In The Supreme Court of Bermuda

CIVIL JURISDICTION
2017: No. 293

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. Sarah-Jane Hurrion and Mr. Henry M Komansky of Hurrion & Associates Ltd, for the Plaintiffs**
	Mr. Stephen Moverley Smith QC, Mr. John Wasty, Ms. Hannah Tildesley and Ms. Luisa Olander, Appleby (Bermuda) Limited, for the Defendant
Dates of Hearing:	**17-18 May 2021**
Date of Ruling:	**10 June 2021**

JUDGMENT

(Application to vary existing discovery order)

Application to vary an existing discovery order under O24 r17; necessary requirements to establish "sufficient cause" under the rule; approach of the Court where the production of the documents in a foreign country by a third party may amount to a criminal offence

HARGUN CJ

Introduction

1. The factual background to this action is set out in paragraphs 3 to 15 of this Court's Ruling dated 13 September 2018.

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

3. The Plaintiffs allege that they entrusted US $755 million to CS Life by way of lump sum insurance premiums ("**the Policy Assets**"). The Policy Assets were invested in accounts with Credit Suisse AG ("**the Bank**") in the name of CS Life ("**the CS Life Accounts**"). The Plaintiffs allege that in 2015 they discovered unauthorised, imprudent and fraudulent trading on the CS Life Accounts resulting in huge losses to the Policy Assets.

4. In these proceedings the Plaintiffs assert that CS Life owed the Plaintiffs various contractual, fiduciary, statutory and common law duties, and that CS Life breached those duties resulting in losses estimated to be in the region of US $400 million.

5. Following a two-day hearing on 21 and 22 January 2020 the Court, by its Judgment dated 11 February 2020, made a number of discovery and ancillary orders including an order that CS Life should file an affidavit confirming *"that [CS Life] has examined the disclosed documents including the emails and the documents referred to at Coffey 4 paragraphs 26 (i) to (v) in unredacted form and satisfied itself that any redactions are appropriately made in accordance with Bermuda law. To the extent that such redactions are not appropriately made in accordance with Bermuda law, provide a further list of unredacted versions of the disclosed documents."*

6. The Judgment explained that the purpose of this provision is that any redactions in relation to CS Life's own documents should not be carried out by its parent, the Bank, but CS Life itself should take responsibility for such redactions.

7. The formal Order giving effect to the Judgment dated 11 February 2020 is dated 2 June 2020 and this provision appears as paragraph 5 of that Order ("**the Order**").

8. The present application is made by CS Life by Summons dated 19 January 2021 seeking to vary paragraph 5 of the Order so that it reads as follows:

> *"5. Save in relation to those documents redacted by Credit Suisse AG pursuant to the requirements of Swiss law, namely Art. 47 Federal Law on Banks (Swiss banking secrecy law), Art. 42c para. 5 Federal Act on the Swiss Financial Market Supervisory Authority (supervisory authority privilege) or by reference to Swiss-attorney-client privilege, confirm that the Defendant has examined the disclosed documents including the emails and the documents referred to at Coffey 4 paragraph 26 (i) – (v) in unredacted form and satisfied itself that any redactions are appropriately made in accordance with Bermuda law. To the extent that such redactions are not appropriately made in accordance with Bermuda law, provide a further list of unredacted versions of the disclosed documents."* (proposed additional words underlined)

Procedural background

9. On 22-23 October 2020 the Court heard a number of discovery applications including an application by the Plaintiffs for an unless order to compel CS Life to comply with paragraph 5 of the Order. The Plaintiffs submitted that CS Life had not complied with paragraph 5 of the Order that the redactions may only be made in accordance with Bermuda law. The Plaintiffs argued that CS Life should have ensured that all of the redactions were effected by or reviewed by Appleby Bermuda, CS Life's Bermuda attorneys, or other Bermuda qualified lawyers. Instead, what appears to have happened is that only Swiss lawyers, Homburger, instructed by CS Life, have reviewed the unredacted documents. Furthermore, even Homburger have not reviewed all the unredacted documents because the Bank will not allow any party, including Homburger, to review the redactions made by the Bank based upon Legal Professional Privilege ("**LPP**") or based upon the requirements of Swiss bank secrecy laws and in particular Article 47 of the Federal Law on Banks.

10. In the Judgment dated 22 December 2020 this Court held that the literal terms of paragraph 5 of the Order had not been complied with noting that, despite the terms of paragraph 5 of the Order, approximately 71,000 redactions on the documents of the Bank and CS Life have not been reviewed by a Bermuda lawyer in order to ascertain whether those redactions are appropriate as a matter of Bermuda law.

11. The Court also noted that there was no suggestion at the February 2020 hearing, as Mr. Moverley Smith acknowledged, that all the documents, both belonging to the Bank and CS Life, were subject to mandatory redactions under Swiss law.

