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:	**Hon. Chief Justice Hargun**
Appearances:	**Mr. Joe Smouha QC, Ms. Sarah-Jane Hurrion and Mr. Henry M Komansky of Hurrion & Associates Ltd, for the Plaintiffs**
	Mr. Stephen Moverley Smith QC, Mr. John Wasty, Ms. Hannah Tildesley and Ms. Luisa Olander of Appleby (Bermuda) Limited, for the Defendant
Date of Hearing:	**23 September 2021**

Date of Ruling: **30 September 2021**

RULING

(Unless Order)

Compliance with the terms of the discovery order; whether the parent company is to be treated as a "third-party" for discovery purposes; whether appropriate to make an unless order

Introduction

1. By Summons filed on 5 of August 2021 the Plaintiffs seek, *inter alia*, an order that:

   (1) Unless Credit Suisse Life (Bermuda) Limited ("**CS Life**") provides discovery of (i) the reports produced by PwC and the supporting documents insofar as they relate to the CS Life Accounts, and (ii) the report by Geissbuhler Weber & Partners AG ("**GWP**") on behalf of the Swiss Financial Market Supervisory Authority ("**the FINMA Report**"), within 14 days, its Defence shall be struck out; and

   (2) Unless CS Life provides copies of its requests and responses to Credit Suisse AG ("**the Bank**") as required by paragraph 4 of the Court's Order dated 2 June 2020 ("**the Specific Discovery Order**") within 14 days, its Defence shall be struck out.

Background

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

3. Briefly, the Plaintiffs' claim against CS Life is for losses suffered by two unit-linked life insurance policies ("**the Policies**"), which were issued to Meadowsweet Assets Limited and Sandcay Investments Limited, the Sixth and Seventh Plaintiffs (as policyholders) in

2011 and 2012 respectively. The First to Fifth Plaintiffs are the ultimate beneficiaries of the proceeds of the Policies, as the beneficiaries of trusts within which the Policies are held.

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

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

6. By its Ruling dated 11 February 2020 ("**the February 2020 Ruling**") the Court determined that, in relation to its own documents, CS Life was required to produce documents evidencing investigations and reports into the collapse in value of the Policy Assets in 2015 including the PwC Reports commissioned by the Bank. The Court required CS Life to confirm that it has searched for the relevant documents evidencing investigations and reporting of the collapse in value of the Policy Assets in 2015.

7. In relation to the documents of the Bank the Court determined that as a consequence of the duty to account under Article 400 of the Swiss Code of Obligations ("**the Code**"), subject only to the issue of relevance, CS Life has the power to call the Bank to provide and the Bank has an obligation to provide all documents evidencing investigations and reports into the collapse in value of the Policy Assets in 2015.

8. These determinations by the Court are reflected in the Specific Discovery Order which provides:

> ***AND UPON THE COURT FINDING*** *that as a matter of the duty to account under Article 400 of the Swiss Code of Obligations, subject only to the issue of relevance,*

the Defendant has the power to call for Credit Suisse AG to provide and Credit Suisse AG has an obligation to provide all documents within the categories set out below:

...

Documents of the Bank (Credit Suisse AG)

3. Confirm, by way of the Affidavit referred to at paragraph 1 of this Order, that the Defendant has required Credit Suisse AG pursuant to Article 400 to provide the following documents and categories of documents to the Defendant and provide copies of all letters of request and responses received from Credit Suisse AG:

...

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 the 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 Policy Assets; margin calls on the CS Life Accounts; fraudulent conduct on the CS Life Accounts; "Project Dino"; the reports produced by the 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.

9. CS Life appealed the February 2020 Ruling to the Court of Appeal and in particular the finding that Article 400 of the Code empowers CS Life to require the documents set out in paragraph 3.4 of the Specific Discovery Order and that the Bank is obliged to provide the said documents. In its Judgment dated 7 October 2020 the Court of Appeal dismissed CS Life's appeal in relation to this issue and confirmed the scope of Article 400 as set out in the February 2020 Ruling and as reflected in the Specific Discovery Order.

Application for an unless order in relation to the PwC Reports and related documents

10. In relation to this application CS Life contends that the Plaintiffs are only entitled to discovery of the relevant documents within CS Life's possession, custody or control. CS Life argues that as the Bank is a third party, what documents are, or are not, in CS Life's power is a matter subject to practical limitations. It argues that the PwC Reports and the FINMA Report are not documents within CS Life's possession, custody or power save, in relation to the FINMA Report, to the extent that the First Plaintiff already has it but is embargoed from discovering or using it.

11. Mr. Moverley Smith QC argues that the key point is that CS Life does not have access to the PwC Reports and that whilst it has the power to call on the Bank for the PwC Reports, that power is limited, constrained by the Bank's response to the request.

12. Mr. Moverley Smith QC also relies upon the letter of Schellenberg Wittmer on behalf of the Bank dated the 20 September 2021 where it is said that the PwC Reports are subject to attorney-client privilege in favour of the Bank and that supervisory privilege and confidentiality considerations prevent the Bank from providing the FINMA Report to CS Life.

