# In The Supreme Court of Bermuda

## CIVIL JURISDICTION
## 2017: No. 293

**BETWEEN:**

**(1) BIDZINA IVANISHVILI**

**(2) EKATERINE KHVEDELIDZE**

**(3) TSOTNE IVANISHVILI**

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

**(4) GVANTSA IVANISHVILI**

**(5) BERA IVANISHVILI**

**(6) MEADOWSWEET ASSETS LIMITED**

**(7) SANDCAY INVESTMENTS LIMITED**

**Plaintiffs**

**-and-**

**CREDIT SUISSE LIFE (BERMUDA) LIMITED**

**Defendants**

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| **Before:** | **Hon. Chief Justice Hargun** |
| **Appearances:** | **Mr. Joe Smouha 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** |
| **Dates of Hearing:** | **12 February 2021** |
| **Date of Ruling:** | **1 March 2021** |

# RULING

*Test for awarding indemnity costs of the entire action; test for awarding indemnity costs in relation to an interlocutory application; test for making an order that the costs should be paid "forthwith"*

**Hargun CJ**

**Introduction**

1. On 22 December 2020 I handed down a Ruling ("**the Judgment**") in relation to nine separate applications dealing with various interlocutory matters**.** This Ruling deals with matters arising from the Judgment and various subsequent summonses. The factual background to this action is set out in paragraphs 3 to 15 of my Ruling in relation to the strike out application dated 13 September 2018 and in paragraphs 2 to 4 of the Judgment.

2. The matters before the Court are:

   (1) Finalisation of the Order arising from the Judgment;

   (2) Costs arising from the Judgment;

   (3) Directions in relation to the application to vary paragraph 5 of the Order dated 2 June 2020;

   (4) Consideration of the draft order inviting the Court to case manage and hear together action no. 2017 : 293 ("the Main Proceedings") and action no. 2020 : 373 ("the Misrepresentation Proceedings");

   (5) Credit Suisse Life (Bermuda) Limited's ("CS Life") application for leave to appeal the Judgment; and

(6) CS Life's application in respect of the Plaintiffs' failure to delete qualifying words from the amended Statement of Claim as indicated in the Judgment.

**(1) Finalisation of the Order arising from the Judgment**

3. The terms of the order appended to the skeleton argument of the Plaintiffs are agreed by the parties (other than the issue of costs). I confirm the agreed terms as appearing in paragraphs 1 to 26 of the draft order. I confirm that in paragraph 12 the words "*excluding its Defence on the amendments leave for which will be determined at trial*" should remain in the order. In relation to paragraph 25, the trial of this matter is now fixed to commence on 15 November 2021 with a time estimate of 5 weeks.

**(2) Costs arising from the Judgment**

4. The application for costs raises three separate issues: (a) whether the Plaintiffs should be entitled to costs in respect of certain applications determined by the Court and as set out in the Judgment; (b) if the Plaintiffs are entitled to costs in relation to certain applications, whether those costs should be assessed on the indemnity basis; and (c) if the Plaintiffs are entitled to costs in relation to certain applications, whether those costs should be taxed and paid forthwith.

**(a) Plaintiffs' entitlement to costs**

5. As noted in paragraph 74 of the Judgment, Kawaley CJ in *Binns v Burrows* [2012] Bda LR 3, summarised the relevant Bermudian costs principles and stated that the Court's duty in awarding costs will generally be to determine which party has in common sense or "real-life" terms succeeded; award the successful party its/his costs; and consider whether those costs should be proportionately reduced because,

for example, they were unreasonably incurred or there is some other compelling reason to depart from the usual rule that costs follow the event.

**(i) Costs in relation to CS Life's discovery application**

6. As noted in paragraph 19 of the Judgment, CS Life sought extensive discovery in relation to bonus payments; emails and other forms of correspondence; notes of calls/meetings; telephone records; Raptor investments; account statements; investment agreements/contracts/profiles; and portfolios with third party banks/financial institutions.

7. At paragraph 94 of the Judgment, this application was dismissed by me on the basis that: "*Having considered the affidavit evidence and submissions of Counsel, I have determined that this application fails both as a matter of principle and in relation to the individual categories of documents sought*."