12. In the end the Court concluded that it would not be appropriate to make an unless order at that stage without clarifying the position as a matter of Swiss law. The Court made an order requiring CS Life to comply with the exact terms of paragraph 5 of the Order, namely, that it was obliged to review the appropriateness of redactions solely by reference to Bermuda law and in particular without reference to the requirements of Swiss law, and CS Life was required to comply with this order within the next 28 days. The Court further ordered that in the event CS Life takes the position that it is unable to comply with paragraph 5 of the Order due to the mandatory requirements of Swiss law, then it must,

within 21 days, make an application to the Court to vary the terms of paragraph 5 and that such an application must be supported by expert evidence of Swiss law. Following the Judgment dated 22 December 2020, CS Life filed the Summons in the terms referred to at paragraph 8 above.

Issues raised

13. Having regard to the submissions made by counsel, this application to vary paragraph 5 of the Order raises the following issues:

    (a) Whether the application satisfies the requirement of "*sufficient cause being shown*", as required by Order 24 rule 17 of RSC 1985, in order to allow the Court to exercise its discretion to vary its previous order.

    (b) Whether there are any legal or practical difficulties in Bermuda attorneys reviewing the documents already reviewed by the Swiss firm Homburger, if the Court considered it appropriate to do so in order to comply with paragraph 5 of the Order.

    (c) Whether there are any legal or practical difficulties in Bermuda attorneys reviewing the unredacted documents which have been redacted by the Bank on the ground of the Bank's LPP, if the Court considered it appropriate to do so in order to comply with paragraph 5 of the Order.

    (d) What is the appropriate approach for this Court to take in relation to a claim by CS Life that it is unable to comply with paragraph 5 of the Order due to its inability to obtain unredacted documents from the Bank on the ground of Swiss bank secrecy requirements under Article 47 of the Federal Law on Banks.

Requirements of Order 24 rule 17

14. Order 24 rule 17 of RSC 1985 provides that:

> *"**Revocation and variation of orders***
>
> *Any order made under this Order (including an order made on appeal) may, on sufficient cause being shown, be revoked or varied by a subsequent order or direction of the Court made or given at or before the trial of the cause or matter in connection with which the original order was made."*

15. *In Par-La-Ville Hotel and Residences Ltd (in liquidation) v Shane Mora and another* [2016] (Bda) 16 Com (19 February 2016), the Court granted an application for summary judgment after a contested hearing. The following day, the defendant applied to the Court to reconsider its decision on the ground that the plaintiff had failed to comply with the requirements of Order 14 rule 1 as regards the filing of a Statement of Claim. No such argument was presented to the Court at the hearing on the previous day. In these circumstances Kawaley CJ considered the principles which govern the exercise of the Court's inherent discretion to reconsider his decision rather than leaving the aggrieved party to appeal the order. Kawaley CJ followed the English approach at [7]:

> *"7. What principles govern the exercise of the Court's inherent discretion to reconsider a decision rather than leaving the aggrieved party to their appeal rights? The English Court of Appeal in R (Compton)-v-Wiltshire Primary Care Trust [2008] EWCA Civ 749 has approved the following approach to the jurisdiction to reconsider a decision which in England finds expression in a statutory rule. Waller LJ held as follows:*
>
> *'33. Mr Opperman for Mrs Compton, in order to bring paragraph 79 into line with the rules, submitted that the PCT's application was in fact being made under Rule 3.1(7) and he relied on the fact that the very general power given by that rule had been held to be somewhat circumscribed. McCombe J accurately put the matter this way:-*

"This apparently quite general power in the court to vary or revoke an order has been held not to be available as a simple tool for an aggrieved party to mount a disguised appeal against an order with which he is dissatisfied. As is noted in 'Civil Procedure 2007' in Lloyd's Investment (Scandinavia) Ltd. v Ager-Hanssen [2003] EWHC 1740 Mr Justice Patten said that

'in his opinion, for the court to revisit one of its earlier orders, the applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him. The latter type of case would include, for example, a case of material non-disclosure on an application for an injunction. If all that is sought is a reconsideration of the order on the basis of the same material, then that can only be done in the context of an appeal. Similarly it is not open to a party to the earlier application to seek in effect to re-argue that application by relying on submissions and evidence which were available to him at the time of the earlier hearing, but which, for whatever reason, he or his legal representatives chose not to employ. ' (See Civil Procedure 2007 Vol. 1 paragraph 3.1.9 p.92)."

This is an approach which was endorsed in the Court of Appeal in Collier v Williams [2006] EWCA Civ 20, a case to which I shall have to return hereafter." (Emphasis by Kawaley CJ).

