Neutral Citation Number: **[2023] EWHC 548 (Comm)**

Case No: **FL-2018-000019**

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **28 February 2023**

Before :

Mrs Justice Cockerill

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Between :

Loreley Financing (Jersey) No. 30 Limited	**Claimant**
- and -	
(1) Credit Suisse Securities (Europe) Limited; **(2) Credit Suisse International;** **(3) Credit Suisse (USA) LLC;** **(4) Credit Suisse AG**	**Defendant**

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Tim Lord KC, Fred Hobson, Ben Woolgar and Andris Rudzitis (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimant**
Patrick Goodall KC, Adam Sher, Laurie Brock and Marcus Field (instructed by **Cahill Gordon & Reindel (UK) LLP**) for the **Defendant**

Hearing dates: **28th February 2023**

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APPROVED JUDGMENT

Mrs Justice Cockerill **Tuesday, 28 February 2023**
(**15:24** pm)

MRS JUSTICE COCKERILL:

Introduction

1. The Claimant Loreley Financing (Jersey) No. 30 Limited ("L30") was one of a number of special purpose entities created by IKB, a German Bank in 2002. The Defendants Credit Suisse Securities (Europe) Limited "CSSEL", Credit Suisse International "CSI", Credit Suisse (USA) LLC "CSSU" and Credit Suisse AG "CSAG" are companies within the Credit Suisse ("CS") banking group.

2. In July 2007, Loreley 30 paid $100 million to acquire the Notes, which formed the basis of a synthetic CDO transaction. The CDO transaction was jointly arranged by CSI and CSSU. The Notes were linked to the credit of 100 residential mortgaged-backed securities ("RMBS"). Of those 100 RMBS, CS was itself involved in the securitisation of twelve during 2005-2007. Each of the RMBS itself comprised rights to cash-flows arising from pools of underlying mortgage loans. In summary, therefore, the mortgages were packaged into RMBS; the RMBS were in turn packaged into the CDO that was sold to L30 in July 2007.

3. By 2010, L30 lost its entire $100m investment in the Notes. It brings a claim against CS primarily in fraudulent misrepresentation, on the basis that CS made false and dishonest representations which induced it to buy the Notes.

4. L30's case involves two layers of alleged fraud on the part of CS: the underlying fraud in relation to CS' securitisation of RMBS ("the RMBS Misconduct") and the fraudulent representations made to L30 in selling the Notes ("the CDO Fraud"). It is the alleged CDO

Fraud on which the claims in this action are founded. The alleged RMBS Misconduct is what falsifies the representations which lie at the centre of the alleged CDO Fraud.

5. The wrongdoing which forms the basis of the RMBS Misconduct came to light following a five-year investigation undertaken by the US Department of Justice ("the DOJ") in relation to CS' securitisation of RMBS. This resulted in a settlement agreement reached between the DOJ and CS in January 2017, by which CS (i) agreed to pay a $2.48 billion penalty and (ii) admitted the underlying conduct relating to its securitisation of RMBS between 2005-2007.

6. The timings being what they are there is an obvious limitation issue. It is common ground that L30's claims are prima facie time barred, such that L30 must rely on statutory extensions to the limitation period under (variously) section 32 of the Limitation Act 1980 (Section 32), its Irish equivalent, or section 14A of the Limitation Act 1980. It is also common ground that Section 32 raises a question as to when L30 could, with reasonable diligence, have discovered the alleged RMBS misconduct which forms the basis of its claims. L30's case is that prior to the announcement in 2017 of the settlement of potential claims by the US Department of Justice against CS, L30 could not have discovered the alleged misconduct (and therefore asserted its claims) and, moreover, that (at least prior to 15 November 2012 – i.e. 6 years prior to the date of issue of this claim) there was no 'trigger' for it even to investigate whether it had any such claims.

7. This application is made against a background where at the end of June 2021 L30 provided three documents:

    a. minutes of a meeting of L30's board (Messrs Hollywood and Germain) on 7 November 2018 (the November 2018 Minutes;

b. an engagement letter of RPC with L30 dated 12 November 2018 (the RPC Engagement Letter); and

c. minutes of a meeting of L30's board (Messrs Hollywood and Burgess) on 13 February 2020 (the February 2020 Minutes).