8. In response CS Life contends that whilst it was not successful in obtaining an order for specific discovery, its application did result in the provision of further discovery by the Plaintiffs because they conceded that their existing discovery was deficient in various respects. CS Life contends that following the service of its specific discovery application the Plaintiffs produced their Third List of Documents dated 19 October 2020 including (1) account statements for New Frontier Asset Management AG showing payments made to Chista Enterprises Limited, this being one of the categories of documents requested at paragraph 1.1(a) of the summons; and (2) account statements for Mandalay Trust for the year ending 2012 as requested at paragraph 1.6 of the summons. CS Life also points to the Fourth List of Documents dated 5 January 2021 which contained telephone records showing communications between various Credit Suisse and Bank employees and Bidzina Ivanishvili and George Bachiashvili, this being the subject of paragraph 1.4(a) of the summons.

9. I am satisfied that these documents would have been produced had CS Life provided the draft summons to the Plaintiffs as requested in correspondence. In this regard it is to be noted that the Plaintiffs served their First List of Documents in December 2018 and no complaint was made in respect of that List until the letter from Appleby dated 18 March 2020, 15 months after the service of the Plaintiffs' List of Documents. The letter set out the alleged deficiencies in the discovery given by the Plaintiffs (as reflected in the summons) and took the position that unless the Plaintiffs confirmed within 7 days that they would provide the additional discovery requested "*we will immediately apply to the Court for an order for specific discovery*".

10. The Plaintiffs' response to Appleby's letter of 18 March 2020 was provided in the letter from Hurrion, the Plaintiffs' Bermuda attorneys, dated 25 March 2020. This letter provided a comprehensive response by reference to each category of the documents sought to be discovered but stated that "*in the event that your client remains intent to issue an application, we expect that you will provide us with a draft of any application such that we can attempt to deal with any alleged issues without wasting Court time and resources."* CS Life ignored this reasonable request and issued the application without any constructive engagement with the attorneys for the Plaintiffs.

11. In any event, I am satisfied that the discovery given in the Third and Fourth Lists of Documents bears no relationship to the extensive documentation sought in the discovery application and, in my judgment, provides no basis for denying costs to the Plaintiffs in respect of the entirely unsuccessful discovery application pursued by CS Life. Accordingly, in my judgment, CS Life should pay the Plaintiffs' the costs related to its specific discovery summons dated 17 July 2020.

**(ii) Costs in relation to CS Life's application for further and better particulars**

12. In paragraph 87 of the Judgment I refused to make an order that the Plaintiffs provide further and better particulars to the 121 separate requests made by CS Life. The Judgment notes that a substantial number of requests for particulars were already answered in the form of amendments sought to be made to the Statement of Claim (category 4 amendments). The application for further and better particulars, as made by the summons, was dismissed. In the circumstances, the Plaintiffs are entitled to the costs related to the unsuccessful application for further and better particulars of the Statement of Claim.

13. In response, CS Life argues that whilst it was unsuccessful in the application it achieved a measure of success in relation to this application and points to the provision made by the Court enabling CS Life to obtain particularisation in relation to certain of its requests by ordering that the Plaintiffs' case would be particularised in its forensic accountancy report. It also points to the statement made by the Court that the Plaintiffs' pleading should not be left open ended by the use of qualifying words.

14. The Court took the view that the bulk of the particulars requested by the Defendant were, on a proper analysis, requests for evidence which are to be properly provided in the form of the forensic accountancy report. The Court did not consider that these requests were proper requests for particulars of the Statement of Claim. Accordingly, this is not the basis for denying costs to the Plaintiffs to which they would otherwise be entitled on account of an unsuccessful application for further and better particulars by CS Life.

15. Overall, I am satisfied that the Plaintiffs were the successful parties in relation to CS Life's application for further and better particulars of the Statement of Claim and there is no substantial reason why they should be denied the costs

related to the application. Accordingly, CS Life should pay the costs of the Plaintiffs in relation to CS Life's unsuccessful application for further and better particulars of the Statement of Claim.

**(iii) Costs in relation to the Plaintiffs' application for an unless order**

16. In paragraph 54 of the Judgment the Court noted that paragraph 5 of the Order dated 2 June 2020 required CS Life to confirm that CS Life has examined the disclosed documents in unredacted form and satisfied itself that any redactions are appropriately made in accordance with Bermuda law.

