



In The Supreme Court of Bermuda

COMMERCIAL COURT

CIVIL JURISDICTION

2018: No. 83

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 A POLICY OF INSURANCE

BETWEEN:

JOSE MUNOZ-VARGAS

Applicant

-and-

SUN LIFE ASSURANCE COMPANY OF CANADA

Interpleader

EX TEMPORE RULING

(in Chambers)

Life Insurance Act 1978-Order 115 RSC-payment into Court by insurance company-dissolution of policy owner-application for payment out by beneficiary-notification of interested persons- procedural requirements

Date of hearing: March 27, 2018

Mr Scott Pearman, Conyers Dill & Pearman Limited, for the Applicant

Mr Steven White, Appleby (Bermuda) Limited, for Sun Life Assurance Company of Canada (“the Insurer”)

Introductory

1. In this matter the Insurer paid monies into Court on March 16, 2018 being “\$400,000 in satisfaction of liability for insurance money payable in respect of the life insurance policy 019000050 in the name of E.S. Venture Limited (dissolved), with Jose Munoz-Vargas named therein as the life insured, and where there is no person capable of giving valid discharge”.

Procedural requirements for payment in

2. Shortly after that payment in was made, Appleby, the attorneys for the Insurer, were requested to file an Originating Summons, which they duly did. The first question the Court is asked to consider is whether or not such an originating Summons was required to be filed by the Insurer or whether or not it should only have been filed by the Applicant. The Applicant subsequently in this matter issued an *inter partes* Summons on March 22, 2018 seeking to have the monies paid out to him.
3. The scheme of the Act as far as the present application is concerned arises from two sections. First of all, section 34 of the Life Insurance Act 1978 provides as follows:

“Proof of claim and place of payment

34 (1) When an insurer receives sufficient evidence of the happening of the event upon which the insurance money becomes payable and of—

(a) the cause and circumstances upon which insurance money becomes payable;

(b) the age of the person whose life is insured;

(c) the right of the claimant to receive payment; and

(d) the name and age of the beneficiary, if there is a beneficiary,

he shall, within thirty days after receiving the evidence and proof, pay the insurance money to the person entitled thereto.

(2) Insurance money is payable in Bermuda unless the contract otherwise provides.”

4. The second section, and the one that is directly relevant to the present proceedings is section 43, which provides as follows:

“Payment into court

43 (1) Where an insurer does not within thirty days after receipt of the evidence and proof required by section [34] pay the insurance money to some person competent to receive it or into court, the Court may, upon application of any person, order that the insurance money or any part thereof be paid into court, or may make such other order as to the distribution of the money as it deems just.

(2) When an insurer admits liability for insurance money and he is unable to obtain an adequate and sufficient discharge because—

(a) there are adverse claimants; or

(b) the whereabouts of a person entitled is unknown; or

(c) there is no person capable of giving and authorized to give a valid discharge therefor, who is willing to do so,

the insurer may pay the insurance money into court at any time after thirty days from the date of the happening of the event upon which the insurance money becomes payable.

(3) A receipt from the Court shall be sufficient discharge to the insurer for the money paid into court under subsection (1) and (2).

(4) When money is paid into court under this Act it shall, subject to rules of court, be dealt with according to the orders of the Court.

(5) Subject to rules of court the Court may on the application of any interested person make such order as to distribution of money paid into court under this Act as it thinks just.”

5. The relevant Order in this Court’s Rules is Order 115(“*PROCEEDINGS UNDER THE LIFE INSURANCE ACT 1978*”). And the relevant rules, as far as the issue of the requirement to issue an Originating Summons or not on the part of the Insurer is concerned, is Order 115 rule 1. This crucially provides that “[w]here an insurance company pays money into court under section 43(2) of the Life Insurance Act 1978...it shall at the time it pays money into court file an affidavit or affidavits setting forth” the various matters which are there specified, to which I will return later.

6. In short, in my judgment it is clear that the insurer is not required to issue an Originating Summons because its statutory duty is to pay the money into Court. It merely must file an affidavit or affidavits, broadly speaking, designed to identify potential interested parties. It is ultimately for interested parties to make an application to obtain payment out. This much is clear from rule 2 which provides as follows:

“115/2 Notice to be given of payment into court

2 An insurance company that pays insurance money into court shall forthwith give notice thereof by registered letter to the persons named in its affidavit whom it believes may be interested in the insurance money.”

7. Order 115 rule 3 then provides:

“115/3 Interested persons may apply to the Court

3 Any person believing himself to be entitled to any insurance money that has been paid into court under section 43 of the Act may apply within ninety days of the payment being made to the Court for the money to be paid to him and shall file an affidavit stating the grounds upon which he bases his claims and may support that affidavit with the affidavits of other persons.”

