaintiffs again submit that it is overwhelmingly clear that Mr Lescaudron was executing investments for the purpose of obtaining unlawful commissions. In the Court's view the following evidence does substantiate this factual allegation.

340. Mr Lescaudron admitted that he made the Raptor investments at least in part to obtain kickbacks. In his interview with the Prosecutor on 22 March 2016, he said, *inter alia* that he used his company 'NFAM' to enrich himself through the payment of multiple kickbacks:

> "***The enrichment aspect came about later and over time NFAM served to receive kickbacks which I could receive on investments made on behalf of my clients*** *… It is true to say that the investments in the Raptor security on my clients' behalf were not agreed by them. I am here talking of Raptor investments via the investment funds which I set up, notably Hyperion, Mensah (sic) and Matterhorn (Sequoia funds). There were also structured products with the company Centris, only one held Raptor securities, but fewer in quantity. There were also two compulsory funds with the company Centris. The first fund had a total of 20 million EUR and was called European Illiquid Debt. It was a good product with a performance of 10% when I left the bank. The second fund was a copy of the first with leverage. 5 M EUR were invested in it. When I left the bank, this fund was stable. I have always generally invested in these products which I considered to be good quality.* ***It cannot be denied that I set up all these funds particularly so as to increase my income via multiple kickbacks****. I also had other reasons, which were that financial terms on the issue of trading costs are advantageous with this kind of fund. …. My clients were generally not informed of the trading I was undertaking on their behalf via the funds I mentioned.*" (emphasis added)

341. CS Life has offered no explanation for why Mr Lescaudron would have admitted to taking unlawful "*kickbacks*" in the context of criminal proceedings if that had not happened.

342. PwC (acting on behalf of CS Life as part of the Group Function) concluded that Mr Lescaudron obtained CHF 27,011,860 in '*retrocessions*' i.e., kickbacks for the investments he directed into funds related to Raptor (such as Hyperion, Matterhorn, Marketview etc). PwC concluded that he received further commissions for the investments he directed in Pearl Gold ("*Retrocessions: We have assumed that all of retrocessions to PL were based on Raptor investments. However, it looks like there were retrocessions for Pearl Gold investments as well*.")

343. CS Life was ordered to discover "*Documents evidencing fees and commissions in connection with the Policies and/or the CS Life Accounts and/or the investments entered into on the CS Life Accounts and/or for the benefit of the Policies*" pursuant to paragraph 3.6 of the Specific Discovery Order. The Court accepts that it is evident from the PwC and FINMA Reports that the Bank is in possession of extensive documentation evidencing that Mr Lescaudron received commissions for transactions executed on the Policy Accounts. The Court accepts the Plaintiffs' submission that in the circumstances the Court should infer that CS Life did not discover documents responsive to paragraph 3.6 of the Specific Discovery Order because such documents would have revealed that Mr Lescaudron executed transactions on the Policy Accounts for the purpose of obtaining commissions.

344. The Plaintiffs also complain that CS Life should have given discovery from the Group Function which was investigating the Lescaudron fraud. The Group Function will be in control of documentation recording the nature of Mr Lescaudron's commissions. Likewise, had CS Life called witnesses from the Group Function they would have confirmed that Mr Lescaudron had received commissions for his Raptor investments. For example, the Plaintiffs would have been able to ask them questions about PwC's conclusions.

345. In all the circumstances the Court is satisfied, and finds, that the fraud included executing investments for the purpose of obtaining unlawful commissions.

(iii) Directing the sale of assets for an undervalue and the purchase of securities at an overvalue

346. As admitted by Mr Lescaudron at [325] above a key part of his *modus operandi* involved transferring assets from Mr Ivanishvili's account to his other clients at undervalue and transferring assets to Mr Ivanishvili at overvalue. This is the '*Scenario 2*' identified by PwC as part of the Group Function's investigation into Mr Lescaudron. Mr Lescaudron admitted to this fraudulent behaviour.[17] It is summarised by Walder Wyss in the letter to the Prosecutor as follows:

> "*Various transactions in which securities (i.e., shares) were transferred against payment between accounts of Bidzina Ivanishvili or his companies and the accounts of other customers. In part no underlying payment and transfer instructions exist or such instructions have several indications suggesting that they are not authentic. These 'securities against payment' transactions are pertinent because the prices paid for these shares were either too high or too low when compared with market prices thus shifting funds to either the buyer or the seller*."

347. In this way, Mr Lescaudron moved value from Mr Ivanishvili's accounts to his other clients, for his own purposes.

348. GWP also details so-called Scenario 2 transactions in the FINMA Report:

> "*40 transactions in connection with Scenario 2 were identified. In most cases, these were securities purchases from B.I. for which a price was paid that significantly exceeded the market price and thus caused B.I. a financial loss. These were purchases that did not take place via the stock exchange but were settled directly via the bank by means of a private agreement (OTC). The alleged orders of the*

[17] Interview with the Prosecutor (22 March 2016) ("*With reference to "scenario 2" given in the chart, it is true that on Mr Ivanishvili's account, and unknown to him, I transferred securities belonging to him to other clients for a price below their value or else I acquired securities from other clients for Mr Ivanishvili's account at a price above their value. To do this I also made use of false instructions from the client*. …")

customers that gave P.L. permission for direct securities trading between his customers at the prices used were documented. In the context of the investigation of the ORIS incidents, P.L. stated that he had brokered the prices for the securities between his customers without having to disclose the identity of the contractual partners (cf. Section 6.1.2.3 "Unclear internal securities transfer (cross-trades)"). The internal bank investigation (DINO project) showed that the signatures in the orders were forged. Payments were made between 9 July 2009 and 11 October 2011."

349. The Plaintiffs have been unable to particularise specific transactions on the Policy Accounts which were executed for this purpose. The Plaintiffs contend that is because CS Life wrongly failed to provide the Plaintiffs with information about the counterparties for transactions on the Policy Accounts, so they have not been able to identify whether assets were transferred from the Policy Accounts to Mr Lescaudron's other clients. The Plaintiffs argue that this information is available to CS Life and should have been discovered pursuant to paragraph 3.2 of the Specific Discovery Order.

350. The Plaintiffs further argue that information about investments that were made for these purposes is also likely to be available to the Group Function that investigated the Lescaudron fraud. The Plaintiffs submit and the Court accepts that the Court should infer that CS Life failed to give discovery of documents from the Group Function relevant to this issue because it would have revealed Mr Lescaudron executed transactions on the Policy Accounts at over/under value. The Court also accepts that it is to be inferred that CS Life did not proffer any witnesses involved in investigating the Lescaudron fraud because they would have confirmed that Mr Lescaudron made transfers for these reasons.

351. Mr Lescaudron also on occasion transferred cash directly from Mr Ivanishvili to his other clients. For instance, in his interview with Homburger on 9 October 2015 he said:

"Money transfer from Client 1 account in favour of Client 2 and 3. The transfer of money from the account of Client 1 was not at all connected to Raptor. It had the

aim of covering up the losses. I think there were made three or four transfers. I think in 2009 and the last in 2011 or 2012. ***I took this money from Client 1 to cover the losses of client 2 and 3. Roughly for 60 million.****"* (emphasis added)

352. CS Life's case in response appears to be to say that money transfers were not possible "*because the money could only be paid into the policyholder's account*". The Plaintiffs argue that this is nothing to the point. Mr Lescaudron had unfettered access to the Policy Accounts. He could (and it is to be inferred did) transfer 'cash' by funnelling it through an intermediary company, Wellminstone: Mr Lescaudron confirmed this *modus operandi* in his interview with the Public Prosecutor on 3 November 2016:

> "*Mr Jeanneret is asking me to explain the movements of 14,300,000.00 USD belonging to Meadowsweet which finally served to pay 13,893,282.00 EUR to the Mottet partnership (SOP****). My answer is that Meadowsweet was a trust, it was not possible to make a payment outside the trust, which is why I made the transfer to Wellminstone's account (the trust's beneficiary being Wellminstone's beneficial owner, so such a payment could be made).*** *Then I paid the money to XX personal account, then to the Roswell account of which he was the beneficial owner, an account which he had used for this property purchase*." (emphasis added)

353. In all the circumstances and having regard to the evidence presented to the Court, the Court is satisfied and finds that Mr Lescaudron committed a long-running fraud against Mr Ivanishvili, involving the Policy Accounts and that fraud included: (i) making investment decisions without proper authority; (ii) forging documents; (iii) executing investments for the purpose of obtaining unlawful commissions; (iv) directing the sale of assets for an undervalue; (v) directing the purchase of securities at an overvalue; and (vi) transferring assets to his other clients.

(16) Mr Lescaudron was fraudulently mismanaging the Plaintiffs' accounts with the Bank before the LPI Policies were taken out

354. The Meadowsweet Policy was issued by CS Life on 7 November 2011. Mr Lescaudron admits in his Police Interview dated 18 January 2016 that he stopped needing the client approval at some time, which was from 2009 onwards and from that moment, he started to manage independently. Mr Lescaudron "*started to buy the securities the client used to buy, but I bought more".*

355. Mr Lescaudron states that in 2009 "*I sent an Excel report to the client with false figures. I made modifications in Excel and I changed values. I put the bonds at nearly 0 and I put the shares to nearly the maximum. I also modified the performance. At this time, I started to do even more 'solo trading' to recover the sum*."

356. In the Police Interview Mr Lescaudron points out that "*I had made a capital gain thanks to unauthorised trading at the end of 2009, which was enough to compensate for the losses made due to the error of Credit Suisse Singapore, which I had not declared."*

357. In the same Police Interview Mr Lescaudron also admitted further fraudulent conduct in 2009 in relation to Mr Ivanishvili's accounts:

> *"At the end of the year 2009, I had a certain amount left from this unauthorised trading. Roughly speaking, a part of the funds, up to around 20 million, remained with Mr IVANISHVILI. The rest was distributed into the accounts of Clients 2 and 3. I estimate this sum to be around 60 million in total for both of these clients.*
>
> *In addition, I sold securities of two or three other clients to Mr IVANISHVILI. These securities were sold at a price 60 to 70% more expensive than their value. This cost Mr IVANISHVILI around 6 or 7 million."*

358. In his written statement to the Public Prosecutor's Office dated 22 March 2016 Mr Lescaudron admits to fraudulent conduct in relation to Mr Ivanishvili's accounts: "*The first transfer I recall goes back to late in 2008. During a purchase of securities belonging to XX by Mr Ivanishvili, I wrongfully transferred 1.5 M USD to my wife's account at the*

CMB bank of Monaco. On the other hand, I no longer recall if I debited this amount on Mr Ivanishvili's account or XX account. I think that there must be around 1 M USD remaining in the account I mentioned."

359. In the circumstances the Court is satisfied and finds that Mr Lescaudron was fraudulently mismanaging the Plaintiffs' accounts with the Bank before the LPI Policies were taken out.

(16) CS Life knew about certain of Mr Lescaudron's wrongdoing, and could and should have known about his further wrongdoing

360. Mr Lescaudron was CS Life's agent, performing CS Life's functions on its behalf. His knowledge of his own wrongdoing is directly imputed to CS Life. Prior to the issuance of the Meadowsweet Policy on 7 November 2011 Mr Lescaudron acted as an agent of CS Life in relation to the sale of and agreeing the wording for the Meadowsweet Policy. After the sale of the Meadowsweet Policy, according to a letter dated 7 December 2012 from CS Life and the evidence of Mr Vaccaro, Mr Lescaudron was held out by CS Life as the point of contact between the Plaintiffs and CS Life, as well as between the Plaintiffs and the Bank ensuring a "*truly personal client service."* The Plaintiffs argue and the Court accepts that Mr Lescaudron's knowledge of his own wrongdoing is directly imputed to CS Life.

Nature of the fraud committed by Mr Lescaudron

361. The Court accepts the Plaintiffs' submission that the fraud committed by Mr Lescaudron in relation to the CS Life Accounts was not particularly "*sophisticated*", as alleged by CS Life. The overarching mechanism he deployed was to book transactions on the Credit Suisse 'Frontnet' system as having been authorised by Mr Ivanishvili by telephone, when they had not been. This allowed him to purchase large volumes of Raptor stock and thereby to obtain vast commissions and to transfer assets from Mr Ivanishvili's accounts to his other clients at under value or into Mr Ivanishvili's accounts at overvalue.

362. Under Credit Suisse rules, "*the relationship manager has to document the service type 'advised' or 'non-advised' in FrontNet application for all securities transactions*." An advised transaction is one in which Credit Suisse has advised the client to enter into the transaction, whereas a '*non advised*' transaction is one in which the client decides that the transaction should be effected, i.e. not on the advice of Credit Suisse. Credit Suisse employees are only permitted to advise that clients make investments that are within the Credit Suisse offering (termed the "*product buffet*"). Raptor was not part of the product buffet and so Mr Lescaudron was not permitted to advise his clients to purchase this stock. Indeed, it was "*a restricted security, and therefore no advice should be provided on it*".

363. In order to conceal his fraud, Mr Lescaudron booked the Raptor trades on his clients' accounts as '*non-advised'* on FrontNet (thus saying that they were telephone orders given by the customer). He initially sought to book the trades as '*advised*' but he was caught out. That meant that his fraud was particularly easy to spot because he had done this across the accounts of multiple clients. In short the Court accepts that it was not plausible that all Mr Lescaudron's clients were by their own accord, and by sheer coincidence, purchasing extraordinary volumes of Raptor stock. In reality, at least insofar as Mr Ivanishvili was concerned, Mr Lescaudron had simply executed transactions for his own purposes without any instructions at all.

The Credit Suisse anti-fraud systems

(i) Actimize

364. Actimize is a Credit Suisse application which:

> *"…supports compliance in transaction monitoring. It uses algorithms to query transaction data - based on defined scenarios - and generate alerts in the event of unusual transactions. These algorithms are designed to identify transaction scenarios that indicate potential misconduct or market abuse."*

365. GWP obtained and reviewed the documentation from Actimize on transactions picked up on Lescaudron relationship-managed accounts for Ivanishvili and found that it had generated separate warnings (including on the Policy Accounts). Amongst other things, "*Between 2013 and 2015, 49 red flags were generated by the Actimize system due to transactions with shares of Raptor Pharmaceutical Corp*." GWP observed that these cases were '*closed*' with "*almost identical comments*" and that "*Further clarifications and investigations, such as with regard to a possible concentration risk (and associated reporting obligations) with Raptor Pharmaceutical Corp, were, however, not made despite the high number of cases*."

(ii) Operational Risk Indicator System (ORIS)

366. ORIS is "*the anti-fraud application of CS. This application monitors both client and employee accounts with regard to fraud risks. The monitoring of employee accounts is carried out comprehensively, while that of client accounts is only carried out by means of random samples*".

367. GWP explain that ORIS generated 29 cases related to Mr Lescaudron between 2010 and mid-2013, 27 of which were generated on client accounts. These "*cases*" or alerts are raised where the ORIS monitoring system identifies possible fraudulent behaviour. It follows that in a three-year period 27 alerts of possible fraudulent behaviour and fraud risk were generated on Lescaudron client accounts. This is set out in section 6 of the FINMA Report.

(iii) Data Loss Prevention Solution

368. GWP record that Mr Lescaudron's communications with Mr Bachiashvili "*generated a large number of warnings through the Data Loss Prevention solution in the period from 2010 to 2015 (over 180 warnings), neither the warnings nor the manipulated account statements were escalated nor analysed. The warnings were all closed as 'plausible'*."

Wrongdoing before the Meadowsweet Policy commenced on 8 November 2011

369. The evidence before the Court in relation to any wrongdoing on the part of Mr Lescaudron prior to 8 November 2011 is as follows. In May 2008 Mr Lescaudron received a verbal reprimand for unauthorised action.[18] In June 2008 Credit Suisse internal audit graded the Russia/Eastern Europe/ Central Asia Desk, where Mr Lescaudron was based, 'D4' (the lowest rating), noting, amongst other things "*Management controls were ineffective as applied in various matters*."

370. The issues with Mr Lescaudron were already serious enough that on 16 August 2010, Mr Krattinger informed Ms Kaegi that:

> *We should escalate all issues to Mr John/Mr Godard that come up with Mr Lescaudron going forward.*
>
> *Mr John is prepared to see Mr Lescaudron leave the bank and is willing to accept this fact. Let's discuss how we are dealing with Mr Lescaudron going forward.*

371. In March 2011, the Credit Suisse Internal Audit observed with respect to the Russia desk that: "*… the documentation of client activities and suitability and appropriateness checks as well as know your client (KYC) documentation needs improvement. In addition, we noted missing verification and documentation of client orders. Further, e-mail agreements for clients communicating with the bank should be obtained consistently. Above issues might lead to legal and reputational risks for the Bank.* (emphasis added)

372. GWP conclude in the FINMA Report at [6.1.6] that:

> *The documents show that P.L.'s disregard for internal directives and guidelines, the inadequate safeguarding of client documentation as well as unauthorised*

[18] Case "PL" Fact Finding (24 September 2015) {ref} ("*Client complaint for reimbursement of damages of EUR 520000.-to cover losses on an investment in a highly leveraged structured product. PL promised to client that CS would cover the entire loss of EUR 420'000. plus pay an additional amount of EUR 100000.- without authorization*."); Credit Suisse Memorandum 26 May 2008.

settlements of client transactions had been known to the bank since June 2011 and had also been analysed and escalated to a certain extent.

373. GWP have set out in detail in the FINMA Report in section 6 the basis for their conclusions. Amongst other things:

(1) ORIS generated 29 cases related to Mr Lescaudron between 2010 and mid-2013.

(2) Trade Surveillance were on notice of Mr Lescaudron's inappropriate cross-trading between his clients in 2011. In short, Trade Surveillance was made aware that Mr Lescaudron was executing transfers from Mr Ivanishvili's account to his other clients without going through the appropriate processes, which required the cross-trade to be reviewed by Advisory and cleared by Compliance.

(3) GWP noted that despite the issue being raised by Trade Surveillance, "*the cross trades were never corrected as required by Trade Surveillance*."

(4) Compliance was informed about the improper cross-trading on 30 May 2011 and took various steps to investigate the position, including informing Mr Lescaudron's superior (Mr Vitse) about the issue.

(5) Business Risk Management was informed about various issues with respect to Mr Lescaudron, including his woeful report following a review of his enhanced due diligence processes.

Credit Suisse's knowledge of Mr Lescaudron's wrongdoing post-dating the issuance of the Meadowsweet Policy on 8 November 2011

374. By January 2012, there was an ongoing audit investigation into Mr Lescaudron's activities focused on his trading of Raptor shares.

375. On 2 February 2012, Mr Kilcher emailed Messrs Michaelides, Inhester, Spilsbury (who was Head of Business Risk Management) and Vitse (Mr Lescaudron's supervisor) setting out various suspicious aspects of Mr Lescaudron's trading:

"*We have potentially an issue identified by Audit regarding Patrice Lescaudron and his trading activities. At this stage the below information was only communicated verbally to me and an investigation is ongoing on their side.*

***Facts**:*

(1) Audit has found that the US Stock RAPTOR is traded in a very high volume by Patrice Lescaudron (buy, sell, buy, sell).

(2) Patrice Lescaudron is using bulk orders for these trades. The bulk orders are executed for various accounts and apparently for different BOs. (Confirmed by audit verbally)

(3) At a certain period of time, it appears based on Audit's calculation that all investments executed in the name of various clients of Patrice represented > 10% of the Market cap of the stock RAPTOR. (Confirmed by audit verbally)

What Audit is looking for:

(a) Is the documentation for these trades done properly (NB: already identified in the last Audit in September 2011)?

(b) Why Patrice is using bulk orders and for different BOs?

(c) Can Patrice as Investment Manager manipulate the stock price if he plays more than 10% of the Market Cap. (based on Audit calculation)".

376. The Court is unaware what further review was in fact carried out or what steps were taken by Messrs Spilsbury, Klaus and Vitse to "*try and understand the rationale behind the trades and the volumes and an understanding of the B/O*". The Plaintiffs complain that CS Life has failed to call any relevant witness or to explain what further steps were taken by the relevant individuals.

377. The Court accepts the Plaintiffs' submission that the revenues Mr Lescaudron was generating were very present in the minds of those who should have been stopping him from further wrongdoing. Despite all this, Mr Godard, Mr Lescaudron's direct supervisor, was at the same time considering giving Mr Lescaudron an award as the "*top performer of the EMEA*". On 16 February 2012, he asked for an update about the audit investigation (as he was concerned about giving Mr Lescaudron the award if there was "*something not compliant in his accounts*"). He was informed "*there will not be any further investigations by Audit*" and was given a summary of the "*key aspects of our internal investigation*". Given these findings, the Court accepts the submission that it is extraordinary that no further steps were taken.

378. The "*internal investigation*" had revealed that Mr Lescaudron's clients were buying very large quantities of Raptor shares, which Mr Lescaudron was booking as "*advised*" on the Frontnet system. This was concerning, not least because Raptor was not part of the Credit Suisse '*product buffet'* and therefore could not be an '*advised trade'*. When challenged about this, Mr Lescaudron changed his story and said that in fact the investments were "*execution only*" (i.e. the client's choice). Business Risk Management did not find Mr Lescaudron's story convincing, including because a number of his clients were investing in Raptor and summarised the key aspects of their investigation in the following email dated 16 February 2012:

> *"(1) RAPTOR was traded 2'724 times in 2011 for an amount > CHF 50 mios by PL clients. Most of the transactions were purchased orders (2'407 trades)*

(2) This shares accumulation strategy was identified by Audit and is one of the issue raised in the report because Control Room was not informed on time (PL sent the information but to the wrong Control Room). This is done now.

(3) Audit also identified that all these trades were reported as "advisory". Since RAPTOR is not in the CS universe, these trades could not be advised. PL admitted his mistake and explained these were "execution only " trades.

(4) However BRM has identified 9 accounts involved in these transactions. These are accounts of various group of BOs (one is Meadowsweet living in Caucasian region, another is the [ ] a third one is the [ ]).
Question: how can all these investors trade this stock on an "execution only " basis since there are no business links between them? BRM view is that these investors were advised to purchase this stock by PL

(5) Price of RAPTOR has raised from around US$ 3 up to US$ 6 in 12 months. PL clients have traded this stock during 138 days (Nasdaq quotation: 252 days). In details, during 33 days of trading, ***PL clients are representing > 30% of stock exchanges (#) on RAPTOR. Or during 54 days, PL clients represent > 20% of the volume of shares exchanged.***

BRM cannot exclude that with such a high volume invested in the stock, PL clients have contributed to the stock price appreciation.

(6) By extending the review to other stocks traded > 200 times in the year, BRM has found 6 other stocks. For all these 6 stocks, investors are partly the same as for RAPTOR. ***Strategy in some case is shares accumulation, in other churning (buy-sell).”*** (emphasis added)

379. Thus, Business Risk Management had identified that the problem probably affected other stocks – Mr Lescaudron had traded 6 other stocks more than 200 times in the year

and those stocks were held on client accounts that overlapped with the clients whose accounts he had bought Raptor on. Mr Inhester was alive to at least one possible fraud, as he asked in response: "*can we check if PL bought this stock for himself?"*

380. In June 2012, the Fraud Prevention team became involved as the anti-fraud system, ORIS, had repeatedly flagged Mr Lescaudron's purchases of Raptor shares. The anti-fraud department raised a number of issues on 1 June 2012, including (i) that Mr Lescaudron's story that the trades were '*execution only'* did not stack up; (ii) Mr Lescaudron's clients owned nearly 19% of Raptor; and (iii) Mr Lescaudron was misusing sensitive data (i.e. front running) with respect to Raptor transactions:

> *"**Description:***
>
> 1) *The RM starts buying Raptor share on his personal account [redacted] on the 30.04.2010.*
> 2) *A few important clients of the same RM started to buy significant amount of the same share on the 28.07.2010.*
> 3) *The RM sold his position on Raptor with a gain of CHF 62 740 over a period of one year (30.04.2010-03.06.2011) while his customer were still massively buying.*
> 4) *Important customers of the RM still buy Raptor Shares, they have now all together 19% of the company.*
> 5) *The RM bought new Raptor Shares on the 17.05.2012 on his personal account.*
>
> ***Moreover, what is important to know is:***
>
> *- Raptor is a quite illiquid share*
> *- 8 customers of this RM have on the 15.05.2012 80% of Raptor position within Credit Suisse*

- 8 Customers of this RM hold on the 15.05.2012 19% of the company Raptor Pharmaceutical.

- It is not clear if the RM advised this share to his customer or not, but why did he buy this quite illiquid share first and then his major customers?

- According to the RM, customers do not know each other except [redacted] and [redacted] which is quite difficult to believe.

My conclusion is that the RM has misused inside/sensitive information which are not publicly known and which are price sensitive to generate gain for himself…." (emphasis added)

381. On 22 June 2012, the '**ORIS Memorandum'** was circulated, which observed that in one quarter of 2011, numerous ORIS cases had been generated with respect to Mr Lescaudron. The ORIS Memorandum is summarised in the FINMA Report at [6.1.2]. The memorandum sets out a number of issues, including:

(1) Misuse of sensitive information.

(a) Mr Lescaudron was purchasing Raptor shares on his personal account whilst his clients also bought "*significant amount of the same share*". He then sold his shares whilst his clients were "*still massively buying*".

(b) Eight of Mr Lescaudron's clients had 80% of the Raptor positions in Credit Suisse and held 19% of the company.

(c) It "*stays unclear*" whether he advised the shares to his clients.

(2) Unclear advisory process

(a) Raptor is not covered by the Bank's research/product offering and so should not have been advised by Mr Lescaudron.

(b) "*Major customers never take their RET post*".

(c) It "*stays unclear*" what "*influence*" Mr Lescaudron has over his clients, and why his clients held such substantial Raptor positions.

(d) It was recommended that Mr Hobi "*further investigate the entire situation*". The Court is unaware if that happened or what the result of that further investigation was.

(3) Unclear internal cross trade transactions between three of Mr Lescaudron's clients

(a) Mr Lescaudron was executing transactions between his clients which is not permissible because "*there is no monitoring of price this way*". Internal trades are required to go through a special Advisory and Compliance process which Mr Lescaudron had not followed.

(b) It appears that the ORIS Memorandum had identified '*trades*' in which Mr Ivanishvili's assets were '*sold*' to Mr Lescaudron's other clients without any of the necessary checks. That appears to be a key part of the fraud.

(c) None of the necessary documentation for the internal trades existed.

(d) It "*stays unclear*" why Mr Lescaudron did not follow the proper process for trading between clients.

382. Mr Vaccaro accepted that, as a result of the ORIS Memorandum, "*various senior bank employees were informed … about serious wrongdoing by Mr Lescaudron*".

383. After the ORIS Memorandum was circulated, on 3 August 2012 Mr Rosskopf circulated a '*management summary'* which:

"*…went beyond the information in the ORIS memorandum. In addition to the suspicion of misuse of confidential information (front running) expressed in the ORIS memorandum, the unclear "advisory practice" and the internal securities transfers (cross trades), Jorg Rosskopf named two further grievances:*

- *unauthorised payments (UPA); and*
- *irregularities in the occasion-based EDD review*."

384. Notwithstanding the numerous failings detailed in the ORIS Memorandum, no serious disciplinary action appears to have been taken: Mr Lescaudron only received warnings and a 24.5% bonus reduction for one year. Mr Rosskopf explains that this was because "*there was a conflict of interest between compliance and the revenues produced by [Mr Lescaudron]*". Following the Bank's failure to take appropriate measures against Mr Lescaudron, Mr Battig (Manager of the EMEA business) wrote to Mr Andreas John (Head of UK / International) in November 2012: "*I am no longer prepared to support [Mr Lescaudron] anymore. It is blatantly obvious that he does not care one jot about our regulations and your (hopefully) clear instructions. I cannot imagine why you want to continue to employ an employee with such character deficits*".

385. On 3 September 2012 Mr Rosskopf emailed Messrs Schnyer and Clemencon explaining that a further issue with Mr Lescaudron had come up with respect to his execution of unauthorised payments:

"*For your information, here is information from LCD regarding new 'unauthorised payments'. Obviously, this gentleman cannot or does not want to learn anything and continues his consistent ignoring of all game rules without being deterred*."

386. The issue was escalated to Mr Dastmaltschi who instead of taking steps to prevent Mr Lescaudron's wrongdoing said "*they are watching him like a hawk. Can you please ask him to stop this until the new trust is set up?*". The reference to a '*new trust'* is a reference to the Sandcay Policy which was issued in December 2012 (and was held under the Green

Vals Trust). It is reasonably clear to the Court that Mr Dastmaltschi's concern was not to prevent Mr Lescaudron's wrongdoing, but to ensure his wrongdoing did not get in the way of Mr Ivanishvili transferring further substantial sums to CS Life. It is also reasonably clear that a conscious decision was taken to allow Mr Lescaudron to proceed to allow the Policy to be issued by CS Life knowing of his wrongdoing (and not informing Mr Ivanishvili of what was known to have been unauthorised trading on his accounts, wrongful transfers and other wrongdoing).

387. On 3 September 2012, Mr Spilsbury became involved again on the Business Risk Management side. He summarised the position as follows:

> *A lot has been written on the Patrice Lescaudron case, he has violated policy on a continued basis from 30/05/2011 where he had broken policy on misuse of internal cross trades.*

A summary of his violations reads as follows:

> *30.05.2.011 and 25.07.2.011 Patrice Lescaudron performed internal cross trades without passing through advisory (EBA) and compliance as required by L/C alert A- 07-00018*
>
> *Misuse of sensitive information e.g. Patrice Lescaudron sold shares 03.06.2011 20000 shares, immediately after 2 clients buy 123000 shares client 1 client sells 30000 shares; total trade volume at that date was over 2m shares.*
>
> *Non-Product Buffet Raptor stock suspected advisory trades booked as execution Unauthorized payments USD 3000'000 March 19th EDD [enhanced due diligence] reviews out of 51 reviews 45 where not plausible.*

388. The review of the evidence outlined above shows, and the Court finds, that no action was taken to stop Mr Lescaudron and remove him from being able to carry on wrongful dealings on the accounts.

389. It is known from the "*grey zone*" email of 26 June 2015 and Mr Dastmaltschi's conversation with Mr Bachiashvili on 29 June 2015, and the Court finds, that Mr Dastmaltschi consciously allowed Mr Lescaudron to continue to operate in the "*grey zone*" "*outside the frame of a mandate*" by then over a period of years since he had become aware of the violations.

