

# The UK High Court Discusses the Question of Agency in the Disclosure of Third-Party Documents

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## INTRODUCTION

In the recent judgment of [\*Loreley Financing \(Jersey\) No 30 Ltd v Credit Suisse Securities \(Europe\) Ltd\* \[2023\] EWHC 548 \(Comm\)](#), the High Court affirmed the legal principles which govern the question of when a third party's documents are sufficiently within the control of a litigant party.

Significantly, Mrs Justice Cockerill held that the third party's scope of agency would have to be carefully considered in determining whether the litigant party has sufficient control over a set of requested documents and whether those documents would have to be disclosed.

Notably, documents that the third party may be able to access *only* in a separate capacity, for example as employee of the third party (as distinct from its capacity as agent of the litigant party), would not satisfy the test of control that would merit disclosure upon request.

## BACKGROUND

The underlying dispute arose from transactions dating back to 2007.

In July 2007, the claimant ("Loreley"), a special purpose vehicle set up by IKB (a German bank), acquired \$100 million worth of notes from the defendant ("Credit Suisse") (the "CDO transaction"). By 2010, Loreley had lost its entire \$100 million investment in the notes.

Subsequently, Loreley brought claims against Credit Suisse, alleging fraudulent misrepresentation and unlawful means conspiracy in relation to the CDO transaction.

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The main point of contention between the parties was whether the claims were time-barred.

It was common ground between the parties that the claims were prima facie time barred, such that statutory extensions to the limitation period under s.32 Limitation Act 1980 (“LA”) had to be relied on. Accordingly, a key issue between the parties was when Loreley could, with reasonable diligence, have discovered the misconduct which formed the basis of its claims.

Loreley argued that prior to the announcement in 2017 of a settlement of potential claims by the US Department of Justice against Credit Suisse, it could not have discovered the alleged misconduct, and at least prior to 15 November 2012 (i.e., six years prior to the date of issue of Loreley’s claims against Credit Suisse), there was no trigger for Loreley to investigate whether it had any available claims relating to the misconduct.

Credit Suisse argued that the knowledge of KfW, a German bank which is a creditor of Loreley with security over its assets (including the claim against Credit Suisse) was capable of being attributed to Loreley. Thus, Loreley knew, or could with reasonable diligence have known, of certain relevant facts at an earlier period. By this application, Credit Suisse applied for disclosure from KfW of documents held by two of its employees who had acted as agents for Loreley in terms of conducting the legal claims brought by Loreley against Credit Suisse. The application was made on the basis that such documents are to be regarded as within Loreley’s control.

## JUDGMENT

Cockerill J dealt with the question of whether the documents Credit Suisse sought were within the control of Loreley.

### Principles of Disclosure Against Third Parties

Cockerill J first stated the law in relation to control of documents in the possession of third parties. She noted the following:

- Disclosure against a third party is exceptional, or at least not normal.
- The authorities reveal a degree of “stringency” to the test of control.
- There needs to be evidence of the requisite degree of control – a right of access that is “unfettered” (*Ardila Investments v ENRC* [2015] EWHC 3761). An expectation of a third party’s compliance with a request to produce documents is not sufficient.

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- It is not sufficient generally to show simply a close legal or commercial relationship between the party to the litigation and the third party being asked to produce documents. Something more, some specific and compelling evidence is necessary. In *Various Airfinance Leasing Companies v Saudi Arabian Airlines* [2022] 1 WLR 1027, it was said that there ought to be specific evidence to show that there is a “standing or continuing practical arrangement between the party and 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”.
  - There is a need to show that there is not simply a specific but general right for the litigant party to ask the third party for access to the relevant documents (*Berkley Square Holdings v Lancer Property Asset Management case* [2021] EWHC 849 (Ch)).
  - The right can be predicated on an agency relationship but also applies more broadly than that. There must be an arrangement or understanding that the holder of documents will search for relevant documents or make documents available to be searched (*Berkley Square*), and in that context it may be key to consider whether access has been permitted in the past (*Ardila*).

#### **Application of the Law**

Applying these principles to the facts, Cockerill J held that the requisite hallmarks of control were not satisfied.

Credit Suisse had argued that the application should be dealt with by focusing on the roles of the individual employees, rather than approaching it as an application for KfW's documents. However, Cockerill J rejected this characterisation, and noted that in reality, what was being sought were KfW documents dating back to 2010 and possibly earlier, and not documents from the individuals.

Cockerill J then highlighted that the essential consideration was which “hat” the individuals were wearing at the relevant time. The individuals had access to some documents as employees of KfW and access to other documents as agents of Loreley. The fact that the individuals acted (for a specific purpose and at a specific point in time) as agents of Loreley, does not mean that there is a “reaching back” to infer control over documents that the individuals may have held in their capacity as employees at the time of the agency relationship.

Following the analysis above, Cockerill J concluded that the evidential hurdle to prove control was not met; Credit Suisse's request for disclosure by Loreley of documents held by KfW was rejected.

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**TAKEAWAY**

The decision confirms that there must be a specific nexus or link between the scope of the third party’s agency and the documents requested before disclosure would be warranted upon request. The court will not permit an applicant for disclosure to “reach back” into documents that the agent had access to in a distinct and separate capacity.

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Please do not hesitate to contact us with any questions.

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