13. It appears to the Court that the analysis advanced by Mr. Moverley Smith QC may well be compelling if the position of the Bank in this case was strictly that of third party but the position of the Bank is not such in this case. As the Court of Appeal found in its Judgment dated 7 October 2020, this is an exceptional case "*where responsibility for the discovery process has, in effect, been delegated on a wholesale basis*" by CS Life to the Bank itself.

14. Furthermore, there are other compelling reasons, as correctly submitted by Mr. Smouha QC, why the Bank cannot properly be characterised as a third-party for the purposes of complying with the discovery obligations of CS Life, as set out in the Specific Discovery Order:

    (1) Not only is CS Life a 100% subsidiary of the Bank, it is an account holder with the Bank in relation to the CS Life Accounts. As such, there is a client/banker relationship between the two Credit Suisse entities. CS Life opted to entrust the premia to the Bank under the Policies with the Bank.

    (2) CS Life delegated and/or outsourced significant aspects of its insurance business to the Bank by entering into a suite of agreements. Under these arrangements CS Life delegated to the Bank the sale of LPI Policies on behalf of CS Life pursuant to the Collaboration Agreements; CS Life's due diligence (KYC) responsibilities pursuant to the Delegation Agreements; inventory management and servicing of CS Life's insurance business (including underwriting of insurance policies, management or policies, and issuing invoices) pursuant to the Outsourcing Agreements; and managing policyholders' assets pursuant to the Asset Management Agreements. CS Life's pleaded case is that the Bank provided asset management services in respect of the Policy Assets held in the CS Life Accounts.

    (3) CS Life largely relied on Bank employees to perform its functions, which conducted business through generic Credit Suisse email addresses, worked out of the Bank's offices in Switzerland and used the Bank's IT systems.

(4) CS Life opted to store its documents in Switzerland on the Bank's servers, and to use the Bank's IT technology to run its Bermudian insurance operations.

(5) The Bank directs CS Life's economic activity and has been directing and controlling this litigation.

15. In relation to the Bank's role in this litigation it is to be noted that upon discovery of the collapse in the value of the Policy Assets in 2015 it was the Bank which was directly dealing with Mr. Bidzina Ivanishvili, the First Plaintiff, and was offering to share with him the results of the PwC investigation which the Bank had instigated. In response to a request on behalf of the First Plaintiff for a list of all inflows and outflows on every account for cash and securities; a list of all transactions carried out within each account of the structure; details of legal owners of the structures (the names of trusts and holding companies) and scans of all mandate letters or orders in relation to any of the past or present structures in relation to any of the securities operations, the Bank advised by an email from François Barrial dated 23 October 2015:

> *"In response to your email below we kindly inform you that we intend to provide to all the requested documents, to the extent that they are available to us, in two steps.*
>
> *As soon as operationally possible, we will provide you with all statements of movements and settlement advices on all your active and inactive accounts since their inception in addition to the quarterly statements you have already received. As a result, you will have full transparency on all flows and transactions. We will also provide you with the requested mandate letters or contracts in relation to all of your structures that hold or held account relationships with us and all stored written orders in relation to any securities operations executed on such account relationships. As outlined in our previous mail, we will also share with you all the corporate documents we have on file as well as the information on beneficial ownership submitted to us by the legal entities (i.e. directors) in connection with*

the respective account openings and the names of your trusts administered by CS Trust.

In a second later step, we will serve further information resulting from PwC's comprehensive due diligence of your relationship with Credit Suisse AG.

By following this approach, we provide you with full transparency on what we have readily available on our systems and share insights from the independent PwC review as they become available" (emphasis added).

16. Further, in the Particulars of Claim dated 1 March 2021 filed in the English High Court of Justice the Bank sought an injunction against a number of defendants including the First Plaintiff in respect of the use of the FINMA Report and alleged that the disclosure of the FINMA Report constituted a breach of the duty of confidence to the Bank. Specifically, the Bank alleged at [18] that the First Plaintiff has made further use of the FINMA Report in breach of confidence including the "*disclosure to other persons and/or use in other legal proceedings involving entities within the Claimant's corporate group in Bermuda and Singapore*" (emphasis added). In paragraph 18 the Bank is clearly referring to these Bermuda proceedings commenced by the Plaintiffs against the Bank's subsidiary, CS Life.

17. The substance of the PwC Reports is described in the Bank's attorneys (Walder Wyss) letter to the Swiss Public Prosecutor dated 5 February 2016. In that letter Walder Wyss advised the Public Prosecutor that after the first indications of irregularities in mid-September 2015, the Bank's Security Services conducted an interview with Mr. Lescaudron where he explained that (i) he had decided to hide from some of his clients, mostly from Client 2 and Client 3, the losses they had incurred after the 2008 crisis and for this purpose he had transferred the money from the account of Bidzina Ivanishvili, the First Plaintiff, to these clients; and (ii) as he received fewer and fewer instructions from Mr. Ivanishvili and/or his advisors, he took decisions independently about investments, including very significant investments in Raptor shares and options.