390. The Court finds that the decision in 2012 not to remove Mr Lescaudron and to allow him to carry on his wrongdoing was driven, to a significant degree, by concern to protect revenues. He "*accounted for 70 per cent of revenues for his team in Geneva*" and "*generated more than CHF 54 million in revenue for CS*". As the FINMA report records, Mr Rosskopf, the then head of Business Risk Management told GWP in his interview specifically that the issue with dealing properly with Mr Lescaudron had been "*the conflict of interest between adherence to rules/compliance and revenue production*". As Mr Rosskopf said to Mr Clemencon after the fraud began to unravel in September 2015:

> "*It is ultimately always about the same question: if everyone knew that PL. is not exactly a guy who stands out for compliance, why did you tolerate it for so long and only react after the transgressions have become massive (i.e. in 2012). I think we all know the answer*."

391. It is also reasonably clear that Business Risk Management (which was the compliance and internal audit department for CS Life as much as the Bank) clearly wanted Mr Lescaudron removed and Mr Lescaudron's wrongdoings exposed (which would have required the clients to be informed). They were not able to:

> "*Overall, Jorg Rosskopf was able to bring the misconduct of P.L. to light, as far as his position so permitted at the time. Nevertheless, Jorg Rosskopf was not able to*

assert himself against other employees of the bank who advocated for a lower punishment of P.L. According to Jorg Rosskopf's statement in the interview with GWP, he refrained from further escalation of the incidents because he feared that this would mean a breach of loyalty to his line management and he could lose his position within the bank." (FINMA Report page 257).

Credit Suisse's knowledge of Mr Lescaudron's wrongdoing following the margin calls in September 2015

392. Credit Suisse brought in their internal Security Services to investigate Mr Lescaudron's fraud after the margin calls and concluded that he had acted fraudulently, including against Mr Ivanishvili with respect to the Policy Accounts.

393. Credit Suisse Security Services interviewed Mr Lescaudron on 18 September 2015. Mr Lescaudron admitted, *inter alia*, that he forged Mr Ivanishvili's signature "*to create false handwritten transfer orders*", bought Raptor in "*large amounts for [Mr Ivanishvili]*" and that whilst Mr Ivanishvili knew about the "*initial investment*" he did not know about the "*volumes which followed*". He admitted to trading without authority or instructions ("*I did not have an advisory mandate to do this*") and to modifying performance reports "*to hide the losses and in other cases to hide a profit*".

394. Credit Suisse concluded in light of that interview that "*As of Sept. 16., 2015, [Mr Lescaudron's three clients] together held the equivalent of CHF 141mn in "R' shares (-25% of company's market capitalization) and incurred a loss at book value of CHF 100mn*."

395. Credit Risk Management prepared an initial summary on 24 September 2015 (DINO update) which concluded, *inter alia*:

"RM built up hidden (for the client) positions in Raptor shares in several client portfolios.

It is not clear what his intention was…

B.I….It seems that the RM not only has invested in Raptor shares without client orders but also in other securities."

396. Credit Suisse set up a task force to investigate the fraud with 10 streams of work. Specific '*streams*' were assigned to various individuals:

(1) Overall co-ordination: Mr Ribet supported by Mr Frochlicher and Ms Scheidegger.
(2) Client Contingency: Mr Huguenin supporting by, inter alios, Mr Dastmaltschi.
(3) Fact finding and emergency measures, including interviews: Mr Seegar (Security Services) supported by inter alios Mr Huguenin.
(4) Investigation (file-based fact finding, understanding the possible scope of the fraud): Mr Ribet supporting by 'internal audit'.
(5) Raptor stock position (investigations etc): Mr Frochlicher supported by *inter alios* Mr Ribet.
(6) Credit Risk: Mr Scheich.
(7) SEC reporting: Messrs Gillieron and Schoch.
(8) HR Measures: Ms Rizzoli.
(9) Criminal Complaint: Mr Landry
(10) NDA: Mr Frochlicher.

397. The Plaintiffs rightly complain that each of these individuals is likely to have highly material information about Mr Lescaudron's wrongdoing, but none have been called by CS Life to give evidence.

CS Life's knowledge (irrespective of the Group Function) of Mr Lescaudron's inappropriate Raptor investments

398. There can be little doubt that the size of the investment in the acquisition of the Raptor stock in the Meadowsweet and Sandcay accounts was entirely inappropriate and unjustifiable. As Mr Vaccaro accepted, Raptor is a risky stock with a boom or bust

model. Mr Lescaudron purchased, even on CS Life's case, "*extraordinary*" levels of Raptor shares which were "*no doubt…beyond what was appropriate*".[19] As at 31 August 2015 (and assuming that 100% of the indirect Raptor funds were invested in Raptor) over 35 per cent of the Sandcay Policy Assets (and a far greater percentage if the Sandcay 75-3 Sub Account is removed) were invested in Raptor and over 75 per cent of the Meadowsweet Assets. Clearly someone at CS Life (whether from the Group Function or CS Life's own asset monitoring department) should have noticed this and investigated the size of the investment in Raptor.

399. CS Life's own asset monitoring department was on notice that Mr Lescaudron's investments in Raptor were very far from normal, such that CS Life should have investigated what was going on.

(1) Mr Lescaudron was buying such large volumes of Raptor stock that CS Life was hitting the limit at which it was required to make SEC filings in the USA. He was instructed to reduce his Raptor purchases by CS Life (which as legal owner of the securities had the right to issue that instruction), but he did not merely ignore the instruction, he purchased yet further Raptor shares. When he was caught out by CS Life's asset monitoring team, he offered what was (as Mr Vaccaro agreed) a particularly weak excuse (that he understood that he had to sell some shares but did not realise he was not allowed to buy more). This should have put CS Life on notice (again) that something odd was going on.

(2) Mr Lescaudron was instructed by Mr Saluz of CS Life on 22 November 2013 that "*no further investments*" in Raptor were to be purchased without "*explicit pre-approval of CS Life*". Large quantities of Raptor shares were nevertheless purchased on the Policy Accounts after this date. Mr Coffey could not say whether CS Life had given approval for those purchases, but he accepted that although he was not made aware of these special rules for Mr Lescaudron's Raptor purchases, he should have been made aware of them.

[19] per Mr Moverley Smith QC.

400. The fact CS Life imposed a special regime under which Mr Lescaudron was required to obtain pre-authorisation from CS Life itself before making additional Raptor purchases, establishes that it was on notice that Mr Lescaudron's behaviour with respect to Raptor was concerning. The Court accepts that the fact Mr Lescaudron subsequently bought further Raptor shares apparently without obtaining the necessary pre-authorisation should have raised further red flags. Instead, this appears to have been entirely ignored by CS Life. Certainly, none of CS Life's witnesses offered any explanation for why CS Life permitted Mr Lescaudron to buy further Raptor shares once the pre-authorisation regime had been put in place by Mr Saluz. Had Mr Saluz been proffered as a witness, the Plaintiffs contend they would have asked him about this.

CS Life's knowledge (irrespective of the Group Function) that Hyperion was inappropriate

401. CS Life itself (i.e., irrespective of the Group Function) was aware from at the latest August 2013 that there was something odd about Mr Lescaudron's investments in the Hyperion funds on the Policy Accounts. These funds were vehicles for indirect Raptor purchases that Mr Lescaudron invested in to obtain unlawful commissions. Mr Weinwurm raised concerns about the investments in the Hyperion funds (which were on the Policy Accounts) directly with Mr Läser and Mr Schmid on 26 August 2013. Mr Weinwurm, *inter alia*, said:

> ***Funds****:*
>
> *Line 12: Hyperion 50 m*
> *I don't know the fund, not even our hedge fund analysts*
> *But I did some rough research.*
> *Seems to be an investment manager in Geneva (Sequoia AM).*
> *Strategy seems to be managed futures, rather volatile (-24% in July 2011).*
> *Bloomberg has even more up-to-date data.*

402. Mr Weinwurm attached two documents. First, an extract from an excel spreadsheet, seemingly showing the position on the Policy Accounts revealing large positions in the

Hyperion funds. Secondly a fund information sheet showing that Hyperion was performing disastrously, in that it was down 45.81% year to date and was performing catastrophically when compared to the S&P500.

403. Mr Läser then forwarded the information to Mr Cielen promising to give him "*more information on this tomorrow morning so that you are prepared*". Mr Coffey accepted that this was information which "s*hould have been investigated [by CS Life] and perhaps was by Mr Laser*" (although he did not know whether it had been). Mr Coffey accepted that these emails show there "*clearly was some substantive asset monitoring going on in relation to assets on the CS Life accounts*".

404. In the circumstances the Court finds that CS Life knew about certain of Mr Lescaudron's wrongdoing and could and should have known about his further wrongdoing before the Meadowsweet Policy commenced on 25 October 2011 and after the Meadowsweet Policy commenced.

(18) CS Life turned a 'blind eye' to Mr Lescaudron's wrongdoing and/or concealed its knowledge of Mr Lescaudron's wrongdoing from CS Life's CEO

405. As set out at [360] to [404] above, the Court accepts that given the multitude of alerts and warnings of Mr Lescaudron's repeated wrongdoing, the failure to take appropriate and effective action to bring Mr Lescaudron's wrongdoing to an end can only be explained by CS Life having turned a 'blind eye'.

406. Further, the Court accepts that the information that the Group Function had identified calling into question Mr Lescaudron's suitability as relationship manager was not shared with CS Life's CEO in Bermuda.

(19) The Group Function and/or CS Life did not take action (or adequate action) to prevent Mr Lescaudron's fraudulent mismanagement of the Policy Accounts because it was

prioritising the revenues Mr Lescaudron generated for Credit Suisse over the interests of its clients, including the Policyholders or Mr Ivanishvili

407. As noted at [360] to [404] and as admitted by Mr Rosskopf at [390] above the Group Function and/or CS Life did not take action (or adequate action) to prevent Mr Lescaudron's fraudulent mismanagement of the Policy Accounts because it was prioritising the revenues Mr Lescaudron generated for Credit Suisse over the interests of its clients, including the Policyholders and Mr Ivanishvili.

408. The Court accepts that extensive issues came to the attention of the Group Function and/or CS Life about Mr Lescaudron's mismanagement (and/or potential mismanagement) of client funds and, in particular, his mismanagement of Mr Ivanishvili's funds. No steps (or at least no adequate steps) were taken to prevent him from committing his fraud against the Policy Assets (Findings 17 at [360] to [404], Finding 18 at [405]-[406] and Finding 19 at [407] to [409]). Mr Vaccaro accepted that, notwithstanding Credit Suisse was on notice of Mr Lescaudron's wrongdoing, steps were not taken to bring his misconduct to an end.

409. As the Court has already held, it is evident that a significant factor which led to the situation was because Credit Suisse was concerned about losing the revenues that Mr Lescaudron was generating (including from Mr Ivanishvili).

(20) CS Life had the power not to appoint Mr Lescaudron to manage and/or hold and/or invest the Policy Assets and/or to remove Mr Lescaudron from those roles

410. CS Life had the right to insist not to appoint and/or to insist that Mr Lescaudron was removed as relationship manager dealing with the Policy Accounts. The Court accepts that this was confirmed by CS Life's then-CEO, Mr Coffey.

411. After being shown a summary of the ORIS Memorandum, Mr Coffey said that if it had been brought to his attention, he would have investigated, and had there been no good

explanation he would have stopped Mr Lescaudron from selling policies and stopped CS Life issuing the policies to Mr Ivanishvili:

> *Q…We will come to the ORIS memorandum in a moment but can I ask you this, Mr Coffey, and we will look at this in a little more detail, but just on the basis of this summary for the moment. If it had been identified to you in 2011 and 2012 that the anti- fraud system within the group had identified possible fraud risks in connection with Mr Lescaudron, what would you have done about that so far as allowing policies to be sold by Mr Lescaudron to clients and then CS Life issuing those policies?*
> *A. If any of this would have been brought to my attention, I think we would well, we would have investigated*
> *Q. There's no question of you allowing policies then to be issued on the basis of Mr Lescaudron's dealings with clients, is there?*
> *A. Well, I am assuming that this information would go to his supervisor who would contact us and we would address it and get it resolved.*
>
> *Q. If you are assuming that, then you are saying you are assuming this information would go to his supervisor who would contact us. Well, you see just in terms of summary, that it was identified and we will see in a moment, it certainly did go to his supervisor and higher but you weren't contacted, were you?*
> *A. No, I was not.*
>
> *Q. So I will, if I may, repeat my question.* ***If it had been identified to you in 2011 and 2012 that the anti- fraud system within the group had identified possible fraud risks in connection with Mr Lescaudron, what would you have done about that so far as allowing policies to be sold by Mr Lescaudron to clients and then CS Life issuing the policies?***
> *A.* ***Investigate it to make sure it's not a false positive or there isn't a good explanation and then stop him from doing that.*** (emphasis added)

412. In the circumstances the Court finds that CS Life had the power not to appoint Mr Lescaudron to manage and/or hold and/or invest the Policy Assets and/or to remove Mr Lescaudron from those roles.

(21) CS Life did not (i) proffer witnesses who would have been likely to have material evidence to give on matters arising in this action and (ii) offered no explanation for not doing so

413. As set out at [160] to [179] above, CS Life has failed to call multiple witnesses who would have been likely to have material evidence to give on matters relevant to these proceedings. The Court accepts that CS Life has offered no explanation for that failure.

(22) CS Life did not give discovery of all documents responsive to the Specific Discovery Order

414. As set out [146] to [156] above, the Court holds that CS Life did not give discovery of all documents responsive to the Specific Discovery Order.

(23) CS Life (i) concealed from the Plaintiffs and the Court that the Bank had not responded to its letter seeking production of documents under Article 400; and (ii) gave the Plaintiffs and the Court the misleading impression that the Bank had provided documents to CS Life pursuant to that request

415. Having reviewed the evidence in relation to CS Life's requests to the Bank as set out in Burke 28 at [32]-[54] the Court declines to make a finding in the precise terms set out above.

(24) CS Life concealed that the 'group functions' were performed on its behalf by the Bank (see: Factual Finding 12) until trial, including during the discovery phase of these proceedings (and in related interlocutory hearings)

416. The Court has already found that the Bank performed various group functions on behalf of CS Life, including providing compliance, human resources, fraud prevention and general counsel services for CS Life (Finding 12).

417. The Plaintiffs complain that despite its obvious relevance to the proceedings, CS Life concealed from the Court and the Plaintiffs that the Bank performed the group functions on behalf of CS Life throughout the material period.

418. The Plaintiffs contend that it is unacceptable that this highly relevant information was revealed for the first time at the trial in cross-examination. In the witness statements filed on behalf of CS Life, CS Life repeatedly suggested it only had a very limited role, that it did nothing and carried out no monitoring of the CS Life accounts. Those statements (which formed the basis for CS Life's opposition to various discovery orders), the Plaintiffs contend, were misleading.

419. The Court refers to the evidence which first surfaced during the trial and as set out at [284] to [303] above and, having regard to that evidence, the Court does find that the existence of the Group Function was not disclosed by CS Life either to the Plaintiffs or to the Court prior to the commencement of the trial.

(25) CS Life did not identify in Mr Coffey's Fourth Affidavit each of the individuals that had been "made available by the Bank to conduct life insurance business"

420. The Plaintiffs complain that CS Life (through Coffey 4) identified 26 so-called "*Bank-Life Employees*" who had been made available by the Bank to carry out CS Life business. That identification was used to identify custodians for the purpose of discovery. Mr Coffey explained in his oral evidence that the names had been provided to him for inclusion. The Plaintiffs contend that it is likely it came from the General Counsel unit at the Bank, which has control of the litigation. Mr Coffey effectively accepted that he had taken no steps to verify whether the list of names provided to him was complete.

421. The Plaintiffs contend that the list was materially incomplete:

(1) Mr Coffey did not include Mr Schmid, notwithstanding Mr Schmid was in charge of CS Life's asset monitoring department during the material period. Mr Coffey stated that he had no knowledge of either Mr Schmid or the CS Life asset monitoring department.

(2) Mr Coffey did not include any individuals from the Group Function. Importantly, none of the individuals involved in carrying out anti-fraud monitoring / prevention on the Policy Accounts were identified. Nor were any of the individuals involved in investigating the Lescaudron fraud on behalf of CS Life included by Mr Coffey.

(3) Mr Keusch gave evidence that Messrs Bhojwani and Parashar worked for CS Life in Asset Accounting (which department held information about all transactions on the accounts). They were not included in Mr Coffey's list of Bank-Life employees.

422. The Court again refers to the evidence which first surfaced during the trial and is set out at [284] to [303] above and having regard to that evidence the Court does find that the existence of the Group Function and the individuals who performed the Group Function on behalf of CS Life was not disclosed by CS Life either to the Plaintiffs or to the Court prior to the commencement of the trial.

(26) CS Life concealed the fact of its asset monitoring team from the Plaintiffs and the Court

423. The Plaintiffs complain that not only did CS Life not reveal that it had a dedicated asset monitoring department in its witness statements or during the discovery phase of these proceedings, but it also redacted all reference to this department in its discovery. The Plaintiffs argue that they only found out that this department existed after obtaining an order that CS Life must confirm that the redactions were properly made under Bermuda law. CS Life did not give discovery from its asset monitoring department until the Plaintiffs applied for an 'unless order' on 22 October 2021 which was compromised by

consent 11 days before the hearing. The disclosure revealed that the asset monitoring team carried out extensive previously undisclosed monitoring of the Policy Accounts, including receiving notifications when the value of assets in one of the CS Life accounts broken down on an individual policy level moved by more than 5% in a month.

424. The Plaintiffs say that CS Life finally addressed the asset monitoring department in Mr Celia's fourth witness statement, sworn after the presence of the department had come out and the relevant documents had been discovered. Amongst other things, this statement revealed for the first time, the Plaintiffs argue, that CS Life had specific tools (including a Risk Analyser) for monitoring the management of its accounts, which it used to monitor external asset managers. Mr Celia explained in evidence that CS Life could, but did not, opt to use these tools to monitor the management of its accounts by the Bank's asset manager. The Plaintiffs argue that CS Life could have used the tools to monitor Mr Lescaudron, but it opted not to do so.

425. The Plaintiffs also contend that none of CS Life's witnesses could give any explanation for why they had not mentioned the CS Life asset monitoring department in their witness statements, despite each of them addressing CS Life's asset monitoring function in detail. Mr Celia accepted that he knew monitoring was an issue in these proceedings but claimed to be unable to "*recall the reason exactly*" for not referring to the asset monitoring department in his first three statements. Ms Homann was also unable to recall why she had avoided all reference to the CS Life asset monitoring team in her evidence. Mr Keusch not only made no mention of the asset monitoring department in his witness statement, but he also went further and positively asserted that "*nor were any steps taken [by CS Life] to identify unusual fluctuations or changes in asset composition*." The Plaintiffs contend that this assertion is untrue: CS Life's asset monitoring department monitored for fluctuations or changes of +/- 5% on the CS Life Accounts and submitted reports, as explained above.

426. All the witnesses on behalf of CS Life emphasised that the principal function of the asset monitoring department was to monitor that only appropriate products comprised the

investments in the Policy Accounts. However, the evidence also shows that the asset monitoring department, as outlined above, went further than simply ensuring that the appropriate products were included in the Policy Accounts. It is also a fact that the existence of the asset monitoring department was not disclosed by CS Life until just prior to the commencement of the trial in November 2021.

(27) The investigations by Credit Suisse (and its agents, Walder Wyss and PwC) into Mr Lescaudron's fraud were (insofar as they affected the Policy Accounts) carried out on behalf of CS Life (as well as the Bank) as a group subsidiary affected or potentially affected by the fraud which had to be investigated

427. The Plaintiffs' position is that the investigations carried out by Credit Suisse (and its agents, Walder Wyss and PwC) into Mr Lescaudron's fraud were (insofar as they affected the Policy Accounts) carried out on behalf of CS Life by the Group Function. CS Life's case is that these investigations were carried out by the Bank only on its own behalf.

428. It is clear to the Court that CS Life's witnesses accepted that Credit Suisse's investigations into Mr Lescaudron's fraud were carried out on both the Bank's and CS Life's behalf, as CS Life was a Credit Suisse subsidiary that was directly affected by the fraud. Thus, Mr Celia confirmed in cross-examination that "*the security services investigating this matter, they would be investigating for the bank, but also for any subsidiary within the group that was potentially affected*"; and that in relation to an allegation that there had been unauthorised trades on a Policy Account "*investigation of that would need to happen and it would need to happen for CS Life because it would be a matter directly affecting CS Life's assets, the assets on its books that were in its accounts with the bank*."

429. This was also confirmed by Mr Vaccaro as a CS Life director:

COURT: Mr Vaccaro, you are giving evidence as a director of this company, CS Life. You said just before the adjournment that if you suspected fraud, such as, for example, that the relationship manager wasn't carrying out transactions without authority of the client you would ask the compliance department to investigate. Do you remember that, do you remember saying that?
A. Yes, I do

Q. What are you hoping to achieve?
A. So if there is a suspicion of fraud and we are basically escalating that to the compliance or to the fraud department, it is basically essentially knowing whether a fraud was there or not.

Q. So the compliance department would be conducting this investigation on behalf of the company, would it?
A. Yes.

430. The evidence of Mr Vaccaro is consistent with the other evidence confirming that (i) fraud prevention, internal audit, compliance, security services and investigations are group functions ([284] to [303] above); (ii) the investigations directly related to a fraud that took place on the CS Life accounts; and (iii) Bank-Life employees assisted with the investigations.

431. Thus, on 28 September 2015, Mr Keusch - following "*a very urgent request*" from Mr Laser – asked Messrs Davda and Bhojwani to provide "*a complete history of the portfolios. That means every shares and units were ever booked in this two policies form the beginning (October 2011) (sic).*" Mr Keusch followed up "*If it takes too much time please to provide the complete portfolio history I kindly ask you to send me a complete history of the 'Raptor Pharmaceuticals (RPTP)' ...which is held in the mentioned policies*." This was 10 days after Mr Lescaudron had been interviewed by the Credit Suisse Security Services and had admitted to wrongdoing relating to Raptor. The Court accepts that it is therefore obvious that Mr Läser (then a CS Life director) was initiating

or at least involved with the Credit Suisse investigation into Mr Lescaudron's wrongdoing, as were other CS Life Bank-Life employees.

432. The Court also accepts that it is evident from the face of the PwC Reports that PwC was given access to information about the CS Life accounts, which would not be permissible unless the investigation was being carried out on behalf of CS Life.

433. In the circumstances the Court finds that the investigations by Credit Suisse (and its agents, Walder Wyss and PwC) into Mr Lescaudron's fraud were (insofar as they affected the Policy Accounts) carried out on behalf of CS Life (as well as the Bank) as a group subsidiary affected or potentially affected by the fraud which had to be investigated.

(28) CS Life has not taken any steps to recover the losses on the Policy Accounts

434. It is common ground that CS Life has taken no steps to recover the losses on the Policy Accounts.

435. CS Life's witnesses accepted that CS Life had a legal claim against the Bank arising out of the Lescaudron fraud which CS Life had opted not to pursue. CS Life's witnesses were unable to offer any explanation for why CS Life had not pursued a claim against the Bank.

(29) If Mr Ivanishvili had known the Policy Assets were not being managed professionally and/or that funds were being misappropriated he would have moved the Policy Assets to a reputable European bank to be invested in a medium risk portfolio

436. Mr Ivanishvili's evidence is that if he had known that the Policy Assets were not being managed professionally and that funds were being misappropriated, he would have moved the Policy Assets "*to a reputable European bank to be invested in a medium risk investment portfolio*".

437. The Court accepts that this is consistent with the inherent probabilities that an account holder would move their assets out of a financial institution if it transpired its assets were being fraudulently mismanaged and that should be uncontroversial. Mr Ivanishvili's relationship with Credit Suisse was based on trust of them as safe and reputable.

438. It appears that CS Life contends that Mr Ivanishvili would have left the Policy Assets with the Bank even if he had discovered the fraud earlier. The basis for this argument is that Mr Ivanishvili left in the region of USD 60 million in the Policy Accounts after he discovered the fraud. The Court accepts that the reason why Mr Ivanishvili did not transfer the entirety of the assets from the Bank and CS Life was because CS Life took the position that it would not give up reliance on a provision in the GPCs that could be interpreted as allowing it to be exempted from all liability if all policy assets were surrendered. The Court accepts that Mr Ivanishvili was quite reasonably concerned that if he transferred the totality of the Policy Assets out of the Policy Accounts, CS Life would have argued that this automatically disbarred him from pursuing this claim pursuant to Clause 11 of the GPCs, which provide if a total surrender is affected "*[t]he Policy will expire and all liabilities of Credit Suisse Life will immediately and irrevocably cease from the date of the payment*."

439. The factual position is that Mr Ivanishvili asked CS Life to confirm that it would not argue, if he transferred the totality of the Policy Assets out of CS Life, that this would defeat this claim. However, CS Life refused to give that confirmation. The Court accepts that left Mr Ivanishvili in an invidious position: leave substantial funds with CS Life (notwithstanding the fraud) or move the funds to Julius Baer and risk disabling himself from bringing this claim.

440. The Court notes that CS Life's pleaded case remains that if the totality of the Policy Assets were moved out of the Policy Accounts, it would argue that this defeated this claim:

(1) RASOC, prayer paragraph 6 seeks "*a declaration that a total surrender does not avoid or reduce the liability of CS Life for the claims made in these proceedings whether under section 11 of the GPC, or any other clause of the Policies, or at all*"

(2) CS Life's case in response (at paragraph 69B {A/3/24}) is that "*The Plaintiffs are not entitled to the relief sought which would be contrary to the express terms of the GPC. Clause 11 of the GPC provides that on a total surrender of the Policy: 'The Policy will expire and all liabilities of Credit Suisse Life will immediately and irrevocably cease from the date of the payment*.'"

441. In the circumstances the Court is satisfied and finds that if Mr Ivanishvili had known the Policy Assets were not being managed professionally and/or that funds were being misappropriated he would have moved the Policy Assets to a reputable European bank to be invested in a medium risk portfolio.

(30) If Mr Ivanishvili had known that fraudulent transactions had been taking place on his accounts with the Bank, he would not have agreed to set up the LPI Policies but would instead have moved the management of the money to a reputable European bank to be invested in a medium risk investment portfolio

442. The Court accepts Mr Ivanishvili's unchallenged evidence that if he had known that fraudulent transactions had been taking place on his accounts with the Bank, he would not have agreed to take out the Policies and would instead have moved the management of the money to a reputable European bank to be invested in a medium risk investment portfolio. Accordingly, the Court makes a finding in these terms.

(31) Mr Lescaudron (on behalf of CS Life) impliedly misrepresented when selling the LPI Policies to Mr Ivanishvili that he (and the Bank) was not fraudulently managing the Plaintiffs' existing accounts and/or did not intend to manage the Policy Assets fraudulently and intended the Plaintiffs to act on those misrepresentations

443. The Court refers to its earlier Finding 2 at [188] to [211] (*CS Life delegated responsibility for the sale of the LPI Policies, agreeing the terms on which assets would be transferred to CS Life (including the 'investment alternative'), reporting on the LPI Policies and any ongoing dealings with respect to the LPI Policies to Mr Lescaudron qua Mr Ivanishvili's relationship manager*); Finding 4 at [238] to [240] (*CS Life knew at the time the Policies were taken out that they were being taken out for the benefit of Mr Ivanishvili and his family*); Finding 5 at [241] to [245] (*If the Policy documentation evidences a 'choice' that the Policy Assets should be managed on a non- discretionary basis this was fraudulently put in place by Mr Lescaudron (acting on behalf of CS Life)*); Finding 6 at [246] to [247] (*Mr Lescaudron did not place the Policy Assets in toto with the Bank's portfolio management team in order to facilitate his fraudulent management of the Policy Accounts*); and Finding 16 at [354] to [359] (*Mr Lescaudron was fraudulently mismanaging the Plaintiffs' accounts with the Bank before the LPI Policies were taken out*).

444. The Court accepts and finds that by selling the LPI Policies to Mr Ivanishvili in the circumstances set out in Mr Ivanishvili's evidence, Mr Lescaudron (acting on behalf of CS Life) impliedly represented that he (and the Bank) was not fraudulently managing the Plaintiffs' existing accounts and/or did not intend to manage the Policy Assets fraudulently.

445. The Court also finds that Mr Lescaudron knew the misrepresentations were false and, in the circumstances, infers that he intended to continue fraudulently mismanaging the Plaintiffs' Assets and intended the Plaintiffs to act in reliance on his deceit.

D. Breach of Contract

446. In their written closing submissions, the Plaintiffs contend that CS Life failed to comply with its contractual obligations under the Policies in the following respects:

(1) CS Life failed to invest the Policy Assets in accordance with the investment alternative selected by the Policyholders.

(2) CS Life failed to comply with its implied duty to carry out the services it provided under the Policies with reasonable care and skill.

(3) CS Life failed to invest the premiums prudently and/or with proper care, skill and diligence, when appointing (and/or causing the appointment of) the Bank and/or Mr Lescaudron to manage and/or hold and/or invest the Policy Assets.

(4) CS Life failed to monitor the investment of the Policy Assets for fraud and/or supervise the Bank.

(5) CS Life failed to hold and deal with the Policy Assets for the benefit of Meadowsweet and Sandcay.

(6) CS Life failed to ensure that the policy records provided to the Plaintiffs were true and accurate and maintained in accordance with generally accepted accounting principles.

(7) CS Life failed to take any, or any adequate, steps to recover the losses caused to the Policy Assets.

(1) *CS Life failed to invest the Policy Assets in accordance with the investment alternative selected by the Policyholders (RASOC [51.3] and [51.4]).*

(a) The contractual obligation

447. The Plaintiffs contend, and the Court accepts, that CS Life was under an absolute obligation to invest the Policy Assets "*in accordance with the investment alternative indicated in the application form and as set out in the Policy and any Policy addendum*".[20] This obligation is repeated throughout the GPCs and is also contained in the other LPI Application Documents (albeit in slightly different terms). It forms a

[20] Clause 6 of the 2011 GPCs; Clause 6 of the 2012 GPCs; RASOC [12.7(c)]; [51.3]; [22(c)].

critical part of CS Life's overarching obligation to ensure that the Policy Assets were placed safely with the Bank and thereafter managed competently and in accordance with the Policyholders' wishes.

