



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2020: No. 369

2020: No. 374

BETWEEN:

**AEOLUS RE LTD in respect of its
KEYSTONE PF SEGREGATED ACCOUNT**

Plaintiff

-v-

- (1) CS ILS SICAV-SIF in respect of CREDIT SUISSE (LUX)
IRIS BALNCED FUND**
- (2) CS IRIS ALHC FUND LIMITED
(3) CS IRIS C FUND LIMITED**
- (4) MANAGED INVESTMENTS PCC LIMITED on behalf of its IRIS
BALANCED CELL**
- (5) MANAGED INVESTMENTS PCC LIMITED on behalf of its IRIS
ENHANCED CELL**
- (6) IRIS DYNAMIC SPC on behalf of its IRIS POST-EVENT FUND SP**
- (7) ALPHA Z ILS FUND LIMITED**

Defendants

And

- (1) CS ILS SICAV-SIF in respect of CREDIT SUISSE (LUX)
IRIS BALNCED FUND**
- (2) CS IRIS ALHC FUND LIMITED
(3) CS IRIS C FUND LIMITED**
- (4) MANAGED INVESTMENTS PCC LIMITED on behalf of its IRIS
BALANCED CELL**
- (5) MANAGED INVESTMENTS PCC LIMITED on behalf of its IRIS
ENHANCED CELL**
- (6) IRIS DYNAMIC SPC on behalf of its IRIS POST-EVENT FUND SP**
- (7) ALPHA Z ILS FUND LIMITED**

Plaintiffs

-v-

**AEOLUS RE LTD in respect of its
KEYSTONE PF SEGREGATED ACCOUNT**

Defendant

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr. Peter Dunlop and Shannon Dyer of Walkers (Bermuda) Limited
for the Credit Suisse Parties**

**Mr. Mark Chudleigh and Ms. Laura Williamson of Kennedys
Chudleigh Ltd for Aeolus Re**

Date of Hearing: **19 February 2021**

Date of Ruling: **1 March 2021**

RULING

Competing applications in two separate actions relating to the same subject matter for (i) consolidation of the two sets of proceedings; or (ii) stay of the opposing set of proceedings

Hargun CJ

Introduction

1. The above actions arise out of the same transaction but the parties have elected to pursue separate proceedings rather than having their cross-claims being determined in one single action. The following background facts are taken from the First Affidavit of Laura Williamson dated 8 January 2021 sworn on behalf of the Plaintiff in action number 369 (“**Aeolus Re**”).
2. In early 2018, Aeolus Re, as buyer and beneficiary, entered into a separate written agreement with each of the Defendants in action number 369 (“**the Credit Suisse Parties**”), as seller and grantor. Each written agreement was a “*Swap Confirmation for Catastrophe Derivative Transaction*” (“**the Swap Confirmations**”). Each of the Swap

Confirmations was signed by Aeolus Re on or about 6 July 2018 and by each of the Credit Suisse Parties respectively on or about 10 July 2018.

3. Each of the Swap Confirmations provided for payment of collateral, with the funds to be held in a separate trust account (collectively referred to as “**the Trust Accounts**”) administered by the Bank of New York Mellon as trustee. The administration of the Trust Accounts and the obligations of the trustee was set out in separate Trust Agreements between the trustee, Aeolus Re and each of the Credit Suisse Parties (“**the Trust Agreements**”).
4. The total sum deposited in the Trust Accounts by the Credit Suisse Parties and Aeolus Re in respect of the Swap Confirmations was US \$40 million (“**the Notional Amount**”). On or around 31 July 2020, 50% of the Notional Amount was released back to the Credit Suisse Parties, leaving a total balance of US \$20 million.
5. In these proceedings the Credit Suisse Parties contend that they are entitled to the return of the remaining US \$20 million because the losses caused by Typhoon Jebi in early September 2018 did not exceed the trigger amount. Aeolus Re contends that, had the Credit Suisse Parties complied with the terms of the Swap Confirmations, a report publisher would have certified losses caused by Typhoon Jebi in excess of the trigger amount, meaning it would have been entitled to keep US \$20 million under the Swap Confirmations. Aeolus Re contends that the Credit Suisse Parties’ breach of the Swap Confirmations has therefore caused Aeolus Re to suffer a loss, which it seeks to recover.
6. The background to the dispute, and Aeolus Re’s case in respect of the same, are set out in the Generally Endorsed Writ and Statement of Claim in action number 369.
7. It is the Credit Suisse Parties’ case that they are entitled to the return of US \$20 million because the report publisher identified in the Swap Confirmations did not in fact certify

that Typhoon Jebi caused losses in excess of the trigger amount. The Credit Suisse Parties' case in this regard is set out in the Defence and Counterclaim in action number 369.

Procedural History

8. On 14 October 2020, Aeolus Re filed its Writ of Summons in action number 369, seeking relief in respect of the above-mentioned dispute.
9. On or around 19 October 2020, the Credit Suisse Parties filed their Writ of Summons in these proceedings in action number 374.
10. On or around 30 October 2020, the Court issued both Writs of Summons.
11. At approximately 10:50 AM on the 30 October 2020, Aeolus Re served its Writ of Summons in action number 369 on the Credit Suisse Parties by delivering copies of the Writ of Summons to the offices of ASW Law Limited, attorneys for the Credit Suisse Parties, who had indicated that they were instructed to accept service.
12. Later that afternoon, the Credit Suisse Parties served a copy of their Writ of Summons in action number 374 on Aeolus Re by delivering a copy of the same to the offices of Kennedys Chudleigh Ltd. No further steps have been taken in relation to this action, save the application for consolidation of the two sets of proceedings.
13. On 23 November 2020, Aeolus Re filed and served its Statement of Claim in action number 369, particularising its case as to the Swap Confirmations, the Trust Agreements, and Aeolus Re's entitlement to the disputed US \$20 million. The parties agreed an extension of time for the Credit Suisse Parties' Defence to 18 December 2020.