18. Walder Wyss further explained that the Bank's lawyers together with PwC have reviewed the transactions between the First Plaintiff (including the companies or entities in which he is beneficial owner) on the one hand and Client 2 and Client 3 (and their respective entities) on the other hand. As a further step, the Bank's lawyers together with PwC also reviewed transactions between the First Plaintiff, Client 2 and Client 3 and further clients for whom Mr. Lescaudron was the relationship manager. As a result of these investigations PwC identified:

    (1) Various transactions in which money was transferred from accounts of the First Plaintiff or his companies' accounts to other customers. The underlying payment instructions from these transactions have several indications suggesting that they are not authentic (so-called "Scenario 1" transactions).

    (2) Various transactions in which securities (i.e. shares) were transferred against payment between accounts of the First Plaintiff or his companies and accounts of other customers. In relation to some transactions there are no underlying payment and transfer instructions of such instructions have several indications suggesting that they are not authentic. These "securities against payment" transactions are pertinent because the prices paid for the shares were either too high or too low when compared with the market prices thus shifting funds to either the buyer or the so-called seller (so-called "Scenario 2" transactions).

    (3) Individual transactions in which securities were transferred out of the First Plaintiff or his companies' accounts without any corresponding payment (so-called "Scenario 3" transactions). Such transactions do not appear to make economic sense and have thus been deemed suspicious.

19. Walder Wyss referred to a number of payment/share transactions and noted that the instruction document was available in the Bank's archives system as a fax/PDF and appears to bear the signature of the First Plaintiff. However, the Bank's lawyers also note that in relation to the same transaction a Word version of the same document was discovered on

Mr. Lescaudron's office computer and thus strongly suggesting that the document had been forged by Mr. Lescaudron.

20. The significance of the PwC Reports can be appreciated by reference to the pleaded case in these proceedings and the position taken by CS Life in relation to that pleaded case. At paragraph 49 of the Re-Amended Statement of Claim it is alleged by the Plaintiffs that on 18 January 2016, Mr. Lescaudron was arrested in Switzerland and was held on remand during an investigation by the Geneva Public Prosecutor. In the course of the criminal investigation, the Public Prosecutor obtained evidence from the Bank and Mr. Lescaudron and interviewed Mr. Lescaudron on various dates in 2016 and 2017. During the interviews Mr. Lescaudron made various statements including the statement at paragraph 49.10, that certain of the transfers, acquisitions and trading in relation to the Accounts had been completed using forged signatures and/or instructions.

21. In response to the allegations made in paragraph 49 of the Re Amended Statement of Claim CS Life states at paragraph 55 of the Re-Amended Statement of Defence that the Plaintiffs are required to prove the allegations made in paragraph 49, specifically, and without prejudice to the generality of that requirement to prove, the Plaintiffs must prove:

    (1) The fact of the making of the pleaded statements by Mr. Lescaudron.

    (2) The truth of the pleaded statements purportedly made by Mr. Lescaudron.

    (3) The relevance of the pleaded statements made by Mr. Lescaudron to the Plaintiffs' claims in these proceedings.

22. Thus, it appears that CS Life is putting the Plaintiffs to strict proof of the allegation that certain of the transfers, acquisitions and trading in relation to the Policy Accounts by Mr. Lescaudron had been completed using forged signatures and/or instructions despite the fact that the Bank has in its possession the PwC Reports which apparently confirm that allegation and in circumstances where the Bank refuses to disclose the PwC Reports to CS Life so that they can be discovered in these proceedings.

23. The Court is concerned that in relation to the PwC Reports the discovery process in these proceedings may have been exploited by the Bank. As noted at the outset, these proceedings concern the investment of US $755 million by CS Life, on behalf of the Plaintiffs, with the Bank. In 2015 the Plaintiffs discovered unauthorised, imprudent and fraudulent trading on the CS Life Accounts resulting in losses in the region of US $400 million. The primary purpose of the PwC Reports was to investigate, *inter alia*, how the losses in the CS Life Accounts occurred. It was for this reason the email from François Barrial of the Bank dated 23 October 2015 offered to the First Plaintiff "*further information resulting from PwC's comprehensive due diligence of your relationship with Credit Suisse AG*."

24. A section of the PwC Reports dealing with "*C1 Commissions and Fees Calculation Review*" dated 10 October 2016 notes that the scope of the PwC review covered (i) all beneficially owned accounts of the First Plaintiff from which Mr. Lescaudron executed potentially unauthorised transfers of cash and securities to other clients at the Bank; (ii) the period 1 January 2009 to 30 September 2015, the time during which Mr. Lescaudron supposedly executed the transfers; and (iii) revenue and costs directly realised by the business unit in which Mr. Lescaudron carried out his day-to-day activities. The PwC Reports expressly note that the "*Affected Accounts*" included CS Life Meadowsweet and CS Life Sandcay, i.e. the two policy accounts.

25. In the circumstances it is reasonably clear that the PwC Reports reviewed and analysed the reasons for the losses suffered which are the subject matter of these proceedings. CS Life clearly had a compelling commercial interest to receive and review the PwC Reports in order to understand why such catastrophic losses had been suffered by the CS Life Policy Accounts of Meadowsweet Assets Limited and Sandcay Investments Limited. Yet, despite the obvious relevance to its business, it appears that the Bank did not provide the PwC Reports to CS Life. In the Court's view there can be no sensible commercial reason why reports dealing with the catastrophic losses suffered by CS Life's clients would not be provided to CS Life. Mr. Moverley Smith QC was unable to advance any rational

explanation as to why CS Life did not receive the PwC Reports when they were finalised. The Court is bound to conclude that the PwC Reports were not provided by the Bank to CS Life to ensure that CS Life was not put in a position where it had to discover the PwC Reports in these proceedings.