448. As noted earlier, the 2011 GPCs provide:

> *"The internal fund consists of the integrated assets invested separately from the other assets of Credit Suisse Life, in accordance with the investment alternative chosen by the policyholder and is linked to the segregated account in respect of the Policy.*
> *The investment alternative*
>
> *The policyholder chooses an investment alternative to match his/her investment goals and risk tolerance. For discretionary mandates, the portfolio is managed according to the current investment policy of the custodian bank and in line with the guidelines relating to discretionary mandates issued by the Swiss Bankers Association.*
>
> *6) Use of the premium*
> *The invested capital consists of the premium after deduction of any upfront-insurance fees or deductions. The net single premium and the net additional premium (if any) are invested in the internal fund in accordance with the investment alternative indicated in the application form and as set out in the Policy and any Policy addendum.*
>
> *7) The investment alternative and content of the internal fund*
>
> *The policyholder may choose an investment alternative with or without discretionary mandates. The investment alternative without discretionary mandate may comprise of investment funds, structured investments, direct investments and fiduciary deposits"* (emphasis added).

449. The obligation on CS Life to invest the insurance premium in accordance with the agreed investment alternative is carried through into the LPI Application Documents (which the parties agree form part of the contract between CS Life and the Policyholders). The Meadowsweet LPI Application at page 12 states, under the heading "*the Internal Fund*", that "*[t]he internal fund is invested separately from the insurance company's other assets and managed according to the investment alternative chosen in the application*." The first line of the next paragraph provides: "*Credit Suisse Life will invest the insurance premium according to the investment alternative agreed with the policyholder*."

450. The Sandcay LPI Application form contains similar terms.

451. Given the express terms of the Policies, the Court accepts that CS Life was under a duty to invest the premium payments in accordance with the investment alternative selected by the Policyholders. In its Skeleton Argument, CS Life submits that this submission represents an "*ambitious attempt to extract contractual duties from narrative passages in the GPC*". The Court considers that the GPCs clearly constitute contractual obligations of the parties. They state on their face: "*These General Policy Conditions stipulate the rights and obligations of both contracting parties to the Policy*". The parties agree that they contain terms of the contract between the Policyholders and CS Life.[21]

452. The Court accepts Mr Smouha QC's submission that there is also nothing surprising about CS Life being under an absolute obligation to invest the premium payments in accordance with the investment alternative selected by the Policyholders. The Policyholders transferred legal ownership of extremely valuable assets to CS Life on the basis that CS Life would invest them in accordance with the investment alternative that they had selected. For obvious reasons, it was not open to CS Life to invest the assets on some other basis.

453. As set out in Clause 7 of the GPCs, there are only two possible investment alternatives:

[21] Re-Amended Defence [58]; Reply [16].

"*The policyholder may choose an investment alternative with or without discretionary mandates*". Ms Homann repeatedly confirmed that these are the only two options.

454. On either basis, the Bank manages the internal fund; however, the basis on which it does so is different. Mr Celia put it like this in his second witness statement:

> *...there were two choices of investment strategy under the LPI product. The client either selected a discretionary mandate, in which case a portfolio management team would have been instructed, or investment without a discretionary mandate, in which case the client was responsible for choosing the investments.*

(b) The investment alternative with a discretionary mandate

455. It is common ground that if the policyholder chooses the investment alternative with a discretionary mandate, the internal fund "*is managed according to the current investment policy of the custodian bank [in this case the Bank] and in line with the guidelines relating to discretionary mandates issued by the Swiss Bankers Association*." If a discretionary mandate is selected, CS Life is thus under a contractual obligation to ensure that the assets are managed by the Bank in line with the Swiss Bankers' Guidelines. The Court accepts that this duty is necessary to protect the Policyholders' interests, by giving them an enforceable right to insist the assets are managed in their best interests, professionally, competently, and appropriately.

456. The Swiss Bankers' Guidelines contain various principles necessary for good portfolio management, for instance that:

> *The bank pursues its mandate in good faith and in consideration of the client's personal requirements that may reasonably be familiar to the bank. For this purpose, it draws up a risk profile that notes the client's risk appetite and risk capacity. The bank acts on a discretionary basis in line with its asset allocation policy, the client's investment objectives as determined with him/her, the applicable*

investment strategy and any instructions set out by the client (including any investment restrictions).

The asset management mandate must be issued in writing as per the bank's proposed wording which must bear the client's signature.
The bank must carefully select the investments to be included in the portfolio managed for the client. The bank must monitor the client's portfolio under the asset management agreement and these Guidelines on a regular basis.

The bank must spread the portfolio risk by a diversified asset allocation policy… It avoids cluster risks from unusual concentration in an excessively small number of investments.

457. Mr Celia's Fourth Witness Statement, dated 28 October 2021, explained at [9] for the first time that if a discretionary mandate is chosen, CS Life ensures the internal fund is *"administered by the portfolio management team at the Bank (Multi Asset Class Solutions or "MACS").* As noted earlier, the Credit Suisse website states that the MACS team comprises a "*core team of 39 people*" which "*draws on the expertise of more than 300 investment professionals, with specialist knowledge of all asset classes.*"

458. The Court accepts that when the discretionary mandate option is selected, the relationship between CS Life (as the Bank's client/customer) and the Bank (which is managing CS Life's assets) is governed by a series of contracts, under which CS Life, as the contractual counterparty, has various rights. First, CS Life has entered into various asset management agreements with the Bank. For example, the 2005 Asset Management Agreement (which was entered into when the CS Life-Bank structure was put in place) provides that the Bank "*shall carry out its assigned tasks to the best of its knowledge and belief and with the due diligence expected of an expert*" and that CS Life "*shall monitor whether the tasks delegated to [the Bank] are carried out in a contractually and legally compliant manner*." Secondly, CS Life enters into specific discretionary portfolio management agreements with the Bank covering particular CS Life accounts. CS Life

has rights under those agreements too. Thirdly, CS Life is also the account holder / Bank customer, with all the usual associated rights.

459. This contractual 'chain' produces the result such that (i) CS Life owes obligations towards its clients (principally, to invest the assets with the Bank on a discretionary basis and to ensure the Bank manages the assets in accordance with the Swiss Bankers' Guidelines); and (ii) the Bank owes CS Life various obligations (in short, to manage the assets in the internal fund properly). If the Bank fails to manage the assets properly, CS Life is liable to its clients for any resulting losses and the Bank is in turn liable to CS Life.

(c) The investment alternative without a discretionary mandate (execution only)

460. Again, it is common ground that if the non-discretionary investment alternative option is chosen, the policyholder (or its lawful attorney) selects the investments. It means that the Bank has no discretion to make investment decisions. The Sandcay Application provides: "*The part of the internal fund specified for investment will be invested in the investment instruments selected by the policyholder*." The Meadowsweet Application is in similar terms: "*The Policyholder/s will choose the investments, which should be part of the internal fund*."

461. As Ms Homann explained, every trade if the non-discretionary investment alternative is selected must be instructed by the policyholder or their attorney:

> *"Q…what you are saying is that if Mr Ivanishvili chose an investment alternative without a discretionary mandate, then CS Life would not place the assets with the portfolio management team at the bank for them to manage?*
> *A. Correct.*
>
> *Q. And what should happen is that all dealings with assets on those accounts should be as instructed by Mr Ivanishvili?*

A. Correct.

Q. And there should not be any circumstances in which there could be a dealing with an asset on those accounts other than as instructed by Mr Ivanishvili?
A. Correct, because he had the power of attorney, the signed power of attorney.

Q…As you said before, on a non-discretionary mandate, all that can happen is that the client and only the client, through the powers of attorney on behalf of policyholder, can instruct the trades?
A. Correct."

462. Likewise, Mr Keusch confirmed: *"My understanding was that every investment had to be instructed by the policyholder to the relationship manager."*

463. Ms Homann accepted that CS Life was required to ensure that assets held in CS Life accounts without discretionary mandates were only invested in accordance with the policyholder's instructions. Ms Homann accepted "*it would be of concern to CS Life because it would be a wrong dealing with a CS Life asset that CS Life was supposed to make sure that assets in the accounts under a without discretionary management mandate were done in accordance with the instructions of the policyholder*."

464. As is the case with a discretionary mandate, CS Life appoints the Bank to manage the internal fund even if the policyholder chooses the non-discretionary investment alternative. CS Life therefore has all the usual account holder/customer rights.

465. The various Powers of Attorney ("**PoAs**") seek to ensure the Bank is not liable for losses that result from the Bank executing investment instructions given by the policyholders on behalf of CS Life. To this end, the PoAs contain exemption clauses, which provide that the "*[t]he obligations of the Bank are discharged insofar as it executes an instruction from an Attorney, which is within the scope of the authority agreed to under this power of attorney*" and state "*[t]he Bank bears no responsibility for the investment decisions of*

the Attorney". If the Bank executes instructions from anyone other than an attorney acting within the scope of its authority, the Court accepts that it is not entitled to invoke this exemption clause as the exemption clause is not engaged.

466. Once again, the contractual chain produces the results such that CS Life has obligations to its clients to ensure the internal fund is only invested in instruments selected by the Policyholder (or its lawful attorney) and the Bank owes various obligations to CS Life as the customer and account holder, including that it only executes investments on CS Life's accounts that have been authorised by someone with proper authority.

467. The Court accepts that the LPI Policies therefore set up a binary choice. Premium payments are paid to CS Life on the basis that they will either be invested (i) by CS Life with the Bank and managed on a discretionary basis in accordance with the Swiss Bankers' Guidelines or (ii) with the Bank, but with the policyholder (or its lawful attorney) selecting the investments. There is no other option.

(d) The "general instructions" mandate

468. CS Life contends that the best '*fit*' for the available evidence is that Mr Lescaudron did have "*general instructions*" to make investment decisions in collaboration with Mr Ivanishvili and his assistants from time to time. CS Life asserts that this is also consistent with Mr Ivanishvili's approach to investing in hedge funds and his instructions to Mr Khukunashvili. The Court is unable to accept the submission made on behalf of CS Life for the reasons advanced by Mr Smouha QC (which the Court adopts).

469. First, Mr Ivanishvili did not give Mr Lescaudron "general instructions" to act freely on the Policy Accounts and therefore this argument fails to get over the first hurdle (Finding 7 above).

470. Secondly, and in any event, the GPCs provide that there are two types of investment alternative: discretionary (where the Bank selects the investments) and non-

discretionary (where the policyholder selects the investments). There is no third option whereby the relationship manager selects the investments. The two choices are set out in CS Life's factual witness statements for trial. That there were only two options was repeatedly confirmed by CS Life's witnesses in cross-examination. It is also evident from Mr de Skowronski's interview in the criminal proceedings that Credit Suisse would not permit Mr Lescaudron to manage client assets "*outside the framework of the asset management division to which [Mr Lescaudron] did not belong*."

471. Thirdly, there is no evidence that supports an argument that it would be permissible under the Policies for the relationship manager to select the investments under cover of some form of general instruction. CS Life did not seek to adduce such evidence by way of examination in chief (or otherwise) from its witnesses in support of this new case.

472. Fourthly, the notion that it would ever be appropriate for a relationship manager to be given a free reign to select investments held in the internal fund is unrealistic. This would, in effect, be a discretionary mandate, but without any of the protections that are in place to protect the interests of the policyholder, CS Life or the Bank (not least the requirement that discretionary mandates be managed according to the Swiss Bankers' Guidelines). Unlike the MACSs team, Mr Lescaudron did not have the expertise or equipment to select investments on a multi-hundred million dollar portfolio; he did not even have access to a Bloomberg terminal.

473. Fifthly, even if he wanted to (which he did not) Mr Ivanishvili would not have had the power under the PoAs to give an instruction to Mr Lescaudron to act freely with respect to assets held in CS Life's name in the internal fund. Likewise, neither CS Life nor the Bank would be able to rely on the exemption clauses in the Policies or PoAs if Mr Lescaudron executed instructions under cover of some nebulous "general instructions".

474. Sixthly, amongst other things, Mr Lescaudron invested the Policy Assets in various risky funds in order to obtain tens of millions of dollars in kickbacks and commissions. The Court is unable to accept that this was somehow permitted under a general instruction.

(e) Breach of the contractual obligation

475. The Plaintiffs rely on the following factual findings made by the Court in support of their case for breach of contract:

> **Finding 1**: From the outset Mr Ivanishvili informed Credit Suisse that he had a moderate approach to risk and wanted the assets managed by Credit Suisse to be managed on the basis of a well-balanced portfolio / to be kept safe / with the objective of asset preservation in the long term / without adopting a risky investment strategy / without "aggression" and those investment objectives did not change ([181] to [187]).
>
> **Finding 2**: CS Life delegated responsibility for the sale of the LPI Policies, agreeing the terms on which assets would be transferred to CS Life (including the 'investment alternative'), reporting on the LPI Policies and any ongoing dealings with respect to the LPI Policies to Mr Lescaudron qua Mr Ivanishvili's relationship manager ([188] to [211]).
>
> **Finding 3**: Mr Ivanishvili (on behalf of Sandcay and Meadowsweet) agreed with Mr Lescaudron (acting on behalf of CS Life) that the Policy Assets would be managed by the Bank on a discretionary basis 9[212] to [237]).
>
> **Finding 5**: If the Policy documentation evidences a 'choice' that the Policy Assets should be managed on a non- discretionary basis this was fraudulently put in place by Mr Lescaudron (acting on behalf of CS Life) ([241] to [245]).
>
> **Finding 6**: Mr Lescaudron did not place the Policy Assets in toto with the Bank's portfolio management team in order to facilitate his fraudulent management of the Policy Accounts ([246]-[247]).

Finding 7: Mr Ivanishvili did not give Mr Lescaudron a "general instruction" to take investment decisions on the Policy Accounts and nor did he make the "final decisions" as to the investments that were made on the Policy Accounts ([248] to [255]).

Finding 8: Aside from the Sandcay 75-3 sub-account, investment decisions on the Policy Accounts were made by Mr Lescaudron without instructions from the Policyholders or their lawful attorney ([256] to [269]).

Finding 9: Mr Lescaudron was not instructed (or otherwise authorised) by the Policyholders or their lawful attorney to build up the large concentrations in Raptor on the Policy Accounts ([270] to [276]).

Finding 15: Mr Lescaudron committed a long-running fraud against Mr Ivanishvili, involving the Policy Accounts. That fraud included: (i) making investment decisions without proper authority; (ii) forging documents; (iii) executing investments for the purpose of obtaining unlawful commissions; (iv) directing the sale of assets for an undervalue; (v) directing the purchase of securities at an overvalue; and (vi) transferring assets to his other clients ([313] to [353]).

476. The Court accepts that CS Life was under an obligation to invest the Policy Assets in accordance with the investment alternative selected by the Policyholders. The Plaintiffs assert that in breach of that obligation, the assets were neither managed pursuant to a written discretionary mandate by the MACS team nor invested only on instructions from the Policyholders. Instead, Mr Lescaudron made the investment decisions himself. That was not permitted under either investment alternative: (i) trades were executed without instructions from the Policyholders which is not permitted under the non-discretionary investment alternative; and (ii) the Policy Assets were not managed pursuant to a written discretionary mandate by the MACS team as required by the discretionary investment alternative. Thus, CS Life did not comply with its obligation to invest the Policy Assets

in accordance with the investment alternative selected by the Policyholders in breach of clause 6 of the GPC.

477. The Meadowsweet and Sandcay application forms constitute part of the Policies, which are governed by Bermuda law. They must be construed objectively by reference to what a reasonable person would understand the Policies to mean. The Court accepts Mr Smouha QC's submission that there is nothing in any of the Policy documents which would lead a reasonable bystander to conclude that there had been a particular choice of either a discretionary or non-discretionary investment alternative.

478. The Court accepts Ms Homann's evidence of how she would interpret the Policy documents, subjectively and with the "*bias*" of her knowledge of the Bank's systems is not relevant. She accepted that there was nothing in the application form or selection of attachments that would tell a putative client reading the application form that there was a selection of a non-discretionary investment alternative (or that the Relationship Manager had omitted the terms for a discretionary investment alternative) (Finding 3 above). Objectively, the Application refers to what has been agreed with the Policyholder but says nothing about whether the Policy Assets would be managed by the Bank or the Policyholder.

479. The Court has found that the evidence supports the case that Mr Lescaudron agreed with Mr Ivanishvili that the Policy Assets would be managed in toto on a discretionary basis by the Bank (Finding 3 above). To the extent that the LPI documentation did not properly reflect this agreement, it is likely because it was not in Mr Lescaudron's interests for the Policy Assets to be managed by the MACS team, as this would have moved the assets out of his control (Findings 5 and 6 above). It was in the interests of Mr Lescaudron to engineer a situation whereby the Plaintiffs believed the Policy Assets were being managed by the Bank in order to create room for him personally to direct the investments.

480. Although there is a lack of clarity on the LPI Application documentation as to the selection of either investment alternative (which Mr Lescaudron appears to have

exploited to perpetrate his fraud), insofar as the present claim is concerned, the Court accepts that it does not matter which investment alternative was selected, because Mr Lescaudron was not permitted personally to select the investments either way.

481. Even if the Court had found that Mr Ivanishvili chose a non-discretionary investment alternative on the Policy Accounts (excluding the Sandcay 75-3 Sub-Account), then CS Life would have been under a contractual obligation only to permit the internal fund to be invested in instruments selected by the Policyholders or their lawful attorney. In breach of its obligation to invest the Policy Assets in accordance with the non-discretionary investment alternative, investments were selected and executed on the Policy Accounts by Mr Lescaudron, without instructions and without a power of attorney (Findings 7-9 above).

482. The Court has found that Mr Ivanishvili always intended that the Policy Assets would be managed by the Bank on a discretionary basis (Finding 3). This is what was agreed with Credit Suisse when he first moved his assets to the Bank, what Mr Ivanishvili understood would continue to be the case after the Policies were taken out and what Mr Lescaudron led him to believe was actually happening after the LPI Policies incepted.

483. On that basis, the Court accepts that the entire portfolio should have been "*managed according to the current investment policy of the [Bank] and in line with the guidelines relating to discretionary mandates issued by the Swiss Bankers Association*". That did not happen:

(1) The Bank's "*current investment policy*" is not to permit a relationship manager to select the investments on a client's portfolio. Mr Lescaudron should never have personally selected and executed instructions on the Policy Accounts – the investments should have been selected by the Bank's portfolio management team (the MACS team), as described in Mr Celia's fourth witness statement.

(2) The portion of the portfolio managed by Mr Lescaudron was not managed in accordance with the Swiss Bankers' Association Guidelines. Amongst other things, the investments were not made "*in good faith*" (contrary to Art 1); the mandate was not "*performed with due diligence*" and Mr Ivanishvili's "*legitimate interests*" were not "*safeguarded in good faith*" (contrary to para 8); the Bank did not ensure that "*its relevant staff [i.e., Mr Lescaudron] carr[ied] out the asset management mandate according to these Guidelines*" (contrary to Art 3); investments were not carefully selected by the Bank and the Bank did not monitor the portfolio on a regular basis (contrary to Art 7); the Bank did not "*spread the portfolio risk by a diversified asset allocation policy*" (contrary to Art. 10); and the Bank selected transactions which had the "*effect of leveraging the overall portfolio*" (contrary to Art 13).

(3) Mr Lescaudron was not qualified to manage an investment portfolio and did not have access to the necessary equipment.

484. Irrespective of the investment alternative selected by Mr Ivanishvili, the fact Mr Lescaudron selected the investments on the Policy Accounts places CS Life in breach of its obligations towards the Policyholders. This result is not surprising given that the Policyholders transferred large sums of money to CS Life on the basis that they would be professionally managed; instead, as the Plaintiffs contend, they were fraudulently mismanaged by Mr Lescaudron.

(2) ***Breach of duty to take reasonable care and skill***

485. The Plaintiffs contend that such a term should be implied into the contract. The test for implying a term into a contract is, as the Plaintiffs contend, if the term is either necessary to give the contract business efficacy or is so obvious that it went without saying. The Court accepts that a term can be implied either on the grounds of business efficacy or obviousness. In *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co*

(Jersey) Ltd [2016] AC 741, the Supreme Court held that this test is one of the two alternative tests for the implication of a term at [21]:

> "…*Fourthly, as Lord Hoffmann I think suggested in Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied…Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence*."

486. The *Marks and Spencer* decision was recently cited with approval by the Bermuda Court of Appeal in *Grand View Private Trust Company Ltd v Wong; Wang intervening* [2020] Bda LR 29. At paragraph 94 the Court of Appeal held: "…*In contract for such a term to be implied it must be either necessary to give the contract commercial or practical coherence, or so obvious that it goes without saying*".

487. CS Life has now accepted that it was under an implied duty, by reason of the Supply of Services Implied Terms Act 2003, to carry out the services it provided under the Policies with reasonable care and skill. There is, however, a dispute between the parties about the scope of the implied duty to take reasonable care and skill (and in particular what '*services*' CS Life was required to provide) which feeds into a number of the Plaintiffs' contractual claims

488. CS Life, in its written submissions, continues to make the argument that the services CS Life provided under the Policies did not "*extend to making investment decisions or managing the LPI Policy Assets given that was not a service it was offering*". This argument made by CS Life is not in dispute since the Plaintiffs do not contend that CS Life agreed to advise on and take specific investment decisions on the Policy Accounts. However, the Plaintiffs contend that CS Life was required to provide various services under the Policies, and it was required to perform those services with reasonable care and skill.

489. The basic structure of the Policies was that the Policyholders transferred ownership of assets to CS Life in the form of the premium payments. The Policy Assets then formed part of the internal fund, which was held in CS Life's name in a segregated account. CS Life was therefore holding client assets in its accounts in its name, as part of the services it was offering. The Court accepts the Plaintiffs' submission that to that extent, it was 'managing' and 'holding' the Policy Assets and it was therefore required to act with reasonable care and skill when fulfilling these services. At the very least, this imposed an obligation on CS Life to take reasonable steps to safeguard the assets held in its accounts. CS Life could not, for instance, permit inappropriate people to represent CS Life in its dealings with its clients or to have access to client funds.

490. The Court further accepts that CS Life was required to ensure the assets in the internal fund were managed in accordance with the investment alternative selected by the Policyholder. CS Life was required to exercise reasonable care and skill when providing that service. Accordingly, CS Life was under a duty to take reasonable care and skill when appointing the Bank and/or Mr Lescaudron to manage the Policy Assets in accordance with the investment alternative selected by the Policyholders.

(3) ***CS Life failed to invest the Premiums prudently and/or with proper care, skill and diligence, when appointing (and/or causing the appointment of) the Bank and/or Mr Lescaudron to manage and/or hold and/or invest the Policy Assets***

491. CS Life was contractually required to "*invest the insurance premium according to the investment alternative agreed with the policyholder*." The Plaintiffs argue that in the circumstances it was an implied term that it do so "*prudently and with reasonable due diligence*" pursuant to section 3 of the Supply of Services (Implied Terms) Act 2003 and/or under the common law.

492. The holding and investing of the premiums is a service being provided by a supplier (CS Life) in the course of its business. It follows, in the Court's view, that it is an implied term that CS Life must carry out that service with reasonable care and skill. Alternatively, or additionally, this term is necessary to give business efficacy to the Policies, which would lack commercial and practical coherence if CS Life was entitled to invest the premiums imprudently and without reasonable due diligence.

493. Likewise, the Court holds, this term falls to be implied because it is so obvious as to go without saying. Had the parties, or a reasonable observer, been asked at the time of contracting whether CS Life was required to hold and invest the premiums prudently and with due diligence, the answer would have been '*of course'*.

494. In relation to the breach of this implied term the Plaintiffs rely upon Findings 14, 15, 16, 17, 18, 19, and 20 above.

495. Having regard to the knowledge of CS Life of the circumstances outlined below, the Court finds that CS Life failed to exercise reasonable care and skill when appointing and retaining Mr Lescaudron to manage and/or hold and/or invest the Policy Assets. The circumstances referred to are:

(1) CS Life knew or should have known that Mr Lescaudron was not an appropriate person to be appointed "*as the day-to-day controller of the LPI Policy Assets*". As set out above, Credit Suisse's centralised anti-fraud, compliance and human resources departments were all on notice from before the Meadowsweet Policy was taken out (and at various dates thereafter) that Mr Lescaudron was acting

inappropriately with regard to client assets. That knowledge was within CS Life (through employees of the departments to whom those functions had been delegated by CS Life to carry out on its behalf). Mr Läser (a director of CS Life) and Mr Saluz (responsible for CS Life's business in the insurance department) are likely to have known.

(2) CS Life knew or should have known that Mr Lescaudron was fraudulently mismanaging the Plaintiffs' accounts since 2007, such that it was not appropriate to appoint Mr Lescaudron as relationship manager with day-to-day control of the Policy Accounts.

(3) CS Life knew, or should have known, that Mr Lescaudron was fraudulently mismanaging the Policy Accounts, including by executing investment decisions without proper authority.

496. CS Life's principal defence is that it did not have "*authority*" to appoint the Bank or Mr Lescaudron. The Court does not accept this contention given that CS Life is the Bank's customer and has various rights under the CS Life-Bank contracts, including the right not to appoint Mr Lescaudron in the first place or to insist the Bank replace Mr Lescaudron (Finding 20). Further, Mr Coffey explained during his cross-examination that Mr Lescaudron's wrongdoing (as identified by the Group Function) should have been brought to his attention as CEO and, if it had been, he would have "*investigated*" the position and "*stop[ped] him from doing that*". Inconsistently with CS Life's defence in these proceedings, Mr Coffey was clear that, as CEO, if he had been told about the issues the Group Function had become aware of, he would have insisted that Mr Lescaudron was removed as the relationship manager on the CS Life accounts (see [411] above).

(4) ***CS Life failed to monitor the investment of the Policy Assets for fraud and/or supervise the Bank***

497. In support of this breach the Plaintiffs rely upon Findings 12, 14, 15, 16, 17, 18, 19.

498. The Plaintiffs pleaded that CS Life had a relatively broad obligation to monitor the investment of the Policy Assets and/or to supervise the Bank. The Plaintiffs say that given the evidence that has emerged during the trial about the Credit Suisse group functions, they no longer rely on the full width of that obligation and are content to proceed on a narrower basis, *viz*. that CS Life was under an implied obligation: (i) to monitor for fraud on the Policy Accounts: and (ii) to assess whether the investment alternative was being complied with.

CS Life's obligation to monitor for fraud on the Policy Accounts

499. The Plaintiffs contend that CS Life was under an implied obligation to monitor for fraud on the Policy Accounts. This term falls to be implied (i) on grounds of business efficacy or obviousness, and (ii) as part of the implied duty on CS Life to perform its obligations with reasonable care and skill (which term CS Life now accepts was implied into the policies). CS Life took ownership of assets worth hundreds of millions of dollars, which it held in bank accounts in its own name. It then entered into agreements in its name with the Bank governing the management of those assets. In these circumstances, the Plaintiffs argue, CS Life was obliged to monitor for fraud on its accounts, as an implicit part of its safeguarding, custody, segregated account and reasonable skill and care duties. The Court accepts that the converse position that CS Life contends for, that it owed no duty to its policyholders to check whether there was fraudulent activity on the Policy Accounts, even though such monitoring was done for CS Life, would create an incoherent gap in the contractual chain of responsibility created by the interposition of CS Life by the policies as the custodian of the assets.

500. The recently disclosed Board documents show that monitoring, compliance, and anti-money laundering were seen as an essential part of CS Life's governance framework. Each of CS Life's witnesses agreed in cross-examination that CS Life did in fact monitor for fraud.

CS Life failed to monitor for fraud on the Policy Accounts

501. CS Life's pleaded case is that it did not carry out any monitoring, even for fraud. However, that plea appears to be inaccurate given that monitoring for fraud was a centralised function which was performed by the Group Function on behalf of CS Life. In these circumstances, it is necessary to consider the question of whether that monitoring was adequate.

502. In its Skeleton, CS Life appears to be suggesting that even if it had monitored for fraud on the Policy Accounts, it would not have been able to detect Mr Lescaudron's wrongdoing. Paragraph 217 of its Skeleton states:

> *"…even if there was some sort of duty upon CS Life to check over the Bank's shoulder for rogue employees, it is highly unlikely that compliance with that duty would have uncovered this alleged, sophisticated and hidden one-man fraud which no one closer and in more regular contact to Mr Lescaudron spotted."*

503. Likewise, paragraph 137 states:

> *None of the Plaintiffs, their senior advisors or the Bank – all of whom were much closer to Mr Lescaudron than CS Life – spotted anything suspicious.*

504. The Court is unable to accept these submissions of CS Life given (i) the late disclosure of numerous documents which show that the Bank was well-aware that Mr Lescaudron's behaviour with respect to client funds was highly suspicious, and (ii) the wholesale failure to call any witness to speak in relation to this factual issue. Such witnesses could have been Mr Lescaudron's superiors (including Mr Dastmaltschi and Mr Vitse), the compliance department employees (including Mr Spilsbury, a senior executive who was made aware of the Lescaudron issues), and many others.

505. The Court agrees that it is unclear on what basis CS Life can properly submit that the Bank did not realise that there was anything suspicious. CS Life's anti-fraud systems, including ORIS and Actimize, had repeatedly flagged Mr Lescaudron's activities as suspicious and he had been frequently disciplined (see: [360] to [404] above). The FINMA Report details countless governance and regulatory failings which more than establish that Credit Suisse should have become aware that Mr Lescaudron was carrying out a fraud on the Policy Accounts.

506. The Court accepts that Mr Lescaudron's fraud was not, as CS Life characterises it, "*sophisticated*". In essence Mr Lescaudron engineered a situation in which the Plaintiffs considered that the Bank was managing the Policy Accounts professionally on a discretionary basis and then simply executed transactions for his own purposes and lied to the Plaintiffs about the performance of the portfolio. The Court considers that any basic transaction monitoring should have picked up that the transactions on the Policy Accounts had not been authorised by the client; investments were being made in unsuitable stocks; Mr Lescaudron was misreporting the value of the portfolio; and investments were being made for the purpose of obtaining unlawful commissions.

507. The Court has already held at [405]-[406] above that Credit Suisse turned a '*blind eye'* to Mr Lescaudron's wrongdoing because he was generating such large revenues for the group. This was expressly accepted by Mr Rosskopf.