16. Kawaley CJ noted that the argument that no Statement of Claim had been served, as required by the Rules, could have been advanced at the hearing on the previous day but was not. In the circumstances the Court held that it was now too late to take the point, relying upon the statement by Patten J (as he then was) in *Lloyd's Investment (Scandinavia) Ltd v Ager- Hanssen* that *"it is not open to a party to the earlier application to seek in effect to re-argue that application by relying on submissions and evidence which*

were available to him at the time of the earlier hearing, but which, for whatever reason, he or his legal representatives chose not to employ."

17. In *Tibbles v SIG plc (trading as Asphaltic Roofing Supplies)* [2012] EWCA Civ 518, the Court of Appeal considered the scope of the power and discretion of the Court to vary the original order under CPR r3.1(7). At paragraph 39 Rix LJ held:

> *"In my judgment, this jurisprudence permits the following conclusions to be drawn:*
>
> > *(i) Despite occasional references to a possible distinction between jurisdiction and discretion in the operation of CPR 3.1(7), there is in all probability no line to be drawn between the two. The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. Whether that curtailment goes even further in the case of a final order does not arise in this appeal.*
> >
> > *(ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated."*

18. Mr. Moverley Smith submits that in *Par-La-Ville Hotel* the Court was not considering its jurisdiction or the exercise of discretion under Order 24 rule 17 but was exercising its

inherent jurisdiction. He submits that under Order 24 rule 17 there is no requirement to show that there has been a change of circumstances. He argues that all the Court needs to be satisfied is that "*sufficient cause*" exists even if none of the requirements identified in *Par-La-Ville Hotel* or *Tibbles v SIG plc* exist.

19. It seems to me that the terms of CPR Rule 3.1 (7) are wider in scope than the terms of Order 24 rule 17. Rule 3.1 (7) is in general terms and provides that "*a power of the Court under these Rules to make an order includes a power to vary or revoke the order*." If it is necessary to show a change of circumstances in order to invoke the jurisdiction under Rule 3.1 (7) it seems unlikely that there would be no such requirement under Order 24 rule 17.

20. The Court was not taken to any cases under Order 24 rule 17. The commentary in the *1999 Supreme Court Practice* cites *Frogmore Estates Plc v Berger*, July 20,1992 (unreported), Chancery Division, Knox J, "*for the possibility of variation order hereunder*".

21. The decision of Knox J in *Frogmore Estates* [1992] Lexis Citation 3786 appears to contemplate a change of circumstances as the primary consideration in relation to the exercise of jurisdiction and/or discretion under Order 24 rule 17. At page 9 of the Lexis transcript Knox J analyses the possible application of Order 24 rule 17 by reference to the requirement of a change of circumstances in the following terms:

> *"Secondly, it was suggested to me that there had been significant changes in the situation between that which obtained when I made the unless order on 16th December and today. The particular changes that were identified were first of all that there had been introduced a requirement of payment of money to discharge the lien. I am not satisfied that that really is a change when the situation is properly looked at. On 16th December the parties, by which I mean DJ Freeman on the one side and Mr Berger on the other, were at arms length on the question of whether there should be a release of the documents on payment of sums. DJ Freeman were seeking the whole of the sum that they were claiming, which, as I have said, was in excess of £250,000. Mr Berger's case was that the usual practice and this is right,*

on such occasions is to require delivery without payment for the purposes only of the litigation. I took the view that the proper order to make was the order that I did make and it was submitted to me that I ought to have no regard to the merits as between DJ Freeman on the one side and Mr Berger on the other in relation to the exercise of my discretion under O 24, r 17, in this case.

…

I do not accept that the change from there being a dispute between the parties whether or not a substantial payment should be required by the court, to the order of the court that a payment of X pounds should be made, constitutes such a significant change as to impinge significantly on any discretion to be exercised under O 24, r 17.

The next change in circumstances that was relied on was that the offer which was contained in that letter of 25th October from DJ Freeman had, at any rate, changed in the circumstances.

…

The third and last submission was that there was something in the nature of a change, as I understand it, in the impact in the Lonrho decision on the pre-existing rule about discovery notwithstanding the exercise of a lien, but that is a matter that I have already expressed my views upon." (emphasis added)

22. In the circumstances I am satisfied that the requirement in Order 24 of "*sufficient cause*" being shown contemplates that there has been a material change of circumstances or that the judge was misled in some way, whether innocently of otherwise, consistently with the test articulated in the *Par-La-Ville Hotel* and *Tibbles v SIG* cases.

