In The Supreme Court of Bermuda

COMMERCIAL COURT

CIVIL JURISDICTION

2017: No. 293

BETWEEN:

(1) BIDZINA IVANISHVILI
(2) EKATERINE KHVEDELIDZE
(3) TSOTNE IVANISHVILI
(an infant, by his mother and next friend, Ekaterine Khvedelidze)
(4) GVANTSA IVANISHVILI
(5) BERA IVANISHVILI
(6) MEADOWSWEET ASSETS LIMITED
(7) SANDCAY INVESTMENT LIMITED

Plaintiffs

-and-

CREDIT SUISSE LIFE (BERMUDA) LIMITED

Defendant

RULING

(in Chambers)

Strike out application – Serious and prolonged argument – Soundness of pleadings – Decisive – When inappropriate

Date of Hearing: August 31 2018

Date of Judgment: September 13 2018

Ms Sarah-Jane Hurrion and Judith Roche, Hurrion & Associates Ltd., for the Plaintiffs;
Mr John Wasty and Ms Hannah Tildesley, Appleby (Bermuda) Limited, for the Defendant.

INTRODUCTORY

1. By a summons dated 6 July 2018 the Plaintiffs seek an order that the applications contained within paragraphs 1 to 5 inclusive of the Summons of the Defendant dated 1st June (the Defendant's Summons) be not entertained and/or summarily dismissed, in accordance with the power of the court exercised in Williams & Humbert v W&H Trade Marks (Jersey) Ltd [1986] 1 AC 368 and/or the Court's inherent jurisdiction and/or RSC Order 18, rule 19, and RSC Order 1A, rules 1 and 4. Alternatively, the Plaintiffs seek an order that the applications contained in the Defendant's Summons be stayed generally pending trial of this action.

2. By the Defendant's Summons the Defendant seeks an order pursuant to RSC order 18, rule 19 or under the inherent jurisdiction of the Court to strike out the entirety of the claims made by the 1st to 5th Plaintiffs in the Statement of Claim. These claims consist of damages based on breach of statutory duties contained in the Segregated Accounts Companies Act 2000 (the "SAC Act") (Statement of Claim 31, 58 – 59) and damages for breach of "common law duties" (Statement of Claim 60).

BACKGROUND

3. The background to this action is taken from the Statement of Claim dated 22 August 2017 and filed on behalf of all the Plaintiffs. The 1st Plaintiff is a Georgian national, a prominent businessman, and who was the Prime Minister of Georgia from 25 October 2012 to 20 November 2013. The 2nd Plaintiff is the 1st Plaintiff's wife. The 3rd, 4th and 5th Plaintiffs are the children of the 1st and 2nd Plaintiffs. The 1st to 5th Plaintiffs (the "Family Plaintiffs") are the beneficiaries of the Mandalay Trust and the Green Vals Trust.

4. The Mandalay Trust is a trust established under the laws of the Republic of Singapore by declaration of trust dated 7 March 2005. At all material times Credit Suisse Trust Limited (the "Mandalay Trustee") has been the trustee of the Mandalay Trust. The 6th Plaintiff, Meadowsweet Asset Limited ("Meadowsweet"), is a company incorporated in the British Virgin Islands. The Mandalay Trustee at all times owned, and continues to own, the entire share capital of Meadowsweet.

5. The Green Vals Trust is a trust established under the laws of Prince Edward Island by declaration of trust dated 10 August 2012. On 1st July 2014 Credit Suisse Trust Limited became the trustee of the Green Vais Trust (the “Green Vals Trustee”) and the proper law of the Green Vals Trust was changed to New Zealand law. The 7th Plaintiff, Sandcay Investments Limited (“Sandcay”), is a company incorporated in the Bahamas and has, at all material times, been owned by the Green Vals Trustee.

6. The Defendant, Credit Suisse Life (Bermuda) Ltd (“CS Life”), is an insurance company incorporated and registered in Bermuda as a segregated accounts company under the SAC Act. CS Life is a wholly owned subsidiary Of Credit Suisse AG (the “Bank”), which provides private banking services from various locations around the world. The Trustees, the Bank and CS Life are all subsidiaries of Credit Suisse Group AG (“Credit Suisse”), a global financial services company headquartered in Zurich, Switzerland.

7. In or around 2004, the Bank approached the 1st Plaintiff to offer private wealth management services to him and his family. The 1st Plaintiff agreed to invest monies through the Mandalay Trust established by the Mandalay Trustee. In 2010 or 2011, the investment in an insurance policy under the Mandalay Trust was suggested and/or recommended by the Bank. At all material times it was envisaged that the premium payable under the life insurance policy would be held and invested by the Bank acting as agent for CS Life. On 7 November 2011, CS Life issued unit – linked life insurance policy to Meadowsweet in consideration of a single premium payable by Meadowsweet in the amount of USD 480, 267, 313. Meadowsweet paid that premium in due course.

