



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: No. 293

BETWEEN:

| | |
|--|---------------------------------|
| BIDZINA IVANISHVILI | 1st Plaintiff |
| EKATERINE KHVEDELIDZE | 2nd Plaintiff |
| TSOTNE IVANISHVILI (An infant, by his mother and next friend, Ekaterine Khvedelidze) | 3rd Plaintiff |
| GVANTSA IVANISHVILI | 4th Plaintiff |
| BERA IVANISHVILI | 5th Plaintiff |
| MEADOWSWEET ASSETS LIMITED | 6th Plaintiff |
| SANDCAY INVESTMENTS LIMITED | 7th Plaintiff |
| -and- | |
| CREDIT SUISSE LIFE (BERMUDA) LIMITED | Defendant |

Before:

Hon. Chief Justice Hargun

Appearances:

**Mr. Charles Hollander QC, Ms. Sarah-Jane Hurrion
and Ms Judith Roche for the Plaintiffs
Mr Stephen Moverley Smith QC, Mr John Wasty, Ms
Hannah Tildesley and Mr Sam Riihiluoma for the
Defendant**

Dates of Hearing:

21 & 22 January 2020

Date of Ruling:

11 February 2020

RULING

Application for specific discovery; scope of order 24 rule 7; relevance of Overriding Objective; whether waiver of privilege; whether Defendant entitled to obtain documents under Article 400 of the Swiss Code of Obligations

Introduction

1. 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.
2. Briefly, the Plaintiffs' claim against Credit Suisse Life (Bermuda) Limited ("CS Life") is for losses suffered by two unit-linked life insurance policies ("the Policies"), which were issued to Meadowsweet Assets Limited and Sandcay Investments Limited, the Sixth and Seventh Plaintiffs (as policyholders) in 2011 and 2012 respectively. The First to Fifth Plaintiffs are the ultimate beneficiaries of the proceeds of the Policies, as the beneficiaries of trusts within which the Policies are held.
3. The Plaintiffs allege that they entrusted US \$755 million to CS Life by way of lump sum insurance premiums ("the Policy Assets"). The Policy Assets were invested in accounts with Credit Suisse AG ("the Bank") in the name of CS Life ("the CS Life Accounts"). In 2015 the Plaintiffs discovered unauthorised, imprudent and fraudulent trading on the CS Life Accounts resulting in huge losses to the Policy Assets.
4. In these proceedings the Plaintiffs assert that CS Life owed the Plaintiffs various contractual, fiduciary, statutory and common law duties, and that CS Life breached those duties resulting in losses estimated to be in the region of US \$400 million.
5. This is an application by the Plaintiffs for specific discovery. By this application, made by summons dated 5 August 2019, the Plaintiffs seek discovery of the following categories of documents:
 - (1) Emails of CS Life personnel and all correspondence between CS Life personnel, third parties and the Bank including documents that CS Life has the right to call for from the Bank under Swiss law;

- (2) Meeting/attendance notes and call records of CS Life personnel and any such documents that CS Life has the right to call for from the Bank;
 - (3) Documents evidencing transactions carried out on the CS Life Accounts;
 - (4) Documents evidencing investigations and reports into the collapse in value of the Policy Assets in 2015;
 - (5) Audit, risk assessment and monitoring documents;
 - (6) Documents evidencing fees and commissions; and
 - (7) Client notes.
6. The Plaintiffs argue that they are entitled to specific discovery of the above categories of documents on the grounds that: (a) the documents requested are in the possession, custody, power of CS Life as a matter of fact and/or (b) CS Life has a right to call for the relevant documents from the Bank which, as asserted by CS Life, managed the assets at issue in these proceedings.
7. In addition to the categories of documents sought in the summons, the Plaintiffs also seek an order for discovery in relation to categories of documents recently identified in the Fourth Affidavit of Thomas Coffey ("Coffey 4"), sworn on behalf of CS Life, on 13 January 2020. The Plaintiffs also seek information as to methodology utilised in CS Life's discovery.

Evidence

8. The application is supported by the First Affidavit of Judith Roche dated 26 July 2019 ("Roche 1"); the Second Affidavit of Judith Roche ("Roche 2"); and the Third Affidavit of Judith Roche ("Roche 3"). The evidence on behalf of CS Life is to be found in the Second Affidavit of Thomas Coffey ("Coffey 2"), the Third Affidavit of Thomas Coffey ("Coffey 3"); and the Fourth Affidavit of Thomas Coffey ("Coffey 4").

Rival contentions

9. The Plaintiffs complain that to date, CS Life has offered no explanation to the Plaintiffs regarding the cause of the collapse in value in the Policy Assets, nor has CS Life shared the results of any investigation or inquiry conducted into the fraud carried out on the CS Life Accounts, nor accounted to the policyholders for the losses suffered. The position CS Life has taken in this litigation is to put the Plaintiffs to proof of the wrongdoing in relation to bank accounts in CS Life's name which held assets which the Plaintiffs had entrusted to CS Life.