508. As the Plaintiffs rightly complain, CS Life did not adduce evidence from anyone involved in (i) the Credit Suisse anti-fraud department; (ii) managing Mr Lescaudron; or (iii) investigating his fraud. Nor did CS Life give discovery from these individuals even where they were discharging a function for the Group including CS Life. The contemporaneous documents have come from the PwC database. Instead, CS Life sought to run a case that it carried out no monitoring for fraud. As above, to the extent necessary, the Court infers that CS Life failed to call relevant witnesses or to give discovery because these witnesses / documents would have extensively confirmed what FINMA, PwC's

reports and the limited documents now produced reveal, namely that CS Life either did, or should have, discovered Mr Lescaudron's wrongdoing.

CS Life's obligation to assess whether the investment alternative was being complied with

509. The Court accepts that, as with CS Life's duty to monitor for fraud, this term also falls to be implied (i) on grounds of business efficacy or obviousness; and (ii) as part of the implied duty on CS Life to perform its obligations with reasonable care and skill. CS Life was required to invest the Policy Assets in accordance with the investment alternative that had been agreed with the Policyholders. It is a necessary part of that obligation that CS Life was required to confirm that in fact the investment alternative was being complied with.

510. Accordingly, as the Court has concluded that the Policyholders selected the investment alternative with discretionary management, CS Life was required to ensure that the Bank was managing the Policy Assets "*according to the current investment policy of the custodian bank [in this case the Bank] and in line with the guidelines relating to discretionary mandates issued by the Swiss Bankers Association*."

511. As noted at [476] to [484] above, investments on the Policy Accounts were selected by Mr Lescaudron, which is inconsistent with both investment alternatives. The Court accepts that had CS Life taken steps to assess whether the investment alternative was being complied with, it would have been obvious that it was not.

(5) *CS Life failed to hold and deal with the Policy Assets for the benefit of Meadowsweet and Sandcay*

512. The Plaintiffs submit that CS Life was required to hold and deal with the Policy Assets for the benefit of the Policyholders. They argue that this is a necessary term given that the Policyholders transferred legal ownership of the Policy Assets to CS Life to invest in accordance with the investment alternative selected by the Policyholders. It would

therefore be odd if CS Life was entitled to hold or deal with the Policy Assets for the benefit of anyone other than the Policyholders. The Plaintiffs argue that this contractual obligation arises in two ways:

> First, Clause 18(a) of the GPCs (set out at [67] above) provides that "*The fund, in this case the internal fund, is to be* ***held for the benefit of the policyholder*** *as the account owner and is available to meet the claims of the policyholder and the creditors of the segregated account*" (emphasis added).

513. Secondly, the Plaintiffs point out that it is now common ground that CS Life is obliged to exercise reasonable care and skill when performing services under the Policies. As explained above, the services provided by CS Life included looking after the assets in the internal fund. Given the internal fund comprised of assets the Policyholders had transferred to CS Life to invest on its behalf, CS Life was required ***to hold and deal with those assets only for the benefit of the Policyholders.***

514. The Court is unable to accept that Clause 18(a) of the GPC's has the effect of introducing the term sought by the Plaintiffs. As CS Life correctly submits Clause 18(a) is concerned with setting the parameters of a segregated account under the SAC Act. The Court accepts that the purpose of the Clause 18(a) is to describe the relevant provisions of the Bermudian legislation and to explain that the funds within a segregated account are not available to meet the claims of creditors of a segregated accounts company. This merely serves to explain (as is common ground) that the LPI Accounts, though held in the name of CS Life, were for the account of the Account Owners. Clause 18(a) does not, in the Court's view, give rise to a separate and free-standing duty on the part of CS Life to hold the LPI Policy Assets for the benefit of the Account Owners save than in that limited statutory sense.

515. The Plaintiffs also argue that this obligation also arose as an incidence of CS Life's duty to take reasonable care and skill. The Court has dealt with the scope of the duty to take

reasonable care and skill and whether there has been a breach of that obligation at [491] to [496] above.

(6) ***CS Life failed to ensure that the policy records provided to the Plaintiffs were true and accurate and maintained in accordance with generally accepted accounting principles***

516. In support of this claim the Plaintiffs rely upon Finding 2 at [188] to [211], Finding 10 at [277]-[278] and Finding 11 at [283] to [287].

517. The Court accepts that CS Life was under an implied obligation to ensure that the reports provided to the Plaintiffs detailing the performance of the Policy Assets were true and accurate.

518. The Plaintiffs contend that by Clause 16 of the GPCs, CS Life was required "*to communicate the value of the internal fund and the composition of the portfolio*" to the Policyholder "*once a year, or on request*".

519. The Plaintiffs asked Mr Lescaudron to provide reports on the performance of the Policy Assets, which he did (i.e., the Direct Reports). Those reports were provided by Mr Lescaudron on behalf of CS Life, which relied on Mr Lescaudron to perform all client related interactions both before and after the LPI Policies were taken out. To the extent CS Life maintains that Mr Lescaudron did not have actual authority to report on the performance of the CS Life Accounts, the Court accepts and holds that he had apparent authority to do so: CS Life explicitly held out Mr Lescaudron as the person the Policyholders should contact with respect to the Policy Accounts (Findings 2 and 11).

520. It is common ground that the Direct Reports were false (Finding 10). Mr Lescaudron accepts that he was lying about the performance of the Portfolio in order to hide his fraudulent actions. That fraudulent misreporting by CS Life's agent, Mr Lescaudron, is in the circumstances attributable to CS Life.

521. The false reporting started in December 2012 on both policy accounts and continued throughout until September 2015. The Court accepts and holds that had the false reports been exposed from the start, Mr Ivanishvili would of course have been informed, and Mr Lescaudron's wrongdoings (including unauthorised transfers between client accounts, sales at over and undervalues on Ivanishvili accounts) exposed, and Mr Ivanishvili would have moved his assets, including the Policy Assets, from Credit Suisse (Finding 30 at [442]).

Relevance of Swiss law to the claim in contract

522. In its Skeleton, CS Life placed reliance on Dr Weibel's evidence about the Swiss law concept of compound contracts. CS Life argues that a compound contract is a set of related agreements which are interdependent and aimed at forming a whole: though they may be concluded separately they are connected functionally such that events which touch upon the sphere of one contract also affect the others. CS Life argues that is clearly the case in relation to the various agreements at play in the relationship between the First Plaintiff, the Bank and CS Life. It is said on behalf of CS Life that from a Swiss law perspective it would be wrong to ascertain the contractual duties falling on CS Life by construing the LPI Policies in isolation from the compound contract.

523. However, as Mr Smouha QC correctly submits, in cross-examination Dr Weibel accepted that this is a Swiss law concept which he says applies as a matter of Swiss law, but he did not contend that there is any reason how or why any such principle of Swiss law should come to be applied by the Bermuda court construing a Bermuda law contract:

> *Q. Thank you. So it is a Swiss law principle which you say applies as a matter of Swiss law, but I don't see in your report, and I don't think you contend, do you, that there is any reason how or why any such principle of Swiss law should come to be applied by the Bermudian court construing a Bermuda law contract?*
> *A. Yes, that is certainly correct. I am not opining on Bermuda law.*

524. In those circumstances the Court accepts that it is unnecessary to address further the Swiss law concept of a "*compound contract*".

Causation

525. The Court accepts the Plaintiffs' submission that they should be placed, insofar as possible, in the same position as if the Policies had been performed. The Court should take a 'common sense' approach to the question of whether CS Life's wrongful conduct was a sufficiently substantial cause of the Plaintiffs' losses.

526. The Court accepts that CS Life's failure to invest the Policy Assets in accordance with the investment alternative selected by the Policyholders has caused loss. 'But for' that breach, the Policy Assets would not have been fraudulently mismanaged by Mr Lescaudron. Instead, they would have been professionally managed by a reputable European bank on a medium risk basis.

527. It is the Plaintiffs' case that CS Life should have invested the Policy Assets in toto in accordance with the investment alternative with a discretionary mandate. The Court accepts that 'but for' that breach of contract, the entirety of the Policy Assets would have been invested "*according to the current investment policy of [the Bank] and in line with the guidelines relating to discretionary mandates issued by the Swiss Bankers Association*". In practice, this would have meant the Policy Assets would have been managed by the Bank's portfolio management team (i.e. the MACS team). It is common ground that had the Policy Assets been managed by the MACS team, Mr Lescaudron would not have had access to the Policy Accounts and therefore the fraud would not have occurred.

528. As explained below at [716] to [718], the Plaintiffs' Model 1 of loss calculation reflects this. This counterfactual model assumes that the Policy Assets would have been managed appropriately by a reputable European bank, according to a medium risk portfolio. In

effect, that is what should have happened had the MACS team been managing the Policy Assets.[22]

529. CS Life argues for a different counterfactual and asserts that if Mr Ivanishvili had not invested in the LPI Policies the likelihood is that he would have had his wealth managed or mismanaged by Mr Lescaudron and the Bank. The Court is unable to accept this submission for the following reasons,

530. First, the Court accepts Mr Smouha QC's submission that 'but for' CS Life's breach, the Policy Assets would have been invested in accordance with the investment alternative selected by the Policyholders, i.e. either managed by the Bank's portfolio management team or in investments selected by the Policyholder. There is no 'investment alternative' which permitted or required the Policy Assets to be mismanaged by Mr Lescaudron and the Bank.

531. Secondly, substantial assets were transferred directly into the Policy Accounts that had not been previously held by the Bank. This counterfactual would appear to be based on a flawed factual premise.

532. Thirdly, in the event that the Policy Assets had been "left" with the Bank, Mr Ivanishvili (or his companies) would have had a direct contractual claim against the Bank arising out of Mr Lescaudron's fraud, so they would have been able to recover these losses from the Bank. The fact the Policy Assets were transferred to CS Life means that the direct contractual link with the Bank was broken.

533. The Court accepts Mr Smouha QC's submission that CS Life's proposed counterfactual – i.e., "*a universe in which the First Plaintiff (and his family) would have left their wealth to be managed or mismanaged by Mr Lescaudron and the Bank*" – is inapposite, since it fails

[22] The Plaintiffs point out that there is one potential wrinkle, which is that Mr Celia's fourth witness statement has now disclosed that a portion of the Sandcay Assets were in fact managed by the MACS team. The issue for the Court is whether the assets in the Sandcay 75-3 should be removed from the Plaintiffs' counterfactual. Given that CS Life does not advance this position and given that it is likely to result in higher damages, the Court considers that the appropriate approach is to take the entirety of the Policy Assets and consider what returns would have been made had they been invested in toto in a medium risk portfolio with a reputable European bank.

to address what would have happened 'but for' the breaches of contract. It seeks to answer a different question, namely what it alleges would have happened if Mr Ivanishvili had "*not acquired the life policies*". Here the breaches are the appointment and/or retention of Mr Lescaudron, which is a different point.

534. The court accepts that the breach of the obligation to monitor the investment of the Policy Assets for fraud and/or to assess whether the investment alternative was being complied with and/or supervise the Bank are also causative of loss. Had CS Life monitored the Policy Assets for fraud and/or to assess whether the investment alternative was being complied with (at all or adequately), it would, or should, have identified that Mr Lescaudron was fraudulently mismanaging the accounts. In those circumstances, Mr Ivanishvili would have had to be informed that there was fraud on the accounts (as CS Life witnesses accepted) or that the investment alternative was not being complied with, and he would have moved the Policy Assets to a reputable European bank to be invested in a medium risk investment portfolio.

535. CS Life's failure to ensure the policy records were true and accurate and maintained in accordance with generally accepted accounting principles is also causative of the losses suffered by the Plaintiffs. Had Mr Lescaudron not been able to provide untrue and inaccurate reports of the Policy Accounts to the Plaintiffs, he would not have been able to carry out his fraud. Had Mr Ivanishvili become aware of the misreporting of the Policy Assets, he would have moved those assets to be managed by a reputable European bank.

536. The Court further accepts that CS Life's failure to take steps to recover the losses caused to the Policy Assets is an additional consideration. As set out above, CS Life has or had a claim against the Bank to recover the losses caused to the Policy Assets by reason of Mr Lescaudron's fraud and mismanagement. Had that claim been pursued and the losses recovered (as the Plaintiffs contend they should have been), then the recoveries could and should have been used to reconstitute the Policy Accounts and would accordingly have been available to the Plaintiffs.

E. Breach of Fiduciary Duty

537. In their pleaded case the Plaintiffs contend that the Account Owners have an undivided beneficial interest in the assets linked to the segregated accounts pursuant to section 18(10) and (11) of the SAC Act. As such, CS Life is obliged to account to the Account Owner (section 16 of the SAC Act) and to hold and deal with the assets for the benefit of the Account Owner (clause 18(a) of the GPC and section 17(2) and 11(d)(iii) of the SAC).

538. The Plaintiffs also contend that the relationship between CS Life and the Account Owners was one of trust and confidence, in that the Account Owners entrusted the Policy Assets to CS Life to invest for their benefit in accordance with the investment profile and account to them for the proceeds.

539. In the circumstances, the Plaintiffs argue that CS Life owed Meadowsweet and Sandcay fiduciary duties to act, at all times, in the best interests of the Account Owners and to not prefer the interests of any other party to those of the Account Owners; to act in good faith; to safeguard the Policy Assets; not to place themselves in a position where their own interests conflict with those of the Account Owners; not to make an unauthorised profit from its position; to account to the Account Owners; and to act with the reasonable care and skill required of a professional segregated accounts company.

540. In response CS Life argues that the factual basis relied upon by the Plaintiffs does not provide a sound basis for the contention that CS Life owed fiduciary duties to the Plaintiffs. The SAC Act does not impose fiduciary duties on a segregated accounts company. Rather, the rights, interests and obligations of account owners in a segregated account are evidenced by the governing instrument of a segregated account (s 11(1) SAC Act) and thus it is primarily to the contractual documents that the Plaintiffs must look to establish that CS Life owed duties of a fiduciary nature. Those documents do not support any suggestion of a relationship of trust and confidence between the Plaintiffs and CS Life.

541. CS Life argues that the relationship between CS Life and the Plaintiffs was strictly limited in scope, being confined to the administrative operation of the wrapper product. There is no reason to import fiduciary duties into that relationship because there was nothing in that relationship to which fiduciary duties could attach.

542. In *Bristol & West Building Society v Mothew* [1998] Ch. 1, it was held that "*a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence*." (per Millett LJ at 18). *Bristol & West Building Society v Mothew* has been followed in Bermuda on a number of occasions, see, for instance, *Robinson v Bank of Bermuda* [2007] BDA LR 58 at [29] et seq and *Horizon Bank International v Walsh* (Bermuda Court of Appeal 4 of 2008) at [33].

543. The relevant question is whether the alleged fiduciary has taken on a role in respect of which it appropriate for the law to impose fiduciary obligations. In *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594 (PC) Henry J said at 598:

> "*The concept encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal*."

544. The decision of Newey J in *Vivendi SA v Richards* [2013] EWHC 3006 (Ch) at [139] and [142] holds that whether such an expectation exists is judged objectively. The subjective views of the putative fiduciary are irrelevant.

545. The Court accepts Mr Smouha QC's submission that the circumstances arising in the present case establish that there was a relationship of trust and confidence between CS Life and, at least, the Policyholders.

546. The relevant facts in this context are that Mr Ivanishvili transferred ownership of assets worth over USD 750 million to CS Life on the basis that (i) the Policyholders would retain

"*an undivided beneficial interest*" in the assets; (ii) CS Life would hold these assets separately from its other assets; and (iii) CS Life would arrange for them to be managed by a third party, *viz*. the Bank in the Policyholders' interests. The Court accepts that in transferring ownership of the Policy Assets to CS Life and placing them under its control, Mr Ivanishvili and the Policyholders reposed considerable trust in CS Life. Objectively speaking, this situation gave rise to a legitimate expectation that CS Life would not utilise its position in a way which was adverse to the Policyholders' interests.

547. The Court accepts that transfer by Mr Ivanishvili of assets worth over USD 750 million to CS Life on the basis that CS Life would arrange for them to be managed by the Bank is analogous to a situation in which an individual transfers assets to a third party to invest on their behalf. In that situation, the third party will hold the assets on trust and will owe fiduciary obligations to the principal. Thus, in *Diamantis Diamantides v JP Morgan Chase Bank* [2005] EWCA Civ 1612 Moore-Bick LJ held at [27]:

> "*It would be unusual for an investment manager acquiring and managing a portfolio of investments under a formal management agreement not to owe duties of care and duties of a fiduciary nature to the other party to the agreement…".*

548. And at [42]:

> *"It is accepted, however, that the agreement for the management of the portfolio, which in the ordinary way would bring about a relationship of a kind that could be expected to give rise to duties of care at law and in equity, as well as duties of a fiduciary nature, …*".

549. In similar circumstances in *Horizon Bank International v Walsh* the Court of Appeal upheld the Supreme Court's decision that a privately owned bank (HBI) owed fiduciary duties to the investors because it had agreed to "*establish an offshore structure which entailed [the Investors] placing assets into companies which HBI would control on their behalf… HBI in my judgment became a fiduciary of [the Investors] to the extent that it was*

trusted to ensure that Boomer [the trading company] would be managed consistently with the interests of [the Investors] and, most importantly, within the parameters of the mandate [they] gave HBI". The Court of Appeal held that it was "*undoubtedly correct*" that this situation gave rise to a fiduciary relationship (at [40]). An important factor was that the assets to be managed were "*to be kept separate*" from HBI's other assets (at [35]). Thus, the Supreme Court (Kawaley CJ) held at first instance (at [59]):

> "*In my judgment, HBI entered into a fiduciary relationship with Walsh and Taal and Boomer because it agreed to manage their assets, which were to be kept separate from HBI and Extant's assets, subject to certain broad guidelines through a structure over assets of which Walsh and Taal had relinquished operational legal control*."

550. CS Life argues that the Plaintiffs' reliance on *Horizon Bank International* is misplaced. It argues that the crucial distinction between that case and this one is that Walsh and Tall relinquished operational legal control over the assets and so HBI was fixed with fiduciary responsibility. In this case the position is different since the Policyholder continues to retain control over the investments.

551. The Court is unable to agree with the submission of CS Life that there are significant material differences in the *HBI case* and the present case. In both cases the offshore investment structure was promoted and implemented by the relevant financial institution. In both cases the beneficial owners of the assets transferred legal title to the assets to the financial institution or a third party recommended by the financial institution. In both cases the beneficial owners expected that they may have some say in the way their assets were managed: in *HBI*, Walsh and Tall, the plaintiffs, expected and trusted that "*Boomer [the investment vehicle] would be managed consistently with the interests of [Walsh and Tall] and, most importantly, within the parameters of the mandate [they] gave to HBI*" (see paragraphs 56 and 59 of the Judgment of Kawaley CJ); in the present case Mr Ivanishvili expected and trusted, in accordance with the offshore investment structure promoted by CS Life, that the Relationship Manager (Mr Lescaudron) would faithfully carry out the

investment mandate selected by Mr Ivanishvili. In both cases, the offshore investment structure promoted by the financial institution resulted in the plaintiffs entrusting their assets to a third-party in a manner that left them in a position of vulnerability and dependence which gave rise to a fiduciary duty being owed to the plaintiffs.

552. In all the circumstances the Court concludes that the relationship of CS Life and the Plaintiffs (in particular Mr Ivanishvili) was such that CS Life owed to the Plaintiffs duties of a fiduciary nature.

Scope of the fiduciary duties

553. CS Life *qua* fiduciary owed the Policyholders an obligation of loyalty. This has many facets. A non-exhaustive summary was given by Millett LJ in *Bristol & West Building Society v Mothew* at 18:

> "*A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal."*

554. *Snell's Equity 34th Ed*. ("**Snell's**") [7-008] explains that the duty of loyalty broadly encompasses two related elements (internal citations omitted):

> "*The first prohibits a fiduciary from acting in a situation where there is a conflict between the fiduciary's duty and his or her interest: "the objective is to preclude the fiduciary from being swayed by considerations of personal interest". The second prohibits a fiduciary from making a profit out of his or her fiduciary position: "the objective is to preclude the fiduciary from actually misusing his position for his personal advantage*."

555. Hellman J in *PT Satria Tirtatama v East Asia Company* [2016] SC BDA 90 (Supreme Court of Bermuda)[23] considered the scope of the duty of loyalty, holding at [74]:

> "…*the fiduciary duty of loyalty owed by a director to his company, which has been said to be 'the distinguishing obligation of a fiduciary'. See Bristol and West BS v Mothew [1998] Ch 1 EWCA per Millett LJ (as he then was) at 18 B. That duty has various facets. Examples germane to the present case are that a fiduciary must not place himself in a position where his duty and his interest may conflict and that he must not use his position as a fiduciary to make a secret profit, ie one for which he has not accounted to his principal. See Bott v Southern California Recyclers, 7th February 1986, unreported, SC, per Collett J at 15:*
>
> > *'In those circumstances the Defendants rely upon the well established principle of Equity, which forbids an agent from entering into any transaction in which he has a personal interest which might conflict with his duty to his principal unless the principal with full knowledge of all the material circumstances, and of the exact nature and extent of the agent's interest, consents to it: See Bowstead on Agency, 14th Edition, page 130. A number of legal authorities bearing upon that principle and its application have been cited in argument and counsel for the Plaintiff does not seek to dispute it. Nor does he dispute the further proposition established by Boston Deep Sea Fishing and Ice Co. v. Ansell (1888) 39 Chancery Division 339 that, where an agent makes a secret commission he is … accountable to his principal for the amount of it …*"

556. The Court determines that CS Life is in breach of its fiduciary duties in a number of respects as discussed below.

[23] The actual decision of the Supreme Court in *PT Satria Tirtatama* was reversed by the Court of Appeal (see: [2017] Bda LR 97) and the Privy Council (See: [2019] UKPC 30) but the above passage is unaffected. The decision of Collett J in *Bott v Southern California Recyclers Association* is reported at [1986] Bda LR 39 and was upheld by the Court of Appeal at [1987] Bda LR 16.

557. First, CS Life failed to act in the best interests of the Policyholders, in that the Policy Accounts were fraudulently mismanaged by CS Life's agent, Mr Lescaudron, who CS Life relied on for all dealings related to the Policy Accounts (Finding 2 at [188] to [211]). Transactions on the Policy Accounts were not executed in the best interests of the Policyholders; instead, they were executed without authority (Finding 7 at [248] to [255]; Finding 8 at [256] to [259]; and Finding 9 at [270] to [276]) pursuant to forged documents (Finding 15 at [313] to [353]) to benefit Mr Lescaudron personally (through the payment of commissions (Finding 15)), Credit Suisse (through increased revenues) and/or other of the Bank's clients (to whom the Policy Assets were transferred at undervalue or from whom assets were purchased on the Policy Accounts at over value (Finding 15).

558. Secondly, CS Life failed to act in the best interests of the Policyholders when appointing (and/or retaining) the Bank and/or Mr Lescaudron to manage and/or hold the Policy Assets. In particular, it is now apparent from the evidence given at the trial that CS Life prioritised the Bank's interest in generating revenues over the best interests of the Policyholders, by not preventing Mr Lescaudron from having access to the Policy Assets, despite numerous 'red flags' being raised about his behaviour (Finding 17 at [360] to [404]; Finding 18 at [405]-[406]; and Finding 19 at [407] to [409]).

559. Thirdly, CS Life failed to act in the best interests of the Policyholders by (on its case) not monitoring the Policy Assets at all either to prevent fraud or to ensure the investment alternative was being complied with.

560. Fourthly, CS Life failed to safeguard the Policy Assets by failing to take any, or any adequate steps, to prevent the fraudulent mismanagement of the Policy Accounts by Mr Lescaudron (Findings 15-20).

561. Fifthly, CS Life failed to account accurately to the Policyholders by providing (through Mr Lescaudron) materially inaccurate reports about the performance of the Policy Assets (Finding 10 at [277] to [279] and Finding 11 at [280] to [283]).

562. As to the evidence, it is clear that: (i) Mr Lescaudron committed a long running fraud against the Policy Accounts (Finding 15); (ii) CS Life did monitor for fraud on the Policy accounts (Finding 14 at [307] to [312]); (iii) CS Life's anti-fraud monitoring had raised numerous concerns about Mr Lescaudron's behaviour (Finding 17 at [360] to [404]); and (iv) CS Life did not take steps to prevent Mr Lescaudron managing the Policy Assets because he was generating large profits for the Credit Suisse group (Findings 18 at [405]-[406] (CS Life turned a 'blind eye' to Mr Lescaudron's wrongdoing and/or concealed its knowledge of Mr Lescaudron's wrong-doing from CS Life's CEO); and 19 at [407] to [409] (The Group Function and/or CS Life did not take action (or adequate action) to prevent Mr Lescaudron's fraudulent mismanagement of the Policy Accounts because it was prioritising the revenues Mr Lescaudron generated for Credit Suisse over the interests of its clients, including the Policyholders or Mr Ivanishvili).

Causation

563. The Court accepts that the causation analysis set out above applies *mutatis mutandis* to the breach of fiduciary duty claims. The claim that CS Life failed to act in the best interests of the Policyholders, in that the Policy Accounts were fraudulently mismanaged by Mr Lescaudron is, for causation purposes, the same as the contractual claim that CS Life failed to hold and deal with the Policy Assets for the benefit of Meadowsweet and Sandcay. CS Life's breach of the obligation to safeguard the Policy Assets can likewise be treated in the same manner for causation purposes.

564. The claim that CS Life failed to act in the best interests of the Policyholders (or in good faith) when appointing (and/or retaining) the Bank and/or Mr Lescaudron to manage and/or hold the Policy Assets falls to be treated in the same way as the contractual appointment claim.

F. Breach of statutory duty and tort claims

565. The Plaintiffs have confirmed that they no longer wish to pursue any claims based upon the breach of statutory duty.

566. The Plaintiffs also acknowledge that since the tortious breaches overlap entirely with the breach of contract claims, they do not intend to address them separately.

G. <u>The misrepresentation claim</u>

(1) Choice of law and limitation issues

(a) Was the tort in substance committed in Bermuda and/or should the court consider this claim as an exception to the double actionability rule?

567. The Plaintiffs in the misrepresentation claim (i.e, Mr Ivanishvili, Meadowsweet Assets Limited and Sandcay Investments Limited ("**the Misrepresentation Plaintiffs**")) claim that in proffering the Meadowsweet and Sandcay Policies to the Plaintiffs, the Bank and/or Mr Lescaudron (acting on behalf of CS Life) impliedly misrepresented that the Bank was not fraudulently managing the Plaintiffs' existing accounts and/or did not intend to manage the Policy Assets fraudulently. Had there not been a hiding from the Plaintiffs of the existing wrongdoing on Mr Ivanishvili's accounts, he would not have invested. He is entitled to be put in the position he would have been in that event.

568. The Plaintiffs' primary case is that the misrepresentation claim is actionable in Bermuda as a Bermuda law claim.

569. It is common ground that in determining the applicable law, the Bermuda court will ask "*where in substance was the tort committed*": see *Lisa S.A. v Leamington Reinsurance Company Limited and Avicola Villalobas S.A.* [2008] SC (Bda) 47 Com at [101]. The Plaintiffs argue the tort was in substance committed in Bermuda. The Plaintiffs say that the misrepresentations were impliedly made, or made by conduct, by the proposal that the Misrepresentation Plaintiffs should enter into the LPI policies, proposals which were made from Switzerland and in Georgia at two meetings with Mr Ivanishvili.

570. The representations were received by Mr Ivanishvili in Georgia, acted upon in Georgia by his signature of the letters to the trustees, but also acted on by the trusts' investment

vehicles (Meadowsweet, a company incorporated in the BVI and Sandcay, a company incorporated in the Bahamas) applying to enter into the LPI Policies. The effect was that Meadowsweet and Sandcay entered into the LPI policies, which are governed by Bermuda law, with CS Life in Bermuda.

571. In the circumstances the Plaintiffs argue that given the variety of jurisdictions involved before the substantive step of entering into the LPI policies, which is the key action taken in reliance on the relevant misrepresentations, that the tort was in substance committed, and the cause of action arose, in Bermuda when the Plaintiffs entered into the relevant contracts. The Plaintiffs rely upon *JIO Minerals v Mineral Enterprises* [2010] SGCA 41, a decision of the Singapore Court of Appeal.

572. There is no dispute that the common law choice of law rule for a claim in deceit or fraudulent misrepresentation is that for tortious claims – the claim must be actionable under the law of the place where the tort occurred: Rule 203 of *Dicey and Morris on the Conflict of Laws* (12th ed.), as approved by the Privy Council in *Red Sea Insurance v Bouygues* [1995] 1 AC 190, 198:

> "*Rule 203 - (1) As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both (a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and (b) actionable according to the law of the foreign country where it was done. (2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties*."

573. Alternatively, the Plaintiffs argue that where another country has "*the most significant relationship*" with the events and parties, there is an exception to the double actionability rule: see *Imanagement v Cukurova Holdings* [2008] ECarSC 119 at [56], relying on *Red Sea Insurance Co v Bouygues SA* [1995] 1 AC 190 (PC) at 207, per Lord Slynn giving the judgment of the Board. The Plaintiffs argue that, for the reasons set out above, this

case is one where "*all or almost all of the significant connecting factors point*" in the direction of the relevant country (*Imanagement* at [56]).

574. CS Life's case in relation to this issue is that the promotion of the LPI Policies did not take place in Bermuda and therefore this is a claim relating to an alleged tort committed overseas. As such, the Plaintiffs will have to establish that their claim would succeed both under the law of the place where the tort occurred and Bermuda law as the law of the forum.

575. CS Life points to the Plaintiffs' pleaded case and evidence: the representations were received by Mr Ivanishvili in Georgia and the apparent reliance was applying for the LPI Policies, which applications Mr Ivanishvili says he signed in Georgia. Mr Ivanishvili does not refer to any relevant event or action taking place in any other country. Nor is there any pleading of any relevant action in any other country. It is not even suggested that the alleged wrongdoer (Mr Lescaudron) or victims (the Plaintiffs) ever even visited Bermuda.

576. CS Life also points to the fact that the Policies were subsequently issued by CS Life in Zurich, Switzerland. The Policies were not signed in Bermuda but in Switzerland by Mr Keusch on behalf of CS Life. That is, CS Life argues, entirely consistent with CS Life's evidence that operations were conducted by the Bank Life Employees, who were all based in Switzerland.

