



**Credit Suisse AG in the matter of a proposed
amalgamation pursuant to Part VI of the Companies
(Guernsey) Law, 2008 as amended**

Royal Court
15th July 2016

**JUDGMENT
60/2016**

Declaratory relief, concerning how to give good and valid written notice to every creditor of a proposed amalgamation involving a Guernsey incorporated subsidiary, whereby it is proposed that the Applicant will acquire the business operations of the subsidiary and, subject to being granted an investment licence, will henceforth operate the business as a Guernsey Branch.

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between:

CREDIT SUISSE AG

(“the Applicant”)

and

**IN THE MATTER OF A PROPOSED AMALGAMATION PURSUANT TO PART VI OF THE
COMPANIES (GUERNSEY) LAW, 2008 AS AMENDED**

Hearing Date: 12 July 2016

Judgment handed down: 15 July 2016

Before: Sir Richard Collas, Bailiff

Advocate for the Applicant: Advocate T C Corfield

1. This is an application for declaratory relief brought by Credit Suisse AG (“CSAG”), a Swiss-based international bank with worldwide activities. What is sought is a declaration as to how to give good and valid written notice to every creditor of CSAG of a proposed amalgamation of CSAG and Credit Suisse (Channel Islands) Ltd, (“CSCIL”), a Guernsey incorporated subsidiary of CSAG, whereby it is proposed that CSAG will acquire the business operations of CSCIL and, subject to being granted an investment licence, will henceforth operate the business as CSAG – Guernsey Branch.
2. The amalgamation is to be effected under Part VI of The Companies (Guernsey) Law, 2008 as amended (“the 2008 Law”) and specifically under section 65 of the 2008 Law which relates to short form amalgamations for a subsidiary body corporate.
3. Section 65(3)(a) requires that:-

“(a) the directors of each amalgamating body corporate, not less than 28 days before the day on which the amalgamation is proposed to take effect, shall give written notice of the proposed amalgamation to every creditor of the body corporate,”

4. The Application, presented by Advocate Tim Corfield, was heard ex parte and in camera on the ground that the proposed amalgamation is presently highly confidential and, I am told, of a price-sensitive nature. This judgment may be published in due course but only when the proposal to amalgamate has been disclosed publicly. The Application was supported by an Affidavit from Patrick Roger Peyer sworn on 22 June 2016; he is a partner of Niederer Kraft & Frey Ltd in Zurich, specialising in corporate law with a focus on M&A transactions. I also had an Affidavit from each of: Christian Schmid, the Managing Director of the General Counsel Department of CSAG, sworn on 27 June; Roy McGregor, the Chief Executive Officer and a member of the board of directors of CSCIL, sworn on 29 June; and Timothy John Bamford of Carey Olsen, sworn on 11 July.

5. The reason for the proposed amalgamation was described by Mr McGregor at paragraph 10 of his Affidavit:-

“10. Credit Suisse Group is currently undergoing a restructuring exercise in order to reduce the number of licensed subsidiaries and booking platforms within the group. This restructuring exercise, in terms of its effects on Credit Suisse operations in Guernsey, has resulted in a decision to amalgamate CSCIL with CSAG pursuant to section 70, Part VI of The Companies (Guernsey) Law, 2008, as amended (the Companies Law) to the effect that CSAG will acquire the business operations of CSCIL. The amalgamation is intended to utilise capital across the group in the most efficient manner, reduce costs and enhance operational efficiency, whilst retaining and strengthening the CSCIL business platform.”

6. He advised that every creditor of CSCIL will receive written notice of the proposed amalgamation by way of a letter sent either by post, facsimile or electronic mail. The size of CSCIL and the nature of its operations are such that it will be possible to contact all of its creditors individually. The difficulty lies with CSAG, where the same will be impossible in view of its size as well as the nature and diversity of its operations, including the global reach of the business and the level of daily activity, as explained by Mr Schmid:-

“5. CSAG is a Swiss-based international bank. It is one of the leading global wealth managers, and offers inter alia investment banking services, maintaining a strong presence in its home market of Switzerland. CSAG is a wholly-owned (100%) subsidiary of Credit Suisse Group AG (Credit Suisse Group), a financial services holding company headquartered in Zurich. Credit Suisse Group’s shares are listed on the Swiss Exchange (SIX), the Swiss stock exchange, and – in the form of Depositary Shares – on the New York Stock Exchange (NYSE).”

