In The Supreme Court of Bermuda

COMMERCIAL COURT

CIVIL JURISDICTION

2013: No. 466

IN THE MATTER OF THE RULES OF THE SUPREME COURT 1985, ORDER 115

AND IN THE MATTER OF THE LIFE INSURANCE ACT 1978, SECTION 43

AND IN THE MATTER OF THE ESTATE OF MRS. ERIKA SCHIRMER

REASONS FOR DECISION

(in Chambers)

Date of Ruling: April 28, 2014
Date of Reasons: April 30, 2014
Mr. Alex Potts, Sedgwick Chudleigh Ltd., for the Applicants
Mr. Adam Collieson, Appleby (Bermuda) Limited, for the Insurer[1]

Introductory

1. On December 23, 2013, Credit Suisse Life (Bermuda) Ltd. ("the Insurer") paid US$549,171.86 into Court pursuant to section 43(2)(a) of the Life Insurance Act 1978 ("the Act") and Order 115 of the Rules of the Supreme Court 1985. In support of the payment in, the First Affidavit of Thomas Coffey sworn on December 20, 2013 was filed. This explained the reasons for the payment into Court of the proceeds of an insurance contract between the Insurer and Mrs. Erika Schirmer ("the Insured") which took effect from August 26, 2005 ("the Policy"). In essence, the Insured had died on February 7,

[1] The Insurer adopted an entirely neutral position throughout.

2012 and a Mr. Hans-Jürgen Hopke was disputing the entitlement of the three named beneficiaries to the Policy proceeds as the sole heir to the Insured's estate.

2. On March 10, 2014, under cover of a letter dated March 6, 2014 from Bernd-Rolf Dräger, a lawyer and notary based in Berlin, Germany, an unstamped notarised 'Affidavit' of Hans-Jürgen Hopke was filed[2]. The deponent claimed to have revoked the benefits conferred by the Policy on the named beneficiaries.

3. By a Summons dated March 31, 2014, Stiftung SOS Kinderdorf Schweiz[3] and Stiftung Kinderdorf Pestalozzi[4], both Swiss children's charities, applied for payment out of 1/3rd each of the monies paid into Court. The Summons was supported by Affidavits sworn by Claudia Lehnherr Mosimann and Denis Humbert, respectively. The first return date was April 17, 2014. Only the Insurer and the Applicants appeared. Although I was satisfied that both Mr. Hopke and the third named beneficiary, a German children's charity, UNESCO Bildung für Kinder, had received some notice of the hearing, I adjourned the Applicants' Summons to a date to be fixed by the Registrar on notice to the parties affected.

4. By a Notice of Hearing dated April 23, 2014, a special appointment was fixed for the hearing of the Applicants' Summons for April 28, 2014. Again, neither Mr. Hopke nor the third named beneficiary appeared or signified their interest in appearing at that or any subsequent hearing of the Applicants' Summons. Although I was shown copies of email correspondence which satisfied me that Mr. Hopke's German attorneys had notice of the hearing, no indication of any desire to participate in the hearing or to instruct local counsel to appear and formally oppose the application was received by the Applicants' attorneys or the Court.

5. After a hearing that lasted almost 2 hours, in the course of which Mr. Potts took the Court through the evidence and addressed the Court on the applicable legal principles, I decided to grant the application for payment out, although not in precisely the terms of the draft Order handed up by counsel. Because of (1) the somewhat contentious background to the application, (2) a suggestion that the Order made by this Court might be challenged abroad, combined with (3) the absence of any previous judicial guidance on this commercially significant area of the law, I now give reasons for the Order I made directing payment out.

[2] I overlooked the filing of this document in preparing for the hearing, but counsel made a copy of it available in the course of the hearing so I considered its contents before making the Order.
[3] The 1st Applicant focuses on abandoned and orphaned children, with a current emphasis on Africa.
[4] The 2nd Applicant was established in response to World War II, and focuses on promoting educational and social development for children and adolescents in Europe and in the developing world.

