Neutral Citation Number: [2023] CA (Bda) 13 Civ

Case No: Civ/2022/08

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS CIVIL JURISDICTION (COMMERCIAL COURT)
BEFORE THE HON. CHIEF JUSTICE
CASE NUMBER 2017: No. 293
and 2020: No. 373

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12
Date: 23/06/2023

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
and
JUSTICE OF APPEAL SIR ANTHONY SMELLIE

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Between:

CREDIT SUISSE LIFE (BERMUDA) LIMITED

Appellant

-v-

(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

Respondents

Lord Falconer KC, Steven Thompson KC, Peter Dunlop and Izabella Arnold of Walkers (Bermuda) Limited, for the Appellant

Richard Morgan KC, Louise Hutton KC, Sarah-Jane Hurrion and Henry Komansky of Hurrion & Associates Ltd, for the Respondents

Hearing date(s): 5-9 December 2022
Further written submissions December 2022 and January 2023

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APPROVED JUDGMENT

BELL JA:

Introduction and background

1. These proceedings were taken at first instance by the first Respondent, Bidzina Ivanishvili, members of his family (the second to fifth Respondents) and two companies, the sixth and seventh Respondents, to which I will refer as "Meadowsweet" and "Sandcay", against Credit Suisse Life (Bermuda) Limited ("CS Life"), claiming more than US$550 million. CS Life is itself a subsidiary of Credit Suisse AG ("the Bank"). When referring to the first instance proceedings, I will refer to the Respondents as "the Plaintiffs". Meadowsweet was incorporated in the British Virgin Islands on 4 January 2005, and is owned by the Mandalay Trust, a Singaporean trust established on 7 March 2005. Sandcay was incorporated in the Bahamas on 11 July 2012, and is owned by the Green Vals Trust, a trust established under the laws of Prince Edward Island on 1 August 2012 (together "the Trusts"). The trustees of the Mandalay Trust and the Green Vals Trust (together "the Trustees") were at all material times companies within the Credit Suisse group.

2. The trial was heard before Hargun CJ ("the Chief Justice") over five weeks in November and December 2021, and his comprehensive judgment ("the Judgment") was delivered on 29 March 2022. In it he awarded the Plaintiffs damages for the losses they had suffered in consequence of a long-running fraud perpetrated by Patrice Lescaudron, who was at all material times employed by the Bank, and who was Mr Ivanishvili's relationship manager. From 2005, Mr Ivanishvili had invested more than one billion dollars with the Credit Suisse group ("Credit Suisse") and Mr Lescaudron's fraud was said by the Plaintiffs to have commenced as early as 2007, and to have continued until September 2015. It involved (as the Chief Justice found) not only the misappropriation and mismanagement of Mr Ivanishvili's accounts and those of Meadowsweet and Sandcay, but also those of other Credit Suisse clients. The question as to which Credit Suisse entity Mr Lescaudron was acting for when the frauds were perpetrated is at the heart of the issues in this case. CS Life contended in the court below that any claims the Plaintiffs may have had in relation to the frauds could only properly be pursued against Mr Lescaudron's employer, the Bank, and not against CS Life.

3. Mr Ivanishvili is a successful businessman, philanthropist and former Prime Minister of Georgia, which position he held between October 2012 and November 2013. The second Respondent is his wife, and the third to fifth Respondents are their children. Meadowsweet and Sandcay are investment companies forming part of a trust structure set up (on the advice of the Bank) for the benefit of Mr Ivanishvili and his family. Mr Ivanishvili's evidence-in-chief was given in four witness statements dated between May 2020 and November 2021, and it is to be noted that Mr Ivanishvili said at the outset of his first statement that he did not feel comfortable preparing formal legal documents (by which I infer he included his affidavit) in English, so that the document was prepared in Georgian, and translated into English. He also said that in relation to a letter relating to the Mandalay Trust, prepared by Credit Suisse, that the latter would have been aware that he would not readily understand the document, since it was presented to him in English; he would have signed the document at Credit Suisse's request.

4. His evidence was that in the 1980s he had begun an import business with a friend, importing cheap telephones and computers from Asia for sale in the USSR. In the early 1990s, they had used the profits from the import business to establish Rossiyskiy Kredit, one of the first privately owned banks in Russia, of which he owned two thirds and his friend Vitaly Malkin owned one third. Towards the end of 2004, Rossiyskiy Kredit sold its major stake in a metallurgical complex, Mikhailovsky, for approximately US$1.6 billion, and in 2005, it sold the retail bank Impexbank for US$550 million. It was at about this time that Mr Ivanishvili decided to move from Russia back to Georgia.

5. The sale of Mikhailovsky was widely reported in the media, and resulted in an approach being made to Mr Ivanishvili by Credit Suisse. Up to that point Mr Ivanishvili had managed his own money, but with his dramatically increased wealth had planned to speak to other banks regarding wealth management. In the event, no other banks approached him and he decided to accept the proposal made to him by Credit Suisse. The person who made the approach was Daria Mihaesco Krassiakov, who became his first relationship manager at Credit Suisse.

6. Mr Lescaudron had taken over from Ms Krassiakov as relationship manager in 2006, and Mr Ivanishvili's evidence was that as he came to trust the Credit Suisse team more with the management of his accounts and their performance, his contact with Credit Suisse began to reduce. From around 2008 he would have annual or bi-annual meetings with members of the Credit Suisse team in Georgia. Mr Lescaudron would generally (but did not always) attend these meetings, as would various other Credit Suisse personnel, often including one of Mr Lescaudron's superiors. The investments which were made through Meadowsweet and Sandcay with CS Life involved the payment of premiums to CS Life of more than $750 million, using an insurance policy investment structure.

7. In 2012, Mr Ivanishvili appointed George Bachiashvili to act as his personal assistant, and he and others appointed by Mr Ivanishvili acted as his points of contact with Credit Suisse. By 2011 Mr Ivanishvili had become involved in Georgian politics, forming a new political party in April 2012, and becoming Prime Minister of Georgia in October 2012. He resigned that position after a year, though since 2018 he has returned to politics. But from late 2011, Mr Ivanishvili took the view that he no longer had the time to provide any input into investment decisions, and his evidence was that this was well known to those with whom he dealt at Credit Suisse.

8. On 15 September 2015 Credit Suisse issued a margin call on the accounts of a company owned by Mr Ivanishvili named Wellminstone, for US$4.86 million, occasioned by a sudden drop in the value of a pharmaceutical company named Raptor, something which Mr Ivanishvili learned from Mr Bachiashvili. It quickly transpired that the total holding of Mr Ivanishvili's investments with Raptor was more than 14 million shares, representing over 18% of the company, with a pre-collapse value of US$170 million. Margin calls to Meadowsweet and Sandcay followed, and the true picture in relation to Mr Lescaudron's activities involving fraudulent trading in Raptor (and other stocks) began to emerge. Mr Ivanishvili filed a criminal complaint against Mr Lescaudron in Geneva on 21 December 2015, alleging misappropriation, criminal mismanagement and forgery, and two days later Credit Suisse filed its own criminal complaint against Mr Lescaudron. He was indicted in June 2017, his trial took place between 15 and 25 January 2018, and the judgment of the Swiss court convicting him was handed down orally on 9 February and in writing on 14 March

2018. Mr Lescaudron was convicted of criminal mismanagement, aggravated criminal mismanagement and forgery. He was sentenced to five years' imprisonment, and also ordered to pay very large fines, and the convictions were upheld on appeal. Mr Lescaudron subsequently committed suicide.

9. The above represents the broadest description of the background facts, and I will now turn to the proceedings, which were issued against CS Life in August 2017 by the Plaintiffs. By the time of the trial the definitive pleading for the Plaintiffs was the Re-Amended Statement of Claim ("RASoC") dated 19 July 2021.

The pleadings at first instance – the RASoC

10. Having identified the parties, the RASoC then turned to the policy issued by CS Life to Meadowsweet ("the Meadowsweet Policy"), and that issued to Sandcay, ("the Sandcay Policy", together "the Policies" or "the LPI Policies"), pleading that the investment in an insurance policy under the Mandalay Trust had been suggested and/or recommended by the Bank, acting on behalf of CS Life, in 2010 or 2011, and that the premium payable under the life insurance policy would be held and invested by the Bank "as agent". On 8 April 2011 Meadowsweet had applied to CS Life for unit-linked life insurance known as "Life Portfolio Insurance" ("LPI"). The application documents stated that the premium would be invested in an internal fund managed by the Bank ("the Internal Fund"). Meadowsweet also authorised CS Life to apply for a credit facility from the Bank and entered into a pledge over the assets in the Internal Fund, and authorised the Bank to carry out various transactions in relation to the Internal Fund. Any "Non-Traditional Investment Products" were to be chosen by the client. And on 7 November 2011 CS Life issued the Meadowsweet Policy. Material aspects of the policy were identified, including the general policy conditions ("GPC 2011") for the LPI version 1.2011. In relation to the Policies, Meadowsweet and Sandcay are referred to as "the Policyholder", or together "the Policyholders".

11. Accounts were opened with the Bank in the name of CS Life in relation to the Meadowsweet Policy, the premium was paid to CS Life, to be invested in the Internal Fund, in accordance with the "investment alternative" nominated by Meadowsweet, and in March 2015 CS Life entered into a Framework Agreement for a Lombard Facility, a credit facility for an amount not exceeding US$150 million. This facility was believed to have replaced an earlier agreement dating back to 2013. The facility was said to have permitted CS Life to acquire more investments. It was then pleaded that so far as the Plaintiffs were aware, there were no written discretionary mandates in relation to the total assets and investments subject to the Meadowsweet Policy ("the Meadowsweet Policy Assets"), but the Bank nonetheless acted in relation to the Meadowsweet Policy Assets as though there was a written mandate in place conferring a power to invest on a full discretionary basis, according to the Bank's own judgment and irrespective of any instructions which it did or did not receive from CS Life, Meadowsweet or their authorised representatives.

12. In relation to Sandcay, similar matters were pleaded, save that Sandcay involved a new trust, which was said to have been established on the Bank's advice. The underlying assets are referred to as "the Sandcay Policy Assets", and together with the Meadowsweet Policy Assets are referred to as "the Policy Assets" or "the Policy Accounts". And the same pleading was made as to the manner in which the Bank acted in relation to the assets of the two trusts, defined in the pleading as "the

Bank's Management Practice". The general policy conditions applicable for Sandcay were GPC 2012 (together with GPC 2011, "the GPCs").

13. The pleading then set out the governing statutory provisions and the application of the Life Insurance Act 1978 and the Segregated Accounts Companies Act 2000 ("the SAC Act"). The duties which CS Life owed pursuant to the SAC Act were pleaded.

14. The pleading then turned to the involvement of the Bank, pointing out first that it was the Bank that had recommended that a large part of the Mandalay Trust fund and the majority of the Green Vals Trust fund should be invested in life insurance policies issued by CS Life, a sister company of the Trustees and a subsidiary of the Bank. Specifically, it was pleaded that in making that recommendation, the Bank was acting on behalf of CS Life. With the agreement of the Trustees, by opening accounts into which the Meadowsweet and Sandcay premiums were paid, and by contracting with the Bank and/or authorising or permitting the Bank's Management Practice, CS Life had entrusted the custody and investment of the said premiums to the Bank. This section of the pleading concluded that the Bank had acted at all times as agent in marketing, offering for sale, and/or negotiating the sale of the life insurance policies issued by CS Life and in holding and investing the said premiums.

15. Next, the pleading turned to the reports produced by the Bank, defining the different reports given by Mr Lescaudron to Mr Bachiashvili as "the Direct Reports", or, where there was one such, "a Direct Report". By authorising or permitting the Bank to report on the Policies to the Plaintiffs, it was pleaded that CS Life entrusted the reporting of the performance of the Policies to the Bank, and that the Bank had acted as CS Life's agent in providing reports, including the Direct Reports, detailing the performance of the Policies.

16. The pleading next gave details of the margin calls, giving the amounts, and pleading that the most recent Direct Report, for 31 July 2015, showed that the Meadowsweet CS Life Accounts had a balance of US$331,830,409 and the Sandcay CS Life Accounts had a balance of US$252,993,191.

17. The pleading then turned to the discovery of Mr Lescaudron's fraud (at least by Mr Ivanishvili), said to have been on 27 September 2015, when the Bank sent Mr Ivanishvili, copied to Mr Bachiashvili, the investment reports for the Sandcay and Meadowsweet CS Life accounts, showing the value of those assets as at 31 December 2014 and 25 September 2015, the first time that the recipients had seen these reports. From a comparison with the Direct Reports, they were able to learn that the Direct Reports they had received (and more particularly the account balances referred to above) were false. The reduction in the value of the two accounts was given, as well as the subsequent continuing decline in value. The Bank's filing of a criminal complaint on 23 December 2015 was pleaded, and reference was made to the interviews which the Bank had conducted with Mr Lescaudron, the first of which was on 18 September 2015, in which the latter had admitted modifying the performance of the accounts relating to Mr Ivanishvili, with a view to hiding losses or covering up profits, which were then diverted elsewhere, something which had happened for the previous two years.

18. Mr Lescaudron was arrested on 18 January 2016 and made various statements to the Geneva police and public prosecutor concerning the scope of his frauds. These included causing funds to be stolen

from the Plaintiffs' portfolio ("the Portfolio") and transferring funds to the accounts of other Bank customers, causing assets to be transferred from the Portfolio to the accounts of other Bank customers for no or less than market value consideration, acquiring stocks at prices in excess of their market value, and without undertaking any due diligence, failing to execute instructions which Mr Lescaudron had accepted, causing losses which he then hid from Mr Ivanishvili, and recommending and advising Mr Ivanishvili to purchase stock in a pharmaceutical company named Raptor, when such an investment was unsuitable due to its high risk. These are but some of the comprehensive frauds committed by Mr Lescaudron; others included hiding loans to Bank employees from the Portfolio, and using forged signatures or instructions. Mr Lescaudron had taken over the Portfolio, as if he alone had a discretionary mandate.

19. The pleading then turned to the investments made by the Bank which were imprudent and/or fraudulent, which included Raptor, funds in which employees of the Bank or their families had interests (and which were exposed to Raptor stock), various derivative products which had significant exposure to Raptor stock, and certain individuals who had been involved in a real estate fraud, a matter which was public knowledge.

20. Next pleaded were claims in misrepresentation ("the Misrepresentation Claim"), which went back to the proposals made by the Bank and/or Mr Lescaudron to invest in the Meadowsweet and Sandcay Policies. For these purposes the relevant plaintiffs are referred to as "the Misrepresentation Plaintiffs". It was pleaded that CS Life knew of and consented to the sale of CS Life policies to the Bank's customers and the Plaintiffs. Specifically, it was pleaded that in so acting the Bank and/or Mr Lescaudron impliedly represented by their conduct that the Bank was not then managing the Plaintiffs' accounts fraudulently and did not intend to manage them fraudulently in the future. Such representations were false insofar as the Bank and/or Mr Lescaudron had previously managed and intended to continue to manage the accounts fraudulently and/or imprudently. In support of this plea, the Plaintiffs relied upon Mr Lescaudron's admissions, the findings of the Swiss court, and the Bank's pleading in certain proceedings in the High Court in London. The pleading relied upon Mr Lescaudron's knowledge of the fraud as an employee of the Bank to establish the knowledge of the Bank and as agent for CS Life, and pleaded that CS Life as principal was responsible for the misrepresentations of its agents. But for the implied representations, Mr Ivanishvili, Meadowsweet and Sandcay would not have agreed to apply and sign for the life insurance policies, but rather would have invested in a medium risk investment portfolio with a reputable European bank. Details of the losses suffered were pleaded, being US$206.24 million in respect of Sandcay and US$347.62 million in respect of Meadowsweet.

21. The next claim was for breach of contract, the contracts being the Policies. The duties owed by CS Life regarding the investment and supervision of the Policy Assets were set out, and breaches in terms of imprudent and/or fraudulent transactions were particularised, with reference to the various transactions in question. It was pleaded that the CS Life accounts included very large borrowings which were used to fund investments and so increased the risk of trading on those accounts. Details of the transactions involving the excessively high number of trades in Raptor shares, those involving forged signatures and instructions as well as those involving unauthorised commissions, and those in breach of regulatory requirements were all set out. Reference was also made to the fact that Raptor stock had been on the Bank's restricted list since 5 August 2013, and that there

was an over concentration in pharmaceutical and mining/energy stocks, identifying those stocks as representing 5% or more of the Portfolio.

22. Included in the failures pleaded under the breach of contract head were failures to hold the Policy Assets for the benefit of the account owners, and failure to invest the Policy Assets in accordance with the investment profile (captioned the "Investment Alternative", which term I shall use), in breach of the specified clauses of the GPCs, and failures to ensure that the Policy records made available to the account owners were true and accurate. In this regard it was pleaded that CS Life entrusted its reporting obligations to the Bank, and that the records produced by the Bank and Mr Lescaudron were false, misleading and inaccurate. Further pleaded failures were the failure to invest the premiums prudently and/or with proper skill and diligence when appointing or causing the appointment of the Bank and/or Mr Lescaudron, and consequently appointing fraudulent and/or incompetent persons. In this regard, the complaint was that CS Life failed to give the selection honest and genuine consideration, and instead selected an entity associated with CS Life. The matters which CS Life failed to take into account were particularised. Complaint was also made as to the terms which CS Life agreed with the Bank, which permitted the Bank to restrict its liability and/or act in conflict with CS Life's interests, and causing or procuring Sandcay and Meadowsweet to waive their rights to receive financial statements or auditor's reports.

23. The next pleaded complaint was in relation to CS Life's failure to monitor the performance of the Policy Assets and/or supervise the Bank. Reference was made to declines in the value of the Policy Assets, which had not been identified by CS Life, and in connection with which CS Life had taken no action. CS Life did not assess whether the Investment Alternative was being complied with, failed to heed the fall in value of the Policy Assets, failed to take any action to reduce the overexposure to Raptor stock, and failed to take any action in response to Mr Lescaudron's failure to comply with instructions to reduce exposure to Raptor, provided by CS Life and/or the Bank (as to which, see below). Further, CS Life failed to heed that there were a significant number of positions in relation to both Sandcay and Meadowsweet assets which were over-concentrated, and whether these should be varied, failed to review the investments or to ensure that the Policy Assets were being invested in accordance with Mr Ivanishvili's goals and risk tolerance, or to ensure that the assets were being managed in accordance with the Bank's current investment policy and guidelines, and contrary to the GPCs, with various references to the Swiss Bankers Association guidelines.

24. Next was a claim for a declaration as to the construction of the Policy documents in relation to surrender, pleading that the Plaintiffs wished to effect a total surrender of the Policies but had not done so because of CS Life's refusal to confirm that it would not argue that a total surrender would avoid or reduce its liability in the proceedings.

25. Next was a claim for breach of fiduciary duty, pleaded with reference to the relevant sections of the SAC Act. The relationship between CS Life and the account owners was one of trust and confidence, and the duties owed by CS Life to Meadowsweet and Sandcay were pleaded, together with the breaches of duty by reference to previously pleaded matters, referencing the failure to prevent transfers of the Policy Assets to other customers of the Bank, the failure to take any steps to recover the losses caused to the Policy Assets, allowing the interests of other customers of the

Bank and/or the interests of the Bank to be preferred over the account owners' interests, and other complaints previously pleaded.

26. The next pleaded claim was for breach of statutory duty, ultimately not pursued, pleaded with reference to the appropriate sections of the SAC Act, and repeating previously pleaded matters.

27. And the last of the heads of claim was for the breach of common law duties, pleading that at all material times CS Life knew that the purpose of the Meadowsweet and Sandcay Policies was to provide investment for the Mandalay and Green Vals Trusts, and as such assumed responsibility to the 1st to 5th Plaintiffs for the custody and management of the assets in the CS Life accounts, relying on the breaches previously pleaded.

28. The pleading next turned to loss and damage, pleading that the Plaintiffs were entitled to be put back in the position they would have been in had CS Life properly discharged its duties, and the value that would have been achieved if the Policy Assets had been honestly and prudently managed. Reference was made to the expert evidence of David Morrey and William H Davies, leading to a claim for the figures set out in paragraph 20 above. In respect of the margin calls, the Plaintiffs pleaded that these had been satisfied by liquidating other assets which, but for the margin calls, would have continued to appreciate.

The Re-Amended Statement of Defence – ("the RASoD")

29. This document was dated 20 August 2021, and referred at an early stage to the proceedings taken by the 1st to 5th Plaintiffs in the courts of Singapore, New Zealand and Switzerland ("the Foreign Proceedings"), saying that those proceedings arose out of the same factual matrix as the matters pleaded in the RASoC, and noting that the Foreign Proceedings all included claims in respect of the Policy Assets. The Plaintiffs were invited to agree to a stay of the Bermuda Proceedings. It should be noted that the Swiss proceedings involved Mr Ivanishvili's participation in the Swiss criminal proceedings as a civil plaintiff.

30. The pleading then averred that Mr Ivanishvili was a sophisticated investor capable of making educated decisions about the investment of his wealth, including receiving advice on potential investments and deciding whether or not to follow that advice without input from third parties such as CS Life and the Bank.

31. In relation to Meadowsweet, it was denied that the Bank acted on behalf of CS Life in regard to any representations or suggestions, pointing out that Mr Ivanishvili was a discretionary beneficiary of the Mandalay Trust and had no legal or beneficial interest in any money settled by him on the terms of the Mandalay Trust. It was envisaged that at all material times the premium payable under the Meadowsweet Policy would be held and invested by the Bank. Various provisions of the application made to CS Life by Meadowsweet were identified, as were certain provisions of the GPCs. It was averred that there were no discretionary mandates in relation to the Meadowsweet Policy Assets and averred that CS Life did not give instructions to the Bank in respect of investments. By identified powers of attorney Mr Ivanishvili acted as the investment manager of the Meadowsweet Policy Assets and gave instructions to the Bank in respect of investments. If and insofar as the Bank gave any advice or made any suggestions or recommendations, it was

denied that the Bank acted on behalf of CS Life in so doing. In relation to the Green Vals Trust and Sandcay, Mr Ivanishvili was a discretionary beneficiary and hence retained no legal or beneficial interest. It was denied that the Bank had ever acted as agent for CS Life in holding or investing any insurance policy premium, noting that in the Foreign Proceedings the Plaintiffs had averred that the Bank was investing the Sandcay Policy Assets for the Green Vals Trust.

32. The pleading next turned to the Sandcay LPI application and referenced the relevant documents. CS Life denied acquiring or directing the acquisition of any investments, noting that by powers of attorney Mr Ivanishvili acted as the investment manager of the Sandcay Policy Assets. In relation to both Meadowsweet and Sandcay, it was noted that the names of the 2nd to 5th Plaintiffs did not feature on any application or contractual document linked with the Policies, and it was averred that they had no standing to sue CS Life.

33. Insofar as the Bank made any recommendations, it was denied that the Bank had acted on behalf of CS Life. In relation to its reporting requirements pursuant to the GPCs, CS Life averred that those were complied with.

34. In relation to Mr Lescaudron's fraudulent activities, CS Life pleaded that it had no knowledge of these at the time the events took place, noted that some of the allegations pre-dated the commencement of the Policies, and pleaded that it would rely on expert evidence at trial.

35. In relation to the allegations concerning Raptor shares, it was pleaded that these pre-dated the commencement of the Policies. It was also noted that the Plaintiffs' forensic accountancy expert had not identified any instances of unauthorised or fraudulent transactions on the Policy Accounts, whether in relation to Raptor or otherwise. It was accepted that the Policies invested in Raptor, and pleaded that reliance would be placed on the expert report of Mark Bezant of 12 July 2021. The GPCs did not restrict investment in Raptor save by reference to clause 7 of the GPCs, which involved reporting duties or other regulatory obligations. It was admitted that Raptor was on the Bank's restricted list from 5 August 2013, but pleaded that this had no effect on a client's ability to trade in the stock, and that the inclusion of Raptor on the Bank's restricted list in fact had no effect on the composition of the Policy Accounts save to reduce the holdings in Raptor from time to time.

36. In relation to purported amendments pleading the Misrepresentation Claim, CS Life pleaded that no permission had been granted by the court for such a pleading.

37. In relation to the claims for breach of contract, CS Life pleaded that the contracts between CS Life and Meadowsweet and Sandcay respectively comprised the Policies, the GPCs and the applications. It was denied that the contracts contained any of the implied terms pleaded in the RASoC; the implication of the terms alleged would be in direct contradiction to the express terms of the contracts, in particular in relation to the Bank's management of the Internal Fund. CS Life bore no responsibility for the investment decisions of the Policyholder, who was responsible for any losses resulting from any of the transactions listed in clause 7 of the GPCs, and the Policyholder was obliged to indemnify CS Life. It was pleaded that the investment of the assets was directed by Mr Ivanishvili, and the Policyholder was obliged to consider and understand the risks associated with the Policy and determine whether the Policy was the right choice.

38. As to the alleged breaches of the express and/or implied terms of the contracts, CS Life pleaded that it would rely on the expert evidence of Bruno Campana and Mr Bezant. In relation to the detail of the pleaded breaches of contract, CS Life responded. In relation to the duty to monitor, CS Life denied that it was under a duty to identify changes in the value of the Policy Assets or the reasons therefor, and any duty to seek to identify falls in value in a portfolio was "speculation and an inappropriate application of hindsight". And the fact that certain investments suffered an 80% drop in value over some period of time did not mean that such investments were unsuitable for inclusion in the Policy Accounts. The Plaintiffs' own experts concluded that they were unable to draw conclusions regarding the drop in value of those positions, noting that all appeared to have been deposited in the Policy Accounts *in specie*, presumably after selection by Mr Ivanishvili. No conclusion regarding suitability could be gleaned from Mr Davies' flawed approach to the data, and it would be wrong to infer that the Policy Accounts were poorly, let alone negligently, imprudently or fraudulently invested or inadequately monitored. And in any event if CS Life had sought and reviewed the Policy Accounts (which it was under no duty to do) it would not have been able to discern that there were any indirect investments in Raptor or what the position was in relation to concentration in direct and indirect investments in Raptor.

39. And in paragraph 69 (ii)(a) of the RASoD, CS Life pleaded, in response to the Plaintiffs' pleading that CS Life had failed to take any adequate action to reduce the over exposure to Raptor, that the Bank and CS Life had a policy to avoid coming under enhanced regulatory filing duties with the SEC. When the Bank notified CS Life (presumably that its aggregate holdings in Raptor were close to a regulatory filing threshold), it contacted the Bank to seek a reduction in the Raptor position. So, pausing for a moment on the pleading narrative, this pleading indicates that CS Life was aware of an aggregate level of holdings in Raptor which came close to requiring an SEC filing, and that the Bank did not feel able to act without CS Life's authority in relation to the reduction of the size of the holding in Raptor stock. Yet, contradictorily, the pleading had just averred (paragraph 69 (i)(a)) that such was not part of CS Life's role, and it was under no duty to monitor changes in value on the Policy Accounts or to take action in respect of any such changes. And the CS Life pleading carried on to say that the inclusion of a stock on the Bank's restricted list imposed no duty on CS Life to monitor the Policy Accounts. The pleading continued to deny that any investment was significantly concentrated in the Policy Accounts. And in paragraph 69 (iii) (c) CS Life denied that any concentration of an investment would have been apparent from the material it was entitled to and did in fact receive concerning the Policy Accounts. And finally in this part of the pleading, CS Life averred that the Plaintiffs had failed to plead what it is alleged they should have done in such circumstances.