7. He explained that, consequently, CSAG has numerous creditors of diverse nature spread around the world including in 20 branches of CSAG:-

“15. The creditors of CSAG comprise, amongst others, and non-exhaustively, the following: banking and investment business clients and counter-parties; various suppliers and service providers; investors in a variety of structured products issued by CSAG, including CSAG-Guernsey Branch (collectively for ease of reference the Investors), including noteholders in notes issued by CSAG, including CSAG-Guernsey Branch; employees of CSAG and its branches worldwide (except for CSAG-Guernsey Branch, which does not currently have any employees); pension providers; various governments and governmental departments in CSAG branch locations worldwide; and corporate vehicles in which CSAG has proprietary investments where CSAG has future payment obligations (e.g. capital calls).”

8. He advised (in paragraph 16) that:

“It would be impossible (given that the identity and number of creditors will change on a daily basis) to issue a written notice by way of personal letter individually to every creditor of CSAG. Even if that were not so, it would certainly constitute a mammoth exercise, an arduous, onerous

and administratively disproportionate undertaking, to seek to issue a written notice by way of personal letter individually to every creditor of CSAG.”

9. He went on to say that CSAG has, at any one time, in issue hundreds of thousands, if not more than one million, structured products worldwide. To identify the precise number, and identity, of investors at any given time would be a *“Herculean, and likely futile, task given that the identity of investors may change numerous times in one day”* (paragraph 16.3).
10. The method of giving notice to creditors of CSAG proposed by CSAG and for which the declaratory relief is sought is set out in paragraph 17 of Mr Schmid’s Affidavit:-

- “17.1 four (4) publications in La Gazette Officielle in the Guernsey Press over four consecutive weeks;*
- 17.2 three (3) publications in the Swiss Official Gazette of Commerce, in accordance with the advice of CSAG’s Swiss legal counsel, Niederer Kraft & Frey Ltd in Zurich, Switzerland;*
- 17.3 one (1) publication in the Financial Times;*
- 17.4 one (1) publication each in The New York Times and The Wall Street Journal;*
- 17.5 an announcement and copy notice on the CSAG website and CSAG intranet, which notice will appear daily for the entire 28 day period required by the Companies Law;*
- 17.6 by individual letter to every pension provider; and*
- 17.7 in the case of locally managed private banking clients of CSAG-Guernsey Branch, direct letters to each of those clients.”*

11. Mr Schmid stated that the financial position of the two amalgamating entities is such that no creditor of CSAG would be prejudiced:

“19. Further, I confirm that the amalgamation will in no respect prejudice the position of the creditors of CSAG. The total assets of CSCIL were USD 2.7 billion as at 31 December 2015, compared with the total assets of CSAG of USD 74.2 billion as at that date. The consolidated assets of CSAG as at that date amounted to USD 812.7 billion. The overall consolidated assets of CSAG-Guernsey Branch post amalgamation will be USD 76.9 billion. Furthermore, of the USD 2.7 billion of assets held by CSCIL, USD 2.3 billion are onward lent to CSAG. Accordingly, the acquisition by CSAG of the assets of CSCIL as a result of the amalgamation will have no material effect on the creditors of CSCIL or CSAG, either in its Guernsey Branch or worldwide.”

12. Mr McGregor confirmed the accuracy of that financial position and advised that the amalgamation would *“have no material effect on the creditors of CSCIL or CSAG, either in its Guernsey branch or worldwide”* (paragraph 14).
13. In his Affidavit, Mr Peyer advised that Swiss law permits a merger by absorption of a foreign company by a Swiss company provided that the foreign law allows for emigration mergers and that the merger agreement complies with the mandatory provisions of the foreign law, i.e. Guernsey law. Hence the proposed amalgamation in this matter must comply with the provisions of the 2008 Law.
14. Mr Bamford exhibited correspondence to his Affidavit showing that both the Guernsey Financial Services Commission and the Companies Registrar were aware of the Application and neither of them sought to make any representations to the Court.
15. Against that factual background, CSAG seek a declaration as to how they can give effect to the requirements for giving notice under section 65(3)(a) in order to be able to comply with the requirements for a merger under Guernsey Law. In so doing, Advocate Corfield emphasised that CSAG is behaving responsibly and appropriately. There is a further motive on the part of the directors of CSAG, in that section 65(4) provides that *“A director who fails to comply with subsection (3)(a), (3)(c) or (4) is guilty*

of an offence". The penalty is prescribed under section 513(i) as not exceeding level 2 on the uniform scale (i.e. £1,000). It is not the size of the penalty but the desire not to commit a criminal offence with which the directors are concerned. An offence could also potentially be committed under section 74 if anyone "*without reasonable excuse makes a [compliance] declaration which is false, deceptive or misleading in a material particular*", for which the maximum penalty is a level 5 fine (£10,000). I note in passing that the words "*without reasonable excuse*" do not appear in the definition of the offence under section 63(5).

