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: The Hon Chief Justice Hargun

Appearances: Joe Smouha QC and Louise Hutton QC, Essex Court Chambers, Sarah-Jane Hurrion and Henry Komansky, Hurrion & Associates Ltd.
Jonathan Crow QC, 4 Stone Buildings, Stephen Moverley Smith QC, XXIV Old Buildings, John Wasty, Hannah Tildesley and Luisa Olander, Appleby (Bermuda) Limited

Date of Hearing: **21 June 2022**
Date of Judgment: **25 July 2022**

JUDGMENT

(Consequential Applications)

Abuse of process; whether an issue under section 17(5) of the Segregated Accounts Companies Act 2000 could and should have been raised earlier in the proceedings; proper construction of section 17(5); whether appropriate to order a stay of execution of the judgment pending appeal; whether to award costs on the indemnity basis; proper test for the award of costs on the indemnity basis; power to award interest in excess of the statutory rate under section 9 of the Interest and Credit Charges (Regulation) Act 1975; whether interest can be awarded for the pre-judgment period under section 9 of the 1975 Act

HARGUN CJ

A. Introduction

1. Following a five-week trial in November/December 2022 the Court delivered its judgment dated 29 March 2022 ("**the Judgment**") and the associated order dated 6 May 2022 giving judgment for the Plaintiffs in the sum of USD 607.35 million ("**the Judgment Debt**"). Following the delivery of the Judgment the Court heard the following applications by the parties on 21 June 2022:

    (1) CS Life's application for a declaration under section 17(5) of the Segregated Accounts Companies Act 2000 ("**the SAC Act"**) that the Judgment Debt can only be enforced against the segregated accounts for the CS Life policies numbered 903PTF813696 and 755PTF813830, i.e. the segregated accounts in the names of Meadowsweet Assets Limited ("**Meadowsweet**") and Sandcay Investments Limited ("**Sandcay**"), the Sixth and Seventh Plaintiffs respectively ("**the Segregated Policy Accounts**") (and the Plaintiffs' counter application for a declaration that the Judgment Debt is enforceable against CS Life's 'general account').

    (2) CS Life's application for a stay of execution of the order of 6 May 2022 pending

the outcome of its appeal.

(3) The Plaintiffs' application for costs to be taxed on an indemnity basis, for a payment on account in respect of their costs, and for interest to be ordered to run on the Judgment Debt and on the costs order already made.

B. Background

2. The background facts in relation to the present applications are set out in in the Judgment.

C. CS Life's application for a declaration under section 17(5) of the SAC Act

3. The determination of this issue requires the Court to consider (i) whether the raising of this issue after the handing down of the Judgment constitutes an abuse of process such that CS Life should not be permitted to argue this point at this very late stage in the proceedings; and (ii) whether, as a matter of construction of section 17(5) of the SAC Act, CS Life is correct in its contention that the Judgment against CS Life can only be enforced against the assets of the Segregated Policy Accounts.

Abuse of process

4. The Plaintiffs complain that section 17(5) of the SAC Act is an entirely new point that was first raised by CS Life on 17 May 2022, nearly five years after these proceedings were issued and some 7 weeks after the Judgment was handed down. The Plaintiffs point out that on CS Life's case the entire judicial process that resulted in the Judgment was a complete waste of time because it effectively has a complete defence to the Plaintiffs' claims, as the Plaintiffs are only entitled to enforce the Judgment Debt against their own assets. If CS Life is correct in relation to the effect of section 17(5) then the Plaintiffs' claims, far from being worth c. USD 607 million, as the Court has found, are actually valueless. The Plaintiffs contend, not only that this argument is hopeless as a matter of construction of section 17(5) but that CS Life should not be permitted to argue this point at this very late stage in the proceedings.

5. There is no dispute between the parties in relation to the applicable legal principles relating to abuse of process in this context. The Court accepts the Plaintiffs' submission that it is well established, under the *Henderson v Henderson* jurisdiction, that the Court "*will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case*" (*Seele Austria GmbH Co v Tokio Marine Europe Insurance Limited* [2009] EWHC 255 (TCC) at [21] quoting *Henderson v Henderson* [1843] 3 Hare 100 at 114–115). The underlying principle is that "*in any given litigation the parties are required to bring forward their whole case*" because, amongst other things, this "*provokes certainty of economy and minimises expense*" (*Nikken Kosakusho Works v Pioneer Trading Co* [2005] EWCA Civ 906 at [33]. The English Court of Appeal in *Barrow v Bankside Members Agency Ltd* [1996] 1 All ER 981 at 983 held:

> "*The rule in Henderson v Henderson (1843) 3 Hare 100, [1843–60] All ER Rep 378 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the courts so that all aspects of it may be finally decided once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion, but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.*"

6. The rule applies where, as here, a party seeks to raise an issue in the same proceedings that it could have raised earlier (*Seele Austria GmbH Co v Tokio Marine Europe Insurance Limited* [23]; [27]; [106-108]). Whether doing so is abusive is fact sensitive and requires the Court to undertake a "*broad merits-based judgment*" (*Seele Austria GmbH Co v Tokio Marine Europe Insurance Limited* [23]). It is regarded as "*unfair to*

allow a party to amend his case post judgment so as to allow an opportunity to succeed after a further trial" (*Nikken Kosakusho Works v Pioneer Trading Co* [34]); and "*the court should be astute to prevent a claiming party from putting its case one way, thereby causing the other side to incur considerable expense, only for the claiming party to lose and then come up with a different way of putting the same case, so as to begin the process all over again*" (*Seele Austria GmbH Co v Tokio Marine Europe Insurance Limited* [107]). It is common ground that the critical question is therefore whether CS Life not only could but **should** have raised this issue earlier in these proceedings (*Seele Austria GmbH Co v Tokio Marine Europe Insurance Limited* [23]).

7. Mr Crow QC, for CS Life, submits that there is no basis for suggesting that CS Life *should* have raised the issue under section 17(5) earlier and as a consequence there is no basis for suggesting that CS Life is guilty of abuse in raising the issue now. He argues that the question whether the Plaintiffs can recover from CS Life's general account as opposed to the Segregated Policy Accounts is purely a matter for enforcement: putting it another way, even if CS Life's argument were accepted it would not have provided them with a defence to the claim, and as such it was not an issue for trial.

8. Mr Crow QC also argues that there is no basis for suggesting that, had this issue been raised earlier, it might have provided the reason for not holding a contested trial because victory for the Plaintiffs would have been valueless. Firstly, he argues, even if CS Life's interpretation of section 17(5) were to be accepted, there would have been an argument for allowing the case to proceed to trial, because the Plaintiffs might well have said that the issues of liability as between them and CS Life needed to be determined for the purpose of founding any claim they might have for onward liability as between CS Life and the Bank. Secondly, there is no realistic prospect that the Court would have directed that the argument under section 17(5) should be determined as a preliminary issue (with likely appeals to the Court of Appeal and the Privy Council), with all further proceedings in the trial put on hold pending final determination of the issue under the SAC Act.

9. The Court is unable to accept these submissions advanced on behalf of CS Life.

10. Firstly, the Plaintiffs' case was clearly and unambiguously that CS Life was itself liable (and not the Segregated Policy Accounts) to the Plaintiffs for substantial losses caused by

the Lescaudron fraud. Thus, in the Generally Indorsed Writ of Summons dated 17 August 2017, the Plaintiffs claimed:

> *"(1) An account to establish the value of the Policy Assets had the Defendant's breaches of contract and/or duty not taken place.*
>
> *(4) Further or alternatively, equitable compensation for breach of fiduciary duty in order to reconstitute the CS Life Accounts.*
>
> *(5) Further or alternatively, a declaration that upon the occurrence of the insured event… CS Life shall pay to the beneficiaries or policyholders under the Policies an amount equal to the respective loss declared to have been suffered in relation to that Policy [by reason of breaches and or negligence of CS Life by itself or by Credit Suisse AG]."*

11. In the Statement of Claim dated 22 August 2017 the Plaintiffs claimed in paragraph 61.1 that they are "*entitled to damages and/or equitable compensation to put them back in the position they would have been in had CS Life properly discharged its duties. The Plaintiffs will seek an account to establish the value of the Policy Assets had the breaches not taken place."*

12. In the Statement of Defence dated 12 January 2018 CS Life expressly pleaded that "…*in the event the Plaintiffs establish liability, they are required to prove the causation and quantum of their pleaded losses and they are put to full proof that they have mitigated those losses as required by law."*

13. The Court accepts that it would have been obvious to CS Life from the pleaded case that the Plaintiffs were seeking damages from CS Life itself. CS Life and its legal advisers must have appreciated that it is not possible "*to reconstitute CS Life Accounts*" by requiring the very same accounts to pay the damages assessed against CS Life. The Court is satisfied that CS Life fully appreciated that the damages were being claimed against itself (and not against the Segregated Policy Accounts) since otherwise it makes no legal or commercial sense for CS Life to insist upon strict proof of causation and quantum of losses and for proof that they have mitigated those losses. The Court is satisfied that the

new argument raised now, that under section 17(5) any damages awarded against CS Life must be paid by the Segregated Policy Accounts, constituted a defence to the pleaded claim and *should* have been raised at the outset in the underlying proceedings. If CS Life was correct in its interpretation of section 17(5) then it necessarily follows that section 17(5) provided CS Life with a complete defence in commercial terms and rendered the underlying proceedings commercially pointless.

14. Secondly, the Court accepts Mr Smouha QC's submission that the section 17(5) point was an issue which CS Life was obliged to raise at the outset so that the Court could properly case manage this action. As noted earlier, if CS Life is correct in its interpretation of section 17(5), the entire proceedings have served no commercial purpose and have been an enormous waste of legal fees and a huge burden on the judicial resources of this jurisdiction. The legal costs incurred by the Plaintiffs exceed USD 20 million. No doubt similar legal costs have been incurred by CS Life.