8. On or around August 2012 at the bank advised the 1st Plaintiff that he should establish a new trust to hold and invest with the Bank proceeds relating to the sale of a pharmaceutical business, which could then be used to provide more generally for inheritance purposes for the 1st Plaintiff’s family members. The Bank suggested and/or recommended the investment in an insurance policy which would be held by a company, the shares in which be held by the Green Vals

Trustee. At all material times it was envisaged that the premium payable under the life insurance policy would be held and invested by the Bank acting as an agent for CS Life. On 7 December 2012, CS Life issued a unit – linked life insurance policy to Sandcay in consideration of a single premium payable by Sandcay in the amount of USD 275, 075, 927. Sandcay paid that premium in due course. The total premiums paid by Meadowsweet and Sandcay amounted to USD 755, 343, 240.

9. On various dates between 2011 and 2013, the Bank recommended certain investments for the Mandalay Trust and the Green Vals Trust. In particular, the Bank recommended that a large part of the Mandalay Trust and the majority of the Green Vals Trust fund should be invested in life insurance policies issued by CS Life, sister company of the Trustees and a subsidiary of the Bank.

10. In September and October 2015, the Bank made a number of margin calls in relation to the CS Life accounts. On 29th of September 2015, the Bank issued a margin call of USD 5, 550, 000 in relation to the Meadowsweet accounts and a margin call of USD 26, 880, 000 in relation to the Sandcay accounts. On 16th and 30th October 2015, the Bank issued further margin of USD 9,420, 000 and USD 12, 500, 000 respectively in relation to the Sandcay accounts. On 11th and 12th January 2016, the Bank issued margin calls of USD 6, 285, 000 and USD 7, 500, 000 respectively in relation to the Sandcay accounts. In paragraph 61.2 (b) of the Statement of Claim it is averred that "The Plaintiffs have satisfied margin calls by liquidating other assets held by them by the Bank which, but for the margin calls caused by the Bank's misconduct aforesaid, would not have been liquidated and which would have continued to appreciate".

11. On 27th September 2015, the Bank sent to the 1st Plaintiff the Investment Reports for Sandcay and Meadowsweet CS Life accounts showing the values of the assets held in those accounts as at 31st December 2014 and 25th September 2015. These revealed that from 31st of December 2014 to 25th of September 2015 the Meadowsweet account assets had reduced from USD 202.7 million to USD 119.6 million and the Sandcay account assets had reduced from USD 257.4 million to USD 144.8 million.

12. It is alleged by the Plaintiffs that the fall in the value of the accounts is due to the fraudulent activities of certain employees within the Bank. Criminal proceedings have since taken place in Switzerland against one of the Bank's employees, Mr Lescaudron, who has admitted most of the allegations against him. In February 2018 he was convicted of embezzlement, simple and aggravated misappropriation and forgery and sentenced to 5 years in prison.

13. The detailed allegations of misconduct on the part of the Bank are set out in paragraph 49 of the Statement of Claim. They include the allegations that the Bank had caused funds to be stolen and transferred from the Meadowsweet and Sandcay accounts to the accounts of certain other customer of the Bank for no or less than market consideration; the Bank caused the Meadowsweet and Sandcay accounts to acquire certain assets (stocks) from the accounts of certain other customers of the bank at a price in excess of their market value; the Bank facilitated (hidden) transfers, ostensibly loans, from the Meadowsweet and Sandcay accounts to the Bank's own employees or their associates which have not been repaid; and certain of the transfers, acquisitions and trading had been completed using forged signatures and/or instructions.

14. In the Statement of Claim the Plaintiffs pursue four causes of actions against CS Life. Meadowsweet and Sandcay, 6th and 7th Plaintiffs, alone assert causes of action based upon breach of contract and breach of fiduciary duty (Paragraphs 51 – 57). All the Plaintiffs assert a cause of action based upon breach of statutory duty under the SAC Act (paragraphs 58 – 59). The Defendant accepts that Meadowsweet and Sandcay have the necessary legal standing and are entitled to pursue the claims for breach of statutory duty under the SAC Act but disputes that the Family Plaintiffs are entitled to do so. The Family Plaintiffs also assert a cause of action based upon breach of common law duty of care (Paragraph 60). The Defendant denies that such a cause of action is open to the Family Plaintiffs.