16. The availability of declaratory relief in this jurisdiction is beyond doubt – see a number of cases, starting with In re Westbury Property Fund Ltd [2005-06] GLR 176, and including In re AB International Fund PCC Ltd [2007-08] GLR 347, In re the Registrar-General of Electors [2007-08] GLR 304 and A Father v H M Greffier (Royal Court, Unreported 18/2015). I note that the first two of those cited related to the construction of statutory provisions in the Companies Law.
17. I was also referred to two decisions of the Royal Court of Jersey: In the Matter of the Curatorship of X [2002] JLR 259; and SWM Ltd v JFSC and HM Attorney-General [2016] JRC 014.
18. I will not attempt to draw up an exhaustive list of the circumstances where declaratory relief may (or may not) be available. However, I note some relevant principles:
 - i) it is a discretionary remedy;
 - ii) it is to be used sparingly;
 - iii) it is available where the plaintiff claims a right which is disputed by the defendant and is a practical not a theoretical one (see the Curatorship of X, paragraph 10 citing Craven v IDC (1970) JJ 1425 at 1430-1431);
 - iv) declaratory relief is not to be sought where there is an alternative remedy. I drew attention to section 74A of the 2008 Law pursuant to which the Committee for Economic Development may by regulation make provision "*for the purposes of the implementation of and giving effect*" to this part of the Law. I was informed that no relevant regulations have been made.

Whilst the Applicant could request the Committee to do so, that is not an alternative remedy for present purposes. However, I would urge that consideration be given to requesting the Committee to consider making regulations to avoid the need for a similar application in future. Section 523(4) of the 2008 Law offers a method of effecting service of a document in circumstances where "*after reasonable enquiry*" service cannot otherwise be effected in accordance with the section. Unfortunately, that section is of no assistance in the present matter as it is specific to the service of a document and does not extend to the giving of written notice;
 - v) a person may seek a declaration that a proposed course of action would not be illegal. I was referred to paragraphs 4-184 to 4-202 of Zamir & Woolf – The Declaratory Judgment, 4th Edition. Without wishing to be drawn into a discussion as to whether Guernsey law should follow the Scottish or English approach to the remedy (as discussed by the Jersey Royal Court in The Curatorship of X), I find the paragraphs helpful and persuasive. The authorities show that the civil courts are reluctant to interfere with any jurisdiction of the criminal courts, especially where what is involved is a serious criminal offence (Zamir & Woolf paragraph 4-206). It is pertinent in the present case that no criminal offence has yet been committed - the directors are seeking to avoid doing so. Also, the offences concerned are not serious criminal offences, as is indicated by the maximum penalties which are fines, not imprisonment, and comparatively modest in amount (I make no comment as to how serious the consequences might be for any director who might be convicted of one of the offences). The declaration sought would

in all likelihood provide a “*reasonable excuse*” defence to a section 74(3) offence. Additionally, there is no real risk of any conflict between the civil and criminal jurisdictions of our courts.

- vi) the risk of prejudice to persons who are not before the Court and the wider implications (if any) of the decision are relevant factors. It is these issues that Advocate Corfield recognised as being the most important in the present application.

19. In the context of the present Application, it is significant that the evidence before the Court is that the proposed amalgamation will have no material effect on the creditors of CSAG. Even if that were wrong and if a creditor did not become aware of the notices proposed to be given, statutory protection would be given to him if he were prejudiced by the amalgamation. Section 71 of the 2008 Law protects creditors in that the amalgamated body corporate (CSAG) becomes liable for any obligation of CSCIL and provides that all rights and remedies may continue to be pursued against CSAG. Further, section 73 permits a creditor to apply to the Royal Court to modify the amalgamation proposal either before the amalgamation becomes effective or within such further time as the Court may allow. In Switzerland, Swiss law enables a creditor to apply for its claim to be secured if it so demands within three months of the claim becoming effective (according to the evidence of Mr Peyer). Finally, it is to be observed that the banking regulator, the GFSC, will have to be satisfied before an investment licence will be granted to CSAG-Guernsey Branch post the amalgamation.
20. This is not a fanciful or hypothetical situation. The directors of CSAG are faced with a real dilemma. They wish to effect the amalgamation of CSCIL and CSAG for legitimate business purposes. I am satisfied that I have the jurisdiction to grant declaratory relief in the present matter.
21. The pertinent words of section 65(3)(a) require the directors of CSAG to “*give written notice ... to every creditor*” of the company. The issue for me is how to interpret those words. In order to comply with the 2008 Law, must the directors be satisfied that every creditor of CSAG at the moment of amalgamation has received notification? If that were so, I accept the evidence of Mr Schmid that it would be impossible to give such notice and hence the amalgamation would not be able to proceed.
22. At the end of the oral hearing I invited Advocate Corfield to submit a further written argument dealing with the principles of statutory interpretation and in particular whether I could give a purposive interpretation in order to avoid what would seem to be an absurd result. I am grateful for his additional skeleton argument and the authorities and texts cited relating to the law of England and Wales, but which is nevertheless highly persuasive and which I gratefully adopt.
23. As Lord Reid said in Mansell v Others [1975] AC 373 at 382, “*rules of construction ... are our servants, not our masters. They are aids to construction, presumption or pointers. In each case we must look at all relevant circumstances and decide as a matter of judgment what weight to attach to any particular “rule”*”.
24. The trend of judicial interpretation has unquestionably moved towards a purposive approach. In R (Quintaville) v Secretary of State for Health [2003] 2AC 686, Lord Steyn held at p.700C “*The pendulum has swung towards purposive methods of construction*” and “*nowadays the shift towards purposive interpretation is not in doubt*”.
25. In the same case, Lord Bingham of Cornhill held at 695C “*The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed*”. That, he said, may be (inter alia) “*because the situation which has arisen is one which the draftsman could not have foreseen and for which he has made no express provision*”.
26. Lord Millet reiterated the same in R (on the application of Edison First Power Limited) v Central Valuation Office [2003] UK HL20 “*The courts will presume that Parliament did not intend a statute to*