40. In the next section of the pleading, CS Life denied that the Policy Assets were constrained to be managed with a medium risk profile, or that there was any failure on its part in relation to the investment and management of the Policy Assets, pleading that that was no part of its role. And the pleading averred that the Plaintiffs had failed to plead what steps CS Life ought to have taken to recover the alleged losses.

41. In relation to surrender, CS Life relied upon the terms of clause 11 of the GPCs to rebut the claim for a declaration that a surrender would not avoid or reduce CS Life's liability. There were denials in relation to the claims for breach of fiduciary duty, breach of statutory duty and common law

duties. In relation to the quantum calculation, CS Life denied that there had been any fraudulent schemes or transactions of the type alleged, and it was pleaded that Mr Davies' calculation of loss was based on the notion that all of the LPI Policy premiums would have been invested with a completely different financial institution and based on a different investment structure, which was not an appropriate counterfactual. All of the counterfactual portfolios and models created by Mr Davies were said to have been inappropriate and the damages calculations flawed. CS Life relied upon the reports of Messrs Bezant and Campana.

The Re-Amended Reply ("RAR")

42. The Plaintiffs denied that the characterisation given by CS Life of the Foreign and Bermuda Proceedings was accurate. In relation to the application documents for the LPI Policies, it was pleaded that the premium would be held and invested by the Bank as CS Life's agent. In relation to the Meadowsweet powers of attorney it was denied that these purported to appoint Mr Ivanishvili as investment manager; they were limited to administrative transactions only. Similar pleas were made in respect of Sandcay.

43. In relation to the pleading that Mr Davies had been unable to identify any unauthorised or fraudulent transactions in the Policy Accounts, it was pleaded that there were substantial limitations in the documents and information given to Mr Davies, said to be in consequence of CS Life's failure to provide proper discovery. Particularly, it was noted that the reports from PwC and FINMA (referred to below) had not been disclosed at that point in time. They were in fact disclosed "just prior to the trial" – see the Judgment at paragraph 152.

44. In relation to the Misrepresentation Claim (which CS Life had pleaded was liable to be struck out on the basis that the Plaintiffs did not have permission to plead it) this was denied, and reference was made to proceedings #373 of 2020, by which the Misrepresentation Claim had first been pleaded. The Plaintiffs pleaded that the Misrepresentation Claim arose out of the same or substantially the same facts as were already in issue in the original proceedings.

45. In relation to the management of the Policy Assets, CS Life had pleaded that they were deposited in the Internal Fund, as required by the terms of the Meadowsweet and Sandcay applications. The Plaintiffs pleaded in reply that depositing the assets in the Internal Fund did not exhaust CS Life's duties; the Policy Documents required those assets to be managed in accordance with the Investment Alternative. And the pleading continued by denying that the Plaintiffs had requested that the Policy Assets be invested with the Bank. The product offered by CS Life was an LPI policy, the assets of which were to be managed by the Bank, so the Plaintiffs relied on CS Life's selection of the Bank as manager of the Policy Assets.

46. In relation to the Investment Reports (as that term is used in the RAR), the Plaintiffs pleaded that with two exceptions, Mr Ivanishvili did not receive the Investment Reports until 27 September 2015, after the fraud had been discovered. Mr Lescaudron had sought to explain the differences in the figures to Mr Bachiashvili.

The Judgment – introduction and background

47. The Judgment comprises some 280 pages, and I will refer to the principal findings, of which necessarily there are many, and comment where appropriate. Helpfully, the Judgment started with an index of topics, and with an introduction which identified the factual and expert evidence given at the trial. Mr Ivanishvili's relationship with Credit Suisse and the latter's offer of wealth management services were covered, as was the establishment of the Mandalay Trust. Mr Ivanishvili's approach to risk was dealt with (he wanted a well-balanced portfolio with a moderate approach to risk, and did not want to invest more than 25% in emerging markets because of the risk involved). Specifically, the issue of who should be investment adviser to the Trusts was covered; Mr Ivanishvili had stated in his evidence that it made no sense for him to take on that role, for the reasons he gave. Mr Lescaudron became the "outward face of Credit Suisse". Mr Ivanishvili began having annual or bi-annual meetings with the Bank in Georgia, attended by various Bank and Credit Suisse Trust employees. At these meetings the Bank would suggest investment proposals and provide the documentation needed to take their ideas forward. The Bank, Mr Ivanishvili claimed, knew that he could not read the detail of these documents (his English not being good enough). He trusted the Bank and signed the documents presented to him as he was told that this was necessary to put the Bank's investment advice into practice.

48. Mr Ivanishvili's evidence was that the investment by Meadowsweet in a life policy was first suggested at a meeting in Tbilisi, Georgia in March 2011, attended by Mr Lescaudron, his direct superior and a CS Trust employee. Mr Ivanishvili's evidence was that he did not believe that anyone present at the meetings was introduced as being from CS Life. This led to the structure being established and Mr Ivanishvili signing a letter of wishes to the Mandalay Trust requesting that Meadowsweet sign an application for an LPI policy with CS Life. The insurance was to be against Mr Ivanishvili's life, and upon his death the assets would be remitted to Meadowsweet, the Policyholder, and distributed according to the Mandalay Trust letter of wishes. The Meadowsweet Policy was issued on 7 November 2011. Assets from Meadowsweet's accounts at the Bank were transferred to the Meadowsweet Policy Accounts from September 2011 onwards and CS Life thus assumed legal ownership of those assets.

49. Then the history of the Sandcay policy was set out in detail, and the Judgment then referred to the contractual framework of both Policies, highlighting the relevant provisions. It is to be noted that the Meadowsweet application form contains a Clause C headed *"Investment Alternative"* which does not in terms distinguish between discretionary and non-discretionary alternatives. Instead, it says that "*The single premium will be invested in an internal fund as stated below (which is invested separately to the insurance company's other assets). More information about the alternative profile can be found in the "Description of the internal fund & asset management which is an integral part of the application*". There is then a definition of "*Profile*" which is "*Structured investments, investment funds, direct investment and fiduciary deposits.*" That is a list of what General Condition 7 specifies as the composition of an Investment Alternative without a discretionary mandate. A Description of the Internal Fund, containing an Investment Alternative without Discretionary Mandate was signed on behalf of Manex Ltd (CB 41/13) in Switzerland. One of the executed documents, with CS Life's name and address at the top (CB/43/1), headed "Relationship Manager Profile" specified Mr Lescaudron as the relationship manager. The relationship is plainly between CS Life and the Policyholders, in respect of which Mr Lescaudron

was plainly put forward by CS Life to act on its behalf. Similar documents were executed in the case of Sandcay, (CB/48/13 and 33). The Judgment then turned to the operation of the Policies, quoting from an email from Mr Lescaudron to Mr Bachiashvili dated 30 January 2013 in support of the latter's contention that the Bank was managing Mr Ivanishvili's portfolio. The words "*So far we have been extremely free to manage these assets*" were emphasised.

50. In September 2013 Credit Suisse reported the value of the Portfolio to be in excess of US$1 billion, and this led to Mr Ivanishvili transferring further funds to Credit Suisse from late 2013 to early 2015. Mr Bachiashvili had stipulated that, as the Bank was managing the Portfolio, the only information that Mr Ivanishvili wanted was the overall performance of the assets. From February 2013 Mr Lescaudron began sending Mr Bachiashvili the Direct Reports, which purported to show the Portfolio's continued success. Mr Ivanishvili did not see those reports, but was updated by Mr Bachiashvili as to the performance of his investments. During 2013, 2014 and the first half of 2015 the reports given by Credit Suisse were of continuing investment gains. By April 2015 the value of the total assets in Mr Ivanishvili's portfolio was said to be US 1 billion. At a meeting in April 2015, Credit Suisse proposed that Mr Ivanishvili establish individual trusts for each of the family members, to which Mr Ivanishvili agreed. Then on 26 June 2015 Mr Lescaudron emailed Mr Bachiashvili "out of the blue", indicating that a portion of Mr Ivanishvili's portfolio had been managed by Mr Lescaudron and his team "*outside the frame of a mandate*" and "*in a grey zone*", suggesting how this might be dealt with going forward. At a meeting on 29 or 30 June 2015, this subject was again discussed, at a meeting with senior Credit Suisse personnel. The terms "*without a proper mandate*" and "*in a grey zone*" were again used, but Mr Bachiashvili' s evidence was that he did not escalate the issue to Mr Ivanishvili because he thought that the fact that the subject had been raised showed that Credit Suisse was managing the investments as it was supposed to be doing, and because the issue was presented as being a matter of form only. Further, the Bank was proposing a way forward. Thereafter, Mr Bachiashvili was sent reports of trading activity on a nearly daily basis, although he did not pay a great deal of attention to such reports.

51. Next came the margin call in mid-September 2015 on the accounts of Wellminstone, one of Mr Ivanishvili's companies' accounts, due to a sudden drop in the Raptor share price. This led to the uncovering of Mr Lescaudron's frauds, through the provision of the investment reports on 27 September 2015 for Mr Ivanishvili's accounts (including the Policy Accounts). These showed that the value of the Portfolio as at December 2014 was approximately US$ 743 million, and not US$ 1 billion. The Judgment records that in September and October 2015 representatives of the Bank informed Mr Bachiashvili that PwC had been mandated "*to conduct a comprehensive due diligence of your relationship with Credit Suisse AG*" and that the Bank would provide all requested documents and share further information from PwC's investigation ("the PwC Reports"). In fact, contrary to what Mr Ivanishvili and Mr Bachiashvili were being told by the Bank as to transparency in relation to their investigations, in practice the Bank only provided the PwC Reports to CS Life when faced with an unless order, to the effect that unless CS Life did produce the PwC Reports, its defence would be struck out. Let me digress for a moment. It was no doubt matters such as these that caused Lord Falconer, early on in his submissions, to address the criticisms made in the Judgment as to the manner in which CS Life had conducted its case, and, broadly, to acknowledge those criticisms, saying that he was not pushing back in any substantive way on the strictures passed on the way that CS Life had conducted the litigation. For my part, given how Lord Falconer then proposed that the litigation should move forward, I am deeply cynical that his proposal, to

which I will come in due course, merely represented more of the same. The notion that the solution to this litigation should come in the form of an evaluation of the worth of a claim to be made by CS Life against the Bank for damages to be determined according to Swiss law rules (including rules as to quantification of damages and substantive defences available to the Bank) seems to me extraordinary, particularly given that such a course was always open to CS Life, and, as the Chief Justice found (paragraph 434 of the Judgment), it was "common ground that CS Life has taken no steps to recover the losses on the Policy Accounts". That horse has long since left the barn.

52. The Judgment then turned to the Raptor investments. Mr Lescaudron had built up very large direct positions in Raptor in the Meadowsweet and Sandcay Policy Accounts and also invested heavily in funds that were exclusively or almost exclusively invested in Raptor. The Judgment noted that it appeared that Mr Lescaudron had recommended Raptor to Mr Ivanishvili at some time in 2011, and Mr Ivanishvili had taken his advice. But his evidence was that he did not recall giving instructions for the purchase or sale of Raptor stock thereafter and did not authorise Mr Lescaudron to build up the large positions in Raptor within the Policy Accounts, as had occurred.

53. The Judgment next turned to the criminal proceedings against Mr Lescaudron, and quoted from the criminal complaint filed by the Bank which demonstrated that he had made admissions at three "hearings" (interviews) occurring between 18 September and 26 October 2015. The Bank's lawyers Walder Wyss, assisted by two Swiss law firms, were also involved in the process by then. The Judgment set out how Mr Lescaudron had abused his position to perpetrate his frauds, at the expense (at least) of Mr Ivanishvili and the Meadowsweet and Sandcay Trusts. The Judgment also recorded that Walder Wyss had sent a letter on 5 February 2016 to the Swiss prosecutor, explaining the steps they had taken to uncover the fraud. That letter included an extract from the PwC Reports. Reference was also made to the investigation undertaken by FINMA, the Swiss Financial Market Supervising Authority ("the FINMA Report").

Factual findings in the Judgment

54. Before making any factual findings, the Chief Justice addressed certain legal issues, the first of which related to the admissibility of the Swiss court convictions and judgments, and the PwC and FINMA Reports. Counsel for CS Life had submitted that as a matter of law, the Swiss court convictions and judgment, and the PwC and FINMA Reports, were inadmissible and should be disregarded in their entirety, while conceding that the court was entitled to consider the remaining material, comprising the interviews of Mr Lescaudron conducted by the Bank and his statements to the police and public prosecutor.

55. The basis for CS Life's objection lay in the case of *Hollington v F Hewthorn & Co* [1943] 1 KB 587, and the explanation for the rule given by Christopher Clarke LJ in *Rogers v Hoyle* [2015] 1 QB 265. The rationale for the rule is that to admit evidence of the findings of fact of someone who is not the trial judge is irrelevant and not one to which the judge ought to have regard. But the Court of Appeal in *Rogers v Hoyle* recognised that the exclusionary rule does not apply to expert evidence. The Chief Justice dealt first with the FINMA Report, accepting the submission that it was in substance an expert report, and consequently admissible. Unsurprisingly, he took the same view in relation to the PwC Reports.

56. Counsel for the Plaintiffs accepted that the effect of the Swiss judgment upholding Mr Lescaudron's fraud conviction was not evidence of the truth of the position. But counsel argued, and the Chief Justice accepted, that the court was entitled to admit the recitation of evidence referred to in the Swiss judgments. The court accepted that most of the findings of fraud made by the Swiss courts were admitted by Mr Lescaudron during his various interviews with those investigating his frauds. The Chief Justice also noted that the parties had agreed that all the documents in the trial bundle were admissible as to the truth of their contents. He cited *Rogers v Hoyle* to demonstrate that there was no absolute prohibition against a court taking into account factual evidence referred to in an earlier judgment or report, and it was for the court to give such weight to that evidence as it thought fit. He therefore concluded that the findings of fact in the Swiss judgments, to the extent that they reflected admissions made by Mr Lescaudron, were admissible in relation to the issues raised in the proceedings before him.

57. The Judgment then turned to the Plaintiffs' complaint that CS Life had materially and deliberately failed to give proper discovery and had failed to call material witnesses who could give evidence in relation to significant material issues, and their invitation to the court to draw adverse inferences against CS Life in relation to specified factual issues.

58. The Chief Justice reviewed the different failures on the part of CS Life in this regard. He found that highly relevant documents had been disclosed at the last possible moment, with "vast numbers of documents" being provided during trial, so that the Plaintiffs had had no reasonable opportunity to consider their relevance. The Chief Justice found that within the late discovery of documents were documents which would harm CS Life's case. In relation to the PwC Reports he accepted the Plaintiffs' submission that those documents had been deliberately withheld from discovery. He noted that CS Life had submitted that it was not the Bank and could not give discovery of documents held by the Bank. But the Chief Justice noted the Plaintiffs' submission that Credit Suisse operated on an integrated basis, and that numerous functions (including anti-fraud, compliance, and the general counsel function) were centralised and performed by the Bank or Group functions or departments on behalf of CS Life. He found it to be highly likely that the centralised group function held materially important relevant documents. And he concluded that, in principle, the court was prepared to draw relevant adverse inferences against CS Life for its failure to give full and frank disclosure.

59. In relation to the calling of relevant witnesses, the Chief Justice reviewed the inability of certain CS Life witnesses to give relevant evidence. Daniele Celia, who was head of product management for the Credit Suisse Liechtenstein equivalent of CS Life, gave four witness statements, but had little direct factual evidence to give. The Chief Justice concluded that Mr Celia was not an appropriate witness. Next was Thomas Coffey, CS Life's CEO, whom the Chief Justice described as an appropriate witness on paper, but who had very little direct evidence to give about material matters. His knowledge of Mr Lescaudron's frauds appeared to be largely limited to what he had read in the press, and the "snippets" that his line manager Mr Läser had chosen to reveal to him. He accepted that as CEO he should have been (but was not) informed about Mr Lescaudron's (poor) disciplinary record as well as Credit Suisse's investigations into the fraud. Then there was Nicolas Vacccaro, a line manager at the Bank and a CS Life director. But he had only been appointed in 2020 and had very little direct factual evidence to give. Cecilia Homann, head of product management for life insurance at the Bank, was able to give evidence as to how CS Life's

LPI policies were intended to operate in principle, but had very little direct evidence to give about relevant matters.

60. The Judgment then turned to those witnesses whom CS Life had chosen not to call. Mr Celia's counterpart at CS Life was Luzi Saluz, who had direct involvement in the operation of the LPI Policies, but was not called, although he was still employed by the Bank, working on insurance matters. Mr Coffey gave evidence that Mr Saluz would have been in charge of giving CS Life approval for Raptor purchases (and hence able to give evidence on an important aspect of the case). And there were others, identified in the Judgment, who would likely have had relevant evidence to give, but who were not called, including, in particular Patrik Läser, the key CS Life director who acted as the connection between CS Life and the Bank and who directed CS Life's activities on the Bank's behalf, leading the Chief Justice to accept that it was clear that CS Life had opted not to call witnesses who were involved in managing CS Life at the material time. In relation to Mr Dasmaltschi, the person who had overall responsibility for Mr Lescaudron throughout the material period, who was directly involved in the investigation into Mr Lescaudron's fraud, and who remained a senior executive employed at the Bank, the Chief Justice accepted that he was a key witness and that the failure to call him made CS Life's "non-admission" of the Lescaudron frauds an abuse of process. Philip Vitse had been present at the meeting when the Sandcay Policy had been sold to Mr Ivanishvili, and was Mr Lescaudron's direct supervisor, but he was not called, and no witnesses were called who could speak to the Group Function, defined at paragraph 73 below or who were involved in investigating the Lescaudron fraud.

61. Relying on the case of *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324, the Chief Justice held that this was an appropriate case to draw adverse inferences, depending on context, as to CS Life's failure to call witnesses who could give direct evidence in relation to the central issues in these proceedings. All the above paragraphs (57 to 60) may well be relevant when the time comes to consider Lord Falconer's submissions referred to in paragraph 51 above.

62. The Judgment then turned to the various findings of fact which the Chief Justice had been invited to make. The first of these was in relation to the degree of risk that Mr Ivanishvili was prepared to take. The Chief Justice referred to CS Life's case in this regard, and concluded that Mr Ivanishvili had informed Credit Suisse from the outset that he had a moderate approach to risk and wished to have a well-balanced portfolio, and wanted his assets kept safe with the object of asset preservation in the long term (paragraph 187 of the Judgment).

63. Next was the issue of delegation of responsibility by CS Life for the sale of the LPI Policies and the ongoing dealings with them. The Chief Justice dealt with the functions within the Credit Suisse group which CS Life had outsourced to other entities within the group, as revealed by the CS Governance Handbook, which was disclosed during the course of the trial, virtually all of which were delegated to Bank departments and individuals. The Handbook revealed that "Sales/Distribution", "Insurance Policy Administration", "Asset Management and Custody" and "AML Due Diligence Delegation Compliance" had all been outsourced to the Bank pursuant to key service contracts. The Chief Justice detailed the relevant evidence with considerable care, and refused to deal with the question on the basis of a pleading point taken by CS Life, finding that the Plaintiffs' pleaded case on the issue was reasonably clear. He concluded (paragraph 211) on the basis of evidence that he described as overwhelming and consistent, that CS Life had delegated

responsibility for the sale of the LPI Policies, agreeing the terms on which the assets would be transferred to CS Life (including the Investment Alternative), reporting on the LPI Policies and any ongoing dealings with respect to them to Mr Lescaudron in his capacity as Mr Ivanishvili's relationship manager. In my judgment he was entitled so to find.

64. Then came the question of the basis upon which the Policy Assets would be managed by the Bank. The Chief Justice accepted Mr Ivanishvili's evidence and that of Mr Bachiashvili, which he also found to be consistent with the documentation before the court. He noted that there were individuals available to give evidence on behalf of CS Life who had attended the meetings at which the LPI policies were sold, but who had not been called. Again there was a pleading point taken which the Chief Justice rejected, and he found as a matter of fact (paragraph 237) that Mr Ivanishvili, acting on behalf of Meadowsweet and Sandcay, had agreed with Mr Lescaudron, acting on behalf of CS Life, that the Policy Assets would be managed by the Bank on a discretionary basis.

65. Next was the short point that CS Life knew at the time that the Policies were taken out for the benefit of Mr Ivanishvili and his family. The Chief Justice found (paragraph 240) that they were.

66. And then another short point. If the Policy documentation evidenced a "choice" that the Policy Assets should be managed on a non-discretionary basis, this was fraudulently put in place by Mr Lescaudron, acting on behalf of CS Life. The Chief Justice found this to be the case, with a view to engineering a situation where Mr Ivanishvili believed the Bank was professionally managing the Policy Assets on a discretionary basis, but in fact Mr Lescaudron had a free rein to do as he wished with the Policy Assets by the simple expedient of falsely recording client instructions for the trades he was doing (paragraph 245).

67. Next, another short point, dealing with the fact that Mr Lescaudron had not placed the totality of the Policy Assets with the Bank's portfolio management team, because had he done so he would have lost access to the Policy Accounts and hence the ability to perpetrate his frauds. The Chief Justice so found (paragraph 247).

68. The next factual finding ties in with the third finding at paragraph 237. The Chief Justice rejected in terms CS Life's case that (i) Mr Ivanishvili had given Mr Lescaudron a general instruction to take investment decisions, and (ii) Mr Ivanishvili had made the final decisions as to the investments made on the Policy Accounts (paragraph 255).

69. Next was the finding that, with one exception, the investment decisions were made by Mr Lescaudron without instructions from the Policyholders or their lawful attorney. CS Life had submitted that communications between the Plaintiffs and Mr Ivanishvili's assistants and Mr Lescaudron were sufficient to provide Mr Lescaudron with authority to manage the Policy Accounts. The Chief Justice reviewed the relevant evidence with reference to the documents, which included client notes forged by Mr Lescaudron, and concluded at paragraph 269 that with the exception of the one identified account, investment decisions on the Policy Accounts were made by Mr Lescaudron without instructions from the Policyholders or their lawful attorney.

70. The next finding of fact dealt with the large concentration of Raptor holdings in the Policy Accounts. The Chief Justice found at paragraph 276 that Mr Lescaudron had not been instructed or otherwise authorised to build up such holdings.

71. The next finding related to the Direct Reports which Mr Lescaudron had sent to Mr Bachiashvili. CS Life's own expert Mr Bezant had accepted that these had inaccurately overvalued the Meadowsweet Assets from December 2013 onwards. The Chief Justice relied upon the answers given by Mr Lescaudron to the Credit Suisse security services in concluding at paragraph 279 that this was indeed the case.

72. At paragraph 283, the Chief Justice found that insofar as the Direct Reports reported the value of the Policy Accounts they were sent by Mr Lescaudron on behalf of CS Life.

73. The next finding dealt with the various services which the Bank had performed on behalf of CS Life, with reference to parts of the evidence, and the documentation[1], which services included fraud prevention, legal support, compliance and internal audit, security services and investigations, and human resources, all defined by the Chief Justice as "the Group Function". These matters were all covered by agreements between CS Life and the Bank. The Chief Justice pointed out that CS Life's witnesses had accepted that when CS Life used the Group Function, it was responsible for the acts or omissions of that Group Function. In relation to fraud, Mr Coffey had accepted that if the Group Function found or suspected fraud affecting CS Life accounts, this should have been brought to his attention. The Chief Justice found that CS Life would be fixed with such knowledge as was acquired by Credit Suisse entities carrying out the Group Function on behalf of CS Life. And he made a specific finding (paragraph 303) that the Bank had performed various Group Functions on behalf of CS Life.

74. At paragraphs 304 to 306, the Chief Justice made reference to the fact that employees of CS Life used the same email domain as used by employees of the Bank, and so found.

75. Next was the monitoring of the Policy Accounts for fraud or wrongdoing, fraud prevention being one of the Group Functions. The Chief Justice found that the Bank undertook this function on behalf of CS Life and supervised the Bank's management of the Policy Accounts for fraud or wrongdoing (paragraph 311).

76. Next came the fraud itself, and the various dishonest dealings which were included. The Chief Justice noted that CS Life had continued to make no admission in relation to the fraud, something which had caused astonishment to the Plaintiffs and their legal advisers, given that the litigation was being conducted by the general counsel's office of Credit Suisse, the same office which had made the criminal complaint against Mr Lescaudron, arising out of the same facts and circumstances. And it transpired that CS Life had conducted its own investigation and concluded that Mr Lescaudron had indeed committed the fraud. So that was established, not just alleged, and in any event was all set out in Mr Lescaudron's written statement to the Swiss police, with damning detail. Mr Lescaudron's statement to the public prosecutor in Geneva contained similar details, and a hearing before the Judicial Authority in Geneva disclosed more of the same. Unsurprisingly,

[1] Which included the CS Life Governance Handbook and the Credit Suisse Organisational Guidelines and Regulations

the Chief Justice concluded that Mr Lescaudron had committed a long-running fraud against Mr Ivanishvili, including the Policy Accounts, and the relevant particulars were set out between paragraphs 328 and 353. The fraud consisted of (i) making investment decisions without prior authority from the Policyholders and forging client notes; (ii) executing investments for the purpose of obtaining unlawful commissions in respect of transactions executed; (iii) directing the sale of assets at an undervalue and the purchase of securities at an overvalue; and (iv) transferring assets to other clients.

77. The Chief Justice's next finding was that Mr Lescaudron had been mismanaging the Plaintiffs' accounts with the Bank before the LPI Policies had been taken out (paragraph 359), something which was clearly established by reference to Mr Lescaudron's admissions of dishonesty.

78. The next subject concerned CS Life's knowledge of certain of Mr Lescaudron's wrongdoing, and the allegation that it could and should have known about his further wrongdoing. The Chief Justice started with the fact that Mr Lescaudron's knowledge of his own wrongdoing was directly imputed to CS Life (paragraph 360). He then considered Credit Suisse's actions. The fraud committed was not a particularly sophisticated one, involving the booking of transactions as having been authorised by Mr Ivanishvili when that was not the case. The Credit Suisse anti-fraud systems were identified, and the fact that by 2012 there was an ongoing audit investigation within Credit Suisse into Mr Lescaudron's activities, focused on his trading of Raptor shares. The investigation uncovered any number of failings in relation to Mr Lescaudron's activities, but without any disciplinary action being taken. The Chief Justice found that no action had been taken by the Bank despite the detail of wrongdoing, which he set out. Mr Coffey had accepted that this was information which should have been investigated by CS Life. The Chief Justice found that CS Life knew about certain of Mr Lescaudron's wrongdoings and could and should have known about his further wrongdoing before the Meadowsweet Policy commenced on 25 October 2011 and thereafter (paragraph 404).

79. The Chief Justice further found in the following paragraph that given the multitude of alerts and warnings of Mr Lescaudron's repeated wrongdoings, the failure to take action to bring that wrongdoing to an end could only be explained by CS Life having turned a 'blind eye' to it. And in this regard he accepted that the information that the Group Function had identified, calling into question Mr Lescaudron's suitability as relationship manager, had not been shared with CS Life's CEO in Bermuda.