15. The Plaintiffs say that they are entitled to damages and/or equitable compensation to put them into the position they would have been in had CS Life properly discharged its duties. The plaintiffs seek payment of damages and/or equitable

compensation in order to reconstitute the CS Life accounts. The Plaintiffs assert that the losses claimed will remain the same whether the Plaintiffs succeed on any one or more of the causes of action pleaded.

RELEVANT LEGAL PRINCIPLES

16. The correct approach to be followed in considering whether the Court should proceed with an application to strike out pursuant to RSC Order 18, rule 19 is well settled. In Williams & Humbert Lord Templeman, after considering the differing approaches at the time, stated the approach to be followed in the following terms:

> *"... If an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that the striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself"*

17. This approach was recently followed in Bermuda by Hellman J. in Kingate Global Fund Ltd (In Liquidation) V Kingate, Management Ltd & Ors [2016] Bda 4. Hellman J. restated the rule of practice as follows at [13]:

> *"If the Court is satisfied that the strike out application would be likely to involve serious and prolonged argument, then it will not generally allow the application to proceed unless it: (1) harbours doubts about the soundness of the pleading/thinks it likely that it may reach the conclusion that the pleading should be struck out; and (2) is satisfied that the application will either be decisive or appreciably simplify the eventual trial. However even if these criteria have not been met, in exceptional circumstances, such as present in Williams & Humbert, the Court may nonetheless allow the application to proceed".*

18. It was argued on behalf of the Defendant that the test in Kingate only requires the Defendant to satisfy in respect of any one of the three questions: (I) would the

application likely involve serious and prolonged argument; (2) does the court think it likely that it may reach the conclusion that the pleading may be struck out; and (3) is the court satisfied that the application will appreciably simplify the eventual trial. I am unable accept that submission. The passages from the speech of Lord Templeman and judgment of Hellman J. set out above make it clear that unless the Court comes to the view that the application is unlikely to involve serious and prolonged argument, the Court will only proceed with the application if it is satisfied that (1) it may reach the conclusion that the pleading should be struck out and (2) that the application will either be decisive or appreciably simplify the eventual trial.

19. It is well established that applications for striking out are only suitable where it is plain and obvious that the pleaded claims cannot succeed. It is not a suitable procedure where the underlying facts, upon which the application is based, may be in dispute. It is also clear from the authorities that a strike out application is not an appropriate procedure for determining controversial points of law in a developing area. The statement of principle and some of the main authorities are set out in Altimo Holdings V Kyrgyz Mobil Tel Ltd [2012] 1 WLR 1804 per Lord Collins at para 84:

> *"The general rule is that it is not normally appropriate in a summary procedure (such as an application to strike out or for summary judgment) to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts: e.g. Lonrho Plc. v. Fayed [1992] 1 A.C. 448 , 469 (approving Dyson v Att-Gen [1911] 1 KB 410, 414: summary procedure "ought not to be applied to an action involving serious investigation of ancient law and questions of general importance ..."); X (Minors) v Bedfordshire County Council [1995] 2 AC 633 at 741 ("Where the law is not settled but is in a state of development … it is normally inappropriate to decide novel questions on hypothetical facts"); Barrett v Enfield London BC [2001] 2 AC 550, 557 (strike out cases); Home and Overseas Insurance Co. Ltd. v Mentor Insurance Co. (U.K.) Ltd [1990] 1 WLR*

153 (summary judgment). In the context of interlocutory injunctions, in the famous case of American Cyanamid Co v Ethicon Ltd [1975] AC 396, 407 it was held that the court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. It was no part of the court's function "to decide difficult questions of law which call for detailed argument and mature consideration."

ISSUES RAISED IN THE APPLICATION

20. The main point taken by the Defendant in the strike out application is that it is an essential ingredient of the causes of action based upon common law duty of care and the breach of statutory duty that the Family Plaintiffs have suffered special damage. It is argued by the Defendant that the Family Plaintiffs are not named as beneficiaries in the policies issued by CS Life. The Family Plaintiffs are merely discretionary beneficiaries of the Mandalay Trust and the Green Vals Trust and as such have no proprietary interest in the trust assets. Given that a discretionary beneficiary has no interest in trust property unless and until it is appointed to him, the Defendant argues that a diminution in the value of the trust fund caused by the wrongdoing of a third party does not cause a discretionary beneficiary any loss and accordingly he has no cause of action against that third party. The Defendant argues that it is the trustees alone who have the right to pursue any claim arising out of the diminution in value of the fund. It follows, the Defendant argues, that the Family Plaintiffs have suffered no actionable loss and as a result can have no claim pursuant to section 18 (7) of the SAC Act and at common law.