26. As noted above the Bank itself was dealing with the requests of the First Plaintiff for information and explanation relating to the losses in the region of US $400 million in 2015 and at that time the Bank offered to the First Plaintiff "*further information resulting from PwC's comprehensive due diligence of [his] relationship with Credit Suisse AG*." No credible explanation has been provided as to why the Bank is no longer in a position to provide the same PwC Reports to CS Life so that they could be discovered to, *inter alia*, the First Plaintiff in these proceedings.

27. The Court does not accept that paragraph 3 of the Specific Discovery Order merely required CS Life to write a letter to the Bank requesting the PwC Reports and if the Bank, for whatever reason, refused to provide them there could be no breach of the Order. The February 2020 Ruling and the Specific Discovery Order recognised that CS Life could *require* the Bank to provide the documents listed in paragraph 3 of the Order *and* the Bank was *obliged* to provide the documents to CS Life under the Bank's duty to account pursuant to Article 400 of the Code. The terms of paragraph 3 recognised that there is an obligation upon CS Life to discover the documents listed in that paragraph. In the event the Bank refuses to comply with its obligation to provide the PwC Reports under Article 400 it necessarily means that CS Life is prevented from complying with its obligation to provide the PwC Reports as required by paragraph 3 of the Order. It may well be that the Court could take a lenient view of the breach of paragraph 3 if the relationship of CS Life and the Bank was merely that of principal and agent and the Bank was truly an independent third-party. But this is not such a case. Here, as noted above, the Bank is very much involved in the underlying transactions giving rise to these claims. The Bank has a direct economic interest in the outcome of these proceedings, and it seems clear that it is controlling the discovery process and indeed this litigation.

28. 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.

29. The Court does not accept that the Bank's refusal to provide the PwC Reports can be justified on the basis that it is protected by attorney-client privilege. The Court accepts Mr. Smouha QC's submission that the Court has already determined that CS Life is entitled to these documents subject only to the issue of relevance. Accordingly, the assertion of "*attorney-client secrecy*" over the PwC Reports should have been taken (if at all) in advance of the February 2020 hearing. Such an application would have had to be supported by expert evidence and it is inappropriate for CS Life to raise this issue at this stage of the proceedings. It is noted that CS Life does not contend that there is any privilege under Bermudian law which it could assert.

30. Secondly, it is common ground that the Bank could provide the PwC Reports to CS Life without any loss of privilege. As the Court noted at [43] of the June 2021 Ruling it was *agreed* between the parties that it was "*possible for legally privileged information to be passed within a group of companies without waiver of that privilege*."

31. Thirdly, as noted above, in October 2015 the Bank agreed to share the findings of the PwC Reports with the First Plaintiff. Furthermore, the Bank selected some of the PwC Reports and findings to provide to the Public Prosecutor in the Swiss criminal proceedings, which were relied on to convict Mr. Lescaudron. In the circumstances it is not readily apparent how it can be asserted that the PwC Reports are privileged. In this regard it is also to be noted that the contribution of the PwC Reports is said to be in the nature of "*forensic services and forensic accounting*."

32. The Court accepts Mr. Moverley Smith QC's submission that an unless order is considered to be one of the most powerful weapons in the Court's case management armoury and should not be deployed unless its consequences can be justified. In *Marcan Shipping (London) Ltd v Kefalas* [2007] 1 WLR 1874 Moore-Bick LJ said at [36]:

> *"…before making conditional orders, particularly orders for the striking out of statements of case or the dismissal of claims or counterclaims, the judge should consider carefully whether the sanction being imposed is appropriate in all the circumstances of the case. Of course, it is impossible to foresee the nature and effect of every possible breach and the party in default can always apply for relief, but a conditional order striking out a statement of case or dismissing the claim or counterclaim is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified. I find it difficult to imagine circumstances in which such an order could properly be made for what were described in Keen Phillips v Field as* '*good housekeeping purposes*'*".*

33. To the same effect is the judgment of Richards LJ in *Michael Wilson & Partners v Sinclair* [2015] EWCA Civ 774, confirming at [34] that the strike out is the sanction of last resort:

> *" Strike-out is, moreover, a sanction of last resort. In Global Torch Ltd v Apex Global Management Ltd and Others (No.2) [2014] UKSC 64, [2014] 1 WLR 4495, Lord Neuberger (with whom Lord Sumption, Lord Hughes and Lord Hodge agreed) quoted with evident approval the observation of Norris J at first instance that 'the striking out of a statement of case is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified'. The sanction had been imposed in that case pursuant to an unless order made only after the party in question had failed to comply with an earlier order requiring him to sign a statement personally. In relation to the alleged disproportionality of the order, Lord Neuberger's judgment included this:*

'23. … The importance of litigants obeying orders of court is self-evident. Once a court order is disobeyed, the imposition of a sanction is almost inevitable if court orders are to continue to enjoy the respect which they ought to have. And, if persistence in the disobedience would lead to an unfair trial, it seems, at least in the absence of special circumstances, hard to quarrel with a sanction which prevents the party in breach from presenting (in the case of a claimant) or resisting (in the case of a defendant) the claim. And, if the disobedience continues notwithstanding the imposition of a sanction, the enforcement of the sanction is almost inevitable, essentially for the same reasons ….