80. His next finding related to the reason for matters not having been pursued, and in this regard the Chief Justice found in terms that the Group Functions (that is to say the various services carried out by the Bank on behalf of CS Life) and/or CS Life did not take the necessary action because CS Life was prioritising the revenues which Mr Lescaudron generated for Credit Suisse over the interests of its clients, including the Policyholders or Mr Ivanishvili. Jörg Rosskopf, then the head of Business Risk Management within Credit Suisse, whose findings are contained in the FINMA Report, prepared a report dated 3 August 2012, which gave details of what he had found about Mr Lescaudron's activities. The FINMA Report said in terms that Mr Rosskopf had brought Mr Lescaudron's misconduct to light, but that he had not been able to "*assert himself against other employees of the bank who advocated for a lower punishment".* Mr Rosskopf had concluded that further escalation might mean that he would lose his position within the Bank. The Chief Justice

had found (paragraph 390) that the decision made in 2012 not to remove Mr Lescaudron was driven, to a significant degree, by a concern on the Bank's part to protect revenue. He was said to have accounted for 70% of revenues for his team in Geneva, and generated more than CHF 54 million in revenue for Credit Suisse. The Chief Justice noted (paragraph 391) that Business Risk Management (the department within the Bank of which Mr Rosskopf was the head) and which the Chief Justice pointed out was the compliance and internal audit department for CS Life as much as for the Bank, clearly wanted Mr Lescaudron removed but were unable to achieve this.

81. The next finding related to CS Life's power not to appoint Mr Lescaudron to manage the Policy Assets and to remove him from the roles he held. Mr Coffey had said as much in his evidence, the pertinent parts of which were set out in the Judgment. There followed a number of formal findings which followed from findings that the Chief Justice had already made – that CS Life had not proffered witnesses who would have been likely to have material evidence to give, and had offered no explanation for that failure; and that CS Life had not given discovery responsive to a specific order.

82. There was one matter where the Chief Justice declined to make a finding sought by the Plaintiffs, and this was in relation to the Bank's alleged concealment of its failure to respond to a letter seeking production of documents under Article 400 of the Swiss Civil Code, and had given the court the misleading impression that the Bank had provided documents to CS Life pursuant to that request. The Chief Justice reviewed the evidence of Janita Burke, a CS Life director, and this had led to his decision.

83. The next finding again related to discovery, and stemmed from the Plaintiffs' complaints that CS Life had concealed from the court and the Plaintiffs until trial that the Bank performed the Group Functions on behalf of CS Life throughout the material period. The witness statements put forward on CS Life's behalf repeatedly suggested that it only had a very limited role. The Chief Justice accepted the Plaintiffs' complaint.

84. In much the same vein was the next finding, which related to the fact that Mr Coffey's fourth affidavit was materially incomplete, insofar as it gave incomplete details of some 26 people employed by the Bank, but made available to undertake "CS Life work". He described those persons as "Bank Life Employees". Those Bank Life Employees undertook business administration with respect to the individual LPI policies, and, as Mr Coffey put it, "*CS Life's day to day business was conducted by Bank employees*". Mr Coffey explained in his evidence that the names set out in his affidavit had been provided to him for inclusion (the Plaintiffs contended by the Bank's general counsel). The Chief Justice found that the list of individuals who performed the Group Functions was not disclosed by CS Life either to the Plaintiffs or to the court. I should say that to my mind the evidence given by Mr Coffey seems to go further than that Bank Life Employees performed the Group Function on behalf of CS Life; the reality was that CS Life's LPI business was conducted by the Bank on its behalf.

85. The next example of misleading information having been provided by CS Life to the Plaintiffs related to the existence of a dedicated assets monitoring department, something which was not revealed in its witness statements or during discovery. In fact, CS Life redacted all references to this department in its discovery, and proper discovery was not given until after an unless order had

been made, a mere 11 days before the start of the hearing. CS Life's witnesses were unable to explain why they had not mentioned the existence of this department. The Chief Justice found as a fact (paragraph 426) that the existence of the department was not disclosed by CS Life until just prior to the start of the trial.

86. The Chief Justice next considered the investigations into Mr Lescaudron's fraud. He found (paragraph 433) that the investigations by Credit Suisse, and its agents Walder Wyss and PwC, were carried out on behalf of CS Life as well as the Bank, the former in its capacity as a group subsidiary affected by the fraud. CS Life's case was that these investigations were carried out only on behalf of the Bank. But the position as the Chief Justice found it to be was confirmed by CS Life witnesses such as Mr Celia and Mr Vaccaro. And PwC was given access to information about the CS Life accounts which would not be permissible unless the investigation was being carried out on behalf of CS Life.

87. The next finding related to CS Life's failure to take any steps to recover the losses on the Policy Accounts, something the Chief Justice described as "common ground". He noted that CS Life's witnesses had been unable to offer any explanation as to why CS Life had not pursued a claim against the Bank.

88. The next finding related to Mr Ivanishvili's evidence that if he had known that the Policy Assets were not being managed professionally and/or that funds were being misappropriated, he would have moved the Policy Assets to a reputable European bank to be invested in a medium risk portfolio (paragraph 441). CS Life had contended that Mr Ivanishvili would have left the Policy Assets with the Bank, even if he had discovered the fraud earlier. This was apparently on the basis that Mr Ivanishvili had left approximately US$60 million in the Policy Accounts after he had discovered the fraud. The Chief Justice accepted that the reason for this was Mr Ivanishvili's concern that CS Life was taking the position that a transfer of the entirety of the Policy Assets would have led to an argument by CS Life that he would be disbarred from pursuing his claim against them, pursuant to clause 11 of the GPCs. CS Life had been asked for confirmation that it would not rely on the clause, and had declined to give such confirmation. The Chief Justice took the view that that left Mr Ivanishvili in an invidious position, and he set out CS Life's pleaded case on that aspect of matters.

89. The next finding might be thought to be a formality, namely that if Mr Ivanishvili had known that fraudulent activity had been taking place on his accounts with the Bank, he would not have set up the LPI Policies, but would instead have moved the management of the money to a reputable European bank to be invested in a medium risk portfolio. Mr Ivanishvili's evidence in this regard was unchallenged and the Chief Justice so found.

90. And the last finding related to the implied misrepresentation made by Mr Lescaudron on behalf of CS Life when selling the LPI Policies to Mr Ivanishvili. The Chief Justice found that Mr Lescaudron, acting on behalf of CS Life, had impliedly represented that he and the Bank were not managing the Plaintiffs' existing accounts fraudulently and/or did not intend to manage the Policy Assets fraudulently. The Chief Justice found (paragraph 445) that Mr Lescaudron knew that the misrepresentations were false, inferred that he intended to continue his frauds, and intended the Plaintiffs to act in reliance on his deceit. As it seems to me the reference to "*the Plaintiffs' existing*

accounts" must be taken to refer to different persons at different times. Prior to the Meadowsweet Policy it must be taken to refer to the accounts of Mr Ivanishvili (including those of his companies) and thereafter to include the Meadowsweet Policy Accounts.

The Judgment - breach of contract

91. The Judgment then turned to the Plaintiffs' claim for breach of contract, quoting seven different breaches, taken from the Plaintiffs' written closing submissions. The first breach was that CS Life had failed to invest the Policy Assets in accordance with the Investment Alternative selected by the Policyholders. The Chief Justice held that under clause 6 of the GPCs, CS Life was under an absolute obligation to invest the Policy Assets in that manner, which led to only two options; the Policyholder could choose an Investment Alternative with or without discretionary mandates, as Ms Homann had repeatedly confirmed in her evidence, as had Mr Celia. However, the Chief Justice had recorded Mr Celia as having said in his fourth witness statement that if a discretionary mandate is chosen, CS Life ensures the Internal Fund is administered by the portfolio management team at the Bank (Multi Asset Class Solutions or "MACS"), a team of 39 people drawing on the experience of more than 300 investment professionals. As I read Mr Celia's witness statement, this was the position in relation to one Sandcay US$ sub account, but that, according to him, both Meadowsweet and Sandcay had selected the Investment Alternative without discretionary mandate. The Chief Justice recorded that, when the discretionary mandate option is selected, CS Life has rights against the Bank (a) under the 2005 Asset Management Agreement; (b) under specific discretionary portfolio management agreements covering particular CS Life accounts and (c) as the account holder.

92. CS Life contended that the best 'fit' for the available evidence was that Mr Lescaudron had "general instructions" to make investment decisions in collaboration with Mr Ivanishvili and his assistants from time to time. The Chief Justice rejected that contention (paragraph 468), first on the basis that Mr Ivanishvili had not given Mr Lescaudron such general instructions, and secondly, that there was no such third option available. As CS Life's witnesses had confirmed, there were only two options. And he gave further reasons, all supporting that position. The reality was that the Policy Assets were neither managed pursuant to a written discretionary mandate by the MACS team, nor invested only on instructions from the Policyholders. Mr Lescaudron made the investment decisions himself. The Chief Justice found that Mr Lescaudron had agreed with Mr Ivanishvili that the Policy Assets would be managed *in toto* on a discretionary basis by the Bank, which meant that it should have been managed in accordance with the current investment policy of the Bank and in line with the guidelines relating to discretionary mandates issued by the Swiss Bankers Association. The fact that the LPI Policy documentation did not properly reflect this agreement was likely because it was not in Mr Lescaudron's interests for the Policy Assets to be managed by the MACS team. It was in his interests to engineer a situation where the Plaintiffs believed the Policy Assets were being managed by the Bank, to enable him personally to direct the investments (and hence perpetrate his frauds). The Chief Justice concluded that it did not matter which investment alternative was selected because either way Mr Lescaudron was not permitted personally to select investments. Irrespective of the Investment Alternative selected by Mr Ivanishvili, the fact that Mr Lescaudron selected the investments on the Policy Accounts as he did placed CS Life in breach of its obligations to the Policyholders.

93. The second breach was a failure by CS Life to carry out the services it provided under the Policies with reasonable care and skill. The Chief Justice held that such a term could be implied either on the grounds of business efficacy or being so obvious that it went without saying – see *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742. CS Life accepted that it was under such an implied duty by reason of the Supply of Services (Implied Terms) Act 2003, but there remained a dispute between the parties as to the scope of the implied duty. The Chief Justice found that by holding client assets in its name as part of the services it was offering, it was "managing" and "holding" the Policy Assets, and was therefore required to act with care and skill when fulfilling these services, which, at the lowest, imposed on CS Life an obligation to take reasonable steps to safeguard the assets held in its accounts, which would involve not permitting inappropriate people to represent CS Life in its dealings with its clients or to have access to client funds. He further found that CS Life was under a duty to ensure that the assets in the Internal Fund were managed in accordance with the Investment Alternative selected by the Policyholder and that CS Life was under a duty to take reasonable care and skill when appointing the Bank and/or Mr Lescaudron to manage the Policy Assets in accordance with the Investment Alternative selected by the Policyholder.

94. The third breach was that CS Life failed to invest the Premiums prudently and/or with proper care, skill and diligence when appointing and/or causing the appointment of the Bank and/or Mr Lescaudron to manage and/or hold and/or invest the Policy Assets. The Chief Justice held that CS Life's obligation to do so arose both under section 3 of the Supply of Services (Implied Terms) Act 2003 and under the common law, by way of implication of such a term as necessary to give business efficacy to the Polices and because it was obvious. CS Life was, the Chief Justice held, in breach of that term when appointing Mr Lescaudron to manage and/or hold and/or invest the Policy Assets. It should have known that he was not an appropriate person to be appointed as a result of Credit Suisse's centralised anti-fraud, compliance and human resources department being on notice from before the Meadowsweet Policy was taken out that Mr Lescaudron was dealing inappropriately with client assets and had been fraudulently mismanaging Mr Ivanishvili's account and the Policy Accounts since 2007.

95. The fourth breach was the failure by CS Life to monitor the Policy Accounts for fraud, and to assess whether the Investment Alternative was being complied with. The Plaintiffs had originally put their case wider, but given the evidence which had emerged were content to proceed on that basis. The Chief Justice started by observing that the position for which CS Life contended, that it owed no duty to its policyholders to monitor whether there was fraudulent activity on the policy accounts, (even though it did so) would create "an incoherent gap in the contractual chain of responsibility" and held that such a duty was to be implied. It had been established by CS Life's witnesses that it did in fact monitor for fraud. Even though its pleaded case was that CS Life did not carry out any monitoring, that was a centralised function performed by the Group Functions on behalf of CS Life. So the question was whether that monitoring was adequate.

96. CS Life contended that even if it had monitored for fraud it would not have been able to detect Mr Lescaudron's wrongdoing. The Chief Justice rejected that submission. Mr Lescaudron's activities had been repeatedly flagged as suspicious and his fraud was not sophisticated, and should have been picked up. The Chief Justice referred to his finding that Credit Suisse had turned a blind eye to Mr Lescaudron's wrongdoing because he was generating such large revenues for the group,

noting that Mr Rosskopf had expressly accepted this. He referred also to the Plaintiffs' complaints that CS Life did not adduce evidence from anyone involved in the Credit Suisse anti-fraud department, in managing Mr Lescaudron, or investigating his fraud. And the Chief Justice inferred that CS Life's failure to call relevant witnesses or give discovery was because such witnesses and documents would have confirmed what the PwC and FINMA Reports disclosed, namely that CS Life either did discover or should have discovered Mr Lescaudron's wrongdoing.

97. In relation to CS Life's obligation to assess whether the Investment Alternative was being complied with, the Chief Justice also held that such a term fell to be implied. It followed from his finding that the Policyholders had selected the Investment Alternative with discretionary management that CS Life was required to ensure that the Bank was managing the Policy Assets according to the Bank's current investment policy and in line with the guideline relating to discretionary mandates issued by the Swiss Bankers Association. In view of the manner in which Mr Lescaudron was selecting investments (inconsistent with both Investment Alternatives), the Chief Justice held that, had CS Life taken steps to assess whether the Investment Alternative was being complied with, it would have been obvious that it was not.

98. The fifth breach related to the Plaintiffs' submission that CS Life failed to hold and deal with the Policy Assets for the benefit of Meadowsweet and Sandcay, arguing that clause 18(a) of the GPCs so provided and relying upon the duty to exercise reasonable care and skill when performing services under the Policies. The Chief Justice rejected the former submission and observed that he had dealt with the scope of the duty to take care in relation to the third breach.

99. The sixth breach was that CS Life failed to ensure that the Policy records provided to the Plaintiffs were true and accurate and maintained in accordance with generally accepted accounting principles. The Chief Justice accepted that CS Life was under an implied obligation to ensure that the reports provided were true and accurate, and also found that Mr Lescaudron provided those reports on behalf of CS Life, since they explicitly held him out as the person the Policyholders should contact with regard to the Policy Accounts. He noted that it was common ground that the Direct Reports were false, and that Mr Lescaudron had accepted as much. That fraudulent misreporting was, the Chief Justice found, attributable to CS Life. He also noted that the false reporting had started in December 2012 and continued until September 2015. Had the falsity of the reporting been exposed from the start, Mr Ivanishvili would have moved his assets, including the Policy Assets, from Credit Suisse.

100. The next issue concerned the relevance of Swiss law to the claim in contract. CS Life's expert Dr Weibel gave evidence concerning the Swiss law concept of compound contracts. But he accepted that he was not contending that such a principle of Swiss law should be applied by a Bermudian court construing a Bermuda law contract. The Chief Justice therefore took the view that it was unnecessary to address the concept further.

101. Next, the Judgment dealt with the issue of causation. The Plaintiffs' case was that CS Life should have invested the Policy Assets *in toto* in accordance with the Investment Alternative with a discretionary mandate. That would have involved management by the Bank's MACS team, which would have meant that Mr Lescaudron would not have been able to perpetrate his fraud. The Chief Justice explained why he disregarded the one Sandcay account (which was in fact managed by the

MACS team), and preferred to take the entirety of the Policy Assets and consider what returns would have been made in a medium risk portfolio managed by a reputable European bank, which, in effect, was what should have happened had the MACS team been managing the Policy Assets. CS Life contended that if Mr Ivanishvili had not invested in the LPI Policies, the likelihood was that he would have had his wealth managed (or mismanaged) by Mr Lescaudron and the Bank. The Chief Justice rejected that submission.

102. Finally, the Chief Justice accepted that CS Life's failure to take steps to recover the losses caused to the Policy Assets was relevant. Had that claim been pursued and the losses recovered, those recoveries would have been used to reconstitute the Policy Assets.

The Judgment - breach of fiduciary duty

103. The Plaintiffs relied upon the provisions of the SAC Act and that the relationship between CS Life and the account owners was one of trust and confidence. CS Life contended that the SAC Act did not impose fiduciary duties, and thus it was to the contractual documents that the Plaintiffs had to look to establish that fiduciary duties were owed.

104. The Chief Justice accepted the submission that the circumstances of the case established a relationship of trust and confidence between CS Life and the Policyholders, citing English and Bermudian authority, the latter being the Court of Appeal case of *Horizon Bank International v Walsh and Taal* (Bermuda Court of Appeal #4 of 2008). CS Life sought to distinguish that case, a submission the Chief Justice rejected. He found (paragraph 552) that the relationship of the Plaintiffs (in particular Mr Ivanishvili) was such that CS Life owed to the Plaintiffs duties of a fiduciary nature. He set out the breaches of those duties between paragraphs 557 and 561, repeating various of his earlier findings at paragraph 562. He further held that the causation analysis undertaken in relation to the breach of contract claim applied *mutatis mutandis* to the breach of fiduciary duty claims.

The Judgment – the misrepresentation case

105. Having noted that the Plaintiffs no longer wished to pursue claims based on breach of statutory duty and had stated that they did not intend to address the tortious breaches separately because they overlapped entirely with the breach of contract claims, the Chief Justice turned to the Misrepresentation Claim, and considered first the choice of law and limitation issues. By way of background, the original claim made by the Plaintiffs was for damages for breach of contract and fiduciary duty, issued on 22 August 2017. By an application made in October 2020, the Plaintiffs sought to add a claim in fraudulent misrepresentation or deceit. It was common ground that if the Georgian limitation period applied, the Misrepresentation Claim would be time barred. In addressing the issue of double actionability, the Plaintiffs had argued that given the variety of jurisdictions involved, the key action was entering into the LPI Policies, and that the tort was in substance committed and the cause of action arose in Bermuda. The Chief Justice referred to Rule 203 of *Dicey and Morris on the Conflict of Laws* (12th Ed), as approved by the Privy Council in *Red Sea Insurance v Bouygues* [1995] 1 AC 190 at 198, where the rule on double actionability is set out in the following terms:

> *"Rule 203 – (1) As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both (a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and (b) actionable according to the law of the foreign country where it was done. (2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties."*

106. The Plaintiffs also argued that where another country has the most significant relationship with the events and parties, there is an exception to the double actionability rule - see *Imanagement v Cukurova Holdings* [2008] ECarSC 119 at paragraph 56. CS Life pointed to the fact that the representations were made to Mr Ivanishvili in Georgia, which is where the applications for the Policies were signed. (This must have been intended as a reference to the Letters of Wishes to the Mandalay Trust and the Green Vals Trust signed by Mr Ivanishvili). The Policies were issued in Switzerland, which is where the operations of the Bank Life Employees were based, and were signed there by Mr Keusch on behalf of CS Life. The Chief Justice considered the case of *JIO Minerals v Mineral Enterprises* [2010] SGCA 41, a decision of the Singapore Court of Appeal, which between paragraphs 88 and 95 recognised the applicability of a "general substance test" for determining the proper forum for the trial of a misrepresentation claim where the elements constituting the tort did not occur in a single jurisdiction. In *Red Sea Insurance*, the Privy Council had reviewed the earlier cases and had confirmed that the double actionability rule should be applied with flexibility. The Chief Justice held that there were strong connecting factors with Bermuda as the *lex fori*, namely (a) the fact that CS Life was incorporated in Bermuda, had at the relevant time an office and staff in Bermuda, and was registered as an insurer and as a segregated account company; and (b) the LPI Policies were subject to Bermuda law and the exclusive jurisdiction of the Bermuda courts. He took the view that the substance of the tort did not take place in Bermuda, but accepted the submission that this was a case where Bermuda had the most significant relationship with the events and the parties, in that all or almost all of the significant connecting factors pointed to Bermuda; and he held that the claim in relation to misrepresentation was governed by the law of Bermuda alone. If that was correct the matters set out in the following paragraphs did not have to be determined.

107. As an alternative to their primary submissions, the Plaintiffs argued that the Misrepresentation Claim is actionable in Georgia, but the Georgian court would consider it to be a claim governed by the law of Bermuda, since it related to a Bermuda law contract and would therefore apply the Bermuda law limitation period. In this regard the Plaintiffs relied upon the evidence of Professor Rolf Knieper, and CS Life's expert, Mr Bibliashvili agreed with his conclusion.

108. However, CS Life argued that the Plaintiffs' alternative argument, which depended upon the doctrine of renvoi, was wrong as a matter of law because the doctrine of renvoi was abolished for the purposes of limitation by section 34A of the Limitation Act 1984 ("the Bermuda Limitation Act"). CS Life's argument was that the equivalent English legislation, section 1 of the Foreign Limitation Periods Act 1984, was designed and intended to exclude the application of renvoi. The case of *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 supported the proposition that when enacting the legislation, the UK legislature clearly had in mind the double actionability rule as it then applied to torts. CS Life argued that the same must be inferred of the

Bermudian legislature, with the consequence that for torts located overseas, the double actionability rule required both laws to be considered, but section 34A of the Bermuda Limitation Act operated to exclude renvoi in this context. Since the Georgian limitation period of three years is shorter than Bermuda's limitation period of six years, that is the only limitation period the Bermuda court needed to consider.

109. However, the Chief Justice accepted that the position in the case before him was different from the position in New York in the *Metall und Rohstoff* case, where the claim was statute barred in New York. On the basis of the expert evidence he found that as a matter of Georgian law, the claim was not statute barred there, because, at a trial in Georgia, Georgia would apply Bermuda law. To hold that the misrepresentation case could not be pursued on the ground that it was statute barred in Georgia would require the court to ignore the evidence of both Georgian law experts (by which I take him to mean the evidence that under Georgian private international law rules the Georgian court would apply the Bermudian law of limitation because Bermuda was the law of the contract), and that, he found, would be contrary to public policy. In the alternative, the Chief Justice indicated that he would exercise the court's discretion under the jurisdiction identified by Lord Wilberforce in *Boys v Chaplin* [1971] AC 356 at 389, which he had dealt with at paragraph 599 of the Judgment.

110. The Chief Justice then dealt with an argument that the limitation period had been interrupted, on which the Georgian law experts disagreed, preferring the approach of Professor Knieper. He held that the effect of the issue of the original proceedings in Bermuda was to interrupt the limitation period for the Misrepresentation Claim pursuant to Article 138 of the Georgian Civil Code.

111. The Chief Justice next turned to the issue of amendment in the context of the expiry of a relevant limitation period. He directed himself to the question of whether a new claim could be said to arise out of the same or substantially the same facts. He noted that the sale of the Policies had always been at issue in the proceedings, quoting from the original Statement of Claim ("the SoC"). He then referred to the relevant parts of the witness statements, and next noted that CS Life had given no additional discovery in relation to the Misrepresentation Claim; save for Mr Celia (whose witness statement on the subject demonstrated that he had no first-hand knowledge in relation to the factual issues, and which was described by the Chief Justice as being in the nature of legal submissions) no additional witnesses were called by CS Life. In the circumstances, he held that the facts underpinning the Misrepresentation Claim had been pleaded in the SoC.

112. The Chief Justice then turned to the Misrepresentation Claim under Bermuda law, setting out the constituent elements. He found (paragraph 640 and 641) that the implied misrepresentations were communicated to Mr Ivanishvili at the meetings at which the LPI Policies were proposed; and (paragraph 642) that the implied representations made by the Bank were false, as had been admitted by Mr Lescaudron. He then addressed the issue of CS Life's knowledge of the representation and its falsity, setting out the case which CS Life had advanced that Mr Lescaudron had no actual or apparent authority to make any representations on behalf of CS Life. The Chief Justice rejected those submissions, referring to his finding, referenced at paragraph 63 above, that CS Life had delegated responsibility for the sale of the LPI Policies to Mr Lescaudron in his capacity as Mr Ivanishvili's relationship manager. He accepted that the Bank and Mr Lescaudron had actual authority to make representations to the Misrepresentation Plaintiffs, and accepted the Plaintiffs' submissions that since the Bank and Mr Lescaudron were used by CS Life to sell the

LPI product, they were authorised for the purpose of making representations to the Plaintiffs about the LPI product. CS Life had contended that the collaboration agreement between CS Life and the Bank meant that there was no actual authority for Mr Lescaudron to make the alleged misrepresentations. The Chief Justice found the factual case in that regard to be overwhelming, referring to the relevant evidence. And he found in terms that the Plaintiffs had discharged the burden of proving that at the time of the promotion of the LPI Policies, Mr Lescaudron was fraudulently managing the Plaintiffs' accounts.

113. The Chief Justice then found that it was clear that Mr Lescaudron had intended to induce the Misrepresentation Plaintiffs to enter into the LPI Policies, and next turned to the question of whether they were in fact so induced. He referred to Mr Ivanishvili's evidence, and then reviewed the authorities concerning the need for actual inducement, and the cases relied on in that regard by CS Life, the net effect of which were, it submitted, that the requirement that a plaintiff must be aware of an alleged misrepresentation cannot be satisfied simply by his saying that he assumed the state of affairs that formed the content of the alleged representation. There must be some contemporaneous conscious thought given to it.

114. The Plaintiffs argued that the question as to how inducement should be analysed in the context of implied representations is not straightforward and is fact sensitive. The Chief Justice reviewed the authorities[2] in some detail, with particular reference to the requirement of understanding on the part of the representee in relation to the nature of the misrepresentation. He concluded (paragraph 682) that there were cases where the "understanding" requirement was appropriate, where the representations were intricate and/or ambiguous, but that was not so where the conduct spoke for itself, as Cockerill J recognised in the case of *Leeds City Council v Barclays Bank* [2021] 2 WLR 1180. The Chief Justice held the case before him to be materially in the same category as the case of *Gordon and Teixeira v Selico Ltd* [1986] 18 HLR 219, a case where a landlord had deliberately covered up the presence of dry rot. He accepted that Mr Ivanishvili was deceived because he did not know there was fraudulent mismanagement of his assets, and would not have entered into the LPI Policies if he had known there was such fraud. He held (paragraph 686) that in appropriate circumstances, an implied representation intended by the representor to be relied upon by the representee, accompanied by evidence such as that of Mr Ivanishvili, could be sufficient to found liability for misrepresentation. The Chief Justice noted that the decision in *Spice Girls Limited v Aprilia World Services BV* [2002] EWCA Civ 15 supported that view, as did the more recent decision of *Crossley & Ors v Volkswagen Aktiengesellschaft* [2021] EWHC 3444. He noted that the conduct and the representations to be implied therefrom were relatively simple. Unlike some of the cases cited to him, there was no complex web of communications. He concluded (paragraph 696) that the Misrepresentation Plaintiffs were induced by the implied representations made on behalf of CS Life to agree to set up the LPI Policies.