15. The Court is satisfied that had this issue been raised at the outset, as it should have been, the Court, exercising its case management powers, would have required that this issue be determined as a preliminary issue. Even if the issue had to be determined by the Privy Council, the issue could have been decided within a period of two years and well before the start of the trial of this matter in this Court in November 2021. The failure by CS Life to take this point at the outset has deprived this Court of the opportunity to properly case manage this action.

16. Furthermore, CS Life has failed to provide the Court with any explanation as to why the point was not raised at the outset in the underlying proceedings. CS Life has not advised the Court whether it was a deliberate decision not to raise the point or whether it was unaware of this potential argument until very recently. The Court accepts Mr Smouha QC's submission that on either explanation the Court should not allow CS Life to take this point after Judgment has been delivered.

17. Thirdly, the Orders made by the Court following the delivery of the Judgment are premised upon the assumption that the damages are to be paid by CS Life itself (from its general account) and not from the Segregated Policy Accounts. The Order made by the Court on

29 March 2022 is directed at CS Life itself (and not the Segregated Policy Accounts). Thus, it provides:

> *"IT IS HEREBY ORDERED that:*
>
> > *2. Judgment is given for the Plaintiffs on the Plaintiffs' claims-*
> > *(a) For breach of contract;*
> > *(b) For breach of fiduciary duty; and*
> > *(c)For fraudulent misrepresentation.*
>
> ***AND UPON the Court finding that the Defendant is liable to pay damages to the Plaintiffs calculated in accordance with Model 1…***
>
> *IT IS FURTHER ORDERED that:*
>
> > *3. The forensic accounting experts appointed by the Plaintiffs (Mr Davies) and by the Defendant (Mr Bezant) shall by 4 PM on Monday 25 April 2022 file a short joint report either (a)* ***agreeing the sum of the damages to be paid by the Defendant pursuant to the Court's findings in the Judgment*** *or (b) identifying the issues on which they disagree and which need to be decided by the Court in order for the damages to be calculated.*
>
> *AND IT IS FURTHER ORDERED that:*
>
> > *4.* ***The Defendant is to pay the Plaintiffs' costs of the actions****. The basis of the taxation is to be determined at a later hearing in accordance with paragraph 6 of this Order."*

18. Likewise, the Order of 6 May 2022 provided *inter-alia*:

> ***AND UPON the Parties' forensic accounting experts (Messrs Bezant and Davies) having agreed the quantum of the Plaintiffs' damages is USD 607.35 million and there being no further issues for the Court to resolve pursuant to paragraph 3 of the Order***

AND UPON the Parties having agreed the terms of this order

IT IS HEREBY ORDERED that:

> ***1. Judgment is given for the Plaintiffs in the sum of USD 607.35 million.***
>
> ***5. Any application by the Defendant for a stay of execution pending the outcome of any appeal shall be issued and served on the Plaintiffs by no later than 16.30 on 17 May 2022.***

19. The Court is satisfied that the Orders of 29 March 2022 and 6 May 2022 are plainly premised upon the assumption that the payments required to be made by CS Life under those Orders would be made by CS Life itself and not from the Segregated Policy Accounts. Thus, it makes no commercial sense for CS Life to seek a stay of execution pending the outcome of any appeal if the payments under the Judgment are to be made by the Segregated Policy Accounts (which are beneficially owned by the Plaintiffs).

20. Finally, the Plaintiffs in their written submissions assert that, had CS Life raised this point at the outset of these proceedings, the Plaintiffs would have counterclaimed on the basis that, if this was correct, the Policies had been mis-sold to them. The Court accepts Mr Smouha QC's submission that no rational actor would ever take out an insurance policy with a company on terms that would grant the company a free hand to breach the terms of the policy (including by fraudulently or negligently managing the policy assets) without any possibility of the company being legally liable for any consequent losses.

21. In applying the principles relating to abuse of process the Court is required to take into account both the public and private interests of the parties. Having taken those considerations into account, the Court is satisfied that the raising of the new point under section 17(5), which is of such fundamental importance in the context of these proceedings, nearly 5 years after the proceedings were issued and 7 weeks after the Judgment was handed down, does indeed constitute an abuse of process. In the Court's view any one of the grounds outlined above is sufficient to constitute abuse of process requiring the Court not to allow CS Life to raise the new point at this very late stage of the proceedings.

Construction of section 17(5) of the SAC Act

22. The Court's decision in relation to the issue of abuse of process is sufficient to decide whether CS Life should be permitted to argue that point at this stage. However, as the point has been fully argued and, in the alternative, the Court will proceed to consider the proper construction of section 17(5) of the SAC Act.

23. CS Life seeks a declaration that under the SAC Act, the judgment is enforceable only against the assets in the segregated accounts linked to the Segregated Policy Accounts. CS Life contends that the combined effect of section 17(5) of the SAC Act and of the General Policy Conditions governing Meadowsweet's and Sandcay's relationship with CS Life ("**GPC**") is that the Plaintiffs can only enforce against the assets linked to the Segregated Policy Accounts.

24. The concept of a segregated accounts company was introduced in Bermuda in 2000 by the SAC Act. The concept of a segregated accounts company is that the company, as a separate legal entity, may create segregated accounts such that the assets and liabilities of each segregated account are separate from the assets and liabilities of each other segregated account. A segregated accounts company comprises (i) a general account containing assets and liabilities which are separate from the assets and liabilities of other segregated accounts; and (ii) the segregated accounts. A fundamental feature of a segregated accounts company is that assets *linked* to the segregated account may only be used to discharge liabilities which are *linked* to that segregated account. This fundamental feature is reinforced by a number of provisions set out in the SAC Act.

25. The requirement of an asset or liability being *linked* to the segregated account is central to the concept and functioning of a segregated accounts company. The meaning and scope of an asset or liability being *linked* to a segregated account is given the precise and limited definition in section 2 of the SAC Act which provides that:

> *""linked" means referable by means of—*
>
> *(a) an instrument in writing including a governing instrument or contract;*
>
> *(b) an entry or other notation made in respect of a transaction in the records of a segregated accounts company; or*

(c) an unwritten but conclusive indication,

which identifies an asset, right, contribution, liability or obligation as belonging or pertaining to a segregated account".

26. The Judgment requiring CS Life to pay the Judgment Debt would not be a liability *linked*, within the meaning of section 2 of the SAC Act, to the Segregated Policy Accounts.

27. Section 2 of the SAC Act defines "*general account*" as "*an account comprising all of the assets and liabilities of a segregated accounts company* ***which are not linked*** *to a segregated account of that company*." Prima facie, as the Judgment is not linked to the Segregated Policy Accounts, it would need to be satisfied from the assets comprised in the "*general account*" of CS Life.

28. Section 2 of the SAC Act also defines who is a "*creditor*" of a segregated account. It provides that creditor "*means, in respect of any segregated account (and in that regard may include a counterparty of the segregated account) or the general account respectively, any person to whom any liability is owed by the segregated accounts company* ***and such liability is linked to that segregated account*** *or is a liability of the general account, as the case may be…*". The Plaintiffs, based upon their rights arising under the Judgment, would not be *creditors* of the Segregated Policy Accounts.

29. Section 17 of the SAC Act is fundamental to the scheme and operation of segregated account companies. In the Explanatory Memorandum, which accompanied the original Bill in 2000, section 17 was described as "*the crux of the Bill and sets out the operative law that effects the separation of accounts. The assets of the segregated account are held exclusively for the benefit of the beneficial owner or counterparty and can only be applied to the liabilities of the account and a statutory "firewall" insulates those assets from the claims of other creditors*."

30. In *BNY AIS Nominees Limited et al v New Stream Capital Fund Limited* [2010] SC (Bda) 26 Com, Kawaley J (as he then was) considered the scope of section 17 in detail and explained that "S*ection 17 contains the umbrella provision which requires each segregated account to have a separate fund of assets and liabilities, which assets are*

only available to the account owners and counterparties to transactions with such account" and accepted the submission that "*section 17 is primarily concerned with immunizing segregated accounts from claims by the company's general creditors*."

31. Since its original enactment in 2000, section 17 has been amended by the Segregated Accounts Companies Amendment Act 2002 and the Segregated Accounts Companies Amendment Act 2021.

32. The current section 17(2) appeared as section 17(1) in 2000 and provided:

> *"17(1) Notwithstanding any enactment or rule of law to the contrary, any asset which is linked by a segregated accounts company to a segregated account—*
>
> *(a) shall be held by the company as a separate fund which is not part of the general account exclusively for the benefit of the beneficial owner of the segregated account and any counterparty to a transaction linked to that segregated account and in such proportions as may be specified in the governing instrument and shall only be available to meet liabilities to the creditors of that segregated account; and*
>
> *(b) shall not be available or used to meet liabilities to and shall be absolutely and for all purposes protected from, the general shareholders and from the creditors of the company who are not creditors in respect of the particular segregated account identified in the governing instrument."*

33. This provision has remained the same and as a result of the amendments in 2002 and 2021 now appears as section 17(2) and (2A):

> "*17(2) Notwithstanding any enactment or rule of law to the contrary, but subject to this Act, any liability linked to a segregated account shall be a liability only of that account and not the liability of any other account and the rights of creditors in respect of such liabilities shall be rights only in respect of the relevant account and not of any other account.*

17(2A) For the purposes of subsection (2) and for the avoidance of doubt, any asset which is linked by a segregated accounts company to a segregated account—

(a) shall be held by the segregated accounts company as a separate fund which is—

(i) not part of the general account and shall be held exclusively for the benefit of the account owners of the segregated account and any counterparty to a transaction linked to that segregated account; and

(ii) available only to meet liabilities to the account owners and creditors of that segregated account; and

(b) shall not be available or used to meet liabilities to, and shall be absolutely and for all purposes protected from, the general shareholders or general interest holders and from the creditors of the company who are not creditors with claims linked to segregated accounts."