577. In *JIO Minerals* the Plaintiff commenced proceedings in Singapore claiming a declaration that he had validly rescinded the investment agreement; the return of the balance of the investment funds; alternatively, damages for fraudulent misrepresentation.

578. In relation to the claim for fraudulent misrepresentation the Court of Appeal held that the choice of law rule that the Singapore courts apply for tort is that of double actionability rule which provides that the tort must be actionable under both the *lex fori* and *lex loci delicti*. Exceptionally, the double actionability rule may be displaced such

that the tort may be actionable in Singapore even though it is not actionable under either the *lex loci delicti* or the *lex fori.*

579. The Court of Appeal noted that the test that is commonly applied for determining the place of the tort is that which looks at the events constituting the tort and asks where, in substance, the cause of action arose ("**the Substance Test**"). However, the facts in *JIO Minerals* did not fit comfortably within the suggested rule. The Court noted that the actual misrepresentation was received in India because that was the place where the First Appellant sent the Letter of Offer and the Exclusive Mining Agreement. Both those documents contained a representation that the First Appellant had mining concessions with one million tonnes of iron ore. However, representations were also made during meetings in Indonesia as to the mining concessions that the First Appellant could rely on to make up a total of one million tonnes of iron ore. The representations were also acted upon in two jurisdictions. The Respondent acted on the representation by remitting funds from India. The Respondent also acted on the representation in Indonesia by conducting drilling works in Indonesia. In the circumstances the Court applied the Substance Test and held at [95]:

> "*Applying the general Substance Test, we were of the view that the place of the tort was Indonesia. Indonesia was the place where most of the negotiations took place. The Respondent also took steps in reliance of the representations in Indonesia. The only reason why the representations in the Letter of Offer and the Exclusive Mining Agreement were received in India was because the Respondent was based in India. Accordingly, we were of the view that the lex loci delicti is Indonesian law*."

580. In *Red Sea Insurance* the Privy Council reviewed the earlier cases and in particular the speeches in the House of Lords in *Boys v Chaplin* [1971] AC 356 and confirmed that the double actionability rule should be applied with flexibility. In an appropriate case the court may conclude that a particular issue or the entire case may be governed by the law of the country which, with respect to that issue or the case as the most significant

relationship with the occurrence and the parties. Lord Slynn, giving the judgment of the Board, held at 206:

> "*Their Lordships, having considered all of these opinions, recognise the conflict which exists between, on the one hand, the desirability of a rule which is certain and clear on the basis of which people can act and lawyers advise and, on the other, the desirability of the courts having the power to avoid injustice by introducing an element of flexibility into the rule. " They do not consider that the rejection of the doctrine of the proper law of the tort as part of English law is inconsistent with a measure of flexibility being introduced into the rules. They consider that the majority in Boys v. Chaplin [1971] A.C. 356 recognised the need for such flexibility. They accept that the law of England recognises that a particular issue between the parties to litigation may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and with the parties. They agree with the statement of Lord Wilberforce, at pp. 391-392, which has been set out above as to the extent and application of the exception. They accept, as he did, that the exception will not be successfully invoked in every case or even, probably, in many cases and, at p. 39 1H, that "The general rule must apply unless clear and satisfying grounds are shown why it should be departed from and what solution, derived from what other rule, should be preferred*."'

581. The issue in *Red Sea Insurance* was whether the insurer could rely on a direct cause of action under the *lex loci delicti* (Saudi Arabia) but not by the *lex fori* (Hong Kong). In considering this issue the Privy Council considered that the following factual factors were relevant: (i) the policy of insurance was subject to Saudi Arabian law, the project was to be carried out in Saudi Arabia and the property was owned by the government; (ii) the main contract, the supply contract and the consortium's service contract were all subject to the law of Saudi Arabia and were to be performed there; (iii) the breaches and the alleged damage occurred in Saudi Arabia; (iv) the expense of repairing alleged damage occurred in Saudi Arabia; and (v) the defendant, though incorporated in Hong Kong, had its head office in Saudi Arabia.

582. The Privy Council held that all these factors should be taken into account in considering whether exception to the double actionability rule should be applied in this case. Lord Slynn considered that the "*arguments in favour of the lex loci delicti are indeed overwhelming*."

583. In *Imanagement* the Eastern Caribbean Court of Appeal held that "*Lord Slynn's reasoning [in Red Sea Insurance] seems to have extended the application of the exception by stating that although such instances might be rare, the exception was not limited in application to isolated issues but might also apply to the whole claim. This should take place in circumstances where all or almost all the significant connecting factors point in the direction of the law of the place where the wrong was committed*."

584. The Court accepts that there are strong connecting factors in this case with Bermuda as the *lex fori*.

585. Firstly, CS Life is incorporated in Bermuda under the Companies Act 1981 and the Insurance Act 1978 and had at the relevant time an office and staff in Bermuda. CS Life was registered as an insurer under the Insurance Act 1978. CS Life was also registered as a segregated account company under the Segregated Accounts Companies Act 2000 and was obliged to retain Policy Assets as a separate fund for the benefit of the Policyholders in a segregated account.

586. Secondly, the LPI Policies issued by CS Life to Mr Ivanishvili were subject to Bermuda law as the governing law of the contract. The LPI policies were also subject to an exclusive jurisdiction clause which provided Bermuda as the exclusive jurisdiction for the resolution of all disputes:

> "*The exclusive jurisdiction for all disputes between the parties* ***in connection with the Policy*** *(including all documents comprising the Policy even where such documents indicate they are governed by other laws) shall be Bermuda and the*

parties hereto, which includes the policyholder and any beneficiaries, irrevocably submit to the exclusive jurisdiction of the Bermuda courts."

587. The Court also accepts that whilst a number of jurisdictions were involved in relation to the misrepresentation issue, the connection with some of the jurisdictions is tangential. As noted above, the representations were received by Mr Ivanishvili in Georgia, but it could be said that the "*only reason why*" was because Mr Ivanishvili was based in Georgia (as was the case with the letter sent to India in the *JIO Minerals* case). The representations were acted upon in Georgia by Mr Ivanishvili's signature on the letters to the trustees, but also acted on by the trusts' investment vehicles (Meadowsweet, a company incorporated in the BVI and Sandcay, a company incorporated in the Bahamas) applying to enter into the LPI policies. The effect was that Meadowsweet and Sandcay entered into the LPI policies, which are governed by Bermuda law, with CS Life in Bermuda. The consequence was that hundreds of millions of dollars (in cash and securities) were transferred from the ownership of Meadowsweet and Sandcay to the ownership of CS Life in Bermuda.

588. Having set out the relevant factors the Court turns to consider the issue whether the substance of the tort of misrepresentation took place in Bermuda. The Court has come to the view that in the circumstances of this case the substance of the tort did not take place in Bermuda. The principal reason for coming to this conclusion is that it is not obvious that any of the constituent elements of the tort of misrepresentation took place in Bermuda given that the Policies were in fact signed in Switzerland on behalf of CS Life. There are material differences between this case and the facts in *JIO Minerals*. In the *JIO Minerals* case the primary reason why the Singapore Court of Appeal concluded that the substance of the talks took place in Indonesia was because "*Indonesia was the place where most of the negotiations took place*". No such claim can be made in this case.

589. However, having regard to the factors outlined above, the Court accepts the submission that this is a case where Bermuda has "*the most significant relationship*" with the events and parties and the Court should exercise the jurisdiction restated by Lord Slynn in *Red*

Sea Insurance and the Court of Appeal in *Imanagement* and hold that in this case the claim in relation to misrepresentation be governed by the law of Bermuda alone. The Court is satisfied that "*all or almost all of the significant connecting factors point*" to the direction of Bermuda.

(b) Is the application of Georgian law on limitation contrary to public policy?

590. In light of the Court's conclusion that the Court should consider the misrepresentation claim as an exception to the double actionability rule and apply only Bermuda law, the remaining issues under Georgian law can be dealt with briefly.

591. As an alternative to their primary submission that the misrepresentation claim is governed solely by Bermuda law, the Plaintiffs, in the alternative, say that the misrepresentation claim is actionable in Georgia because the Georgian court would consider the misrepresentation claim to be a claim governed by the law of Bermuda because it relates to a Bermuda law contract and would therefore apply the Bermuda law limitation period.

592. The Plaintiffs rely on the expert evidence of Professor Rolf Knieper, a retired professor of civil law, commercial and economic law and comparative law at the University of Bremen (Germany), who expressed the view that such an action is not barred in Georgia by reason of limitation. In his report dated 14 May 2021 Professor Knieper states:

> *"81. Georgian courts would also apply Bermudan law for misrepresentation when it applies to the contract in the context of which misrepresentation occurs. This follows from Article 27.1 LIPL which provides:*
>
> > *"Entry into force and authenticity of a transaction or of its individual provision shall be determined by the law of a country which ought to have been applied to determine the authenticity of the transaction or any of its provisions."*

82. Further, Georgian courts would also apply the Bermudan statute of limitation. Article 30 LIPL provides:

> *"Period of limitation of a claim shall be determined by the law of a country applied in relation to the claim.""*

593. This was confirmed by Mr Bibilashvili, an attorney licensed to practice law in Georgia and an expert called on behalf of CS Life. In cross examination Mr Bibilashvili confirmed as follows:

> *"Q. What Professor Knieper is saying is that Article 35.1 of the law on the regulation of international private law is set out at the bottom of the page over the page, that is the provision pursuant to which the Georgian courts would give effect to the choice of law clause in the LPI policies?*
> *A. That is correct, article 35.1.*
>
> *Q. Thank you, and you also both agree that the Georgian law, the Georgian court, would apply Bermudian law -- Bermudian law as to limitation, to such a contract claim; i.e. a contract claim governed by Bermudian law?*
> *A. Yes, we have agreed."*
>
> *Q. Thank you. I think just for the court's reference that's at item 9.1 of the joint statement, which is at {E/5/39}. Would you agree, Mr Bibilashvili that if the Georgian court was considering a claim for breach of pre-contractual obligations and/or misrepresentation in relation to the LPI policies it would also apply Bermudian law because of the Bermudian choice of law clause?*
> *A. Yes, we have come to the same conclusion, but there were different kind of analyses because in my view I was saying that these pre-contractual duties are separate from contractual duties but, nevertheless, under Georgian law, although again the only place where the law refers to pre-contractual duties is the same clause, Article 35.1 of the private international law, which also includes pre-*

contractual duties in the same clause, so I believe that under such circumstances, pre-contractual duties would also be governed and the respective claims would be governed by Bermudian law.

Q. Thank you very much. Again, therefore, it follows that the Georgian court would apply the Bermudian law to the limitation of such a claim?
A. Yes."

594. CS Life argues that the argument advanced by the Plaintiffs is wrong as a matter of law because the doctrine of renvoi is abolished for the purposes of limitation by s.34A of the Limitation Act 1984:

"***34A Application of foreign limitation law***

(1) Subject to the following provisions of this Part, where in any action or proceedings in a court in Bermuda the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter— the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings; and except where that matter falls within subsection (2), the law of Bermuda relating to limitation shall not so apply.

(2) A matter falls within this subsection of it is a matter in the determination of which both the law of Bermuda and the law of some other country fall to be taken into account.

...

(5) In this section "law", in relation to any country, shall not include rules of private international law applicable by the courts of that country or, in the case of Bermuda, this Part."

595. Section 34A is substantially the same as section 1 of the UK Foreign Limitation Periods Act 1984 ("FLPA"), which, argues CS Life, was designed and intended to exclude the application of any renvoi. The reliance is placed upon *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, CA, p.438, in support of the proposition that the UK legislature clearly had in mind the double actionability rule as it then applied to torts, when enacting s.1(2) FLPA.

596. CS Life argues that same must be inferred of the Bermudian legislature with the enactment of section 34A(2). The upshot, CS Life argues, is that for torts located overseas, the double actionability rule requires both laws to be considered, but s.34A(5) operates to exclude renvoi in this context. In this regard reference is also made to *Dicey, Morris and Collins* (15th ed) at ¶7-058:

> "*The double actionability rule as to foreign torts…illustrates the case of two leges causae. In such a case the limitation rules of the law both of England and of the relevant foreign country will apply and the expiry of either limitation period will bar the action."*

597. CS Life submits that as a matter of law, the expiry of either the limitation period in Georgia or Bermuda will bar the misrepresentation claim. As the Georgian limitation period is shorter (three years), that is the only limitation period the Court need to consider.

598. The Plaintiffs submit that it would be contrary to public policy for the claim to be barred in this Court under the principle of double actionability and pursuant to section 34A(5) on the basis that the Georgian limitation period (which would not be applied if the claim was proceeding in Georgia) had expired. The Plaintiffs argue that it cannot be consistent with public policy that a claim that would not be time barred in Bermuda and would not if brought in Georgia be found to be time barred, should be held to be time barred by combination of Bermuda and Georgia law.

599. In considering these submissions it is relevant to remember the rationale behind the double actionability rule. The rule is designed to control and limit civil liability for wrongs committed outside the jurisdiction. The control mechanism adopted is that a Bermuda court would only allow the proceedings to continue if the wrong was actionable and could be pursued in the place where it was committed. Lord Wilberforce so held in *Boys v Chaplin* [1971] AC 356 at 389D:

> *"The broad principle should surely be that a person should not be permitted to claim in England in respect of a matter for which civil liability does not exist, or is excluded, under the law of the place where the wrong was committed. This non-existence of exclusion may be for a variety of reasons and it would be unwise to attempt a generalisation relevant to the variety of possible wrongs… I would, therefore, restate the basic rule of English law with regard to foreign torts as requiring actionability as a tort according to English law, subject to the condition that civil liability in respect of the relevant claim exists as between the actual parties under the law of the foreign country where the act was done."*

600. It is clear from the evidence of Professor Knieper and Mr Bibilashvili that, as a matter of practice in the Georgian courts, civil liability for misrepresentation claim does exist and can be pursued in the Georgian courts. It is the evidence of both Professor Knieper and Mr Bibilashvili that any proceedings in relation to the misrepresentation claim under Georgia law could be pursued because, applying the Georgian rules of private international law, the Georgian courts will apply the Bermudian limitation period of 6 years. It follows that in substance the policy considerations which give rise to the existence of the double actionability rule are fully satisfied in this case.

601. CS Life relies on section 34A of the Limitation Act 1984, which gives effect in Bermuda to the English Foreign Limitation Periods Act 1984. The primary object of the 1984 Act, as noted by Lord Sumption in *Ministry of Defence v Iraqi Civilians* [2016] UKSC 16, was to reverse the earlier English law position which classified foreign limitation law as procedural with the result that English courts disregarded foreign limitation law and

applied English statutes of limitation irrespective of the *lex causae*. The object of the 1984 Act was to reverse this position and treat foreign limitation laws as substantive as opposed to procedural.

602. It is indeed the case that section 34A (5) provides that the reference to foreign limitation law "*shall not include rules of private international law applicable by the courts of that country*". However, as Vos LJ noted in *Iraqi Civilians v Ministry of Defence (No 2)* [2016] 1 WLR 1290 at [55] the object of section 34A (5) was "*to prevent the local forum's renvoi rules imposing an eternal game of ping pong*".

603. The cases relied upon by CS Life in relation to the scope of public policy (*Arab Monetary Fund v Hashim* [1993] 1 Lloyd's Rep 543; *Gotha City v Sotheby's* The Times, 8 October 1998; *KXL v Murphy* [2016] EWHC 3102 (QB); *Harley v Smith* [2010] EWCA Civ 78; *Jones v Trollope Coils Cementation Overseas*, CA, 25 January 1990; *Connelly v RTZ Corp plc* [1999] CLC 533; and *Alseran v Ministry of Defence* [2019] QB 1251) are all cases dealing with the issue whether the short duration of a foreign limitation period amounts to "*undue hardship*".

604. The disability under foreign law in *Metall & Rohstoff v Donaldson Inc* [1990] 1 QB 391, another case relied upon by CS Life, was first, the claim in respect of conspiracy would never have been actionable in New York because, under New York law, there is no separate tort of conspiracy and secondly, at a time when the proceedings were instituted against A D.L.J, and A.C.L.I, on 13 April 1987, the claim in respect of procurement of breach of contract was statute-barred under New York law and accordingly no longer actionable in that jurisdiction.

605. Here we are dealing with an entirely separate issue. The actual position in this case is that the misrepresentation claim, as a matter of Georgia law, is not statute barred and can be pursued. However, if this Court was to ignore the Georgian private international law rule, which applies Bermuda limitation period to the misrepresentation claim in this case, then the Court would be bound to conclude that the misrepresentation claim is statute

barred. The Plaintiffs submit that that conclusion does not reflect reality of the position under Georgia law and leads this Court to artificially and wrongly conclude that the requirements of double actionability have not been met. In the circumstances the Plaintiffs submit that it is contrary to public policy for the Court to dismiss the misrepresentation claim on the basis that it cannot be proceeded with in Georgia.

606. The Court accepts that in the present case to deny the Plaintiffs the right to pursue the misrepresentation claim on the ground that it is statute barred under Georgia law is contrary to public policy since this conclusion requires the Court to ignore the evidence of both Georgian law experts that such a claim is in fact not statute barred.

607. In the alternative to the reliance on public policy, the Court would exercise its discretion under the jurisdiction identified by Lord Wilberforce in *Boys v Chaplin* and referred to at [580] above, hold that in the exceptional circumstances of this case only the Bermuda limitation period shall apply in relation to the misrepresentation claim. In support of this conclusion the Court relies upon its earlier finding at [585] to [587] above that this case is one where all or almost all of the significant connecting factors point to Bermuda.

(c) Interruption of limitation period in Georgia

608. The experts agree that the tort claim in Georgia is subject to a 3-year limitation period. Professor Knieper says that the proper interpretation of the relevant article of the Georgian Civil Code (art.138) results in the conclusion that the limitation period was interrupted. He explains in the Joint Statement that:

> "*In such a situation it is appropriate to find an interpretation that balances considerations of material justice and legal security and peace. I have done this in my first Report. I believe it is fair to interpret the term 'claim' broadly and accept an interruption of the period of limitation when plaintiffs, that are part of a group of plaintiffs,who are already pursuing claims, pursue a substantially identical claim based on identical or substantially identical facts but on several grounds, if the*

court admits a consolidation of the lawsuits. In such cases, the dispute is already heard by a court and I consider it more in line with a fair distribution of risks in commercial matters not to allow an inroad into principles of material justice to secure legal certainty which does not exist in any event."

609. Mr Bibilashvili maintained that the issue of the original claim did not interrupt the limitation period for the misrepresentation claim because, he said, all three of the following elements of both claims needed to be identical for the limitation period to be interrupted: "(i) *the claims (subject of the claim); (ii) basis for the claim (factual circumstances on which the plaintiff bases its claim); and (iii) the parties*" (see Joint Statement). He relied on the decision *AS-838-796-2013* and to the effect that the claim, the basis of the claim and the parties had to be the same.

610. The Court accepts Ms Hutton QC's submission that Mr Bibilashvili's view on this issue cannot be correct because it would then be difficult to conceive of any case where there would be interruption of the limitation period – because any new claim that needed to be made would *ex hypothesi* not be identical in all three respects. Professor Knieper pointed out, and Mr Bibilashvili accepted, that this decision of the Supreme Court (because it is not a decision of the Grand Chambers) is not binding. Professor Knieper also referred in his Report at paragraph 106 to a more recent Supreme Court case, *AS-591-2019*, where the Supreme Court stated that "*in order to stop the running of the limitation period, it is not the legal grounds of the suit that have to be identical but it is important that the subject of dispute and factual circumstances be identical*", as Mr Bibilashvili accepted during his evidence.

611. Having heard Professor Knieper and Mr Bibilashvili give evidence the Court prefers the approach and evidence of Professor Knieper. The Court found that Mr Bibilashvili, at times, was overly focused on defending the position he had set out in his original Report.

612. Professor Knieper also notes in the Joint Statement that in considering Mr Bibilashvili's interpretation of art.138, it is relevant to have in mind that the Georgian Civil Procedure

Code provides that "*[a]dding specificity to, rectification and supplementing the circumstances indicated in the lawsuit as well as reduction of the amount of a lawsuit claim or the demand to award another object instead of the initially indicated object or the demand to be compensated the value of that object shall not be considered as alteration of a lawsuit*".

613. In cross-examination, Mr Bibilashvili accepted that the Georgian authorities referred to showed that the identification of the appropriate or available cause of action in any particular case, on the basis of the facts pleaded by the plaintiff, is a matter for the Court. He further accepted that in light of this principle, "*it would be surprising … if a new claim which involved only a change in that legal analysis didn't get the benefit of the limitation period being interrupted under Article 138*".

614. Under cross examination Mr Bibilashvili accepted that the reference in the cases to the subject of the claim (i.e. category (i) in the case he referred to (AS-838-796-2013)) was "*the actual claims put forward by the plaintiff … meaning what it is that the plaintiff seeks*", and that the "*grounds of the claim*" (i.e. the basis of the claim, category (ii)) means "*the underlying facts, not legal theory*". On that basis, (i) the subject of the claim is the Plaintiffs' claim for damages, (ii) the grounds are the facts on which the Plaintiffs rely, and (iii) the parties are the parties, and on that basis also, the Plaintiffs contend, the test would be met because the misrepresentation claim is a claim for damages which mirrors the claims advanced in the original proceedings.

615. Mr Bibilashvili agreed in cross-examination that where "*The parties are the same, the facts are the same and the claim for damages is the same*", then "*[t]hat would mean that it is the same claim, Yes*", and confirmed that "*in this case, where we have an original claim seeking damages and a misrepresentation claim seeking damages, that element of the test would be met and all that has to be addressed is the parties and the facts on which the claimant relies*".

616. Mr Bibilashvili confirmed that ultimately "*it is a matter for this court whether the facts are the same or sufficiently similar and whether the parties are the same or sufficiently*

similar, but you have agreed that for the purpose of the test a remedy in damages would meet the interruption test" with the caveat that "*[t]he test is to be the same. I read same as being identical and I think sufficiently similar does not meet that threshold that has been put forward by the Supreme Court*…".

617. In the light of this evidence, and preferring the evidence of Professor Knieper, where appropriate, the Court finds that where the new claim involves (i) no new parties, (ii) the facts are substantially the same, and (iii) the claim (in terms of an award of damages for the same loss) is the same, then the limitation period is interrupted under art.138, which provides that:

> "*The running of the period of interruption shall be interrupted* ***if the entitled person files a lawsuit for satisfaction of the claim*** *or for its ascertainment or tries to satisfy the claim by some other means such as by filing a declaration of the existence of the claim with a state body or with a court* …". (emphasis added)

618. This finding is supported by *Case No. AS-591-2019* holding that for the interruption of the limitation period, it is not the legal basis for the claim but the subject of the dispute and the underlying factual basis that are decisive, and the provision in the Georgian Civil Procedure Code that "*[a]dding specificity to, rectification and supplementing the circumstances indicated in the lawsuit as well as reduction of the amount of a lawsuit claim or the demand to award another object instead of the initially indicated object or the demand to be compensated the value of that object shall not be considered as alteration of a lawsuit*".

619. Having regard to the above findings of Georgia law and the factual findings made by the Court in [625] to [633] below in relation to the misrepresentation claim, the Court finds that the effect of the issue of the original proceedings in Bermuda was to interrupt the limitation period for the misrepresentation claim pursuant to art.138.

(d) Leave to amend under RSC Order 20 rule 5

620. The Court has found that (i) as an exception to the double actionability rule the misrepresentation claim is only governed by Bermuda law and not by Georgian law ([584] to [589] above); (ii) the Court would not give effect to the Georgian limitation period either because it is contrary to public policy or as an exception to the double actionability rule ([590] to [607] above); (iii) the Georgian limitation period is in any event interrupted pursuant to art. 138 ([608] to [619] above), with the result that the misrepresentation claim is not barred as a result of the application of Georgian limitation law. In the circumstances, the Court hereby gives leave to the Plaintiffs to amend the relevant Writ of Summons and the Statement of Claim to plead the misrepresentation claim.

621. As a further alternative the Plaintiffs submit that, in any event, the limitation problem will fall away if permission is given in Bermuda to amend the original proceedings to include the misrepresentation claim, because the consequence of such an amendment would be that, as the result of relation back, the misrepresentation claim would be treated as if it had been included in the writ and would accordingly be within the 3-year Georgian limitation period.

622. RSC O.20, r.5 provides the following in relation to applications for leave to amend a writ or pleading:

> *"**20/5 Amendment of writ or pleading with leave***
>
> *(1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.*
>
> *(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current*

at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

…

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

623. CS Life submits that the Court may not permit an amendment to plead a new claim the limitation period for which has expired, unless that new claim arises out of the same or substantially the same facts as an existing cause of action: *Welsh Development Agency v Redpath Dorman Long* [1994] 1 WLR 1409, CA at pp.1415-1416. The same approach was confirmed by the Court of Appeal in *Grayken v Grayken* [2011] CA Bda LR 14.

624. In deciding the question of whether a new claim arises out of the same or substantially the same facts, the Court assesses whether the facts necessary for the new claim are essentially the same as for an existing claim. In *Akers v Samba Financial Group* [2019] 4 WLR 54, the Court of Appeal held that that before allowing an application to amend, the court was required to conduct an evaluation of the new case as against the old case in order to determine the threshold question whether the new case arose out of the same or substantially the same facts as were already in issue in the existing claim; that broadly similar allegations, implicitly made or understood would not suffice to meet the threshold test; that in the majority of cases the question of what was in issue in an existing claim would usually be determined by examination of the pleadings alone; that although there could be rare cases, for example where there had been an extensive evidential battle on a summary judgment application or on a jurisdictional question, where it would be possible to discern that facts were already in issue in a case prior to being crystallised in formal pleadings.

625. In considering whether the misrepresentation claim arises out of the same or substantially the same facts and matters pleaded in the Plaintiffs' original Statement of Claim the Court firstly notes that the sale of the Policies has always been at issue in the proceedings. Thus:

(1) Paragraph 10 of the Statement of Claim dated 22 August 2017 ('**SOC**") pleads that in around 2004, the Bank approached Mr Ivanishvili to offer private wealth management services to him and his family. Mr Ivanishvili agreed to invest monies through the Mandalay Trust established by the Mandalay Trustee. In 2010 or 2011, the investment in an insurance policy under the Mandalay Trust was suggested and/or recommended by the Bank. At all material times it was envisaged that the premium payable under the life insurance policy would be held and invested by the Bank as agent.

(2) Paragraph 19 of the SOC asserts that the Bank advised Mr Ivanishvili on or before 6 August 2012 that he should establish a new trust to hold and invest with the Bank proceeds relating to the sale of a pharmaceutical business, which could then be used to provide more generally for inheritance purposes for Mr Ivanishvili's family members. The investment in an insurance policy under that trust, the Green Vals Trust, was suggested and/or recommended by the Bank. At all material times it was envisaged that the premium payable under the life insurance policy would be held and invested by the Bank as agent.

(3) Paragraph 34 of the SOC asserts that on various dates between 2011 and 2013, the Bank recommended certain investments for the Mandalay Trust and the Green Vals Trust. In particular, the Bank recommended that a large part of the Mandalay Trust fund and the majority part of the Green Vals Trust fund should be invested in life insurance policies issued by CS Life, sister company of the Trustees and a subsidiary of the Bank.

626. Secondly, the application to amend by pleading the misrepresentation claim, pursuant to RSC Order 20, rule 5, first came before the Court on 22 October 2020. By this time witness statements in relation to the existing claims had already been exchanged. The sale of the policies is in fact addressed in the witness statements served on behalf of CS Life.

(1) At paragraph 22 of his Witness Statement dated 15 May 2020 Mr Celia states that: "*This agreement [Collaboration Agreement Dated 24 January 2005] enabled the Bank to offer LPI to its clients. Having identified existing Bank clients who might benefit from LPI, the RMs would also complete the application forms with the client and review the various life insurance contracts with the client, those documents also having been provided to the Bank by CS Life. There was a dedicated sales support team within CS Trust (which covered the life business also) who supported the Bank (mainly RMs) in promoting this product to the clients. The sales support team offered training on the different aspects of the products and the LPI application documents to RMs They sometimes attended client meetings to support the RMs directly. CS Life did not have a sales team who approached clients or prospective clients without the involvement of the Bank's RMs*".

(2) At paragraph 12 of his Witness Statement dated 15 May 2020 Mr Vaccaro states that; "*LPI was promoted to the relationship managers at the Bank by the Key Account Managers in the Credit Suisse Life and Pensions Team. The arrangements between CS Life and the Bank were that the Bank would provide its clients with the option of taking up LPI, supported in that effort by CS Life. This was achieved by a collaboration agreement between CS Life ('the Insurance Company') and the Bank ('the Intermediary') in January 2005. The introductory paragraphs say that the Bank is interested in offering its clients life insurance policies issued by CS Life. The Bank agrees to include LPI in its 'distribution network' (clause I.1). Clause V 'Servicing clients' states 'The Insurance Company assumes that the Intermediary shall continue to provide services to clients the Intermediary has acquired also after they have taken out the policy, and that customer service shall be ensured*

during the time that the client maintains a business relationship with the Intermediary.' This emphasises the aim of LPI to enable the Bank's clients to continue their relationship with the Bank via the LPI wrapper. When the relationship managers identified one of their clients that the LPI product was suitable for, they referred the client to the CS Life sales team to assist or offered the policy directly. I do not know for sure, but I think it is highly likely that it was Mr Lescaudron who introduced LPI to Mr Ivanishvili."

(3) At paragraph 8 of his Witness Statement dated 15 May 2020 Mr Keusch states that: "*The CS Life Key Account Management team were responsible for introducing the LPI product to the relationship managers at the Bank. The CS Life Key Account Management team also provided training and support to the relationship managers. The RMs identified clients for whom the product was suitable. The RMs received training on the operation of the product from the CS Life team and had access to the application documents. LPI policies were sold on the basis that the Bank was to be the custodian. There may have been a few ofpolicies when the product first started in which the policy assets were invested with a third-party bank, I don't know for sure either way, but this certainly did not happen save at the very beginning. It was not an option by the time the Meadowsweet and Sandcay Policies were set up. This is because the LPI policies were intended to benefit companies within the Credit Suisse group as well as CS Life. The application documents for the LPI policies provided as standard that CSAG would be the custodian Bank. Once the client had completed the application forms and signed up formally to LPI, the application forms would be returned to my team at CS Life for processing*."