The Judgment - loss and damage

115. The case for the Misrepresentation Plaintiffs was that if Mr Ivanishvili had not been deceived, he would not have invested in the Policies but would instead have invested these funds with a

[2] *Property Alliance Group v Royal Bank of Scotland* [2016] EWHC 3342 (Ch); [2018] EWCA Civ 355; *Marme Inversiones v Natwest Markets* [2019] EWHC 366 (Comm); *Raiffeisen Zentral Bank Osterreich AG v The Royal Bank of Scotland* [2010] EWHC 1392 (Comm*); Leeds City Council v Barclays Bank* [2021] 2 WLR 1180;

reputable European bank to be invested in a medium risk investment portfolio. CS Life's case was that Mr Ivanishvili's evidence was undermined in cross-examination, but the Chief Justice rejected that suggestion. Specifically, he held that it was not open to CS Life to pray in aid the counterfactual of no representation having been made (see *Downs v Chappell* [1997] 1 WLR 426) and found in favour of the Plaintiffs' case.

116. The Chief Justice then turned to the issue of actionability under Georgian law. The elements of the claim for damages in tort were agreed by the Georgian law experts, but the component parts were not. In relation to the question as to whether any representation had to be explicit, the Chief Justice preferred the evidence of the Plaintiffs' expert Professor Knieper. The experts agreed on the next remaining elements, but disagreed on the application of Article 396 of the Georgian Civil Code[3]. The Chief Justice again preferred the evidence of Professor Knieper, and concluded that the Misrepresentation Claim in the Bermuda proceedings was actionable as a matter of Georgian law.

117. The Chief Justice then turned to damages, and reviewed the counterfactual models used by the experts, concluding that it was appropriate to assess damages by reference to Model 1, that used by Mr Davies, the Plaintiffs' expert. That model calculated the difference between the value of the Policy Accounts and the value that would have been achieved if the assets had been invested from inception in Mr Davies' Medium Risk Portfolio. Model 3 A (the Objectionable Transactions Model) focused on specific transactions which had been identified as unauthorised or imprudent (based on Mr Morrey's Report) and assumed that funds invested pursuant to those transactions were invested in the Medium Risk Portfolio. Model 4 (the Over-concentrated Model) focused on assets which accounted for 5% or more of the total asset value of the Policy Accounts. Model 3 B comprised Over-concentrated positions which were not also Objectionable Transactions *per se*. In rejecting CS Life's defence, the Chief Justice held there to be "an air of unreality" about it. The court was not being asked to assess the work of a professional, competent portfolio manager or specialist team who made bad decisions in good faith. What was happening was not portfolio management of any recognisable kind. Mr Lescaudron was not a professional investment manager, and that he made catastrophic investment decisions and breached all basic principles of good portfolio management was, as the Chief Justice commented, hardly surprising.

118. And the Chief Justice held that the Investment Risk Profile of the Policy Accounts was medium risk, the view expressed by the Plaintiffs' expert David Morrey. He then reviewed the approaches of the two experts on the appropriate construction of the Portfolio, noting that Mr Campana, CS Life's expert, had effectively withdrawn his opinions on the issue. The Chief Justice then dealt with the funds which had been deposited into the Meadowsweet Policy Accounts *in specie*, on which the experts had opined, preferring the opinion of Mr Bezant in one case and Mr Davies in the other. He moved on to the appropriate start dates for the calculation of damages (Mr Bezant's dates were later than Mr Davies'), preferring those of Mr Davies.

119. Next the Chief Justice turned to the appropriate rate of interest, preferring Mr Bezant's approach; then he addressed the question of concentration, ie the appropriate limit for a holding in a single security. Mr Morrey's view was that the appropriate figure was 5%, and he identified 18 cases where the Policy Accounts had a concentration level over 5%. Mr Campana's view was that 10%

[3] Article 396 provides that "An obligor shall be liable for the actions of his/her representative and of the persons whom he/she employs to perform his/her obligations to the same extent as for his/her own culpable action".

should be the threshold, though he accepted, in answer to a question from the Chief Justice, that there was a real risk that including more than 5% of a stock would have a real impact on the portfolio if the stock performed badly. The Chief Justice preferred Mr Morrey's approach.

120. The next question was as to the suitability of a particular transaction. It was common ground that Raptor and another company named Pearl Gold were necessarily unsuitable because they were tainted by the commissions that Mr Lescaudron received. In relation to other investments the Chief Justice preferred Mr Morrey's evidence.

121. And the next issue was whether it was appropriate to adjust for leverage. The Chief Justice accepted that it was not feasible to consider the amount of leveraging in place at the date of every transaction and make an adjustment, Mr Davies' view.

122. The Chief Justice then set out his conclusions, which I will not repeat. In relation to damages, the Chief Justice instructed the forensic accounting experts for the parties to calculate the quantum of damages, having regard to his findings.

123. So, the Judgment sets out the issues, and how the Chief Justice ruled on them, but also gives a clear picture as to how CS Life chose to conduct its case, which may be relevant when it comes time to consider Lord Falconer's new approach as to how he submits the litigation should now be resolved.

The grounds of appeal

124. The grounds of appeal began with an overview, which contended that the core errors in the Judgment were, first, that the Chief Justice had failed to recognise and give effect to the Plaintiffs' decision to take proceedings against CS Life rather than the Bank; secondly, that the Chief Justice had decided the issues against CS Life on the basis of an unpleaded case; and thirdly, that he had compounded his error by quantifying damages on "an erroneous and unprincipled basis".

125. The first matters which the grounds attacked were the findings by the Chief Justice (i) that Mr Ivanishvili had agreed with Mr Lescaudron, on behalf of Meadowsweet and Sandcay, that the Policy Assets would be managed by the Bank on a discretionary basis, and (ii) that Mr Lescaudron (acting on behalf of CS Life) had fraudulently concealed the non-discretionary mandate terms from Mr Ivanishvili when the latter signed the LPI Policies ("the Unpleaded Contentions"). In fact, the Chief Justice's finding on the second of these was that it was likely that Mr Lescaudron deliberately did not select the correct additional documents from the application pack, in order to engineer a situation where Mr Ivanishvili believed the Bank was managing the assets on a discretionary basis, when in fact Mr Lescaudron had a free hand to do as he wished with the Policy Assets by the simple expedient of falsely recording client instructions for the trades he was doing, when no such instructions had been given by the Policyholders. CS Life contended that the Unpleaded Contentions were not only not pleaded, but were directly contradicted by the express terms of the Plaintiffs' pleaded case, and were set out for the first time in the Plaintiffs' written submissions filed before trial, without any application being made to amend their pleadings. CS Life explained to the Chief Justice in its oral submissions that it was addressing only the Plaintiffs' pleaded case, and contended that the Unpleaded Contentions, if pleaded, would have fundamentally changed the

nature of the case which CS Life had to answer from one of breach of contract to a claim based in substance on mistake or *non est factum*. Had the Plaintiffs made an application to amend their pleadings, CS Life would have opposed it, on various grounds, which were set out. In its oral closing submissions CS Life confirmed that it had conducted its case solely on the basis of the Plaintiffs' pleaded case. And the last complaint in relation to this ground was that the Chief Justice had not given any indication that he was going to decide the case by reference to the Unpleaded Contentions.

126. The second ground concerned the Group Functions. CS Life contended that because CS Life had the ability to call on those functions provided by the Bank to group companies, the Chief Justice had wrongly held that CS Life owed a duty to the Plaintiffs to do so; he had, it was said, conflated CS Life's contractual duties to those functions which it could call on the Bank to perform. And the Chief Justice was wrong to ignore the division of responsibility between CS Life (insurance) and the Bank (banking), and had wrongly held that CS Life owed contractual duties to the Plaintiffs which were the responsibility of the Bank, not CS Life, which the Chief Justice found should have been performed with care and skill. Lastly, the Chief Justice had wrongly concluded that Mr Lescaudron was acting as CS Life's agent when he was acting for the Bank. The grounds set out the duties which CS Life was said to owe and identified the errors which it maintained the Chief Justice had made in reaching his conclusions.

127. The third ground maintained the Chief Justice had been wrong to conclude that CS Life owed the Plaintiffs fiduciary duties where there was an arm's length commercial relationship between the two, when the SAC Act did not impose fiduciary duties, and by reason of CS Life's provision of "an insurance wrapper", the Policy Assets had been entrusted to the Bank and not CS Life.

128. The fourth ground said that the Chief Justice had erred in finding that the Misrepresentation Claim was not barred by limitation. It was said that he erred in concluding that Bermuda law alone applied to that claim; he should have found that the tort in substance took place in Georgia. Next, it was said that he erred in relying on the doctrine of renvoi, which does not apply to tort claims and has no application in commercial matters; even if it did apply, the Georgia law experts were agreed that Georgia would apply the doctrine of double or total renvoi, such that if the foreign court would apply Georgian law, the Georgia court would do likewise, resulting in a three-year limitation period. Further, it was said that the Chief Justice erred in concluding that the application of Georgian law on limitation and the exclusion of renvoi was contrary to public policy and could be disapplied under section 34B of the Bermuda Limitation Act. Next it was said that he had erred in relation to the suspension of the limitation period, for reasons that were set out. Finally, it was said that the original claim did not relate to the same subject matter and could not be said to arise from substantially the same facts as the original claim, all leading to the conclusion that the Misrepresentation Claim was subject to a three-year limitation period, and applying the double actionability rule, the claim was barred by limitation.

129. Ground five maintained that the Chief Justice had erred in his *obiter* holding that if the Georgian limitation period did apply, he would have given leave to amend, with the consequence that the Plaintiffs' limitation problem would disappear.

130. The sixth ground related to the requirement that Mr Ivanishvili should have had a conscious understanding or awareness of the representation being made to him at the time it was made, and that the Chief Justice had erred in law in concluding that CS Life was responsible for the fraudulent misrepresentations sued on.

131. The seventh ground related to erroneous findings in relation to quantum, with reference to the start and end dates for the calculation, the causative finding in relation to the latter being that the Plaintiffs had freely chosen to keep a significant proportion of their investments in the Policy Accounts, despite being aware, from August 2017, if not before, of their contractual entitlement to withdraw at least 95% without charge, penalty or disadvantage. Further, the undisputed evidence was that the Plaintiffs had left substantially all (more than $200 million) of the Policy Assets in the Policy Accounts following the discovery of the fraud, the figure of $60 million representing the position at the date of trial. Next was a criticism of the Chief Justice's acceptance of Mr Morrey's counterfactual model, it being said that he should have used Mr Campana's counterfactual model.

132. Finally, the eighth ground concerned what was said to be the unprincipled adoption of the wrong model. The Chief Justice was said to have erred in failing to take into account that the vast majority of the initial investment was made by the deposit of investments in specie, the majority of which were suitable and unobjectionable, and the Plaintiffs' case was for the difference between the actual value of the Policy Accounts and the value the assets would have had if honestly and prudently invested. The only appropriate methods of calculating damages presented to the Chief Justice were Mr Davies' models 3 and 4, as adjusted and corrected by Mr Bezant. The Chief Justice had, it was said, failed to take sufficient account of the fact that the Plaintiffs' experts had distinguished between unsuitable and objectionable investment from acceptable ones. The distinction ought to have led the Chief Justice to calculate the recoverable loss by reference to a counterfactual in which only those unsuitable and objectionable investments were replaced. Further, the Chief Justice had made erroneous findings in relation to the unsuitability of investments and leveraging. CS Life's proposed course was that any calculation of damages based on models 3 and 4 ought to be remitted to the Supreme Court for argument before another judge.

Respondents' notice

133. There was a Respondents' notice regarding the Chief Justice's finding that the substance of the tort did not take place in Bermuda, and in relation to the application of the Bermuda Limitation Act, it being common ground that a Georgian court would, at any rate in the first instance, apply Bermuda law to the substance of the claim.

Submissions on behalf of CS Life – the New Argument

134. While the parties' submissions were, as was to be expected, comprehensive, I would propose to deal at the outset with Lord Falconer's submissions as to the way forward, made relatively early on during the first day of hearing, that the Policies could (Lord Falconer went no further than that initially) require CS Life to pursue claims against the Bank, the value of which would be governed by Swiss law. This was defined by the Respondents as "the New Argument", and I shall use the same term. When asked why CS Life had not sued the Bank to protect the Policyholders, Lord

Falconer said that he had no answer to that, though he later accepted that there was an obligation on CS Life to sue the Bank; he did not explain CS Life's failure to do so over the many years which had elapsed since the fraud had been discovered. He had already indicated that he was by now taking instructions from the new Credit Suisse group general counsel, who should have been able to give him the answer to that question. No answer appeared in the written note that CS Life put in on the issue subsequently. When Lord Falconer was asked by my Lord President whether this "*rather rococo approach"* had ever been suggested by CS Life at trial, he pushed back on the use of the word rococo, but said that it had not been with the degree of certainty with which it was now being made. That response did not answer the question, and when CS Life put in its written note on the issue, it made no reference to the matter having been raised before the Chief Justice. What it did say was that the position as set out in its note (in essence that a claim by CS Life against the Bank was an asset of the segregated accounts held for the benefit of the Policyholders, the value of which could be obtained upon surrender) was the correct contractual basis for any claims made by the Policyholders against CS Life, and that the best means of resolving the matter would be for this Court to direct that CS Life's claim, the non-pursuit of which Lord Falconer accepted to be a breach, be valued, and that the valuation exercise be remitted to the Supreme Court. The Respondents' reply note said in terms that the New Argument was not advanced at first instance, as well as being unpleaded (as it clearly should have been), not featuring in the amended grounds of appeal, and not referred to in CS Life's skeleton argument for this hearing. It was raised without the courtesy of any advance warning to the Respondents, who naturally contended that it was an abuse of process. It was also inconsistent with what had been advanced below, namely that the Plaintiffs had no contractual rights against CS Life with respect to claims that CS Life might have against the Bank.

135. In my judgment CS Life's New Argument, even though it is relied on only to rebut any suggestion that the Plaintiffs otherwise have no means of recovering their losses (which was not the basis of the Chief Justice's decision), was clearly an abuse of process, and it may be seen as ironic that CS Life itself made complaint that the Chief Justice had made findings on the basis of an unpleaded case. As the Respondents pointed out, originally CS Life had been running an abusive case because it did not admit the Lescaudron frauds. It could not at the same time refuse to admit the Lescaudron frauds and say that it had a claim against the Bank in respect of them. And, as is obvious, had the New Argument been raised earlier it would materially have impacted the scope of the trial, including discovery, cross-examination and expert evidence.

136. And the Respondents set out in detail a number of potential issues with any claims that CS Life might have against the Bank. These include (i) the question as to whether the claims are an asset linked to the segregated accounts; (ii) the nature of the claims available to CS Life, and of any defences thereto, under Swiss law – a question of fact; (iii) the value of such claims; (iv) the potential significance of the fact that CS Life was itself implicated in the fraud; and (v) limitation issues. (CS Life's note had referred to the time bar defence the Bank might have against CS Life, and said that neither CS Life nor the Bank would rely on any time bar defence, but did not explain how it had authority to speak on the Bank's behalf). Finally, the Respondents noted that CS Life's New Argument was inconsistent with its pleaded case, which was that it was under no duty to sue

the Bank[4]. CS Life merely pleaded that the Plaintiffs had failed to plead the steps which it should have taken. I referred earlier, no doubt inelegantly, to that horse having long since left the barn. The stage at which this particular issue has been raised, without any advance notice to the Respondents, makes it comprehensively abusive. CS Life should not be able to advance its case one way, and then, when that case is rejected by the trial judge, choose another way that is fundamentally inconsistent with its first case, and which would effectively require a further trial. I would therefore reject CS Life's New Argument, and consider this appeal only on the basis of how matters were run at first instance.

CS Life's submissions - the contractual and corporate structure

137. The starting point for CS Life was to emphasise that it and the Bank are two different legal persons, and then to refer to the fact that Mr Lescaudron was employed by the Bank, had no contract with CS Life and was not paid by CS Life. The relationship between the Plaintiffs and the Bank predated any involvement of CS Life by some seven years. The submissions then turned to the different contractual relationships between CS Life and the Bank, starting with a collaboration agreement dated 24 January 2005. It was submitted that this gave the Bank no right to represent CS Life, and the same was true of Mr Lescaudron. Then there was the delegation agreement of the same date, which delegated to the Bank certain of CS Life's due diligence obligations. Finally, there was an asset management agreement dated 10 October 2008, which governed the management of policy assets by the Bank when there was a discretionary mandate in place. Where there was not, the Bank's standard terms and conditions applied.

138. In relation to the Policies, CS Life described the LPI structure as a "pass-through" which allowed the Bank's investment management services to be provided more tax efficiently. Reference was made to the fact that the discretionary mandate page was not included in the documents, and that the non-discretionary mandate page was included and signed. This meant, it was submitted, that it was Mr Ivanishvili and not CS Life who was authorised to give instructions to the Bank in relation to the Meadowsweet Policy. Effectively the same submissions were made in regard to Sandcay. CS Life did not address the fact that Mr Lescaudron was in fact authorising trades without reference to Mr Ivanishvili. Rather, it submitted that all aspects of the fraud were actions taken in respect of the management of the Policy Assets, those being actions of the Bank. It was the Bank that had control of the Policy Accounts and the assets therein. It followed, it was submitted, that insofar as Mr Lescaudron committed frauds (as the Chief Justice found), he did so in his capacity as an employee and the agent of the Bank. It is interesting to note that in respect of CS Life's New Argument, its skeleton was still not prepared to admit Mr Lescaudron's fraud.

139. The submissions carried on to say that it had never been suggested that there was any fraud in relation to the transfer of premium by CS Life to the Bank. Accordingly, the key determinations in the Judgment concerned the mechanisms by which the Chief Justice found CS Life liable for breaches of duty by Mr Lescaudron and his employer, the Bank.

[4] CS Life had, at 69A of the RASoD, denied the allegation in paragraph 53.8 of the RASoC that it had failed to take any or any adequate steps to recover the losses caused to the Policy Assets, which would, in context, appear to be a contention that it was not bound to take any.

CS Life's submissions - the Unpleaded Contentions

140. The submissions next turned to the Unpleaded Contentions, which the Chief Justice had accepted in finding that Mr Ivanishvili had orally agreed with Mr Lescaudron that the Policy Assets would be managed by the Bank on the basis of a discretionary mandate, and that insofar as the LPI documentation recorded the selection of a non-discretionary mandate, that had been effected by Mr Lescaudron for his own fraudulent purposes. That was said to be wrong for the reasons advanced in relation to the second ground, but it was also said that that legal issue should not have arisen, because the factual basis for the Chief Justice's conclusion was derived from the Unpleaded Contentions. Specifically, it was contended that the Plaintiffs had not pleaded the agreement between Mr Ivanishvili and Mr Lescaudron referred to above. The pleading said that so far as the Plaintiffs were aware there were no written discretionary mandates in place, but the Bank has acted as though there were; CS Life complained that the first time the Unpleaded Contentions were set out was in the Plaintiffs' written submissions received ten days or so before trial, and that it had no proper opportunity to answer these allegations prior to trial. I pause to note that Mr Ivanishvili's witness statements had said that because of his new political involvement he did not have the time to manage any of the investments, and he said that Credit Suisse was well aware of that. But CS Life maintained that it had made clear to the Chief Justice that it was answering only the Plaintiffs' pleaded case, and the transcript of counsel's opening remarks confirms that he took the position that CS Life was entitled to proceed on the basis of the Plaintiffs' pleaded case. And CS Life went so far as to say that the Plaintiffs' new case was the opposite of their pleaded case, and complained about the Plaintiffs' discovery, since they had resisted CS Life's efforts to secure discovery in relation to historical documents which CS Life maintained were material, in terms of the relationship between Mr Ivanishvili and Mr Lescaudron prior to 2011.

CS Life's submissions - contractual duties

141. The first point made on behalf of CS Life was that nothing in the contracts between the Policyholders and CS Life constituted a warranty that the Bank would perform its obligations, and there was nothing to the effect that any breach or wrongdoing by CS Life would be actionable against CS Life by the Policyholders. There were, it was said, two mechanisms by which the Chief Justice had found that CS Life was responsible for the losses caused by Mr Lescaudron; to attribute certain of his conduct to CS Life, and to seek to spell out of the terms of the LPI policy documents obligations of CS Life which were breached by the Bank.

142. In relation to the Investment Alternative, CS Life repeated that it was not open to the Chief Justice to make the findings of fact that he did because they were not pleaded, but continued to say that the legal determination which he made on the basis of those facts was wrong, because Mr Lescaudron was acting for the Bank when communicating with Mr Ivanishvili, Meadowsweet and Sandcay. Both CS Life and the Bank had a business relationship with Mr Ivanishvili and the other Plaintiffs, and separate contractually defined roles. The fact that Mr Lescaudron was the relationship manager under the Policy documents did not mean that it followed that any steps he took in relation to those policies were taken on behalf of CS Life. That position was consistent with longstanding principles of agency law, and what was necessary was to analyse whether a particular act was undertaken on behalf of the Bank or CS Life. When the LPI Policies were first discussed, Mr Lescaudron could only be said to be representing the Bank. The submissions

referred to the fact that the collaboration agreement provided for the Bank's employees to promote CS Life products, but that did not make an employee such as Mr Lescaudron an agent of CS Life. Insofar as Mr Lescaudron agreed with Mr Ivanishvili to select a discretionary mandate and then wrongly failed to select that mandate when applying (acting on behalf of the Bank) to CS Life, that would be a breach of the Bank's duties to its clients. And in relation to the Investment Alternative, the only proper way to determine the choice of Investment Alternative was by construction of the document itself.

143. In relation to the obligation to apply the chosen Investment Alternative, it was said that the Chief Justice's error was to elide the obligation to invest in accordance with the Investment Alternative selected, and an alleged breach arising from the fact that the assets were not managed pursuant to a written discretionary mandate. The two concepts, investment of the premium by CS Life and management of the Internal Fund, were expressly distinguished. And any claims arising from a fraud on the part of a Bank employee in relation to the Policy Assets, which were allocated to the Bank, would be actionable against the Bank only.

144. Next, the submissions turned to the appointment of the Bank to manage the Internal Fund and that of Mr Lescaudron as relationship manager. CS Life, it was said, had no discretion in regard to either appointment.

145. Then came the issue of the duty to monitor for fraud on the Policy Accounts. CS Life contended that there was no basis upon which the Chief Justice could properly hold that there was an implied term that CS Life had such a duty, when the policy documents provided expressly that it would be the Bank which would manage the Internal Fund. There were said to have been 19,000 trades, so the existence of such an implied term would have far reaching consequences. And it was said that the only basis upon which the Chief Justice had reached his conclusion was to attribute to CS Life the inadequacy in the Bank's monitoring for fraud, and any knowledge the Bank had acquired of Mr Lescaudron's fraud.

146. Next came the Direct Reports, and the Chief Justice's finding that CS Life had an implied obligation to ensure that these were true and accurate. The obligations contained in the GPCs were set out, and it was said that CS Life had complied with these. CS Life had no knowledge of the arrangements whereby the Direct Reports were provided, and contended that in doing so Mr Lescaudron was not acting on behalf of CS Life.

CS Life's submissions - fiduciary duties

147. CS Life's starting point was that the detailed contract, drafted by professionals, did not purport to create such a relationship, and if such a duty was to be identified, it had to be an *ad hoc* fiduciary duty, which the courts are slow to import – see *Bristol & West Building Society v Mothew* [1998] Ch 1, at 18. And it was said that the Chief Justice had misunderstood the case of *Horizon Bank International v Walsh and Taal*. The breaches identified in the judgment were 'repackaged allegations of negligence and breach of contractual duty'.

CS Life's submissions - time bar of the Misrepresentation Claim

148. The first point to be considered was the exception to double actionability, and the Chief Justice was right to find that the substance of the tort had not occurred in Bermuda. So the starting point was that Georgian law (and limitation) applied to the Misrepresentation Claim, and the exception, it was submitted, was of rare and narrow application, and could not be used simply to disapply limitation.

149. Then it was said that the Chief Justice had erred in finding that it would be contrary to public policy to apply the Georgian limitation period, because the exclusion of renvoi itself had the effect that a shorter limitation period was applied than would in fact have been applied by a Georgian court. The Chief Justice's conclusion failed to take into account the relevant test under section 34B(1) of the Bermuda Limitation Act, it was said, and the simple assertion that section 34A(5) of the Act would result in the claim being wrongly and artificially time barred was not enough.

150. Next came the point that the doctrine of renvoi would not apply in the case of a claim in tort in a commercial context, the application of the doctrine being extremely narrow, and the modern approach being to seek to avoid renvoi and expressly exclude it by statute. The consequence, it was submitted, was that the double actionability rule requires the court to apply Georgian law, including limitation, to the Misrepresentation Claim. And even if renvoi were to be applied, it was submitted that on a proper application the doctrine would still require the claim to be actionable under Georgian law.

151. Then it was said that the Chief Justice had erred in relation to his finding regarding the suspension of the Georgian limitation period. That would occur only if the bringing of the action was in respect of the specific claim. The Chief Justice erred by misapplying Article 138 of the Georgian Civil Code, and the Georgian limitation period could not properly be suspended in circumstances where the Misrepresentation Claim did not arise out of substantially the same facts as the main claim.

CS Life's submissions - amendment to plead deceit

152. This point goes to the one just mentioned, and the need for the Misrepresentation Claim to arise from the same or substantially the same facts as the existing claims. The Chief Justice had held that even if the limitation period applied to the Misrepresentation Claim, he would have permitted it to be brought out of time by amendment. Little of the factual basis of the Misrepresentation Claim could be found in the pleading of the main claim, it was submitted, and the Chief Justice failed to conduct a detailed analysis focussed on the pleadings.

CS Life's submissions - elements of implied misrepresentation

153. Under this ground CS Life contended that the Chief Justice had erred in concluding that there was no requirement for the Plaintiffs to establish that Mr Ivanishvili had any conscious understanding of the alleged representation. This was not pleaded and no evidence had been led to establish such an awareness; neither was it alleged that the existence of such an understanding could be inferred. Reference was made to the relevant authorities, and in relation to the *Leeds City Council* case, it

was said that the Chief Justice had misstated the finding in that case. Further, any misrepresentation was not made on behalf of CS Life.

CS Life's submissions - quantum

154. The submissions in relation to quantum began by contending that the findings in this section of the judgment were stated by way of assertion and the reasoning was not sufficient to allow the reader to understand why coherent arguments supported by evidence had been rejected. Consequently, it was open to this Court to consider the principles from scratch. The Chief Justice, it was said, had offered no basis for many of his critical conclusions on issues of quantum and loss.

155. In relation to the commencement date for the calculation of damages, complaint was made that the Chief Justice had offered no basis at all for his decision, having briefly set out that the experts had been instructed to calculate losses from various dates. This was said to be in breach of the principles set down by Lord Phillips in *English v Emery Reimbold & Strick (Practice Note)* [2002] 1 WLR 2409. Secondly it was not a matter within the competence of the experts at all, and thirdly, it was patently wrong in principle since the recoverable loss for breaches of the terms of the LPI Policies could not start before the Policies operated. The net effect of the Chief Justice's conclusion was to give the Plaintiffs the benefit of stock market gains for a period before it was pleaded or suggested (or found by the Chief Justice) that CS Life ought to have invested the deposited assets. Nor was there any suggestion, let alone evidence, that the assets which were transferred to CS Life *in specie* should have been dealt with differently in the period before the Policies themselves commenced from how they would have been dealt with had they remained with the Bank until commencement. That error alone was said to have made a difference of $58 million to the damages calculation. That number does on its face seem surprisingly high, but apparently is a consequence of the market movements during the relevant period.