34. It is clear from the terms of the original provision in 2000 and the current version of section 17(2) and (2A) that the Judgment would not be enforceable against the assets of the Segregated Policy Accounts on the basis, *inter-alia*, (i) the Judgment is not a liability *linked* to the Segregated Policy Accounts; and (ii) the assets of the Segregated Policy Accounts are "*only available to meet liabilities of account owners and* ***creditors***" of the Segregated Policy Accounts. The Judgment does not render the Plaintiffs **creditors** of the Segregated Policy Accounts.

35. The current version of section 17(5) appeared as section 17(4) of the original Act in 2000 and provided:

"17(4) Where a liability of a segregated accounts company to a person arises from a matter relating to, or is otherwise imposed in respect of or attributable to, a particular segregated account, that liability—

(a) shall extend only to, and that person shall, in respect of that liability,

be entitled to have recourse only to, the assets attributable to that segregated account;

(b) shall not extend to, and that person shall not, in respect of that liability, be entitled to have recourse to, the segregated account assets linked to any other segregated account; and

(c) ***unless the parties otherwise provide****, shall not extend to, and that person shall not in respect of that liability, be entitled to have recourse to, the general account."*

36. The current version, amended in 2002, provides that:

"17(5) Unless otherwise expressly agreed in writing by the affected parties—

(a) by virtue of one or more contracts, governing instruments or other documents which are binding on those parties in relation to the affected segregated accounts or general account, as the case may be, and which are executed by parties having authority in relation to those accounts; and

(b) in the case of a mutual fund only where the documents mentioned in paragraph (a) clearly indicate an intention of the parties to extend liability to more than one segregated account or the general account as permitted by this section and contain a specific reference to this subsection and to subsection 11(4),

where a liability of a segregated accounts company to a person arises from a transaction or matter relating to, or is otherwise imposed in respect of or attributable to, a particular segregated account, that liability shall—

(c) extend only to, and that person shall, in respect of that liability, be entitled to have recourse only to, the assets linked to that segregated account;

(d) not extend to, and that person shall not, in respect of that liability, be entitled to have recourse to, the assets linked to any other segregated account; and

(e) not extend to, and that person shall not in respect of that liability, be entitled to have recourse to, the general account."

37. In the Court's judgment, section 17(5) is not dealing with the circumstances in which liability can be affixed against a segregated account. That issue is dealt with elsewhere in the Act and is principally dealt with in sections 17(2) and (2A). Section 17(5) is dealing with a separate issue, namely, assuming liability can be affixed against a segregated account, to what extent that liability can be enforced against the assets of the particular segregated account; the assets of other segregated accounts of the company; and the general account of the segregated account company. Section 17(5) provides that once liability is affixed against a segregated account, that liability (i) can be enforced against the assets of that segregated account; (ii) cannot be enforced against the assets of other segregated accounts of the company; and (iii) **unless the parties otherwise agree in writing** cannot be enforced against the general account of the segregated accounts company.

38. Mr Crow QC, for CS Life, accepts that the Judgment is against CS Life and is the liability of CS Life. However, he submits that the relevant question for the Court to decide is the identification of assets against which that Judgment can be satisfied. Mr Crow QC submits that the correct interpretation of section 17(5) leads to the conclusion that the Judgment in this case can only be satisfied against the assets of the Segregated Policy Accounts. In this regard Mr Crow QC submits that the Judgment falls within the terms of section 17(5), given its wide terms applying to "*a liability*" to "*a person*" from a transaction or "*matter relating to*" or "*otherwise imposed in respect of or attributable to, a particular segregated account*."

39. The Court is unable to accept this submission. Section 17(5), like any other provision in the SAC Act, must be read in its context and having regard to the overall scheme of the Act. The interpretation of section 17(5), advanced by Mr Crow QC, would be entirely inconsistent with the scheme of the SAC Act. This interpretation of section 17(5)

advanced on behalf of CS Life would be inconsistent with the terms of the following provisions of the SAC Act itself:

(1) Section 17(2A)(a)(ii) which provides that, for the avoidance of doubt, any asset which is linked by a segregated accounts company to a segregated account shall be held by the segregated accounts company as a separate fund which is ***available only*** *to meet liabilities to the account owners and creditors of that segregated account*. The Plaintiffs are not, as a result of the Judgment, creditors of the Segregated Policy Accounts. Had the Court wished to achieve the result that its Judgment could only be enforced against the assets of the Segregated Policy Accounts, it could have done so by giving Judgment against the segregated accounts under section 18(8) of the SAC Act.

(2) Section 17(2A)(b) which provides that, for the avoidance of any doubt, any asset which is linked by a segregated accounts company to a segregated account shall not be available or used to meet liabilities to, and shall be absolutely and for all purposes protected from the creditors of the company who are not creditors with claims **linked** to a segregated account. The Plaintiffs are the creditors of CS Life and, as a result of the Judgment, are not creditors with claims linked to the Segregated Policy Accounts.

(3) Section 17(6) which provides that where liability of a segregated accounts company to a person arises or is imposed otherwise than in respect of a particular segregated account, shall extend only to the general account of the segregated accounts company. By virtue of sections 17(2A)(a) and (b) the liability arising under the Judgment is a liability arising or imposed otherwise than in respect of a particular segregated account. It can only be satisfied from the general account of the segregated accounts company.

(4) Section 17(11) which provides that where a given liability is **not linked** to a particular segregated account, or where there is, on grounds that are reasonable, uncertainty as to whether the liability is linked, **that liability shall be deemed to be the liability of the general account**. The liability of CS Life to the Plaintiffs arising out of the Judgment is not linked to the Segregated Policy Accounts and

therefore is deemed to be the liability of the general account of CS Life.

(5) Section 17B(1) which provides that there shall be implied in every contract and governing instrument entered into by a segregated accounts company a term that no party shall seek, whether in any proceedings whatsoever or wheresoever, to establish any interest in or recourse against any asset linked to any segregated account to satisfy the claim or liability **not linked** to that segregated account. The Plaintiffs' rights arising out of the Judgment do not constitute a liability which is **linked** to the Segregated Policy Accounts.

40. The interpretation of section 17(5) now advanced on behalf of CS Life also ignores fundamental concepts such as "*creditor*", "*general account*" and "*linked*" defined in section 2 of the SAC Act.

41. CS Life's submission is also contrary to the terms of clause 18 of the GPC (version 01. 2012). It is apparent that the GPC employ the terminology employed in the SAC Act. Clause 18 expressly provides that: "*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 the 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***."

42. Further, it is to be noted that Parliament intended that segregated account companies could be sued for breach of duty with respect to their dealings with particular segregated accounts so as to impose liability on the company itself (i.e. its general account). Section 18(7) provides:

"*(7) A segregated accounts company may—*

(a) sue and be sued in respect of a particular segregated account, and service of process upon the company in accordance with subsection (9) shall be

sufficient;

(b) be sued… for any damages to persons or property resulting from the negligence of the company acting in the performance of duties with respect to that account;

(c)exercise the same rights of set-off (if any) as between accounts as apply under the general law in respect of companies, including, on an insolvent liquidation of the company, the same rights of set-off which arise in an insolvent liquidation of a company."

43. The Court accepts Mr Smouha QC's submission, on behalf of the Plaintiffs, that if CS Life's construction of the SAC Act were correct, it would render section 18(7) meaningless, as a segregated accounts company could not meaningfully be "*sued for… any damages… resulting from the negligence of the company acting in the performance of duties with respect to that account*" because it could always meet the claim by arguing that any liability could only be enforced against the segregated account. It is highly unlikely that Parliament could possibly have intended this result.

44. As Mr Smouha QC rightly contended, CS Life is inviting the Court to find that a segregated accounts company can, in effect, never be held liable to its account holders for breaches of duty, or even fraud, because the account holders can only ever claim as against their own assets, i.e. that Parliament created a special regime for segregated account companies in which they are immunised from bearing financial responsibility for their wrongdoing. The Court accepts that that would be an absurd position and it is therefore inherently unlikely to be the proper statutory construction: *Oldham MBC v Tanna* [2017] 1 WLR 1970 ("*It is a fundamental principle of the interpretation of statutes that Parliament does not intend an absurd or futile result*.")

45. In response, Mr Crow QC argues that it cannot reasonably be suggested that his construction of section 17(5) produces an unfair or absurd result, because the parties are always free to negotiate different arrangements. He relies upon the opening words of section 17(5): "*Unless otherwise expressly agreed in writing by the affected parties*". Accordingly, he argues that it would be entirely open to an account owner and a segregated accounts company to agree terms under which the account owner would have recourse to

the assets in the general account if (for example) the assets in the segregated account proved insufficient to meet the account owner's claims against the company.

46. Mr Crow QC contends that unless the parties do agree to a different allocation of liability, section 17(5) of the SAC Act makes clear that any company liability arising from "*a transaction or matter"* relating to a segregated account extends only to the assets linked to that segregated account, and recourse cannot be had to the general account. Accordingly, the default position is that a segregated accounts company can, in effect, never be held liable to its account holders for breaches of duty, or even fraud, because the account holders can only ever claim as against their own assets. Mr Crow QC did not identify any legitimate purpose for this default position. The default position clearly produces absurd results, and the Court is entitled to take into account that Parliament did not intend to produce these results.