10. The Plaintiffs also complain about the piecemeal nature of the discovery given by CS Life. Mutual exchange of discovery was initially due to take place on 4 September 2018 but was extended by the Order dated 21 November 2018 to 10 December 2018.
11. On 10 December 2018, CS Life produced its First List of Documents which comprised of 1241 documents.
12. On 31 January 2019, CS Life produced its Second List of Documents which comprised of 1666 documents provided to CS Life by the Bank and 18 documents omitted from CS Life's First List of Documents.
13. Following correspondence from the Plaintiffs detailing the deficiencies in CS Life's discovery, CS Life produced its Third List of Documents on 5 July 2019. This list comprised of an additional 156 Documents obtained from the Bank.
14. Following service of this discovery summons, CS Life produced two further document lists (the Fourth and Fifth Lists of Documents). The Fourth List of Documents disclosed client notes relating to the Policies, which CS Life said it had obtained from the Bank. The Fifth List of Documents comprised of 1283 documents obtained from the Bank on 23 September 2019, including previously disclosed illegible and/or incomplete documents along with a large number of account statements.
15. Mr Coffey's Third Affidavit anticipated the Sixth List of Documents disclosing relevant but previously undisclosed documents, which had previously been marked as irrelevant. The Sixth List of Documents was served upon the Plaintiffs a day before the hearing of this application. Mr Hollander complains that no explanation has been provided as to why the Sixth List of Documents was provided the day before the hearing when it was promised to be served in October 2019. Mr Hollander also complains that the Sixth List was provided with a corrupted USB flash drive.
16. All of the affidavits filed in relation to CS Life's compliance with its discovery obligations have been sworn by Thomas Coffey, who was the Chief Executive Officer of CS Life between 28 September 2009 and 31 July 2017. The Plaintiffs argue that it is wholly inappropriate for Mr Coffey to be swearing such affidavits and that these affidavits should be sworn by an existing director and/or officer of CS Life.
17. The Plaintiffs say that proper discovery is critical in this case given that the Policy Assets were under the control of the Bank, acting as agents for CS Life pursuant to mandates given by CS Life, and that vast sums disappeared as a result of fraudulent, unauthorised and imprudent trading or were simply stolen by an employee of the Bank. The Plaintiffs have no visibility as to how this happened and are therefore dependent on information and documentation

provided by CS Life on discovery and (through CS Life) on that provided by the Bank.

18. In response CS Life emphasises that its role in the overall transaction was a limited one. CS Life argues that it was required by the Policy documentation to entrust the custody and investment of the Policy Assets to the Bank and it was the Bank's responsibility, not that of CS Life, to acquire and manage the investment under the Policies. Save that investments were acquired for the policyholders through accounts with the Bank in CS Life's name and held on their behalf by CS Life, CS Life did not acquire or direct the acquisition of any investments.
19. CS Life argues that, contrary to the Plaintiffs' allegation that the Bank acted as CS Life's agent in making and managing investments, CS Life had appointed Meadowsweet and Sandcay as its attorneys for the purpose of entering into investments through the Bank. As a result of the sub-delegation of a power of attorney to the First Plaintiff, he acted as the investment manager of the Policy Assets and gave instructions, either directly or through his agents, to the Bank in respect of investments.
20. CS Life points out that the limited role it was intended it would take was set out in the relevant contractual documentation. The Policies were "wrapper" products designed to hold a client's investment being managed by the Bank. CS Life's role was to set up the policies, and transfer the premium to an account with the Bank. After that the investment relationship was between the client and the Bank and CS Life had no further involvement, save to deal with the certain limited, largely formal, matters that remained within its remit, such as surrenders, certain regulatory and compliance matters and, on occasion, to execute certain Bank Documents, such as general deeds of pledge.
21. In relation to the present application CS Life argues that the relief sought is outside the proper scope of RSC order 24 rule 7. Relying upon *Berkeley Administration v McClelland* [1990] FSR 381, it is submitted, on behalf of CS Life that:
 - (1) There is no jurisdiction under order 24 rule 7 to order the production of documents unless
 - (i) there is sufficient evidence that the documents exist which the other party has not disclosed;
 - (ii) the documents relate to the matters in issue in the action;
 - (iii) there is sufficient evidence that the documents are in the possession, custody or power of the other party.

- (2) When it is established that these three pre-requisites for jurisdiction do exist, the court has a discretion whether or not to order disclosure.
 - (3) The applicant must identify with precision the document or documents or categories of documents which are required to be disclosed.
22. At the close of the hearing, counsel for the Plaintiffs and counsel for CS Life both provided to the Court draft orders which the Court should consider making in relation to the present application. In considering the appropriate relief to be granted in relation to this application, I propose to go through the provisions of the draft order submitted by counsel for the Plaintiffs. A copy of that draft order is annexed to this Ruling as "Annex 1". The scheme of the draft order is:
 - (a) Paragraph 1 deals with all the categories of documents which are said to be in the possession, custody or power of CS Life.
 - (b) Paragraph 1.8 seeks information in relation to the conduct of discovery and methodology employed by CS Life.
 - (c) Paragraph 2 deals with the provision of a Further and Better List.
 - (d) Paragraph 3 deals with the documents of the Bank and the ability of CS Life to obtain those documents under Article 400 of the Swiss Code of Obligations ("Article 400").
 - (e) Paragraph 4 deals with the disclosure of any further correspondence between CS Life and the Bank in relation to the provision of documents by the Bank to CS Life.
 - (f) Paragraph 5 deals with the issue of redactions.
 - (g) Paragraph 6 and 7 deal with definitions.
 - (h) Paragraph 8 deals with the issue of costs.
23. I should note two preliminary points. First, the approach taken by CS Life in its draft order is to provide a confirmation that it has requested a particular category of documents from the Bank and has discovered any relevant documents received from the Bank as a result of that request. The Plaintiffs complain that in relation to CS Life's own documents, its discovery obligation is not complied with by simply confirming that it has requested the relevant documents from the Bank.
24. CS Life maintains that other than the documents referred to in paragraph 20 of Coffey 4, it is dependent upon the Bank searching and providing documents requested by the Plaintiffs. For the reasons set out in paragraphs 29 to 33 below,

I take the view that CS Life does have access to the documents set out in paragraphs 1.1 to 1.7 of the order discussed below. In the circumstances, in relation to its own documents, CS Life needs to file an affidavit confirming that it has discovered all relevant documents.