23. The issue of whether the Court has the jurisdiction to vary paragraph 5 of the Order and how the Court should exercise any residual discretion in the present circumstances has

been fully argued by Mr. Moverley Smith QC on behalf of the CS Life and by Mr. Smouha QC on behalf of the Plaintiffs. Mr. Smouha reminded the Court that CS Life has been aware of the potential impact of the Swiss banking secrecy regime on its discovery obligations since at least November 2018.

24. At the hearing on 21 November 2018 the Court explored extensively with Mr. Wasty, counsel for CS Life, potential reasons for the delay in obtaining documents from the Bank in Switzerland. Specifically, the Court explored whether banking confidentiality and secrecy regime in Switzerland could result in the Bank refusing to provide documents to its principal, CS Life:

> *"Court: What can be the difficulty?... it is well known that Switzerland, amongst other jurisdictions, has confidentiality and secrecy provisions and the like. That cannot apply to their own clients.*
>
> *Mr. Wasty: I would not imagine it would, but I am not a Swiss lawyer and I do not know."*

25. In the end the Court concluded that *"if you do know that there are categories of documents which you cannot provide by way of discovery, either because your client thinks it should not be given by way of discovery, or the bank is under an impediment, then you should say so at this stage."*

26. The obligation to set out any legal impediment to the Bank providing documents to CS Life is reflected in the Order dated 21 November 2018. The relevant provisions of that Order provide:

> *"2. By 4pm on 5 December 2018 the Defendant shall write to the Plaintiff* (sic) *explaining;* (sic)
>
> *(i) Whether it accepts as a matter of Bermuda law that there are documents in possession of the Bank which are discoverable in the Bermuda proceedings.*

(ii) What, if any, impediments there are as a matter of Swiss law to the production of such documents within the Bermuda proceedings.

(iii) The broad categories of documents held by the Bank which are discoverable in the Bermuda proceedings.

3. Save and except to the extent there are any impediments as a matter of Swiss law as described in paragraph 2(ii) above, the Defendant shall provide discovery of all documents falling within the categories described pursuant to paragraph 2 (iii) above by 4pm on 31 January 2019." (emphasis added)

27. In accordance with the above Order dated 21 November 2018 CS Life did indeed set out the impediments under Swiss law which it alleged may impact the Bank's ability to provide documents to CS Life by way of discovery in these proceedings. By letter dated 6 December 2018 Appleby, acting for CS Life, advised Hurrion and Associates, acting for the Plaintiffs that:

"There are a number of impediments as a matter of Swiss law which might restrict or limit CS Life's entitlement to receive documents… These impediments are based on third party rights under Swiss law:

(1) Data protection law: The Bank has an obligation to protect the interests of third parties that may be affected by the disclosure. In practice this might result in document redaction (for example of the names and other identifying features of employees mentioned in any document) but it may result in the withholding of documents altogether.

(2) Privilege: The Bank may claim privilege in respect of documents and withhold access to documents on that basis.

(3) Federal statutes: Federal statutes concerning secrecy may limit the right of access to the documents. […]"

28. The reference to *"Federal statutes"* in the Appleby letter of 6 December 2018 is clearly a reference to, *inter-alia*, Article 47 of the Swiss Federal Law on Banks. In the circumstances it is difficult to understand and accept CS Life's submission that it was unaware of the potential impact of the Swiss banking secrecy regime on its ability to review unredacted documents at the hearing in February 2020 which resulted in paragraph 5 of the Order.

29. CS Life sought leave from the Court to appeal, *inter alia*, paragraph 5 of the Order. On 25 February 2020, following a hearing, the Court refused to give leave in relation to paragraph 5 of the Order. Following that refusal CS Life made an application to the Court of Appeal for leave to appeal paragraph 5 of the Order.

30. The ground advanced by CS Life for appealing paragraph 5 of the Order was that this Court erred in concluding that the Court was entitled, on an application made under Order 24 rule 7, to grant relief beyond that provided for in that rule, namely to make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been in his possession, custody or power, and if not then in his possession, custody or power whether he parted with it and what has become of it.

31. The Court of Appeal gave leave to CS Life to pursue the appeal in relation to paragraph 5 of the Order but, having heard argument, dismissed the appeal. The Court of Appeal did not accept what it described as the highly technical proposition that this Court is constrained to treat the Plaintiffs' application for discovery as being exclusively brought within Order 24 rule 7. At paragraph 31 of the Judgment dated 7 October 2020, Gloster JA held:

> *"The clear purpose of Order 24 rule 7, and, indeed, Order 24 generally, is to enable one party to find out what specific, and relevant, documents the opposing party has, or has had, in its possession and what has become of them, if they have left such party's possession. In addition, of course, the discovery process leads to inspection*