17. At paragraph 60 of the Judgment the Court ruled that the literal terms of paragraph 5 of the Order had not been complied with. The Court also noted that there was no suggestion at the hearing leading up to the Order of 2 June 2020 that all the documents, both belonging to the Bank and CS Life, were subject to mandatory redactions under Swiss law and that despite the terms of paragraph 5 of the Order, approximately 71,000 redactions on the documents of the Bank and CS Life have not been reviewed by a Bermuda lawyer in order to ascertain whether these redactions are appropriate as a matter of Bermuda law.

18. In the circumstances, the Court made an Order requiring CS Life to comply with the literal terms of paragraph 5 of the Order. However, given the submission made by CS Life that such compliance would be impossible as a matter of Swiss law the Court declined to make an unless order but allowed CS Life to make an application to vary paragraph 5 of the Order by reference to the alleged mandatory provisions of Swiss law.

19. In the circumstances, it seems to me that the Plaintiffs have been the successful party in substance in relation to this application and I see no reason why CS

Life should not be required to pay the costs in relation to this application to the Plaintiffs and I so order.

**(iv) Costs in relation to CS Life's first time summons**

20. As noted in paragraph 89 of the Judgment CS Life filed a summons on 5 June 2020 seeking an extension of time to exchange expert evidence pursuant to paragraph 5 of the Order of 9 September 2019, to a date 8 weeks from the date on which the Plaintiffs reply to CS Life's Request. Given that CS Life's Request was dismissed in the Judgment, this application was accordingly also dismissed. Given that this application, made by CS Life, was dismissed there is no reason in principle why CS Life should not pay the costs of the Plaintiffs in relation to this application and I so order.

**(b) Whether costs should be paid on the indemnity basis?**

21. The Plaintiffs contend that the above noted costs orders at paragraphs 6 to 20 should be paid by CS Life to the Plaintiffs on the indemnity basis as opposed to the conventional standard basis.

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 <u>against a defendant,</u> 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 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. It may not always be an appropriate test in the context of an application for indemnity costs in respect of a distinct interlocutory application prior to the trial and conclusion of the action. In the context of an interlocutory application the Court retains its jurisdiction to award indemnity costs in appropriate cases. In such applications indemnity costs against a party should be reserved for exceptional circumstances involving great impropriety in relation to the conduct of the application under consideration.

26. In the end I have come to the view that the costs orders that I have made at paragraphs 6 to 20 above should be taxed on the standard basis as I take the view that, in all the circumstances, it is not justified that they should be taxed on the indemnity basis. My brief reasons for taking that view are as follows.

27. In relation to CS Life's application for specific discovery, I dismissed the application and stated at paragraph 94 of the Judgment that it failed both as a matter of principle and in relation to the individual categories of documents sought. At paragraph 97, I also held that the principal list of over 10,000 documents was discovered over 17 months ago and no reasonable explanation was provided by CS Life as to why the application could not have been made earlier.

28. The mere fact that the Court considers the application to be without merit does not, in my judgment, provide the exceptional circumstances warranting the making of

an indemnity costs order. Likewise, the delay of 17 months in making the application, in the context of this litigation, does not, in my judgment, provide the exceptional circumstances justifying the making of indemnity costs order against CS Life.

29. In relation to the application for further and better particulars, whilst the Court dismissed the application as framed requesting formal particulars, the Court recognised that some requests were properly made. The Court took the view that some of the requests were properly answered by the amendments made to the Statement of Claim (category 4 amendments). In relation to some of the other requests, the Court took the view that whilst they were in the nature of requests for evidence, the information requested would have to be provided prior to the trial of the action. In relation to these requests, the Court determined, at the suggestion of the Plaintiffs, that they were properly responded to by the service of the forensic accountancy report to be served by the Plaintiffs. In all the circumstances, I do not consider this application provides the exceptional circumstances involving grave impropriety to warrant the making of an award of indemnity costs order against CS Life.