25. Second, to date all the evidence on behalf of CS Life in relation to this discovery application has been filed by Mr Thomas Coffey, who, as noted above, was the Chief Executive Officer of CS Life between 28 September 2009 and 31 July 2017. The Plaintiffs complain that it is inappropriate that the affidavit evidence on behalf of CS Life should be given by a person who is no longer an employee, director or officer of CS Life. I agree and note that CS Life accepts that the affidavit to be filed pursuant to O. 24 r. 7 will be filed by an officer of CS Life. I now turn to the categories of documents which are the subject matter of this application.

1. Documents of CS Life

26. I confirm that the Defendant shall within 14 days of this Ruling file and serve an affidavit sworn by a current officer of the Defendant verifying the discovery of the Defendant ("the Affidavit"). The Affidavit shall provide confirmation in relation to the following information ordered by the Court:

1.1 Emails

27. In paragraph 14 of Coffey 4, Mr Coffey advises that 26 individuals were employed by the Bank or other companies within the Credit Suisse Group and made available by the Bank to conduct life insurance business for CS Life during the period covered by the proceedings. In paragraph 15, Mr Coffey advises that the email accounts of 14 of these employees, considered likely to have emails relevant to the matters in issue in the proceedings, had been searched for documents relevant to the proceedings. The remaining 12 employees have not had their email accounts searched and, given the Plaintiffs' concerns and for the sake of completeness, CS Life will write to the Bank to ask it to search the email accounts of these individuals. In my view, there is no reason why the existing employees, designated to undertake CS Life business, cannot be required by CS Life to undertake the required searches.

28. In the circumstances, I order that the Defendant's Affidavit shall "*confirm that the Defendant has searched all email accounts of the 26 individuals referred to at paragraphs 14 and 15 of Coffey 4 and that all such documents relevant to the issues in dispute have been discovered in native/original format.*"

1.2 Additional documents referred to in Coffey 4

29. In paragraph 11 of Coffey 4, Mr Coffey advises that when he was employed by CS Life he had access to the following documents (i) his own email account which was provided by the Bank and held on Bank's servers; and (ii) the Lifeware system ("Lifeware"), which is the policy administration program holding CS Life's policy life insurance data and system-generated life insurance documents. He advises that it was also the system through which the policies were administered, for example, it would be used to check that any new policy applications were complete and to approve surrenders on policies which were in force.
30. In paragraph 20 Mr Coffey states that on the Bank's systems CS life documents were held in two places: (i) Lifeware (as described in paragraph 11 (ii)); and (ii) a segregated section of the Bank's electronic archive system dedicated to CS Life ("Segregated Electronic Archive"). He confirms that the employees designated by the Bank to conduct life insurance business for CS Life were permitted access to CS Life documents on Lifeware and within the Segregated Electronic Archive for the purposes of their assignment to administer CS Life's business.
31. In paragraph 26 Mr Coffey refers to what he has been told by Ms Homann, a Bank employee designated to conduct CS Life business, that during the period with which the current proceedings are concerned and at the current time, she was given access to the following documents and her access rights remain the same as at the date of his affidavit (13 January 2020):
- (i) Lifeware (as defined at paragraph 11(ii)). Lifeware was a product used for the non-CS Life Bank Insurance Products and Ms Homann had access to the parts of Lifeware necessary to administer those products as well as those of CS Life.
 - (ii) Segregated Electronic Archive (as defined above at paragraph 20 (ii)).
 - (iii) The sections of the Bank's electronic archive containing the documents and information pertaining to her employment functions in relation to CS Life and the non-CS Life Bank Insurance Products.
 - (iv) Transactions and assets archive, which is also a part of the electronic archive. This contains a number of different categories (probably in excess of 100) of formalities on client accounts including, for example, account information on a transactional level, fee reports (showing the amount of fees being debited from the client accounts) and certain kinds of flags on accounts.
 - (v) Bank internal audits undertaken in respect of the entirety of the Bank's life insurance (CS Life and the Non-CS Life Insurance Products). These

audits were not policy specific and reviewed the performance of the products on a functional level, for example reviewing the processes for the setup of life insurance policies.