Background to the Insurer's payment into Court

6. According to First Coffey, Mr. Hopke first wrote to Credit Suisse AG, an affiliate of the Bermudian incorporated Insurer, on June 18, 2012 claiming entitlement to the Policy proceeds as the sole heir of the Insured's estate. A month later he forwarded a copy of the Will. However, he never forwarded the certificate of inheritance he alternately claimed to have (July 18, 2012) or to have applied for (November 5, 2012). By letters dated May 29, 2013, the Insurer notified the three named beneficiaries and Mr. Hopke that it was proposing to pay the Policy proceeds into Court. The payment in was actually made nearly seven months later.

7. Mr. Potts quite appropriately invited the Court, in considering whether it was appropriate to grant his clients the relief they sought or extend yet another opportunity for Mr. Hopke to appear in opposition to the application, to take into account the fact that he had notice of the possibility of the present proceedings as long ago as May 29, 2013, and several months' notice of the actual payment into Court in late December 2013[5].

The relevant terms of the Policy

8. The Applicants' counsel also invited the Court to infer that the terms of the Policy made it clear that Mr. Hopke's unsubstantiated claim was not being seriously pursued because it was wholly unmeritorious. Although the Insured signed a German language version of the Policy, an English version believed by Mr. Coffey to contain the same provisions was placed before the Court. Apart from statutory provisions which I will consider below, I was invited to have regard to certain central terms of the Policy itself:

    (a) the Policy was issued by a Bermudian incorporated and licensed insurer;

    (b) the Policy was expressly governed by Bermuda law and subject to a Bermuda exclusive jurisdiction clause;

    (c) the Policy expressly stated: "*After the death of all insured persons, it is …not possible to change the beneficiary nomination.*";

    (d) the Applicants and the third charity were clearly named as beneficiaries in equal shares under the Policy;

[5]On April 30, 2014, Mr. Potts forwarded to the Court an email received by his firm from Mr. Drager the same morning indicating that Mr. Hopke received notice of the April 28, 2014 hearing too late to instruct Bermudian attorneys. At this point I had already signed the perfected version of the Order.

(e) notices under the Policy were required to be sent to the Insurer. Mr. Hopke instead sent his claim to the Swiss affiliate of the Insurer, Credit Suisse AG.

9. The matters set out in (a) to (d) were all obviously significant considerations. I found the no effective notice point to be a somewhat trivial one, especially since the entity that Mr. Hopke communicated with forwarded the monies paid into Court on the Insurer's behalf. There was no question that the Insurer had received timely and effective notice of the Hopke claim.

Legal Findings

Procedural basis of the hearing

10. I declined to make an order barring Mr. Hopke from making any further claim to the Policy proceeds because I was satisfied that the order sought was a final order made at an *inter partes* hearing of which the purported heir had notice. Under Bermuda law, he would be bound by the Order in any event.

11. The following provisions of Order 32 of the Rules did not, in my judgment, afford any basis for any party affected by the Order who had notice of the present proceedings to apply to set it aside:

> "***32/5 Proceeding in absence of party failing to attend***
> *5 (1) Where any party to a summons fails to attend on the first or any resumed hearing thereof, the Court may proceed in his absence if, having regard to the nature of the application, it thinks it expedient so to do.*
>
> *(2) Before proceeding in the absence of any party the Court may require to be satisfied that the summons or, as the case may be, notice of the time appointed for the resumed hearing was duly served on that party.*
>
> *(3) Where the Court hearing a summons proceeds in the absence of a party, then, provided that any order made on the hearing has not been perfected, the Court, if satisfied that it is just to do so, may re-hear the summons.*
>
> *(4) Where an application made by summons has been dismissed without a hearing by reason of the failure of the party who took out the summons to attend the hearing, the Court, if satisfied that it is just to do so, may allow the summons to be restored to the list.*
>
> ***32/6 Order made ex parte may be set aside***
> *6 The Court may set aside an order made ex parte*."

12. Order 32 in my judgment applies solely to interlocutory applications, not to any application, such as the present application, which happens to be listed as a Chambers matter when it is properly a final hearing, which could (and probably should) be listed in open court. However, even if Order 32 did apply:

(a) the Court would only have the discretion to set aside an order granting the relief sought in the absence of a party before the order is perfected (Order 32 rule 5(4));

(b) the order sought (and granted) was not made on an *ex parte* basis and, accordingly, was not liable to be set aside on that basis (Order 32 rule 6).