47. For the reasons set out above, the Court (a) refuses to make a declaration under section 17(5) of the SAC Act that the Judgment can only be enforced against the segregated accounts for the CS Life policies numbered 903PTF813696 and 755PTF813830, i.e. the segregated accounts in the names of the Sixth and Seventh Plaintiffs respectively; (b) makes a declaration that (i) any liabilities of CS Life arising from the Judgment and/or the orders of the Court dated 29 March 2022 and 6 May 2022; and (ii) all orders for costs made to date, and to be made, in these proceedings against CS Life are liabilities of CS Life's "general account" under the SAC Act.

D. **Stay of execution**

48. The relevant legal principles are not in dispute. The starting point is that an appeal does not operate as a stay and that a successful claimant is not to be prevented from enforcing his judgment even though an appeal is pending. The principles were summarised by Eder J in *Otkritie International Investment Management Ltd & Ors v Urumov & Ors* [2014] EWHC 755 (Comm) at [22] as follows:

> "*i) First, unless the appeal court or the lower court orders otherwise, an appeal shall not operate as a stay of any order or decision of the lower court: CPR r 52.7.*

ii) *Second, the correct starting point is that a successful claimant is not to be prevented from enforcing his judgment even though an appeal is pending: Winchester Cigarette Machinery Ltd v Payne, CA Unrep, 10 December 1993, per Ralph Gibson LJ.*

iii) *Third, as stated in DEFRA v Downs [2009] EWCA Civ 257 at [8]–[9], per Sullivan LJ (emphasis supplied):*

> *'…A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted.*
>
> *It is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture, or because a threatened strike will occur or because some other form of damage will be done which is irremediable. It is unusual to grant a stay to prevent the kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal. So what is the basis on which a stay is sought in the present case?'*

iv) *Fourth, the sorts of questions to be asked when undertaking the 'balancing exercise' are set out in Hammond Suddard Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 2065 at §22, per Clarke LJ (emphasis supplied):*

> *'By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to*

enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?'

v) Finally, the normal rule is for no stay to be granted, but where the justice of that approach is in doubt, the answer may depend on the perceived strength of the appeal: Leicester Circuits Ltd v Coates Brothers plc [2002] EWCA Civ 474 at §13, per Potter LJ."

49. In *Contract Facilities v Rees* [2003] EWCA Civ 465 at [10], the Court of Appeal quoted from the *Hammond Suddards v Agrichem* judgment referred to by Eder J (above) as follows:

"*On the question as to whether there might be a stifling of the appeal, again a further paragraph of Agrichem is material. That is paragraph 18. All I need to quote from that paragraph is that the court made it clear that where somebody seeks to stay orders what they need to do is: '... produce cogent evidence that there is a real risk of injustice if enforcement is allowed to take place pending appeal.' The court was, of course, recognising in that context, which should be stressed, the principle that it is not just a question whether the actual party to the appeal can raise the money. The question is whether money can be raised from its directors, shareholders, other backers or interested persons. This was made clear, in the context of a security for costs application, by Peter Gibson LJ in Keary Developments v Tarmac Construction."*

50. When considering the rival contentions in relation to the issue of stay of execution of the Judgment pending appeal it is essential to keep these principles in mind. The above principles emphasise that the correct starting point is that a successful plaintiff is entitled to enforce the judgment even though an appeal is pending against that judgment. The grant of a stay is the exception rather than the rule and it is for the party seeking a stay to put forward and establish the grounds. *If* such grounds are established the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted. In the case of money judgments the risks of injustice to the appellant are

ordinarily that if a stay is refused (i) there is an appreciable risk of the appeal being stifled; and/or (ii) there is an appreciable risk of the appellant being unable to recover any monies paid to the respondent.

51. In the affidavit evidence filed in support of his application for a stay, CS Life has sought to justify the grant of stay on the grounds that unless a stay is granted to CS Life (i) its appeal may be frustrated; and (ii) if CS Life is successful in its appeal, it may find it difficult to recover the judgment monies from the Plaintiffs.

52. In her 35th affidavit sworn on 17 May 2022, Janita Burke, a director of CS Life, asserted that she understands that without a stay of execution pending appeal, the Plaintiffs may take immediate steps to enforce the Judgment. Ms Burke stated that as at 17 May 2022, CS Life was unable to pay the Judgment Debt with the consequence that its appeal may be frustrated by any enforcement steps, particularly if a winding up petition is presented. She further stated that CS Life had asked the Bank for its intentions in relation to the Judgment but no definitive answer had been received by the date that this affidavit was sworn. Finally, she stated that CS Life does not consider it will be able to obtain funds from any other third party to satisfy the Judgment pending its appeal.

53. Developments after Ms Burke's 35th affidavit indicate that there is no realistic risk that CS Life may be frustrated in pursuing its appeal in the event no stay of execution is granted by this Court. In her 36th affidavit sworn on 13 June 2022, Ms Burke advised that the Bank had now issued a guarantee to CS Life to secure CS Life's liabilities to the Plaintiffs in these proceedings, *provided that* CS Life has first exhausted all of its rights of appeal in respect of both the Judgment and the section 17(5) SAC Act application, including rights of appeal to the Court of Appeal and also rights of appeal to the Privy Council. Ms Burke further advised that if the Plaintiffs take the view that they would rather have a directly enforceable right against the Bank, whilst CS Life does not consider this is strictly necessary, CS Life understands that the Bank is also willing to offer a guarantee directly to Mr Ivanishvili in terms similar to the guarantee it has provided to CS Life.

54. In its written submissions to the Court dated 16 June 2022, CS Life contends that the

Court should not order that CS Life should pay the Judgment Debt into an escrow account. However, if the Court is against CS Life in relation to that submission "*CS Life submits that it should not be required to pay into an escrow account any more than USD 243.89 million*."

55. In the circumstances it is clear to the Court that the Bank by its actions has demonstrated that it will stand behind CS Life's obligations under the Judgment. There is no realistic basis for CS Life to contend that unless a stay is granted its prospects of pursuing an appeal to the Court of Appeal and a possible further appeal to the Privy Council would be frustrated.

56. In the affidavits sworn by Ms Burke, CS Life also contended that if CS Life obtains funding from a third party to satisfy the Judgment Debt and forestalls any enforcement proceedings and it later succeeds on appeal, it would face significant challenges to recover the monies paid to the Plaintiffs. In the affidavit evidence and in the written submissions CS Life has contended:

    (1) The process of enforcing an order for the recovery of the Judgment Debt in Georgia will be protracted and difficult with a real risk that the Judgment Debt, or part of it, will ultimately not be recovered.

    (2) The Plaintiffs' assets are controlled by Mr Ivanishvili and there are cogent reasons why the process of enforcement against those assets is highly likely to be difficult, protracted or impossible given that (a) Mr Ivanishvili holds his, and his family's, assets through an extensive web of trusts and corporate structures apt to make enforcement difficult, if not impossible; and (b) is well known to dissipate vast sums on apparently philanthropic and unprofitable causes. As such, despite his considerable wealth, there is a real risk that the First Plaintiff's liquid and realisable assets may be reduced below the Judgment Debt following a successful appeal.

57. In response to these concerns expressed by CS Life, the Plaintiffs, as confirmed in Mr Alexopoulos' 19th affidavit, are willing to agree that the judgment monies be paid to and held in an escrow account at Bank Julius Baer ("**BJB**"), pending determination of CS

Life's appeal. The officials at BJB have confirmed that BJB can establish an escrow account. The Plaintiffs had provided to CS Life the template escrow agreement by letter dated 10 June 2022 but by the date of this hearing no response had been received from CS Life in relation to its terms.

58. The Court is satisfied that the establishment of an escrow account at BJB meets all of CS Life's legitimate concerns in relation to the recovery of the monies paid in the event that CS Life was successful on appeal. In the event the Court is satisfied that if the application for a stay of execution is refused, there is no realistic prospect that CS Life's appeal to the Court of Appeal or indeed to the Privy Council will be frustrated. The Court is also satisfied that in the event no stay is granted, and CS Life is successful on appeal, there is no realistic possibility, in light of the escrow arrangements, that CS Life will be hindered in the recovery of the judgment monies.

59. In the ordinary case the Court's findings in the previous paragraph would be determinative of the stay application. However, in this case CS Life contends that the Court should grant a stay on the condition that the Bank provides the appropriate guarantee to either CS Life or to the Plaintiffs.

60. Before dealing with the point of principle whether the Court can or should require the Plaintiffs to accept the guarantee as security for the Judgment Debt in circumstances where the arrangements proposed by the Plaintiffs are adequate to ensure repayment to CS Life, in the event CS Life is successful in its appeal, the Court accepts the Plaintiffs' submission that the Bank's proposal of the existing guarantee to CS Life is not adequate in all the circumstances.

61. Lévy Kaufmann-Kohler ("**LKK**"), the Plaintiffs' Swiss lawyers, have reviewed the Swiss law guarantee provided to CS Life by the Bank. The guarantee is governed by Swiss law and it is the opinion of LKK that the "Guarantee" is a bilateral act between the Bank and CS Life, involving no third party, and they could at any time agree to revoke the "Guarantee". Accordingly, the "Guarantee" is not irrevocable.

62. LKK also point out that under the terms of the "Guarantee" the Bank has agreed to make payment "*to the general account of the Guaranteed Entity*". Under Swiss debt enforcement law, the Bank's payment to CS Life's general account would mean that, in

the event of CS Life's insolvency, the amount of the payment would have to be shared among all creditors (and the Bank could raise a claim against CS Life and possibly seek to set it off against the payment of the Guarantee).

63. LKK conclude that based on the foregoing, the "Guarantee" is not a guarantee under Swiss law given that the Bank does not provide any guarantee to the Bermuda Plaintiffs to ensure the payment of CS Life's debt owed to the Bermuda Plaintiffs under the Judgment.