32. It seems to me that a fair reading of paragraphs 11, 20 and 26 shows that an employee designated to conduct CS Life business was allowed access not only to the two categories of CS Life business referred to in paragraph 20 but also the three additional categories in paragraph 26.
33. In the circumstances I order that the Defendant's Affidavit shall "*confirm that the Defendant has searched the sources of documents referred to in paragraph 26 (i) to (v) of Coffey 4 and discovered all documents relevant to the issues in dispute located therein.*"

1.3 Attendance notes/call records of CS Life

34. In Coffey 3 Mr Coffey again emphasises at paragraph 48 that CS Life had a limited role with respect to the Policies and in the circumstances it is not surprising that there are no CS Life meeting notes or memoranda with respect to the Policies. Mr Coffey confirmed that there are no records of the decision-making process because CS Life did not take any decisions in relation to the individual Policy Assets. However, despite this assurance by CS Life, the Plaintiffs are now advised that the Sixth List of Documents does indeed contain some documents in this category. In the circumstances I consider that it is appropriate that the Affidavit should "*confirm that the Defendant has searched for meeting/attendance notes of CS Life personnel and/or created by and/or copied to CS Life personnel and discovered all such documents relevant to the issues in dispute.*"

1.4 Documents evidencing transactions carried out on the CS Life Accounts

35. Under this head the Plaintiffs seek an order that the Affidavit "*confirm that the Defendant has searched for documents in relation to transactions carried out on the CS Life Accounts including all reports, statements, marketing documentation, term sheets, and prospectus relating to any products invested in or offered for investment along with records of investment decisions, correspondence in any form relating to the same and account statements evidencing movements on the accounts and ledgers created in the course of the operations of the Policies, and discovered all such documents relevant to the issues in dispute.*"
36. The scope of the confirmation sought under this head by the Plaintiffs is materially identical to the confirmation sought to be given in paragraph 2 (b) of the draft order proposed by CS Life.
37. In Roche 1 the Plaintiffs complain that the discovery provided to date is lacking in documentation evidencing/relating to the transactions carried out on the

relevant accounts and the investment decisions made during the relevant period. It is said that it is clear from the policy reports and statements discovered to date that there was a very high level of investment activity on the CS Life Accounts. In the circumstances, it is said, that it is reasonable to assume that extensive documentation was generated in relation to the CS Life Sandcay account, including marketing documentation, term sheets, and prospectuses, relating to any products invested in, or offered for investment, along with the records of discussions of such investment decisions.

38. Complaint is also made by the Plaintiffs of what they assert is missing documentation in this category. By way of example, the Plaintiffs refer to investments in the products referred to as Raptor, Exten, Marketview, Mensa, Matterhorn and Hyperion, which are in issue in these proceedings. Whilst further discovery provided by the Defendant, since the filing of this application, provides some additional documents in this category, the Plaintiffs continue to maintain that there are still documents missing.
39. The Defendant again emphasises its limited role in respect of the Policy Assets and confirms that it has sought this documentation from the Bank.
40. The documentation in relation to this category is relevant to the issues in the proceedings and these documents are within the power of CS Life. CS Life responds that it has requested this category of documentation from the Bank and has discovered all the relevant material received from the Bank.
41. Given the circumstances in which the massive loss in value in the Policy Assets was incurred it is not oppressive or disproportionate that the Defendant be required to give discovery of this category of documents. I also take into account that there is no suggestion in the Coffey affidavits that to provide this documentation is oppressive on account of being unduly expensive or otherwise disproportionate.
42. Having regard to the protracted history of documentation discovered under this head and having regard to the disagreement in relation to the Defendant's compliance with its obligation to give discovery, it is appropriate that the Defendant be required to give the confirmation sought in paragraph 35 above.

1.5 Documents evidencing investigations and reports into the collapse in value of the Policy Assets in 2015

43. This category of documents relates to the PwC report commissioned by the Bank; any documents produced in the course of the Bank's investigation into the conduct of Mr Lescaudron, insofar as they relate to the CS Life Accounts, and any audits conducted in relation to the performance of the Policies and/or the CS Life Accounts.

44. CS Life has in the past maintained that it does not possess or have access to these documents. Counsel for the Plaintiffs points to the evidence filed on behalf of CS Life in relation to this issue which he says leaves doubt as to whether these documents are in the possession of CS Life.
45. In paragraph 35 (iii) of Coffey 3 it is asserted on behalf of CS Life that Appleby did not state that CS Life did not undertake any investigation or commission any report into the collapse of the policy assets but that *"CS Life did not itself undertake or commission any investigations or reports into the fraudulent transactions or the collapse in the policy assets which resulted in discoverable material"*.
46. In paragraph 35 of Coffey 4 it is again asserted on behalf of CS Life that *"there is no discoverable material in the category of reports produced by or for CS Life relating to the collapse in asset value. The reason that there is no discoverable material in this category is that any such material is privileged"*.
47. Mr Hollander submits that in light of this evidence the position appears to be at that there may be documents in the possession, custody or power of CS Life but these documents have not been disclosed on the ground that they are privileged. I agree and in the circumstances it is appropriate that the Defendant be required to file the Affidavit to:

"a. Confirm that the Defendant has searched for documents evidencing investigations and reporting the collapse in value of the Policy Assets in 2015 including:

- i. The PwC reports commissioned by Credit Suisse AG and all supporting material, insofar as they relate to the CS Life Accounts;*
- ii. 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; and/or;*
- iii. any audits conducted in relation to the performance of the Policies and/or the CS Life Accounts.*

b. Confirm that the Defendant has searched for documents dated between 1 September 2015 and 31 December 2016 relating to the collapse in the value of the Policy Assets; margin calls on the CS Life Accounts; fraudulent conduct on the CS Life Accounts; "Project Dino"; the report produced by PwC and surrounding documentation (including correspondence, whether by email or otherwise), any restructuring of the investments in the CS Life Accounts and/or other remedial action taken in relation to the CS Life Accounts, including board minutes of the

Defendant's board, and documents which it has a right to call for from Credit Suisse AG;

- c. Insofar as the Defendant objects to the discovery of any document within this category 1.5 on grounds of privilege, explain with particularity the basis and justification for such claim of privilege."*

1.6 Audit, risk assessment and monitoring documents

48. I order that the Affidavit should *"confirm that the Defendant has searched for documents in relation to audits and risk assessments in connection with the policies and all documents evidencing the monitoring of the CS Life Accounts and/or Credit Suisse AG's management of the Policy Assets and discovered all such documents relevant to the issue in dispute"*.