156. CS Life submitted that it had advanced full legal argument to explain that the only proper start date for calculating damages was the commencement date of the Policies, and that the lack of reasoning alone is sufficient for this Court to allow the appeal on this ground and to consider the question afresh. The experts made calculations based on three potential dates, but recognised that the potential start date was not a matter for expert evidence, but rather was for the Chief Justice to determine on the basis of submissions. CS Life rehearsed the factual history, and submitted that before the Policies commenced the money and assets had not been paid to CS Life for investment under the terms of the Policies; it was only on the commencement dates that the obligation to invest arose.

157. Similarly, CS Life argued that the Chief Justice's finding regarding the end date for the calculation of damages was in error, particularly with reference to his finding that Mr Ivanishvili had no choice but to leave substantial funds with CS Life after the discovery of the fraud; he could have left a nominal sum in the Policy Accounts. As it was, the Plaintiffs had a free choice to leave the assets untouched from at least August 2017, when they had been advised of the fraud and their contractual entitlement to withdraw at least 95% of the investments from the Policy Accounts. Their failure to do so broke the chain of causation.

158. The Chief Justice was also criticised for failing to consider what Mr Ivanishvili actually did, as compared with the inherent probability as to what an account holder might do (the manner in which he had addressed the matter). CS Life set out the factual position in relation to both Meadowsweet and Sandcay regarding the withdrawal of funds. The table it produced (which excluded amounts under $1 million) showed a withdrawal by Meadowsweet of $17,435,268 in October 2015, with further withdrawals of $20 million, $28,300,000 and $15 million in December 2017, July and October 2018. In respect of Sandcay, relatively small sums were withdrawn between July 2016 and September 2017, and then a substantial withdrawal of $158,038,670 in October 2017, representing 77% of the Sandcay funds, with two further withdrawals in November and December 2017. The next question to be considered, submitted CS Life, was whether there was any obstacle to withdrawal.

159. CS Life's position was made with reference to the GPCs, and the submission was that these showed that the Plaintiffs would only lose their right to sue CS Life in the event of a total surrender. Further, it was said, the point was confirmed in correspondence. Mr Ivanishvili accepted in his evidence that he had signed letters of wishes on 31 March 2017 asking the Trustees to procure a partial surrender of 94.9% of each of the Policy Account assets. Subsequent correspondence was said to have supported CS Life's position that, provided enough was left in the accounts to cover future fees, the Plaintiffs' legal rights would not be affected. The correspondence referred to leaving an amount of $300,000 in each of the accounts, yet the Plaintiffs elected to keep $60 million in the accounts.

160. At trial, Mr Ivanishvili had been cross-examined on why he had not removed greater sums from either account after he had discovered the fraud (CS Life was still referring in its submissions to the alleged fraud). When he was asked specifically to explain why he did not transfer the Policy assets to another bank in late 2015 or 2016, he said that he could not explain and had no recollection of the matter. This was despite the fact that his fourth witness statement filed only a week earlier complained about CS Life's failure to repay the funds.

161. In conclusion CS Life submitted that the Chief Justice's findings had both the start and end dates wrong, and that there was no legal or practical impediment to withdrawal, something which the Chief Justice had ignored. The Plaintiffs' free choice to leave assets in the Policy Accounts after they had ample time to consider their options and take legal advice broke the chain of causation.

162. The submissions next turned to the Chief Justice's rejection of CS Life's expert's evidence on valuation. The Plaintiffs' pleaded case was that the appropriate measure of damages was the difference between the value of the assets if invested with a reputable European bank from an appropriate start date to an appropriate finish date, and their actual value over the same period. The obvious way to measure that, submitted CS Life, was to review medium risk portfolios managed by reputable European banks and calculate the average return of such banks. The Plaintiffs' expert Mr Morrey had conducted a different exercise, deciding first on a theoretical asset allocation (between liquidity, bonds and equities) and then using indices or exchange traded funds ("ETFs") to approximate the measure of actual performance. The Chief Justice had accepted Mr Morrey's calculations and rejected Mr Campana's methodology, though without saying why he thought Mr Campana's analysis was not orthodox. And complaint was made that the Chief Justice had reached an unfair conclusion in rejecting Mr Campana's real world average when

compared with Mr Morrey's theoretical one. And it was said that the Chief Justice's criticism that Mr Campana had effectively withdrawn his conclusion was unfair, given the terms in which he had been cross-examined. CS Life submitted that the Chief Justice had taken an unprincipled approach which was neither in accordance with principles of damages nor the pleadings, and that on a fresh and fair review, Mr Campana's analysis should be preferred to Mr Morrey's.

163. Next came the complaint that the Chief Justice had given the Plaintiffs an uplift on the actual performance of the entirely unobjectionable elements of their portfolio. The use of the word 'unobjectionable' perhaps should be considered with caution, bearing in mind that Mr Lescaudron's investments were undertaken without reference to either permissible mandate, and that Mr Lescaudron was not qualified to act as an investment advisor. In any event, the Plaintiffs' expert Mr Morrey had identified every security held which could be identified as either an Objectionable Transaction (the majority of which were in Raptor) or an Over-concentrated Position. A relatively small number of these had caused substantial losses, the corollary to which was that the majority of investments had been acceptable. Instead of taking the losses on the transactions identified by the two experts, the Chief Justice's approach had been to use Mr Morrey's much more successful counterfactual portfolio, calculated on the basis of the entirety of the capital paid to CS Life as if every investment were objectionable and fell to be replaced *ab initio*. The Chief Justice had rejected Models 3 and 4 and had directed a re-calculation based on Model 1, the choice of which was said by CS Life to be an error of law. The point was made that Mr Ivanishvili had not taken the view that the entire portfolio was rotten, and had chosen to leave the vast majority of the investments in the Policy Accounts without requesting any changes to the underlying securities. But the Chief Justice had made a finding that the wrongdoing complained of was not captured by identifying objectionable or over-concentrated items, since the court was not being asked to assess the work of a competent portfolio manager or team, the point made earlier in this paragraph. CS Life submitted that Chief Justice had not considered the evidence about the scale of the fraud, or engaged with the detail of the forensic evidence.

164. The submissions then turned to the securities which had been placed into the Policy Accounts *in specie*. CS Life had not chosen those investments. Counsel for the Plaintiffs had not given the basis on which he said Model 1 was appropriate, and the Chief Justice had barely engaged on the various criticisms made about Models 3 and 4, even though they were explored before him. The Chief Justice had made his conclusion on the unsuitability of investments and leveraging without giving reasons. And he had set out the parties' competing positions and then picked the Plaintiffs' without giving reasons for so doing. And the consequence of failing to engage with the arguments concerning Models 3 and 4 meant that (assuming the Judgment was not reversed on liability), a re-calculation of damages would have to be remitted to the Supreme Court, for the experts to be recalled and argument to be heard by a different judge.

Submissions on behalf of the Respondents

165. In their introduction, the Respondents first referred to the extent of the fraud perpetrated by Mr Lescaudron and the manner in which CS Life had run its case in the court below. They then turned to the proper approach to be taken by an appellate court in relation to appeals on questions of fact, citing an extract from the case of *Wheeldon Brothers Waste Ltd v Millennium Insurance Company*

Ltd [2019] 4 WLR 56, where, having referred to the relevant authorities, Coulson LJ said at paragraph 10:

> *"In short, to be overturned on appeal, a finding of fact must be one that no reasonable judge could have reached. In practice, that will usually occur only where there was no evidence at all to support the finding that was made, or the judge plainly misunderstood the evidence in order to arrive at the disputed finding."*

The learned judge noted that similar caution must be exercised in relation to the trial judge's assessment of and evaluation based upon expert evidence adduced at trial.

166. The submissions gave detail as to the manner in which CS Life had run a false case, and which had resulted in an order for indemnity costs. Notable, given the non-admission by CS Life of Mr Lescaudron's fraud, was the FINMA Report, which established the extent of Mr Lescaudron's frauds. He had been questioned by the Bank's security service on 18 September 2015 and was dismissed on 22 September 2015. The Chief Justice held that the PwC investigation and Reports were carried out, insofar as they affected the Policy Accounts, on behalf of CS Life. This was accepted by CS Life witnesses such as Mr Celia and Mr Vaccaro. But more critically, both those witnesses had accepted that they knew of Mr Lescaudron's fraud. And yet CS Life continued to run a false case and refused to admit the fraud until the very end – and beyond; see the continued non-admission of the fraud in CS Life's submissions referred to in paragraphs 135 and 160 above.

167. In relation to CS Life's submissions concerning the contractual and corporate structure, the Respondents submitted that CS Life was attempting to re-argue factual issues that had already been determined against them, when these were not the subject of appeal (save to the limited extent engaged on grounds 5 and 8). There were two aspects of CS Life's operation which were important to note; first, CS Life delegated the vast bulk of its operational functions to the Bank to perform on its behalf, and secondly, CS Life was the Bank's client and account holder, and contractual counterparty with respect to the Policy Assets.

168. The fact that Mr Lescaudron was not a CS Life employee, made repeatedly by CS Life, was not, submitted the Respondents, of great importance; he was made available by the Bank to conduct CS Life's business on its behalf. And CS Life did not challenge the Chief Justice's findings in relation to the Group Functions or the extent of the delegation of CS Life's functions to the Bank. The true position was, submitted the Respondents, that knowledge of the Group Functions was only attributed to CS Life insofar as those individuals were carrying out functions that had been delegated by CS Life to the Bank to perform on its behalf. The Chief Justice had properly proceeded on the basis that delegated functions were, when they were performed or should have been performed by the Bank on behalf of CS Life, the acts or omissions of CS Life. And the Respondents maintained that it was not open to CS Life to make this argument on appeal; its case at first instance was that it did not have the capacity to (and did not) perform any of these functions. Further CS Life did not call any witnesses involved in carrying out those delegated functions, no doubt, submitted the Respondents, because to have done so would have blown apart its false case.

169. The Respondents next pointed out the distinction to be drawn between the argument that the Policies are determinative of the scope of CS Life's duties to the Plaintiffs, and the notion that the

Policies govern the imputation of knowledge to CS Life. CS Life chose to delegate functions to the Bank, and is fixed with the knowledge of those individuals who carried out those functions on its behalf.

170. The Respondents then turned to the Policies, and CS Life's minimalist approach to their construction. That was, effectively, that CS Life's obligations went no further than placing the Policy Assets with the Bank with an instruction as to the mandate to be applied, an argument that the Chief Justice had rejected. Moreover, the construction for which CS Life contended was uncommercial, produced unreasonable outcomes and flouted business common sense. It could not be squared with the commercial reality, which was that (i) the Respondents had legal ownership of hundreds of millions of dollars' worth of assets which they had transferred to CS Life pursuant to the Policies; (ii) CS Life then entered into a suite of agreements with the Bank pursuant to which it had rights and the Bank had obligations; (iii) that the Respondents had thereby given up their direct contractual relationship with the Bank; (iv) CS Life had carried out extensive monitoring of its accounts, including for fraud prevention, and (v) CS Life had its own claims against the Bank, committed against assets held in its name in its accounts, which it had failed to pursue. Although many years had passed after the opportunity for CS Life to take proceedings against the Bank first arose, Lord Falconer was now, for the first time, suggesting that CS Life should in fact pursue them. All of which was advanced at the Bank's behest (the Chief Justice had noted that the Bank directed and controlled this litigation, and indeed Lord Falconer had confirmed before this Court that he took instructions from the Credit Suisse group legal counsel) with a view to engineering a situation in which no Credit Suisse entity had responsibility for the Lescaudron frauds.

171. The submissions then turned to the Chief Justice's conclusion that CS Life had failed to invest the Policy Assets in accordance with the Investment Alternative selected by the Policyholders. The Respondents submitted that CS Life's argument should be rejected because it was not what the Policies said, was uncommercial and would produce absurd results – see the preceding paragraph. CS Life did not identify the wording in the Policies said to support its case, and their argument meant that the Policyholders had no protection whatsoever, even if the Policy Assets were not invested in accordance with the agreed Investment Alternative, but rather were fraudulently mismanaged. The court was entitled to have regard to business common sense, the commercial purpose of the transaction, and the reasonableness of the result. CS Life's argument that it did not provide a guarantee of the Bank's management of the Policy Assets was based on the false premise that CS Life was responsible for managing the Policy Assets in the sense of making investment decisions, whereas the Chief Justice had found that CS Life was responsible for ensuring that the Policy Assets were invested in accordance with the agreed Investment Alternative, as it had promised to do in the Policies. And the reality was that it did not matter which Investment Alternative was selected since CS Life was in breach of contract either way. The minimalist approach to construction has already been addressed; the second argument made by CS Life was that special arrangements had been made with Mr Ivanishvili, and because Mr Ivanishvili was given a power of attorney to make investment decisions, CS Life should not be responsible for the fact that Mr Lescaudron executed investment decisions without authority, a change from CS Life's argument at first instance that Mr Ivanishvili actually gave the investment instructions pursuant to the powers of attorney. That he had the power but not the obligation to make investment decisions was irrelevant, and in any event the argument was based on a misreading of the powers of attorney,

and was inconsistent with the Chief Justice's factual finding that Mr Ivanishvili had not agreed to be in charge of investment decisions.

The Respondents' submissions - the Unpleaded Contentions

172. The submissions then turn to the investment mandate, and dealt first with the pleading point. It was said that CS Life cannot now raise the argument because it did not raise the issue at first instance and insist upon a ruling, per *Hawksworth v Chief Constable of Staffordshire* [2012] EWCA Civ 293. Since the trial in that case had proceeded on the basis that a particular point was in issue, it was too late for the point to be taken at the appellate level. But the Respondents also say that CS Life was well aware that its case was that the Bank was managing the investments (ie a discretionary mandate). Not only had its witness statements said as much, but CS Life's counsel had addressed the issue at an interlocutory hearing more than a year before trial, when, talking of Mr Ivanishvili, he said … "*The essence of his case is that he thought there was a discretionary mandate, and he was not going to have any involvement at all in relation to the investments*". Ms Burke, in her 10th affidavit had referred to Mr Ivanishvili's case in much the same terms, more than 15 months before trial. And, contrary to what CS Life had said in its submissions, Mr Ivanishvili was cross-examined on the subject at trial, as the Chief Justice recorded in the Judgment. The Chief Justice also noted that CS Life had proffered no witness who had attended the meetings at which the LPI Policies had been sold, despite such witnesses still being employed by Credit Suisse.

173. The Respondents also noted the irony in CS Life having changed its case (that Mr Ivanishvili had in fact selected the investments) to an unpleaded one that he had given Mr Lescaudron a general instruction to act freely on the Policy Accounts, a *volte face* which the Respondents submitted CS Life was forced into because, in light of the discovery it had previously suppressed, it was unable to assert positively that the client notes were genuine.

174. Next, the Respondents again noted the lack of discovery of any notes of the meetings at which the Policies were sold, or any witnesses present being called, making the point that it was difficult to believe that CS Life would have called different witnesses or given further discovery if the point had been pleaded, contrary to the submissions made in its skeleton argument. Further, the evidence that Mr Ivanishvili did not agree to manage the Policy Assets was overwhelming, and the Chief Justice had concluded (paragraph 235 of the Judgment) that it would be neither unreasonable nor unfair that the court should deal with the issue.

175. The Respondents' submissions next turned to the argument that Mr Lescaudron had been acting on behalf of the Bank and not CS Life, noting that this finding of fact by the Chief Justice was mischaracterised by CS Life as a challenge to a finding of law. In any event this Court is not in a position to overturn the Chief Justice's finding in the absence of discovery or evidence. CS Life's submission was that the issue should be determined by reference to the contractual and corporate structure, but quite apart from the Chief Justice's finding, the factors put forward on behalf of CS Life did not govern the point. CS Life had delegated the negotiation and sale of the Policies to Mr Lescaudron; the collaboration agreement did not negate the existence of an agency relationship; and to the extent that Mr Lescaudron helped a future client complete a CS Life application form, that was consistent with him being CS Life's agent.

The Respondents' submissions - contractual duties

176. Next was the choice of Investment Alternative. CS Life's witnesses had confirmed that they would expect the relationship manager to discuss and agree that with the client. And the Chief Justice had expressly found that the basic fallacy of CS Life's argument was that the Policies did not contain a choice or selection of Investment Alternative, as Ms Homann had confirmed, and the application form was not the Investment Alternative selecting agreement (paragraph 229 of the Judgment). The Chief Justice did recognise that the Policies lacked clarity, but found that this was irrelevant because Mr Lescaudron was not permitted to select the investments personally either way. That was the Respondents' case, that CS Life was in breach irrespective of which Investment Alternative had been selected.

177. Even if a non-discretionary mandate had been chosen, investments were not executed by Mr Ivanishvili on the Policy Accounts, but were executed by Mr Lescaudron without authority, something which CS Life does not challenge. Further, the Respondents repeated that they were not aware, until they received Mr Celia's fourth witness statement shortly before trial, that when discretionary mandates were agreed, CS Life was supposed to ensure that the relevant assets were managed by the Bank's MACS team. Mr Vaccaro's statement as to the continuing role of the relationship manager in the event of a discretionary mandate was misleading and wrong. And in circumstances where CS Life failed throughout the trial to "come clean" about the nature of the fraud, it lies ill in CS Life's mouth to take the pleading point. Further, in those circumstances, CS Life had not suffered prejudice, when it was in possession of documents relevant to Mr Lescaudron's fraud and did not disclose them in discovery, despite having been ordered to do so.

178. The next point was in relation to the Chief Justice's finding that CS Life was under a duty to exercise care and skill when holding and investing the premium payments, and to ensure that the assets in the Internal Fund were managed in accordance with the Investment Alternative selected by the Policyholder. The Chief Justice had found that CS Life had failed to exercise reasonable care and skill when appointing and retaining Mr Lescaudron to manage and/or hold and/or invest the Policy Assets. The Chief Justice further found that CS Life knew or should have known that he had acted inappropriately with client assets, had been fraudulently mismanaging the Respondents' accounts since 2007, and was fraudulently mismanaging the Policy Accounts. The Chief Justice also found that CS Life did not call relevant witnesses or give proper discovery, because this would have revealed that CS Life either did discover or should have discovered Mr Lescaudron's wrongdoing. These factual findings by the Chief Justice have not been challenged by CS Life. Its argument was made solely by reference to the terms of the Policies.

179. CS Life contended that it had no discretion in relation to the appointment of Mr Lescaudron. The Chief Justice's finding to the contrary is unchallenged. If CS Life had no such right, the question which follows is "Who does?", with the answer impliedly being the Policyholders. But that could only be the case if CS Life were under a duty to inform the Policyholders what it had found out about Mr Lescaudron's activities.

180. The next point covered was the Chief Justice's finding that CS Life had a duty to monitor for fraud, and was obliged to assess whether the Investment Alternative was being complied with. Again,

CS Life did not challenge the Chief Justice's factual findings. Hence CS Life was bound by those findings which included that it had delegated its fraud prevention services and other related functions to the Bank, and had its own systems and monitoring functions in place. CS Life was on notice that Mr Lescaudron's behaviour with respect to Raptor was concerning, had no explanation for why it allowed him to purchase further Raptor shares after it had imposed a "special pre-authorisation regime", and so was aware from August 2013 at the latest that there was something "odd" about his investments in Hyperion. And the other relevant findings of the Chief Justice were repeated.

181. In relation to the duty, contrary to what CS Life had submitted, it was not inconsistent with the express terms of the Policies; monitoring was not addressed in the Policies, and the term fell to be implied because it was to be expected. Everyone would have (correctly) assumed that it would be a central part of CS Life's governance obligations. And those obligations had nothing to do with but were separate from involvement in the investment process.

182. The Respondents' skeleton argument asserted that CS Life had claimed that it had no relevant expertise to carry out any monitoring, and that this claim was unsustainable. As I read this part of the CS Life skeleton, it was referring to its duties in relation to investment decisions. But the basis upon which the Chief Justice found CS Life to be in breach was that it either did uncover or should have uncovered Mr Lescaudron's fraud. This was so both in relation to the Group Function and CS Life's own monitoring, quite apart from the Chief Justice's finding that Mr Lescaudron's own knowledge of the fraud was directly imputed to CS Life, and the adverse inferences which the Chief Justice had drawn, where the context made such inferences appropriate. And finally, in relation to the Group Functions, because CS Life failed to give relevant discovery or to call the relevant witnesses, it was not open to it to say that the Group Functions operated on the Bank's behalf and not CS Life's; if it had wished to make this argument, it should have called witnesses who could have supported it.

183. The next topic addressed was that of ensuring that the reports made by CS Life to the Policyholders were true and accurate. CS Life did not dispute the existence of the obligation, only the Chief Justice's finding that it was in breach, on the basis of his finding that Mr Lescaudron was acting on behalf of CS Life when providing the Direct Reports, which related back to the detail of Mr Lescaudron's role as relationship manager. CS Life was now, said the Respondents, arguing that because Mr Ivanishvili had a power of attorney to make investment decisions on the Policy Accounts, Mr Lescaudron was reporting to him *qua* CS Life's agent, so that CS Life was the victim of the false reporting rather than the Policyholders. Quite apart from being unpleaded and not being made at first instance, the Chief Justice's unchallenged factual findings were that CS Life delegated <u>its</u> reporting obligations to Mr Lescaudron and that he purportedly fulfilled <u>those</u> obligations by sending the Direct Reports to Mr Ivanishvili.

184. The Respondents drew a distinction between Mr Lescaudron's activities when he was acting for the Bank (in relation to non-CS Life accounts), and when he was acting for CS Life, in relation to its accounts. CS Life referred to having to rely on the Bank for information, but as the Respondents said, it must either have known or been able to find out about the assets the Bank held on its behalf. And in relation to the new case referred to in the preceding paragraph, if that was CS Life's case

it needed to have been advanced at first instance so that it could have been explored with the Swiss law experts, to the extent that it raised issues of Swiss law.

The Respondents' submissions - fiduciary duties

185. The skeleton next turned to the existence of fiduciary duties and if they were owed, whether they were breached. The Respondents relied upon the following passage from the judgment of Lord Millett in *Twinsectra Ltd v Yardley* [2002] 2 AC 164, paragraph 76:

> *"…The duty is fiduciary in character because a person who makes money available on terms that it is to be used for a particular purpose only and not for any other purpose thereby places his trust and confidence in the recipient to ensure that it is properly applied. This is a classic situation in which a fiduciary relationship arises, and since it arises in respect of a specific fund it gives rise to a trust."*

186. And the Respondents referred to the way in which the Chief Justice had correctly set out the overarching principle at paragraph 543 of the Judgment, citing *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594, in the following terms:

> *"The concept encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal."*

187. And finally, the Respondents contend that CS Life's argument that all the fiduciary duties were parasitic on the claims for breach of contract such that if it succeeded in overturning the Chief Justice's conclusion on breach of contract, it could not be held in breach of fiduciary duty, was wrong. The causes of action were distinct, and CS Life was a fiduciary irrespective of the terms of the Policies.

The Respondents' submissions - time bar of the Misrepresentation Claim

188. The skeleton then turned to the alleged erroneous findings of law in relation to misrepresentation, starting with the exception to double actionability, and the Chief Justice's finding that the substance of the tort had not taken place in Bermuda. The Respondents contended that the Chief Justice had correctly identified the relevant test, set out in *Imanagement v Cukurova Holdings* [2008] ECarSC 119, and it could not be said that he had erred in reaching the conclusion that he did. The nature of the connections with Bermuda and the other jurisdictions combined with the Chief Justice's findings as to the relevant connections meant that the decision the Chief Justice reached was the conclusion of an evaluative exercise and involved no error of law.

189. Next was the suggestion that the Chief Justice had erred in law in relation to the basis of the exception. He had referred to the relevant authorities, and his language correctly reflected the purpose of the exception as being to provide some flexibility in applying the double actionability principle. He relied upon his findings that there were strong connecting factors with Bermuda as the *lex fori*.

190. The issue that arose in the court below was whether, in the event that the substance of the tort did not take place in Bermuda, and the exception to the double actionability rule did not apply, the Georgian limitation period applied, or whether, as the Respondents contended, the only applicable limitation period was that found in Bermuda domestic law. The Respondents contended that the Georgian court would consider the Misrepresentation Claim to be governed by the law of Bermuda and so would apply the Bermuda limitation period. Further, if the application of Bermuda law was blocked by the Bermuda Limitation Act, then the public policy exception contained in section 34B of that act was engaged, as the Chief Justice accepted.

191. The skeleton next turned to double actionability and renvoi. The Respondents contended that CS Life had failed to engage with the context-sensitive approach required. Although CS Life referred to "common law authority" as to whether the doctrine of renvoi applied to tortious claims, there are in fact no English cases which address the subject. The modern form of the rule on double actionability is derived from the case of *Boys v Chaplin*, and the Chief Justice considered the rationale of the rule at paragraph 599 of the Judgment. The Respondents maintained that the Chief Justice was correct to find that the object of the double actionability rule is supported by the recognition of Georgia's choice of law rules and therefore apply the doctrine, and to allow the Bermuda court to decide as the Georgian courts would.

192. Next the skeleton addressed double renvoi, which CS Life had argued arose. The Respondents contended that the mistake that CS Life make is that the Chief Justice made no findings as to whether the Georgian choice of law rules relating to tort adopt the doctrine of renvoi. Nor did the Judgment address whether the Georgian choice of law rule adopted the doctrine of double renvoi. And the authority of *Dicey* (16th edition) suggested that in circumstances where both Bermuda and Georgia adopted double renvoi, the most rational conclusion was that the English (for which read Bermudian) court should apply its own law.

193. The skeleton turned next to public policy. The Respondents contended that CS Life's argument was based on the incorrect submission that section 34A (5) of the Bermuda Limitation Act was intended to exclude renvoi, which section, they said, was entirely consistent with the court's application of renvoi in the context of double actionability. If they were wrong on that, they submitted that the Chief Justice was correct to find that the application of the Georgian time bar was contrary to public policy on the facts of the case.

194. Next was the suspension of the limitation period. The Chief Justice's conclusion as to this was a finding of fact - again, see *Dicey*. And the Chief Justice had preferred the evidence of Professor Knieper on this point.

The Respondents' submissions - amendment to plead deceit

195. The issue here was whether the Misrepresentation Claim arose from the same or substantially the same facts as the original pleading. CS Life could not argue that the Chief Justice had applied the wrong test, since he had cited both English and Bermudian authority, citing the principles enunciated in *Akers v Samba Financial Group* [2019] 4 WLR 54. There was no error of law involved, and the Chief Justice did not make any error of fact in applying the correct legal test.

The lack of pleading in relation to materiality, inducement, understanding and reliance did not mean that the claim did not arise out of the same or substantially the same facts.

The Respondents' submissions - the constituent elements of a claim for implied misrepresentation

196. CS Life's case was that the Chief Justice had erred in concluding that Mr Ivanishvili did not need to have any conscious understanding of the alleged representation. The Respondents' submission was that the Chief Justice's conclusion on the issue (at paragraph 686 of the Judgment) to the effect that in appropriate circumstances, an implied representation, intended by the representor to be relied upon by the representee, which is accompanied by evidence that the representee would not have entered into the agreement if he had known the true position, can be sufficient to found liability, was correct as a matter of law. The Chief Justice recognised that there is no single evidentiary test for establishing understanding and awareness, and the test involves a fact sensitive enquiry in which the nature and scope of the misrepresentation is highly relevant. CS Life had mis-characterised Cockerill J's judgment in the *Leeds City Council* case, and a single test for what amounts to the necessary awareness may not be possible – see *Crossley v Volkswagen*.