30. With respect to the application for the unless order, the Court noted that there had been historical non-compliance with the Specific Discovery Order. However, in the context of the application for an unless order, the relevant issue was whether there was any existing and continuing non-compliance with the existing Orders. In relation to this aspect CS Life presented an arguable legal issue that it was simply unable to comply given the mandatory restrictions imposed upon the Bank and CS Life under Swiss law. In the circumstances, the Court took the view that it would be unjust to make an unless order until the position under Swiss law was clarified. Given the uncertainty as to the reason for the existing non-compliance, it would not, in my judgment, be appropriate to award indemnity costs against CS Life. Mr Moverley Smith freely admitted that he was unaware of the restrictions placed by

Swiss law on giving discovery by the Bank and CS Life at the hearing which led to the Specific Discovery Order and so was unable to advise the Court in relation to these restrictions. The inability of Mr Moverley Smith to advise the Court of these restrictions does not, in my judgment, justify the making of an indemnity costs order against CS Life.

31. In relation to the first Time Summons, I do not consider that there are any exceptional circumstances which would justify the making of an indemnity costs order against CS Life.

**(c) Whether costs should be paid "forthwith"**

32. The Plaintiffs submit that the Court has a broad discretion under RSC Order 62, Rule 8(2) to order that the costs are taxed before the conclusion of the proceedings. They submit that such an order is appropriate here since there have been a significant number of interlocutory applications and CS Life has repeatedly been on the losing side of these applications. These applications include an application brought by CS Life to strike out certain claims; CS Life's opposition to the Plaintiffs' specific discovery application dated 5 of August 2019 which required a two day hearing, involving leading counsel and expert evidence of Swiss law; CS Life's unsuccessful applications at the October 2020 hearing for further and better particulars of the Statement of Claim and specific discovery.

33. The Plaintiffs complain that they have accrued very large legal bills dealing with these interlocutory matters which CS Life will in due course have to pay and yet which may not be taxed until (in all likelihood) sometime in late 2022 or early 2023 if the parties are unable to reach agreement following the conclusion of these proceedings. Accordingly, any costs orders made in the Plaintiffs' favour arising out of the October 2020 hearing, submit the Plaintiffs, should be taxed forthwith.

34. RSC Order 62, Rules 8(1) and (2) provide:

***"62/8 Stage of proceedings at which costs to be taxed***

*(1) Subject to paragraph (2), the costs of any proceedings shall not be taxed until the conclusion of the cause or matter in which the proceedings arise.*

*(2) If it appears to the Court when making an order for costs that all or any part of the costs ought to be taxed at an earlier stage it may, except in a case to which paragraph (3) applies, order accordingly."*

35. Construing the corresponding rule in the Grand Court Rules in the Cayman Islands in *Re Sphinx* [2009] CILR 178, Smellie CJ considered that an order that costs should be taxed forthwith could only be made in exceptional circumstances:

*"8 The second question is whether DPM should be ordered to pay these costs forthwith. DPM"s further contention is that even if, as I have determined, a dispositive costs order should now be made, the further exceptional requirement that it be paid forthwith - which is contended for by the joint official liquidators and the committee - cannot be justified. The normal costs order to be made in respect of an interlocutory proceeding such as the present is that the costs be taxed if not agreed in the usual way, and be paid at the conclusion of the case.*

*9 An order for payment forthwith would therefore be exceptional and was so acknowledged by the other parties. The rules of court would clearly so regard such an order. Order 62, r.9(1) of the Grand Court Rules provides that 'the costs of proceedings shall not be taxed until the conclusion of the cause or matter in which the proceedings arise' unless, subject to r.9(2), earlier taxation is deemed suitable by the court.*

*10 A cause or matter is concluded when the court in question has finally determined the matters in issue, whether or not there is an appeal from that determination. So said Saville, J. in* Rafsanjan Pistachio Producers Co-op. *v.* Bank Leumi (UK) Ltd. *(3) (cited in 1* Supreme Court Practice 1999, *para. 62/8/1, at 1136) indicating that an interlocutory application, such as the one being discussed here as to the incidence of its costs, would not ordinarily be a proper stage at which to make an order for costs to be taxed forthwith. In the absence of any exceptional circumstances, I take the same approach here and refuse to order that there should be taxation and payment forthwith."*

36. In *Fortunate Drift Limited v Canterbury Securities Ltd*, Cayman Grand Court, Financial Services Division, 11 June 2020, Kawaley J accepted, at [10], that the usual rule in the Cayman Islands is that the costs of the proceedings shall be taxed at the conclusion of the cause or matter in which the proceedings arise and the purpose of this rule is to enable interlocutory costs orders to be set off against one another. At [24] Kawaley J summarised the relevant factors in the exercise of the discretion as follows:

*"To summarise, I found that not ignoring the fact that each case falls to be determined on its own facts, the factors likely to be relevant in many cases to determining whether or not to order the interlocutory costs should be taxed and paid forthwith under GCR 62 rule 7(2) were the following:*

*(1) whether the relevant interlocutory costs were incurred in relation to a discrete issue within the wider proceedings viewed as a whole;*

*(2) whether the paying party has acted unreasonably in any relevant way in relation to the application to which the interlocutory costs order relates;*

*(3) whether the proceedings as a whole have a long time to run; and*

*(4) whether being required to pay the interlocutory costs forthwith before the end of the litigation would be for any reason unfair, having regard to the overriding objective of GCR Order 62."*

37. I consider that the same considerations apply in relation to the exercise of the Court's discretion under the Bermuda RSC Order 62, Rules 8(1) and (2).

38. In the end I have come to the conclusion that this is not a sufficiently exceptional case where the Court should exercise its discretionary jurisdiction and order that the costs of the October 2020 interlocutory applications should be taxed and paid forthwith. Firstly, I refer to the considerations which led me to decline making costs orders on the indemnity basis as set out in paragraphs 6 to 20 above. Secondly, I bear in mind that the trial of this action is scheduled to commence on 15 November 2021 and is scheduled to be completed by the end of this year. In the context of these substantial and long-standing proceedings, commenced on 17 of August 2017, the proceedings do not have a long time to run. In my judgment, the ordinary rule that the interlocutory costs orders should be taxed at the conclusion of the proceedings should be followed so as to facilitate costs orders to be set off against each other.

**(3) Directions in relation to the application to vary paragraph 5 of the Order dated 2 June 2020**

39. I am content to give the following directions, which did not appear to be opposed, to determine the summons to vary paragraph 5 of the Order dated 2 June 2020:

(a) The Plaintiffs to file their evidence in response, including Swiss law expert evidence if so advised, by 4 PM on 5 March 2021;

(b) The Defendant to file its evidence in reply, including any Swiss law expert evidence if so advised, by 4 PM on 26 March 2021;

(c) A without prejudice meeting/teleconference of the Swiss law experts to be held on or before 23 April 2021, and the Swiss law experts to file a joint memorandum by 4 PM on 30 April 2021;

(d) The hearing to be listed for the first mutually convenient date for the parties and the Court on or after 17 May 2021, with the time estimate of one day, with skeletons to be exchanged two clear days before the hearing.

**(4) Consideration of the draft order inviting the Court to case manage and hear together action no. 2017 : 293 ("the Main Proceedings") and action no. 2020 : 373 ("the Misrepresentation Proceedings")**

40. I approve the draft Consent Order whereby the Plaintiffs and CS Life have agreed that the Main Proceedings and the Misrepresentation Proceedings be case managed and heard together. It is agreed that the Main Proceedings shall be designated as the lead proceedings. If the Plaintiffs are successful in obtaining permission to plead their misrepresentation claims in the Main Proceedings, the Defendant's defence to the Misrepresentation Proceedings shall stand as its defence to the misrepresentation claims in the Main Proceedings the Consent Order also makes provisions in relation to discovery and evidence in the Misrepresentation Proceedings. It is agreed that the Misrepresentation Proceedings and the Main Proceedings shall be determined together at trial, currently listed for five weeks commencing on 15 November 2021.

**(5) CS Life's application for leave to appeal the Judgment**

41. By notice of motion dated 5 January 2021, CS Life applies for leave to appeal three aspects of the Judgment:

(1) the dismissal of the aspects of the CS Life summons for further and better particulars where those further particulars cannot be provided by way of the Plaintiffs' forensic accountancy expert evidence;

(2) the direction for CS Life's forensic accountancy expert report to be served only two weeks after the service of the Plaintiffs' report; and

(3) the dismissal of CS Life's application for specific discovery so far as it relates to documents concerning the Plaintiffs' investments in other accounts with the Bank and with other financial institutions**.**

*42.* Mr Moverley Smith accepts that the decisions in respect of which he seeks leave to appeal are decisions which are made by the Court in the exercise of its discretionary jurisdiction. He submits that the relevant test in relation to the appeal against a decision made in the exercise of the Court's discretion is set out in this Court's decision in *Athene Holding Ltd v Imran Siddiqui* [2019] SC (Bda) 3 Com (14 Jan 2019) at paragraph 119:

> ***"****The decision whether to grant a stay on grounds of forum non conveniens or case management is a discretionary one and an appellate court is unlikely to interfere with that decision unless it can be shown that the court below has made an error of law. Sir Alastair Blair-Kerr P. in* Fordingbridge International Agencies Limited v American Centennial Insurance Company *(Bermuda Civil Appeal No. 15 of 1986) outlined the approach of the Bermuda Court of Appeal as follows:*
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> > *"Appellate Courts are slow to interfere because, as Lord Brandon said in* The Abidin Daver *[1984] 1 AC 398, the decision whether to allow or refuse (sic) an application to stay an action is a discretionary decision for the judge of first instance to whom the application is made. The grounds on which an appellate court may interfere have often been stated; but bear repetition; and I cannot do better than quote the words of Lord Brandon at p 420: "… Where the judge of first instance has exercised his discretion in one way or the other, the grounds*

*on which an appellate court is entitled to interfere with the decision which he has made are of limited character. It cannot interfere simply because its members considered that they would, if themselves sitting at first instance, have reached a different conclusion. It can only interfere in three cases: (1) where the judge has misdirected himself with regard to the principles in accordance with which his discretion had to be exercised; (2) where the judge, in exercising his discretion, has taken into account matters which he ought not to have done or failed to take into account matters which he ought to have done; or (3) where the decision is plainly wrong."*

43. In relation to the application for further and better particulars, CS Life contends that given the Plaintiffs' assurances that the further and better particulars would be provided by their forensic accountancy report, the Court did not order that the Plaintiffs should provide responses to CS Life's request for further and better particulars. CS Life contends that the Court erred in so deciding in that it overlooked the class of important requests for particularisation of the Plaintiffs' case on the alleged failure by CS Life in its alleged duties to monitor and supervise investment activity and the Plaintiffs' case on the causative impact of the same upon any loss suffered by the Plaintiffs.

44. CS Life states that the CS Life Duty Requests are highlighted in red in an annotated copy of the request for further and better particulars annexed to the proposed notice of appeal ("**the Annotated Request**"). CS Life further states that this document was prepared by CS Life in order to demonstrate which requests could be dealt with by the provision of particulars in the Plaintiffs' forensic accountancy expert report and which could not. This document, CS Life states, was before the Court when the Judgment was written.

45. In considering this ground of appeal it is relevant to consider the presentation of the application for further and better particulars by CS Life at the October 2020 hearing. As noted earlier, the request for further and better particulars was extraordinarily broad containing 121 separate requests, many of which comprised multiple sub requests.

However, Mr Moverley Smith elected not to address the Court in relation to each and every request but simply highlighted some of the requests. The purpose of this exercise was, as Mr Moverley Smith stated, to give "*your Lordship… a flavour of the sorts of points we are making. If I can just to do that by reference to perhaps two or three more of the requests your Lordship will see where we go to*" (page 56 of transcript of the 22 October 2020 hearing). The Court expressed concern that it may not be in a position to properly rule on the requests in circumstances where the vast majority of the requests were not argued by either counsel at the hearing.

46. As Mr Smouha correctly points out it was only on the second day of the hearing that Mr Moverley Smith stated he would be providing an Annotated Request for the purposes of identifying "*those parts of the further and better particulars that no longer need to trouble your Lordship… I think it's going to be color-coded so your Lordship can easily see particulars we are concerned about*" (page 6 of transcript of 23 October 2020 hearing). Mr Smouha advised the Court that the submissions had been concluded and that the Plaintiffs had pointed out in their skeleton argument and in submissions that CS Life had not sought to review its own requests, even to remove those that had fallen away, and submitted that it was completely inappropriate for such an Annotated Request to be put before the Court (page 20-21 of the transcript of 23 October 2020 hearing).

47. The position remains that most of the requests which are colour-coded red in the Annotated Request and in respect of which leave to appeal is sought, were not in fact addressed to the Court by CS Life at the October 2020 hearing. In these circumstances, the Court made no determination that any of these requests were proper requests for further and better particulars. In the circumstances there can be no real prospect of success in relation to this ground of appeal.