1.7 Documents evidencing fees and commissions

49. I also order that the Affidavit should *"confirm that the Defendant has searched for documents evidencing fees and commissions in connection with the Policies and/or the CS Life Accounts and/or the investments entered into on the CS Life Accounts and/or for the benefit of the Policies, and discovered all such documents relevant to the CS Life Accounts"*.

1.8 Conduct of discovery and methodology

50. Under this head the Plaintiffs seek information, to be confirmed by affidavit, *"in relation to each of the searches carried out, identify the parameters of searches carried out including any word searches, the date range, identify the sources searched (including all electronic and hardcopy sources), who conducted the search, the steps taken by Appleby (if any) to supervise the searches, and whether backup/archived/deleted documents have been searched"*.
51. Mr Hollander argues that this information is critical for the Plaintiffs and the Court to assess whether there has been full compliance with the Defendants statutory duty to provide proper discovery. He points to the exceptional circumstances of this case. The Plaintiffs' claim is estimated to be in the region of US \$400 million arising out of alleged imprudent and fraudulent trading in the CS Life Accounts resulting in huge losses to the Policy Assets. The Defendant has put the Plaintiffs to proof in relation to these allegations in circumstances where all the information in relation to how the losses were incurred is in the possession of the Defendant and/or the Bank. The Bank, despite its earlier promise to be transparent with the Plaintiffs in relation to the losses, has refused to disclose the PwC report which it is said investigated the losses suffered by the CS Life Accounts. The Defendant maintains that it has only a few documents to discover as it had a very limited role in setting up the Policies, taking receipt of the sums and placing them into an account with the Bank. On the Defendant's

case the relevant documents are with the Bank and it is the Bank which is carrying out the searches and providing relevant discovery. In the circumstances, Mr Hollander argues it is critical that the Court ensures and objectively determines that the Defendant has complied with its discovery obligation.

52. Mr Moverley Smith argues that the Plaintiffs' application is brought pursuant to RSC order 24, rule 7 and the remedies provided for under this rule are restricted to the production of an affidavit stating whether any document specified or described in the application is, or has at any time been in the possession, custody or power of the respondent. He argues that order 24, rule 7 does not provide the Court with any power to require a party to detail the methodology adopted in carrying out discovery, nor does it give the Court the ability to require a party to carry out specific searches.
53. I consider that the Court does have the power in an appropriate case to require a party to provide the information in relation to the conduct of discovery and methodology as sought by the Plaintiffs in paragraph 50 above. Order 1A incorporates in the Bermuda Rules of the Supreme Court the overriding objective of enabling the Court to deal with cases justly. Order 1A rule 2 requires the Court to give effect to the overriding objective when it exercises any powers given to it by the Rules or interprets any rule.
54. An example of this in the discovery context is the decision of Kawaley J in *Stiftung Salle Modulable v Butterfield Trust (Bermuda) Limited* [2013] Bda LR 45, at [6]. Order 1A rule 4(1) mandates the Court to further the overriding objective by actively managing cases including by the use of technology and giving directions to ensure that the trial of the case proceeds quickly and efficiently.
55. In my judgment, in the unusual circumstances of this case as outlined in paragraph 51 above, it is appropriate to require the Defendant to provide the information sought in paragraph 50 above. The provision of this information will allow the Court to ensure that proper discovery has been provided by the Defendant, reduce the risk of further applications in relation to discovery and ensure that the trial of this case proceeds quickly and efficiently.

Further and better list

56. Clearly if the email accounts referred to in paragraphs 14 and 15 of Coffey 4 and the documents from sources listed in paragraphs 26 (i) to (v) have not been produced they should be listed in a further and better list. Accordingly, I order that the Defendant provide a further and better list of all native documents emanating from the sources listed in Coffey 4 paragraphs 26 (i) to (v) and the email accounts referred to in paragraphs 14 and 15, if not already discovered by the Defendant.

Issue of Privilege

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".

61. The relevant issue for the Court to consider is whether, having regard to what is said in Coffey 3 and the Appleby letter of 2 July 2019, any privilege which may exist in relation to the correspondence between the Defendant and the Bank has been waived. Both counsel rely upon the decision of Elias J in *Brennan v Sunderland City Council* Employment Appeal Tribunal, [2009] ICR 479. The relevant test is whether a reference is made to the effect of the document (in which case there is no waiver) or there has been a reference and reliance on the contents (in which case there is a waiver). The relevant paragraphs in the judgment are [45] and [51]:

1. "45. Both Mr Reade and Mr White rely upon substantially the same authorities. They referred to a number of Court of Appeal authorities which they say support their analysis that disclosure of contents and reliance is, on any view, central to an analysis of waiver. In *Dunlop Slazenger International v Joe Bloggs Sports Ltd* [2003] EWCA Civ 901 Lord Justice Waller, with whose judgment Lord Justice Thorpe agreed, expressed the view that the principles of waiver operating in this area, although not altogether easy to discern, are as follows:

"... If one goes to one of the text books, Matthews & Malek, one finds at paragraph 10.17 a summary of the position as those authors see it. First of all, in that paragraph there is the reference to the dictum of Mustill J (as he then was) in *Nea Karteria*, which provides as follows:"

"Where a person is deploying in court material which would otherwise be privileged, the opposite party and the court must have the opportunity of

satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood."