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

32. The hearing before the Court of Appeal took place on 4 June 2020 and, as noted above, was limited to the argument that it was beyond the power of the Court to make an order in the terms of paragraph 5 under Order 24 rule 7. No argument was presented to the Court of Appeal on 4 June 2020 that the Court should not have made the order in terms of paragraph 5 because CS Life would not be able to comply with it due to the banking secrecy regime in Switzerland and the Swiss legal constraints imposed upon the Bank. This position was maintained despite the fact that in the Fifth Affidavit of Janita Burke sworn on 11 March 2020 CS Life was positively asserting at [16] that:

> *"The Bank, as holder of the documents, has consented to allow Homburger to see behind the redactions made on the basis of Swiss data protection, employment law and references to other policies or business of CS Life which are confidential and irrelevant to the matters in issue. <u>The Bank will not lift redactions made on the basis of the Bank's Swiss attorney-client privilege or the Bank's statutory obligations in relation to Swiss supervisory privilege and Swiss banking secrecy</u>."*
> (emphasis added)

33. In the circumstances I am satisfied that no "*sufficient cause*" exists to exercise the power set out in Order 24 rule 17. The evidence reviewed above establishes that CS Life was fully aware of the Swiss legal position in relation to the Bank's statutory obligations in relation to supervisory privilege; Swiss banking secrecy; and data protection by the February 2020 hearing. Indeed, by the time of the hearing of the appeal on 4 June 2020 the Bank had, according to the sworn evidence filed on behalf of CS Life, taken the position that it will not lift redactions made on the basis of the Bank's Swiss attorney client privilege or the Bank's statutory obligations in relation to the Swiss supervisory privilege and Swiss banking secrecy. However, CS Life did not suggest either to this Court or to the Court of Appeal that paragraph 5 of the Order should either be set aside or varied due to the legal impediments imposed by Swiss law on the Bank.

34. I should add that having regard to the history of the matter the Court would not, in any event, have exercised its discretion to exercise the power, set out in Order 27 rule 17, in the circumstances of this case. This is so having regard to the proximity of this application to the scheduled trial of this matter in November 2021 and the fact that any application to the Swiss court, as suggested is necessary by counsel for CS Life, is entirely impractical. Such an application could have been pursued in the Swiss courts if the point in relation to legal impediments under Swiss law had been taken either at the February 2020 hearing in this Court or before the Court of Appeal in June 2020.

Bermuda attorneys reviewing unredacted documents reviewed by Homburger

35. I turn to consider whether there are any practical difficulties in Bermuda attorneys reviewing the documents already reviewed by Homburger.

36. As confirmed in the Fifth Affidavit of Janita Burke the Bank has consented to allow Homburger to see behind redactions made on the basis of the Swiss data protection,

employment law and references to other policies or business of CS Life which are confidential and irrelevant to the matters in issue.

37. Prior to the hearing of this application it appeared to be suggested that these unredacted documents could not be shown to Appleby in Bermuda. In her Fourth Affidavit sworn on 13 March 2020 Ms. Judith Roche suggested that it was common practice to review documents located in Switzerland via secure on-line portals. At paragraph 31 she stated:

> *"In my experience, document review exercises involving documents located in Switzerland can be conducted via secure on-line portals. This facility allows for legal teams outside of Switzerland to carry out an on-line/electronic review of documents and redaction exercise before any transmission of such documents outside of Swiss territory. This kind of remote access and review tool is common in large-scale, electronic discovery exercises. The Plaintiffs' position is that Appleby should review any redactions to these documents, which the Court has found are in the possession of the Defendant to ensure that such redactions are made in accordance with Bermuda law as ordered by the Court."*

38. At the hearing of this application Dr. Thomas Weibel, Swiss law expert called on behalf of CS Life, accepted that the process described in paragraph 31 of Ms. Roche's Fourth Affidavit is a common way of carrying out discovery exercises in relation to documents located in Switzerland.

39. Prof. Pascal Pichonnaz, Swiss law expert for the Plaintiffs, also agreed that the redaction procedure might take place with Swiss attorneys and their Bermudian counterparts sitting in Bermuda (who are officers of the Bermudian Court and under strict duties in relation to document discovery) simultaneously reviewing the documents on servers located in Switzerland. In Prof. Pichonnaz's opinion such a procedure is perfectly compatible with Article 6 of The Federal Data Protection Act ("FDPA") as long as the data remains on servers in Switzerland.

40. Mr. Moverley Smith also accepted that CS Life's Bermudian attorneys could review the documents (with the redactions removed as reviewed by Homburger) either remotely from Bermuda (as described by Ms. Roche in her affidavit) or by physically reviewing the unredacted documents in Switzerland.

