



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: No. 293 and 2020: No. 373

BETWEEN:

(1) BIDZINA IVANISHVILI

(2) EKATERINE KHVEDELIDZE

(3) TSOTNE IVANISHVILI

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

(4) GVANTSA IVANISHVILI

(5) BERA IVANISHVILI

(6) MEADOWSWEET ASSETS LIMITED

(7) SANDCAY INVESTMENTS LIMITED

Plaintiffs

-and-

CREDIT SUISSE LIFE (BERMUDA) LIMITED

Defendant

Before:

Hon. Chief Justice Hargun

Appearances:

Ms. Louise Hutton QC, Ms. Sarah-Jane Hurrion and Mr. Henry Komansky, Hurrion & Associates Ltd, for the Plaintiffs

Mr. Stephen Moverley Smith QC, Mr. John Wasty, Ms. Hannah Tildesley and Ms. Luisa Olander, Appleby (Bermuda) Limited, for the Defendant

Date of Hearing:

16 July 2021

Date of Ruling:

26 August 2021

RULING
(Amendment and Costs)

HARGUN CJ

Introduction

1. At the conclusion of the hearing on 16 July 2021 the Court gave leave to amend the Amended Statement of Claim (“ASOC”) as sought by the Plaintiffs. This Ruling sets out the reasons for giving leave to amend the ASOC. The Ruling also deals with the outstanding issue of whether costs, in relation to related applications, should be awarded to the Plaintiffs on the standard or the indemnity basis.

Reasons for giving leave to amend the Amended Statement of Claim

2. The amendments sought by the Plaintiffs related to (i) further particulars, based on material already contained in the Plaintiffs’ investment management and forensic accounting reports; and (ii) the removal of qualifying words, and consequential amendments. A number of the proposed amendments were opposed by Credit Suisse Life (Bermuda) Limited (“CS Life”), the Defendant.
3. In considering the objections made by CS Life the Court reminds itself of the basic principle relating to an application to amend pleadings. As the Court stated in its ruling of 22 December 2020 the starting point is that the Court would ordinarily give leave to amend the ASOC unless the proposed amendment is improper, or the amendment is likely to cause irreparable prejudice to the defendant. To disallow a proposed amendment to the ASOC the Court would have to be satisfied that the proposed amendment is either improper or that the amendment is likely to cause irreparable prejudice to CS Life.

4. CS Life opposed the final clause of paragraph 50H.3 of the draft Re-Amended Statement of Claim (“**RASOC**”) which states (in bold below) that when it comes to the damages for the misrepresentation claim:

*“The Plaintiffs rely on Mr. Davies’ evidence on those other models of loss in the alternative and claim the sum calculated under the Whole Portfolio Model set out above, updated to shortly before the date of trial, as their loss; **alternatively, a sum to be calculated in accordance with the court’s findings at trial as to the loss and damage suffered by the Plaintiffs.**”*

5. CS Life also objected to the same wording in paragraph 61.2(a) of the RASOC, which addresses losses flowing from the rest of the Plaintiffs’ claims.
6. Ms. Hutton QC, for the Plaintiffs, explained that the Plaintiffs have calculated their losses on the basis that, had the funds not been invested in the CS Life accounts, they would have been invested in a Medium Risk Portfolio with a reputable European bank. Mr. William Davies, the Plaintiffs’ forensic accounting expert, calculates the Plaintiffs’ losses using the various alternative counterfactual models which are as follows:

(a) Model 1 (the **Whole Portfolio Model**) calculates the difference between the value of the Policy Accounts and the value that would have been achieved if the assets had been invested in the Medium Risk Portfolio from inception;

(b) Model 2 (the **Surrendered Portfolio Model**) is based on the Whole Portfolio Model, but takes account of the surrenders that in fact took place with respect to the Policies;

(c) Models 3(a) and 3(b) (the **Objectionable Transactions Model**) focus on specific transactions which have been identified as unauthorised or imprudent and assumes that funds invested in those transactions were invested in the Medium Risk Portfolio; and