8. It is clear from this procedural framework that it is the interested person who is required to make an application to the Court. And that application would in the ordinary course be by way of Originating Summons. It is that application that actually commences a formal proceeding in the Court while the payment in simply results in monies being held by the Court, either indefinitely or until such time as interested persons make an application under Order 115 rule 3.

The scheme of the Policy

9. The only matter which was in dispute in this case was the precise terms on which the monies should be paid out. In brief the Policy in question was taken out by an employer for the benefit of its senior management employees, of whom the Applicant is one. The Policy crucially in clause 4 provides that it is “*governed by and construed in accordance with the laws of Bermuda. The parties expressly agree that the*

Bermuda courts shall have exclusive and sole jurisdiction over disputes arising hereunder.” As a result of that clause, it is common ground that the Bermuda Life Insurance Act applies to the present application.

10. The scheme of the Policy, looked at in isolation, is to create two main parties. One party is an “Owner” and the other party is the “Beneficiary”. Clause 5 defines the rights of the Owner and also the Rights of the Beneficiary. The key rights of the Owner are to transfer ownership to a new Owner and to “*change or revoke a Beneficiary*”. In addition of course, the Owner is empowered to “*exercise all other rights under this policy*”. One of those rights is to request the Insurer to make payments out to a Beneficiary in a specified annual amount. In this case the annual amounts were \$100,000 commencing with the date when the Applicant reached retirement age.
11. It is important to remember, looking at the Policy again in isolation, that the Beneficiary under clause 5 has no rights in this Policy until it matures. If a Beneficiary is alive at that time, that person will be entitled to the payment of the Policy proceeds as they become due. Clearly in this Policy where the maturity date would have been the date when the Applicant reached, I believe, 99 years of age, what was anticipated to happen was that the Policy proceeds would be exhausted by annual advance payments being made before that late date.

The factual matrix

12. The Insurer filed an Affidavit sworn by a Mr Fubler who exhibited the Policy but who also identified the persons he considered to be potentially interested in these monies. One was the Applicant. The other was the Liquidator appointed in Luxembourg over the company which employed the Applicant in Madrid but which is now in liquidation.
13. The “interest” is in practical terms somewhat tenuous because the Owner of the Policy was a BVI company which was struck off the register in BVI on October 1, 2012. Since that date the Owner has not existed and does not exist to this date. The hypothetical interest which the Liquidator has arises in the following way. The Liquidator, it is believed and for the purposes of the present application it is assumed, might have the ability to apply in the BVI:

(a) to revive the Owner; and

(b) to assert the various rights the Owner has under the Policy.

14. The interest is in my judgment somewhat hypothetical because not only has the Liquidator been given notice of the payment in by the Insurer as required by the Rules. But Mr Pearman on behalf of the Applicant has engaged in correspondence with the Liquidator seeking to ascertain whether or not the Liquidator wishes to pursue any claim to the insurance monies. The response has been tacitly negative and the Liquidator has, perhaps understandably, shied away from communicating any formal claim to the insurance monies but has clearly failed to assert any positive interest in these monies. Perhaps the most significant communication from the Liquidator is the following from an email dated January 18, 2018 to Mr Pearman:

“I am still confused as to why ESPIRTO SANTO FINANCIAL GROUP (in liquidation) would need to take action in relation to Mr Munoz-Vargas’s insurance policy.

As I mentioned on several occasion to Nolan Financial and Mr Munoz-Vargas’ Luxembourg lawyers, I am absolutely fine to assist to the extent I am provided with due evidence that ESFG is a party to the insurance policy (or has taken over any assets or liabilities after the BVI company’s dissolution).

As you may understand, as liquidator, I am acting under the Luxembourg court’s supervision and must obtain any due evidence of ownership or titles on assets on which third parties pretend having rights or that are subject to my release or confirmation.

I am available to discuss this further if you wish.”

15. From a Bermudian insolvency law perspective that communication may seem somewhat odd. We might expect a liquidator to adopt a more assertive position and to be interested in investigating whether there are in assets which exist which might fall into the liquidation estate ‘pot’. Instead, Ms Jacques is saying that she requires proof that she has an interest in the Policy before she takes a position. Looked at in a common sense and practical way, the Liquidator is clearly indicating no interest in taking a positive step towards asserting a claim to the monies which have been paid into Court.
16. That background is significant because the only issue in controversy between the Applicant and the Insurer and the Applicant is whether or not the Applicant should be entitled to an immediate Order of payment out to him of these monies, which he has been seeking to access for some several years, being in the form of pension payments which he assumed he would be able to live on. Or whether he should instead be

required to wait for 90 days from the date when the monies were paid into Court to allow the Liquidator to make an application which it seems very unlikely will ever be made.