24. … Further, it is difficult to have much sympathy with a litigant who has failed to comply with an unless order, when the original order was in standard terms, the litigant has been given every opportunity to comply with it, he has failed to come up with a convincing explanation as to why he has not done so, and it was he, albeit through a company of which he is a major shareholder, who invoked the jurisdiction of the court in the first place."

25. … The Prince has had two very clear opportunities to comply with the simple obligation to give disclosure in an appropriate fashion, namely pursuant to the orders of Vos and of Norris JJ. Indeed, there would have been a very good chance that, if he had offered to sign the relevant statement after judgment had been entered against him, the court would have set aside the judgment and permitted him to defend provided that no unfair prejudice was thereby caused to the other parties, and he satisfied any appropriate terms that were imposed.'

Those observations lay stress on the sequence of orders that gave every opportunity for compliance before the ultimate sanction of strike-out was imposed. In similar vein, albeit dissenting as to the result, Lord Clarke referred at paragraph 47 of his judgment to his previously expressed view that 'the draconian step of striking a claim out is always a last resort'. (I should add that nothing in Global Torch Ltd was intended to impinge on Mitchell or Denton, as was made clear in the judgments at paragraphs 40 and 79.)"

In the Matter of Up Energy Development Group Ltd [2018] Bda LR 100 Subair-Williams J considered at [40] that effectively, unless orders "*serve as a final warning before punitive action is taken by the Court. Such orders denote a willful or intentional default on the part of one side in the litigation*."

34. The Court accepts Mr. Smouha QC's submission that CS Life's failure to comply with the Specific Discovery Order (and the Bank's decision not to provide documents to CS Life and in particular the PwC Reports) is causing the Plaintiffs substantial prejudice. In particular, as noted above, CS Life has put the Plaintiffs to proof on various points relating to the fraud carried out by Mr. Lescaudron, but the Bank has failed to provide documents to CS Life that go directly to these issues. The Court has found that the PwC Reports and the surrounding documents are likely to be highly relevant to these issues. They are also likely to be relevant to the issue of quantum.

35. The PwC Reports clearly fall within the express terms of the Specific Discovery Order. For the reasons set out earlier at paragraphs 13 to 26 above the Court finds that the Bank is not to be treated as a mere third-party in relation to the issue of discovery. The Court accepts the submission that the Bank controls CS Life and directs this litigation. It is apparent that the Bank has decided that CS Life should breach the Specific Discovery Order by disabling it from complying with its terms. As noted above, the Bank stands to gain if the Plaintiffs are unsuccessful at trial and to lose if the Defendant is unsuccessful. The Court also finds that the Bank can readily provide the PwC Reports to CS Life enabling CS Life to comply with its obligations under the Specific Discovery Order.

36. In the circumstances the Court concludes that it is just and appropriate that the Court should make an order that unless CS Life provides discovery of the PwC Reports and the supporting documents, insofar as they relate to the CS Life Accounts, within 14 days of the date of this Ruling, its Defence shall be struck out. The Court so orders. For the avoidance of doubt the expression "*supporting documents*" refers to all documents, analysis and/or records provided by the Bank to PwC in relation to the preparation of the PwC Reports and/or referred to in the PwC Reports.

Application for an unless order in relation to the FINMA Report

37. The background to the FINMA Report is set out at paragraphs 33 to 55 of the 13th Affidavit of Ioannis Theodore Alexopoulos dated 5 August 2021. It appears that by order dated 10 March 2016, the Swiss Financial Market Supervisory Authority ("**FINMA**") appointed a Swiss law firm, GWP, to conduct an investigation into the Bank. The result of the investigation was the FINMA Report which was produced on 6 April 2017. A press release was issued by FINMA on 17 September 2018 which summarised the findings of the Report. For present purposes it is to be noted that the press release states, among other things, that Mr. Lescaudron "*who was very successful in terms of assets under management - breached the bank's compliance regulations repeatedly and on record over a number of years. However, instead of disciplining the client manager promptly and proportionately, the bank rewarded him with high payments and positive employee assessments. The supervision of the relationship manager was inadequate due to this special status*."

38. The First, Sixth and Seventh Plaintiffs are treated as parties for certain purposes in criminal proceedings against the Bank in Switzerland. Together with other plaintiffs in Switzerland ("**Swiss Plaintiffs**"), the First, Sixth and Seventh Plaintiffs asked the Public Prosecutor to request a copy of the Report from FINMA. On 30 July 2019, the Public Prosecutor wrote to FINMA and a copy of the Report was provided on 11 September 2019.