"I would describe that as the cherry picking aspect. Then the paragraph reads as follows:

"The key word here is 'deploying'. A mere reference to a privileged document in an affidavit does not of itself amount to a waiver of privilege, and this is so even if the document referred to is being relied on for some purpose, for reliance in itself is said not to be the test. Instead, the test is whether the contents of the document are being relied on, rather than its effect. The problem is acute in cases where the maker of an affidavit or witness statement has to give details of the source of his information and belief, in order to comply with the rules of admissibility of such affidavit or witness statement.

Provided that the maker does not quote the contents, or summarise them, but simply refers to the document's effect, there is apparently no waiver of privilege. This benevolent view has not been extended to the case where the maker refers to the document in order to comply with the party's need to give full and frank disclosure, eg on a without notice (ex parte) application."

So it is that the authors correctly identify that the authorities provide for a distinction between a reference to the effect of the document and reliance on the content. Mr Croxford suggests that this is a reference case and not a deployment case."

As to the question of reliance, again the council and the unions rely heavily upon a number of Court of Appeal authorities. The Dunlop Slazenger case is material to this issue also. It is not necessary to go into the details of that case, but suffice it to say that having noted that the test was whether the contents of the advice were being relied upon, the court then examined with some care the nature of the issues in the case before it concluded that the advice referred to was being specifically relied upon by the party to bolster its position before the court."

62. Mr Moverley Smith argues that in Coffey 3 and the letter from Appleby dated 2 July 2019 the reference to the correspondence between the Defendant and the Bank is to the effect of that correspondence and not to its contents. He argues that in those circumstances there has been no waiver of any legal privilege which may otherwise exist.
63. I am unable to accept this submission. In paragraph 27 of Coffey 3 it is expressly stated that the Defendant made a request to the Bank for the classes of

documents and specific documents identified in the Hurrion letter of 19 June 2019. This is a reference to the contents of the letter sent by the Defendant to the Bank. The significance of this letter is not that it was written but that it contained the identical request made in the Hurrion letter of 19 June 2019. Likewise the reference to the response from the Bank in paragraph 29 of Coffey 3 is not to the fact that a letter was received from the Bank but the precise contents of that response from the Bank. The purpose of this correspondence, as Mr Hollander submits, was to deflect criticism in relation to discovery by pointing out that the Defendant had complied with the request made by the Plaintiffs by making the same request to the Bank. In the circumstances I am bound to conclude that any legal privilege in relation to this correspondence which may have existed has been waived by the Defendant.

Documents of the Bank

64. The issue relating to the Bank's obligation to provide information and documents to the Defendant under the various contractual agreements between the parties, arising out of the loss in value of the Policy Assets is governed by Swiss law.
65. In relation to this issue expert evidence was given by Professor Pichonnaz on behalf of the Plaintiffs. Professor Pichonnaz is the Professor of Private Law (specialising in contract law) at the University of Fribourg. The Defendant's expert is Dr Dallafior, a commercial litigation partner at Nater Dallafior, a law firm in Zurich. The experts prepared a joint report as well as their individual reports and were tendered for cross-examination at the hearing of this application.
66. Both experts agree that in principle the issue is to be determined by reference to the ambit of Article 400 of the Swiss Code of Obligations. Mr Moverley Smith agrees that while the parties differ as to the effect of various agreements, there is consensus that Article 400 does apply and in the circumstances it is unnecessary to dwell on the distinctions between the expert reports in that respect. Article 400 provides;

"The agent is obliged at the principal's request, which may be made at any time, to give an account of his agency activities and to return anything received for whatever reason as a result of such activities."
67. It is also common ground that Article 400 provides for two distinct duties: first, a duty to return everything received under the contract of mandate; and second, a duty to account for the performance.
68. In relation to the duty to return documents and values, Professor Pichonnaz explains at paragraph 41 of his report, this duty is directly linked to the fact that the agent has acted in the interests of another; it is therefore also based on the principle of trust. The agent has to return any money, value-paper, documents,

even without market value, received from the principal to perform the contract. The agent has also to return any documents, values, or anything received by third parties while performing the contract, which have an internal link to such performance. There is no relevant disagreement between the experts in relation to the duty to return documents and values.

