



**IN THE SUPREME COURT OF BERMUDA  
CIVIL JURISDICTION  
(COMMERCIAL COURT)  
2022 No. 52**

**IN THE MATTER OF AMEDEX INSURANCE COMPANY (BERMUDA) LTD.  
AND IN THE MATTER OF SECTION 25 OF THE INNSURANCE ACT 1978**

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**Appearances: Mr N Miles of Kennedys Chudleigh Ltd for the Petitioner**

**Date of Hearing: 7 June 2022**

**Date of Judgment: 1 July 2022**

**JUDGMENT**

*Test to be applied in considering whether to sanction the scheme of transfer under section 25 of the Insurance Act 1978; whether section 25 applies to a scheme of transfer where the transferee is not a registered insurer under the Insurance Act 1978; whether a scheme under section 25 may extinguish an existing guarantee given by a third party*

## HARGUN CJ

### **Introduction**

1. On 3 June 2022 the Court heard an application on behalf of Amedex Insurance Company (Bermuda) Ltd (“**the Petitioner**”) for sanction of a scheme of transfer pursuant to section 25 of the Insurance Act 1978 (“**the Act**”). At the conclusion of the hearing the Court sanctioned the scheme of arrangement and indicated that it would give brief reasons principally in relation to the issues whether the Court has jurisdiction to sanction a scheme under section 25 where the transferee is not an insurer registered under the Act; and whether the Court has jurisdiction to extinguish a guarantee given by a third party.

### **Background**

2. By Petition dated dated 10 March 2022, the Petitioner sought sanction of the Court pursuant to Section 25 of Act to a scheme of transfer executed (“**Scheme of Transfer**”) by the Petitioner and AmFirst Life Insurance Company I.I. (the “**Transferee**”) on 24 February 2022. The Petitioner is an exempted company registered as a Class C insurer under the Act. The Transferee is a company registered in Puerto Rico as an international stock insurer Segregated Asset Plan Company. It is licensed by the Office of the Insurance Commissioner of Puerto Rico. It holds a Class 5 International Insurance licence.
3. The Scheme of Transfer provides for the transfer of the entire in-force business of the Petitioner to the Transferor. The purpose of the Scheme of Transfer is to provide an exit strategy for the Petitioner, which has been in runoff since 2008, that will ultimately allow it to surrender its insurer licence to the Bermuda Monetary Authority (“**BMA**”) following which the Petitioner will be wound up and dissolved. For AmFirst Life, the transfer aligns with its strategy to acquire or assume blocks of insurance or reinsurance policies or

reinsurance contracts in runoff that were originally issued or entered into outside Puerto Rico.

4. Section 25 deals with transfer of long-term business and provides that:

*“25 (1) Any scheme under which the whole or any part of the long-term business of any insurer to which this Part applies (in this section referred to as the “transferor”) is to be transferred to another insurer (in this section referred to as the “transferee”) shall be void unless it is made in accordance with this section and the Court has sanctioned the scheme thereunder.*

*(2) Either the transferor or the transferee may apply to the Court, by petition, for an order sanctioning the scheme, and the Court shall have power to make such an order subject to this section.*

*(3) The Court shall not entertain such a petition unless the petition is accompanied by a report on the scheme prepared by an approved actuary and the Court is satisfied that sufficient notice of the scheme has been served on each policy-holder affected and been published in the Gazette, and also that copies of the petition and the report have been served on the Authority.*

*(4) On any petition under this section—*

*(a) any person who alleges that he would be adversely affected by the carrying out of the scheme; and*

*(b) the Authority, shall be entitled to be heard.”*

5. In accordance with section 25(3) of the Insurance Act, the Petition as presented to the Court is accompanied by the Report of the Approved Actuary (Mr Steffin Du Preez of

KPMG Bermuda). The conclusion of the Approved Actuary is that the Scheme of Transfer will not have a material adverse effect on the reasonable benefit expectations or the financial security of any of the policyholders involved, Therefore, in the view of the Approved Actuary, policyholders will not be materially adversely affected by the proposed Scheme of Transfer.