39. On 2 October 2019, the Public Prosecutor placed the FINMA Report on his file without restrictions and informed the Swiss Plaintiffs of this. On 4 October 2019, the Bank made a request to the Public Prosecutor to place the document under seal. The request was heard by the *Tribunal des Mesures de Contrainte* ("**TMC**"). In the judgment dated 13 December 2019 the request was rejected. The Bank appealed the judgment of the TMC and on 19 June 2020, the Swiss Federal Court dismissed the Bank's appeal.

40. On 4 August 2020, the Bank requested that the FINMA Report should not be entered on the Public Prosecutor's file or, if entered, that it should be a redacted version. There is an issue before the Swiss courts whether it was permissible for the Bank to make this request, given that it had not objected to it being placed on the Public Prosecutor's file in 2019.

41. On 19 August 2020, the Public Prosecutor wrote to the parties rejecting the Bank's request and stating that it would place the FINMA Report on the Court file for the parties to view, but that it would prevent the parties from taking copies.

42. The decision to place the FINMA Report on the Public Prosecutor's file was appealed by the Bank on 24 August 2020 to *La Chambre pénale de recours* ("**CAC**"). The decision to restrict the making of copies was also appealed by several of the Swiss Plaintiffs on 31 August 2020.

43. On 4 December 2020, the CAC sent to the legal representatives of the First, Sixth and Seventh Plaintiffs, the filing of the Bank dated 24 August 2020, along with the list of exhibits, which included a photocopy of the FINMA Report. The other Swiss plaintiffs also received a copy of the FINMA Report.

44. Having received a copy of the FINMA Report, the First Plaintiff gave discovery in these proceedings of an electronic copy of the Report (in German) on 5 January 2021 and subsequently disclosed an English translation to CS Life (and formally the other plaintiffs) on 26 January 2021 and a copy was filed with the Court. Both the original German and the English translation of the Report was redacted to remove personal information and irrelevant bank account details relating to other Swiss Plaintiffs prior to disclosure. No objection was raised to this disclosure by either CS Life or the Bank. The Plaintiffs' expert reports on investment management and forensic accounting subsequently referred to the FINMA Report.

45. On 12 February 2021, as noted above, the Bank obtained an interim *ex parte* injunction from the High Court in England restraining *inter alios* the First Plaintiff from disclosing or making "*use*" of the FINMA Report.

46. The Bank subsequently issued a claim in England asserting the confidentiality of the Report and seeking permanently to restrain the First Plaintiff from making use of the Report, especially including for the purpose of these proceedings (paragraph 18 of the Particulars of Claim). The Bank also applied for the continuation of the injunctive relief until the trial of the claim. In the English proceedings the Bank asserts that the FINMA Report concerns an "*investigation into the circumstances surrounding the misconduct of an employee of the Claimant, from 2004, which resulted in significant fraudulent losses to clients*." Evidently the Bank's case in England is premised on a positive plea that there had been a fraud and that this fraud had caused "*significant*" losses to its clients, which includes the First Plaintiff.

47. It can be seen from the press release issued by FINMA on 17 September 2018 and the Bank's own pleaded case in the English proceedings that the FINMA Report is highly material to the issues which are raised in the Bermuda proceedings. It is also clear that the FINMA Reports would be covered by the terms of paragraph 3 of the Specific Discovery Order. Despite its obvious relevance the Bank failed to provide the FINMA Report to CS Life for discovery in Bermuda. The contention by the Bank that it is under no obligation to provide the FINMA Report to CS Life on the grounds the Report is (i) confidential; and (ii) covered by Swiss law supervisory privilege, is not, in the Court's view, well-founded.

48. The Court accepts Mr. Smouha QC's submission that the fact that a document is confidential does not mean that it should be withheld from discovery. Further, to the extent that there is a genuine concern around the confidentiality of the FINMA Report, the Plaintiffs are willing to take appropriate measures to protect the confidentiality and the Court, as previously indicated, is also willing to assist in that regard.

49. As far as the claim for supervisory privilege is concerned, the Court accepts that it was agreed by CS Life's Swiss law expert, Dr Weibel, in his written opinion that FINMA supervisory privilege "*does not deal with the provision of information or documents either to customers of the financial services provider or in the framework of civil litigation, including to a counterparty in the framework of discovery*" (at [14]). In any event, the Bank's supervisory privilege claim would not prevent the Bank providing the FINMA

Report to CS Life as it is common ground between the parties that the Bank can provide allegedly privileged documents to CS Life without the privilege being lost (paragraph 43 of the June 2021 Ruling).

50. In any event CS Life now has in its possession a copy of the FINMA Report and there is no sufficient reason why it should not be required to provide discovery of the document. This is particularly so given that unless and until the FINMA Report is discovered to the First Plaintiff in these proceedings, the First Plaintiff is, as a result of the actions taken by the Bank in the English proceedings, prohibited from "*using*" the FINMA Report. It is noted that the other Plaintiffs in the Bermuda proceedings, who are not subject to the injunction, are not prevented from using the FINMA Report.