69. In relation to the second duty under article 400, the duty to account, there is disagreement between the experts as to its precise scope. Professor Pichonnaz expresses the opinion at paragraph 42 of his report that this duty is also grounded on the fact that the agent acts in the interests of another. It therefore enables the principal to assess whether and to what extent the agent has performed its obligations in conformity with the contract. This is the reason why, explains Professor Pichonnaz, it is understood by authors and considered by the Federal Tribunal to be wider than the duty to return documents.
70. According to Professor Pichonnaz (paragraph 44) the duty to account covers "*any information which may be useful for the legal assessment and legal enforcement of any right or right for damages*". In other words the agent has to inform the principal "*on anything which may have any importance for him*", including the opportunity to file a liability claim against the agent.
71. In relation to the duty to account Professor Pichonnaz expresses the view that all information in the documents in the possession of the agent has to be brought to the attention of the principal provided that the information is *relevant* to the agent's performance. According to Professor Pichonnaz the test is one of *relevance* and not the categorisation of the classes of documents in the possession of the agent.
72. Dr Dallafior disagrees with Professor Pichonnaz that *relevance* is the primary test in relation to the duty to account. Dr Dallafior expresses the view that there is a category of document, *purely internal documents*, which is excluded from the duty to account irrespective of the *relevance of those documents* to the issue of the agent's performance.
73. In relation to the duty to account Dr Dallafior states that the current position under Article 400 is as follows:
- (1) Internal documents are included in the agent's duty to account under Article 400 to the extent that they are *relevant* in order to enable him to review the activities of the agent.
 - (2) *Purely internal documents* do not form part of the agent's duty to account and in consequence the principal is not entitled to information contained in those documents even though that information may otherwise be *relevant* to the potential liability of the principal.

- (3) If an internal document is in principle covered by the agent's duty to account, a weighing of interests has to be conducted if the confidentiality interests of the agent are at stake.
74. Having considered the reports of the respective experts and having heard the evidence in Court, I prefer, for the reasons given by him, the opinion of Professor Pichonnaz in relation to the scope of Article 400 concerning the duty to account.
75. Both Experts agree that the position in relation to the duty to account under Article 400 is governed by the landmark case of the Swiss Federal Tribunal (the top Swiss court) in November 2012 (*case 139 III*).
76. In the first 2 paragraphs of section 4.1.3 of case *139 III* the court rejected the submission that the duty to account "*cannot go any further than the obligation to surrender.*"
77. The court defined the scope of the duty of accountability as "*limited to matters relating to the contractual relationship, whereby the agent must inform the principal fully and truthfully and submit to them all documents relating to the transactions carried out in the principal's interest*" [Emphasis added].
78. The court defined the scope of the obligation to surrender as including "*everything that has been handed over to the agent by the client or received from third parties in execution of the mandate*". The court noted that "*exceptions are purely internal documents such as preparatory studies, notes, drafts, material collections and own accounts*".
79. The Complainant argued that the duty of accountability was a complimentary right to information and cannot go further than the obligation to surrender and was subject to the same restrictions. Implicitly the Complainant argued that the duty of accountability could not extend *to purely internal documents*.
80. The court rejected that submission holding that "*the fact that certain documents are not subject to the obligation to surrender, it cannot therefore automatically be concluded, contrary to the Complainant's view, that no account is to be given of them either*". The court declared that "*it cannot be concluded ... that disclosure and accountability are of equal importance*" and noted "*for example, records of customer visits and contracts may be subject to accountability, although such (internal) records are generally not subject to the obligation to surrender*".
81. The ratio of the case appears in the final paragraph of section 4.1.3 on page 56 where the court stated:

"A distinction must therefore be made between internal documents (not subject to the obligation to surrender), the content of which must be brought to the attention of the principal in an appropriate form in order to enable it

to exercise any control over the activities of the agent, and purely internal documents such as draft contracts that have never been sent, which are in any case not relevant for the verification of the agent's performance of the contract in accordance with the contract".

82. I accept Professor Pichonnaz's evidence that the ratio of this case is that all documents which are *relevant* to the assessment of the agent's performance are subject to the duty to account. Only documents which are excluded and not subject to the duty to account are documents which are *not relevant* to the assessment of the agent's performance. The relevant criteria for this purpose is *relevance* of the documents in question and not their *categorisation* either as internal or *purely internal documents*.

83. Professor Pichonnaz's opinion in this regard is supported by the Federal Tribunal case *FT 4A 522/2018*. At paragraph 4.2.2.1 the court summarised the legal position in relation to the duty to account as follows:

"Regarding the agent's obligation in general, case law accepts that the obligation to account for his management (Accountability) includes the obligation to inform (Obligation to inform). The right to information must allow the principal to verify whether the activities of the agent correspond to a good and faithful execution of the mandate and, if necessary, to claim damages based on the responsibility of the agent... The duty to provide information may also relate to the content of internal documents, provided that it is relevant for monitoring the activities of the agent (ATF 139 III 49 recital 4.1.3 p.56)."

84. The reference to *ATF 139 III 49* recital 4.1.3 p.56 is a reference to the ratio of the *ATF* case referred to in paragraph 81 above. I accept Professor Pichonnaz's evidence that this Federal Tribunal case in 2018 confirms that the *ATF 139* case decided that the sole criterion for seeking information in aid of the duty to account is relevance and not categorisation of the documents into internal documents and purely internal documents.

85. It seems clear to me, consistent with the evidence of Professor Pichonnaz, that the concept of *relevance* in the final paragraph of section 4.1.3 on page 56 in the *ATF 139 III 49* case, (paragraph 81 above), and in section 4.2.2.1 in the *4A 522/2018*, is a reference to the degree to which a particular document is useful in verifying the performance of the agent in relation to a contract. I do not accept, as submitted by counsel for the Defendant, that the reference to *relevance* in section 4.1.3 on page 56 in the *ATF 139 III 49* case bears a special or restrictive meaning. In particular I do not accept the submission that the words "*not relevant*" in the statement "*and purely internal documents such as draft contracts that have never been sent, which are in any case not relevant for the verification of the agent's performance*" mean that the category of *purely internal documents* is not part of the duty to account.