21. The Family Plaintiffs respond that this formulation of the damages claim by the Defendant does not take into account the factual case advanced by all the Plaintiffs in the Statement of Claim. The Family Plaintiffs point to paragraph 61.2 (b) which asserts that the Plaintiffs (including the Family Plaintiffs) have satisfied margin calls by liquidating other assets held by them. If that plea is factually correct then the Family Plaintiffs may well be able to argue that they have satisfied the requirement of special damage both in respect of the common law and breach of statutory duty claims. The issue whether the Family Plaintiffs did in

fact make payments in respect of the margin calls can only be determined at trial following discovery given by the parties.

22. The Family Plaintiffs further contend that the proposition of law that a diminution in the value of the trust fund caused by the wrongdoing of third party does not cause a discretionary beneficiary any loss is a controversial one in a developing area of law. They rely upon Freeman V Ansbacher Trustees (Jersey) Limited [2009] JRC 003 where it was argued that the claim should be struck out on the basis that the losses suffered by a company, wholly owned by a trust, could not be recovered at the instance of discretionary beneficiaries of that trust. It was argued that the losses suffered by the discretionary beneficiaries were reflective of the losses suffered by the company which would have been made good if the company had taken the necessary action to recover. However, Deputy Bailiff Birt refused to strike out the claim of the discretionary beneficiaries to reconstitute the trust fund:

> *"… I have come to the clear conclusion that it would be wrong to strike out the claim. My main reason for doing so is that I consider there is considerable uncertainty as to the extent to which the Prudential principle [reflective loss] should be applied to a claim such as the present relating to a trust. The authorities are clear that the court should be particularly careful in striking out a claim in a developing field of law on the basis of assumed facts. It is best to consider how the law should develop with the benefit of knowing the actual facts" [83].*
>
> *"I accept that, if the Prudential principle applies to the present case, the order of justice should be struck out. However, I am by no means convinced that the principle should necessarily be applied to a situation such as the present involving a discretionary trust. I think it is not entirely clear that the principle would necessarily be applied in England; but, even if it were, I consider that there are strong grounds for believing that Jersey law should follow a different path" [96].*

> *"None of the English cases has had to consider the position where there is a discretionary trust. It seems to me strongly arguable that the two reasons for the principle may have no application in a case such as the present. Rosanna has no entitlement to the trust fund. She will not be entitled to receive any monies paid out by Ansbacher. She is merely seeking reconstitution of the trust fund. It seems to me strongly arguable that the remedy, were breaches of trust on Ansbacher's part proved, is at the discretion of the Court and, being an equitable remedy, maybe moulded to suit the circumstances of the case" [97(iv)].*

23. The Family Plaintiffs also point out that the issue whether and to what extent the company law principle of reflective loss should be applied in the trust context may well depend upon the proper law of the trust. Here the proper law of the Mandalay Trust is the law of Singapore and in the case of Green Vals Trust, the law of New Zealand. A proper consideration of the application of the reflective loss principle to discretionary beneficiaries of trusts may require the consideration of the relevant law in Singapore and New Zealand.

THE PRESENT APPLICATION

Would the strike out application be likely to involve serious and prolonged argument?

24. The strike out application is estimated to last one and a half to two days. The Defendant has confirmed that its application would be argued by Queen's Counsel which would indicate that the Defendant accepts that the application involves "question of law or practice of considerable difficulty or public importance" (section 51 (3) Of the Supreme Court Act 1905). As appears from paragraphs 22 above the sole point of law advanced by the Defendant involves controversial issues of developing law which, as noted above, is in any event unsuitable for resolution at a strike out application. Indeed the Defendant accepts that the strike out application raises "serious" questions of law. In all the circumstances I am satisfied that the strike out application would be likely to involve serious and prolonged argument.

Does the court harbour doubts about the soundness of the pleading or otherwise thinks it likely that it may reach the conclusion that the pleading should be struck out?

25. On a strike out application the Court will have to consider the argument that the claims advanced by the Family Plaintiffs should be struck out on the basis that they have not suffered any special damage. It will be argued that any loss they have suffered is merely reflective of the loss suffered by the trusts and the underlying companies. The Family Plaintiffs are likely to argue that this argument does not take into account the factual allegations made in paragraph 61.2 (b) of the Statement of Claim asserting that all the Plaintiffs have paid the marginal calls. They are likely to contend that the payment of the marginal calls by them satisfies the requirement of special damage and in the circumstances they are entitled to assume the claims against the Defendant.