8. Certain (it is now accepted, unjustified) redactions had been made both to the November 2018 Minutes and the RPC Engagement Letter, which were only removed after the decision of the Court of Appeal dismissing L30's claims that the identity of those giving instructions to RPC on behalf of L30 was privileged. As such, the section of the RPC Engagement Letter revealing that the "main day-to-day points of contact for this matter" were "Thomas Bulgrin and Michael Christ of KfW" was only revealed to CS in November 2022. A further redaction was removed from the November 2018 Minutes at the same time, which RPC now admits should not have been made, irrespective of the outcome of the Court of Appeal hearing. The effect of that unjustified redaction was wrongfully to conceal from CS from June 2021 to November 2022 that an important advice memo (the RPC-KfW Memo) prepared by RPC concerning the basis of the present claim was addressed to KfW and was provided to it on 4 July 2018, four months prior to L30 even instructing RPC in respect of this claim. These redactions are said to be highly significant.

9. Stress is also placed on the facts that:

a. Information has been revealed by L30's trial witness statements as to the steps taken by KfW since 2008 to investigate claims which the Loreley SPVs might have against banks which sold them CDOs.

b. In 2010, KfW entered into an agreement with IKB (the IKB Review Agreement, which L30 has not produced and which is the subject of the Agreements Issue) pursuant to

which KfW and IKB apparently agreed that IKB would analyse 161 CDOs purchased by the Loreley SPVs (including the Notes) to assess whether there were potential claims arising from them (the IKB Review). The results of the IKB Review were sent to KfW (via KfW's counsel).

c. Also in 2010, KfW instructed US counsel – Meister Seelig & Fein (MSF) and Kasowitz Benson Torres LLP (Kasowitz) – to advise it in relation to recoveries by the Loreley SPVs. KfW and its lawyers considered the output of the IKB Review (as supplemented by public information and court filings) to assess whether there were viable claims. According to Mr Bulgrin, where KfW considered there were viable claims, details were passed onto the Loreley SPVs, but this did not happen in connection with L30 and the Notes.

d. In 2011 and 2012, various Loreley SPVs brought claims (with the consent of KfW) against various banks in the United States concerning the sale of CDOs. Mr Hollywood (and the other Loreley SPVs) entrusted the progress of the actions to the Loreley SPVs' and KfW's lawyers such that: (i) Mr Hollywood reviewed draft complaints only when they were "sufficiently advanced"; and (ii) it was not necessary for him to "engage with the detail of the proceedings", becoming involved only with significant decisions such as settlements.

e. In order to obtain documents for use by the Loreley SPVs in their claims, KfW entered into an agreement (the Litigation Assistance Agreement) whereby IKB agreed with KfW to provide copies of documents for the Loreley SPVs to use in their litigation, subject to reimbursement of expenses. No such agreement has been disclosed and this is also the subject of the Agreements Issue.

f. The directors of L30 had no input whatsoever into the DPoC, which must therefore have been produced on the instructions of Messrs Bulgrin and Christ, using documents to which they had access at KfW.

10. Against this background the Defendants apply for disclosure by the Claimants of the KfW documents to which Messrs Bulgrin and Christ have access going back to 2009 on the basis that such documents are to be regarded as within L30's control.

The Law

11. I will start with the law in relation to control and what the cases say about the line which needs to be drawn. Here I have been reminded by Mr Lord by way of backdrop that disclosure against a third party is exceptional, or at least not normal. I have here in mind the gloss on CPR 31.17 which has developed in the cases relating to the ordering of disclosure of documents of a third party.

12. He also prays in aid the authorities in relation to the stringency of the requirements in relation to that concept of control. It seems to me that the authorities justify the conclusion that there is a degree of stringency required.