48. Mr Moverley Smith did address the Court in relation to the request for further and better particulars of the allegation that CS Life failed to monitor investment of the Policy Assets and/or supervise the Bank as alleged in paragraph 53.7 of the Statement of Claim. As the

Judgment noted in paragraph 83 CS Life has had no difficulty understanding this allegation bearing in mind that CS Life has in fact served evidence dealing with this allegation. The evidence in question is Ms Homann's statement dated 15 May 2020 paragraph 20; Mr Celia's first statement at paragraph 59 and 85; Mr Coffey's first statement at paragraphs 55, 56, 63-67; Mr Keusch's first statement at paragraphs 85, 86, 45-47; and Mr Vaccaro's first statement at paragraphs 29, 42-45, 47-49, 51-52.

49. As noted in paragraphs 86 and 87 of the Judgment I accepted Mr Smouha's submission that *many of the requests* for particulars made by CS Life were in reality requests for evidence in support of allegations made in the Statement of Claim. In relation to these requests I accepted that the identification of these detailed particulars is properly the subject matter of forensic accounting reports. I understood Mr Moverley Smith to accept this position when he stated: "*I would be content on the basis that it is essentially treated as the particularisation of the pleading and then we respond the particularisation. I think all these issues go away if the Court adopts that approach. It will then mean that we know what the case is we have to answer and can then instruct our expert report and accordingly*" (page 20 of the transcript of 23 October 2020 hearing).

50. In the circumstances, as stated above, I do not consider that CS Life has a real prospect of success in relation to this ground and, accordingly, I refuse the application for leave to appeal.

51. In relation to the second ground of appeal, CS Life complains that the Court ordered a sequential exchange of forensic accountancy expert reports, giving the Plaintiffs until 16 April 2020 (some 4 months from the Judgment) to particularise their case by way of their forensic accountancy expert report but giving CS Life only 14 days to respond. CS Life complains that it is only when CS Life's forensic accountancy expert receives the Plaintiffs' report that he will be able to identify the particular transactions sought to be impugned by the Plaintiffs. It is said that it is only from that point onwards that he will be able to investigate the allegations made by the Plaintiffs in respect of those transactions

and that it is simply impossible for the task to be carried out within 14 days. Accordingly, CS Life seeks a stay of the Order at paragraph 131 of the Judgment providing the service of CS Life's forensic accountancy expert report by 4 PM on the 30 April 2020 pending the determination of the appeal.

52. I decline to grant the stay sought in relation to CS Life's forensic accountancy expert report for the following reasons. First, it is entirely unrealistic for CS Life to contend that it would have no idea of the scope of the Plaintiffs' forensic accountancy report. As was made clear by Mr Smouha at the October hearing, it is of course important that the forensic accountancy experts have a proper understanding of what the issues in the case are and of the questions they must address. It is precisely for that reason that the Plaintiffs have proposed that the parties provide an agreed and joint list of questions to the experts. The Plaintiffs' proposed list of questions has been provided to CS Life. The list contains, *inter-alia*, a series of specific questions about the nature of the transactions on the CS Life Policy Accounts, for example asking the experts to identify and provide details of any transactions at an over or under-value and any transactions which generated unauthorised fees. These questions will properly allow the experts to identify the transactions falling within the scope of paragraph 61.2 of the Amended Statement of Claim. In the circumstances, it is expected that CS Life's forensic accountancy expert would be engaged in the same exercise at the same time as the Plaintiffs' expert.

53. Second, the Court has made clear to CS Life that in the event it has genuine difficulties meeting the deadline for the service of its forensic accountancy report, it is of course at liberty to apply to the Court to seek an extension to do so.

54. Third, in the circumstances, this ground of appeal based upon alleged discrepancy in the delivery of the expert reports of 4 months for the Plaintiffs and 2 weeks for CS Life has no real prospect of success and I would refuse leave to appeal on this ground.

55. Fourth, a stay of the Court's order would in substance provide - CS Life an indeterminate extension to serve its forensic accountancy report. This would clearly be disruptive to the parties' preparation for the trial scheduled to commence on 15 November 2021.