64. CS Life says that the Bank is prepared to provide a guarantee directly to the Plaintiffs, which is irrevocable and governed by English law. CS Life submits that the Court should order that the security provided by such a guarantee is sufficient as a condition of granting a stay. CS Life argues that to require it to pay over USD 600 million into an escrow account is disproportionate in circumstances where the Plaintiffs do not have any immediate need for that money.

65. The Plaintiffs rely upon the general rule that a successful plaintiff is entitled to be paid the judgment sum pending appeal and the Court will only interfere with the general rule and grant a stay where the defendant has established the relevant factual grounds for the grant of such a stay. The Court is satisfied that no such factual ground exists in this case. The fact that the plaintiff may not have immediate needs for the judgment monies is not a basis for disapplying the general rule that the plaintiff is entitled to enforce the judgment pending appeal.

66. Furthermore, in his 20th affidavit, Mr Alexopoulos confirms that the Plaintiffs have their own concerns that, if the Judgment Debt is not paid now, they may be unable to enforce this against CS Life and ultimately the Bank. The Plaintiffs are aware that, in June 2022, the UK Financial Conduct Authority placed the Bank on its watch list of institutions requiring tougher supervision. This step is reported to have been taken because of the FCA's concern that the Bank had not done enough to improve its culture, governance and risk controls, including "*a lack of internal challenges to risky transactions*".

67. In the Court's view the Plaintiffs are entitled to take the position that CS Life should pay the Judgment Debt into an escrow account and that the Plaintiffs should not be required to assume the "credit risk" of the guarantor's ability to honour the terms of the guarantee.

The Plaintiffs also have justifiable concerns that CS Life and the Bank may not voluntarily honour the terms of the guarantee and any enforcement of the guarantee in due course would be the beginning of further protracted litigation. The Judgment records the instances where the Bank has not kept its promises in the context of this litigation.

68. In the circumstances, the Court accepts the Plaintiffs' submission that the Court should order a stay on the condition that CS Life arranges to pay the Judgment Debt into the escrow account at BJB within 42 days of this Judgment.

69. The affidavit evidence filed on behalf of CS Life also exhibits the text of the European Parliament resolution of 9 June 2022 which "*calls on the Council and democratic partners to consider imposing personal sanctions on Ivanishvili for his role in the deterioration of the political process in Georgia*." The Court agrees with the submission of Mr Smouha QC that there is nothing in this resolution which would directly affect the efficacy of the escrow arrangements. Of course, the parties are free to obtain further directions from the Court in light of any future developments which may have any relevant impact on the escrow account.

70. Finally, the Court confirms that it is aware and has taken into account the fact that CS Life is appealing the Judgment on a number of grounds which not only deal with the issue of liability but also with the calculation of the quantum. The Court is unable to agree with the submission advanced on behalf of CS Life that on the strength of ground seven of its appeal (findings on quantum) the Court should reduce the sum required to be paid into the escrow account at BJB.

E. Application for indemnity costs

71. By the order of 29 March 2022, the Court ordered CS Life to pay the Plaintiffs' costs of the actions, with a basis of taxation (i.e. indemnity or standard) to be determined at a further hearing. At this hearing, the Plaintiffs seek their costs on the indemnity basis for the reasons set out in the Plaintiffs' skeleton argument presented to the Court on 25 March 2022. The Plaintiffs contend that the grounds set out in that skeleton argument provide the clearest possible case for the award of costs on the indemnity basis irrespective of the test applied by the Court in determining whether costs should be awarded on an indemnity

basis. CS Life's position is that an order for indemnity costs would be wholly inappropriate in the circumstances of this case.

The applicable test for indemnity costs

72. In *Crisson v Marshall Diel & Myers Limited* [2021] CA (Bda) 13 Civ (Costs) the Court of Appeal (Clarke P, Kay JA and Gloster JA) held that: "*In order for the indemnity costs to be ordered it is necessary that there is something significantly out of the ordinary in respect of the manner in which the case has been conducted, or its nature, which justifies the making of such an order*." As Mr Smouha QC correctly submits, this statement reflects the English case law on indemnity costs, as applied since the introduction of the Civil Procedure Rules. In *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 2848 (Comm) at [7(x)], Gloster J (as she then was) cited the decision of Christopher Clarke J (as he then was) in *Balmoral Group Limited v Borelis (UK) Limited* [2006] EWHC 2531 (Comm), where he said at [1]:

> "*Balmoral lost the action. They will have to pay the costs. The question I have to decide is whether they should pay the costs, or some of them, on the standard or the indemnity basis. The basic rule is that a successful party is entitled to his costs on the standard basis. The factors to be taken into account in deciding whether to order costs on the latter basis have been helpfully summarised by Tomlinson, J., in Three Rivers District Council v The Governor and Company of the Bank of England [2006] EWGC 816 (Comm). The discretion is a wide one to be determined in the light of all the circumstances of the case. To award costs against an unsuccessful party on an indemnity scale is a departure from the norm. There must, therefore, be something – whether it be the conduct of the claimant or the circumstances of the case –which takes the case outside the norm. It is not necessary that the claimant should be guilty of dishonesty or moral blame. Unreasonableness in the conduct of the proceedings and the raising of particular allegations, or in the manner of raising them may suffice…"* (emphasis added).

73. Mr Moverley Smith, for CS Life, submits that despite the clear terms in which the test was expressed by the Court of Appeal in *Crisson*, the Court must follow the test articulated by Ground CJ in *DeGroote v Macmillan* [1991] Bda LR 27. This Court has

previously followed the guidance given by Ground CJ in *DeGroote v Macmillan* in the previous costs Rulings made in this case. Thus, in the Ruling of the Court dated 1 March 2021, the Court summarised and applied the test in *DeGroote v Macmillan* at [22]-[25]:

> "*22. The decision of Ground J (as he then was) dated 17 December 1993 in De Groote v Macmillan and others, Civil Jurisdiction, 1991 No. 148, confirms that the Supreme Court does indeed possess the jurisdiction to award indemnity costs against the defendant in appropriate circumstances. As to the circumstances in which the Court is justified in making an order for costs to be paid on the indemnity basis, Ground J held at page 4:*
>
> > *"... I consider that an award of indemnity costs, as against a defendant, should be reserved for exceptional circumstances, involving grave impropriety going the heart of the action and affecting its whole conduct. That is not the case here, where, although I consider that the affidavit of 24th December 1991 [filed in opposing an application for summary judgment] amounts to a grave impropriety, I cannot say that it went to the heart of the matter as eventually fought, because the defendant subsequently relied upon different or modified allegations which sustained the continuance of the action."*
>
> *23. In Phoenix Global Fund Ltd v Citigroup Fund Services (Bermuda) Ltd [2009] LR 70, Bell J referred at [13] to the test articulated by Ground J as representing the relevant test for indemnity costs and held:*
>
> > *"...The comments which appear in the 2008 White Book at paragraph 44.4.3 indicate that there is an infinite variety of situations that might justify a court making an order for costs on the indemnity basis. Nevertheless, Ground J in De Groote v MacMillan et al [1993] Bda LR 66 was clearly making comments of general application when he indicated that he considered that an award of indemnity costs as against a defendant should be reserved for exceptional circumstances, involving grave impropriety going to the heart of the action and affecting its whole conduct. That said, the judgment as to whether a particular case is exceptional, and*

the nature and extent of the impropriety will always be matters for the trial judge before whom the question falls to be determined."

24. Bell J again referred to the restricted test in De Groote v Macmillan for indemnity costs in SCAL Limited v Beach Capital Management Limited [2006] Bda LR 93 and noted at [84] that:

> *"In DeGroote v Macmillan , Ground J. declined to make an order for indemnity costs as between plaintiff and defendant, even though he took the view that the defence and counterclaim relied upon grounds which were 'arguable but essentially insubstantial and shadowy' Ground J. carried on to say that he considered that 'an award of indemnity costs, as against a defendant, should be reserved for exceptional circumstances, involving grave impropriety going to the heart of the action and affecting its whole conduct."*

25. I accept, as submitted by Mr Smouha, that in DeGroote v Macmillan; Phoenix Global v Citigroup Fund Services; and SCAL Limited v Beach Capital Management Limited, the Court was considering whether indemnity costs in relation to the entire action should be awarded against a party to the proceedings. Ground J's articulation of the test that indemnity costs are to be reserved for exceptional circumstances "involving grave impropriety going to the heart of the action and affecting its whole conduct" was made in the context of an application for indemnity costs at the conclusion of the action and that is clearly the appropriate test in that context…" (emphasis added).

74. Mr Moverley Smith submits that the Court of Appeal in *Crisson* did not change the test for awarding indemnity costs. He submits that the Court of Appeal followed the established test under Bermuda law referring in paragraph 5 to the requirement for "*exceptional"* circumstances to justify an award of indemnity costs. He argues that beyond any doubt, the Defendant's conduct in *Crisson* fulfilled the *DeGroote* requirement for "*exceptional circumstances, involving grave impropriety going to the heart of the action and affecting its whole conduct*."

75. Mr Moverley Smith QC points out that the Court of Appeal did not examine or change the test set out in the Bermudian jurisprudence relating to indemnity costs; it was simply applied. He submits that the Court of Appeal's comment at paragraph 2 "*In order for indemnity costs to be ordered it is necessary that there is something significantly out of the ordinary in respect of the manner in which the case has been conducted, or its nature, which justifies the making of such an order*" and its decision to award indemnity costs in that case were both entirely consistent with the existing Bermudian jurisprudence. Mr Moverley Smith QC contends that to suggest that the similarity between this comment and the different English jurisprudence on indemnity costs is capable of importing that jurisprudence into Bermudian law is fanciful.