13. For example, in *Ardila Investments v ENRC* [2015] EWHC 3761 it was said that caution was needed and that the issue was not to be elided with practical control in the sense of there being an expectation of complying with a request. The test as it emerges from *Ardila* indicates that there needs to be evidence of the requisite degree of control, a right of access, "unfettered access" is the way that it is put at paragraphs 11 and 14.

14. It is also noted in the authorities that it is not sufficient generally to show simply a close legal or commercial relationship. Something more, some specific and compelling evidence is necessary. In relation to this, I was taken in particular to paragraph 21 of the *Various Airfinance Leasing Companies v Saudi Arabian Airlines* [2022] 1 WLR 1027 case which says:

> "Insofar as a document is in the physical possession of a third party, meaning a person who is not a party to the action, that document is in the control of the party to the action not only where the party has a legally enforceable right to obtain access to such a document, but also where there is a standing or continuing practical arrangement between the party and the third party whereby the third party allows the party access to the document, even if the party has no legally enforceable right of such access ... However, in order to establish that there is such a standing or continuing arrangement or even a specific, time-limited arrangement, whereby a third party allows a party to the action access to the document which the third party has in its possession, it is not generally sufficient to demonstrate that there is a close legal or commercial relationship between the party and third party, such as parent and subsidiary companies or employer and employee relationships; something more is required; there must be more specific and compelling evidence of such an arrangement ..."

15. That echoes the approach taken in paragraph 13 and 14 of *Ardila* where it was said that the expectation of compliance was not enough for control. Unfettered access would tend to be required.

16. Further, there is a need to show that there is not simply a specific but a general right to ask. Again, the authorities, both *Berkeley Square Holdings v Lancer Property Asset Management* case [2021] EWHC 849 (Ch) at 46 and *Various Airfinance* at 21, indicate that what is being looked for is not a specific request but more general in nature, a standing or continuing practical arrangement as it was put in *Various Airfinance*.

17. That right can be predicated on an agency relationship as noted in the *North Shore* case (*North Shore Ventures Ltd v Anstead Holdings Inc* [2012] EWCA Civ 11) at paragraph 40. But it goes more broadly than that. So in the *Berkeley Square* case (*Berkeley Square Holdings Ltd v*

Lancer Property Asset Management Ltd [2021] EWHC 849 (Ch)) at paragraph 44, it was put as "*some understanding or arrangement that the party [with] control [can] access the documents*".

18. At paragraph 46(ii) it was said:

> "There must be an arrangement or understanding that the holder of the documents will search for relevant documents or make documents available to be searched ..."

19. In that context it may be key whether access has been permitted in the past, see *Ardila* paragraph 41.

20. So far as the other authorities are concerned, those do not seem to me to help generally in relation to the principles. It is the cases which I have just cited, *Ardila*, *Various Airfinance* and *Berkeley*, which really assist most in relation to the principles.

21. Turning to cases cited which do not assist, case of *Suez Fortune Investments Ltd v Talbot Underwriting Ltd* [2014] EWHC 2848 (Comm) upon which the defendants relied does not alter anything in those principles. All of these situations, where the question of control over a third party's documents come into focus, are all fact-specific. *Suez* was a very particular case on very particular facts where there was very little evidence and what there was indicated not just an elision of business but also an indication that some searches had been undertaken in the past - which is a factor which is noted in *Ardila* as relevant.

22. Equally I do not regard the *Peaudouce* case (*Procter & Gamble v Peaudouce* (unreported, 22/11/84)) on which reliance was placed by the claimants as being relevant, essentially for the reasons which were given on behalf of the defendants in argument. That is a case which is

now somewhat old. It relates to a test which has developed since in the authorities to which I have alluded.

The Law Applied

23. So, taking the relevant authorities and the principles which they set out and applying them to this case, I conclude overall that the evidence does not show the requisite hallmarks of control which would be required.

24. I should deal specifically with the argument by reference to Messrs Bulgrin and Christ; because the defendants were adamant that this was key and that the claimants had misunderstood the application by characterising this as being an application which related to KfW documents rather than focusing on the role of Messrs Bulgrin and Christ.