51. However, the English Court has made it clear that its order is not intended to prevent this Court from ordering discovery of the FINMA Report, if it considered it appropriate to do so. In the Observations made by Mrs. Justice Collins Rice in relation to the scope of the English Order dated 21 May 2021 the learned judge expressly stated that the injunction does not affect the legal rights of any Defendant (including the First Plaintiff in these proceedings) who may be entitled to obtain the FINMA Report by lawful means other than those asserted in the English proceedings. Collins Rice J confirmed that the First Plaintiff is not restrained from seeking and obtaining disclosure of the FINMA Report in the normal and formal way in the Bermuda proceedings and subject to the usual undertakings of confidentiality that attend to it. The learned judge expressly stated that "*The Order is intended to enable the [First Plaintiff] to seek disclosure of the Reports in other proceedings and use it for the purposes of those proceedings*."

52. Mr. Moverley Smith QC suggested that the Swiss courts have ordered that the First Plaintiff return all copies of the FINMA Report to the Swiss courts. There is no satisfactory evidence upon which this Court could properly conclude that this is indeed the case.

53. The Plaintiffs assert that they are concerned that the Bank is taking steps in Switzerland and/or England that are designed to ensure that the trial of this claim takes place without the Plaintiffs, or the Court, being in a position to take into account the FINMA Report. The

Plaintiffs contend that the content of the FINMA Report is damaging to the defence being run by CS Life in these proceedings.

54. The Court accepts the submission that the FINMA Report is relevant to issues in these proceedings and it should have been originally discovered by CS Life. Further, the Bank should have provided it to CS Life under the terms of the Specific Discovery Order.

55. In the circumstances the Court considers that it is appropriate to make an order that unless CS Life provides discovery of the FINMA Report within 14 days, its Defence shall be struck out. The Court so orders.

Correspondence with the Bank (paragraph 4 of the Specific Discovery Order)

56. Paragraph 4 of the Specific Discovery Order provides that:

> "Insofar as the Defendant has not requested all documents relating to any of the categories of documents listed at paragraph 3 above from Credit Suisse AG, the defendant shall make such request of Credit Suisse AG, ***such request and any responses received from Credit Suisse AG to be provided to the Plaintiffs***."

57. The Bank's obligation to provide documents listed in paragraph 3 of the Specific Discovery Order was confirmed as a result of the finding by the Court that on a proper construction of Article 400 of the Code the Bank was indeed legally obliged to provide these documents. The Court made this finding in its February 2020 Ruling which resulted in the Specific Discovery Order. It follows therefore that in principle all requests from CS Life relating to the Bank's obligation to provide documentation under paragraph 3 of the Specific Discovery Order and the Bank's responses in relation thereto should be provided to the Plaintiffs.

58. CS Life contends that the Plaintiffs have never disputed, either at first instance or on appeal, that CS Life's requests for documents from the Bank and the Bank's responses thereto are

covered by the litigation and/or common interest privilege. CS Life further contends that the Plaintiffs' contention that there had been a waiver of privilege was rejected by the Court of Appeal in its Judgment dated 7 October 2020. In relation to this contention, it is necessary to consider what precisely was decided by the Court of Appeal in relation to the issue of waiver of privilege.

59. The background to the issue of waiver of privilege is set out in paragraphs 57-60 of this Court's February 2020 Ruling:

> *"57. In correspondence the Plaintiffs have asked for copies of all correspondence between the Defendant and the Bank in relation to the Defendant's requests that the Bank produce documents in relation to the discovery in this action and the responses received from the Bank. The Defendant's position, as set out in Coffey 3, is that this correspondence is privileged and that any reference to that correspondence in the affidavit should not be taken as a waiver of that privilege by CS Life.*
>
> *58. In paragraph 27 of Coffey 3 it is said on behalf of the Defendant that 'whilst the Defendant does not accept that its discovery is in any way deficient, it made a further request to the Bank for the classes of documents and specific documents identified in the Hurrion letter of 19 June 2019 (Further Bank Request). The documents identified in the Hurrion letter of 19 June 2019 substantively mirror the documents sought by the Plaintiffs in this Discovery Application and the Further Bank Request requested the specific documents and categories of documents set out in that letter'.*
>
> *59. In paragraph 29 Mr Coffey states that 'The Bank responded to the Further Bank Request on 23 September 2019 (23 September 2019 Letter) and provided further documentation (Additional Documents). In summary, the Additional Documents include:*
>
> *(i) All of the Statements of Account, Statements of Safekeeping Accounts and Investment Reports. Out of an abundance of caution the Bank has resent all*

of the statements already sent to CS Life (which have already been provided by the Defendant), as well as generating new statements where it is able to do so.

(ii) Attachments to the client notes (which were not provided to CS Life with the client notes).

(iii) Legible versions, where possible, of the illegible documents identified by Hurrion in their letter of 18 April 2019 and clarified by Appleby in their letter of 2 May 2019.'

60. The Plaintiffs also rely upon the letter from Appleby dated 2 July 2019 where the compliance with the Defendants discovery obligations is explained in the following terms:

'Categories of Documents/Information Requests"

All documents evidencing transactions carried out on the relevant accounts (including investment reports and documents relating to investment decisions)

CS Life agrees that it can call on the Bank to provide documents under these categories that fall within the ambit of Article 400.