76. It seems reasonably clear to the Court that the Court of Appeal in *Crisson* was referring to and applying the test for indemnity costs as reflected in the English case law and in particular the judgment of Christopher Clarke J in *Balmoral Group* and the judgment of Gloster J in *Morgan Chase Bank*. The expressions used to articulate the test for the award of indemnity costs by Ground CJ in *DeGroote* and the Court of Appeal in *Crisson* may not be entirely consistent and going forward it would be preferable for the court to apply the test clearly set out by the Court of Appeal in *Crisson*. There is no public policy reason why the test for the award of indemnity costs should be different in Bermuda from that applied by the English courts.

77. However, for the purposes of considering the present application, it does not matter in the Court's view whether the test to be applied is that set out by Ground CJ in *DeGroote* or by the Court of Appeal in *Crisson.* The facts in this case which are prayed in aid of an order for indemnity costs are, on any view, truly exceptional. For the purposes of the present application the Court is prepared to assume and apply the test articulated by Ground CJ in *DeGroote*.

78. In support of the application for indemnity costs the Plaintiffs rely upon how CS Life discharged its obligation to provide proper discovery; CS Life's failure to call relevant witnesses; failure to admit Mr Lescaudron's fraud; and failure to acknowledge and advise the existence of the Group Function.

Provision of discovery

79. The provision of proper discovery was central to the conduct of a fair trial in this case. In its Ruling dated 30 September 2021, referred to at [147] of the Judgment, the Court held that discovery was of particular importance in this case as CS Life had failed to admit the wrongdoing of Mr Lescaudron and was putting the Plaintiffs to strict proof thereof:

> "*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.*"

80. As noted at [148] of the Judgment, paragraph 3.4 of the Specific Discovery Order dated 2 June 2020 required CS Life to discover categories of documents which were of central importance to the issues raised in these proceedings:

> "*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."

81. The Court has held at [149] of the Judgment that there had been a wholesale failure on the part of CS Life to discover these documents and that this failure caused the Plaintiffs substantial prejudice. In particular, none of the documentation in relation to the PwC Reports or the FINMA Report was disclosed by CS Life. Indeed, on 10 September 2021, 15 months after the Specific Discovery Order, Ms Burke, a director of CS Life, in response to an application for an unless order, advised the Court:

> "***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)

82. On 30 September 2021 the Court made an unless order requiring CS Life to provide discovery of the PwC Reports and supporting documents and the FINMA Report. Following the unless order, CS Life finally discovered the PwC Reports and the FINMA Report, along with some of the supporting documents just prior to the trial of this matter. CS Life also advised that there was in fact in existence a PwC data room, which contained over a million documents potentially relevant to these proceedings.

83. The trial of this matter was scheduled to commence on 15 November 2021 and in the circumstances, as the Court held at [152] of the Judgment, 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's primary discovery obligations, these documents

were provided at the last possible moment and only because they were provided to PwC and fell within the scope of the unless order.

84. The Court has held at [153] of the Judgment, that the position prevailing at the close of the trial with respect to discovery of documents from the PwC data room was highly unsatisfactory in that:

(1) At the time of filing the parties' skeleton arguments, on 4 November 2021, 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 had provided the Plaintiffs with a further 53,489 documents across 13 productions. The Plaintiffs stated that they had endeavoured to review as much of this late discovery as possible during the trial of these proceedings, however the Plaintiffs contended that it had not been practically possible to complete the review whilst the trial was ongoing.

(3) On 12 November 2021, three days before the commencement of the trial, Bermuda attorneys for CS Life advised that the Plaintiffs' Bermuda attorneys 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, the fourth week of the trial, 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 were going to be discovered during the final week of trial.

85. The Court has held at [155] of the Judgment, that 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 was 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 4th 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 submitted that this assertion was premised on a false account of how CS Life and the Bank operated: it became 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 Court accepted that it was highly likely that the centralised Group Function hold materially important relevant documents.

86. The Court has held at [154] of the Judgment that it is appropriate to infer that within the late discovery are documents which would harm CS Life's case, support the conclusion of the PwC Reports and that the PwC documents had been deliberately withheld from discovery until very near the commencement of the trial. In this regard it is to be noted that the PwC documents, dealing with the wrongdoing of Mr Lescaudron, are held in the PwC data room investigating the same wrongdoing. The office of the General Counsel, responsible for this litigation on behalf of CS Life, must have had knowledge of the PwC data room at all material times and yet allowed Ms Burke to represent to this Court on 10 September 2021 that "*The documents provided by the Bank are in line with what CS Life would expect."*

87. The Court has found at [154] of the Judgment that the exceptionally late discovery provided in this case affected the trial process, because the Plaintiffs had "*no reasonable opportunity to consider their relevance and impact on the case*."

88. Having regard to the circumstances outlined above, it is clear to the Court that the discovery provided by CS Life during the currency of these proceedings including the trial

itself was seriously deficient and bound to cause real prejudice to the Plaintiffs. The failure to provide proper discovery at the appropriate time was not due to an isolated accidental omission. It was a deliberate decision made by or on behalf of CS Life to represent to the Court that CS Life had only a few relevant documents and the remaining relevant documents were with the Bank, a party over whom CS Life had no control. This position, represented to the Court for a period of over five years, ignored the centralised Group Function, 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. It also ignored that this litigation was being conducted by the office of the General Counsel by the Bank.

89. In the circumstances, the Court accepts the Plaintiffs' submission that the position on discovery, taken alone, would more than justify an order that CS Life pay the costs of the proceedings on an indemnity basis. The circumstances outlined above amply satisfy the test set out by Ground CJ in *DeGroote*. The circumstances outlined above are on any basis truly exceptional and involve grave impropriety. As noted above at [79], the conduct of a fair trial in this case required that there be proper discovery of relevant documents by CS Life and the Bank. The serious deficiencies in the provision of discovery, as outlined above, went to "*the heart of the action and affecting its whole conduct*."

90. The Court does not accept that simply because the Court did not make cost orders on an indemnity basis in the previous discovery applications, the Court is now precluded from doing so. Firstly, as noted at [85] above, it was during the discovery given just prior and during the trial that the Court realised the fact and full implications of the Group Function. As held at [155] of the Judgment, the evidence that emerged during trial from CS Life's witnesses demonstrated that CS Life resisted giving discovery on an entirely false basis. Secondly, the facts that (i) two weeks before the commencement of the trial CS Life had disclosed 11,799 documents from the PwC data room; (ii) since 5 November 2021 (10 days before the commencement of the trial) to the close of the trial, CS Life had provided the Plaintiffs with a further 53,489 documents across 13 productions; (iii) the fact that three days before the trial CS Life's Bermuda attorneys advised the Plaintiffs 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; and (iv) in the fourth week of the trial CS Life produced 3,393 documents on 8 December 2021,

completely change the assessment of how discovery was given by CS Life in this case. It is entirely unacceptable that a party in the position of CS Life should be giving discovery of thousands of highly relevant documents during the course of trial. This is highly prejudicial to the other party as indeed was the case to the Plaintiffs in the present proceedings.

91. The Court also does not accept that merely because the Court has drawn adverse inferences from the failure to give proper discovery, it is precluded from making a costs order on the indemnity basis on the same ground. There is no reason in principle why the Court should not draw adverse inferences from the failure to give proper discovery and at the same time award indemnity costs, if the Court considers that it is appropriate to do so.

Failure to call relevant witnesses

92. At [179] of the Judgment, the Court has held that "*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.*"

93. At [160]-[178] of the Judgment, the Court reviewed the witnesses who were called and the witnesses who should have been called at the trial of this action. In particular, the Court held that Mr Patrick Läser, a director of CS Life and Mr Dastmaltschi, who had overall responsibility for Mr Lescaudron throughout the material period, were witnesses who had relevant evidence and should have been called by CS Life at the trial of the action.

94. Mr Läser 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 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*".

95. 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.

96. At [169] of the Judgment, the Court accepted 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.

97. As held at [172] of the Judgment, Mr Dastmaltschi 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.

98. The Court has held at [174] of the Judgment that Mr Dastmaltschi is a key witness who should have been called and the failure to call him, and his knowledge, make CS Life's "non-admission" of the Lescaudron frauds an abuse of process. Mr Dastmaltschi is still a senior executive employed at the Bank.

99. Mr Moverley Smith QC, on behalf of CS Life, points out that there is "*no evidence*" that Mr Dastmaltschi would have been available to CS Life to be called as a witness or that he would have agreed to appear. At the same time there is "*no evidence*" that Mr Dastmaltschi was not available to CS Life to be called as a witness or that he would not have agreed to appear. Ms Homann and Mr Celia, who were not employees of CS Life and were employed by the Bank, were called by CS Life to give evidence and they agreed to do so. Accordingly, there is no compelling evidence that the Court should conclude that Mr Dastmaltschi would have refused to appear if he had been asked to do so by CS Life.

100. At [179] of the Judgment the Court has held that there were witnesses available to CS Life who could have given evidence in relation to these central issues set out at [92] above. Yet CS Life elected to call witnesses who could give no direct evidence in relation to any of these issues. In the circumstances the Court concluded that this was an appropriate case where the Court should be willing to draw 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. The Court further concludes that for the same reason the Court should be willing to award costs against CS Life on the indemnity basis.

Non-admission of fraud and Group Function

101. Whilst it is unnecessary to do so, there are additional matters which support the award of costs on the indemnity basis.

102. Firstly, as noted at [125] and [316] of the Judgment, 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 continued to take the position that it did not admit that Mr Lescaudron committed a long-running fraud against Mr Ivanishvili, involving the Policy Accounts.

103. At [319] and [427] to [433] of the Judgment, the Court has held that the Group Function carried out the investigation into Mr Lescaudron's fraud. The Court also held that it followed that the conclusions reached by the Bank, and their 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. 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. In the circumstances, the Court accepted that there was no proper basis on which CS Life could properly not admit Mr Lescaudron's fraud.