627. Thirdly, the Bank's role as CS Life's agent was included at paragraphs 10 and 19 of the Amended Statement of Claim pursuant to an Order dated 22 December 2020.

628. Fourthly, the wrongdoing on the Plaintiffs accounts and Mr Lescaudron's fraudulent conduct was pleaded in the original SOC at paragraphs 48, 49, and 53.5(b)(iii). Mr

Lescaudron's fraudulent conduct in the period prior to the sale of the LPI Policies was expressly pleaded. The proposal for the sale of the Meadowsweet Policy was made, according to the evidence of Mr Ivanishvili, at a meeting in Tbilisi in March 2011. Paragraph 49.5 of the SOC pleads that in about February 2009, the Bank (acting by persons unknown in Singapore) failed to execute instructions which it had already accepted by Mr Ivanishvili, giving rise to significant losses which the Bank (acting by Mr Lescaudron) then hid from Mr Ivanishvili. Mr Lescaudron explains this incident and his fraudulent conduct in 2009 in his interview with the Geneva Police on 18 January 2016:

> *"There were certain problems that are the bank's responsibility. There was an incident which meant that the client lost earnings of 40 to 50 million. The bank did not place an order. In February 2009, the crisis was at its most critical point. We had a conversation with Mr IVANISHVILI. We thought that the share market had reached its lowest point.*
> *We came to the conclusion that his bonds mandate with Credit Suisse Singapore should be transformed into full equity. From memory, there was about 600 million. He gave about 4% per year.*
>
> *At the end of this conversation, the client decided to change his mandate. I contacted Singapore and I asked them to send me the forms for changing a mandate profile, which I asked the client to sign before returning them to Singapore. They sent me a receipt of reception and indicated that were going to sell everything. To be precise, these products are 'sold' as being saleable in 2 days.*
>
> *This switch was made in 15 days, between the last week of February 2009 and the first week of March. The 6th of March was the lowest point on the markets. From then on, the markets picked up. They went up by 15% until the end of the month of March.*

Considering the instructions given, I thought the client must have had a capital gain of 10% on 600 million. The timing was perfect. To answer your question, the client received a monthly report, which I put together.

On the 2nd or 3rd of April, I received the report. The client had earned between 0.5 and 1.5%.

The portfolio was still principally composed of bonds.

I wrote to Singapore to ask for the accounting reports. One of the managers replied that she knew they had not followed the client's instructions, thinking that there was still some value in keeping the bonds. I wondered what I would say to the client. I had a moment of panic. I asked my superior about it. He was an inefficient type who had no desire to manage problems. He was very annoyed. He told me to speak to the client to do what was best. I felt very alone.

*I had two solutions**. I chose to lie and tell the client that he had gained between 7 and 10%. I do not remember if I initially sent a report with the exact figures, which led to a call from the client, or if I hid the truth straight away. I won't describe the state I was in. I know that at this time, I sent an Excel report to the client with false figures. I made modifications in Excel and I changed values. I put the bonds at nearly 0 and I put the shares to nearly the maximum. I also modified the performance.***

***At this time, I started to do even more 'solo trading' to recover the sum**."* (emphasis added)

629. Fifthly, facts relevant to establish that the Plaintiffs were not informed of the wrongdoing on the accounts were pleaded in the original SOC (for example at paragraphs 40, 48 and 53.4).

630. Sixthly, CS Life has given no additional discovery in relation to the misrepresentation claim.

631. Seventhly, Mr Celia, an existing witness filed a three-page witness statement in relation to the misrepresentation claim. Mr Celia has no first-hand knowledge in relation to the factual issues relating to the misrepresentation claim and his witness statement is in the nature of legal submissions.

632. Eighthly, no additional witness was called by CS Life as a result of the misrepresentation claim being brought.

633. In the circumstances the Court is satisfied that the facts underpinning the misrepresentation claim were pleaded in the original SOC, including the sale of the policies, the Bank's role as CS Life's agent (by amendment on 22 December 2020) and Mr Lescaudron's fraudulent conduct and wrongful trading on the Plaintiffs' accounts which was concealed from the Plaintiffs. Specifically, the original SOC pleaded Mr Lescaudron's wrongful and fraudulent conduct in relation to Mr Ivanishvili's accounts in 2009 prior to the sale of the LPI Policies in 2011 and 2012. Accordingly, the Court is satisfied that the misrepresentation claim arises out of the same facts or substantially the same facts as the causes of action in respect of which relief has already been claimed in the original SOC and that it is appropriate to give leave to amend the Writ of Summons and the SOC in accordance with the terms of RSC Order 20 rule 5.

(2) The misrepresentation claim under Bermuda law

634. The basic elements of a claim in fraudulent misrepresentation / deceit are well-established and are summarised, for example, in *Civil Fraud: Law, Practice and Procedure* (Eds. Grant and Mumford) at 1-003 as follows:

(a) The defendant made a representation which was false.

(b) The defendant knew that the representation was made and that it was untrue, or was reckless as to its truth or falsity.

(c) The defendant intended that the representation would induce the claimant to act or refrain from acting.

(d) The claimant was in fact induced by the representation to act or refrain from acting.

(e) The claimant thereby suffered loss.

(a) CS Life made a representation which was false

635. It is common ground that the representation can be made impliedly as well as expressly. In *Pitt & Co Ltd v White* [2014] SC (Bda) 17 Civ at [46] Hellman J held at [46]:

> *"Thus a true statement of fact, when coupled with a material omission, can give rise to an implied misrepresentation. This was the point made by Lord Chelmsford in the extract which Hamblen J cited from Oakes v Turquand. More recently, Lewison LJ gave a helpful analysis of this kind of situation in Mellor v Partridge [2013] EWCA Civ 477 at para 17:*
>
> > *"First, a representation which is literally true may nevertheless be a misrepresentation if relevant facts are concealed. Second, allied to this proposition is the proposition that a representation may be implicit. Often the two will overlap. A half truth may amount to deceit if it is suggestive of a falsehood and intended so to be. Thus in Nottingham Patent Brick & Tile Co v Butler (1866) 16 QBD 778 a statement by a solicitor that he did not know of any restrictive covenants (but who did not reveal that he had not looked at the deeds) was held to have been a misrepresentation. In Spice Girls Ltd v Aprilia World Service BV [2002] EWCA Civ 15 [2002] EMLR 27 an express representation that the Spice Girls were "committed" to a*

contract carried with it the implied representation that the representor did not know of any matter which might falsify the assurance. What the court must consider is what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context."

636. Again, it is common ground that that a representation may be made by conduct alone. As an example, the Plaintiffs referred to *Gordon v Selico* (1986) 18 HLR 219, where the defendant was found liable in deceit where he had deliberately had patches of dry rot in a flat covered up before showing it to prospective purchasers who went on to buy the flat.

637. The Misrepresentation Plaintiffs say that in proffering the Meadowsweet Policy in around March 2011 and the Sandcay Policy in around June 2012, the Bank and/or Mr Lescaudron (acting on behalf of CS Life) impliedly represented that the Bank was not fraudulently managing the Plaintiffs' existing accounts and/or did not intend to manage the Policy Assets fraudulently.

638. The Court accepts that the documentary evidence supports the case advanced by the Misrepresentation Plaintiffs by making it clear that the purpose of the LPI policies was succession planning. In particular:

(1) Credit Suisse Trust had recorded the purpose for which the Mandalay Trust was established as being "*Inheritance Planning and Asset Holding*". The beneficiaries of the Mandalay Trust were Mr Ivanishvili, his wife (the Second Plaintiff), and his children at the time: Uta, Bera and Gvantsa.

(2) The letter drafted for Mr Ivanishvili's signature dated 2 April 2011 requesting the trustees of the Mandalay Trust to sign the application for an LPI policy with CS Life stated that "*The policy holder shall be Meadowsweet Assets Limited, the insured person shall be myself and the sole beneficiary of the LPI shall be*

Meadowsweet Assets Limited. Therefore, upon my death, the assets held by [CS Life] under this policy would be remitted to Meadowsweet Assets Limited and will be distributed to the beneficiaries of the above mentioned Trust according to the Trust's Letter of Wishes". The letter goes on to record that it is confidential but states that it may be released to CS Life and Credit Suisse Trust Ltd, Geneva.

(3) The "MRC Submission" prepared for the Green Vals Trust describes the purpose of the structure (including the proposed Sandcay LPI policy) as being "*to organize the Settlor's succession smoothly and in a flexible way*" as well as consolidating proceeds from the sale of his Russian business and Stamp Duty savings.

(4) The beneficiaries of the Green Vals Trust (as established on 10 August 2012) were Mr Ivanishvili, his wife and his four children.

(5) At the meeting in June 2012, Mr Ivanishvili was provided with the presentation which was entitled "*Estate Planning Structure Proposal*" and included the statement that the "*Advantages*" included "*Asset protection / estate planning / flexibility*".

639. The Court accepts Mr Ivanishvili's evidence that he understood that all the investments proposed to him, including the Life Policies "*were designed to achieve [his] objectives – to preserve and protect the wealth that [he] had built up for [his] family and to ensure they were looked after in the future should anything happen to [him]"* and that at the time the policies were proposed he understood his relationship with Credit Suisse to be a successful one. The Court accepts his evidence that "*As long as the investments were performing well and were in line with the investment objectives that I had outlined to Credit Suisse, I was happy. In fact, performance was shown by Credit Suisse to often exceed expectations … Since I was being told that the investments in my portfolio were doing well and returning healthy profits, I was willing to listen to such proposals and accept recommendations given to me*".

640. The Plaintiffs contend, and the Court accepts, that the implied misrepresentations were communicated to Mr Ivanishvili at the meetings at which the life policies were proposed, discussed above.

641. The Court also accepts that by communicating the implied representations to Mr Ivanishvili, the Bank/Mr Lescaudron intended and expected those representations to be passed on to Meadowsweet and Sandcay, as in fact happened when Mr Ivanishvili requested Meadowsweet and Sandcay to enter into the Life Policies. The Plaintiffs contend, and the Court accepts, that for the cause of action to be complete, it is not a requirement that the representations were actually passed on to Meadowsweet and Sandcay, so long as they reached Mr Ivanishvili who was in this context their agent (see *Chitty on Contracts* at para 7- 032, in particular the final sentence approved by Flaux J (as he then was) in *OMV Petrom SA v Glencore International* [2015] EWHC 666 (Comm) at [139]: "*If a person asks an agent to find some property for him, and the agent, relying on the fraudulent inducements of the vendor, recommends that vendor's property, the buyer will be entitled to relief for misrepresentation even though the agent did not actually pass on the fraudulent statements*").

642. The Court accepts the Plaintiffs' submission that the representations – that the Bank was not fraudulently managing the Plaintiffs' accounts and/or did not intend to manage the Policy Assets fraudulently – were false in that:

(1) The Bank had, as admitted by Mr Lescaudron, as found by the Swiss court and as admitted and averred by the Bank in its Particulars of Claim in the English injunction proceedings, carried out fraudulent trading on the Plaintiffs' accounts since 2007 including (i) misappropriation of funds and securities between August 2007 and May 2011, by way of transfers at an over or under value (or for no consideration) or transfers using falsified transfer instructions; and (ii) unauthorised investment in funds, such as the Sequoia Funds, for the purpose of obtaining kickbacks from March 2010.

(2) Fraudulent transactions had also taken place on the Policy Accounts.

(3) It is to be inferred from the continuous pattern of fraudulent trading on the Plaintiffs' accounts that, as at the date the Policies were taken out, the Bank intended to continue trading on the Plaintiffs' accounts in the same way as it had done so previously, i.e., fraudulently.

(b) CS Life's knowledge of the representation and its falsity

643. The relevant issue in this respect is whether CS Life is vicariously liable for that deceit on the part of Mr Lescaudron. It is common ground that as a matter of Bermuda law, because the tort of deceit is a tort involving reliance by the plaintiff upon the truth of a representation made by a person, the principal is not liable for his agent's representation unless made within his actual or ostensible authority: "*the essence of the employer's liability is reliance by the injured party on actual or ostensible authority*" (*Armagas Ltd v Mundogas SA, The Ocean Frost* [1986] AC 717 at 782).

644. CS Life submits that in this case there was no actual authority for Mr Lescaudron and/or the Bank to make the alleged misrepresentations. In relation to actual authority CS Life contends that the Collaboration Agreement between CS Life and the Bank makes clear that the Bank "*shall not have the right to represent*" CS Life in relation to the promotion of the LPI Product. Accordingly, there was, CS Life submits, plainly no actual authority for Mr Lescaudron to make any representations for and on behalf of CS Life. The Collaboration Agreement is governed by Swiss law.

645. CS Life also submits that Mr Lescaudron and/or the Bank had no apparent authority to act on behalf of CS Life. In relation to this submission CS Life argues that the Plaintiffs had no interaction with CS Life, and do not even appear to have thought about CS Life at all, prior to their applications to CS Life for the LPI Policies. As such, CS Life argues, it would have been impossible for CS Life (as opposed to Mr Lescaudron or the Bank)

to have made any representations to the Plaintiffs so as to clothe Mr Lescaudron or the Bank with authority to represent CS Life.

646. The Court is unable to accept these submissions. The Court refers to its Factual Finding 2 at [188] to [211] above, that CS Life delegated responsibility for the sale of the LPI Policies, agreeing the terms on which assets would be transferred to CS Life (including the 'investment alternative'), reporting on the LPI Policies and any ongoing dealings with respect to the LPI Policies to Mr Lescaudron *qua* Mr Ivanishvili's relationship manager.

647. The Court accepts Ms Hutton QC's submission that the Bank and Mr Lescaudron had actual authority to make representations to the Misrepresentation Plaintiffs in the context of marketing, selling or promoting LPI to the Plaintiffs. *Chitty on Contracts,* 34th Edn, para 9-030 states (emphasis added):

> "*In order to ground relief to a person who has entered into a contract as a result of a misrepresentation, it is normally necessary that the misrepresentation should have been made either by the other party to the contract, or by his agent acting within the scope of his authority, or by someone with whom the other party shared a joint design to defraud and who thus was a joint tortfeasor; or that the other party had notice of the misrepresentation. Notice may be actual or constructive. A person who has been induced to enter into a contract with A as a result of a misrepresentation made to him by B and of which A had no notice has no ground of relief against A unless B was A's agent. It is, however, not necessary to show that the misrepresentor was the agent of the other contracting party for the purpose of concluding the contract, or even for the purpose of conducting negotiations; it is sufficient if the misrepresentor was the agent of the other contracting party simply for the purpose of passing on the misrepresentation to the misrepresentee*". (emphasis added)

648. The authorities cited for that last proposition are *Pilmore v Hood* (1838) 5 Bing NC 97; *First Energy v HIB* [1993] 2 Lloyd's Rep 194, 204; *Avonwick Holdings Ltd v Azitio Holdings Ltd* [2020] EWHC 1844 at [390-395]; and *MCI Worldcom International Inc v Primus Telecommunications plc* [2004] 2 All ER (Comm) 833 at [25] where Mance LJ held:

> *I would accept that Ms McKibbin's known role as an in-house lawyer (as well as the apparent brevity and spontaneity of the discussion during which the alleged representations were made) are relevant when considering both how to understand what she said and how it was reasonably capable of being (and may have been) relied on. But, in so far as it derives from her position or her inability to sign the agreements that she cannot have had WorldCom's authority to make any representations relating to WorldCom's financial position or strength, this seems very likely to go too far, since—*
>
> > *'the law recognises that in modern commerce an agent who has no apparent authority to conclude a particular transaction may sometimes be clothed with apparent authority to make representations of fact.' (See First Energy (UK) Ltd v Hungarian International Bank Ltd [1993] 2 Lloyd's Rep 194 at 204 per Steyn LJ; and also Australasian Brokerage Ltd v Australian and New Zealand Banking Corp Ltd (1934) 52 CLR 430 especially at 441, 450–451.)"*

649. The Court accepts the Plaintiffs' submission that as the Bank and Mr Lescaudron were used by CS Life to sell the LPI product, they were each authorised for the purpose of making representations to the Plaintiffs about the LPI product, and the Collaboration Agreement dated 24 January 2005, which is properly characterised under Swiss law as a commercial agency contract, does not establish otherwise. This was not a case where the relationship between CS Life and Mr Lescaudron (or CS Life and the Bank) is properly analysed as something other than a principal/agent relationship.

650. The factual position on actual authority in this case is now overwhelming. In addition to the Finding 2, there is Mr Celia's evidence that "*CS Life did not have a sales team who approached clients or prospective clients without the involvement of the Bank's RM*".

651. The extent of CS Life's delegation to and reliance on Mr Lescaudron, *qua* relationship manager, was summarised by Mr Keusch under cross examination when he accepted that (i) in so far as dealings with the client were concerned in relation to the proposal of the policies, that was all done through the relationship manager; (ii) it was a relationship manager who explained to the client the benefits of the LPI Policies; (iii) confirming what the client wanted was again the responsibility of the relationship manager; (iv) putting together the documentation reflecting what the client wanted was also the responsibility of the relationship manager; and (v) after the inception of the Policy it was the relationship manager who was responsible for all dealings with the client in connection with the Policy.

652. Finally, slide 9 of the 24 April 2012 *Governance Handbook* for CS Life Bermuda states that CS Life's "*Sales/Distribution*" function is outsourced to the Bank.

653. As noted above, CS Life relies on the Collaboration Agreement, which is governed by Swiss law, as the basis for its case that the Bank (and Mr Lescaudron as a Bank employee) did not have actual authority to make representations on behalf of CS Life. The Plaintiffs submit that that Swiss law is irrelevant relying upon *Bowstead & Reynolds* para 12-014, citing inter alia, *Rimpacific Navigation Inc v Daehan Shipbuilding Co Ltd* [2009] EWHC 2941 (Comm) "*It is well established at common law … that questions of apparent authority are governed by the law governing the main contract entered into … The law governing the contract with the third party will determine questions of how such authority can be established, its extent, when the third party is put on inquiry and the degree of inquiry required and so forth*." *Bowstead's* preferred view is that the law governing the contract with the third party also determines questions of actual authority (*Bowstead* para 12-015) (subject to two possible exceptions, neither of which apply in

these circumstances). Swiss law is accordingly not relevant to this question, but in any event Professor Pichonnaz's evidence, on behalf of the Plaintiffs, was clear that as a matter of Swiss law, Mr Lescaudron had actual and apparent authority to make representations on behalf of CS Life in marketing the LPI Policies.

654. Dr Weibel's evidence, on behalf of CS Life, was that the Collaboration Agreement is correctly interpreted as not providing authority to the Bank or its employees to make representations on CS Life's behalf, and that that is the case because the LPI Policies were a standardised product that were exhaustively explained in the documents and did not require any negotiations (Sixth Report, para 4(f)). The Court accepts that this point is entirely inconsistent with the evidence from CS Life's witnesses to the effect that CS Life relied on the relationship managers to discuss the LPI policies and, in particular, the choice of investment alternative, with the clients in marketing the policies and completing the application forms (see Coffey at para 9, Celia 1 para 22 and Vaccaro 1 para 12).

655. Although it was put to him that the interpretation of the Collaboration Agreement did not involve any Swiss law, Professor Pichonnaz was cross-examined about its construction, with it being put to him that the effect of Section I, clauses 2 and 3 of the agreement were that the Bank was not authorised to make representations on behalf of CS Life. He explained (as set out in his Report) that his interpretation of the agreement was that:

(1) The restriction in clause I, 2 ("*the Intermediary shall not have the right to represent the Insurance Company*" was limited to meaning that the Bank cannot conclude the contract on behalf of CS Life.

(2) Professor Pichonnaz said "…*under Swiss law a broker can have three possibilities. He can just indicate an opportunity to conclude a contract; he can negotiate a contract; or he can even conclude a contract on behalf of the principal. So by inserting that sentence, the drafter wants clearly to indicate that the last option is*

not an option. That the bank here, the intermediary, can only negotiate, that will never be allowed to conclude the contract." As Professor Pichonnaz explained, interpreting the Collaboration Agreement as meaning that CS Life was permitted only to present the customer with the marketing materials provided by CS Life and the application form and not make any other representation about the policy (put to him in cross examination), which Professor Pichonnaz described as meaning "*like a postman, just bringing the documents*", "*you would not have all the rest [of the Collaboration Agreement] if the whole purpose of the collaboration agreement was to act as a postman*".

656. The Court accepts Professor Pichonnaz's construction of the Collaboration Agreement in preference to the evidence of Dr Weibel. Professor Pichonnaz gave his evidence in a forthright manner which made commercial sense.

657. In relation to the issue of apparent authority the Court accepts the Plaintiffs' submission that the Bank and Mr Lescaudron were clearly held out by CS Life as authorised to make representations on behalf of CS Life in marketing the LPI Policies. The life policies were sold by the Bank, through Mr Lescaudron, acting on behalf of CS Life. As set out above, the meetings at which the LPI proposal was discussed with Mr Ivanishvili were attended by Ms Novoa Sampaoli, Mr Godard and Mr Lescaudron (the March 2011 meeting) and Mr Vitse and Mr Lescaudron (the June 2012 meeting). The Court finds that in all the circumstances of those meetings, the Bank and Mr Lescaudron had apparent authority to act on CS Life's behalf, including to make representations on CS Life's behalf, to bind CS Life and to conclude sales of LPI on behalf of CS Life.

658. In addition to the evidence referred to above, there is a letter from CS Life dated 7 December 2012 to Sandcay after the LPI Policies were taken out promising to provide a "*a truly personal-client service*" and stating unambiguously that "*[i]f you have any questions or would like any changes to be made, please ask your Relationship Manager*." As noted earlier, Mr Celia accepted that in this letter CS Life was expressly holding out Mr Lescaudron, i.e. the relationship manager, as the person who was to provide the

"*personal-client service*" on its behalf (which makes commercial sense since CS Life has no operational employees that could provide client services).

659. The Court also accepts the submission that terms of the Collaboration Agreement cannot be relied on by CS Life to say there was no apparent authority because the agreement was not something the Plaintiffs were aware of. On the other hand, by granting the Bank the power to act for CS Life in marketing the LPI policies by the Collaboration Agreement, CS Life created the appearance of authority on the part of the Bank and its employees to make representations in relation to those policies on CS Life's behalf.

660. CS Life submits that the Plaintiffs are required "*to prove that at the time of the promotion of the LPI Policies, Mr Lescaudron was fraudulently (not merely imprudently or negligently) managing the Plaintiffs' accounts*". Having regard to the Findings 8 to 11 and 15 above, the Court finds that this burden has been discharged by the Plaintiffs.

(c) Defendant intended that the representation would induce the plaintiff to act or refrain from acting

661. Again, it is clear that Mr Lescaudron intended the implied misrepresentations to induce the Misrepresentation Plaintiffs to enter into the LPI policies.

(d) The plaintiff was in fact induced by the representation to act (or refrain from acting)

662. The Plaintiffs contend that the nature of the misrepresentations here and their seriousness – that the Bank was not fraudulently managing the Plaintiffs' accounts and/or did not intend to manage the Policy Assets fraudulently – make it obvious that they induced the Misrepresentation Plaintiffs to enter into the LPI policies. In this regard it is Mr Ivanishvili's evidence that:

> "*Of course, had I known at the time that fraudulent transactions had taken place on the existing accounts at Credit Suisse and that the accounts had been*

mismanaged, I would never have agreed to set up the Life Policies. The driving force behind setting up accounts for the benefit of my family was to entrust Credit Suisse to keep this wealth secure and to ensure my family were taken care of in the future. Had I known that the accounts were not being managed properly and that money was being misappropriated, I certainly would not have requested that Life Policies worth over USD 770 million be taken out with the life insurance division of Credit Suisse. Instead, I would have moved the management of this money, along with the sale proceeds of my Russian business interests, to a reputable European bank to be invested in a medium risk investment portfolio. I already had some options in this respect at Coutts and Raiffeisen Bank."

663. CS Life submits that Plaintiffs need to prove that the representation actually induced them to act in reliance upon it (with all the constituent elements of the same) in a way which resulted in loss. Of particular significance to this claim is the suggested principle that, for a misrepresentation to be actionable, the representee must be aware of it; he must understand it in the sense in which he later complains of it; it must be "*actively present to his mind"* or he must have given it some *"contemporaneous conscious thought*".

664. CS Life relies on *Property Alliance Group v Royal Bank of Scotland* [2016] EWHC 3342 (Ch) at [419], where Asplin J (as she then was) held:

"*It seems to me therefore, that there was no understanding of what are extremely complex and intricate pleaded representations meant and for the most part, the matters which were pleaded did not cross Mr Russell and Mr Wyse's minds. On that basis, in my judgment, they could not have understood the implied representations to have been made and therefore, did not rely upon them... At best, it seems to me that both Mr Russell and Mr Wyse assumed that LIBOR, which they understood to be a commercial rate of interest, would be set in a straightforward and proper manner. In my judgment, therefore, they gave no thought to the LIBOR Representations in the form pleaded and did not rely upon them*."

665. CS Life also refer to *Marme Inversiones v Natwest Markets* [2019] EWHC 366 (Comm), where Picken J considered the point and held:

> "*[278] The next issue to be considered is that of reliance since it was common ground that, in order to succeed with a misrepresentation claim, a claimant must show that it relied upon the alleged misrepresentation. That applies whether the misrepresentation claim is founded on the existence of an express representation or, as in the present case, implied representations. Either way, there needs to be reliance on the part of the representee.*
>
> *"[279] There are two aspects to this issue since, in the first place, a claimant must establish that it was aware of the representation at the time that it was made and, secondly, the claimant must show a causal connection between the making of the representation and its decision to enter into the contract which ensued from the making of the representation."*
>
> *…"[286] … a claimant…should have given some contemporaneous conscious thought to the fact that some representations were being impliedly made, even if the precise formulation of those representations may not correspond with what the Court subsequently decides that those representations comprised. If the position were otherwise, then…the consequence would be that there would be a substantial watering down of the reliance requirement*."

666. CS Life also relies upon the recent decision of Cockerill J in *Leeds City Council v Barclays Bank* [2021] 2 WLR 1180, when the learned judge summarily dismissed the case on the basis that there was no pleading of awareness or understanding of the relevant representation. Seeking to rely on the presumption of inducement and the counterfactual of truth was insufficient. Cockerill J held:

> "*[144] I would tend to accept the submission that, in terms of building blocks, the third element of a cause of action in misrepresentation, inducement, is all about the*

causal link between the conduct of the defendant and the conduct of the claimant. I also accept that this question is a question of fact in each case.

[145] In my judgment the authorities…tend to show that based on the facts of different cases it may (or may not) be necessary to break that building block down into smaller parts (assumption, the counterfactual of truth and so forth) and that in different cases those smaller parts will be thrown into greater relief. That does not mean however that each expression of the workings of that part becomes an essential component of inducement in each case.

[146] That there is some requirement of awareness I am, as I have indicated, persuaded is established by the authorities. Often that requirement will not be in issue; but that does not mean that it is not a requirement; just that in some cases that it is so obvious that the parties do not bother to argue about it. And when that requirement is in issue, in some cases the question will be what the claimant consciously thought, but in other cases it may be better expressed by a focus on active presence."

667. CS Life submits that the net effect of these decisions is that the requirement in a misrepresentation claim that a plaintiff be aware of an alleged misrepresentation (whether implied or otherwise) cannot be satisfied simply by his saying that he assumed the state of affairs that formed the content of the alleged representation. Nor can the awareness requirement be inferred simply by asking what the representee would have done in the counterfactual situation that he had been told the truth. There is a specific requirement that the representee gave some contemporaneous conscious thought to the alleged representation.

668. The Plaintiffs say that the question as to how inducement should be analysed in the context of implied representations is not straightforward (and fact sensitive). They say that recent English cases, in particular those concerning the manipulation of LIBOR and EURIBOR, have raised questions as to the extent to which this "*inducement*" element

involves a requirement that the plaintiff understood at the time that the alleged misrepresentation was being made to him.

669. The "*understanding*" requirement would appear to serve a purpose where there is a dispute as to whether a misrepresentation was in fact made or there is a dispute as to the precise scope of the alleged misrepresentation (the ambiguous representation cases).

670. The modern line of cases starts with the well-known decision of Sir Christopher Clarke J (as he then was) in *Raiffeisen Zentralbank Osterreich AG v The Royal Bank of Scotland PLC* [2010] EWHC 1392 (Comm). In that case the learned Judge held at [80] and [87]:

> "*80. In order to succeed in its claim RZB must show:*
>
> *(a) that RBS made representations to it;*
> *(b) that it understood that those representations were being made;*
> *(c) that such representations were false;*
>
> *(d) that it was induced by those representations;*
>
> *(e) that RBS intended that such representations should induce RZB to enter into the contract;*
>
> *....*
>
> *87. Lastly the claimant must show that he in fact understood the statement in the sense (so far as material) which the court ascribes to it: Arkwright v Newbold (1881) 17 Ch D 301 13; Smith v Chadwick (1884) 9 App.Cas 187; and that, having that understanding, he relied on it. This may be of particular significance in the case of implied statements*."

671. *Raiffeisen* was a case where the making of relevant representations was in issue. The authority relied upon by counsel for the defendant for the "*understanding*" requirement seems in fact to have been limited to *Arkwright v Newbold* (1881) 17 Ch D 301 and *Smith v Chadwick* (1884) 9 App Cas 187.

672. *Arkwright* was a case where there was no pleaded allegation, or evidence, that the statement in the prospectus as the plaintiff understood it, was false.