56. The third ground of appeal deals with the specific discovery. By summons dated 10 July 2020, CS Life applied for specific discovery orders in relation to the Plaintiffs' discovery. The Court dismissed the application for specific discovery on the grounds, *inter-alia*, the application was too late, the request constituted a fishing expedition, the potential probative value of the documents was so marginal that they did not justify the inconvenience and expense of the Plaintiffs repeating the discovery exercise and the documents requested went only to credibility.

57. CS Life seeks leave to appeal that decision in relation to three classes of documents: (i) documents relating to investments made by the Plaintiffs in Raptor other than through the Bank, (ii) the Plaintiffs' investment agreements/contracts/profiles with third-party financial institutions to include their non-CS Life accounts with the Bank, and (iii) documents relating to the Plaintiffs' investment portfolios with third-party financial institutions.

58. I decline to give leave in relation to this ground of appeal as I do not consider that it has a real prospect of success. It does not appear that CS Life has identified any error of law or any other basis on which it could be said that the Court of Appeal is entitled to take a different view. The discovery application was dismissed on the basis that it failed both as a matter of principle and in relation to the individual categories of documents sought. The matters of principle are set out in the Judgment at paragraph 97-99.

59. In relation to the Raptor documents I also declined to order discovery on the specific grounds set out in paragraphs 113-115 of the Judgment and I do not consider that CS Life has identified any basis which would entitle the Court of Appeal to take a different view.

60. In relation to the Plaintiffs' investment agreements/contracts/profiles with third-party financial institutions and their non-CS Life accounts with the Bank, I also declined to order discovery on the specific grounds set out in paragraphs 117-120 of the Judgment and I do not consider that CS Life has identified any basis which would entitle the Court of Appeal to take a different view.

61. In relation to documents relating to the Plaintiffs' investment portfolios with third-party financial institutions, I also declined to order discovery on the specific grounds set out in paragraphs 121-122 of the Judgment and I do not consider that CS Life has identified any basis which would entitle the Court of Appeal to take a different view.

62. In all the circumstances, I decline to give leave to appeal to the Court of Appeal.

**(6) CS Life's application in respect of the Plaintiffs' failure to delete qualifying words from the amended Statement of Claim**

63. In paragraph 45 of the Judgment the Court accepted "*the objection made by Mr Moverley Smith that the qualifying words such as "including" and "inter alia" render the pleading open ended and as such are to be avoided.*"

64. CS Life complains that it cannot be certain about the case the Plaintiffs will actually advance at the trial because they may seek to rely upon further, as yet unparticularised, matters. CS Life argues that is inappropriate because CS Life is entitled to know the case

actually advanced, so it may understand it and prepare its defence accordingly. As a result, CS Life has issued a summons seeking to set aside the qualifying words in the Main Proceedings and in the Misrepresentation Proceedings.

65. In response, Mr Smouha makes two main points. First, the Plaintiffs recognise that the qualifying words are capable of rendering the pleading open ended and as such are to be avoided and that they should, in due course, make the position clear in relation to all of them. The issue for the Plaintiffs is when and how would this clarification be most appropriate. The Plaintiffs have always recognised that the Amended Statement of Claim, which was before the Court at the October hearing, may require amending in light of the investment management expert report and possibly the forensic accounting expert report. The investment management report was served on 12 February 2021 and the Plaintiffs anticipate that this report will meet CS Life's alleged questions so far as properly raised about the case it has to meet. The Plaintiffs will review their pleading after this report has been served and where appropriate the Plaintiffs will apply to remove qualifying words and/or to include further particulars arising out of the investment management report.

66. Second, for the avoidance of doubt, the Plaintiffs accept that they will need permission to amend their pleading. The Plaintiffs do not suggest that the words such as "*inter-alia*" can be relied on so as to avoid applying for permission to amend to include additional particulars. In light of this concession, Mr Moverley Smith appeared to accept that it would be difficult to maintain CS Life's main objection under this head, namely, "*CS Life cannot be certain about the case the Plaintiffs will actually advance at trial because they may seek to rely upon further, as yet unparticularised, matters*."

67. In light of the above two points made by Mr Smouha I decline to strike out the qualifying words in the Main Proceedings and the Misrepresentation Proceedings, as sought in the summons dated 3 February 2021, at this time.

68. I will hear the parties in relation to the issue of costs of this hearing, if required.

Dated this 1 March 2021

NARINDER K HARGUN

CHIEF JUSTICE