6. The BMA has by letter dated 22 February 2022 confirmed that it has no objection to the Scheme of Transfer.

### **Role of the Court in sanctioning scheme of transfer**

7. The role of the Supreme Court when considering an application to sanction a scheme of transfer under section 25 of the Act was considered by Hoffmann J (as he then was) in *Re London Life Association Ltd* (21 February 1989, unreported)<sup>1</sup> at paragraph 6:

*“In the end the question is whether the scheme as a whole is fair as between the interests of the different classes of persons affected. But the court does not have to be satisfied that no better scheme could have been devised ... I am therefore not concerned with whether, by further negotiation, the scheme might be improved, but with whether, taken as a whole, the scheme before the court is unfair to any person or class of persons affected.*

*In providing the court with material upon which to decide this question, the Act assigns important roles to the independent actuary and the Secretary of State. A report from the former is expressly required and the latter is given a right to be heard on the petition. The question of whether the policyholders would be adversely affected by the scheme is largely actuarial and involves a comparison of their security and reasonable expectations without the scheme with what it would be if the scheme were implemented. I do not say that these are the only*

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<sup>1</sup> The relevant part of the judgment of Hoffmann J is set out in the judgment of Evans-Lombe J in *Re AXA Equity and Law Life Assurance Society plc* [2001] 2 BCLC 447 at 452c

*considerations, but they are obviously very important. The Secretary of State, by virtue of his regulatory powers, can also be expected to have the necessary material to express an informed opinion on whether policyholders are likely to be adversely affected.”*

8. In his judgment in *Re AXA Equity and Law Life Assurance Society plc* [2001] 2 BCLC 447, Evans-Lombe J at 468e held that the following principles emerge from the judgment of Hoffmann J which should govern the approach of the court to applications of schemes of transfer:

*“(1) The 1982 Act confers an absolute discretion on the Court whether or not to sanction a scheme but this is a discretion which must be exercised by giving due recognition to the commercial judgment entrusted by the Company's constitution to its directors.*

*(2) The Court is concerned whether a policyholder, employee or other interested person or any group of them will be adversely affected by the scheme.*

*(3) This is primarily a matter of actuarial judgment involving a comparison of the security and reasonable expectations of policyholders without the scheme with what would be the result if the scheme were implemented. For the purpose of this comparison the 1982 Act assigns an important role to the Independent Actuary to whose report the Court will give close attention.*

*(4) The FSA by reason of its regulatory powers can also be expected to have the necessary material and expertise to express an informed opinion on whether policyholders are likely to be adversely affected. Again the Court will pay close attention to any views expressed by the FSA.*

*(5) That individual policyholders or groups of policyholders may be adversely affected does not mean that the scheme has to be rejected by the Court. The*

*fundamental question is whether the scheme as a whole is fair as between the interests of the different classes of persons affected.*

*(6) It is not the function of the Court to produce what, in its view, is the best possible scheme. As between different schemes, all of which the Court may deem fair, it is the Company's directors' choice which to pursue.*

*(7) Under the same principle the details of the scheme are not a matter for the Court provided that the scheme as a whole is found to be fair. Thus the Court will not amend the scheme because it thinks that individual provisions could be improved upon.*

*(8) It seems to me to follow from the above and in particular paragraphs (2) (3) and (5) that the Court, in arriving at its conclusion, should first determine what the contractual rights and reasonable expectations of policyholders were before the scheme was promulgated and then compare those with the likely result on the rights and expectations of policyholders if the scheme is put into effect.”*

9. The guidance given by Hoffmann J and Evans-Lombe J in the passages cited above applies equally to the exercise of discretion by this Court when considering whether to sanction a scheme of arrangement under section 25 of the Act.

#### **Application of section 25 to transferees not subject to the supervision of this jurisdiction**

10. As noted above, the Transferee is a company not registered under the Act or the Companies Act 1981 and is not resident in Bermuda. In order to resolve any possible issues about the amenability of the Transferee to the jurisdiction of this Court, the Transferee instructed Kennedys to file notice of appearance on its behalf at the sanction hearing.

11. Mr Miles, on behalf of the Petitioner, submits that the Court’s jurisdiction under section 25 extends to schemes of transfer of insurers registered under the Act to insurers that are not registered under the Act. Mr Miles points out that the Court has previously sanctioned schemes of transfer where the transferee is not registered under the Act or the Companies Act 1981 and is not resident in Bermuda.
  
12. Thus, in *Re AXA China Region Insurance Company (Bermuda) Limited and Principal Insurance Company (Hong Kong) Limited* (2015 No. 229), the transferee, Principal Insurance Company (Hong Kong) Limited was demonstrably not registered under the Companies Act 1981 or the Insurance Act. There is no written decision of the Court, but the scheme of arrangement annexed to the sanction order made by Hellman PJ on 22 July 2015 makes clear that the transferee, Principal Insurance Company (Hong Kong) Limited, was a company incorporated in Hong Kong and was not registered in Bermuda or under the Act or the Companies Act 1981.
  