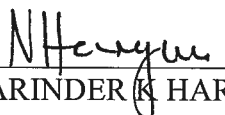
86. Accordingly, I find that under the duty to account under Article 400, subject only to the issue of relevance, the Defendant has the power to call the Bank to provide and the Bank has an obligation to provide all documents within the categories set out in the proposed order. This finding should be reflected in the order.
87. I now turn to the documents required from the Bank under paragraph 3 of the draft order proposed by the Plaintiffs. The Plaintiffs seek that an officer of CS Life "*confirm, by way of the Affidavit, that the Defendant has required the Bank pursuant to Article 400 to provide the documents and categories of documents to the Defendant [specified in the sub paragraphs below] and provide copies of all letters of request and provide copies and responses received from the Bank*". I confirm that it is appropriate that the Defendant should provide such a confirmation.
88. Paragraph 3.1 of the draft order seeks "*Attendance Notes/Call Records of the Bank relating to the Policies.*" This paragraph seeks the same documents from the Bank as sought from CS Life under paragraph 1.3 of the draft order. I confirm that it is appropriate that CS Life should confirm that it has sought this category of documents from the Bank.
89. Paragraph 3.2 seeks documents evidencing transactions carried out on the CS Life Accounts from the Bank and is in the same terms as paragraph 1.4 seeking the same documents from CS Life directly. As noted above at paragraph 36, the scope of this request is the same as that proposed by the Defendant in paragraph 2(b) of the draft order proposed by the Defendant. In the circumstances I consider that it is appropriate that CS Life should confirm that it has sought this category of documents from the Bank.
90. Paragraph 3.3 seeks from the Bank account statements provided in Excel or CSV format. Counsel for CS Life complains that the Plaintiffs have already been advised that the Bank account statements do not exist in these formats. He explained that CS Life has already provided relevant information in this category and the Plaintiffs can arrange to produce those statements in Excel or CSV format. He submits that it is inappropriate that the Bank should be required to incur this expense. I agree that the Bank should not be required to produce the Bank account statements in Excel or CSV format if they do not already exist in those formats. However, if the documents already exist in Excel or CSV format then the Bank should be required to produce them to CS Life. In the circumstances I consider it appropriate that CS Life confirm that it has sought this category of documents from the Bank on the assumption that they already exist in Excel or CSV format.
91. Paragraph 3.4 seeks from the Bank documents evidencing investigations and reports into the collapse in value of the Policy Assets in 2015 and is in the same terms as documents sought from CS Life directly under paragraph 1.5 of the

draft order (see paragraph 47 above). In particular paragraph 3.4 seeks from the bank the PwC report commissioned by the Bank and supporting documents, insofar as they relate to the CS Life Accounts. I consider it appropriate that CS Life should confirm that it has sought this category of documents from the Bank.

92. Paragraph 3.5 seeks from the Bank audit, risk assessment and monitoring documents in connection with the policies and all documents evidencing the monitoring of CS Life Accounts and/or Credit Suisse AG's management of the Policy Assets and is in the same terms as documents sought under paragraph 1.6 directly from CS Life. I consider it appropriate that CS Life confirm that it has sought this category of documents from the Bank.
93. Paragraph 3.6 seeks documents from the Bank evidencing fees and commissions in connection with the Policies and/or the CS Life Accounts and/or the investments entered into on the CS Life Accounts and/or for the benefit of the Policies. Paragraph 3.6 is in the same terms as documents sought directly from CS Life under paragraph 1.7. I consider it appropriate that CS Life confirm that it has sought this category of documents from the Bank.
94. Paragraph 4 of the draft 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 the Bank, the Defendant shall make such a request of the Bank, such a request and any responses received from the Bank to be provided to the Plaintiffs."* I consider it appropriate that CS Life be required to comply with this provision.
95. Paragraph 5 of the draft order deals with redactions. It provides that the Affidavit should *"confirm that the Defendant has examined the disclosed documents including the emails and the documents referred to at Coffey 4 paragraphs 26 (i) to (v) in an unredacted form and satisfied itself that any redactions are appropriately made in accordance with Bermuda Law. To the extent that such redactions are not appropriately made in accordance with Bermuda Law, provide a further list of unredacted versions of the disclosed documents"*. As counsel explained the purpose of this provision is that any redactions in relation to CS Life's own documents should not be carried out by the Bank but CS Life itself should take responsibility for such redactions. I agree that CS Life should be required to comply with this provision.
96. Paragraph 6 seeks to provide that the searches be undertaken by a person qualified to search and retrieve documents. I do not consider it necessary to provide for such a provision as it is likely to lead to further disputes as to whether searches have indeed been undertaken by "qualified" persons.
97. Paragraph 7 seeks to define the term "documents" as encompassing all sources of electronically stored information and hardcopy documents howsoever stored. This provision is uncontroversial and should be included.

98. Paragraph 8 deals with the issue of costs. My provisional view is that the Plaintiffs' costs of and occasioned by the Plaintiffs' Summons for Specific Discovery should be paid by the Defendant but if this is not agreed I will hear the parties on this issue.

Dated 11 February 2020



NARINDER K HARGUN
CHIEF JUSTICE