673. *Smith v Chadwick* was also a case involving an ambiguous representation where the plaintiff did not give evidence that he understood the representation in the relevant way. The context of the "*understanding*" requirement in *Smith v Chadwick* was not that the plaintiff had not seen the words in question but rather that they bore two possible meanings and he had put forward no positive evidence to establish the sense in which he understood the representation, which was critical to the question of reliance. The claimant alleged that he had been induced to buy shares by a statement contained in the defendant's Prospectus which stated that*: "The present value of the turnover or output of the entire works is over £1,000,000 sterling per annum."* That statement admitted of two interpretations. It could have meant that the actual turnover for the year exceeded £1 million in which case it was plainly false. Or it could have meant that the works could produce that output, in which case it was true. Lord Blackburn stated at page 195 that whatever the statement meant, the claimant had not sufficiently proved that it did influence him. Lord Blackburn thought that the words used here could plausibly have had the sense contended for by the defendant and could not see why the plaintiff did not give evidence as the burden was on the plaintiff to show that he had been induced by the representation to buy the shares. The significance of the "*understanding*" requirement in *Smith v Chadwick* is explained in the recent judgment of Waksman J in *Crossley & Ors v Volkswagen Aktiengesellschaft* [2021] EWHC 3444 at [57]:

> *"Here, the point was not that the claimant had not seen the words in question. It was rather that they bore two possible meanings and he had put forward no positive evidence to establish the sense in which he understood them, which was critical to the question of reliance. Accordingly, awareness as such was not the key issue but rather it was his understanding. That said, I take the point made by VW here that it is hard to see how the relevant understanding (whatever it was) did not involve awareness of the words in question."*

674. In *Property Alliance Group*, a LIBOR related case, the extremely complex and intricate pleaded representations were in dispute as to whether they had been made. The plaintiffs pleaded, *inter alia*, "*the bank had falsely represented to the claimant that each of the swaps was a "hedge" which would reduce the claimant's overall interest rate exposure, which they did not do since they acted as a hedge against rises, but not falls, in interest rates*". It was in this context that Asplin J held that:

> *"417. I agree with Mr Handyside that the evidence of Mr Wyse and Mr Russell in cross- examination does not support the contention that they entered into the Swaps in reliance upon the LIBOR Representations.* ***Mr Russell accepted in evidence that at the relevant time he knew nothing of the BBA Definition or the way in which submissions were made by Panel Banks, whether RBS was a panel bank or how LIBOR was calculated and that it had never occurred to him that it was capable of manipulation****. He was able to say however, that he had "complete trust and faith that RBS were setting correct and qualified rates… ."*
>
> *419.* ***It seems to me therefore, that there was no understanding of what are extremely complex and intricate pleaded representations meant and for the most part, the matters which were pleaded did not cross Mr Russell and Mr Wyse's minds****. On that basis, in my judgment, they could not have understood the implied representations to have been made and therefore, did not rely upon them. In the circumstances, it is not necessary to consider whether it is appropriate to ask what they would have done if told the alleged truth as against if nothing had been said. It was accepted the form of the implied representations had been "borrowed" from the Graiseley case and it seems to me that the pleading was not led by the evidence. At best, it seems to me that both Mr Russell and Mr Wyse assumed that LIBOR, which they understood to be a commercial rate of interest, would be set in a straightforward and proper manner. In my judgment, therefore, they gave no thought to the LIBOR Representations in the form pleaded and did not rely upon them."* (emphasis added)

675. In *Marme Inversiones*, a EURIBOR related case, the representations in question were again intricate and complex:

> *"67. The implied representations (the 'EURIBOR Representations') alleged by Marme have undergone a number of changes during the course of the proceedings, but Marme ultimately alleged that five representations were made, namely that:*
>
> > *(1) RBS had not at the time material to the Transaction sought to manipulate EURIBOR, was not seeking to do so at the date of the Swaps, and did not intend to do so in the future. ('EURIBOR Representation 1').*
> >
> > *(2) RBS had no reason to believe that any other banks had at the time material to the Transaction sought to manipulate EURIBOR, were seeking to do so as at the date of the Swaps, or would seek to do so in the future. ('EURIBOR Representation 2').*
> >
> > *(3) RBS had not at the time material to the Transaction conducted itself in such a way as to undermine the integrity of EURIBOR, was not conducting itself in such a way as at the date of the Swaps, and did not intend to do so in the future. ('EURIBOR Representation 3').*
> >
> > *(4) RBS had no reason to believe that any other banks had at the time material to the Transaction conducted themselves in such a way a s to undermine the integrity of EURIBOR, were not conducting themselves in such a way as at the date of the Swaps, and did not intend to do so in the future. ('EURIBOR Representation 4').*
> >
> > *(5) RBS had at all times material to the Transaction acted honestly, was acting honestly at the date of the Swaps, and intended to act honestly in the future, in relation to the EURIBOR rate-setting process. ('EURIBOR Representation 5')."*

676. Picken J held that on the evidence he could not conclude that these representations had been made out. Having made this finding Picken J went on to consider what the position would have been if he had held that the representations were made by reference to the "*understanding*" requirement:

> "*286. In the circumstances, I agree with Mr Howe QC when he submitted that these authorities support the proposition that a claimant in the position of Marme in the present case should have given some contemporaneous conscious thought to the fact that some representations were being impliedly made, even if the precise formulation of those representations may not correspond with what the Court subsequently decides that those representations comprised.*
>
> *287. The question for the Court, in these circumstances, is whether Marme (in the shape of Mr Maud given that he was the only witness to give evidence on Marme's behalf) had the necessary awareness as regards the EURIBOR Representations. As previously explained, however, Mr Maud agreed that it would not have occurred to him in 2008 that any bank might put in a false quote into the EURIBOR process.* ***He agreed also that he would not have spent any time in 2008 thinking about the process by which EURIBOR was set, and that he did not start thinking about how EURIBOR might have been manipulated until many years later.*** *This is evidence which makes it abundantly clear that, even as regards EURIBOR being a "true and honest" rate, the most that can be said is that Mr Maud assumed this to be the position – indeed, as he put it in his second witness statement, he had no reason to think that the position was other than that. An assumption, however, is insufficient for the reasons which I have given. Accordingly, even in relation to the EURIBOR rate being "true and honest", since Mr Maud did not give conscious thought to the point, he cannot have had the necessary awareness to mean that reliance has been made out in this case. In truth, Mr Maud simply did not turn his mind to the point at the time*." (emphasis added)

677. The Court accepts that as Cockerill J made clear in her analysis of the relevant law in deciding the case before her in *Leeds v Barclays*, the question of inducement is always fact-sensitive and thus she made clear that her decision depended on the fact that:

> "*[149] … awareness has been found to be required in the cases of Marme [2019] EWHC 366 (Comm) and PAG [2018] 1 WLR 3529, which relate to alleged representations which are effectively identical. This, it seems to me, is key in the present case.* ***Were it not for this I would certainly be tempted to say that the question of what feeds into the equation on understanding depends on the precise facts as to the representation, and the answer may be one which requires conscious thought or some less stringent element of awareness. From there it would be but a short step to acceding to the submissions made as to the unsuitability of determining these issues at the strike out/summary judgment stage.***
>
> *150. However I do not operate in a vacuum; far from it. I have two cases where the representations found or assumed to be found were essentially the same as the representations to be assumed in this case; and where the judges involved have said in one form or another that awareness is required*." (emphasis added)

678. Cockerill J expressly recognised that there will be cases where the element of awareness will come very close to something which might loosely be characterised as an assumption and other cases where a requirement for separate or distinct understanding of thought to the representation would be artificial at [147]:

> *"147. I am of the opinion that there will however be cases where the element of awareness will come very close to something which might loosely (and without careful analysis) be characterised as assumption and which is most obviously derived from conduct. As I remarked to Mr Beltrami in closing,* ***the dividing line between giving contemporaneous conscious thought to the conduct and contemporaneous conscious thought to the representation may—in some cases—be thin to non-existent. In some cases what Mr Cox referred to as specific conduct***

may precisely and inevitably equate to a representation, without any room for ambiguity. That may be the case, for example, in the simplest of representation by conduct cases. Thus, for example, in the case of a bidder at an auction raising a paddle, representing a willingness and ability to pay a certain sum. In such a case a requirement for separate or distinct understanding or thought to the representations would be artificial." (emphasis added)

679. The Plaintiffs submit that what is particularly relevant to this case is the distinction made by Leading Counsel for Barclays (Adrian Beltrami QC) and accepted by Cockerill J at [148], i.e., that:

"***This case is not so stark in its facts, such that those facts provide an easy basis for inference of any representation***. *Further (and this may be only partly a different point) here the nature of the facts is some way distant from the representations which are ultimately spelt out****; the conduct does not 'speak for itself' in the same way so as to permit of the quasi-automatic understanding which may look like assumption***. *He is rightly keen that I should not infer a principle out of a situation which is overly simplistic which would then prove inapt in more complex cases. He is of course right about this; but the principle operates in reverse. I should be equally cautious about expressing a principle which works well in the complex cases but which is unrealistic in more pedestrian situations*." (emphasis added)

680. The "*understanding*" requirement recognised in *Leeds v Barclays* has been the subject of criticism. In *Clerk & Lindsell*, 23rd edition, 1st supp., the learned editors state at para 17-35, Fn 179:

"*In Marme Inversiones 2007 SL v Natwest Markets Plc [2019] EWHC 366 (Comm) at [286] Picken J said, obiter, that a showing of reliance required proof that the representee had "given some contemporaneous conscious thought to the fact that some representations were being impliedly made". In Leeds City Council v Barclays Bank Plc [2021] EWHC 363 (Comm) Cockerill J accepted this as correct*

and struck out a claim to rescind a loan contract, and to claim damages for deceit, on the basis of an implied representation by the lenders that no dishonest manipulation of LIBOR had taken place. In the absence of any awareness that a representation had been made, the claim had to fail. Although this was a very carefully-crafted judgment from a commercial judge deserving of the greatest respect, such a requirement seems problematical, if only because it is difficult to reconcile with cases such as Schneider v Heath (1813) 3 Camp. 506; and Gordon v Selico Ltd (1986) 18 H.L.R. 219, where liability in deceit arose from acts intended precisely to hide the fact that any representation was being made. It is submitted that the point should be regarded as remaining open."

681. In an article headed "*Reliance: a comparison between the common law and s90A FSMA*" (2021) 6 JIBFL 389 Mr Peter de Verneuil Smith QC and Mr William Day suggest that *Leeds v Barclays* was not correctly decided and pose the following question:

> "*Can a person be influenced by a representation of which they are subjectively unaware? The answer must be yes. It clearly did not cross the sponsor's mind in Spice Girls that Geri Halliwell might be about to leave the group; yet but for that assumption the sponsorship deal would not have been concluded. The exception which Cockerill J recognised in Leeds itself for conduct which "spoke for itself" is also an illustration that an incorrect assumption can have causative effect.*
>
> *For these reasons we consider that the better formulation of the test for reliance in misrepresentation claims requires:*
>
> *- the claimant to mistakenly believe in the truth of the representation or at least mistakenly assume it to be true; and*
>
> *- such mistake to materially cause the claimant to enter into the contract.*
>
> *That is the most coherent way to understand the traditional language that a representation must have "operated on the mind" of the representee. Actual awareness of the representation per se is neither sufficient nor necessary. A person*

may be aware of the representation and deliberately choose to ignore it. A person may be unaware of the representation and still be influenced by the representation. For these reasons, in our view Leeds v Barclays was not correctly decided."

682. The Court accepts the submission that even assuming the "*understanding*" requirement is appropriate in cases where the representations are intricate and spelled out from a complex web of communications and/or ambiguous, it does not apply, as Cockerill J recognised in *Leeds v Barclays,* where the conduct "*speaks for itself*". Here, the proposal of the LPI policies on terms that the Bank would manage the Policy Assets (as is now common ground) necessarily involved the fundamental and straightforward representation that that the Bank was not fraudulently managing the Plaintiffs' accounts and/or did not intend to manage the Policy Assets fraudulently. By contrast, the LIBOR and EURIBOR cases, of which *Leeds* is one, and which Cockerill J emphasised (at [150]) were key to her decision, were cases involving more complex representations that in proposing or transacting certain loans (and in particular in putting forward transactions which ere referenced to LIBOR), Barclays impliedly represented (i) that it was not itself manipulating LIBOR and that it did not intended to do so in the future and/or (ii) Barclays had no reason to believe that LIBOR was being manipulated or would be manipulated in the future. *Leeds* was not a case where the conduct could be said to "speak for itself".

683. The present case is materially in the same category of cases such as *Gordon and Teixeira v Selico Ltd* [1986] 18 H.L.R. 219, where the landlord had covered up serious defects in the flat which was then sold to the purchaser on a long lease. This included the deliberate concealment of dry rot. Goulding J held that the concealment of the dry rot by the builder amounted to a positive representation that there was no dry rot, which was false and fraudulently so. Goulding J also held that there was reliance by the claimant in the counterfactual sense that if he knew of the concealment of the dry rot, he would not have purchased the flat. At page 231 the learned judge held:

"*In my judgment the concealment of dry rot by Mr Azzam was a knowingly false representation that Flat C did not suffer from dry rot, which was intended to deceive purchasers, and did deceive the plaintiffs to their detriment. I am satisfied that the*

plaintiffs would not have entered into a contract or accepted the lease had they known there was dry rot inside Flat C. I do not know whether the lessor (against whom alone this claim of deceit is made) had by its responsible officers any dishonest state of mind, but the dishonest act was done by Azzam in the course of work ordered by Select within the scope of Select's authority as the lessor's agent. The contrary has not been argued. I accordingly hold that the lessor is liable to the plaintiffs in damages for deceit. "

684. There was no appeal against the finding that the concealment itself amounted to a false representation and the Court of Appeal (Slade and Woolf LJJ and Sir Denys Buckley) confirmed that the landlord was guilty of the tort of deceit. The Court of Appeal so concluded in circumstances where the plaintiff could not have been "*consciously aware*" of the representation as distinct from making an assumption. Slade LJ held at page 233:

> "*Neither in his notice of appeal nor in argument has Mr Sunnucks sought to challenge the learned judge's findings that (a) Mr Azzam deliberately covered up active patches of dry rot in Flat C without any attempt at eradication; (b) the concealment of dry rot by Mr Azzam was a knowingly false representation that Flat C did not suffer from dry rot; (c) this representation was intended to deceive purchasers of Flat C; and (d) it did deceive the plaintiffs to their detriment. These findings inevitably mean that this court must proceed on the footing that, in relation to the plaintiffs, at least Mr Azzam personally was by his conduct guilty of the tort of deceit*."

685. Here, the Plaintiffs submit, and the Court accepts that Mr Ivanishvili was deceived because he did not know that there was any fraudulent mismanagement of his assets and would not have entered into the LPI policies if he had known there was such fraud.

686. The Court's conclusion that in appropriate circumstances, an implied representation, intended by the representor to be relied upon by the representee, which is accompanied by evidence that the representation would not have entered into the agreement if he had known the true position, can be sufficient to found liability for misrepresentation is

supported by the Court of Appeal's decision in *Spice Girls Limited v Aprilia World Service BV* [2002] EWCA Civ 15. This case involved a sponsorship agreement made between the Spice Girls' trading company and Aprilia, a motor scooter company. After the agreement had been made, Geri Halliwell, one of its members, left the band. Aprilia alleged misrepresentation on the basis that there had been implied representations to the effect that, as Arden J (as she then was) held at first instance the conduct of the Spice Girls in (i) approving and using promotional material depicting all five of them for use until March 1999 and (ii) participating in the commercial shoot on 4 May 1998 gave rise to a continuing representation by conduct that SGL did not know and had no reasonable grounds to believe that any of the Spice Girls had an existing declared intention to leave the group before the end of March 1999.

687. In this case Aprilia had no "*understanding*" whatsoever of the implied representation found to exist by Arden J and had no reasonable ground to believe that any of the Spice Girls had an existing declared intention to leave the group. With this factual background Arden J dealt with the issue of reliance upon the representation at [113] – [114] as follows:

> "*113. I next turn to the question whether the representations by conduct induced the agreement. This is a necessary requirement for an action in misrepresentation (see Horsfall v. Thomas (1852) 1 H & C 90 and see the Misrepresentation Act 1967 section 2(1)). Mr Mill submits that there is no evidence that AWS relied on any representation by conduct in entering into the agreement. No one gave evidence on behalf of AWS. Mr Brovazzo was part of the team who took the decision to cause AWS to enter into the agreement, but he does not state that he relied on these representations.* ***In certain limited circumstances, reliance can be inferred****. In Smith v. Chadwick (1884) 9 AC 187, Lord Blackburn stated:*
>
> *"I think if it is proved that the defendants with a view to induce the plaintiff to enter a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter*

into the contract, it is a fair inference of fact that he was induced to do so by the statement."

114…Given that Aprilia had to sign the agreement to get the right to use the commercial shoot (and that there was no other reason for it to sign the agreement except to get the rights thereunder), it seems to me that the court can infer that indirectly it was induced to enter the contract by the representation made to it when it made the shoot. The same would apply to other promotional material which constituted a representation by conduct. I am satisfied that SGL participated in the commercial shoot and provided logos, images and so on of the Spice Girls in order that Aprilia should sign the agreement. ***I am also satisfied that the representations by conduct were such as to be likely to induce a person to enter into the agreement. An inducement to enter into a contract need not of course be the sole inducement***." (emphasis added)

688. It is to be noted that Arden J expressly relied upon the House of Lords decision in *Smith v Chadwick* and the judgment of Lord Blackburn in *Smith v Chadwick* in turn refers at page 193 to the decision in *Arkwright v Newbold* [1881] 17 Ch D 301, the two decisions relied upon in *Raiffeisen* at [87].

689. In the Court of Appeal, one of the points taken on behalf of the Spice Girls was that Aprilia had no contemporaneous understanding of the representations in the sense alleged and in the circumstances the representations could not have induced Aprilia to enter into the agreement. This submission was rejected by the Court of Appeal comprising the Vice Chancellor (Sir Andrew Morritt), Chadwick LJ and Rix LJ:

"66. ***These conclusions were challenged by SGL on the grounds that it had not been established that AWS understood the representations in the sense contended for by AWS*** *(E.A.Grimstead & Son Ltd v McGarrigan Court of Appeal 27th October 1999 unreported), or that SGL intended to induce AWS to sign the Agreement in reliance on representations so understood (Nautamix BV v Jenkins of Retford [1975] FSR 385 a case in fraud). SGL submits that there was no*

evidence that AWS relied on the representations in that sense; in particular AWS relied on the commercial success of the Spice Girls to keep them together. ***SGL contends that there was no evidence from any individual in AWS to the effect that AWS would have withdrawn from the negotiations had the representation not been made****.* *It is suggested that AWS was committed too far to justify any implication of withdrawal.*

67. ***We do not accept these submissions. The representation bears the meaning in which it would be reasonably understood by the representee, that is to say, the natural and ordinary meaning which would be conveyed to a normal person****.* *Akerhielm v De Mare [1959] AC 789.* ***In the circumstances no one at AWS gave any consideration at the time to what representations were to be implied into the statements and conduct of the Spice Girls. But this is not a case in which the representations were ambiguous, so that the problem exemplified in E.A.Grimstead & Son Ltd v McGarrigan does not arise****.* ***There is no reason to think that AWS did not understand the representations in the sense alleged. The judge so inferred with regard to approval of promotional material and participation in the commercial shoot. We would do likewise in relation to the other representations to which we have referred.***

69. It remains to consider whether the misrepresentations we have found to have been made did induce AWS to sign the Agreement. SGL contends that no witness for AWS was called to give evidence to that effect. It is true that both Ms Fuzzi and Sr Brovazzo indicated that AWS would not have entered into the Agreement if they had known that Ms Halliwell would leave in September 1998 but that, counsel contended, is not the same as testifying that AWS entered into the contract in reliance on the representation. Moreover, SGL contended, the evidence of Ms Fuzzi appeared to be that AWS was so far committed to the sponsorship deal by 4th May 1998 that it would not have withdrawn even if it had known of Ms Halliwell's intentions.

70. It is sufficient that the misrepresentation is a material inducement, it does not have to be the only one. In ***Smith v Chadwick*** *(ibid.) page 196 Lord Blackburn said: "I do not think it is necessary, in order to prove [damage], that the plaintiff should always be called as a witness to swear that he acted upon the inducement. At the time when Pasley v Freeman was decided, and for many years afterwards he could not be so called. I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, it is a fair inference of fact that he was induced to do so by the statement." Lord Blackburn went on to point out that the inference was one of fact not law and that if no evidence is given as to reliance in fact that was ground for not drawing the inference."* (emphasis added)

690. It is to be noted that the Court of Appeal in *Spice Girls* considered that contemporaneous understanding of the representations alleged is only material when the representations are ambiguous and cited the earlier decision of the Court of Appeal in *Grimstead v McGarrigan*. The relevant representations in *Grimstead v McGarrigan,* which were all made orally, were said to have been in terms that: (i) at a meeting in or about July 1989, that "the company's trading assets and liabilities would be in balance to within a few pounds at the date of sale"; (ii) in the course of a telephone conversation in or about August 1989, that "by the date of exchange of contracts the company's trading assets and liabilities would balance to the nearest £5,000" and (iii) at a meeting on 12 September 1989, "that the assets and liabilities of the company balanced and the money owed by the company did not exceed £10,000". As Chadwick LJ held at page 19 "*it is impossible to decide whether a representation that the assets and liabilities would balance - or would balance to within £10,000 - was true or false without, first, determining the sense in which that representation was made and understood. In particular,* ***it is necessary to decide (i) whether the representor intended (and was understood by the representee to intend) that the assets within the equation would include stock and (ii) whether the representor intended (and was understood by the representee to intend) that the liabilities within the equation would include accrued interest on the bank loan***." (emphasis added)

691. That the contemporaneous understanding of the representation made is not required in all cases is supported by the recent decision of Waksman J in *Crossley & Ors v Volkswagen Aktiengesellschaft* [2021] EWHC 3444. In that case the claimants consisted of about 86,000 owners of VW, Audi, Skoda and SEAT diesel cars. The common feature was that they all use the EA189 engine or a relevant variant of it. The foundation for all the claims made against VW was the fact that each of the engines contained what is known as a "defeat device"; when operating in Mode 1, it enabled the engine to emit Nitrogen Oxide and Dioxide ("NOx emissions") at a level which was below the maximum permissible levels under, among other things, EU Regulation 715/2007 ("the Emissions Regulation"). The defeat device was able to recognise when vehicles were being tested for the purpose of ensuring compliance with the Emissions Regulation which was a precursor to the obtaining of Type Approval, itself necessary before the cars could be manufactured and sold to the public. During the test, the defeat device ran in Mode 1. Otherwise, it ran in Mode 2. In that mode, the NOx emissions exceeded the permissible limits. The defeat device itself consisted of a software function which could and did alter the relevant engine operation so as to reduce NOx emissions, itself known as Exhaust Gas Recirculation ("EGR").

692. The claimants alleged that each manufacturer of the affected Vehicles made the following representations (the Representations):

1. The vehicles complied with all statutory and regulatory requirements imposed by EU and UK law.

2. All requisite testing had been properly and honestly carried out to establish that compliance; and EC Type Approval, and all necessary consents, licenses and registration had been properly and honestly obtained without any misrepresentation to the regulators from whom they were obtained.

3. The vehicles were fit to be lawfully sold, registered and put into service in the UK or any other Member State of the European Union.

4. The vehicles did not incorporate prohibited or illegal components; and did not incorporate devices preventing the proper and accurate testing and recording of their emissions.

5. The vehicles did not require modification in order to meet relevant emissions standards.

6. The Manufacturer Defendants honestly believed 1 to 5 above to be the case.

693. Seeking summary dismissal of the claims VW contended at the hearing that conscious awareness of the relevant representations (here to be implied by conduct) was required to sustain a plea of deceit as a matter of law.

694. Waksman J reviewed the case law in relation to this issue including *Smith v Chadwick*; *Edington v Fitzmaurice* (1885) 29 Ch D 459; *DPP v Ray* [1974] AC 370; *Raiffeisen v RBS*; *Cassa di Risparmio v Barclays* [2011] EWHC 484 (Comm) Hamblen J; *Property Alliance Group v RBS*; *Marme Inversiones v NatWest Markets plc* [2019] EWHC 366 (Comm); *Gordon v Selico*; *Spice Girls v Aprilia*; and *Leeds v Barclays.* Having analysed the relevant law Waksman J determined that it would not be appropriate to strike out the claim on a summary basis on the ground that conscious awareness of the relevant representations was required to sustain a plea of deceit as a matter of law:

> *"94. The case before me is very different from Leeds (and indeed PAG and Marme). The conduct, and the representations to be implied therefrom, as pleaded at paragraph 63 of the GPOC (albeit at some length) are both in fact relatively simple. They are not to be spelled out from a complex web of communications. And while in Leeds it was to be assumed that the implied representations have been made out, it cannot be denied that the whole context was one where the implied representations might have been difficult to establish and indeed were positively rejected in PAG and Marme.*
>
> *…*

97. In addition, I do think there are real questions arising from what is to be drawn from the fact that an implied representation from conduct is established ***which means that the reasonable representee would assume or infer the content of the representation from the conduct observed****. It was put to me in argument by the Claimants that it would be odd if a reasonable representee was found to have made that assumption or inference, and yet such an assumption or inference was not sufficient on the part of the actual representee. I appreciate that the former question is an objective one whereas the latter is subjective, depending on the state of mind (or direction of thought) of the actual representee. Nonetheless, I think that there are particular issues raised where implied representations by conduct are alleged and which have yet to be fully worked out. Given also the decisions of the Court of Appeal in Spice Girls and Gordon and the House of Lords in Ray, and notwithstanding Smith v Chadwick and the other cases referred to above where the question of awareness was not directly for decision, there is in my view a real prospect of success for the Deceit Claim here…"* (emphasis added)

695. Consistent with the position in *Crossley*, the conduct, and the representations to be implied therefrom, as pleaded at paragraph 50B of the RASOC, are in fact relatively simple. They are not to be spelt out from a complex web of communications. Such representations were readily implied in the *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2018] EWCA Civ 355. In that case the plaintiffs sought to imply from the defendant banks conduct, *inter-alia*, the terms that "*the bank had fraudulently made implied representations to the claimant to the effect that, at the date of the swaps, the bank was not itself seeking to manipulate LIBOR and did not intend to do so in the future*". The Court of Appeal readily accepted that the defendant bank made these implied representations:

"*132 The present case appears to be the first in which Colman J's test has been considered by the Court of Appeal.* ***We do think it is a helpful test, in relation to the existence of an implied representation, to consider whether a reasonable representee would naturally assume that the true state of facts did not exist and***

that, if it did, he would necessarily have been informed of it. *To that extent we would approve the dicta of Colman J in Geest plc v Fyffes plc [1999] 1 All ER (Comm) 672 but that is not to water down the requirement that there must be clear words or clear conduct of the representor from which the relevant representation can be implied.*

133 In the present case there were lengthy discussions between PAG and RBS before the swaps were concluded as set out by the Judge in the earlier part of her judgment. We have particularly in mind the facts and matters set out in paras 51-54 and 82-83 of the judgment. ***RBS was undoubtedly proposing the swap transactions with their reference to LIBOR as transactions which PAG could and should consider as fulfilment of the obligations contained in the loan contracts. In these circumstances we are satisfied that RBS did make some representation to the effect that RBS itself was not manipulating and did not intend to manipulate LIBOR. Such a comparatively elementary representation would probably be inferred from a mere proposal of the swap transaction*** *but we need not go as far as that on the facts of this case in the light of the lengthy previous discussions*." (emphasis added)

696. In relation to the relatively simple but fundamental implied representations made on behalf of CS Life, the Court is satisfied that the Misrepresentation Plaintiffs were induced by the representations to agree to set up the Life Policies. This is not the case where the implied representations are derived from a web of communications or ambiguous in any way. The Court is satisfied that the implied representations are of such a fundamental character that it is appropriate to infer that the Misrepresentation Plaintiffs were induced by the representations to enter into the Life Policies.

(e) The plaintiff thereby suffered loss

697. The Misrepresentation Plaintiffs allege that if Mr Ivanishvili had not been deceived, he would not have invested in the life policies but would instead have invested these funds with a reputable European bank as set out at [662] above.

698. Mr Thompson QC for CS Life argues that Mr Ivanishvili's evidence, given in his witness statement, to the effect that but for the alleged misrepresentation, they would have invested their money in a medium investment portfolio with a reputable European bank was undermined in cross examination. Mr Thompson relies upon Mr Ivanishvili's answer: "*of course, by all means I was never interested in the kind of structures and instruments they were suggesting… for me it was Credit Suisse who was supposed to preserve my wealth*" and later "*for my understanding, my money always was in Credit Suisse and not anywhere else*." The Court does not accept that these out of context answers in anyway materially affect Mr Ivanishvili's clear evidence that had he known that Mr Lescaudron and the Bank were engaged in fraudulent conduct in relation to his accounts at the Bank he would have "*moved the management of this money, along with the sale proceeds of my Russian business interests, to a reputable European bank to be invested in a medium risk investment portfolio*."

699. Further, in any event, the Court accepts Ms Hutton QC's submission that in the case of a fraudulent misrepresentation, as is the case here, it is not open to the defendant to pray in aid the counterfactual of no representation being made. Ms Hutton QC correctly submits that in this case there is no counterfactual of no representation being made which involves the Plaintiffs' entry into the Policies. In support of this proposition reference can be made to the judgment of Lord Chelmsford LC in *Smith v Kay* (1859) 7 HL case 750; 11 ER 299 at page 759:

> "*The misrepresentation which is alleged against Smith is, that having obtained possession of some of the bills of exchange accepted by Kay, by discounting them with Johnston, he pretended that he had received them from [759] Adams after they were got in by him as represented, and that Kay executed the securities under the false impression thus produced upon his mind. Now it is contended that this*

representation is wholly immaterial, that it was perfectly indifferent to Kay in what manner Smith became the holder of the bills, provided he gave consideration for them, and that if Kay had been told the whole truth, he would equally have been willing to give the securities. ***But can it be permitted to a party who has practised a deception, with a view to a particular end, which has been attained by it, to speculate upon what might have been the result if there had been a full communication of the truth?*** *How is it possible to say in what manner the disclosure would have operated upon Kay's mind, that he had been the dupe of a scheme of deception, which up to that moment had been successful in inducing him to believe that Adams had befriended him in taking up the bills, and that Smith had kindly co-operated with him. For my part, I think that the Appellant takes too sanguine a view of probabilities when he assumes that the discovery that Johnston was, after all, the holder of the greater part of the bills, would still have left Kay in the same mind to ratify the transaction, as he was brought into by the misrepresentations which were designedly made to him*." (emphasis added)

700. Reference can also be made to *Downs v Chappell* [1997] 1 WLR 426 where the headnote reads "*that since the plaintiffs had established that they were induced to enter into the contract by the fraudulent and material representations of the first defendant and their negligent verification by the second defendants, they had established their case on causation and it was unnecessary to consider how they would have acted if they had been told the truth; and that the only remaining question was the quantum of loss the plaintiffs had suffered as a result of entering into the contract*". In his judgment at Page 433 D-F Hobhouse LJ held:

"*The plaintiffs have proved what they need to prove by way of the commission of the tort of deceit and causation. They have proved that they were induced to enter into the contract with Mr Chappell by his fraudulent representations. The judge was wrong to ask how they would have acted if they had been told the truth. They were never told the truth. They were told lies in order to induce them to enter into the contract. The lies were material and successful; they induced the plaintiffs to*

act to their detriment and contract with Mr Chappell. The judge should have concluded that the plaintiffs had proved their case on causation and that the only remaining question was what loss the plaintiffs had suffered as a result of entering into the contract with Mr Chappell to buy his business and shop."