13. It is acknowledged that section 25 of the Act does not state in express terms that the jurisdiction of this Court extends to schemes of transfer where the transferee is not registered under the Act or the Companies Act 1981 and is domiciled in a foreign jurisdiction and subject to the supervision of an overseas regulatory authority. However, the terms of section 25 are capable of applying to an insurance entity not registered under the Act or present in this jurisdiction. Section 25 applies to any scheme under which any part of the long-term business of “**any insurer**” (referred to as the “transferor”) is to be transferred to “**another insurer**” (referred to as the “transferee”). An “insurer” is defined in the Act as a person carrying on insurance business. “Insurance business” in turn is defined as business of effecting and carrying out contracts (a) protecting persons against loss or liability to loss in respect of risks to which such persons may be exposed; or (b) to pay a sum of money or render money’s worth upon the happening of an event and includes reinsurance business. Having regard to these provisions the reference to “another insurer” is capable of referring to an insurer not registered under the Act and carrying on business as an insurer outside this jurisdiction.

14. The Court also takes into account the fact that insurance/reinsurance business is global in nature and transactions relating to the transfer of insurance business take place across borders. It is not uncommon for transfers of insurance business to take place between insurance entities which are registered in different jurisdictions. It would artificially limit the scope of section 25 of the Act if such schemes were limited to transfer the business where both the transferor and the transferee were registered as insurers under the Act.
15. For all these reasons that the Court confirms that it has jurisdiction to sanction a scheme of transfer under section 25 of the Act where the transferee is not registered under the Act or the Companies Act 1981 and is in fact registered in an overseas jurisdiction.

### **Extinguishment of third-party guarantees**

16. The Scheme of Transfer includes a provision for the release of the former parent company of the Petitioner, Bupa Insurance Company (“**BIC**”), a US entity under common ownership and control with the Petitioner, from any liability as guarantor of liabilities of the Petitioner under its policies. To replace the BIC guarantee (so that relevant policyholders are not materially worse off), the parent company of the Transferor, AmFirst Holdings, Inc., a company domiciled in Mississippi, has executed a deed of guarantee that will apply to the liabilities of the Transferee under those transferring policies that include BIC guarantee language.
17. For the reasons advanced by Mr Miles the Court accepts the submission that the Court has jurisdiction under section 25 to specifically hold back and/or release a third party from liability as guarantor of liabilities of the transferor under transferring policies.
18. Firstly, the use of schemes of arrangement under statutory provisions similar to section 99 of the Companies Act 1981 to extinguish third-party guarantees is well established (See the decision of David Richards J (as he then was) in *Re T&N Ltd (No. 3)* [2006] EWHC 1447 (Ch); *Re Lehman Bros International (Europe) (in administration) (No. 2)*



[2009] EWCA Civ 1161; and the decision of Proudman J in *Re La Seda de Barcelona SA* [2010] EWHC 1346 (Ch)). In *Re Lehman Bros (No. 2)* Patten LJ explained the basis of the jurisdiction at [63] as follows:

*“It seems to me entirely logical to regard the court's jurisdiction as extending to approving a scheme which varies or releases creditors' claims against the company on terms which require them to bring into account and release rights of action against third parties designed to recover the same loss. The release of such third-party claims is merely ancillary to the arrangement between the company and its own creditors.”*

19. Secondly, the benefit of the guarantee given by BIC in this case to the policyholder of the Petitioner is an asset of the policyholders and not an asset of the Petitioner. This position was confirmed in the decision of Snowden J (as he then was) in *Re Copenhagen Reinsurance Co (UK) Ltd* [2016] Bus LR 741 at [39]. The Court has no jurisdiction under section 25 to order that the BIC Guarantee continues to apply to policies transferred under the Scheme of Transfer to the Transferee. Accordingly, there can be no objection in principle to a scheme of transfer expressly providing that the benefit of a third-party guarantee is not part of the assets of the transferor. Such a provision in the scheme of transfer merely states what is in fact the legal position.

20. Accordingly, the Court accepts Mr Miles' submission that the Court may sanction a scheme under section 25 of the Act that specifically holds back and/or releases 1/3 party from liability as guarantor of liabilities of the transferor under transferring policies. The decision of Henderson J in *Re Excess Insurance Company Limited* [2015] EWHC 3572 (Ch) confirms this position.

## **Conclusion**

21. At the conclusion of the hearing on 3 June 2020 the court was satisfied that it had jurisdiction to sanction the Scheme of Transfer and that the statutory requirements for

exercise of the jurisdiction had been met. Specifically, the Court was satisfied that the BMA had been served with the Petition; the Petition was accompanied by the Report of the Approved Actuary; and sufficient notice of the Scheme of Transfer had been served on each policyholder affected. Finally, the court was satisfied that it was just and equitable to sanction the Scheme of Transfer. Accordingly, the Court made the order sanctioning the Scheme of Transfer.

Dated this 1<sup>st</sup> day of July 2022

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NARINDER K HARGUN  
CHIEF JUSTICE