13. The Order made was, to my mind, a final Order made on an *inter partes* basis in circumstances where no third parties had taken any or any effective steps to participate in the hearing. Order 115 rule 6 provides:

> "***115/6 Summons for directions to issue where more than one claimant***
> *6 If more than one person has within ninety days applied under rule 3 to the Court for insurance money to be paid to him the Registrar shall within the next twenty days himself issue a summons for directions addressed to the insurance company and all persons who have applied for the insurance money to be paid to them and shall fix the date of the hearing of the summons bearing in mind the address of any claimant living outside Bermuda.*"

14. This rule was engaged primarily because the Applicants do not qualify as a "sole" applicant under Order 115 rule 5. It was also engaged, assuming the Court was minded to waive the various irregularities, because Mr. Hopke filed an 'Affidavit' on March 10, 2014 asserting an interest in the monies paid into Court. (He did not, incidentally, substantiate his right to assert this claim by attaching the certificate of inheritance which Mr. Coffey was advised was the best evidence of his standing to represent the Insured's estate). Although the rule appears to contemplate the Registrar of her own motion issuing a Summons for Directions, as Mr. Potts pointed out, I found that rule 5 of Order 115 was substantially complied with:

(a) by the Applicants filing on March 20, 2014 a Summons which sought both directions and substantive relief;

(b) by the Registrar issuing this Summons on March 31, 2014; and

(c) by the Court ordering directions on the first return date of the Summons for a further hearing at which the substantive relief was sought and granted[6].

15. By email dated April 23, 2014, the Applicants' attorneys notified Mr. Hopke's attorney, who had, *inter alia*, filed the 'Affidavit' in Court on March 10, 2014, of the April 28, 2014 hearing and enquired whether his client intended to participate and recommended that he seek Bermuda law advice. In addition, a copy of the April 17, 2014 directions Order was supplied. No response was forthcoming by the time the substantive hearing of the Applicants' Summons commenced on the morning of April 28, 2014.

Application of the Act

16. Mr. Potts referred the Court to two main provisions in the Act. With a view to demonstrating that the Act applied to the Policy at all, he submitted that the following section was germane:

> "***Application***
> *2 (1) This Act applies —*
>
> *(a) only to contracts made after its commencement; and*
>
> (b) *to all contracts made in Bermuda unless the parties agree that some other law shall apply…*" [emphasis added]

17. I was satisfied that the Act applied to the Policy on the basis that it was issued by a Bermuda insurer and was expressly governed by Bermuda law; this appeared to me to be the natural and ordinary meaning of the words "*made in Bermuda*" in this statutory context. The purpose of the Act is to regulate life insurance business carried on by insurers based in Bermuda. The legislative history of the Act fortifies this view.

18. The Applicants' counsel helpfully drew the Court's attention to an undated Law Reform Committee Report, '*The Law Relating to Life Insurance*' and the Explanatory Memorandum to the Life Insurance Act 1978 Bill. The Law Reform Committee Report prepared a draft Bill which, as regards section 2(1)(a), was both adopted by Government and enacted by Parliament without alteration. The 'Explanatory and Financial Memorandum' explains (at page 5)the derivation of the Bill as a whole as follows:

[6] The Court might be required to take the initiative and conduct the proceedings in an inquisitorial manner if all of the claimants were local or overseas litigants in person unable to instruct local counsel to file and conduct a formal application on their behalf.

> "*The Bill is based on the Canadian Uniform legislation but has been varied to follow proposed amendments to that legislation and to suit Bermudian conditions. The Bill, however, closely follows sections 145 to 198 of the Ontario Insurance Act (Cap. 224 of the 1970 Revised Statutes of Ontario).*"

19. The Law Reform Committee Report acknowledged (at page 1) that the subject of life insurance law "*was considered in great detail by a Sub-committee largely composed of representatives of insurance companies both Bermudian and overseas who prepared for the Committee a unanimous report together with a draft Bill*." The following explanation of the thinking behind what was enacted as section 2 of the Act (at page 3) is most pertinent in confirming the natural and ordinary meaning of the statutory language:

> "*In view of the international nature of insurance business carried on in Bermuda we were concerned as to what class of the business should be subject to the Act. We were attracted to the idea that only business relating to persons resident in Bermuda should be subject to the Act. On account, however, of the difficulty of defining who was and who was not resident in Bermuda we came to the conclusion that the general law of contract should apply. We have therefore, provided that all insurance contracts effected in Bermuda should be subject to the Act unless the parties otherwise agree.*"