701. In the circumstances, the Court finds that if Mr Ivanishvili had not been deceived, he would not have invested in the life policies but would instead have invested these funds with a reputable European bank.

Actionability under Georgia law

702. The Georgian law experts agree that a party who has been deceived into entering a contract may claim damages for deceit (Joint Report para 3). While CS Life's expert (Mr Bibilashvili) says that the only available claim for damages in such a situation is a tort claim, the Plaintiffs' expert (Professor Knieper) says that in addition to a claim for damages in tort, there is also a claim for damages for breach of (pre-)contractual obligations.

703. The elements of the claim for damages in tort are agreed by the Georgian law experts to be:

(a) unlawful act (action or omission);

(b) injury/damage (as well as the amount of damage);

(c) foreseeability and causal link between unlawful act and damage;

(d) defendant's fault (save for strict/vicarious liability cases).

A plaintiff must prove the existence and extent of injury (amount of damage) as well as the causal link between an unlawful act and damage, meaning that a defendant's act has to be not only faulty, but it must cause damage; to escape liability the defendant must then demonstrate that the alleged wrongful act was lawful, and/or the defendant was not at fault.

Unlawful act

704. There is disagreement between the experts as to whether any representation has to be explicit so that any non-verbal representation may be pursued only in the case of non-disclosure where the party that kept silent had a duty to disclose the relevant information (as CS Life's expert, Mr Bibilashvili, says) or whether Georgian law recognises misrepresentations in non-verbal form, i.e. implied misrepresentations (as the Plaintiffs' expert, Professor Knieper, says).

705. Having heard and seen the two experts give evidence the Court prefers the evidence of Professor Knieper where it differs from the evidence of Mr Bibilashvili. As set out earlier at [611] Professor Knieper gave his evidence in a straightforward way whilst Mr Bibilashvili appeared to be defending the case advanced on behalf of CS Life. In relation to the issue whether any representation has to be explicit, the Court determines that the position of Professor Knieper is correct because it reflects the general recognition in the Georgian Civil Code of a distinction between things said or done expressly and things said or done impliedly (for example, Art.53 of the Code).

706. In any event, in relation to this issue the Court notes that Mr Bibilashvili accepted that the question of whether there was a duty to disclose the relevant information is fact sensitive and recognised in his Report that "*[i]f the court considers the Plaintiffs' relationship (including prior dealings) with the Bank to be relevant, there may have been a duty of disclosure of any significant information that could have influenced the Plaintiffs' decision to apply for the life insurance policies and the concealment on the part of the Bank / Mr Lescaudron would be characterised as a wrongful act*". The Court accepts the Plaintiffs' submission that is indeed clearly the case here and that there would therefore be a duty to disclose.

Injury/damage

707. The experts agree that by art.408 of the CCG "*a person liable to pay damages shall restore the state of affairs that would have existed had the circumstances giving rise to the duty to pay damages not occurred*".

Causation

708. The experts agree that by art.412 of the CCG "*Only those damages shall be compensated which the debtor could have foreseen and which are the direct consequence of the action causing them*", so that for the injury/damage to be the subject of compensation by the defendant, the damages must be (i) foreseeable and (ii) a direct consequence of the wrongful act causing the damage.

Defendant's fault

709. The experts agree that: "*Defendant's fault is another necessary element for awarding damages. In vicarious liability cases the actual perpetrator needs to be at fault (the obligor that uses a third person is responsible for this third party's faulty conduct irrespective of his own fault). In the case of deceit, the court has to find that the wrongdoer made a conscious decision and had an intention to deceive. The wrongdoer must have an understanding that by providing false information or concealing true facts, he created or reinforced false impressions*."

710. The Georgian law experts agree that Georgian law recognises the concept of vicarious liability and art.396 of the CCG provides the basis for a defendant's vicarious liability, providing that a defendant may be held liable despite absence of his or her fault. However, there is disagreement as to the application of art.396 here.

711. Professor Knieper considers that where a third party acts on behalf of principal without power of attorney but his or her acts are attributed to the principal who has induced the other party to believe in good faith that a power of attorney existed because the principal used the third party, then that third party should fall within the term "representative" as used in art.396. Professor Knieper explains that the basis is one of the fair distribution of

risks enshrined in art.104.2 of the CCG: the principal has created the relevant circumstances and it is appropriate that the principal (and not the good faith partner) bears the risk of a lacking or invalid power of attorney.

712. Mr Bibilashvili says that to consider whether a person served as representative / agent or auxiliary of another person, the court should consider the relationship between them, and that the perspective of another person (a plaintiff) is not relevant. Mr Bibilashvili's evidence was that whether Mr Lescaudron was an agent or an auxiliary is a factual matter for the court and would not be further drawn.

713. The Court prefers the evidence of Professor Knieper in relation to the application of art.396 of the CCG. Further, and in any event, the Court is satisfied that as a factual matter Mr Lescaudron was an agent or an auxiliary of CS Life and the Bank (Finding 2 at [188] to [211] above).

714. Having regard to the evidence received in relation to Georgia law the Court is satisfied that the misrepresentation claim in the Bermuda proceedings is actionable as a matter of Georgia law.

H. Damages

715. The Plaintiffs claim damages for fraudulent misrepresentation, for breach of contract and/or common law damages.

716. The Plaintiffs' primary case on the quantum of those damages is that had the Policy Assets not been misappropriated or imprudently invested, they would have been invested and further gains made through that investment. In that regards the Plaintiffs rely upon the evidence of Mr Morrey that the investments that would have been made by a prudent bank would have performed in accordance with the Medium Risk Portfolio. Mr Davies' evidence is that, had the funds invested in the CS Life Accounts been invested instead in that Medium Risk Portfolio, they would (allowing for capital movements) have amounted to USD 230.12m on the Sandcay CS Life Accounts, and USD 379.81m on the

Meadowsweet CS Life Accounts. The Investment Reports for 31 July 2020 valued the Sandcay CS Life Accounts at USD 23.88m and the Meadowsweet CS Life Accounts at USD 33.28m. Accordingly, the loss suffered by the Plaintiffs calculated to 31 July 2020 is: (1) Sandcay CS Life Accounts: USD 230.12m less USD 23.88m = USD 206.24m, and (2) Meadowsweet CS Life Accounts: USD 379.81m less USD 33.28m = USD 346.53m.

717. This is the damages claim which flows from Mr Davies' Model 1. Mr Davies also calculates the Plaintiffs' losses using various other counterfactual models at sections 15 to 18 of Davies 3, which have been subsequently revised in Davies 5 and in the Joint Statement. The models can be briefly described as follows:

(1) Model 1 (the Whole Portfolio Model) calculates the difference between the value of the Policy Accounts and the value that would have been achieved if the assets had been invested in the Medium Risk from inception;

(2) Model 2 (the Surrendered Portfolio Model) is based on the Whole Portfolio Model, but takes account of the surrenders that in fact took place with respect to the Policies;

(3) Models 3(a) and 3(b) (the Objectionable Transactions Model) focus on specific transactions which have been identified as unauthorised or imprudent (based on Mr Morrey's Report) and assume that funds invested in those transactions were invested in the Medium Risk Portfolio; and

(4) Model 4 (the Overconcentration Model) focuses on investments in assets which accounted for 5% or more of the total asset value of the Policy Accounts.

718. As stated above, the Plaintiffs' primary claim seeks damages calculated in accordance with Model 1 for the misrepresentation claim and the breach of contract claims.

719. The Court accepts Mr Smouha QC's submission that in an investment context, a plaintiff may recover damages to reflect the lost profits he would or might have made had he not

been misled. In *Parabola Investments Ltd v Browallia Cal Ltd* [2009] EWHC 901 (Comm), Flaux J (as he then was) said:

> "*If in an appropriate case the court concludes that on a balance of probabilities the alternative trading in which the claimant would have engaged but for the tort would have been profitable overall, I see no reason in principle why the court should not award damages for such lost profits, albeit possibly with a discount for the possibility that some of the trading was loss making or less profitable*."

720. Mr Smouha QC argues that but for the deceit practised on them, the Plaintiffs would have invested the funds invested in the LPI policies in a different way. The funds were available and needed to be invested so this is not a case where there is any question of no investments being made if the misrepresentations had not been made.

721. The approach taken by Flaux J in *Parabola* was approved by the Court of Appeal [2011] QB 477, who refused an application for permission to appeal it. In doing so, Toulson LJ said the following at [22-25]:

> *"… Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss.*
>
> *The claimant has first to establish an actionable head of loss. This may in some circumstances consist of the loss of a chance … but we are not concerned with that situation in the present case, because the judge found that, but for Mr Bomford's fraud, on a balance of probability Tangent would have traded profitably at stage 1*

and would have traded more profitably with a larger fund at stage 2. The next task is to quantify the loss. Where that involves a hypothetical exercise, the court does not apply the same balance of probability approach as it would to the proof of past facts. Rather it estimates the loss by making the best attempt it can to evaluate the chances, great or small (unless those chances amount to no more than remote speculation), taking all significant factors into account …

The appellants' submission, for example, that "the case that a specific amount of profits would have been earned in stage 1 was unproven" is therefore misdirected. It is true that by the nature of things the judge could not find as a fact that the amount of lost profits at stage 1 was more likely than not to have been the specific figure which he awarded, but that is not to the point. The judge had to make a reasonable assessment and different judges might come to different assessments without being unreasonable. An appellate court will therefore be slow to interfere with the judge's assessment …

The appellants' broking expert, Mr Jones, regarded Mr Gill in his report as little more than a gambler, whose trading in market makers was always a 50:50 bet and whose success before and after the Man period was essentially a matter of luck. In his oral evidence he resiled to some extent from that position, and the judge preferred Mr Plowman's opinion that Mr Gill's success was not a pure matter of luck but was due to his astuteness. The judge was entitled to reach that conclusion. No method of assessment could be perfect, but the method of measurement accepted by the judge as a basis for estimating the lost profits was rational and supported by the opinion of an expert who impressed him. I am not persuaded that it was manifestly excessive. I would therefore refuse permission to appeal against the judge's quantification of Tangent's lost profits."

722. In the present case the Court is satisfied that it is appropriate to assess damages by reference to the Models constructed and used by Mr Davies. The Court also considers that the appropriate Model to use for the assessment of damages in this case is Model 1. In the Court's judgment the wrongdoing complained of by the Plaintiffs is not

appropriately captured by identifying investments which were objectionable, or which were over concentrated. The real complaint in this case is, and as the Court has found, that Mr Lescaudron committed a long-running fraud against Mr Ivanishvili, involving the Policy Accounts and that fraud included: (i) making investment decisions without proper authority; (ii) forging documents; (iii) executing investments for the purpose of obtaining unlawful commissions; (iv) directing the sale of assets for an undervalue; (v) directing the purchase of securities at an overvalue; and (vi) transferring assets to his other clients. In light of this evidence and findings made the Court accepts that there is an air of unreality about CS Life's defence through the investment management expert evidence of the trading that was done in the accounts, whether on a risk profile, concentration or basic suitability and prudence basis. It is overwhelmingly clear that Mr Lescaudron was fraudulently managing the Policy Accounts for his own purposes (to enrich himself through commissions and to use Mr Ivanishvili's assets to cover bad decisions he had made on other client accounts). The Court is not being asked to assess the work of a professional, competent portfolio manager or specialist portfolio management team in an investment bank who made bad decisions in good faith.

723. In the circumstances the Court accepts that questions of suitability about particular transactions understates the issue: nothing that Mr Lescaudron was doing was appropriate. Mr Campana's repeated refrain that the Policy Accounts were "*bespoke*" and so the usual standards of portfolio management did not apply was not helpful or appropriate in the present circumstances.

724. The Court accepts that when considering the propriety of the Lescaudron trading on the policy accounts from an investment management perspective (even fraud aside) it is obvious that what was happening was not portfolio management of any recognisable kind. Even leaving aside Mr Lescaudron's bad faith and improper motives, it is not at all surprising that the investments he selected were often inappropriate. He was not a professional investment manager and did not have access to the necessary equipment; he did not even have a 'Bloomberg' terminal because the Bank had refused to provide him with one. The MACS team (which should have been managing the Policy Assets) is

made up of a core team of 39 people which "*draws on the expertise of more than 300 investment professionals, with specialist knowledge of all asset classes*." In contrast, Mr Lescaudron was operating alone, without any support or assistance from anyone. That he made catastrophic investment decisions and breached all basic principles of good portfolio management is hardly surprising. Even aside from his dishonesty he was basically just making a series of huge bets with the Policy Assets. The Court accepts the Plaintiffs' submission that there was nothing tailored or bespoke about Mr Lescaudron's investment management of the Policy Accounts – the clients' interests were flagrantly disregarded.

725. The Court heard evidence from Mr Morrey, the Plaintiffs' expert, and Mr Campana, CS Life's expert, in relation to certain investment assumptions concerning Model 1. Principally the disagreement between the experts related to the Investment Risk Profile and the Portfolio Construction/Returns. The Court found Mr Campana to be an overly defensive witness. Furthermore, in the Court's view, Mr Campana did not adopt an appropriately proactive approach to his role as an expert. He did not ask his instructing client, CS Life/Credit Suisse, for relevant documents and information beyond that which had been disclosed even where it was obvious to him that there was missing relevant information which they should have. Nor did he ask questions of his client when provided with evidence of fraud on the Policy Accounts (the FINMA Report, the PwC Reports, Mr Lescaudron's admissions of wrongdoing etc), such fraud being of obvious relevance to the issues he was opining on. In the circumstances, where there is a dispute between the experts on investment management, the Court prefers the evidence of Mr Morrey to that of Mr Campana.

Investment Risk Profile ("IRP")

726. In Mr Morrey's view the IRP of the Policy Accounts was medium risk. Mr Campana did not agree but did not put forward a definitive view. He contended only that the IRP "*could very well have been high risk*". Mr Morrey did not rule out that possibility but was clear that his view was medium risk: "*my opinion is it's medium risk or the intention*

was medium risk, but I don't express that with a strong degree of certainty. It could be high risk. Not, I think, because of necessarily the evidence you have presented to me but just because there's so much uncertainty in the information generally that almost any conclusion is, sadly, plausible". In cross examination Mr Campana also recognised that the Policy Accounts "*could be medium risk. And I happily take that and I acknowledge that in my report*…"

727. The Court accepts Mr Morrey's evidence that the IRP of the Policy Accounts was medium risk. Mr Morrey's views were reached on the basis of the contemporaneous documents. These views also accord with the Finding 1 at [181] to [187] (from the outset Mr Ivanishvili informed Credit Suisse that he had a moderate approach to risk and wanted the assets managed by Credit Suisse to be managed on the basis of a well-balanced portfolio / to be kept safe / with the objective of asset preservation in the long term / without adopting a risky investment strategy / without "aggression" and those investment objectives did not change).

Portfolio construction/returns

728. In constructing the portfolio Mr Morrey researched medium risk funds publicised by international investment managers and used that research to generate a theoretical asset allocation for a medium risk profile (2% liquidity, 38% bonds, 60% equities and 0% alternatives). Within each asset class he then used indices or exchange traded funds to approximate the measure of actual performance that an investor could achieve in practice. Mr Morrey carried out the same process to approximate the performance of a high-risk fund during the relevant period.

729. Mr Campana took a different approach. He compiled a list of all the funds that he "*managed to find*" managed by European banks offering high and medium risk portfolio and then averaged the returns that they produced during the relevant period.

730. The Court prefers Mr Morrey's approach to the construction of the portfolio. In the Court's view, Mr Morrey's approach was a sound, conventional exercise of portfolio construction based on industry standards, using a valid and comprehensive data set to

build a medium risk (and high risk) portfolio. Mr Campana's methodology was unconventional and produced results which appear to the Court to be implausible.

731. First, the returns calculated by Mr Campana are shown in the following table:

	13 September 2011 to 31 July 2020	7 November 2011 to 31 July 2020	26 September 2012 to 31 July 2020	7 December 2012 to 31 July 2020
Morrey High risk	220	208	189	187
PIMFA Global Growth	215	203	187	184
Morrey Medium Risk	182	175	162	161
PIMFA Investor growth	170	159	145	143
Campana Medium Risk	138	137	131	130
Campana High risk	137	135	126	123

732. It can be seen that Mr Campana's medium risk portfolio was outperformed by all equivalent PIMFA indices (which Mr Campana had himself relied on to critique Mr Morrey's approach). Mr Campana's high risk portfolio was outperformed by all PIMFA indices (even the conservative benchmark).

733. Secondly, it is surprising that Mr Campana's medium risk portfolio outperformed his high-risk portfolio as during this period equities performed well. It is also surprising that there is such a small gap between the performance of his medium and high-risk portfolios during the material period.

734. Thirdly, there are issues with the composition of funds included in Mr Campana's model, including his selection of funds which appears to be a function of artificially imposed data limitations; his averaging of performance which potentially produced meaningless figures, that could not be taken seriously given that that there was a "massive range of performance" of the underlying funds; and there was a lack of transparency around the geographical exposure of the funds he had selected.

735. In the end, when it came to ascertaining whether Mr Campana was putting forward a view as to what returns would have been achieved, it seemed that he was not, and was retreating from expressing a definitive opinion at all. He had said in the Joint Statement and confirmed in evidence that he was not actually able to construct an "*appropriate benchmark for the policy accounts*". So ultimately Mr Campana effectively withdrew his opinions on the issue altogether:

> *Q. Are you saying here that you are not in a position to answer the question that you have been instructed to consider?*
>
> *A.Yes*

736. In relation to Model 1 and Model 2 there is dispute between the forensic accounting experts (Mr Davies for the Plaintiffs and Mr Bezant for CS Life) about the value of the Copernic Fund, Copernic Eurasia Fund and Lyxor Dynamic Fund.

Copernic Fund and Copernic Eurasia Fund

737. The Experts agree that units of the Copernic and Copernic Eurasia Funds were deposited into the Meadowsweet Policy Accounts on 13 September 2011. The values of the Copernic and Copernic Eurasia funds were reported as USD 11.8 million and USD 3.4 million respectively in the Investment Report dated 30 September 2011, based on prices as of 31 January 2011. These same values for the Copernic and Copernic Eurasia Funds, all of which were dated 31 January 2011, were also reported in the subsequent four month ends between 31 October 2011 and 31 January 2012. From 28 February 2012 to 31 July 2020 no price or value for either fund was stated in the Investment Reports.

738. Mr Davies has calculated a loss based on: the initial value of USD 15.2 million reported by the Bank after the units were deposited and as reported until January 2012; and a nil value at 31 July 2020 as no value was reported in the Investment Report at that date.

739. Mr Bezant notes the that the emails listed in 3.13 of the Joint Report provide two potential valuations of the Copernic Fund and Copernic Eurasia Fund: a nil value, as indicated by emails from employees of the Bank on 6-7 May 2013 and by Mr Lescaudron's testimony in the Geneva hearings on 17 June 2016; and between USD 3 million and USD 4 million, as indicated by the client (presumably the First Plaintiff) according to Mr Lescaudron's response to an audit inquiry on 7 May 2013. Mr Bezant suggests that the Court should consider that either the funds had no value at any point they were held in the Policy Accounts, including the time they were deposited in the Policy Accounts and as of 31 July 2020; or the funds were worth USD 4 million at all times they were held in the Policy Accounts including the time they were deposited in the Policy Accounts and as of 31 July 2020. The net result is that the profit or loss would be zero in both scenarios. The Court accepts Mr Bezant's expert opinion for the reasons he gives in the Joint Report.

Lyxor Dynamic Fund

740. The Experts agree that units of Lyxor were deposited into the Meadowsweet Policy Accounts on 13 September 2011. The valuation date for the price recorded in the Investment Reports in the months from 30 September 2011 up until 30 November 2012 was near to the date of the Investment Report. From 30 November 2012 to 30 November 2013 the price remained the same, with a valuation date of 30 November 2012. After 30 November 2013 no 'Price' was reported, nor 'Market Value USD' calculated, for the fund.

741. Mr Davies considers that as the Bank ceased both reporting a 'Price' and calculating a 'Market Value USD' from 31 December 2013 onwards he has assumed that at that point the value of the fund fell to nil or close to nil. Without additional information from the Bank to suggest otherwise, Mr Davies consider this is a reasonable assumption. Mr

Davies contends that as the position had not been assigned a value for nearly seven years, its value at 31 July 2020 was nil or close to nil.

742. Mr Bezant disagrees that the absence of pricing information necessarily implies that the value was nil. He argues that the price of hedge funds such as the Lyxor Dynamic Fund is not determined by the Bank, but communicated by the issuer of the fund, which was Société Générale. If a fund issuer stopped calculating or reporting a NAV, then the Bank would not be able to provide a value for the fund. In the absence of other information, the value of the fund is simply unknown. Therefore, as he is unable to determine the value of the fund at any point between December 2012 and July 2020, he would exclude Lyxor Dynamic Fund from his unrealised profit or loss computation at 31 July 2020 on the basis that he is unable to perform this calculation due to missing price data.

743. The court accepts the evidence and approach of Mr Davies in relation to Lyxor Dynamic Fund and given that the fund has not been assigned a value for nearly seven years, its value at 31 July 2020 should be considered as nil. It is to be noted that the Investment Report dated 31 December 2013 assigns a value of "0" to the Lyxor Dynamic Fund.

Start dates

744. Under Model 1 and Model 2, Mr Davies calculates damages by considering the counterfactual performance of the Plaintiffs' portfolio from 30 September 2011 for the Meadowsweet Policy and 30 September 2012 for the Sandcay Policy, which are the month end dates after the first transactions identified by the Experts in the Safekeeping Account Statements with Movements, i.e., 13 September 2011 and 26 September 2012.

745. Mr Bezant is instructed to calculate damages under three different start date assumptions: the same dates as Mr Davies, which are the month-end dates following the First Investment Dates; 31 October 2011 and 30 November 2012 for the Meadowsweet and Sandcay Polices, respectively (i.e., the month-end dates following Commencement Dates); and 30 November 2011 and 31 December 2012 for the Meadowsweet and Sandcay Polices, respectively (i.e., the month-end dates following the DM Second Start Dates).

746. The Court considers that in all the circumstances the start dates selected by Mr Davies of 30 September 2011 for the Meadowsweet Policy and 30 September 2012 for the Sandcay Policy are appropriate under Model 1 and Model 2.

747. In light of the Court's finding that the appropriate model to assess damages in this case is Model 1 the other disputes between the experts in relation to other models can be dealt with briefly.

Rate of interest

748. In relation to Model 2 one of the items in dispute is the rate of interest applied to additional capital withdrawn. Mr Davies was instructed to use a rate of 5% compounded monthly to 31 July 2020, which he considers to be reasonable. This rate of interest represents the rate which may be available for deposits with financial institutions.

749. Mr Bezant considers the use of a borrowing rate in this case is inappropriate because the Plaintiffs did not suffer lost profits (for which they would have to borrow money to make themselves whole) but forewent the potential for additional capital outside of the Policy Accounts to invest. Mr Bezant states that he has not been provided with any evidence or information about what the Plaintiffs would have done with any additional capital withdrawn, including any evidence that the Plaintiffs had to borrow money to compensate for the lack of any additional capital. Therefore, he does not agree with Mr Davies that a borrowing rate was more appropriate. To the extent the Plaintiffs consider that the additional capital withdrawn would have earned interest, Mr Bezant considers the appropriate rate would be the deposit rate foregone not a borrowing rate. For his interest calculation, Mr Bezant considers the 1-month US deposit rates.

750. The Court considers that the appropriate rate of interest to use in this context is the deposit rate for the reasons given by Mr Bezant.

Concentration

751. One of the issues in relation to Model 3 is the acceptable concentration limit in investments. Mr Morrey's view is that industry standard is that a 2.5% level of concentration in a single security would be the limit in a properly managed medium risk portfolio. To allow a margin of conservative assumption, the Plaintiffs accordingly instructed Mr Morrey to provide his views on whether any stock or position that exceeded a 5% concentration level was an appropriate holding for the Policy Accounts. Mr Morrey identifies 18 positions on the Policy Accounts that had a concentration level over 5% which he considers are inappropriate for this reason.

752. Mr Campana's view was that a 10% concentration should be the threshold for concentration on the Policy Accounts. In response to a question from the Court, Mr Campana accepted that there was a "real risk" that including more than 5% (let alone 10%) of a stock on an account would have a "real impact" on the portfolio if the stock performed badly. The Court accepts Mr Morrey's view that a concentration level exceeding 5% should not be acceptable.

Suitability/Objectionable Transactions

753. Mr Campana accepted that if the Policyholders had not desired a particular security in the Policy Accounts, its inclusion would necessarily be inappropriate. He also accepted that if the Bank did not have a record of a transaction being authorised by the client, then he "*would consider that investment to be unauthorised because there is no instruction to purchase it*." Mr Campana also accepted in evidence that transactions which were fraudulent were necessarily unsuitable. Mr Campana further accepted in his oral evidence that if a portfolio manager received undisclosed retrocessions the investments would be unsuitable "*regardless of the investment strategy*". It is now common ground on the expert evidence that the investments in Raptor (direct and indirect) and Pearl Gold are necessarily unsuitable as they are tainted by the commissions that Mr Lescaudron received.

754. In relation to other investments where there is a dispute as to their suitability between Mr Morrey and Mr Campana the Court prefers and accepts the expert evidence of Mr Morrey.

Adjustment for Leverage

755. Mr Davies does not consider that it is possible to identify which individual investments and/or transactions were funded using leveraging. Therefore, accepting the factual leveraging which took place on the Policy Accounts was a necessary simplifying assumption that Mr Davies had to make in his calculations for the Objectionable Transactions Model. He disagrees with Mr Bezant that only the Objectionable Transactions would have to be adjusted, and considers that all transactions, the Objectionable Transactions and the Remaining Portfolio, would have to be adjusted as both will have been funded by leveraging.

756. Mr Davies considers that there are several practical issues which mean that it is not possible to make an adjustment to the calculations for Model 3 and Model 4 for leverage: (i) thousands of transactions took place on the Policy Accounts and the value of the loan varied greatly over time. It is not feasible to consider the amount of leveraging that was in place at the date of every transaction and make an adjustment; and (ii) given the volume of trading a significant proportion of the trades will be linked i.e., a holding in one position was sold and the proceeds were used to invest in a different position (or the proceeds were withdrawn or used to reduce the leveraging). Therefore, for example, making an adjustment for leveraging for a purchase transaction would result in the actual funds for the follow-on transaction when those units were sold not being available and the factual position would not match up with the counterfactual position. Mr Davies considers that the modelling of this aspect would be extremely onerous and impractical.

757. The Court accepts Mr Davies' evidence that modelling for leveraging is not practical in this case and need not be considered.

I. Conclusion

758. The Court has made a number of factual findings which are set out at [131] to [445] of this Judgment. Among other findings the Court has found that:

(1) CS Life delegated responsibility for the sale of the LPI Policies, agreeing the terms on which assets would be transferred to CS Life (including the 'investment alternative'), reporting on the LPI Policies and any ongoing dealings with respect to the LPI Policies to Mr Lescaudron *qua* Mr Ivanishvili's Relationship Manager ([188] to [211]).

(2) Mr Ivanishvili (on behalf of Sandcay and Meadowsweet) agreed with Mr Lescaudron (acting on behalf of CS Life) that the Policy Assets would be managed by the Bank on a discretionary basis ([212] to [237]).

(3) Mr Ivanishvili did not give Mr Lescaudron a "*general instruction*" to take investment decisions on the Policy Accounts and nor did he make the "*final decisions*" as to the investments that were made on the Policy Accounts ([248] to [255]).

(4) Mr Lescaudron sent reports (the Direct Reports) to Mr Bachiashvili fraudulently misreporting the value of the Policy Accounts ([277] to [283]).

(5) The Bank performed various 'group' functions on behalf of CS Life, including providing compliance, human resources, fraud prevention and general counsel services for CS Life ([284] to [303]).

(6) Mr Lescaudron committed a long-running fraud against Mr Ivanishvili, involving the Policy Accounts. That fraud included: (i) making investment decisions without proper authority; (ii) forging documents; (iii) executing investments for the purpose of obtaining unlawful commissions; (iv) directing the sale of assets for an

undervalue; (v) directing the purchase of securities at an overvalue; and (vi) transferring assets to his other clients ([313] to [353]).

(7) Mr Lescaudron was fraudulently mismanaging the Plaintiffs' accounts with the Bank before the Policies were taken out ([354] to [359]).

(8) The Group Function and/or CS Life did not take action (or adequate action) to prevent Mr Lescaudron's fraudulent mismanagement of the Policy Accounts because it was prioritising the revenues Mr Lescaudron generated for Credit Suisse over the interests of its clients, including the Policyholders or Mr Ivanishvili ([407] to [409]).

(9) If Mr Ivanishvili had known that fraudulent transactions had been taking place on his accounts with the Bank, he would not have agreed to set up the LPI Policies but would instead have moved the management of the money to a reputable European bank to be invested in a medium risk investment portfolio ([436] to [441]).

759. The Court has further held that the Plaintiffs succeed in their claims against CS Life in that the actions and omissions of CS Life were in breach of its contractual obligations and fiduciary duties owed to the Plaintiffs. Furthermore, the Plaintiffs are entitled to damages for implied misrepresentation, at the time when the Policies were issued, namely that Mr Lescaudron (and the Bank) was not fraudulently managing the Plaintiffs existing accounts and/or did not intend to manage the Policy Assets fraudulently.

760. The Court has found (at [722] above) that the damages for breach of contract and misrepresentation should be assessed in accordance with Model 1 which calculates the difference between the value of the Policy Accounts and the value that would have been achieved if the assets had been invested in a medium risk portfolio from inception. The Forensic Accounting experts for the parties are instructed to calculate the quantum of the damages having regard to the findings made by the Court in relation to issues in dispute as set out in the "Damages" section at ([715] to [746]) above.

761. The Court will hear the parties in relation to the issue of costs.

Dated this 29th day of March 2022

NARINDER K HARGUN
CHIEF JUSTICE