41. I understood Mr. Moverley Smith to state that Homburger disclosed 1850 documents to Appleby so that those documents can be reviewed for relevance to these proceedings. Out of those documents 1600 contained redactions. In the circumstances I see no reason why Appleby should not review the 1600 documents which contained redactions, with the redactions removed and as reviewed by Homburger. I order that such a review should be completed by Bermudian attorneys or English counsel instructed by Appleby by 16 July 2021.

Bermudian attorneys reviewing documents which have been redacted by the Bank on the ground of LPP

42. The issue here is whether it is possible for CS Life's Bermuda attorneys to review the unredacted documents of the Bank for the purposes of confirming that the redactions were properly made on the basis of the Bank's LPP.

43. At one stage Dr. Weibel appeared to suggest that any disclosure by the Bank of legal advice to CS Life's Bermuda attorneys may amount to waiver of that privilege. But in the end he accepted that it must be possible for legally privileged information to be passed within a group of companies without waiver of that privilege. Mr. Moverley Smith accepted that, with suitable reservations in relation to that privilege, it was possible to do so.

44. In the circumstances I consider that it is necessary and appropriate that CS Life's Bermuda attorneys review the unredacted documents for the purposes of confirming that redactions are properly made on the ground of LPP in accordance with paragraph 5 of the Order. I

consider that, as noted by the Court of Appeal at [38], in the unusual circumstances of this case, and in particular in circumstances where responsibility for the discovery process has, in effect, been delegated on a wholesale basis to the Bank, it is necessary for the Bermuda attorneys of CS Life to carry out this exercise. Again, I order that such an exercise be completed by 16 July 2021.

Proper approach to discovery orders where it is alleged that compliance with such orders may be unlawful in a foreign jurisdiction

45. CS Life, relying upon the evidence of Dr. Weibel, asserts that Article 47 of the Federal Law on Banks prohibits the disclosure of secrets which have been entrusted to a director, employee or agent of a Swiss bank. As a result, CS Life is not permitted to disclose information regarding a client or account relationship, save where a client has given his consent that such information may be shared, where banking secrecy has been waived by the client, or where the information is no longer a secret.

46. CS Life argues that Article 47 is a fundamental pillar of Swiss banking legislation. Under the regime, all facts entrusted to or learned by a bank in the course of its business (extending to all information connected with that relationship) must be kept secret unless someone has a legitimate interest in learning those facts. Any breach of banking secrecy (even if merely negligent) or participation in a breach thereof (including the mere facilitation of one) constitutes a criminal offence.

47. Dr. Weibel maintains that under Swiss law, the Bank is required (under threat of criminal sanctions) to redact information in any documents it provides to the extent they refer to third parties and account relationships which are unrelated to the Policies. If the Bank provided documents to CS Life without redacting such material, even if only to permit CS Life to see behind and review the redactions, that would constitute a criminal offence. CS Life also risks Swiss criminal liability if it participated in any such breach of banking secrecy.

48. Dr. Weibel states that only the "owner" of the banking secrecy can waive it and the owner is the person with interest in the information to be protected. In the case of the Policy accounts that is the Plaintiffs rather than CS Life. In his view CS Life as the nominal Bank customer is not the "owner" and at any rate not the sole "owner" of secret information. Neither the Bank nor CS Life, as the nominal Bank customer, are the "owners" for these purposes and they are not entitled to waive the secrecy interests of the "owners".

49. In considering this position asserted by CS Life it is relevant to keep in mind the approach of the Court in relation to prohibition of disclosure of the discovery material in a foreign jurisdiction. In *Bank Mellat v Her Majesty's Treasury* [2019] EWCA Civ 449 Gross LJ reviewed the relevant authorities in relation to this issue and summarised the position at [63] as follows:

> *"63. Pulling the threads together for present purposes:*
>
> *i) In respect of litigation in this jurisdiction, this Court (i.e., the English Court) has jurisdiction to order production and inspection of documents, regardless of the fact that compliance with the order would or might entail a breach of foreign criminal law in the "home" country of the party the subject of the order.*
>
> *ii) Orders for production and inspection are matters of procedural law, governed by the lex fori, here English law. Local rules apply; foreign law cannot be permitted to override this Court's ability to conduct proceedings here in accordance with English procedures and law.*
>
> *iii) Whether or not to make such an order is a matter for the discretion of this Court. An order will not lightly be made where compliance would entail a party to English litigation breaching its own (i.e., foreign) criminal law, not least with considerations of comity in mind (discussed in Dicey, Morris and Collins, op cit, at paras. 1-008 and following). This Court is not, however, in any sense precluded from doing so.*

iv) When exercising its discretion, this Court will take account of the real – in the sense of the actual – risk of prosecution in the foreign state. A balancing exercise must be conducted, on the one hand weighing the actual risk of prosecution in the foreign state and, on the other hand, the importance of the documents of which inspection is ordered to the fair disposal of the English proceedings. The existence of an actual risk of prosecution in the foreign state is not determinative of the balancing exercise but is a factor of which this Court would be very mindful.

v) Should inspection be ordered, this Court can fashion the order to reduce or minimise the concerns under the foreign law, for example, by imposing confidentiality restrictions in respect of the documents inspected.

vi) Where an order for inspection is made by this Court in such circumstances, considerations of comity may not unreasonably be expected to influence the foreign state in deciding whether or not to prosecute the foreign national for compliance with the order of this Court. Comity cuts both ways."