26. The Family Plaintiffs are also likely to argue, relying upon Freeman v Ansbacher Trustees (Jersey) Limited, that the principle of reflective loss should not apply in the context of a claim by a discretionary beneficiary where loss is suffered by a company wholly owned by that trust. They are also likely to argue that in any event this is a controversial point of law in a developing area which is unsuitable for determination on a strike out application. Furthermore, the Family Plaintiffs are likely to contend that the issue of reflective loss is likely to be governed by the proper law of the trusts which, in this case, would be the laws of Singapore and New Zealand upon which the court has no evidence at this stage.

27. In relation to the breach of statutory duty claim The Family Plaintiffs rely upon section 18 (7) (b) of the SAC Act 2000 which provides that a segregated accounts company may be sued for debts and other obligations or liabilities contracted or incurred by the company in respect of a particular segregated account, and for any damages to persons or property resulting in respect of a particular segregated account, and "for any damages to persons or property resulting from the negligence of the company acting in the performance of duties with respect to that account". The Defendant accepts that the 6th and 7th Plaintiffs are entitled to sue pursuant to this section as "Account Holders" but denies that the Family Plaintiffs are entitled to sue. The Family Plaintiffs argue that the SAC Act is careful to

differentiate between the rights that are specific to Account Owners as opposed to any other person throughout the Act. The legislature did not limit the right to sue pursuant to section 18 (7) to Account Owners and the word “persons”, it is argued, extends to the Family Plaintiffs.

28. In relation to the common law duty of care the Family Plaintiffs rely upon the factual allegations made in paragraphs 10, 19 and 60 of the Statement of Claim. They argue that having regard to all the circumstances CS Life was under a duty of care to the Individual Plaintiffs, as the ultimate beneficiaries of the Policies. They also rely upon Gorham V British Telecommunications plc [2000] 1 WLR 2129 where the court held that a life insurance company is capable of owing a duty of care to the ultimate beneficiaries of the policy and Vinton V Fladgate Fielder [2010] EWHC 904 where Norris J refused to strike out a beneficiary’s claim for breach of duty of care holding that such a claim was unsuitable for a strike out application given the developing nature of this area of the law.

29. In all circumstances I do not harbour doubts about the soundness of the Statement of Claim in relation to the claims of the Family Plaintiffs nor think it likely that I might reach the conclusion that they should be struck out. I am satisfied that the issues of reflective loss and common law duty of care are controversial issues in developing areas of law which are best decided on the basis of concrete facts found at trial. I do not consider that there are any special circumstances which would otherwise justify the hearing of the strike out application. In the circumstances I conclude that the strike out application should not proceed to a hearing.

Would the strike out application obviate the necessity for a trial or so substantially cut down or simplify the trial as to make the risk of proceeding with the hearing sufficiently worthwhile?

30. Having regard to my finding in relation to the previous issue, it is unnecessary for me to consider this issue. However, as the issue has been argued by the parties, I will set out my findings briefly. It is accepted by the Defendant that even if the strike out application was to be successful there would have to be a trial of the

remaining causes of action. In particular the court will have to consider the 6th and 7th Plaintiffs claims for breach of contract and breach of fiduciary duty. The Defendant also accepts that the 6th and 7th Plaintiffs are entitled to pursue the identical claims for breach of statutory duty under the SAC Act.

31. I accept the Plaintiffs' submission that a trial for breach of fiduciary duty and breach of contract claims is likely to be no different to a trial of the four alternative causes of action currently pleaded. All four causes of actions rely on the same allegations of breach and concern the same accounts and transactions. Furthermore, the losses claimed are likely to remain the same whether the Plaintiffs succeed on any one or more of the courses of action pleaded. The Plaintiffs claim that they are entitled to damages and/or equitable compensation to put them back into the position they would have been in had CS Life properly discharged its duties. They seek damages and/or equitable compensation in order to reconstitute the CS Life accounts.

32. I also agree that the determination of the strike out application is unlikely to change the substance of the Defendant's defence, namely that it complied with its duties by entrusting the policy assets to the Bank. The scope of discovery and evidence is unlikely to change even if the strike out application was successful. One factual issue which is likely to be removed is whether CS life assumed responsibility to the Family Plaintiffs in the event the strike out application was successful.

33. In the circumstances I take the view that the present application to strike out claims against the Family Plaintiffs is unlikely to substantially cut down or simplify the trial so as to make the risk of proceeding with the hearing sufficiently worthwhile.

34. In the result the applications contained in paragraphs 1 to 5 of the Defendant's Summons dated 1 June 2018 should not proceed to a hearing and accordingly I order that they are stayed generally pending trial of this action.

35. I shall hear the parties as to costs.

Dated this 13th day of September, 2018

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NARINDER K HARGUN CJ