197. The Respondents relied upon the case of *Raiffeisen Zentralbank v RBS plc* as one of a number of cases in support of its contention that awareness and understanding of the false representation is an essential element of the causes of action in misrepresentation and deceit. The Chief Justice had, they said, considered the case with care, and relied upon the fact that the 'understanding' requirement had been explained by Waksman J in *Crossley v Volkswagen*. The case was not authority for the proposition advanced by CS Life. And the other cases took the matter no further.

198. Finally, in this section, the Respondents referred to both the Bank and Mr Lescaudron, as CS Life's agent, having actual as well as apparent authority, referring to the Chief Justice's findings of fact.

The Respondents' submissions - quantum

199. Unsurprisingly, the Respondents submitted that CS Life's argument (that this Court should consider quantum issues from scratch) should be rejected. The Chief Justice had heard live evidence from four expert witnesses over five days, and he was entitled to reach the findings of fact that he did. Particularly, it was inappropriate for this Court to substitute its view for that of the Chief Justice, whose unchallenged findings with respect to Mr Campana's credibility would make it even more inappropriate to do so.

200. The cases cited by CS Life did not support the proposition that this Court should consider quantum afresh; the common thread running through the cases cited by CS Life is that only in very unusual circumstances will the appellate court interfere with a trial judge's findings of fact. CS Life sought to establish the high bar that must be met for such to be permitted by making, it was submitted, extraordinary and unjustified complaints about the Chief Justice, saying that he had abdicated the judicial responsibility to consider and judge the competing views. The Respondents submitted that grounds 7 and 8 could simply be put to one side but addressed the complaints for the sake of completeness.

201. Starting then with the start date to be used, the choice lay between the month end dates after assets were first deposited into the Policy Accounts on the one hand, and the commencement dates of the relevant policies on the other. CS Life's position that the start date of the Policies should be applied was all the more remarkable, it was said, given the fact that in the case of Meadowsweet, trading, including the purchase of Raptor shares, had taken place between the two dates, and in the case of Sandcay, a cash deposit of $272 million had remained uninvested for almost 8 weeks.

202. CS Life had complained that the Chief Justice had devoted relatively little of the Judgment to the issue, but the Respondents in reply contended that relatively little time had been spent by counsel on the subject and the "full legal argument" which CS Life referred to had been reduced to two paragraphs in its written closing submissions, which included the assertion that the accounts had been set up only to hold the assets pending their payment to CS Life as premium, clearly inconsistent with the purchase of Raptor shares referred to in the preceding paragraph. Once CS Life had assumed legal ownership and control, responsibility for them necessarily passed to CS Life, and it would be extraordinary, it was submitted, for it to have owed no obligations as to their investment and safekeeping. And in relation to the Misrepresentation Claim, in light of the Chief Justice's findings as to Mr Ivanishvili's intention to transfer management of the money to a reputable European bank, the relevant date was clearly when the assets were transferred to CS Life. The same was true for the breach of contract and fiduciary duty claims. There was no error of principle in the Chief Justice's finding as to the start date.

203. Next comes the end date, and the Respondents started by arguing that CS Life's case that the chain of causation had been broken by the Respondents' exercise of a free choice to leave the assets with CS Life was unpleaded, not addressed in witness statements, nor in written or oral openings. It was therefore not open to CS Life to advance the point on appeal. What had been put to Mr Ivanishvili was that the $60 million had remained in the Policy Accounts because Mr Ivanishvili had chosen to leave it there, and it was wrong to say that CS Life had not allowed him to surrender. The Chief Justice had considered the argument and rejected it.

204. The Respondents then referred to the period of time it had taken for the process of transferring the Policy Assets to be effected. They said that if the point had been pleaded, this would have been explained in evidence. Further the transfer process was complicated by the Lescaudron frauds. And it was said for the Respondents that the Bank had simply stopped managing the Policy Assets, but had not come clean as to that. And in relation to the effect of removal of the Policy Assets, the Chief Justice had found (paragraph 440) that CS Life's case at trial remained that if the totality of the Policy Assets were moved out of the Policy Accounts, this would defeat the Plaintiffs' claim. I would, however, note the use of the word "totality" in the Respondents' submissions.

205. The next matter in the submissions was the Chief Justice's rejection of Mr Campana's counterfactual model in favour of that of Mr Morrey. The Respondents' starting point was that it is not open to CS Life to go behind the Chief Justice's decision, and CS Life's complaints that the Chief Justice had failed to conduct a fair judicial process are unfounded. The Respondents relied upon *English v Emery Reimbold & Strick*, paragraph 26, where Lord Phillips said this, regarding the proper approach of an appellate court when considering the adequacy of the reasons given by the trial judge:

> *"Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed."*

206. If, which was denied, the Chief Justice should have given further reasons, the proper course would be to remit the matter back to him. But the Respondents maintained that Mr Morrey's model properly reflected the counterfactual provided to the experts, which could not be said of Mr Campana's "critique". The fact that Mr Morrey's counterfactual was weighted towards the US market was because that market is by far the largest equity market in the world. CS Life tried to attack the evidential basis for the Chief Justice's findings, but there was no basis upon which to do so.

207. The skeleton finally turned to the Chief Justice's alleged erroneous findings as to the unsuitability of investments and leveraging, the latter of which only fell to be considered if the Court considers that the Chief Justice had erred in adopting model 1. In that event, CS Life argued, the Court should go on to overturn all the Chief Justice's findings affecting models 3 and 4, with one minor exception. This was said by CS Life to be on the (incorrect) basis that there had been no judicial evaluation of the different positions of the experts on how to work models 3 and 4. But the Chief Justice had heard live evidence and submissions and made a series of findings as to how the models should work, and his criticisms of Mr Campana were justifiable. And the Respondents complained that CS Life did not raise the alleged lack of reasons and/or failure to deal with any issue when the draft judgment was circulated or on hand-down. But in any event, the Judgment was sufficiently reasoned, and the Chief Justice was not required to address each and every point raised by Mr Campana in his report.

208. Next was the issue of over-concentration, where CS Life made complaint that the Chief Justice had reached his conclusion that a 10% concentration limit would be inappropriate. The Chief Justice's conclusion that such a concentration would be inappropriate was hardly surprising, said the Respondents, and it was ridiculous to have 10% of a properly balanced portfolio invested in a single stock. And finally there was the fact that the Chief Justice preferred Mr Morrey's view on leveraging, which the Respondents say he was entitled to do, having given a properly reasoned conclusion which was obviously within the bounds of reasonableness.

Oral submissions

209. Given the detail provided in relation to the parties' written submissions, I would not propose to duplicate those. Neither would I propose to spend any more time on Lord Falconer's suggestion that this appeal should in some way be put on hold while CS Life pursues a claim against the Bank on behalf of the Policyholders, something which it could have done many years ago, but did not. We have had a trial on the issues as pleaded (or not, as the case may be), and a judgment in which the Chief Justice set out his findings in considerable detail, and from which this appeal is taken. The task of the Court is to consider whether the complaints made in the notice of appeal as to the Chief Justice's findings and the manner in which he reached them have been made out.

Findings - the first ground of appeal - the Unpleaded Contentions

210. The Chief Justice's findings regarding Mr Ivanishvili's agreement with Mr Lescaudron that the Policy Assets would be managed by the Bank on a discretionary basis are to be found primarily between paragraphs 212 and 237 of the Judgment, with further findings between paragraphs 241 and 245. Lord Falconer dealt with them relatively briefly in oral argument, but in CS Life's written submissions, it is said that the Plaintiffs should have made an application to amend their pleadings, which CS Life would have opposed, on the basis that it had no opportunity to consider the new case, to determine whether further witnesses would need to be called, and whether an application should be made for further discovery, and finally whether the trial needed to be adjourned.

211. Given the terms of Mr Ivanishvili's witness statements, the comments made by CS Life's counsel, and the contents of Ms Burke's affidavit, all referred to in paragraph 172 above, I do not think for a moment that the complaint of prejudice or injustice caused by the Plaintiffs' failure to amend their pleadings is made out. Neither do I accept that the first opportunity CS Life had to consider this case was ten days or so before trial, as it submitted, or that the Unpleaded Contentions were "previously unheralded". CS Life was well aware of the nature of Mr Ivanishvili's case, and he was cross-examined on it by Mr Moverley Smith QC. An example would be the latter's questioning concerning the discussion which took place between Mr Lescaudron and Mr Ivanishvili, when Mr Lescaudron referred to having been "*extremely free to manage these assets*", that is to say, in practical terms, to there being a discretionary mandate in place. Other parts of the cross-examination of Mr Ivanishvili and Mr Bachiashvili were set out in the Judgment, between paragraphs 216 and 219. If CS Life truly took the view that it was being prejudiced, its counsel could and should have raised the matter with the Chief Justice and insisted upon a ruling, as was made clear in *Hawksworth*, which followed *Rolled Steel Products Holdings Ltd v British Steel Corporation & Others* [1986] 1 Ch 246. As in that case, I am of the view that it is simply too late for CS Life to complain about the course taken at trial. And in circumstances where CS Life itself failed to call relevant witnesses or give proper discovery, this complaint on CS Life's part does not sit well with me. I would dismiss this ground of appeal.

Findings - the second ground of appeal - CS Life's contractual duties

212. The Chief Justice set out the extent of CS Life's contractual duties between paragraphs 446 and 521 of the Judgment. As CS Life submitted in its written submissions, there were broadly two mechanisms by which the Chief Justice found that CS Life was responsible for the losses caused by Mr Lescaudron. The first was to attribute his conduct to CS Life, and the second was to spell out of the terms of the LPI Policy documents, obligations of CS Life which were breached, it was submitted, by the Bank.

213. I turn first to the Chief Justice's findings of fact that CS Life delegated responsibility for the sale of the LPI Policies, agreeing the terms on which assets would be transferred to CS Life, reporting on the LPI Policies and any ongoing details with respect to the LPI Policies to Mr Lescaudron in his capacity as relationship manager, to be found at paragraph 211 of the Judgment. This paragraph followed a series of findings by the Chief Justice – see for instance paragraph 193 in relation to the delegation of "virtually all of CS Life's operational functions" to Bank departments and

individuals. And in paragraph 194 was the finding that CS Life looked to Mr Lescaudron to sell the LPI Policies to Mr Ivanishvili on behalf of CS Life, to agree the Investment Alternative, and to prepare the LPI documentation; and that all dealings with respect to the Policies were carried out by Mr Lescaudron, as "the client face of CS Life", which included reporting on the performance of the Policies.

214. The following paragraphs contain many references to the manner in which the evidence of CS Life's witnesses confirmed this to be the case: Mr Coffey's evidence as to CS Life's business administration being outsourced to Bank employees (paragraph 196); Mr Celia's evidence that CS Life did not have a sales team to approach clients (paragraph 197); more critically, Ms Homann's evidence (paragraph 198) that the relationship manager would discuss and agree with the client the various policy terms, including the Investment Alternative; per Mr Celia, the extent to which CS Life relied on the relationship manager for a variety of functions (paragraph 200). And in paragraph 204 the Chief Justice set out Mr Keusch's evidence as to the critical role of the relationship manager in a number of respects and that he was acting for CS Life.

215. CS Life makes the complaint in its grounds of appeal that the Chief Justice conflated CS Life's ability to use the Group Function with it having a legal duty to do so. But the truth is that CS Life operated as the Chief Justice described; and the relevant functions were delegated by CS Life to the Bank because they were functions of CS Life's business and included functions which were CS Life's responsibility and which it had to have performed in order to comply with its obligations to the Policyholders. I would reject CS Life's argument that in relation to these various matters Mr Lescaudron was acting on behalf of the Bank. True it is that he was employed by the Bank, but the two are not inconsistent, as recognised by CS Life when it referred to the need to analyse whether a particular act was undertaken on behalf of the Bank or CS Life. For the reasons given by the Chief Justice, I am of the view that in relation to the matters described in the Judgment Mr Lescaudron was acting on behalf of CS Life.

216. The second part of ground 2 covers the various findings by the Chief Justice, and how CS Life maintains that he had erred. Just by way of a general comment, it seems to me that Lord Falconer placed altogether too much reliance on the Policy documentation, insofar as it specified a non-discretionary Investment Alternative, when it was perfectly clear that the reality of matters was completely different from such documentation – hardly surprising when the Policy Accounts were being administered by a fraudster who very clearly had ensured that the investment of the Policy Assets were managed in such a way as to ensure that the Bank's MACS team neither found out about nor interfered with his fraudulent activities, as the Chief Justice found. I have so far resisted the temptation to refer to Lord Denning's famous comment that "fraud unravels everything"[5]. But it seems to me wholly unrealistic to refer blindly to the terms of the Policy documentation, when they were set up by Mr Lescaudron as a mechanism for perpetrating his frauds, and on which he followed through by ignoring the terms of such documentation. To apply the letter of the Policy documentation to the implementation of a fraud (and one undertaken on a huge scale) in those circumstances seems to me wholly unrealistic.

[5] Lazarus Estates Ltd v Beasley [1956] 1QB 702

217. Turning to the detail of the grounds of appeal, it is said that the Chief Justice erred in his finding that CS Life had failed to invest the Policy Assets in accordance with the Investment Alternative. But as the Chief Justice pointed out, what Mr Lescaudron was doing fitted neither of the Investment Alternatives; if the Policy Assets were to have been managed on the basis of a discretionary mandate, the MACS team should have had the investment responsibility, and if with a non-discretionary mandate, the policyholder or its lawful attorney should have, with every trade following instructions from the policyholder to the relationship manager. In reality, of course, Mr Lescaudron was falsifying instructions and forging documents. But as the Chief Justice found, the Policies set up a binary choice, neither of which was followed in the case of these investments. This caused CS Life to suggest a "general instructions" mandate, which the Chief Justice rejected. CS Life's submissions say the Investment Alternative was for the non-discretionary mandate, but does not address that this was not how the investments were undertaken. Instead, it submitted that the parties made "special arrangements" which had the effect of giving instructions to the Bank, without any involvement (or responsibility) on the part of CS Life. Its submissions concentrated on emphasising that CS Life had no role to play.

218. Included in the CS Life submissions that the Bank would manage the Policy Assets and Mr Lescaudron would act as relationship manager was the contention that CS Life did not have any discretion in relation to those appointments, and did not have the right to dismiss or replace Mr Lescaudron as relationship manager. The Respondents made the point that CS Life does not challenge the Chief Justice's factual findings identified in paragraph 79 of their written submissions. And they pointed out that CS Life referred to the appointment of the Bank, when what was at issue was the appointment of Mr Lescaudron. The Chief Justice's factual finding in this regard (that CS Life had the power not to appoint Mr Lescaudron to manage and/or hold and/or invest the Policy Assets and to remove him) was made at paragraphs 410 to 412 of the Judgment, and relied in part upon Mr Coffey's evidence as to how he would have acted if the Bank's anti-fraud system had identified the possible fraud risks associated with Mr Lescaudron. He closed this part of his evidence by saying that if there wasn't a good explanation, CS Life would have stopped him.

219. I would agree with the Chief Justice's finding on this issue, at paragraph 237 of the Judgment, namely that Mr Lescaudron, acting on behalf of CS Life agreed with Mr Ivanishvili acting on behalf of Sandcay and Meadowsweet that the Policy Assets would be managed by the Bank on a discretionary basis, which in turn would have involved the Bank's MACS team. That imposed on CS Life an obligation to ensure that the Assets were so managed, and not simply an obligation to instruct the Bank as to the Policyholders' choice of Investment Alternative. It follows that CS Life's argument on this issue falls to be rejected.

220. The next item of detail within this ground is in relation to CS Life's duty to monitor the investment of the Policy Assets. The grounds of appeal contend that there was no duty on its part to do so, that it did not have the relevant expertise, that there were no express terms requiring it to do so, and no basis on which to imply such a term.

221. As the Chief Justice found between paragraphs 307 and 312 of the Judgment, on the basis of the evidence of Mr Celia and Mr Coffey, the Bank, acting on behalf of CS Life, did monitor the Policy Accounts for fraud and wrongdoing. Mr Celia had accepted in terms that the Bank's Group

Functions were used by CS Life to discharge its responsibilities, which included fraud prevention. He also found that CS Life knew about some of Mr Lescaudron's wrongdoing and could and should have known more (paragraph 404); turned a blind eye to it (paragraph 405); and took no, or no adequate action to prevent fraudulent mismanagement (paragraph 407). The Chief Justice was entitled so to find. The Respondents set out in detail in their submissions why it is that CS Life's case on monitoring should be rejected. I agree with those submissions.

222. I turn next to CS Life's contention that the Chief Justice erred in finding that CS Life had failed to ensure that the Direct Reports provided to the Respondents were true and accurate. The Chief Justice found that the Direct Reports were provided by Mr Lescaudron to the Plaintiffs, and that it was common ground that they were false. For CS Life, it was argued that the finding was "very briefly reasoned". Nothing more was needed. The obligation to communicate the value of the internal fund was imposed by clause 16 of the GPCs "once a year, or on request". Such a request had been made, and in providing the Direct Reports, Mr Lescaudron was clearly acting on behalf of CS Life, as the Chief Justice found at paragraph 283. I would reject this contention.

223. Finally, the Chief Justice dealt with causation, accepting that the failure on the part of CS Life to invest the Policy Assets in accordance with the Investment Alternative selected by the Policyholders had caused loss. But for that breach, the Policy Assets would not have been fraudulently mismanaged by Mr Lescaudron, and would have been professionally managed by a reputable European bank on a medium risk basis, which is what should have happened had the MACS team been managing the Policy Assets. I agree, and it follows from all that is said above that I would dismiss the second ground of appeal.

Findings - the third ground of appeal - the existence and scope of fiduciary duties

224. The Chief Justice's findings on fiduciary duties are to be found between paragraphs 537 and 564 of the Judgment. He set out the arguments of the parties, and then turned to the law. Having reviewed the relevant authorities, the Chief Justice rejected the argument made for CS Life, that the Plaintiffs' reliance on the case of *Horizon Bank International* was misplaced. He found that there were a number of similarities on the facts between that case and those in the one before him, and concluded that the relationship of CS Life and the Plaintiffs (and in particular Mr Ivanishvili) was sufficient for him to find that CS Life owed to the Plaintiffs duties of a fiduciary nature.

225. I would agree, and would rely particularly on the words of Lord Millett in the *Twinsectra* case, set out at paragraph 185 above. The CS Life / Policyholders relationship was not simply a commercial arrangement between counterparties with competing commercial interests. The Policy Assets were not assets which CS Life was free to use as they chose, as would have been the case with a premium under an ordinary insurance contract. They were to be dealt with by being invested in accordance with the discretionary mandate agreed. CS Life was bound to ensure that they were so invested; and the Policyholders placed trust and confidence in CS Life to ensure that the assets were properly applied. I would also agree with the Chief Justice's description of the similarities between this case and that of *Horizon Bank International* at paragraph 551 of the Judgment. The Chief Justice then turned to the scope of the duties owed, and then to the breaches of those duties by CS Life, in the form of Mr Lescaudron's activities, set out between paragraphs 557 and 562 of the Judgment. These ought not to be controversial and I will not duplicate them. I agree with those findings and

would adopt them. And in relation to causation, the Chief Justice held that his causation analysis in relation to the breach of contract claims applied *mutatis mutandis* to those for breach of fiduciary duty. Accordingly, I would dismiss the third ground of appeal.

Findings - the fourth ground of appeal – time bar of the Misrepresentation Claim

226. The Plaintiffs' primary case was that the Misrepresentation Claim was actionable in Bermuda as a Bermuda law claim. The Chief Justice took the view (paragraph 588 of the Judgment) that the substance of the tort did not take place in Bermuda, the principal reason for coming to that conclusion being that it was not obvious that any of the constituent elements of the tort of misrepresentation took place in Bermuda, given that the Policies had been signed in Switzerland. But he accepted that Bermuda had "the most significant relationship" with the events and parties and exercised the jurisdiction restated by Lord Slynn in *Red Sea Insurance* and the Court of Appeal in *Imanagement*, holding that the claim was governed by the law of Bermuda alone. The Plaintiffs filed an Order 2 rule 13 notice in relation to the finding that the tort did not take place in Bermuda, so no doubt the first issue to be addressed is where in substance the tort was committed.

227. It seems to me that this question falls to be answered by considering the nature of the claim. The implied representations were said to have been made by Mr Lescaudron on CS Life's behalf to Mr Ivanishvili, and/or Meadowsweet and Sandcay between March 2011 and June 2012; and the particular representations were that the Bank and/or Mr Lescaudron had not been fraudulently managing the Plaintiffs' accounts in the past and did not intend to manage the Policy Accounts fraudulently in the future. The starting point comes from Mr Ivanishvili's first witness statement, when he referred to his meetings with Credit Suisse personnel from 2008 onwards, which, he said, would always take place in Georgia. He gave the dates of the meetings which had taken place in Georgia between 31 March 2011, and various dates in May, June, November and December 2012. The 31 March 2011 meeting was the usual annual meeting, and there was then a meeting in late June 2012 at which Credit Suisse personnel made a presentation. The likelihood is that the March 2011 meeting related to Meadowsweet and the June 2012 meeting to Sandcay. And the Chief Justice found as a fact that the representations were received and acted upon by Mr Ivanishvili in Georgia. The documents were signed either in Georgia or in Switzerland, and of course the Policies themselves were governed by Bermuda law. But for my part, I do not see the fact that the Policies are governed by Bermuda law as being of overriding significance, when compared with the place where the representations were made and are said to have been acted on by the representee. The Plaintiffs contend that the key act taken in reliance on the representation was the transfer of the funds to CS Life which took place in Bermuda. That was, however, simply an implementation of the decision made by Mr Ivanishvili, the key decision-maker, whose alleged reliance, and signature of documents (the letters of wishes and the applications for the LPI Policies), was in Georgia, at meetings whose location in Georgia was in no way fortuitous. And in any event, the actual transfer of funds, by way of allocating existing funds to the new Policy Accounts, took place in Switzerland. There is no evidence that any instruction to transfer funds came from Bermuda. I would hold that in substance the tort took place in Georgia. As the Chief Justice rightly found, it clearly did not take place in Bermuda. He also clearly (and rightly) regarded Georgia as the applicable *lex loci delicti commissi*.

228. The next question is whether the exception to the double actionability rule can be applied. The basis upon which the Chief Justice did so was his finding that all or almost all of the significant connecting factors pointed in the direction of Bermuda. But as CS Life submitted, Mr Ivanishvili, the representee, was at all times resident and domiciled in Georgia; Georgia was where he took all relevant decisions and signed documents and where the Policies were promoted, discussed and negotiated. (Where a representation is made in one country in relation to a contract governed by the laws of another country, it is the place of the representations that is the most significant element of the events constituting the tort - see *Diamond v Bank of London & Montreal* [1979] QB 333).The Policyholders were corporations domiciled in the British Virgin Islands and the Bahamas, with nominee corporate directors, representatives and Credit Suisse personnel located in the Bahamas, Singapore and Switzerland; the Mandalay and Green Vals trusts were governed by the laws of Singapore and Prince Edward Island; the Trustees were located in Singapore and Canada. The applications were signed on behalf of the Policyholders in Switzerland and the Policies issued by CS Life personnel in Switzerland. Finally, the frauds themselves did of course take place in Switzerland, where the investments in the Internal Fund were held in accounts with the Bank. The only connections to Bermuda were CS Life's domicile and the contractual governing law. I regard the various connections referred to by CS Life as being sufficiently strong to rebut the contention, accepted by the Chief Justice, that "all or almost all of the significant connecting factors point to Bermuda". I am of the view that the Bermuda connections identified by the Chief Justice are insufficient to lead to the conclusion that the exception to the double actionability rule should be applied to the Misrepresentation Claim. In so finding I am conscious of the need to exercise care when departing from the judge's view. But this is not a case where the relevant facts are in dispute, and no question of having heard oral evidence arises.

229. I would, also, agree with CS Life's submission that once it is determined that there are no proper grounds for concluding that the exception applies to the Misrepresentation Claim as a whole, it is hard to see a case in which the exception should apply specifically to the issue of limitation, relying on the case of *Sophocleous v Foreign Secretary* [2019] QB 949, where Longmore LJ said:

> *"Nevertheless, some caution must be exercised. It is one thing to say that an otherwise valid claim should not be entirely defeated by a technical rule of the forum, if the forum has no close connection with the subject matter of that claim; it is quite another to say that the law of the place of the tort should be completely disregarded. No case has gone as far as that."*

In my view there was no sound basis to conclude, as the Chief Justice did, that the connecting factors with Bermuda were so sizeable that, as to limitation alone, only the law of Bermuda should apply.

230. The question which then arises is whether the Georgian three-year limitation period is in fact applicable. As to that, the experts were in agreement that, if the case were heard in Georgia, Georgia would apply Bermudian law (as the law of the contract) both to the issue of misrepresentation and limitation (see the Judgment at paragraphs 591 to 594). CS Life, however, relied on the provisions of section 34 A of the Bermuda Limitation Act which provides:

> *"34A Application of foreign limitation law*

> *(1) Subject to the following provisions of this Part, where in any action or proceedings in a court in Bermuda the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter— the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings; and except where that matter falls within subsection (2), the law of Bermuda relating to limitation shall not so apply.*
>
> *(2) A matter falls within this subsection if it is a matter in the determination of which both the law of Bermuda and the law of some other country fall to be taken into account. ...*
>
> *(5) In this section "law", in relation to any country, shall not include rules of private international law applicable by the courts of that country or, in the case of Bermuda, this Part."*

231. The interpretation of those provisions is not without difficulty, not least because the question arises as to whether the double actionability rule, which a Bermuda court must apply, requires the law of Georgia, excluding its rules of private international law, to be taken into account. If it does the answer seems plain. On that footing the domestic law of Georgia falls to be taken into account. The domestic law of Georgia imposes a three-year limitation period, which is applicable unless that would be against public policy (see below).

232. It is, however, debatable whether the double actionability rule requires one to look only at the domestic law of the *lex loci delicti commissi.* It is, therefore, necessary to consider the object of the rule. As to that, Lord Wilberforce said in *Boys v Chaplin*:

> *"[t]here have, in the past, been powerful advocates for the lex delicti: if a simple universal test is needed, it is perhaps the most logical, the one with most doctrinal appeal. A tort takes place in France: if action is not brought before the courts in France, let other courts decide as the French courts would. This has obvious attraction."*

concluding, at p 389C, that English law should "*allow a greater and more intelligible force to the lex delicti"* than the Willes J formulation, by adopting (at p 389D—E) a "*broad principle*" that:

> *"A person should not be permitted to claim in England in respect of a matter for which civil liability does not exist, or is excluded, under the law of the place where the wrong was committed. This non-existence or exclusion may be for a variety of reasons and it would be unwise to attempt a generalisation relevant to the variety of possible wrongs."*

233. The Plaintiffs also draw attention to the fact that in an article titled "*In praise and defence of renvoi*" (1998) 47 ICLQ 876, Professor Briggs opined that the seminal judgment in *Boys v Chaplin*

supports the application of the doctrine of renvoi. At p 879 it is said of the 'double actionability' rule:

> "*[t]he rule was new, so it was fair to ask this:*
>
> > *"what was meant by lex loci delicti commissi? Was it the law which a Maltese court would itself have applied, as distinct from local, say Maltese, domestic law? If the speech of Lord Wilberforce meant what it said the answer had to be that it was a reference to the totality of the law which a Maltese court would apply."*

If that analysis were right section 34A would not apply because the Bermuda court would not be required to take into account only the domestic law of Georgia.