50. In relation to the risk of a prosecution the position is summarised in *Disclosure, 5th edition (Matthews and Malek)* at 8.26:

"The court may take into account, in deciding whether to order disclosure, the fact that compliance with the order would or might entail a breach of foreign law. But to make the objection good, it must be shown that the foreign law concerned forbids, not merely disclosing the contents of the relevant documents, but their very existence. If it is only the former, the objection is left to the stage of inspection. It will also need to be shown that the foreign law concerned contains no exception for legal proceedings, and that it is not just a text, or an empty vessel, but is regularly enforced, so that the threat to the party is real. Even so, the court has a discretion and, on the basis that English litigation is to be played according to English and not foreign rules, it will rarely be persuaded not to make a disclosure order on this

ground. More often than not where foreign law is raised as an objection, any threat of a sanction abroad against the disclosing party is found to be more illusory than real." (emphasis added)

51. The existence of the court's discretion to make discovery orders even if the disclosure of documents required to be discovered may amount to an offence in a foreign jurisdiction is confirmed by the Privy Council decision in *Brannigan v Davison* [1997] AC 238. The rationale for retaining such a discretion is explained by Lord Nicholls, giving the advice of the Board, at pp. 249:

> *"It is the unqualified nature of the right, so valuable as a protection for the witness, which gives rise to the problem when a foreign law element is present. If the privilege were applicable when the risk of prosecution is under the law of another country, the privilege would have the effect of according primacy to foreign law in all cases. Another country's decision on what conduct does or does not attract criminal or penal sanctions would rebound on the domestic court. The foreign law would override the domestic court's ability to conduct its proceedings in accordance with its own procedures and law. If an answer would tend to expose the witness to a real risk of prosecution under a foreign law then, whatever the nature of the activity proscribed by the foreign law, the witness would have an absolute right to refuse to answer the question, however important that answer might be for the purposes of the domestic court's proceedings.*
>
> *This surely cannot be right. Different countries have their own interests to pursue. At times national interests conflict. In its simple, absolute, unqualified form the privilege, established in a domestic law setting, cannot be extended to include foreign law without encroaching unacceptably upon the domestic country's legitimate interest in the conduct of its own judicial proceedings. Their Lordships respectfully agree with the views to this effect expressed in the Court of Appeal by Cooke P, Henry and Thomas JJ. Their Lordships' conclusion is that the common*

law privilege does not run where the criminal or penal sanctions arise under a foreign law."

52. Mr. Moverley Smith argues that these cases are dealing with an order for production of documents against a *party* to the proceedings but the Bank in this case is not a party to these proceedings. However, the approach of the Court summarised by Gross LJ in *Bank Mellat* is based on the propositions that *"foreign law cannot be permitted to override the Court's ability to conduct proceedings here in accordance with [Bermudian] procedure and law"* and *"the Court will take account of real - in the sense of actual - risk of prosecution in the foreign state."* These considerations would appear to apply with equal force to a party to the proceedings and a third party who has possession of the documents. In *Brannigan* the Privy Council was advised, at page 252, that the Cook Islands Government had made it plain its intention to *enforce* the Island's secrecy legislation and in those circumstances the Privy Council noted, at page 253, that the Commission recognised that KPMG Peat Marwick (a third-party) could not reasonably be expected to produce documents currently in the Cook Islands.

53. Further, it seems to the Court that in the context of this discovery exercise it may not be entirely appropriate to describe the Bank in this case as a mere "*third-party*". Mr. Smouha submits that the Court should not bow to a Defendant Bermudian subsidiary that says that its parent refuses to let its subsidiary disclose its documents in compliance with Bermudian law and that therefore the Court should vary its previous orders to permit substantial non-compliance. Mr. Smouha contends that this is a form of litigation ransom.