104. Secondly, at [284] to [303] of the Judgment, the Court has set out the evidence which first surfaced during the trial in relation to the existence of the Group Function and held at [422] that having regard to that evidence the Court did 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.

105. In the circumstances the Court considers that the award of indemnity costs of these proceedings against CS Life is justified either on the ground of serious deficiencies in the discovery provided by CS Life or on the ground of failure to call relevant witnesses who should have been called. Such an order is also supported by CS Life's failure to admit that Mr Lescaudron committed a long-running fraud against Mr Ivanishvili, involving the Policy Accounts, and CS Life's failure to disclose the Group Function either to the Plaintiffs or to the Court prior to the commencement of the trial.

F. Interim payment on account of costs

106. By summons dated 17 June 2022, the Plaintiffs seek an order that CS Life shall pay the sum of USD 10.47 million on account of the Plaintiffs' costs, being 50% of the total incurred and recoverable costs set out in the letter from the Plaintiffs' attorneys to CS Life's attorneys dated 10 June 2022. The application is supported by the 20th affidavit of Mr Alexopoulos dated 17 June 2022.

107. The principal point taken against this application by Mr Moverley Smith QC on behalf of CS Life is that this Court simply does not have the jurisdiction to make such orders. He says there is no provision in the Bermuda Rules of the Supreme Court 1985 or under any Bermuda statute enabling the Court to make orders for interim payments on account of damages in non-personal injury cases, or on account of costs. Nor is there such a

power, he argues, under the Court's inherent jurisdiction, as was established by the English Court of Appeal in *Moore & Anr v Assignment Courier Ltd* [1977] WLR 638 dealing with the similar provisions of the English Rules of the Supreme Court.

108. This is a surprising submission given that the Bermuda courts have made interim orders on account of costs in the past and have clearly stated that the courts have the jurisdiction to do so. Thus, in *Corporation of Hamilton v Ombudsman for Bermuda* [2014] Bda LR 1 Hellman J made such an order based upon the inherent jurisdiction to do so. At [53] Hellman J held:

> "*In the alternative to a summary assessment, the Respondent has asked me to make an interim award on account of costs. I am prepared in my inherent jurisdiction to do so. The Applicant must pay the Respondent two thirds of the amount of costs claimed, on the basis that if on taxation she's found to be entitled to a lesser sum she must refund the difference. Payment must be made forthwith upon the Respondent supplying the Applicant with the appropriate amount supported by a schedule of costs.*"

109. Hellman J's decision to make an interim order on account of costs in the *Corporation of Hamilton* was followed 8 months later by Kawaley CJ in *Bermuda Environmental Sustainability Taskforce v The Minister of Home Affairs* [2014] SC (Bda) 73 App (18 September 2014). At [14] the Chief Justice held that "*it was not disputed that this Court may summarily assess costs or, as illustrated by Hellman J's decision of Corporation of Hamilton v Ombudsman for Bermuda [2014] Bda LR1 at paragraph 53, make an interim costs order.*"

110. Recently the issue was addressed by the Court of Appeal in *Crisson v Marshall Diel & Myers Limited* [2021] CA (Bda) 13 Civ. At [6] the Court held that:

> *"We do not think it appropriate summarily to assess those costs at the full sum claimed, without the benefit of any submissions on the amount thereof from MDM, and in circumstances where the total amount properly recoverable on taxation is debatable and should be addressed by the appropriate taxing authority. We do however think it right to order the payment on account of $135,000 sum which*

we are satisfied is an amount which is highly unlikely to represent an over estimate."
(emphasis added)

111. CS Life submits that the decisions to make interim awards on account of costs by Hellman J in *Corporation of Hamilton*, by Kawaley CJ in *Bermuda Environmental Sustainability Taskforce*; and by the Court of Appeal in *Crisson*, were all made *per incuriam*. Mr Moverley Smith QC argues that there is no reasoning in any of these judgments to give any indication of the basis on which the court considered that it had an inherent jurisdiction to make an interim award on account of costs.

112. Mr Moverley Smith QC relies heavily on the English Court of Appeal decision in *Moore & Anr v Assignment Courier Ltd*. He submits that, in that case, the Court of Appeal highlighted the fact that there was then in England only provision for interim payments in respect of damages in personal injury claims, reasoning that this legislative choice was a "*considerable indication*" that the Court had no inherent jurisdiction to make interim payment orders otherwise, for damages at least (643E). In that case Megaw LJ expressed the view that, where statute bestows the power to make rules in relation to a specific matter on a rule-making body, the Court has no remaining inherent jurisdiction to regulate such matters.

113. Mr Moverley Smith QC submits that the same reasoning should apply to interim payments on account of costs in Bermuda. Rule-making powers are conferred upon the Chief Justice by section 62(1) of the Supreme Court Act 1905 including, at (e), "*for regulating any matters relating to the costs of proceedings in the Court*". Whether or not to make an order for payment on account of costs is a matter relating to the costs of proceedings. As a specific rule-making power has been conferred on the Chief Justice in his capacity as rule-maker, it cannot, Mr Moverley Smith QC argues, be a matter in relation to which the Court retains any inherent jurisdiction. Accordingly, there being no rule providing for orders to be made for payment on account of costs in the RSC, the Court has no power to make such an order.

114. However, as Ms Hutton QC correctly submitted, *Moore & Anor* was a case concerning the forfeiture of a lease and dealt with substantive rights of the parties. Sir John Pennycuick summarised the issue before the court at page 639E-F:

"*The issue raised is a short and interesting one, namely: where a landlord purports to forfeit a lease and the tenant remains in occupation, is the landlord entitled to be paid, pending a determination of the landlord's forfeiture action, a periodic interim sum representing compensation, under one head or another, for the use by the tenant of the land during the period between the purported forfeiture and the determination of the action?*"

115. Accordingly, the Court of Appeal was considering an application for an interim payment of mesne profits. It was not an application for an interim payment on account of costs. It was an application for substantive relief, rather than the procedural issue of the payment on account of costs.

116. A case which does provide assistance to the Court is the Cayman decision of Jones J in *Al Sadik v Investcorp Bank BSC* [2012] (2) CILR 33, Grand Court, Financial Services Division. In that case Jones J noted that the Grand Court Rules Committee had the power to make rules about interim payment orders but had not done so. Nevertheless, the court could invoke its inherent jurisdiction to make interim payment orders on account of costs. At [21]-[22] Jones J held:

"*21. Lord Falconer's argument is that the court's inherent jurisdiction to control its own procedure includes jurisdiction to make an interim payment order in respect of a party's liability for costs. The nature and extent of the inherent jurisdiction were analysed by the Court of Appeal in HSH Cayman I GP Ltd. v. ABN AMRO Bank N.V. (2) (2010 (1) CILR 114, at paras. 21–26). It was held that the powers of the court under its inherent jurisdiction are complementary to its powers under the rules of court. It follows that the inherent jurisdiction may supplement the Grand Court Rules but cannot be used to lay down procedure which is contrary to or inconsistent with the rules validly made by the rule-making body. In my judgment, the rule-making power contained in s.19(3)(d) of the Grand Court Law (2008 Revision) and s.24(2) of the Judicature Law (2007 Revision) is wide enough to enable the Grand Court Rules Committee to have made rules about interim payment orders. It has not done so.*

22. The inherent jurisdiction can be invoked in a way which (a) usefully supplements the rules and is not inconsistent with their overall scheme; or (b) is necessary to give effect to the rules. The inherent power contended for by Lord Falconer is not inconsistent with GCR, O.62, but, given the way in which the taxation process works, it could be said that a power on the part of the judge to make interim payment orders is an unnecessary duplication of the taxing officer's power to issue interim certificates. However, I cannot rule out the possibility that some wholly exceptional circumstances may arise in which it will serve the ends of justice for the judge to make an interim payment order prior to, or conceivably instead of, the delivery of a bill of costs." (emphasis added)

117. Jones J also held that interim payment orders on account of costs were procedural in nature. At [25]-[26] the learned judge held:

"*25. Mr. Staff's second point is that the court's inherent jurisdiction relates only to matters of procedure. This is correct. He says that the court's statutory jurisdiction to make inter partes orders for costs is a matter of substantive law. This is also correct. However, rules dealing with the circumstances in which a paying party may be ordered, either by the judge or the taxing officer, to make payments on account, and the circumstances in which such orders may be discharged or varied, are clearly matters of procedure which fall within the jurisdiction of the Rules Committee and within the scope of the court's inherent power.*

26. There is no merit in either of Mr. Staff's points. In my judgment, the court does have an inherent power, exercisable by the judge, to make an interim payment order prior to the lodgement of a bill of costs with the taxing officer. However, given the way in which the taxation process works, the inherent jurisdiction will be exercised by the judge only in rare and exceptional circumstances leading to the conclusion that the issue of an interim certificate by the taxing officer will not be sufficient to do justice between the parties." (emphasis added)

118. It is clear from the reasoning in *Al Sadik* that the fact that there is a statutory power to make rules to provide for interim payments on account of costs, or that the Registrar can issue an interim certificate, does not affect the court's inherent power, exercisable by the court, to make an interim payment order on account of costs. Such an order can be made by the court if it is satisfied that it is appropriate that such an order should be made in the circumstances of a particular case. The inherent power to make interim payment orders is unlikely to be exercised in every case but this jurisdiction need not be confined to "*rare and exceptional circumstances*". Clearly, the applicant will have to make a case why it is appropriate for the court to make such an order.