234. The Plaintiffs also observe that it was the rationale of the doctrine that led the Chief Justice to say at paragraph 599:

> *"In considering these submissions (regarding renvoi and public policy) it is relevant to remember the rationale behind the double actionability rule. The rule is designed to control and limit civil liability for wrongs committed outside the jurisdiction The control mechanism adopted is that a Bermuda court would only allow the proceedings to continue if the wrong was actionable and could be pursued in the place where it was committed."*

And at paragraph 600 that

> *"in substance the policy considerations which give rise to the existence of the double actionability rule are fully satisfied' in circumstances where "civil liability for [the] misrepresentation claim does exist and can be pursued in the Georgian courts" on account of the application of renvoi."*

235. Against that the decision of the Court of Session in *Mc'Elroy v Mc'Allister* 1949 SC 110 held that the reference to the *lex loci delicti commissi* under the principle of double actionability did not include the relevant country's rules of international law. That this is so has been accepted in several textbooks: such as *Briggs Private International Law in English Courts* 3.77:

> "*As a matter of common law conflict of laws, renvoi almost certainly played no part in the private international rules for contract or tort. The reasons are mostly convincing… Renvoi was generally assumed to play no part in the private international law rules for tort where the common law rules of private international law identified the lex delicti commissi, the law of the place of the tort, with the domestic law of the tort".*

See, also *Dicey, Morris & Collins* at 7-058

> "*The applicable provisions of the foreign lex causa are defined to include both procedural and substantive rules with respect to a limitation period, but any renvoi is excluded".*

236. In my judgment we should hold that the private international law of Bermuda does require the law of Georgia to be taken into account, but only its domestic law. That is in accordance with the tenor of such authority as there is, and with a number of authorities criticising the doctrine of renvoi and rejecting its application in substantial commercial matters. Further, an interpretation to the effect that the double actionability rule requires consideration of the private international law of Georgia would appear to emasculate the Bermuda Limitation Act and prevent it from achieving its manifest intention of excluding renvoi.

237. Accordingly, the three-year Georgian limitation period *prima facie* applies. However, the Plaintiffs submitted, and the Chief Justice accepted, that it was contrary to public policy for the claim to be barred in Bermuda by a combination of Bermuda and Georgia law when (a) if Bermuda was the *lex loci delicti* as well as the *lex fori*, there would be no limitation bar; and (b) if the case was being pursued in Georgia, there would be no limitation bar either.

238. The Chief Justice placed some reliance on the rationale behind the double actionability rule expressed by Lord Wilberforce in *Boys v Chaplin* [1971] AC 356 at 386D, part of which I have cited above:

> *"The broad principle should surely be that a person should not be permitted to claim in England in respect of a matter for which civil liability does not exist, or is excluded, under the law of the place where the wrong was committed. This non-existence of exclusion may be for a variety of reasons and it would be unwise to attempt a generalisation relevant to the variety of possible wrongs… I would, therefore, restate the basic rule of English law with regard to foreign torts as requiring actionability as a tort according to English law, subject to the condition that civil liability in respect of the relevant claim exists as between the actual parties under the law of the foreign country where the act was done."*

239. The relevant provisions are those contained in section 34B which reads as follows:

> *"Exceptions to 34A*
>
> *34 B (1) In any case in which the application of section 34A would to any extent conflict (whether under subsection (2) or otherwise) with public policy, that section shall not apply to the extent that its application would so conflict.*
>
> *(2) The application of section 34A in relation to any action or proceedings shall conflict with public policy to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings.*

240. It is apparent from this section that there are circumstances in which the application of section 34A would conflict with public policy otherwise than where the application of the shorter foreign

limitation period would cause undue hardship. It does not seem to me however that it would be contrary to public policy for the Court to apply the domestic law of Georgia in relation to Bermuda. That is the aim of, and the policy behind, section 34 A (5). If the analysis of the Chief Justice be right, it would appear to have the effect that the exclusion of renvoi is always contrary to public policy if the limitation period of the foreign country is shorter than that of Bermuda.

241. If, however, I am wrong on that, and it would be contrary to public policy to apply the limitation period under domestic Georgia law, that begs the question as to whether the Georgian court would in fact apply Bermuda limitation law. As to that, the *Law of Georgia on Private International Law* provides as follows:

> "*Article 3 - Determining the essence of the rules of foreign law*
>
> *1 Making reference to the law of another country (including a third country) shall also mean the application of the Private International Law of the country, unless the reference contradicts the idea of making reference or it implies the application of rules that are related only to a particular law.*
>
> *2 Where the reference back to the law of Georgia is made, the rules of the law of Georgia governing the case in question shall apply."*

242. The effect of that provision, as it seems to me, is that in the present case Georgia would first refer to the law of Bermuda. That is to include Bermuda private international law. That law refers back to Georgia. Accordingly, the rules of the law of Georgia will apply; and the juridical ping pong (or, more eruditely what *Dicey* describes as a "*perpetual circulus inextricabilis*") from Georgia to Bermuda to Georgia stops there. There is double renvoi; but no more.

243. The Chief Justice makes no reference to this law in the Judgment. But it was before him; and paragraph 9.3 of the Joint Experts' report reads as follows

> *"If a claim is brought for a breach of a pre-contractual duty in relation to a contract governed by law other than Georgian law, the court would apply such law in terms of limitation periods as well.*
> *……*
>
> *According to the Georgian renvoi rules, if a foreign law refers the claim back to Georgia, Georgian law will apply to the matter, including three – year limitation period applicable to contractual claims.*

Further, as CS Life noted at paragraph 360-4 of its written closing submissions, this evidence was agreed; and the Plaintiffs did not challenge Mr Bibilashvili's evidence to the same effect (see paragraphs 91 – 93 of his first report) with which Professor Knieper also agreed (paragraph 54 of his reply report).

244. Accordingly, I would hold that, if the claim was brought in Georgia, the Georgian three-year limitation period would apply. This is not, therefore, a case where, if the case was brought in

Georgia, it would be governed by the law of Bermuda as to limitation. As a result, the basis upon which the Chief Justice held that to apply a three-year limitation period would be contrary to public policy, does not apply.

245. It is, thus, necessary to consider whether, the three-year limitation period had in fact been suspended under the provisions of Article 138 of the Georgian Civil Code, which provides:

> *"...The running of the period of limitation shall be interrupted if the entitled person files a lawsuit for satisfaction of the claim or for its ascertainment, or tries to satisfy the claim by some other means such as by filing a declaration of the existence of the claim with a state body or with a court…"*

246. As to that, CS Life contends that the position as to Georgian law at trial was as follows. In their joint report at para 8.3. the Georgian law experts were agreed that the *"dominant position*" was that Article 138 would suspend the running of a limitation period where "*the same claim*" had been brought in a prior action with "*the same*" in the sense of "*identical*" (1) subject matter, (2) parties, and (3) factual circumstances: the so-called triple identity test. Prior to that, in his initial evidence, Professor Knieper had suggested that the test of Article 138 was more flexible and that the article applied if the facts of an earlier claim were *"substantially the same*".

247. There are, apparently only two relevant decisions of the Georgian Supreme Court which say as follows:

(i) SCOG Decision No A5-838-796 -2013 dated 25 May 2015

> *"The Court of Cassation determines that the notion of interruption of running of the limitation period by filing a lawsuit applies to the same claim. And the claim is the same where the following are the same: a) The claim (subject matter of the action/dispute); b) the basis of the claim/action (the factual circumstances on which the plaintiff bases his claim) and c) The parties. In addition, all three of these elements must be present at the same time; otherwise we will not have the same claim.*

(ii) SCOG Decision No AS-591-2109 dated 15 May 2020

> "*in order to stop the running of the limitation period, it is not the legal grounds of the suit that have to be identical but it is important that the subject of the dispute and the factual circumstances be identical*".

248. As I have said, in the joint statement Professor Kneiper accepted that the "*dominant position*" in Georgian law was as explained by Mr Bibilashvili namely the triple identity test. In the course of his evidence Professor Knieper accepted that his more flexible view of Article 138 was "*not the Georgian law yet*", but a way he hoped that the law might be developed in the future. Having said that, a little later he said (i) that it was Georgian law because it was the way in which he interpreted Article 138 (so that it was "*Georgian law in [his] mind*") - for the reasons contained in his Joint Statement which are set out at paragraph 608 of the Judgment, and (ii) that the decisions of the Supreme Court, as opposed to the Grand Chamber, were not precedental.

249. The Chief Justice accepted the submission of Ms Hutton QC that Mr Bibilashvili's views on the issue could not be correct, because it would then be difficult to conceive of any case where there could be an interruption of the limitation period because any new claim that needed to be made would not be identical in all three respects. I see the force of that submission if *"the subject of the claim"* is to be taken to mean the legal grounds of the suit as opposed to what it is that the Plaintiffs seek eg damages. (Professor Knieper acknowledged that the wording of the decisions of the Supreme Court is not always easy to interpret). But it seems to me that the current law of Georgia is, as the second case shows, that although the legal grounds of the suit do not have to be identical the subject of the dispute (ie what the claimant seeks) and the factual circumstances do have to be identical. Whilst the Supreme Court decisions are not precedental they are the only relevant decisions on the law of Georgia. I do not regard it as legitimate to ignore them because a later decision might be different. I also note that Mr Bibilashvili accepted that the "*subject of the claim*" meant what the Plaintiffs sought: see paragraph 614 of the Judgment.

250. The Chief Justice held that it was sufficient if the facts were substantially the same. That is, in substance, the same test as that applicable under Order 2 Rule 5 (Professor Knieper thought that the law of Georgia should be the same). As appears from the next section of this judgment I do not regard the Order 2 Rule 5 test as satisfied. If that is so, *a fortiori* the requirement of identical factual circumstances is not satisfied either. I will therefore rely on what is set out below in relation to the amendment issue, and conclude that the Chief Justice erred in finding that the Georgian limitation period had been interrupted such that the Misrepresentation Claim is not time barred according to Georgia law. I would therefore allow CS Life's appeal on this ground.

Findings - the fifth ground of appeal – leave to amend

251. The Chief Justice held (paragraph 633) that the facts underpinning the Misrepresentation Claim were the same or substantially the same as those in respect of which relief had been claimed in the original SoC, so that it was appropriate to give leave to amend in accordance with RSC Order 2 rule 5 (and so defeat a limitation defence in the event that he was wrong in holding that the Bermuda limitation period applied). The exercise of deciding whether the new case arose out of the same or substantially the same facts (which does not mean similar) usually falls to be determined by an examination of the pleadings alone – see *Akers v Samba Financial Group*. The Chief Justice did undertake that exercise, referring first to three paragraphs of the SoC. He then quoted from the witness statements, before turning back to the SoC. He found that CS Life had given no additional discovery and called no additional witnesses by reason of the Misrepresentation Claim being brought.

252. The first criticism that CS Life makes of the Chief Justice's finding on amendment is that the essential elements of the Misrepresentation Claim were not in issue under the main claim. As it correctly observes, there was no mention of any representation, no mention of the factual issues around CS Life being responsible for the alleged representations, no pleading that Mr Lescaudron intended at the time he promoted the LPI Policies to commit frauds on the Policy Accounts, no allegations that the representations were made with knowledge that they were false, and no pleading as to materiality, inducement, understanding and reliance. Finally, it was said that the claim in misrepresentation was a claim for the difference in value between the actual value of the

Policies at the date of trial and the value they would have had if invested in a medium risk investment portfolio, which is how Mr Ivanishvili would have caused the premiums to be invested if he had known of Mr Lescaudron's fraudulent activity. The contractual claim was for the value that the Policies would have had if CS Life had properly discharged its contractual duties, in which case the premiums would have been invested on a discretionary basis by Bank's MACS team. The two are different, although the models used by the experts were put forward as applicable to both claims. I would, also, add that the unamended pleading did not contain the averment that the Bank was acting on behalf of CS Life.

253. Secondly, it was said that the Chief Justice had failed to conduct a detailed analysis focussed on the pleadings, but instead relied upon irrelevant considerations and materials. Thirdly, the Misrepresentation Claim related to a different time period, namely the pre-contractual period. And fourthly, while the main claim referred to fraudulent mismanagement of the LPI accounts by the Bank, nowhere was fraud, dishonesty or even recklessness alleged against CS Life.

254. To my mind what is significant in the comparison exercise is that the SoC made no reference to the meetings at which Mr Lescaudron "sold" the Policies to Mr Ivanishvili on behalf of CS Life. (The contention that he did so, acting on behalf of CS Life was added in the amendment to plead misrepresentation). The pleading went from Mr Ivanishvili's agreement to invest monies through the Mandalay Trust, to the investment in 2010 or 2011 in an insurance policy under that trust at the suggestion or recommendation of the Bank, and then to the application on 8 April 2011. For Sandcay, the position in the SoC was that the Bank had advised Mr Ivanishvili on or before 6 August 2012 that he should establish a new trust. Considerably more detail was provided in the RASoC, narrowing the date down to March 2011 in the case of Meadowsweet and June 2012 in the case of Sandcay. Nor was there any mention of the matters referred to at paragraph 252 above which were essential elements of the Misrepresentation Claim.

255. The Respondents contended that there was no error of fact or law in the Chief Justice's decision. But to my mind there is a significant difference in the factual basis for the original pleading and that for the amendment which included the Misrepresentation Claim, which can readily be seen on a comparison of the two pleadings. Further, the matters which were relied on by the Chief Justice do not, in my judgment, show that the Misrepresentation Claim arose out of substantially the same facts as those already pleaded. He referred to paragraphs 10,19 and 34 as showing that the sale of the Policies was already in issue. (That seems to me to take the matter no further than to show that the fact of the sale was a matter relied on). He also referred to the fact that the SoC pleaded Mr Lescaudron's wrongful and fraudulent conduct in relation to Mr Ivanishvili's accounts in 2009, prior to the sale of the LPI Policies, and that the Plaintiffs were not informed of it. But that was not enough of itself to support the claim made in deceit, which includes, among many other elements, an intention on the part of Mr Lescaudron to act dishonestly in relation to the Policies. I would take the view that the underlying facts are not the same or substantially the same and would hold that the Chief Justice erred in allowing the Plaintiffs to amend, as he did at paragraph 633 of the Judgment. I would therefore allow this ground of appeal.

Findings - the sixth ground of appeal - the elements of implied misrepresentation

256. This ground of appeal relates to whether or not it was necessary for Mr Ivanishvili to have any conscious awareness[6] or understanding of the representation, albeit implied, being made to him at the relevant time. The Chief Justice reviewed all of the constituent elements of misrepresentation, but, for the purposes of this appeal, the critical question is that of awareness or understanding. In regard to this, the Chief Justice reviewed the relevant cases in detail, and concluded at paragraph 696 of the Judgment that he was satisfied that the Misrepresentation Plaintiffs were induced by what he described as "simple but fundamental implied representations made on behalf of CS Life" to agree to set up the LPI Policies.

257. CS Life began its submissions on this subject by referring to the three LIBOR/EURIBOR cases, where the plaintiffs were said to have relied on implied representations that the rate and rate setting process was honest and accurate. In *Property Alliance Group Ltd v Royal Bank of Scotland plc* Asplin J held that it was essential for a claimant to show that it understood[7] and gave thought to the extremely complicated and intricate implied representations pleaded (which representations she did not find established); it was not sufficient to contend that it assumed that the defendant was setting a LIBOR rate in a straightforward and proper manner. In *Marme Inversiones v Natwest & Ors* Picken J, who had also held that there were no implied representations as pleaded, said that a claimant in the position of the claimant in that case had to have given some contemporaneous conscious thought to the fact that some representations were being impliedly made, even if the precise formulation of those representations might not correspond with what the court might subsequently decide that those representations comprised. He observed that, even in relation to the representation that EURIBOR was the "true and honest" rate, the most that could be said was that the representee assumed this to be the position. And in the third case, *Leeds City Council v Barclays Bank*, Cockerill J, after a substantial review of the authorities, summarily dismissed a claim where there was no pleading of awareness or understanding of the relevant representation. Some of the representations pleaded in that case, particularly for the *Leeds* claimants, were very similar to those relied on in the present case.

258. CS Life contended that the Plaintiffs had not pleaded or led evidence to seek to prove that they (whether through Mr Ivanishvili or any other person) had any awareness or gave any consideration to the misrepresentations sued on in this action. That is correct. The RASoC does not plead any awareness or understanding of the representation relied on, either by Mr Ivanishvili or anyone else, or that such an awareness could be inferred, or the circumstances from which it could be; nor did Mr Ivanishvili give evidence of any such awareness or understanding. He did give evidence that he understood that all the investments proposed to him, including the Life Policies, were designed to achieve his objectives - to preserve and protect the wealth that he had built up for his family and to ensure that they were looked after in the future should anything happen to him; that, at the time the Policies were proposed, he understood his relationship with Credit Suisse to be a successful one; and as long as the investments were performing well and were in line with the investment

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[6] The authorities contain slightly different formulations of awareness, namely "*contemporary conscious thought*" or that the representation must be "*actively present in his mind*".

[7] In *Raiffeisen Zentralbank v RBS plc* [2011] I Lloyd's Rep 123 Christopher Clarke J (as he then was) had identified one of the essential elements of a cause of action in misrepresentation that the representee had understood that the representations relied on were being made, a requirement which was said to be of particular significance in the case of implied representations (as Jacobs J also held in *Vald.Nielsen Holding A/S v Baldorino* [2019] EWHC 1926 (Comm)); and that assumption was insufficient.

objectives that he had outlined to Credit Suisse, he was happy. He also gave evidence that had he known at the time the fraudulent transactions had taken place on the existing accounts at Credit Suisse and that the accounts had been mismanaged he would never have agreed to set up the Life Policies.

259. CS Life maintained that the Chief Justice was in error in his finding at paragraph 682 that the "understanding" requirement did not apply where the conduct "spoke for itself". The Chief Justice had regarded the representation that the Bank would not manage the Policy Assets fraudulently as being a fundamental and straightforward representation, in contrast to the LIBOR and EURIBOR cases, where the representations were more complex. He found the case before him to be more in the category of cases such as *Gordon and Teixeira v Selico Ltd*, where a landlord had deliberately covered up the presence of dry rot. CS Life contended, in my view correctly, that the Chief Justice had mis-stated the position, and referred to the manner in which Cockerill J had emphasised that the awareness and understanding requirement was, indeed, an element of the cause of action; it was simply that in some cases (such as the raising of a paddle at an auction) the implied representation will be obvious; the distinction between complex and simple representations was purely one of fact and proof. There is no separate category of cases for which awareness and understanding does not have to be proved.

260. The Respondents contended that the argument that they were required to plead and prove that Mr Ivanishvili had a conscious awareness of the specific implied representation is not supported by the case law. I disagree. They also rely upon the fact that the Chief Justice had made a finding of inducement. To my mind he was doing so on the basis of the law as he viewed it.

261. The line between the implied representation being obvious and automatically spelled out – so that the representee is plainly aware of it – and the situation where it is not so can be very finely drawn. I do not think that this case falls into the *Gordon and Teixeira v Selico* category, where there was an act on the part of the landlord designed to deceive the tenant, and the covering up of the dry rot was a plain indication that there was none; nor does it fall into the *Spice Girls* category where the promotional material implied that there was no reason to believe that the band was about to lose one of its members. Neither is it in the auction paddle category, where the knowledge and awareness operate in a split second. It seems to me to be much more in the category of assumption, where if Mr Ivanishvili had been asked the question whether he assumed that the relevant Portfolio had not been and was not in the future to be fraudulently managed, he would have said "of course". He had no reason to think otherwise, particularly in the light of the fictitious reports of the success of his investments. But that is not to say that he applied his mind to whether CS Life was making any representation to him. And the LIBOR/EURIBOR cases do seem to me to be on point. There was an assumption in those cases that the rate setting process was being honestly undertaken, but no question of the representee applying his or her mind to the topic of representation.

262. The Chief Justice held that, in appropriate circumstances, an implied representation, intended by the representor to be relied upon by the representee, which is accompanied by evidence that the representee would not have entered into the agreement if he had known the true position can be sufficient to found liability for misrepresentation. In my view this formulation elevates what is, in essence, an assumption of the representee (that the Bank had been and would continue to be honest) into an understanding that a representation had been made; elides the difference between

representation and non-disclosure; and entitles the Plaintiffs to a claim in misrepresentation based upon assumption alone, which is insufficient. It also enunciates a special rule for representations implied from conduct, which the authorities do not, in my view, support. It is no doubt true that the more obvious the implication of a representation the more likely it is that the representee would have understood it to be made; but that is not to say that the evidence of the understanding is unnecessary.

263. And so I come to the conclusion in this case that the necessary requirements for the pleading and proof of an implied representation are not made out and have not been satisfied by the Plaintiffs. That view is not affected by the issue of whether the implied representation was being made on behalf of CS Life. That follows from the Chief Justice's finding that Mr Lescaudron was acting on behalf of CS Life at the material time. Accordingly, I would allow this ground of appeal.

Findings - the seventh ground of appeal – quantum

264. CS Life's initial criticism is that this section of the Judgment demonstrates a lack of consideration of the important issues, sufficient to entitle this Court to be satisfied that the trial judge has clearly failed to take proper advantage of having seen and heard the witnesses, and to substitute its own view, and to consider the principles from scratch. In their submissions in reply, the Respondents say that the Chief Justice's quantum decisions were intimately bound up with his wider evaluation of the facts, making it particularly inappropriate for this Court to substitute its view for those of the trial judge. And they refer to his unchallenged findings as to Mr Campana's credibility and reliability. I would agree that it is inappropriate to judge matters on the basis of the length of the Judgment dealing with other matters when compared with its length dealing with quantum issues. The question is whether the judge gave reasons sufficient for this Court to understand them. And when one looks at the three matters set out in this ground, I find no difficulty in understanding the Chief Justice's reasoning in regard to the start and finish date. I will address the rejection of CS Life's expert's evidence shortly.

265. As to the start date, the Plaintiffs had argued at first instance that, but for the deceit, they would have invested the funds which were invested in the LPI Policies in a different way. Mr Davies calculated damages from 30 September 2011 in the case of Meadowsweet, and 30 September 2012 in the case of Sandcay, the month end dates after the first transactions identified. Mr Bezant added 31 October and 30 November 2011 for Meadowsweet and 30 November and 31 December 2012 for Sandcay. The Meadowsweet policy was issued by CS Life on 7 November, with a start date of 25 October 2011 and the Sandcay policy was issued by CS Life on 7 December 2012 with a start date of 27 November 2012. The Chief Justice said that "in all the circumstances" the dates selected by Mr Davies - the month end when assets were first deposited - were appropriate, without giving reasons. But as the Respondents pointed out, CS Life's submissions were relatively short, a mere two paragraphs, and the reasons were readily apparent from the argument and submissions. CS Life maintained that it was simply wrong for the damages to be calculated from a date before the commencement of the relevant Policies (25 October 2011 and 27 November 2012 respectively). The Respondents pointed out that trading (including the purchase of Raptor shares) had taken place on the Meadowsweet Account between the date of the transfer of assets to CS Life, from 13 September 2021 onwards and the commencement of the Policies: a total of 91 sales and purchases of which 46 were purchases of Raptor shares. The assets transferred to Sandcay were all in cash,

previously held outside Credit Suisse, and included a cash transfer of $272 million on 4 October 2012. There was no trading at all prior to the commencement dates, thus leaving the cash deposit uninvested for almost 8 weeks. The Respondents maintain that CS Life was under contractual obligations and fiduciary duties as soon as the assets were transferred to CS Life. Any other conclusion as to the start date when the assets were in the legal ownership and control of CS Life would be surprising.

266. I would agree that either mismanaging the assets or not managing them at all were clear breaches of CS Life's fiduciary duty (i) to act in the best interests of the Policyholders; (ii) to hold the funds advanced for the Policy premiums, (now in the legal ownership of CS Life), strictly in accordance with the purpose for which they had been advanced, namely to be invested by CS Life (via the Bank) in accordance with the agreed Investment Alternative, and (iii) thereby to safeguard the assets. That trading of the assets took place on the Meadowsweet Policy Account before the Policy commencement date reflects this obligation (albeit defectively since the trades were improper). I would therefore agree with the Chief Justice's conclusion as the appropriate start date.

267. As to the appropriate conclusion date for the calculation of damages, CS Life argued that the Respondents' "free choice" from August 2017 at the latest[8] not to move the assets out of the Policy Accounts broke the chain of causation such that any losses crystallised at that point. The Respondents maintained that this argument was unpleaded, was not addressed in CS Life's witness statements, was not advanced in written or oral openings, was only mentioned in CS Life's written closing submissions served on Wednesday 15 December 2021, and thus not an argument CS Life was entitled to advance on appeal.

268. The relevant facts are these. The Plaintiffs were aware (i) of the facts of the fraud by September 2015, when it was uncovered; and (ii) of their contractual entitlement to withdraw at least 95% (in fact almost 100%) of their investments from the Policy Accounts at any time without charge or penalty by no later than August 2017. Nonetheless they kept a substantial proportion of their investments in the Policy Accounts. Their contractual entitlement is set out in clause 11 of the GPCs, which provides, so far as relevant as follows:

> *"…the Policy may at any time be partially or totally surrendered. The Policyholder shall submit a signed and dated letter or a signed surrender form, except when otherwise stipulated, indicating his/her intent to partially or totally surrender the Policy to [CS] Life. The value of the insurance benefits will be reduced accordingly…*
>
> *"Two partial surrenders of the Policy per calendar year may be made free of charge (up to a limit of 20% of the NAV from the 1st of January that year). For partial surrenders exceeding 20% of the NAV, a charge of 0.25% of the surrender amount will be payable to [CS] Life in respect of such partial surrender (with…a maximum surrender fee of EUR 2,000…). For the the (sic) third and any subsequent partial surrenders in any calendar year, a charge of 0.25% of the surrender amount will*

[8] CS Life chose this date as a date by which the Policyholders knew what had happened in relation to the Policy Accounts; and had had enough time to consider their options, make decisions and effect transfers.

> *be payable to [CS] Life in respect of such partial surrender (with…a maximum surrender fee of EUR 2,000…).*
>
> *"A surrender fee of 0.25% is payable to Credit Suisse Life for a total surrender of the Policy with…a maximum of EUR 2,000... [CS] Life will pay the value of the internal fund in the Policy currency minus the surrender fee and any other outstanding fees or duties, on presentation of the original Policy. The payment may be made by a cash transfer or by a transfer of the ownership of the integrated assets. The Policy will expire and all liabilities of Credit Suisse Life will immediately and irrevocably cease from the date of the payment."*

269. As is apparent, the Plaintiffs would only risk losing their ability to sue CS Life in the event of a total surrender. (There is room for dispute as to whether the last sentence covers liabilities that have already arisen). There was in fact a variation of clause 11 in the Special Conditions for Partial Surrenders with Account Transfer in the Policy applications, which was agreed by CS Life in response to the following application:

> *"As an amendment to paragraph 10 (sic) of the [GPC], I/we hereby apply for the ability to at any time request a partial surrender with account transfer without my/our written approval. I/We acknowledge and confirm that account transfers are only possible to accounts in the name of one or both policyholder(s) and not to accounts in the name of any third person…*
>
> *"I/We furthermore acknowledge that the partial surrender amount must be less then 95% of the latest NAV and that the recipient bears the costs for the transfer."*

270. On 31 March 2017 Mr Ivanishvili signed letters of wishes asking the trustees of the Mandalay and Green Vals Trusts to procure a partial surrender of 94.9% of each of the LPI Policy Accounts assets. The letters stated that "*To the extent that the assets of the Trust continue to be held in the custody or control of the Bank, including the remainder of the assets not surrendered under the CSL policy, I request all such assets to be managed in accordance with existing management powers and agreements in place in respect of those assets, subject to any further letter of wishes being given by me"*.