54. On the basis of the allegations made in the Amended Statement of Claim the Bank is not a stranger to the underlying transactions which are said to give rise to the claims in these proceedings. It is said that in or around 2004, the Bank approached the First Plaintiff to offer private wealth management services to him and his family. The First Plaintiff agreed to invest monies through the trusts. In 2010 or 2011, the investment in an insurance policy under the trust was suggested and recommended by the Bank. The insurance policy was to be issued by CS Life, a wholly owned subsidiary of the Bank and incorporated at the

Bank's direction in this jurisdiction. At all material times it was envisaged that the premium payable under the life insurance policy would be held and invested by the Bank. Given the role of the Bank in managing and/or administering investments on behalf of the trusts the Bank is likely to have substantial documentation which would ordinarily be discoverable in accordance with Bermudian procedural law. In this case, as noted by the Court of Appeal, it appears that the Bank has assumed the primary burden and responsibility of providing discovery in relation to these Bermudian proceedings. In these unusual and exceptional circumstances, the Bank cannot properly be described as a mere third party for the purposes of providing discovery in these proceedings.

55. Mr Smouha argues that had CS Life and the Bank (i) made every effort to obtain Swiss court approval to give the discovery (since such an order would have been complete protection against any threat of prosecution) and (ii) produced cogent evidence of the risk of prosecution, they would at least have some basis for saying that there were real difficulties for them in complying with the Court's order. I accept the submission that CS Life has filed no evidence as to the *risk of prosecution* faced by the Bank or CS Life for any potential breach of banking secrecy resulting from disclosure of documents in this case. In answering questions from the Court Dr. Weibel stated:

    (a) He was not aware of any prosecutions for breach of Swiss banking secrecy where the parent company had disclosed documents under contractual arrangement with a wholly owned subsidiary;

    (b) He was not aware of any prosecution for breach of Swiss banking secrecy where, leaving aside the contractual obligation, a company had disclosed documents to an affiliate; and

    (c) He did not know how often a parent company had been prosecuted because of disclosure to a parent-owned subsidiary.

56. In light of these answers the Court is bound to conclude that in this case there is no proper evidence upon which the Court could conclude that there is a real - in the sense of actual as opposed to theoretical - risk of prosecution of either the Bank or CS Life in Switzerland in relation to compliance with the terms of paragraph 5 of the Order. In the circumstances, even if the Court was satisfied that the terms of Order 24 rule 17 are satisfied, the Court would not have exercised its discretion to vary paragraph 5 of the Order as sought by CS Life's Summons dated 19 January 2021. The Court orders that CS Life comply with the terms of paragraph 5 in respect of Article 47 redactions made by the Bank, by 16 July 2021.

57. In light of the above conclusions it is unnecessary to make any findings in relation to Swiss law issues where there is a conflict of opinion expressed by Dr. Weibel and Prof. Pichonnaz. However, had I found it necessary I would have held:

    (a) I accept Prof. Pichonnaz's evidence to the Court that the question whether the information is "*secret*" depends on the source of the information and its nature, not the purpose for which the disclosure is sought.

    (b) For the reasons set out in paragraphs 31-33 of Prof. Pichonnaz's Report dated 5 March 2021, I accept that CS Life documents do not qualify as secret documents in whole or in part - if they had been handed over to or are held by the Bank on its server for CS Life, they were not secret from CS Life and must be handed over to CS Life without redaction.

    (c) My finding in relation to the expert evidence in relation to Article 400 (Swiss Code of Obligations) documents belonging to the Bank is that any protection of banking secrecy in the context of a duty to account under Article 400 would as a matter of Swiss law involves an assessment of the competing interests of the various parties. The question whether the Bank can withhold documents or parts of documents as against CS Life would involve a balancing exercise. As there is a legal duty to produce documents and to give a full account pursuant to Article 400, Article 47 (Federal Law on Banking) cannot *per se* trump the statutory duty to account under

Article 400. Article 47 is only applicable if it would *outweigh* the interests of the right to get the full account.

(d) In balancing the interests, the Bank would be allowed to ask for redaction of names of customers of the Bank that are totally unrelated to the overall business of the principal under the relevant contract. Third parties that are involved in one way or another with such overall business cannot be redacted.

58. I accept Mr. Smouha's submission and the evidence of Prof. Pichonnaz (paragraph 43) that the balancing of interests exercise envisaged in paragraph 57 (c) and (d) above can be carried out by CS Life's Bermuda attorneys with the benefit of relevant Swiss law advice.

59. In *Bank Mellat* Gross LJ emphasised that where inspection is ordered, the Court can fashion the order to reduce or minimise the concerns under the foreign law, for example, by imposing confidentiality restrictions in respect of the documents inspected. The Court would encourage the parties to agree confidentiality arrangements which would protect the legitimate interests of the Bank and third parties and in the absence of any such agreement, the Court would entertain any reasonable proposal to protect such interests.

Conclusion

60. For the reasons set out above CS Life's application to vary paragraph 5 of the Order is dismissed.

61. The Court will hear any application in relation to costs, if necessary.

Dated this 10 day of June 2021

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NARINDER K HARGUN

CHIEF JUSTICE