119. In the present case, the proceedings were commenced over five years ago, and the Plaintiffs have incurred costs of over USD 20 million. There is a realistic prospect that the appeal process is likely to take another two years. In the circumstances it is, in the Court's view, appropriate that an interim payment order should be made. If it was necessary, the court would say that the present circumstances are indeed "*exceptional*". CS Life does not take issue with the quantum of the interim payment. Accordingly, the Court orders that CS Life should pay to the Plaintiffs, by way of interim payment on account of costs, the sum of USD 10.47 million within 42 days of this Judgment.

G. Interest

120. The Plaintiffs seek orders that:

(i) interest shall run on the Judgment Debt at the US prime rate (from time to time) +1% from 29 March 2022 until payment; and

(ii) interest shall run on the costs order made on 29 March 2022 at the US prime rate (from time to time) +1% from the date on which such costs were paid by the Plaintiffs until payment.

121. By section 9 of the Interest and Credit Charges (Regulation) Act 1975 ("**the 1975 Act**") "[a]*ll sums of money due or payable under or by virtue of any judgment, order or decree of any court shall,* ***unless that court orders otherwise****, carry interest at the statutory rate from the time the judgment is given, or as the case may be, the order or decree is*

made, until the judgment, order or decree is satisfied" (emphasis added). Accordingly, unless the Court orders otherwise, interest will be payable at the statutory rate applicable from time to time (currently 3.5%) on both the Judgment Debt and the costs which CS Life has been ordered to pay.

122. Ms Hutton QC relies upon the practice of the English courts where US Prime +1 is the standard rate imposed for judgment debts in US dollars in respect of interest pre-judgment period. Ms Hutton referred the Court to the decision of Marcus Smith J in *Britned Development Ltd v ABB AB* [2018] EWHC 2913 (Ch) where the court held that:

> "*(1) An award of interest is not punitive and the use to which the party paying interest would have put the funds (and the returns that such party may or may not have made) is irrelevant.*
>
> *(2) There is a convention that at least the starting point for the award of simple interest (at least where the award is in £ sterling) is Bank of England base rate plus 1%. However, where the award is in another currency, like US$, the US$ Prime Rate plus 1% will be used as the starting point.*
>
> *(3)This conventional rate will, usually, be less than what a claimant would have to pay as a borrower, but more than a claimant could earn as a lender. The appropriate benchmark, however, is not to regard the claimant as the <u>lender</u> of monies (inferentially, to the defendant), but rather as having had to <u>borrow</u> money in order to fund the loss that has been vindicated by the award of damages in the judgment. It is this that informs the court's departure from the conventional starting point: the overall aim is to determine a fair rate to compensate the claimant.*
>
> *(4) When considering the departure from the conventional starting point, a broad brush approach must be taken. In Fiona Trust & Holding Corporation v Privalov [2011] EWHC 664 (Comm) Andrew Smith J put the point as follows:*
>
> > *"A "broad brush" is taken to determine what rate of interest is just and appropriate: it would be neither practical nor proportionate (even in a*

case involving as large sums as these) to attempt a minute assessment of what will precisely compensate the recipient. In particular, the courts do not have regard to the rate at which a particular recipient of compensation might have borrowed funds. This policy is adopted in order to control the extent of the inquiry to ascertain an appropriate rate…The court will, however, consider the general characteristics of the recipient in order to decide whether to assess interest at a rate that is higher or lower than is conventional."

(5) Specific evidence (eg as to the claimant's borrowing rates) may be adduced to support a particular departure from the conventional rate or as regards the particular circumstances of the claimant

123. It is clear from the decision in *Britned* that, when considering the rate of interest to be awarded, the English courts take into account the currency of the judgment. The Bermuda legislation and the practice of the Bermuda courts makes no such distinction.

124. Secondly, the *Britned* case concerned the award of interest under section 35A of the Senior Courts Act 1981 which provides that the court may include in any sum for which judgment is given "*simple interest, at such rate as the court thinks fit…on all or any part of the debt or damages in respect of which judgment is given…for all or any part of the period between the date when the cause of action arose and…the date of the judgment*".

125. The corresponding provision in Bermuda to section 35A of the Senior Courts Act 1981 is section 10 of the Interest and Credit Charges (Regulation) Act 1975 which provides that:

"*In any proceedings tried in any court for the recovery of any debt or damages, including proceedings in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at the statutory rate on the whole or any part of the debtor damages for the whole or any part of the period between the date when the cause of action arose and the date of judgment:*

Provided that nothing in this section—

(a) shall authorize the giving of interest on interest; or

(b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any enactment or otherwise; or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange".

126. A Bermuda court would have no jurisdiction to award interest exceeding the statutory rate under section 10 of the 1975 Act (See Kawaley J in *Lisa SA v Leamington Reinsurance Company Ltd v Avicola Villalobos SA* (108 of 1999; 79 of 2001; VLEX-793127373); Ground J in *Evans v Tuzo* [1993] Bda LR 47; and Hull J in *Kelland v Lamer* [1988] Bda LR 69). It is not readily apparent why the court should have the power to award interest in excess of the statutory rate under section 9 of the 1975 Act when there is no such power under section 10 of the same Act.

127. However, the Court accepts that the decision of Kawaley J in *Tensor Endowment Limited v New Stream Capital Fund Limited* [2010] Bda LR 38, is based on the assumption that the court has the jurisdiction to "*tinker with the applicable rate*". In the end Kawaley J rejected the defendant's application that the court should award no interest on the judgment debt as well as the plaintiff's application that the court should award compound interest or interest at the higher rate of 7.5%. It is to be noted that Kawaley J held that section 9 created a presumption that interest will be awarded at the statutory rate. The Court is only likely to interfere with the presumption that the interest will be awarded at the statutory rate if there is clear and cogent evidence that the facts of the particular case warrant such interference.

128. Here, the Plaintiffs simply rely upon the practice of the English courts and rely upon the convention that where the judgment debt is in US currency the starting point is the prime rate +1%. CS Life relies upon the expert evidence of Mr Bezant, set out in his letter of 20 June 2022. Mr Bezant again expresses the view that in the absence of evidence as to how the Plaintiffs would have invested these additional monies, he considers as an expert that the reasoning he put forward in respect of the partial surrenders applies to the wider damages figures. He says the deposit rate should apply to damages.

129. In all the circumstances the Court is not satisfied that it should interfere with the conventional order envisaged by section 9 of the 1975 Act. Accordingly, interest shall run on the Judgment Debt and on the costs order at the statutory rate from 29 March 2022 until payment.

130. In relation to the interest on costs, the Plaintiffs argue that, as the purpose of the interest awarded is to compensate the relevant party for being out of pocket during the period before payment, the appropriate start date for the payment of interest is the date on which the relevant costs were paid. The Plaintiffs therefore seek an order that interest should run on the costs order made on 29 March 2022, in respect of each payment of such costs made by the Plaintiffs to their lawyers, from the date when each payment was made by the Plaintiffs to their lawyers to the date when CS Life makes payment to satisfy the Court's costs order.

131. Ms Hutton QC argues that the Court can make such an order under section 9 of the 1975 Act. The Court accepts Mr Moverley Smith QC's submission that the Court's jurisdiction under "*unless the court orders otherwise*" in section 9 is limited to "*tinkering with the rate of interest*" and does not extend to awarding interest for the pre-judgment period. Were it otherwise, as Mr Moverley Smith QC correctly submits, section 10 would be entirely unnecessary.

H. **Conclusion**

132. Having regard to the legal and factual findings made earlier in this Judgment, the Court concludes that:

    (1) The Court is satisfied that the raising of the new point under section 17(5) of the SAC Act, which is of such fundamental importance in the context of these proceedings, nearly 5 years after the proceedings were issued and 7 weeks after the Judgment was handed down, constitutes an abuse of process. In view of this finding of abuse of process, the Court does not allow CS Life to raise the new point at this very late stage of the proceedings.

(2) For the reasons set out in this Judgment, the Court (a) refuses to make a declaration under section 17(5) of the SAC Act that the Judgment can only be enforced against the segregated accounts for the CS Life policies numbered 903PTF813696 and 755PTF813830, i.e. the segregated accounts in the names of the Sixth and Seventh Plaintiffs respectively; (b) makes a declaration that (i) any liabilities of CS Life arising from the Judgment and/or the orders of the Court dated 29 March 2022 and 6 May 2022; and (ii) all orders for costs made to date, and to be made, in these proceedings against CS Life are liabilities of CS Life's "general account" under the SAC Act.

(3) In relation to the application for a stay of execution pending appeal, the Court orders that a stay of execution pending appeal should be granted on condition that CS Life arranges to pay the Judgment Debt into the escrow account at Bank Julius Baer within 42 days of this Judgment.

(4) In all the circumstances the Court considers that the award of indemnity costs of these proceedings against CS Life is justified either on the ground of serious deficiencies in the discovery provided by CS Life or on the ground of failure to call relevant witnesses who should have been called. Such an order is also supported by CS Life's failure to admit that Mr Lescaudron committed a long-running fraud against Mr Ivanishvili, involving the Policy Accounts, and CS Life's failure to disclose the Group Function either to the Plaintiffs or to the Court prior to the commencement of the trial.

(5) The Court considers that it is appropriate to make an interim payment order on account of costs. The Court orders that CS Life should pay to the Plaintiffs, by way of interim payment on account of costs, the sum of USD 10.47 million within 42 days of this Judgment.

(6) In all the circumstances the Court is not satisfied that it should interfere with the conventional order envisaged by section 9 of the 1975 Act. Accordingly, interest shall run on the Judgment Debt and on the costs order at the statutory rate (3.5% per annum) from 29 March 2022 until payment.

133. The Court will hear the parties in relation to the issue of costs relating to these applications, if required.

Dated this 25th day of July 2022

_____

NARINDER K HARGUN
CHIEF JUSTICE