- (d) Model 4 (**the Overconcentration Model**) focuses on investments in assets which accounted for 5% or more of the total asset value of the Policy Accounts.
7. It is said on behalf of the Plaintiffs that it is practically impossible and not cost-effective for Mr. Davies in the alternative to try and calculate losses covering every possible outcome of the trial. The Plaintiffs recognise that the Court may make particular findings which impact the calculation of loss, or uphold only particular breaches, with the result that the Plaintiffs' experts need to remodel their calculations. The proposed amendment (in bold) is intended to cater for that eventuality.
 8. CS Life objected to these amendments on the basis that the Plaintiffs are reserving their position on loss and damage and that it would "*cause CS Life irremediable prejudice if the Plaintiffs were able to suggest that, following trial, they should have a further opportunity to advance a different case on quantum having failed to establish their case at trial.*"
 9. I accept Ms. Hutton QC's submission that the Plaintiffs are not seeking to reserve their position as the proposed amendment simply reflects that it may be the case that the Plaintiffs' quantum analysis would need to be updated in some way following the judgment. In the circumstances the Court does not consider that this proposed amendment is either improper or is likely to cause irremediable prejudice to CS Life.
 10. CS Life also objected to the addition of the words "*in breach of regulatory requirements*" in paragraphs 53.1(e) and 53.7(g)(iv) of the RASOC. The ASOC averred that imprudent and/or fraudulent transactions have been executed on the Policy Accounts, including transactions conducted for the purpose of receiving unauthorised commissions. The Plaintiffs contend that this proposed amendment reflects that the Plaintiffs' investment management expert, Mr. David Morrey, identified that the payment of such unauthorised commissions constituted a regulatory breach.
 11. CS Life opposed this amendment on the basis that it is a new factual allegation and that it is improperly particularised, as the pleading itself does not refer to the relevant regulations. The Court is satisfied that this is not a new factual allegation as the Plaintiffs' case has

always been that imprudent transactions were executed, which included transactions conducted for the purpose of receiving unauthorised commissions (paragraph 53.1(e) of RASOC) and the amendment simply makes clear that this constituted a regulatory breach. The Court also accepts that the relevant regulations are sufficiently identified in paragraph 11.22 of Mr. Morrey's Report. In the circumstances the Court is not satisfied that this proposed amendment is either improper or is likely to cause irremediable prejudice to CS Life.

12. Further, CS Life opposed the proposed amendments at paragraphs 53.7(a)(i-iv) and 53.7(c3) of the draft RASOC. The Plaintiffs contend that these amendments provide further particulars of the Plaintiffs' case that CS Life failed to monitor the performance of the investments. CS Life objected to these amendments on the basis that these paragraphs "*do not provide adequate particulars of the allegations of the failure to monitor and/or supervise the Bank*".
13. The Court accepts Ms. Hutton QC's submission that the issue of whether the Plaintiffs' case as to the duty to monitor is sufficiently pleaded has already been determined against CS Life by this Court and the Court of Appeal. The fact that the Plaintiffs have added additional particulars arising out of the expert evidence does not allow CS Life to reopen this issue. In any event, if CS Life considers that these further particulars "*do not provide adequate particulars of the allegations of failure to monitor and/or supervise the Bank*", it is open to CS Life to request further particulars. In the circumstances, the Court does not consider that the proposed amendment is either improper or that it will cause irremediable prejudice to CS Life.
14. Finally, CS Life opposed the proposed amendment at paragraph 61.2 of the RASOC whereby the Plaintiffs sought permission to (i) remove a reference to the Plaintiffs reserving the right to provide further particulars once expert evidence has been exchanged and (ii) replace it with a statement that these paragraphs contain "*The best particulars of loss which the Plaintiffs are currently able to provide...*"

15. CS Life objected to the word “*currently*” arguing that it is inappropriate for the pleadings to contain reservations like this and that the word “*currently*” renders the pleading “*open-ended*”.
16. I accept the Plaintiffs’ submission that the pleading is not rendered open-ended by these words given that the Plaintiffs accept that to the extent the Plaintiffs in the future seek to introduce new particulars of loss, this would require either CS Life’s consent or the permission of the Court. In the circumstances the Court does not consider that the proposed amendment is either improper or that it will cause irreparable prejudice to CS Life.
17. It was for these reasons that the Court granted the Plaintiffs leave to amend the ASOC at the conclusion of the hearing on 16 July 2021.