20. Where a Bermuda-based and regulated insurer issues a life policy, in my judgment that will ordinarily constitute sufficient evidence that the relevant contract was "*made in Bermuda*", for the purposes of statutory provisions such as section 2(1)(b) of the Act. The position is far more clear under section 2(1)(b) than under Order 11 Rule 1(1)(1)(d)(i) of the Rules of this Court, as that rule applies to contracts of all kinds. Nevertheless, in considering the latter provision, Ground CJ in *Universal Reinsurance Company Ltd. v Holden & Co. et al* [2006] Bda LR 6 (at paragraph 20) held:

> "(i)*The first Excess Loss agreement, to which Holden and the plaintiff are the parties, contains neither, but the plaintiff argues that it is governed by Bermuda law as it was made in Bermuda, having been executed on behalf of the plaintiff in Bermuda. For the purposes of this interlocutory hearing, I consider that the plaintiff has made out a strong* prima facie *case that that is so.*"

21. Section 2(1)(b) prescribes as a general rule, that where a contract to which the Act applies is made in Bermuda, the Act applies unless the parties to the relevant contract agree otherwise. The legislative context, illumined by the provision's legislative history, requires "*made in Bermuda*" to mean nothing more complicated than that a policy has

been issued by a Bermuda-based insurer. The term "*contract*" is defined by section 1 as meaning "*a contract of life insurance*". And "*insurer*" is defined by the same section as "*the person who undertakes or agrees or offers to undertake a contract*". And "*life insurance*" is defined to mean "*insurance whereby an insurer undertakes to pay insurance money*" if certain events occur. Section 3 of the Act provides: "*(1) An insurer entering into a contract shall issue a policy.*" It then proceeds to regulate various matters relating to contracts to which the Act applies.

22. It was unarguably clear that the Act applied to the Policy which named the Applicants as beneficiaries.

The Impact of the Act on the Hopke Claim

23. The pivotal provision in the Act for the purposes of the present application states as follows:

> "***Insurance money free from creditors***
> *26 (1) Where a beneficiary is designated, the insurance money, from the time of the happening of the event upon which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured…*"

24. Section 26(1) provides in unambiguous terms that where a beneficiary is designated, the insurance monies payable under any contract to which the Act applies cannot be claimed by a person acting on behalf of the deceased's insured's estate. As a result, it was clear that Mr. Hopke's claim was unsustainable in substantive terms, because:

    (a) the Policy expressly provides that the beneficiary nomination cannot be changed after the insured's death;

    (b) Mr. Hopke had no contractual right to change the nomination of the Applicants as beneficiaries after the insured's death; and

    (c) Mr. Hopke has no legal standing in his purported capacity as sole heir of the deceased to the Policy proceeds by virtue of section 26(1) of the Act.

25. In these circumstances, it is unsurprising that Mr. Hopke was unwilling to expend funds to instruct local counsel to actively pursue a claim which, on careful analysis, was obviously hopeless and bound to fail.

Conclusion

26. For these reasons, on April 28, 2014 I granted the Applicants an Order directing the payment out of their respective one-third shares of the monies paid into Court by the Insurer. I made no order as to costs as between the Applicants and the Insurer on terms that the Applicants reserved the right to seek costs orders from other interested parties. Should the third named beneficiary wish to recover its share of the monies which will remain in Court, my provisional view is that it should be required to contribute to the costs of the Applicants, whose efforts have made recovery possible for all.

27. The present judgment effectively decides that the third named beneficiary, UNESCO Bildung für Kinder, is entitled to a similar order provided that the German charity makes what would be essentially an administrative application to the Court. It will likely have to do so through duly instructed local counsel[7]. The Applicants' attorneys, Sedgwick Chudleigh, would seem to be the most obvious choice of counsel as they are already familiar with the background facts, and the interests of the named beneficiaries do not appear to conflict. However, I have no doubt that the beneficiary is quite capable of forming its own judgment as to where its best interests lie in this matter.

Dated this 30th day of April, 2014

IAN R C KAWALEY CJ

[7] The main logistical impediment to paying out to this beneficiary without making a further order is the need to ensure that the party seeking the payment out is duly authorised to do so on behalf of the beneficiary concerned.