271. In June 2017 Natasha Tauckoor and Chris Mountford on behalf of the Trustees enquired of CS Life how to effect the redemption of 94.9% of Sandcay's entire portfolio. On 15 June 2017 Mr Keusch on behalf of CS Life set out the terms governing the surrenders making it clear that there was no limit on transfers provided that the right signatories made the request in the right form and that the 95% figure only applied if there was no written request from the Policyholder.

272. On 18 August 2017 Sandcay directed CS Life to transfer all the assets in the Sandcay Policy Account except the Focus National Resources Funds to Julius Baer & Co. In October 2017 these assets were duly transferred, leaving about $ 47 million comprising almost exactly equal parts cash and Focus Natural Resources funds. There was no later request to transfer cash.

273. On 16 April 2018 Ms Tauckoor wrote to Mr Keusch again to ask him to confirm that there would be no ceasing of the liability of CS Life if a surrender of an amount greater than 94.9% but less than 100% were to be made. Subject only to clarification that enough had to be left to bear the fees, Mr Keusch confirmed that that was so the next day.

274. Ms Tauckoor wrote again to Mr Keusch on 11 July 2018, asking him to confirm in terms that:

> *"CS life agrees that the partial surrender may be in excess of 94.9% of the assets and up to 99.9% of the assets and that CS life will not rely on paragraph 11 of the [GPC] or any other paragraph or provision of the policy or the [GPC] to contend that such partial surrender of up to 99.9% will in any way exclude, restrict or in any way affect CS Life's liability for the claims currently being brought against it by Sandcay in the Court of Bermuda*".

Mr Keusch replied referring back to the June 2017 e-mail exchange and again confirmed that the 95% limit did not apply to authorised signatories who were permitted to withdraw the funds without any restriction. He went on to say that

> "*even a total surrender of the Sandcay Investment Ltd policy by the policyholder or the authorised signatories will not exclude, restrict or in any way affect the claims currently being brought against Credit Suisse Life."*

The latter statement appears to ignore the last sentence of clause 11 of the GPCs, cited in paragraph 268 above.

275. In letters of 8 November 2018 and 5 November 2019 Hurrion, attorneys for the Plaintiffs, expressed concern that a surrender of more than 94.9% would absolve CS Life from liability and asked for confirmation from Appleby, attorneys for CS Life, that it would not. But there was never any doubt that a surrender of up to that percentage would not affect the parties' legal rights.

276. In his first and fourth pre-trial statements Mr Ivanishvili said that, having lost all confidence that the Policy Assets were being properly managed he had decided in early 2016 to transfer his assets to another bank as soon as possible and in summer 2016 he approached Julius Baer and, after some initial meetings, agreed to engage them to manage the Policy Assets. After lengthy discussion he sent the letters of wishes to which I refer at paragraph 270 above. The progress of transferring assets began in 2017. This was, he said, not always straightforward and CS Life had refused to confirm whether it would claim that full surrender of the Policies somehow had the effect of defeating the claims made in these proceedings. In the fourth statement, of 12 November 2021, he said that CS Life had not allowed surrenders to be made of the amount remaining in the Policy Account.

277. When asked at the trial to explain why he did not transfer the policy assets to another bank in 2015 or 2016, he said that he could not do so because of a lack of recollection. CS Life is, I think, right to say that he seemed to remember nothing at all, nor to engage with the questioning when it was put to him that he had just chosen to leave the assets in the accounts.

278. The Chief Justice awarded the Plaintiffs damages calculated according to a counterfactual model of what the Plaintiffs' investments would have grown to, including for the period after discovery of the fraud in 2015 and up to the date of trial. He found (Finding 29 in the Judgment) that if Mr Ivanishvili had known that the Policy Assets were not being managed professionally and/or that the funds were being misappropriated, he would have moved the Policy Assets to a reputable European Bank to be invested in a medium risk portfolio. He held that that conclusion was consistent with the probabilities that *"an account holder would move their assets out of a financial institution if its assets were being fraudulently mismanaged and that should be uncontroversial"*.

279. He then said the following;

> *"438 It appears that CS Life contends that Mr Ivanishvili would have left the Policy Assets with the Bank even if he had discovered the fraud earlier. The basis for this argument is that Mr Ivanishvili left in the region of USD 60 million in the Policy Accounts after he discovered the fraud. The Court accepts that the reason why Mr Ivanishvili did not transfer the entirety of the assets from the Bank and CS Life was because CS Life took the position that it would not give up reliance on a provision in the GPCs that could be interpreted as allowing it to be exempted from all liability if all policy assets were surrendered. The Court accepts that Mr Ivanishvili was quite reasonably concerned that if he transferred the totality of the Policy Assets out of the Policy Accounts, CS Life would have argued that this automatically disbarred him from pursuing this claim pursuant to Clause 11 of the GPCs, which provide if a total surrender is affected "[t]he Policy will expire and all liabilities of Credit Suisse Life will immediately and irrevocably cease from the date of the payment."*

280. This passage gives rise to two points. First, Mr Ivanishvili left considerably more than $ 60 million in the accounts after he learned of the fraud in 2015. In September 2015, when the fraud was discovered, there was some $ 117 million in the Meadowsweet and $ 141 million in the Sandcay Policy Accounts, making $ 258 million in all. Little was actually taken out of the accounts until October 2017. At the time of the issue of the writ in August 2017 only about $ 8.3 million had been withdrawn. It was only by the time of trial that there was much less. The amount concerned appears to have been nearly $ 60 million in the Sandcay Policy Account. What was left in the Meadowsweet Policy Account at that date is unclear; but the spreadsheet attached to the CS Life's Reply Submissions on Quantum of 13 December 2022 shows that nearly $ 125 million remained in that account on 15 June 2020.

281. Secondly, it is apparent from the GPCs that it was only upon a total surrender of the Policy that any liability of CS Life would cease. Mr Ivanishvili could move any lesser amount from the Policies, and, indeed, he did so.

282. It is important to note that, in the light of my conclusion that the Misrepresentation Claim is not sustainable, the claims with which we are presently concerned are claims in breach of contract and breach of fiduciary duty. The loss which the Plaintiffs claimed for breach of contract and breach of fiduciary duty was "*the difference between the value of the Policy Assets at trial or such other date as the court decides, giving credit for partial surrenders, and the value that would have been achieved had the Policy Assets been honestly and prudently managed and/or invested for the*

benefit of the Account Owners" – see RASoC 61.2 (a). I shall call this difference "the Investment Gain".

283. In relation to the claim for misrepresentation, the claim was that, if the fraudulent misrepresentations had not been made, the Policies would not have been entered into; and instead the Plaintiffs would have invested in a medium risk portfolio with a reputable European bank. Mr Davies' counterfactual Model 1 was accepted by the Chief Justice on the basis that it represented what would have happened if the Policy Assets had been managed appropriately by a reputable European bank and, in effect, what would have happened if the Policy Assets had been managed by the MACS team, which managed investments under discretionary mandates: see paragraph 528 of the Judgment.

284. There is an important difference between the two claims. The Misrepresentation Claim involves no contractual promise. It is based on what the misrepresentation caused the representee to do; or, CS Life would contend, what Mr Ivanishvili would have done if no misrepresentation had been made – a proposition which the Chief Justice rejected: see paragraph 699. By contrast, the contractual claim is based on what CS Life promised would be done in relation to the Policy Assets. In relation to the former there is scope for a break in the chain of causation claim. After the fraud had been discovered, the misrepresentation would cease to have effect, at any rate once the Plaintiffs had been able to change the arrangements for the investment of the Policy Assets. But the contractual claim is based upon a promise whose validity would not expire until the contract came to an end. The fact that CS Life has been found to be in egregious breach of its obligations did not, of itself, terminate the contract.

285. In respect of the contractual claim I would accept that there was, also, some scope for the contention that the duty to mitigate loss required Mr Ivanishvili to procure the surrender of almost all of the Policy Assets. That duty may require a person whose funds (or, in a case such as this, premiums) are being invested by others, to withdraw the funds altogether if it becomes apparent that they are being fraudulently dealt with by the person in charge of the investment of them. (It is, of course, not the most attractive of defences for a bank, or someone in the position of CS Life, to say that their client's damages should be reduced because he should have taken the money away from them earlier). Whether that is so may well depend on the prospect of the fraudster remaining in charge of the assets and the availability of a substitute.

286. I do not regard this defence as open to CS Life for a number of reasons. First, it was never pleaded - in circumstances where it was important to know what exactly was being said. Putting the Plaintiffs to proof on causation and mitigation was not enough. The argument now put forward is, in truth, a claim of a failure to mitigate, as opposed to a break in the chain of causation. The loss of the Investment Gain up until the trial was caused by the failure to invest the Policy Assets in accordance with the discretionary mandate agreed. It is only irrecoverable, in part, if the duty to mitigate required the Policy Assets to be surrendered by August 2017, as the CS Life now claims. This defence was not the subject of any submissions in the written or oral openings, or indeed until CS Life's closing submissions served on 15 December 2021 in the final week of the hearing. The focus of the argument in opening was that the relevant counterfactual for any damages calculation (on the assumption that no implied representation had been made) was that the Plaintiffs would have left their assets with the Bank rather than moving them to another European Bank to be

invested in a medium risk portfolio, as appeared from the fact that they had left a substantial proportion of the premiums with the Bank after the fraud was discovered. The Respondents' counsel say that they considered the questions asked of Mr Ivanishvili to have been directed at that case. Further, the matter not having been pleaded, there was an absence of evidence as to the difficulties that, we were told, had apparently arisen in relation to the transfer of assets. I cannot be sure that this Court has all the relevant evidence, including the circumstances in which the letters of wishes were not in fact put fully into effect, the time taken by CS Life to action surrender requests and complications which are said to have arisen in respect of the transfer of assets from the Bank.

287. Secondly, what is now said is that the Plaintiffs should have removed almost all of the investments from the Policy Accounts by August 2017. But by that time, and, indeed, much earlier, Mr Lescaudron's wrongdoing had been discovered. If the investments had been left with the Bank, there was no good reason to suppose that they would be left in Mr Lescaudron's hands. If the Bank had fulfilled its contractual duties, they would have been managed by the Bank's MACS team, which dealt with investments under discretionary mandates. And in his March 2017 letters Mr Ivanishvili had requested the Trustees – Credit Suisse Trust, a subsidiary of Credit Suisse AG (or, according to the RASoC two different trust companies named Credit Suisse Trust) - to have those assets, which remained with the Bank, managed in accordance with existing agreements in place in respect of those assets. It is not clear to me whether CS Life saw these letters; but, even if they did not, I decline to find that there was a breach of the duty to mitigate in leaving Policy Assets with the Bank, to be managed in accordance with the agreement reached in respect of their management. (The position might be different if Mr Lescaudron was the only man in charge).

288. I recognise that in 2017 and, indeed, until the judgment in March 2022, the nature of the agreement between the Plaintiffs and CS Life was in issue. But what the Chief Justice then found was that the relationship was *ab initio* that of a discretionary mandate. It is no defence to the Plaintiffs' claim for damages for CS Life's failure to comply with that mandate that CS Life (to the end and unsuccessfully) disputed its existence; and, because of that dispute, failed to comply with what had been agreed.

289. Lastly CS Life submits that Mr Ivanishvili would have seen that the Policy Assets were not being run by a discretionary team. The extent of his awareness (or at any rate the extent to which he applied his mind to the question) is not clear; but, in any event, I cannot regard an awareness that CS Life was not complying with the contract (not least because they disagreed as to what the terms of the contract were) as requiring the removal of the Policy Assets from the Bank as an act of mitigation; as might have been the case if the only person charged with investment was a fraudster. A bank, or someone in the position of CS Life, that chooses to say that there is no discretionary mandate, when there is one (as the Court ultimately decides), should not expect to escape liability for the loss of the Investment Gain on the ground that the customer realised, or should have realised, that the Bank was not doing what it promised.

290. I have not forgotten that Mr Ivanishvili seemed at trial unable to explain why he did not transfer the policy assets in 2015 or 2016 and, in his witness statement spoke of the refusal of CS Life to confirm that it would not claim that full surrender of the Policies would defeat the claims made in the proceedings, when such a refusal (repeated in the pleadings) did not relate to the position if

less than 100% was surrendered. What CS Life had said in June 2017 was that there was no impediment to a surrender in excess of 95% provided that the right signatories made the request in the right form. At the lowest that meant that 94.9% could be surrendered without affecting CS Life's liability – as was put to Mr Ivanishvili in cross-examination. In fact, even more could have been removed without any such affect. Mr Ivanishvili's letters of wishes to the Trustees of March 2017 invited them to arrange the removal of 94.9% of the Policy Assets. That was not done; nearly 91% of the assets were left untouched before October 2017; thereafter the removal of assets occurred slowly - see paragraph 280 above, and the chart set out at paragraph 27 of CS Life's reply submissions on quantum of 13 December 2022; and did not total 94.9%. Even by the time of the trial there was some $ 59 million left in the Policy Accounts. I cannot, however, regard that as invalidating the point that the duty of mitigation did not require the removal of nearly all the policy assets away from CS Life/the Bank in 2017 in circumstances where the Bank had available to it a fully functioning MACS team, equipped and able to deal with investments under a discretionary mandate, such as the one that CS Life and Mr Ivanishvili had agreed. Nor should it be overlooked that the March 2017 letter of wishes had expressed an intention that assets remaining in the Policy Accounts should continue to be managed in keeping with the existing agreements in place in respect of those assets.

291. I would, accordingly, not regard the Chief Justice as in error for not imposing a limit of August 2017.

292. Finally, in relation to this ground, I would address the criticism that the Chief Justice wrongly preferred Mr Morrey's counterfactual to that used by Mr Campana. In this regard, I would note that the Chief Justice regarded Mr Campana as an unsatisfactory witness (see paragraph 725 of the Judgment) and referred to a number of areas where he preferred Mr Morrey's view of matters to Mr Campana's, such as on the acceptable concentration limit and on suitability/objectionable transactions. His reasons are clear and readily understood. The Chief Justice heard the experts give their evidence, and he gave reasons as to why he preferred one to the other. I would not seek to interfere with his view of their evidence.

293. As I have said, for the purpose of calculating damages Mr Morrey, the Plaintiffs' expert, used his Model 1 which had a theoretical asset allocation for a medium risk profile of 2% liquidity, 38% bonds, 60% equities and 0% alternatives. He worked out this allocation by reference to three specific funds. He used Model 1, rather than Model 3 A which focused on specific transactions identified as unauthorised or imprudent in Mr Morrey's report and assumed that funds invested in those transactions were, instead, invested in the Medium Risk Portfolio; or Model 4 which focused on investments in assets which accounted for 5% or more of the total asset value of the Policy Assets.

294. Mr Morrey then chose 3 medium risk[9] ETFs (see paragraph 162 above), 2 bond ETFs, and 2 liquidity ETFs, and then weighted them within each asset class to produce composite indices for each class. He then applied the 60/38/2% ratio to the relevant indices. The result was that this was a "constructed" portfolio designed to approximate to the measure of actual performance that an

[9] He also did the same exercise for a high-risk portfolio.

investor could obtain in practice, rather than any available and identifiable portfolio fund. Such funds themselves involve a degree of averaging of their constituent elements.

295. By contrast, Mr Campana took the view that it was either impossible or inappropriate to try to construct a benchmark i.e. an asset allocation ratio for ultra-high net worth individuals who would each demand something bespoke to cater for their personal situations. Instead he harvested data for all high and medium risk funds (44 high risk and 102 medium risk – an increase on the 65 in his original report), with at least five years of investment available, managed by five reputable European banks, using the "Bloomberg Fund Search" tool. He then applied some filters designed to ensure that the data cohered with the pleaded counterfactual of a medium risk portfolio managed by a reputable European bank (including ensuring that the funds were domiciled in Western Europe[10]). He calculated the return that the Plaintiffs would have received if they had invested an equal amount of money in each of the funds, but solely over the periods over which each fund was available.

296. The evaluation exercise upon which the Chief Justice was engaged is one well capable of producing different results, none of which can be classified as unreasonable. In my judgment there was nothing unreasonable in his preferring the approach of Mr Morrey. To take a Medium Risk Investment Profile (with a 60/38/2% ratio) was plainly appropriate, since medium risk was what Mr Ivanishvili had specified. The ETFs used to construct the counterfactual were a source, as the Chief Justice put it, of valid and convincing data and the 60/40 split was, as the experts agreed, a very standard allocation. Mr Campana's exercise was based on the funds of five European banks. Further, Mr Campana's exercise produced results which the Chief Justice was entitled to regard as implausible, in that his medium risk portfolio was outperformed by all equivalent PIMFA ("Personal Investment Management and Financial Advice") indices, as was his high risk portfolio (paragraph 731); his medium risk portfolio outperformed his high-risk portfolio during a period when equities performed well; and there was a very small gap between the performance of his medium and high risk portfolios (the latter being below that of the former).

297. Further, whilst the use of an average of several funds has some superficial appeal, the result of using one is likely to attribute inappropriate weight to outliers, particularly if there is, as Mr Campana accepted that there was (paragraph 734), "*a massive range of performance*" (some funds made profits of 142%, and one largely focussed on Spanish investments (in which Mr Ivanishvili would not have been interested), lost 19%). Mr Campana failed to do any weighting for the size of the funds involved (giving the same weight to funds managing $5 billion as to those managing $ 150,000); nor did he exclude very large or very small funds. The average is likely to reflect no actual portfolio, and, as the Chief Justice found, potentially produces meaningless figures. In addition, there was a lack of transparency as to the geographical exposure of the funds selected. The Chief Justice was perfectly entitled to decide that Mr Campana's fund was not an appropriate proxy for what Mr Ivanishvili would have received if the Policy Assets had been invested in a medium risk portfolio by a reputable European bank.

[10] That exercise does not appear to me to justify the characterisation, made by the Plaintiffs and accepted by the Chief Justice as "*artificially imposed data limitations*"; but the filters described in Campana 2 at 2.16 et seq are more debatable.

298. The portfolio notionally created by Mr Morrey reflected a decision as to its make-up and a specific set of ETFs. The ETFs selected reflected a decision by Mr Morrey as to the type of investment that was appropriate, for the reasons set out in his justifications for the proposed percentage holdings: G1/5/1. Mr Morrey also gave extensive evidence as to the reasons for his use of those funds and why his model appropriately reflected a discretionary portfolio (see, in particular Joint Report para 2.3 (G6/1/7) and his cross-examination on Day 14, pp 82-114). A useful cross-check as to the utility of the Morrey portfolio was provided by the returns down to 31 October 2017 generated by the Sandcay 75-3 sub-account (managed by the MACS team and in respect of which Mr Lescaudron had no involvement) – 42%; which was broadly consistent with the returns in Mr Morrey's medium risk portfolio – 34%; and markedly better than Mr Campana's medium risk counterfactual – 17%. Part of the "success" of Mr Morrey's Medium Risk Portfolio is attributable to its US weighting (circa 49%). By comparison Mr Campana's counterfactual was underweight in that market. The US percentage of the Medium Risk Portfolio was in no way inappropriate, given that the US is the largest equity market in the world; and the Sandcay 75-3 sub-account had a broadly similar geographic exposure.

299. The Chief Justice (at paragraph 722 of the Judgment) regarded it as inappropriate only to identify transactions which were objectionable[11] or over-concentrated. He took that view because what had happened was that Mr Lescaudron, who was acting alone, had committed a long running fraud, mismanaging the accounts for his own purposes and benefit (in the form of unlawful commissions), and so as to cover bad decisions he had made on the accounts of other clients. Simply to address the question of suitability of particular transactions was inappropriate when the investments had not been made by a professional portfolio manager or a specialist portfolio management team. What Mr Lescaudron (who did not even have a "Bloomberg" terminal because the Bank had refused to provide him with one) was doing was not portfolio management of any recognisable kind. He was basically just making huge bets with the Policy Assets at his command.

300. In my judgment the approach of the Chief Justice was a wholly legitimate one to take, in making an assessment (necessarily both an estimate and approximate) of the loss that the Plaintiffs had suffered. A properly managed portfolio would have adopted an entirely different approach to one managed by a fraudster without any authority at all. In a case such as this the model adopted for compensatory purposes should reflect the fact that the Policy Assets should have been managed as a coherent whole (as opposed to a model that looks only at the investments actually made and does not cater for investments which were not made but should or could have been). Further, Mr Ivanishvili did not authorise any of the transactions – hence Mr Lescaudron's forgery of instructions. Mr Lescaudron, who was a wholesale fraudster (for the reasons set out at length in the Chief Justice's findings), should not have executed any of them. Thus all the transactions were objectionable.

301. In short, the Chief Justice's assessment, reached after extensive cross-examination and submissions, was not unreasonable and should only be set aside if it was: *Parabola Investments Ltd v Browallia Cal Ltd* [2011] QB 477. His reasoning (in a judgment which necessarily covered

[11] It is to be noted that there may well have been objectionable investments other than those identified as such by Mr Morrey. CS Life had failed to give disclosure of all relevant documents and to call relevant witnesses involved in managing Mr Lescaudron or investigating his fraud: see Davies 3 para 16.12. That circumstance added to the unsuitability of adopting Model 3.

a very wide range of matters) was succinct. No suggestion was made to him when it was circulated in draft that it was defective for want of reasoning; and in my judgment it was not. Nor was it suggested that he should apply some sort of discount to Mr Morrey's Model 1 or order some averaging exercise, to take account of the uncertainties as to what a properly managed portfolio would achieve. And the approach that he favoured was not unpleaded.

302. Accordingly, I would dismiss this ground of appeal.

Findings - the eighth ground of appeal – unsuitability of investments and leveraging

303. The first part of the eighth ground of appeal was the contention that the Chief Justice was in error in accepting the appropriateness of Model 1. I have dealt with that in the preceding paragraphs. Secondly, CS Life submitted that the Chief Justice had failed to engage with the arguments concerning Models 3 and 4. In the light of the conclusion that I have reached in relation to the Chief Justice's conclusion in respect of Model 1 these issues do not arise.

Conclusion

304. The position in summary therefore is that CS Life has succeeded on the fourth, fifth and sixth grounds of appeal, all of which relate to the Misrepresentation Claim. The reality is that the dismissal of that claim has no relevance to the overall claim, save arguably in relation to costs.

Costs

305. In the normal course I would expect that costs should follow the event, but in relation to the Misrepresentation Claim, I expect that there will have been very significant costs spent on an issue where the Respondents failed in this Court, such that some reduction in costs might be appropriate, in accordance with the principles set out in *First Atlantic Commerce v The Bank of Bermuda* [2009] CA Bda 5 Civ. I would therefore ask that the parties provide written submissions as to the appropriate percentage reduction (if such is requested) with CS Life to provide its submissions within 14 days, and the Respondents to provide their reply submissions within 14 days thereafter.

SMELLIE JA:

306. I agree with both judgments.

CLARKE P:

307. I also agree and would add only a few words of my own.

308. In my judgment, the contractual relationship between CS Life and Meadowsweet and Sandcay was that CS Life promised to ensure that the premium paid to them would be managed by the Bank in accordance with the chosen Investment Alternative. CS Life did not simply agree that they would receive the premium in an account with the Bank, and instruct the Bank as to the applicable Investment Alternative, such that, having done so, CS Life had no further obligation to

Meadowsweet and Sandcay in respect of the management of the premium; and could not be held responsible if the Bank did not comply with the investment alternative notified to it.

309. That that is the position seems to me to result from the following:

(a) the GPCs, which are a contract between the Policyholder and CS Life, which provide in Article 6:

> "6 **Use of the premium**
> *The invested capital consists of the premium after deduction of any up-front insurance fees or deductions. The net single premium and the net additional premium (if any) are invested in the internal fund in accordance with the investment alternative indicated in the application form and as set out in the Policy and any Policy addendum."*

(b) That clause (which is expressed in similar terms in the LPI application documents) is properly to be regarded as a promise by CS Life as to what shall happen to the premium, namely that the use of it shall be determined by the Bank in accordance with the relevant Investment Alternative; rather than an undertaking to do no more than deposit the premium with the Bank, together with notification to the Bank of the Investment Alternative selected. Investment in this context involves putting money into different types of assets; it is not simply the giving of instructions to another; and the Investment Alternatives determine who is to make the decisions as to where the money shall be put – the Bank or the Policyholder.

(c) Such a conclusion is consistent with commercial sense. A company in the position of Meadowsweet would legitimately expect that, having changed from the previous arrangement for the investment of its monies, pursuant to which it contracted with the Bank, to one where it took out insurance with CS Life, it would have a contractual entitlement to sue CS Life if the premium (which, commercially, represented its investment) was mismanaged. The opposite conclusion - viz that Meadowsweet and Sandcay, having no contract with the Bank, have no ability to hold CS Life to account for such mismanagement and for the Lescaudron frauds, with their only means of redress against CS Life to be derived by assessing the value of a claim by CS Life against the Bank (never yet made and beset by several potential difficulties) to be determined according to Swiss Law makes little, if any, commercial sense. Indeed, it flouts it.

(d) Such a conclusion tallies with the contractual arrangements between CS Life and the Bank whereby numerous functions including sales/distribution; insurance policy administration; asset management; asset monitoring; and monitoring for fraud were exercised by the Bank on behalf of CS Life pursuant to agreements between CS Life and the Bank and, as Mr Coffey put it in his 4th affidavit "*CS Life's day to day business was conducted by Bank employees*". The fact that CS Life had contracted with the Bank for the Bank to manage the investment of the premium does not inevitably mean that its agreement with

Meadowsweet and Sandcay was that it would ensure that the Bank did so; but it is a strong pointer to that being the nature of the agreement.

310. The Chief Justice was also fully entitled to find:

(i) as a matter of fact that Mr Ivanishvili acting on behalf of Meadowsweet and Sandcay had agreed with Mr Lescaudron, acting on behalf of CS Life, that the Policy Assets would be managed by the Bank on a discretionary basis;

(ii) that CS Life could not legitimately rely on the documentation which indicated that the Investment Alternative was to be a non-discretionary mandate in circumstances where Mr Lescaudron, having made the agreement in (i) above, had fraudulently:

(a) arranged matters by procuring the execution of documentation providing for a non-discretionary mandate, so that the investment of the premium would not be managed by the Bank's portfolio management team, MACS, as would happen with a discretionary mandate, thus leaving him free to make, as he did, investment decisions on the Policy Accounts;

(b) recorded non-existent client instructions therefor, thus booking them as transactions authorised by the client when they had not been.

311. It follows that the appeal stands dismissed.