14. On 15 December 2020, the Credit Suisse Parties served their Defence dated 14 December 2020 in action number 369. The parties agreed a deadline of 15 January 2021 for Aeolus Re's Reply, which was filed on 15 January 2021.

15. The parties' agreement as to the date for filing the Defence and Counterclaim and the Reply in action number 369 was reached by exchange of emails between Mr. Mark Chudleigh of Kennedys and Mr. Jan Woloniecki of ASW Law and recorded in the letter dated 11 December 2020 from Kennedys to ASW Law. ASW Law also appeared to accept, in the email of 10 December 2020, the proposal from Kennedys that the parties agree to stay the Credit Suisse Parties' action number 374, subject to 14 days' notice from either side.

The Applications

16. The Parties have been unable to agree how the two sets of proceedings should move forward and in the circumstances have made the following applications to the Court.

17. By summons dated 18 January 2021, filed in action number 374, Aeolus Re seeks a stay of the proceedings with liberty to the parties to apply to restore on not less than 14 days' written notice.

18. By summons dated 4 February 2021, filed in action number 374, the Credit Suisse Parties seek an order that the Credit Suisse Parties' claim in action number 374 and Aeolus Re's claim in action number 369 be consolidated and that the Credit Suisse Parties' claim in action number 374 shall become the lead claim, and Aeolus Re's claim in action number 369 shall be advanced by way of a counterclaim to the Credit Suisse Parties' claim.

Discussion

19. It is common ground that RSC Order 4, rule 10 gives the Court wide powers to control its own process in aid of achieving the overriding objective. Order 4, rule 10 provides:

“4/10 Consolidation, etc. of causes or matters

10. Where two or more causes or matters are pending in the Court, then, if it appears to the Court—

(a) that some common question of law or fact arises in both or all of them, or

(b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or

(c) that for some other reason it is desirable to make an order under this rule,

the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.”

20. It is again common ground that in exercising jurisdiction under Order 4 rule 10, the Court is concerned with saving time, costs, and the issue whether it is desirable for both sets of proceedings to be determined at the same time.

21. The underlying facts and legal contentions have already been rehearsed in the pleadings filed by the parties in action number 369. As noted in the written submissions filed by Kennedys, Aeolus Re alleges, in action number 369, breach of contract against the Credit Suisse Parties, on the basis that they failed to comply with the terms of the Swap Confirmations by failing to appoint a replacement report publisher when the appointed publisher ceased publishing reports and/or materially altered its method of reporting. Aeolus Re alleges that the Credit Suisse Parties’ breach caused Aeolus Re to suffer loss

and damage in the sum of the US \$20 million, being the amount that Aeolus Re would otherwise have been entitled to receive from the Credit Suisse Parties as a result of Typhoon Jebi, such that it is entitled to keep the US \$20 million collateral that the Credit Suisse Parties paid under the Swap Confirmations.

22. In action number 374, the Credit Suisse Parties alleged breach of contract against Aeolus Re, on the basis that Aeolus Re failed to return the US \$20 million when the agreements terminated after the original report publisher failed to certify losses caused by Typhoon Jebi in excess of the trigger amount. The Credit Suisse Parties therefore seek the return of the US \$20 million collateral paid pursuant to the Swap Confirmations. I accept Mr. Chudleigh's submission that the claim by the Credit Suisse Parties is in substance the same claim that the Credit Suisse Parties have asserted by way of counterclaim in their Defence and Counterclaim in action number 369. I also accept the submission that in the event that Aeolus Re is required to file a Defence and Counterclaim in action number 374, it would plead the facts, matters and causes of action already pleaded in its Statement of Claim in action number 369 in its Defence and Counterclaim. I accept the submission that such an exercise is wholly unnecessary and a waste of resources when the issues have already been fully pleaded in action number 369. Indeed, pleadings in action number 369 closed on 29 January 2021.

23. Both parties sensibly accept that the respective claims and counterclaims of the parties should be managed together and should be tried together. The only issue is whether that solution is achieved by way of staying action number 374 or by way of consolidating actions number 369 and 374.

24. It seems to me that all claims and counterclaims have already been raised in action number 369. There does not seem to be any compelling reason why there should be a parallel set of proceedings in the form of action number 374 which will simply replicate action number 369. I am not persuaded that in the absence of consolidation the Credit Suisse Parties would be disadvantaged in terms of discovery or onus of proof.

25. In all the circumstances and in the exercise of my discretion under Order 4 rule 10, I consider that the appropriate solution to the present duplicative proceedings is to stay the action number 374 and to allow all claims and counterclaims to be determined in action number 369 and I so order. I also consider that all costs incurred in relation to action number 374 be costs in the cause in action number 369.

26. I invite the parties to agree further directions in relation to action number 369 but if they are unable to agree, I will hear the Summons for Directions dated 4 February 2021 on 5 March 2021 at 4:00 PM.

27. My preliminary review in relation to the costs of these applications is that the Credit Suisse Parties should pay such costs to Aeolus Re. However, if the Credit Suisse Parties wish to contend for some other order, they should notify the registrar in writing within the next 14 days.

Dated this 1st day of March 2021.

NARINDER K HARGUN
CHIEF JUSTICE