CS Life has made requests to the Bank for documents in these categories previously (those requests, including the further request Appleby are making to the Bank as set out below, and any responses thereto are, for the avoidance of doubt, legally privileged and CS Life does not waive the legal privilege in those documents by referring to them herein) and disclosed the relevant and non-privileged documents provided by the Bank to the Plaintiffs in the First and Second Discovery Lists.'

We note that your clients are of the view that CS Life's discovery is inadequate in respect of the classes of documents under this heading; a view CS Life does not accept. In an attempt to allay those concerns, however, and consistent with the

overriding objective, we, on behalf of CS Life, made a further request to the Bank for documents. That request seeks any documents falling within classes of documents and specific documents mentioned by the Plaintiffs in the June 2019 Letter under this heading."

60. The relevant issue for the Court, as noted in paragraph 61, was to consider whether, having regard to what was said in Coffey 3 and the Appleby letter of 2 July 2019, any privilege which may exist in relation to the correspondence between CS Life and the Bank had been waived. This issue of waiver had nothing to do with the express terms of paragraph 4 of the Order which was expressly dealt with by the Court in paragraph 94 of the same Ruling.

61. The waiver of privilege issue before the Court of Appeal is summarised by the Court in paragraph 41 of its Judgment in the following terms:

> *"This ground of appeal arises from the Plaintiffs' claim to disclosure of correspondence between CS Life and the Bank which CS Life contends is subject to litigation privilege. The Plaintiffs contend that CS Life has waived privilege by a reference to the correspondence with the Bank in paragraphs 27 and 29 of Coffey 3 and in a letter dated 2 July 2019 from Appleby to Hurrion. CS Life's position is those limited references do not constitute a waiver*."

62. The Court of Appeal's conclusion in relation to the waiver of privilege issue is set out at paragraph 57 of the Judgment in the following terms:

> *"Whilst in one sense it could be said that CS Life was so informing the Plaintiffs and the court so as to give the impression that it had been cooperative and discharged its disclosure obligations appropriately, nonetheless, in my view, and approaching the matter on a realistic basis, what CS Life was in fact doing was no more than providing an explanation of what it had done and what the response had been from the Bank. In my judgment, it cannot realistically be said that, in so doing, CS Life was cherry picking, or deploying, to its unfair advantage, parts of its correspondence with the Bank and, arguably, withholding other parts, so as to give*

rise to a waiver of common interest litigation privilege. In real terms it was doing no more than setting out what the effect of its communications with the Bank had been; it was not in any real sense relying on the content of that correspondence. In those circumstances I conclude that, in the particular circumstances of this case, the Chief Justice wrongly applied the principles governing collateral waiver of privilege to a situation that did not justify it. That, in my view, was an error of law on his part and not merely a case where I take a different view as to the appropriate exercise of discretion in all the circumstances. Accordingly, I would allow CS Life's appeal on this ground."

63. Paragraph 4 of the Specific Discovery Order is noted by the Court of Appeal in paragraph 15 of its Judgment. However, there is no suggestion that the Court of Appeal cast any doubt upon its correctness. It is to be noted that CS Life complained about paragraphs 82-95 of the February 2020 Ruling and as appears from paragraphs 58 to 72 of the Judgment, the Court of Appeal dismissed the appeal in relation to these paragraphs. Paragraph 4 of the Specific Discovery Order appears in paragraph 94 of the February 2020 Ruling.

64. In the circumstances the Court rejects the submission made on behalf of CS Life that the Court of Appeal ruling in relation to the waiver of privilege (as set out in paragraph 57 of its Judgment) has the effect of overriding the express provision contained in paragraph 4 of the Specific Discovery Order. The clear purpose of paragraph 4, as the transcript of the hearing shows, was to give assurance to the Plaintiffs that the requests for documentation by CS Life to the Bank had been properly framed and the responses from the Bank had been accurately conveyed to the Plaintiffs. In the Judgment of the Court paragraph 4 continues to have full force in accordance with its express terms. Accordingly, CS Life is obliged to provide copies of the requests and responses received from the Bank in relation to the categories of documents listed in paragraph 3 of the Order.

65. Having regard to all the circumstances the Court orders that unless CS Life (i) files an affidavit fully describing its communications with the Bank with respect to requests of documents or categories of documents required to be provided pursuant to paragraph 3 of

the Court's Order dated 2 June 2020; and (ii) provide copies of its requests to and responses from the Bank required by paragraph 4 of the said Order within 14 days, its Defence shall be struck out. For the avoidance of doubt CS Life is required to provide copies of the requests to and responses from the Bank since 11 February 2020 (the date of the Ruling) and is required to file an affidavit fully describing its communications with the Bank since 11 February 2020 with respect to requests for documents or categories of documents required to be provided pursuant to paragraph 3 of the Specific Discovery Order.

66. Finally, in relation to the submission that there has been undue delay in making these applications, the Court, for the reasons set out in paragraphs 7-32 of Mr. Alexopoulos's 13th Affidavit, concludes that any such delay cannot fairly be attributed to the Plaintiffs.

67. The Court will hear the parties in relation to the issue of costs arising out of these applications, if necessary.

Dated this 30th day of September 2021.

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NARINDER K HARGUN
CHIEF JUSTICE