have consequences which are objectionable or undesirable; or absurd; or unworkable or impractical; or merely inconvenient; or anomalous or illogical; or futile or pointless”.

27. Bennion on Statutory Interpretation 6th Ed at page 870 states “*The court seeks to avoid a construction of an enactment that produces an unworkable or impracticable result*”.
28. Company amalgamations effected under Part VI of the 2008 Law are not required to come before the Court for approval and hence we have little experience of them. My understanding is that often, and usually, they have been between two companies with a limited or known number of creditors. Hence it has been possible to give prior notification of the proposed amalgamation directly to each and every creditor as indeed CSCIL are proposing to do in this case. What is unusual in this case is that CSAG is so much larger that it would be impossible to do the same. Hence this application seeks to clarify what is required in the special circumstances of this case.
29. The starting point, as Advocate Corfield submitted, is that the giving of notice is not synonymous with serving a document. Both expressions are used in the 2008 Law. Section 523(i) of the Law makes clear that both methods may (and I emphasise the word “may”) be effected by delivering to the recipient or leaving at or sending by post to the last known address or by transmitting to an electronic address. Section 523(4) provides for additional methods of serving a document – but not for giving notice – where after reasonable enquiry other methods are not effective.
30. There is no doubt that the 2008 Law distinguishes between the giving of notice and the service of a document, without specifying exhaustively all the methods of effecting the former. The difference between the two, Advocate Corfield submitted and I agree, is that service is involved with the receipt or deemed receipt by the recipient of a document, whereas the giving of notice only requires publication of the notice, in whatever form, and does not require the publisher of the notice to ascertain that it has been received or read by the persons at whom it is directed.
31. Hence, the giving of notice is often effected by publication in a newspaper and in this island, when the notice is directed to local residents, by publication in La Gazette Officielle. Where that is permitted, there is no guarantee that everyone will read the notice but it is not necessary for them to do so; all that is required is to publish the notice. In this case, publication in La Gazette Officielle alone would not be sufficient where the creditors of CSAG are scattered around the world and most have never heard of, let alone read, La Gazette Officielle. The words “*every creditor*” in section 65(3)(a) make clear that such a publication would be insufficient.
32. I am satisfied that giving notice does not require that everyone to whom the notice is directed should read the notice or even receive it directly. I could have reached that conclusion merely by interpreting the language of section 65(3)(a). However, if that were wrong, I could have reached the same conclusion from the knowledge that such an interpretation avoids producing an impossible outcome that would be absurd on the facts of the present case.
33. The States cannot have intended that amalgamations may only take place between companies that are relatively small and have only a limited or known number of creditors who can be identified 28 days prior to the date of the amalgamation. The 2008 Law is a substantial piece of legislation. It exists, in part, to assist and support the financial services industry on which the island is so dependent. The States must have intended that a large company such as CSAG should be permitted to amalgamate with and to absorb and swallow up a much smaller subsidiary like CSCIL.
34. As to the details of the manner in which CSAG proposes to give notice – I am persuaded that the proposals are appropriate in the circumstances of this proposed amalgamation. The newspapers, in which they propose to publish notice, include the most widely read financial journals in the world. Importantly, publication on CSAG’s website is a recognised and established method of publishing such notices in the financial world.

35. For the reasons I have given, I grant the application.