The meaning of “interested person”

17. Before considering that narrow practical point of how much time should be afforded for a potential application, it perhaps important to consider Mr White’s submission as to what the concept of an “*interested person*” means in the context of payment into Court. Mr Pearman sought to persuade me that this concept is a somewhat narrow one, while Mr White submitted on the contrary that it is a very broad term. The relevant language appears in Order 115 rule 1(b), which requires the affidavit filed with the payment in by the insurer to set out the “*names and addresses of the persons it believes may be interested in the insurance money*”. In my judgment that language is clearly very broad. And sub-paragraph (c) also requires reference to “*the person or persons whom it believes may be entitled to the insurance money, setting out its reasons for such belief*”.
18. I accept Mr White’s submission that when one is looking at the duty to identify persons who “*may be interested in*” the insurance money which is paid into Court, the insurer is required to adopt a very broad-brush approach, and not to exclude from the persons it identifies parties who may appear to have dubious claims. Rather, the insurer is required to identify anyone who might have a possible claim. Because the scheme of the Rules is to require the insurer to notify anybody who may have a claim and then to allow those persons who have a sufficient conviction in the strength of their claim to apply to Court to obtain payment out. The Applicant in the present case is such a person. The Liquidator is, it seems to me, not.

Should there be an immediate or a postponed payment out?

19. The question of time arises under Order 115 rule 3, which provides that “*[a]ny person believing himself to be entitled to any insurance money that has been paid into court under section 43 of the Act may apply within ninety days of the payment being made to the Court for the money to be paid*”.
20. Mr Pearman sought to persuade me that this rule does not apply to the Liquidator because the Liquidator’s interest is not such as to entitle the Liquidator to protection by the 90 day rule. In the alternative, he invited the Court to apply a shorter time period than the 90 day period. Clearly the Court has a broad discretion under Order 3 rule 5 of the Rules to “*extend or abridge the period within which a person is required*

or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings”.

21. The question which arises here is the following, bearing in mind the fact that the Applicant has been out of the money which, based on past practice and, apparently certain contractual entitlements which I have not directly considered, the Applicant was relying on receiving. Because of the insolvency of the Group and, primarily, because of the dissolution of the Owner of the Policy, he has not been able to receive these monies. Does justice require the Court to afford any further time for the Liquidator to decide whether or not to take any action?
22. In my judgment the Court should show some deference to the Officer of a Court in a friendly country such as Luxembourg and not deprive the Officer of such a Court of the opportunity of further considering her position even though she has been given what might be considered to be an ample opportunity to assert a claim to these monies. I say that because the issue of cross-border insolvency is a very complicated matter. It is not entirely straightforward for a Liquidator based somewhere like Luxembourg to consider and form a reasoned judgment as to what his or her rights might be in respect of a foreign policy.
23. In this case I have sought to identify what type of claim might be asserted by the Liquidator. It is not easy to see how the Liquidator could, without considerable trouble and expense, put herself in a position to challenge the entitlement of the Applicant to the particular monies that have been paid into Court. One possible remedy that the Liquidator might have, assuming that the Liquidator has the necessary corporate authority to apply to set aside the dissolution in the BVI, would potentially be to seek to change the Beneficiary of the Policy, although Mr Pearman suggests there might be contractual impediments to that.
24. The Order sought is not limited to the payment out of the monies which have been paid into Court because an Order is also sought in the following terms, which I take from the draft Order:

“2. Notwithstanding the terms of the Policy, including in particular but without limitation Clause 10 thereof, from the date of this Order the Applicant shall be permitted to request any future partial cash surrenders under the Policy, and the Interpleader shall be permitted to pay any future partial cash surrenders under the Policy directly to the Applicant, as if the Applicant were the Owner of the Policy”

25. Because of the breadth of the relief sought, it seems to me on balance that the Liquidator should be given notice of the proposed Order and some time to consider whether she wishes to challenge it. Having regard to all the material presently before the Court, I find that an appropriate time to allow would be 28 days from today's date assuming that the Order can be drawn up and notified to the Liquidator either today or tomorrow. And so I grant an Order substantially in the terms of the form submitted by the Applicant, but with the modification that the Order should be suspended for 28 days, on the understanding that the Court would have jurisdiction to reconsider the matter if an application was made to vary or set aside the Order within this 28 day period.

Dated this 27th day of March 2018 _____
IAN RC KAWALEY CJ