25. In my judgment, the focus which I was urged to place on the role of Messrs Bulgrin and Christ does not assist. These two gentlemen are KfW employees. The application cannot realistically be narrowed simply by focusing on them. It is KfW documents which are sought, albeit via Messrs Bulgrin and Christ and the access which they had. What is sought is access to documents of KfW which go all the way back to 2010 or even possibly before.

26. What is not being sought is the individuals' documents. Ultimately it seemed to me that the fact that the focus has been so resolutely put on Messrs Bulgrin and Christ effectively shows the reluctance on the part of the defendants to grapple with the breadth of what is really sought. Once that is seen, it is clear why control cannot be established, quite apart from the evidence which Mr Bulgrin has given in terms within his witness statement as to request and refusal by KfW.

27. Essentially, the piggyback analysis which was put forward by the defendants has no logical basis. It is not logical to say that one can extend, through the role of Messrs Bulgrin and Christ, back through into the KfW documents. These are not documents which Messrs Bulgrin and Christ have access to as agents of L30; they have access as employees of KfW.

28. It is essentially a question of hats. It cannot be that because Mr Bulgrin has one hat which entitles him to access these documents in his KfW hat that he can therefore access those same documents wearing his other, L30, hat. The way that it would have to be analysed is via the test of the scope of the agency: is the agency for L30 wide enough to satisfy the requirements? Or to put it another way, must they have been dealing with these documents, the documents which are sought, in their capacity as agents of L30 with the authority of L30 to do these things?

29. If one looks at it in those terms, one might at best reach an answer that there might be control for a limited time in relation to the conduct of the claim, once the claim had commenced. So in relation to documents which are created in relation to that claim, where Messr Bulgrin and Christ do act as agent of L30. AT this point they are wearing both KfW and L30 hats. However, the mere fact that they are conducting the claim and they may have control over some documents which then are lodged on the files of KfW for the purposes of that claim does not mean that that gives control over all the documents to which they have access at KfW in relation to this same subject matter going back to the relevant period for fraud which is of course a considerable period, 2012, or negligence, still a considerable period, 2015.

30. It does not in my judgment follow that because agents must have access to some documents, there must be a reaching back. It would depend on the scope of the agency and potentially the agreement of KfW, because the agency itself is essentially a deployment of their personnel.

31. What this comes down to is the submission that one can infer unfettered control over all the documents for the period from the fact of the relationship of agency. I regard that submission as at least one step, very probably more than one step, too far. As I have indicated, it does not follow logically that the creation of that agency relationship for the latter period must follow logically and the balance of the evidence is, in my judgment, against it.

32. This is not a case where one can say that the balance of the evidence favours the conclusion that there should be an inference, as I shall come to shortly. This is not to say that control could never be established against a creditor. A number of submissions were advanced in relation to this proposition, which is effectively a straw man. It was said that if I were to reach this conclusion, I would be driving an unacceptable situation. To be clear, I am not saying that there may not be cases where control could be established against a creditor. There may well be cases where the test is met on the evidence before the court - as the authorities make clear and as the *Suez* case effectively illustrates. The point is that it is not paradigmatic for such control to exist. It is not even conventional for such control to exist. What it is, is unusual; and what it is is something that will require evidence. And here in my judgment, the requisite evidence to reach that test which I have outlined at the start of this judgment is lacking.

33. I appreciate it could be said that it is undesirable that, as a result of a finding that there is no control, that the court will not have the fullest possible material. However, that is a position which is far from unique. That is part and parcel of the approach which this court has long taken and still to a greater or lesser extent takes in relation to the documents of third parties. This takes me back to the point which I made at the very outset of the dispositive part of this judgment.

34. Ultimately, so far as what was being said was that the inference must follow from the evidence before me that there was a reaching back, I cannot accept that that proposition is made good in circumstances where there is specific evidence that there have been requests and refusals and there is specific evidence from Mr Bulgrin and Mr Hollywood in relation to the way that KfW deals with these matters.