Issue of costs

18. The outstanding issue of costs relates to three applications: first, CS Life’s summons for an extension of time to serve its forensic accounting and investment management reports (the **Financial Reports**) (the **Time Summons**). Second, the Plaintiffs’ application for an order that unless CS Life files the Financial Reports within 7 days it shall be prevented from relying on the same at trial (the **Unless Order Summons**). Third, CS Life’s application for leave to appeal the Supreme Court’s decision of 10 June 2021 and a stay of certain resulting orders.
19. The Plaintiffs provided CS Life with the draft RASOC on 6 May 2021. As noted above, CS Life objected to certain proposed amendments and took the position that it would withhold its consent to the amendments unless further particulars were provided.
20. CS Life was due to serve its Financial Reports by 4 June 2021. CS Life did not serve them by that deadline. Instead, it provided a draft Time Summons to the Plaintiffs seeking an extension of time to serve the Financial Reports from 4 June 2021 until “*a date after the*

Plaintiffs provide the particulars of their claim requested by CS Life by letter dated 3 June 2021”.

21. In response, the Plaintiffs filed the Unless Order Summons. The Plaintiffs contend that the application for an unless order was fully justified given that CS Life was ordered to serve its Financial Reports by 30 April 2021. The Plaintiffs agreed to extend the deadline by a week, at CS Life’s request, and then agreed to extend it again by four weeks until 4 June 2021. CS Life waited until the last moment (i.e. the afternoon of 4 June 2021) to issue the Time Summons for an extension of time to serve its Financial Reports. The Plaintiffs argue that by deliberately waiting until the deadline to issue the Time Summons, CS Life was seeking to grant itself a *de facto* extension.
22. The Plaintiffs referred to paragraph 17 of Ms. Burke’s 23rd affidavit, filed on behalf of CS Life, where she states that “*CS Life’s financial experts cannot properly opine on the quantification of losses that potentially flow from the Plaintiffs’ case*” until the issues have been clarified by the Court’s determination of the Plaintiffs’ application to amend the ASOC. Ms. Hutton QC argues that this has been shown not to be the case by the simple fact that CS Life has been able to file those Financial Reports before the Court had the opportunity to hear the amendment application. CS Life filed its Financial Reports, running to nearly 700 pages, late on 12 July 2021, less than 48 hours before skeleton arguments were due to be exchanged.
23. The Plaintiffs submit that in circumstances where CS Life has now been able to file its Financial Reports, and has done so without any explanation of its conduct, the Plaintiffs can only conclude that its Time Summons and its opposition to the Unless Order were based on a characterisation of the position which CS Life knew would not stand up at the hearing, but was cynically designed to buy itself an extension of time which it knew would not be ordered by the Court.

24. Similarly, in relation to the application for leave to appeal CS Life indicated, a day before the hearing, that it had determined not to pursue that application.
25. In the circumstances the Plaintiffs submit that they have met the high threshold for an order for indemnity costs.
26. Mr. Moverley Smith QC accepts that there has been a change of position in relation to the filing of the Financial Reports but submits that CS Life’s conduct is not such that the Court should order costs against it on the indemnity basis. Mr. Moverley Smith QC accepts that the Court should award the Plaintiffs their costs in relation to the Time Summons, the Unless Order Summons and the application for leave to appeal but submits that the Court should do so on the standard basis.
27. As indicated in previous Rulings the practice of the courts in this jurisdiction is to award indemnity costs only in exceptional cases. The leading authority in relation to indemnity costs remains the judgment of Ground CJ in *Michael DeGroot v Marion Macmillan* [1991 No. 148]. In that case Ground CJ reprobated the defendant for having sworn a false affidavit in respect of proceedings brought by the plaintiffs for summary judgment pursuant to Order 86. Ground CJ considered that, had that affidavit not been sworn, the action may well have come to an end at an early stage. However, the Chief Justice declined to order costs against the defendant on the indemnity basis “*because I consider 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 is not the case here, where, although I consider that the affidavit of 24th December 1991 amount 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.*”
28. Whilst the conduct of CS Life in relation to these three applications is open to justifiable criticism, the Court has come to the view that it does not rise to the level of “*grave impropriety*” envisaged in the judgment of Ground CJ. Accordingly, the Court makes an order that CS Life should pay the costs of the Plaintiffs, on the standard basis, incurred in

relation to the Time Summons, Unless Order Summons and the application for leave to appeal.

Dated this 26th day of August 2021.

NARINDER K HARGUN
CHIEF JUSTICE