35. In those circumstances and in the absence of any necessary logical link between the provision of Messrs Bulgrin and Christ to manage the litigation and the necessary access to all the documents as opposed to such documents as KfW chooses to give, I am not persuaded that the evidential hurdle is met.

Timing of the Application

36. There were also some submissions in relation to the question of timing and whether the application came in any event too late. As I have indicated, I am going to refuse this application on the ground that the requisite control has not been established.

37. As far as the timing application is concerned, I therefore do not need to decide this. Had I had to do so, I would have decided that the application came too late at this stage in the proceedings essentially because the involvement of KfW was well alive on the pleadings, as the Court of Appeal noted trenchantly in argument.

38. I struggle to see why the identification of the individuals which resulted from the Court of Appeal's decision was such a game changer that it would turn the application from one which is not worth running to one which had to be run at such a late stage in the day, bearing in mind that it was well known at an early stage that KfW exercised control over the litigation, that KfW was a secured creditor, that KfW had effectively been providing support for the litigation

and in circumstances where there had been a request for searches to be undertaken of KfW custodians in 2021.

39. I would make this decision in relation to timing in the light of the fact that this is an application which comes not simply a long time after those matters were patent but at a stage which is 6 weeks before trial, bearing in mind the requirements of the disclosure exercise and the risk which it would obviously impose in relation to the proper management of, indeed possibly the viability, of the trial.

40. And I say that even if one did not give full weight to the data protection type issues which were flagged in the evidence, simply the disclosure exercise itself would be a significant one and in circumstances where there was sufficient material for the request we have made of KfW searches at a much earlier stage, I would if necessary have taken the view that this application should be refused on a case management basis as coming too late.

41. In relation to agreements, the main part of this stands and falls with the control issue. What remains is the other agreements. That is, those to which L30 is a party. As to which Mr Lord says that this has been sprung on L30, it is on a separate track and should be dealt with separately by correspondence.

42. However, these matters, these other agreements were raised by the claimants' witnesses, Messrs Bulgrin and Hollywood, in response to the application as being potentially responsive to this segment of the application. That evidence has been followed up in correspondence and I agree that in relation to those two agreements, there should be an order to provide the subjective privilege regime.

43. In relation to invoices, I have been in part persuaded by Mr Hobson that this application, or part of this application, should not succeed. This is, as he noted, an application to vary the disclosure regime. That is something which has a high hurdle, one of necessity. That is part and parcel of the disclosure regime which has now been introduced in this court and to which we must pay careful mind and focus on that hurdle must be keen in the game. Therefore, the focus needs to be on effectively the necessity for this disclosure and it needs to go to a key issue, that being the building block of the disclosure regime.

44. Time spent per se is not an issue, let alone a key issue. One is looking rather at the questions of limitation and reliance. So far as reliance goes, the issue is whether L30 knew or could reasonably have known. So far as these documents are concerned, I find it hard to see how these documents are really relevant to that issue. Even with the narrative, as Mr Hobson says, they are likely to be of relatively little value. The narrative is cursory. It is unlikely to be probative in the context of limitation. One can see that it provides material that one might well like to have, but it is a very long way from necessary.

45. My own impression was that it would obviously provide potentially some cross-examination of the sort that one might draft and then not use. So far as the submission that it could have been sought earlier, I see the force of that submission but one can actually see how it arises out of the witness evidence, so I would not reject it on that basis.

Conclusion

46. So far as reliance goes however, I will order that disclosure for that shorter period. Reliance is a key issue. It is a short period of time. As far as this is concerned, unlike the limitation point where the board minutes are likely to be the most useful route, this is the only real way to test the particular evidence to which I have been pointed about preparation for the meeting. That

can't be done via the board minutes, hence I would reach the conclusion that it hits the relevant test for the variation and therefore I would order that.

47. So far as the limitation aspect is concerned, I should add that the fact that it could be done and that it was easy is not a reason to order. It does have to hit that test, particularly in circumstances where I make the order which I do make understanding that any extra disclosure at this stage involves an extra burden and a diversion of resources at a point where nobody wants to be doing other things than preparing for trial.